

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 112 of 2013

Basudeb Sarkar

-Vs-

The State of West Bengal

For the Appellant : Mr. Tapan Dutta Gupta
Mr. Sayantan Hazra

For the State : Mr. Bidyut Kumar Ray
Ms. Rita Dutta

Heard on : 16.11.2023, 06.02.2024, 02.04.2024,
04.10.2024

Judgment on : 07.05.2025

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 22nd January, 2013 passed by the Learned Additional District and Sessions Judge, Fast Track (1st) Court, Raiganj, Uttar Dinajpur in Sessions Case No.63 of 2007 consisting the appellant from the charge framed against him or commission of offences punishable under Section 376 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years with a fine of Rs.5,000/-, in default, further rigorous imprisonment for three months for the offence under Section 376 of the Indian Penal Code with a direction that the period of detention, if any, already undergone by the said convict, be set off against the substantive

sentence of imprisonment imposed on him under Section 428 of the Code of Criminal Procedure.

2. The victim lady lodged a complaint on 30th January, 2000 before the Officer-in-Charge, Kaliaganj Police Station, Uttar Dinajpur against the appellant and three others for offences, if any, under Section 376/109 of the Indian Penal Code.
3. It was allegedly recorded in the complaint that on the date of complaint she was aged about 16 years. The appellant was her private tutor. In the month of April, 1999 in the night at about 10:00 p.m. when she went out of her house to the bank of a pond situated on the western side, the appellant suddenly caught hold her from behind and inserted cloth in her mouth and raped her. It was further recorded in the complaint that compromise was held and settlement was made to the effect that the appellant would marry the complainant. As the marriage did not take place and as she became pregnant for 8 months finding no other alternative she lodged the complaint.
4. On completion of investigation, charge-sheet was submitted.
5. Charges were framed against the appellant to which he pleaded not guilty and claimed to be tried.
6. Prosecution named as many as twenty two witnesses out of which only fifteen witnesses were examined and certain documents were exhibited.
7. The Learned Advocate representing the appellant submitted as follows:-
 - i. In the instant case, it appeared that from the ossification test report conducted by PW-13 the doctor that she was more than sixteen years and less than eighteen years of age at that material point of time.

- ii. Out of fifteen witnesses examined by the prosecution PW-1 the father of the alleged victim girl, PW-6 the mother, PW-13 the doctor, PW-14 the Investigating Officer were important for proper adjudication of the instant appeal.
- iii. In a criminal justice delivery system, it was the prosecution who was to prove the case beyond any reasonable doubt unlike of balance of convenience and inconvenience of probabilities as attracted in the civil cases.
- iv. The lacunas of the prosecution case emerging from the evidence laid before the Trial Court might be categorized in the following manner:
 - (a) The alleged incident occurred in the month of April, 1999 according to the First Information Report and evidences of other prosecution witnesses.
 - (b) But the alleged victim girl lodged the complaint on 13.01.2000, i.e., after a long period of eight months.
 - (c) Another important factor was that the law as it persisted, the communication had to be made immediately. But herein the instant case it appeared from the endorsement of the First Information Report that the Learned Magistrate got the same on 17.01.2000, i.e., after four days. Such inordinate delay in sending not only cause suspicion over the prosecution story but without any sanction of law. Such delay was contrary to Section 157 of the Code of Criminal Procedure, 1973.

- (d) Further the rough sketch map did not reflect the actual place of occurrence and as such showed further doubt about the prosecution case. Since this was mandate of law to indicate properly the place of occurrence.
- (e) Another very important and vital question came into place about the age of the alleged victim girl at the time of occurrence of the incident. But, surprisingly, the prosecution had failed miserably the age of the alleged victim girl on the date of occurrence. Prosecution examined PW-13 the doctor who had performed the ossification test of the alleged victim. After examining the victim girl, he came to the conclusion that the age of the victim girl was more than 16 years but less than 18 years.
- (f) Prosecution in a bid to prove the age of the prosecutrix produced certificate at the time of admission in Class-V.
- (g) So, from the initiation of the prosecution case, it further appeared that the prosecution case did not stand on a solid footing rather on some extraneous and/or weak basis.
- (h) Since the allegations did not come within the meaning, ambit and scope of definition of 'Rape' as stated herein above, conviction recorded under the said section was nothing but misnomer. This desperate attempt by the

prosecution could not be taken into consideration as the Rule 12 of the Juvenile Justice Act, said that the categories of school certificates to be considered in determining the age but said Rule did not speak of any certificate in later stage to be considered.

