

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble **Justice Prasenjit Biswas**

C.R.A. 444 of 1988

Lal Mohan Porel @ Lalmohan @ Lalu Porel

-Versus-

The State of West Bengal

For the Appellant : **Mr. Kallol Mondal, Sr. Adv.
Mr. Krishan Ray,
Mr. Souvik Das,
Mr. Anamitra Banerjee,
Mr. Akbar Laskar.**

For the State : **Ms. Avishek Sinha.**

Hearing concluded on : **20.03.2025**

Judgment On : **25.03.2025**

Prasenjit Biswas, J:-

1. This appeal is directed against the judgment dated 26.09.1988 passed by the learned Additional Sessions Judge, 1st Court, Hooghly in Sessions Trial Case No. 28 of 1987. By the impugned judgment the accused/appellant Lalmohan Porel @ Lalmohan @ Lalu Porel has been convicted under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 500/-, in default to further undergo rigorous imprisonment for one year.
2. Being aggrieved and dissatisfied with the said impugned judgment and order of conviction the present appeal is filed at the behest of the appellant.
3. Despite service effected upon the victim she chooses not to appear in this case.
4. In short campus the story of the prosecution is as follows.

The victim along with her parents and the convict-appellant used to live in the same village Pawnan, P.S. Singur, District- Hooghly. The house of the appellant is situated at a little distance from the house of the victim. In the month of November, 1984 appellant approached the victim with promise that he would marry her and giving her this assurance, he went on having sexual intercourse with the victim for a continuous period of almost every evening after taking the victim to

some abandoned house at the village. At first the victim resisted but when the accused promised to marry her, she did not make any protest any further. As a result of such sexual intercourse the victim became pregnant. She reported the matter to the appellant and requested him to marry her, but the appellant Lalmohan did not agree to such a proposal and told the victim to abort the child in her womb. The victim then reported the incident to her parents and the parents reported the matter to the Anchal Prodhan. The Anchal Prodhan tried to arbitrate over the dispute by calling the appellant to a meeting to be held in the Anchal Office, but the appellant did not turn up and in his place the father of the appellant came before the Anchal Prodhan and gave her undertaking that he would produce his son on the next date. He did not produce his son before the Anchal Prodhan. Thereafter, the victim lodged complaint before Singur Police Station against the accused Lalmohan narrating the entire incident.

5. Over the complaint police started investigation being Singur P.S. Case No. 1 dated 02.02.1986 under Sections 376/420 of the Indian Penal Code. Thus, the criminal law was set in motion. Police investigated the case and after completion of investigation submitted charge-sheet against the appellant under Sections 376/420 of the Indian Penal Code. The charge was framed by the Trial Court against this appellant under Section 376/420/493 of the Indian Penal Code. The Additional

Sessions Judge conducted the trial and convicted and sentenced the appellant as mentioned above.

- 6.** The prosecution in order to prove the charge against this appellant has examined as many as 13 (thirteen) witnesses including PW1 (victim girl). PW2, Giribala Sasmal is the mother of the PW1, PW3, Prasad Ch. Sasmal is the father of PW1, PW4, Bhadrew Rai, PW5, Nirmal Santra, PW7, Khush Manna, Prodhan of Anandanagar Gram Panchayat and PW8, Sambhunath Bera. PW4, PW5, PW7 and PW8 are all common neighbours of both the accused and the victim girl. PW6 is Dr. Pradip Kumar Bagchi who holds the ossification test of the girl in order to ascertain her age and has given report about the age of the girl. PW9 and PW10 are the police officers. PW11 is the Judicial Officer who recorded the statement of the victim girl under Section 164 of Cr.P.C.. PW12, Bharati Chandra and PW13, Dr. B.K. Das are the Medical Officers who medically examined the victim girl and the accused respectively and gave their opinions.
- 7.** Mr. Kalal Mondal, Learned Senior Counsel for the appellants submitted that it is alleged that at the time of incident the prosecutrix was minor, but no authentic documentary evidence was produced by the prosecution in the evidence to prove her age. The prosecution for proving the age of prosecutrix produced an ossification test report in which the age of the prosecutrix is mentioned as 25 years, which is the approximate age, in which a variation of 2 years is possible So, in

absence of any other documentary evidence and on the basis of ossification test report in which the approximate age of the prosecutrix is mentioned as 25 years, it can be held that at the time of the incident the age of the prosecutrix was not below 16 years. From the statement of the prosecutrix, it is apparent that the prosecutrix was the consenting party and went with appellant Lalmohan on her own will.