- (i) Apart from the alleged incident alleged to have taken place in the month of April, 1999. The definition of 'Rape' as embroiled in Section 375 of the Indian Penal Code. The explanation sixthly of Section 375 of the Indian Penal Code at the material point of time must be below 16 years of age. But in the instant case, it appeared from the evidence adduced by the prosecution age of the alleged victim girl was more than 16 years. Resultantly it could not be within the ambit of definition of 'Rape'.
- (j) The prosecutrix waited for seven months for filing the instant case on the pretext that the appellant was agreeable to marry her.
- (k) The Hon'ble Apex Court in a similar circumstance was pleased to hold that it would be unsafe to convict a person on the basis of such testimony of the prosecutrix without any supporting evidence. Citation relied upon: (2009) 3 Supreme Court Cases (Cri) 583 Vijayan – Vs. – State of Kerala.

v. Considering the fact and the law it appeared that the prosecution had failed to prove the allegation against the

appellant beyond any reasonable doubt and as such appeal should be allowed and he should be acquitted.

Considered the submissions of the Learned Advocate representing the appellant as well as the Learned Advocate representing the State.

8. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-5, the victim, gave a detailed account of the incident. She deposed that on the relevant date, around 8:00 p.m. to 9:00 p.m., while she was proceeding to a field adjoining her house to attend nature's call, the accused Basudeb Sarkar caught hold of her from behind, dragged her to a pond near the field, and forcibly committed rape upon her. When she attempted to resist, he allegedly threatened her with dire consequences. Thereafter, he proposed marriage and a date was fixed. However, Basudeb allegedly absconded prior to the wedding. She stated that as a consequence of the sexual assault, she became pregnant, eventually delivered a female child who later died. She was a student of Class-VIII at the material time and used to be tutored by the accused, who had regular access to her household. A village salish had been held, in which the accused had reportedly agreed to marry her. However, he was allegedly confined by his family members at an undisclosed location. She filed a written complaint through one Masiruddin at Kaliaganj P.S., which was marked as Exhibit-1.

- ii. In cross-examination, PW-5 remained consistent in her account, despite attempts to discredit her due to delays in lodging the FIR. She explained that the delay was occasioned by her vulnerable financial circumstances, the societal stigma associated with such offences, and the subsequent betrayal by the accused. She admitted that she had encountered the accused thereafter and again requested marriage.
- iii. PW-1, the father of the victim, stated that he had come to know of the incident only when his daughter was eight months pregnant. He confirmed that the accused had been tutoring his daughter privately and that his daughter had delivered a child who later died. He denied direct knowledge of the incident itself but affirmed the relationship between the parties and the pregnancy of his daughter at a minor age. He was not interrogated by the police.
- iv. PW-6, the mother of the prosecutrix, affirmed that her daughter was a student at Sahebghata High School in Class-VIII and had been tutored by the accused. She confirmed that her daughter became pregnant as a result of a sexual relationship with the accused and that a village salish had taken place where it was resolved that the accused would marry the victim. However, the accused allegedly fled thereafter. In her cross-examination, PW-6 admitted to the delay in complaint and acknowledged the family's financial hardships. She denied stating to the police that Basudeb had tutored her daughter.

- v. PW-8, the Teacher-in-Charge of Sahebghata N.N. High School, confirmed that Chandana Sutradhar was admitted to Class-V in 1997 and her date of birth recorded in the admission register was 08.07.1986. The said register, marked as Exhibit-8, was seized by police. He confirmed that Chandana was studying in Class-VIII in 2000, thereby affirming her minority at the time of the alleged incident. In cross-examination, he admitted that he had not seen the birth certificate himself, and the register was maintained under a clerk's supervision.
- vi. PW-9 and PW-13 corroborated the seizure and content of the school admission register and the ossification test report respectively. PW-13, who conducted the ossification test, opined that the bony age of the victim was more than 16 but less than 18 years. The medical report was marked as Exhibit-3.
- vii. PW-10, a Head Constable posted at the Sahebghata police camp, deposed that both parties had come to the police camp for a settlement. A date for marriage was fixed, but the accused allegedly absconded. He confirmed that he forwarded the complaint to Kaliaganj P.S.
- viii. PW-2 to PW-4 and PW-11 to PW-12 were neighbours who either had no knowledge of the incident or disclaimed having heard of any such occurrence. They largely identified the parties involved as co-villagers but did not contribute substantively to the factum of the incident.
- ix. PW-14, the first Investigating Officer, testified to the registration of Kaliaganj P.S. Case No. 7/2000 based on the written

complaint by the prosecutrix. He prepared the sketch map (Exhibit-5), seized the victim's wearing apparels (Exhibit-6), the compromise petition (Exhibit-7), and the school admission register (Exhibit-2/2). He did not verify pregnancy through medical examination, did not obtain the victim's birth certificate, and did not send the seized items to the forensic science laboratory.

- x. PW-15, the second Investigating Officer, confirmed that after receiving the case, he conducted raids, including in Delhi, to apprehend the accused. He submitted the charge sheet showing the accused as absconding.