8. So, at first I shall examine whether the prosecutrix (PW1) was major or minor at the time of alleged incident.
9. The age of the prosecutrix (PW1) is mentioned as 16 years on her deposition sheet but she did not state regarding her date of birth. It is stated by PW1 that she is the first issue of her parents and she has a brother who was a minor and was aged about 14 years. She was older than his brother by two years. PW2 the mother of the victim deposed that he could not say the date or month or year of the date on which the victim was born. She could not say the difference of age between her two children. PW3, the father of the victim stated that the age of his son is about 20 years and he also could not say the difference of age between his son and his eldest daughter, that is, victim girl. He also stated that he could not say the date or month or year on which the victim was born. As no documentary evidence was brought on record regarding the actual age of the victim the ossification test was done, PW6 who examined the victim submitted a report and deposed before

this Court that the victim completed 25 years of age on the day of X-ray examination i.e. on 07.02.1986. In respect of age there are discrepancies in depositions of the victim, PW2 and PW3 but from the ossification test it would be appeared that the victim was not below the age of 18 years at the time of alleged incident. I.O. did not take any step for collecting the birth certificate of PW1 and in absence of any documentary evidence regarding age of the victim reliance is to be given upon the ossification report.

- 10.** Mr. Kalal Mondal, learned Advocate for the appellant said that there was love affairs in between the appellant and the victim and there was consensual sex between them. So, it cannot be said that the rape was committed upon the victim and the ingredients of Section 375 of the Indian Penal Code can not be attracted.
- 11.** PW1 stated that the appellant gave false assurance to her to that effect that he would marry her and by such promise she went to make sexual intercourse with the appellant. It is said that the appellant had sexual intercourse with her for about 11/12 nights and a result of such sexual intercourse she became pregnant. She had reported the matter to the appellant and told him to marry her but he did not agree and told her to abort the child in her womb. Then she reported the incident to her parents. So, immediately after the alleged incident of rape by the appellant, the victim girl did not report it to anybody and when the victim became pregnant then she told the incident to her parents.

There is nothing in the deposition of the victim that on which date, month of year the appellant approached her for the first time and got the hope that he would marry her or the appellant committed alleged sexual intercourse with her for the first time.

- 12.** PW2 the mother of the victim in her deposition, once said that she did not know about the incident in question and thereafter she said that subsequently she came to know about the incident from the mouth of PW1. PW4 (Bhadreswar Roy) stated that the appellant was in love with the victim. PW5 (Nirmal samanta) stated that about 3 years back he found that the appellant and the victim together were running away from a cowshed. PW8 (Sambhu Nath Bera) stated that about three years back he found the accused and the victim to go together to cinema and jattras and other places and on one occasion when he went to cinema house and he found the victim along with the appellant therein. So, it would appear from the evidences of PW4, PW5 and Pw8 that there were love affairs in between the appellant and the victim. PW1 stated in his deposition that she informed Sibbu Bera, Adhir Bera, Bhanu Bandyapadhyay, Sankar Porel about the incident but none of them has been examined by the side of the prosecution. PW1 further deposed that she intimated about the love affairs between her and the appellant to Panchanan Samanta and her daughters Asha and Prava, but none of them was cited as prosecution witness in the trial.

- 13.** It is further said by the learned Advocate for the appellant that the complaint was not lodged before the police station by the de-facto complainant voluntarily. It appears from the deposition of PW3, father of the victim girl that he was sent to the Thana by the party men of his locality for lodging a complaint which goes to show that there is no voluntariness in lodging the FIR immediately after the alleged incident. It is stated by PW3 that he reported the incident before the Anchal Prodhan but he could not give the date, month of year of his giving information to the prodhan about the incident.
- 14.** PW1 claimed in her deposition that she stated before the Investigating Officer that the appellant used to have sexual intercourse with her at an abandoned house, the appellant committed rape upon her by molesting her breast and having sexual intercourse with her. The appellant had committed such sexual intercourse with her forcefully against her consent. At first she gave resistance to such attempt by the appellant. The appellant suggested to her to destroy the child in her womb by eating some pills, she gave birth to a male child and the appellant had married another girl in the meantime. PW10, Investigating Officer of this case does not say that PW1 told her all these things.
- 15.** PW1 further deposed that the appellant had sexual intercourse with her for 11/12 nights and the appellant had suggested to her that the

child in her womb be destroyed but all these facts were not stated before the PW10 (I.O.).

- 16.** Admittedly, there was love affair between the victim and the appellant. PW6 stated in his deposition that from the radiological findings he opined that the victim completed 25 years of age on the day of x-ray examination i.e. on 07.02.1986. While arguing on behalf of the appellant learned Advocate contended that the evidence adduced on behalf of the prosecution and the whole circumstances would indicate that the prosecutrix willingly gave consent to having sexual intercourse with the appellant. So, the consent of the victim being a major girl was a free consent. The circumstances of this case lead to conclusion that the appellant had reasoned to believe that the consent given by the prosecutrix was the result of deep love for each other. They met often as it appears from the depositions PW4, PW5 and PW8 who are all common neighbours of both the accused and the victim girl.
- 17.** Section 375 of Indian Penal Code defines the expression “rape” which indicates that the first clause operates, where the woman is in possession of her senses and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression “against her will” means that the act must have

been done in spite of the opposition of the girl. An inference as to consent can be drawn if only based on evidence or probabilities of the case.

- 18.** The alleged incident as per deposition of PW1 was held about three years back from the year 1988 when at first sexual intercourse was done in between them on the assurance given by the appellant to the victim that he would marry her. If the offence of rape has been committed by the appellant during the period from February, 1984 to December, 1986 as alleged in the charge framed under Section 376 Indian Penal Code, FIR could not be lodged on 02.02.1986. The evidence of victim is not creditworthy and dependable for acceptance for basing an order of conviction and sentence of the appellant thereon because she has prevaricated at every stage on material points and her evidence in the Court stands contradict with her statement recorded under Section 161 of Cr.P.C.
- 19.** Learned Advocate for the State submits that the prosecution proved his case beyond all reasonable doubts and the appellant is rightly convicted under Section 376 of Indian Penal Code. There is no illegality or material irregularity the impugned judgment and order. It is said by the learned Advocate that when the victim reported the incident to the concerned Anchal Pradhan, then a meeting was called by the Pradhan at his office by calling the appellant thereon. As the appellant did not turn up his father came before the Anchal Pradhan and gave an

undertaking that he would produce his son on the next date fixed. It is said that as undertakings was given by the father of the appellant which means that the appellant was involved in committing the alleged offence. All the evidences as cited by the prosecution vividly narrated incident and supported the contention of the victim and, as such, testimony of the prosecutrix cannot be disbelieved. The other witnesses to the locality also support the statement of the victim by stating that they found the victim and the appellant at different places and, as such, the appellant is responsible for becoming pregnant of the victim. So, he said that there is nothing to interfere in the impugned judgment and order of conviction.

- 20.** It is trite law that the sole testimony of the prosecutrix can be based on conviction without corroboration but at the same time it would be looked into whether the evidence of the prosecutrix (PW1) is cogent and trustworthy and can be based for conviction. The victim cannot give the date, month or year on which the appellant allegedly committed sexual intercourse with her for the first time. After about five months of her pregnancy she reported it to her parents. The bone of contention raised on behalf of the appellant is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and, therefore such consent was no consent in the eye of law and the case does not come under the provisions of Section 375 of

Indian Penal Code. In this case, it has already been held that at the time of alleged incident the victim was not below the age of 18 years. She has not made any alarm immediately. After the first incident she has not made any complaint to her parents in this regard. Moreover, after becoming pregnant for about five months he reported it to the parents for the first time. Pw12 (Dr. Bharati Chatterjee) stated in her evidence that she found the victim habituated and capable of having sexual intercourse regularly and on examination this witness found no external injury on her person including her private parts