9. The alleged incident occurred in the month of April, 1999. The definition of 'Rape' at the material point of time was as under:-

“375. Rape. – A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following description :-

First. – Against her will.

Secondly. – Without her consent.

Thirdly. – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly. – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to

understand the nature and consequences of that to which she gives consent.”

Sixthly. – With or without her consent, when she is under sixteen years of age.”

10. PW-2, PW-3, PW-4, PW-11 and PW-12, the acquaintances of both the parties, denied of their knowledge regarding the relationship and the outcome thereof between the same resulting in the institution of the criminal case. Moreover, they were unaware of any ‘salish’ to resolve the dispute, pertinently PW-2, PW-3, PW-4, PW-11 and PW-12 were not declared hostile by the prosecution. PW-14 in his cross-examination stated the place of occurrence of the incident was at Gangua village. He went to the said village for investigation. Many people used to live in the said Gangua village. There was no reflection in the sketch map as to whether there was any residents surrounding the place of occurrence or not. PW-14 could not state the distance of the houses of the witnesses whom he examined in this case. PW-14 knew the place of Sahebghata of Kaliaganj P.S. The distance of Sahebghata and Gangua village was about 4 kms. Gangua village was situated at the southern side of Sahebghata. The complainant had filed the written complaint at Kaliaganj P.S. PW-14 did not seize anything from Sahebghata police camp during investigation. He had not enquired as to whether the victim lodged any complaint at the Sahebghata camp or not. He had not taken any steps for sending the seized article to F.S.L. PW-14 had not collected any birth certificate of the victim girl in course of investigation. PW-14 visited the place of occurrence at first on 13.01.2000. The accused persons were the residents of Gangua village. There was no reflection in the C.D. regarding the distance of the houses of accused persons and of the victim girl. PW-

14 did not endeavour to investigate as to whether the victim gave birth to a dead child.

11. PW-8 on recall stated in his evidence that he was a retired teacher of Sahebghata N. N. High School. In the year 1997 he was the Assistant Teacher of the said school and in the year 2000 he was the Teacher-in-Charge of it. In the year 2000, police of Kaliaganj P.S. came to PW-8 in connection with a case and seized the admission register of the said school for the period of 1997 to 2000. On 18.05.1997 the daughter of Chittyaranjan Sutradhar of village Palihar, P.S.-Kaliaganj, took admission in Class-V and as per admission register her date of birth was 08.07.1986. The said admission register for the period of 1997 to 2000 which disclosed her admission being Page No.-3, Sl. No.14 along with her date of birth was marked as Exhibit-8.
12. PW-8 during cross-examination stated that the said admission register was not maintained under his supervision before 2000. Generally the admission register was maintained by concerned clerk of respective school under supervision of Teacher-in-Charge. No Assistant Teacher made supervision the same. The victim took admission in their school in Class-V but PW-8 did not know where she used to study previously. PW-8 did not see the birth certificate or transfer certificate of the said girl. PW-8 could not say the date of birth of said victim according to her birth certificate.
13. The seized admission register was not placed before the Court initially. The document marked as Exhibit-8, mentioned of the victim taking admission in Class-V on transfer stating her date of birth to be 08.07.1986. Moreover the ossification test revealed the age of the victim

to be more than 16 years but less than 18 years. The prosecution failed to cite the exact age of the victim at the time of occurrence. There was a delay of seven months in filing the complaint due to an assurance on the part of the appellant to marry the victim. In any case the marriage if the appellant agreed to marry the victim, it would have been contrary to law, since the victim as claimed was still a minor.

14. The evidence of PW-2, PW-3, PW-4, PW-11 and PW-12 being independent, non-interested witnesses who were the neighbours did not mention the victim to be pregnant. A lady to have conceived and to bear a child till 7 to 8 months would visibly attract the attention of others with regard to her physical state with noticeable changes. None of the aforesaid witnesses submitted to have witnessed the victim to have been pregnant.
15. Mere denial to marry the victim in absence of cogent proof, the conviction cannot sustain inasmuch as the ingredients to constitute an offence under Section 376 of the Indian Penal Code are absent. The age of the victim could not be proved beyond reasonable doubt. The delay in filing the complaint further weakened the prosecution case on the pretext of an assurance to marry which had been contrary to the guilty motive and objective of the miscreant who should be allowed to be redeemed from penal consequences for adhering to illegal activities.
16. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and as such the instant criminal appeal being CRA 112 of 2013 is allowed.
17. Under such facts and circumstances, the judgment and order dated 22nd January, 2013 passed by the Learned Additional District and Sessions

Judge, Fast Track (1st) Court, Raiganj, Uttar Dinajpur in Sessions Case No.63 of 2007 is set aside.

18. Accordingly, the instant Criminal Appeal being CRA 112 of 2013 stands disposed of.
19. There is no order as to costs.
20. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
21. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)