- 21.** As per the provision of 'Sixthly' of Section 375 of the Indian Penal Code it would be rape with or without consent when the woman concerned is under sixteen years of age. As per the report of the Radiologist (PW6), who examined the victim girl that the age of the said V.G. was considered as 25 years on 7.02.1986 with allowable variation. In view of this evidence of P.W.6 there can be no hesitation to hold that the said victim girl was more than sixteen years old and she was not under sixteen years of age and as such she was matured enough to give or not to give consent to sexual intercourse with her and so she consented to sexual intercourse with her voluntarily and consequently the instant case does not come within the purview of the description 'sixthly' of Section 375 of the Indian Penal Code.
- 22.** It is clear as per the testimony of PW 1, that it is a case where she was fully consenting party to the act of sexual intercourse with the

appellant. It also appears that she continued without any protest with the affair of having sexual intercourse with the appellant. In this view of the matter the allegation that the informant was made to have sexual intercourse with the accused on the assumption based on an assurance and promise or giving out an understanding that appellant would marry her cannot amount to the lack of consent so far as the informant is concerned. Here PW 1, the informant is not under the age of sixteen years and if she gives consent even on any of the aforesaid assumptions and thus she has sexual intercourse with the appellant she will be under all circumstances and in all respect considered to be a consenting party. In the facts and circumstances of this case the informant is deemed to have given consent so far as sexual intercourse between her and the appellant is concerned and such consent cannot be called as an illegal consent so far as the applicability of Section 376 of the Indian Penal Code is concerned. In such a situation the appellant cannot be deemed to have even prima facie committed the offence of rape under Section 376 of the Indian Penal Code.

- 23.** It is true that prosecutrix gave birth to a child. The evidence of the prosecutrix is that accused-appellant had procured her consent by telling/assuring that he would marry her and believing on the same she had submitted to sexual intercourse with him. It has been urged on behalf of the State that consent of the girl was procured on false

promise made by the accused-appellant to marry her was not a free or voluntary consent. As such the conviction of the accused-appellant is proper for the offence punishable under Section 376, I.P.C. Even if the accused-appellant had made false promise to marry her and whereupon she had consented to sexual intercourse with him, it would not vitiate her consent for the sexual intercourse which she had given fully understanding the nature and implication of the act involved therein. It is not that the girl consented to the act on any understanding or misunderstanding that the accused-appellant was her husband. It is not a case where the girl had any misconception about the nature of the act which she consented. In the instant case, the prosecutrix fully knew that what they were going to commit was the act of sexual intercourse. That being so, it does not become a case of rape when she consented to the act of sexual intercourse fully knowing the nature and implication of such act. PW1 was expected to know the consequences of indulging in sexual activity with a man. She continued to have sex with the appellant for a long time. Even after she became pregnant, she did not immediately disclose this fact to anyone including her mother. The victim stated in her deposition that she reported to her parents about her pregnancy after about 5 months of the date on which she conceived. Meaning thereby, even after prosecutrix became pregnant she did not disclose this fact to her family

members immediately. There was no reason for her not to disclose to her mother about her pregnancy.

- 24.** As I have already stated in the foregoing paragraphs that the victim has prevaricated at every stage on material points and her evidence in the Court stands contradicted by her statement recorded under Section 161 of Cr.P.C. I.O. of the case did not take step for testing the blood of the child born to PW1 (victim). The written complaint of PW3 (father of the victim) allegedly filed before PW7 was not produced before the court and notice which was sent allegedly upon the appellant by PW7 was also not brought in the record. PW4 stated that PW3 lodged a verbal complaint with PW7 whereas PW3 stated that he filed a written complaint before PW7.
- 25.** The evidence of the case goes to show that the prosecutrix was not below the age of sixteen years and consenting party to the commission of sexual intercourse with her. Therefore, the evidence of the prosecutrix cannot be based for conviction of the appellant. The ingredients of section 375 of the Indian Penal Code not having been satisfied in the instant case, the conviction of the appellant under section 376, I.P.C. is not sustainable in Law.
- 26.** On the basis of the aforesaid discussion, I am of the view that the trial court has committed an error in convicting the appellant for the offence punishable under Section 376 of Indian Penal Code. I find sufficient merit in the submission made by the learned Advocate of the appellant.

Hence, the impugned judgment of conviction and sentence is not sustainable. In the result, the appeal is allowed, the conviction and sentence awarded to the appellant under Section 376 of the Indian Penal Code is set aside. He is on bail. His bail bonds are cancelled and sureties stand discharged.

- 27.** Trial Court Records along with a copy of this judgement is to be sent down to the Trial Court immediately
- 28.** Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)