

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CRA/328/2011

WITH

IA NO.CRAN 1 OF 2011

RAKHAL GHOSH

VS.

STATE OF WEST BENGAL

For the Appellant : Mr. Amit Ranjan Pati, Adv.
Ms. Swastika Chowdhury, Adv.
Ms. Khadijatul Kubra, Adv.

For the State : Mr. Debasish Roy, Adv.
Mrs. Manisha Sharma, Adv.
Mr. S. Nandy, Adv.

Last heard on : 29.04.2025

Judgement on : 05.05.2025

CHAITALI CHATTERJEE DAS, J.:-

- 1.This is an application under Section 374 (2) of the Code of Criminal Procedure filed by the appellant petitioner challenging the judgement dated 26 April 2011 and order of sentence dated 28 April 2011 passed by the Learned Additional Sessions Judge, re-designated Court, Paschim, Mednipur in Session Trial Case No. February 2011 arising out of Shani

P.S. case number 18 of 2009 dated April 3, 2009 under Sections 376 of the Indian Penal Code, 1860 corresponding to GR case number 518 of 2009, whereby convicting the appellant for an offence committed under Section 354 of the Indian Penal Code 1860 and sentencing him to suffer simple imprisonment for nine months and to pay a fine of ₹10,000 in default to suffer further simple imprisonment for one month.

Prosecution case

2. A complaint was written by the father of the victim being P.W 4 on 3rd of April 2009 before the Officer-in-charge Salboni Police Station alleging that on 30 March 2009 at noon about 2 o'clock when his daughter that is the victim girl aged about 15 years went to the river for natural call, and while returning alone, the present appellant picked her up and took to a nearby Doba and raped her muffling her mouth. It was further narrated that since his daughter was late in returning, his wife went to search and suddenly found that the present appellant is running away from the said Doba. The de-facto complainant then went to the Doba and noticed his daughter lying down there, and then he called everyone by shouting. After recovery, the victim narrated the incident to the parents who informed to the appellants father, namely Badal Ghosh, and on hearing, they became furious and tried to assault the de-facto complainant and used filthy languages for the reason of which the de-facto complainant did not lodge any complaint on that day, considering the future of his daughter. He also expressed his apprehension of being threatened by the Appellant and his father.

3. On the basis of the said written complaint, the Salboni police case number 18/2009 dated April 3, 2009 started under Section 376 IPC. After completion of investigation, the I.O. submitted the charge sheet against the present applicant for an offence punishable under Section 376 IPC. Subsequently, the said case was transferred to the court of Learned Sessions Judge and on February 28, 2011, the charge was framed against the present appellant under Section 376 IPC.

Submission

4. Learned Advocate appearing on behalf of the Appellant initially submits that the charge was framed under section 376 of the Indian Penal Code but the Learned Trial court has passed the order of conviction under section 354 of the Indian Penal Code since no such materials were found against the appellant to prove the said charge. Further submitted before this court that the prosecution examined 11 witnesses, including the de-facto complainant who did not support the case of prosecution and declared as hostile. The mother of the victim also did not support the prosecution story and declared hostile. There was a delay in lodging the F.I.R of 5 to 6 days, which created doubt over the prosecution case. It is argued that in the written complaint, the age of the victim was mentioned about 15 years but the Doctor Who examined the victim, considering the x-ray for determination of age opined that the age of the victim was more than 17 years, but less than 19 years. The doctor adduced evidence as PW 2 and said medical examination report of the victim girl has been marked with Exhibit 2 and the plates are marked with exhibit 3 series. In view of such report, there was no external injury

and or any injury mark found on her body, and no foreign body was detected in her body and private part. PW 4 the de-facto complainant made a departure from that was written in the complaint and before declared hostile deposed about scuffle in between his daughter and the accused and he was advised by the villagers to lodge the complaint before the police station.

5. The complainant said he was advised by the villagers to lodge a complaint but at the police Station one of them was asked to write something on paper where he put signature. So the F.I.R itself is not proved therefore, the prosecution has miserably failed to prove that the complaint was lodged at the instance of the de-facto complainant and any incident occurred on the relevant day and time by this Appellant. It is further argued that the victim girl, P.W.6 only deposed that on the relevant time on her way to home the appellant came to her and placed his hand on her body. She further said that she put the signature on the statement given under Section 164 Cr.Pc as per the instruction of the police. Furthermore the victim herself gave a different version before the Learned Magistrate under Section 164 Cr.Pc when she herself narrated the incident before the court which was very different. It is therefore submitted that glaring inconsistencies are apparent in the evidence adduced by the victim herself and on the basis of said evidence order of conviction cannot be sustained. P.W. 7, 8 and 9 did not say anything in support of the prosecution case, and their cross-examination was denied. Investigating Officer PW 11 did not visit the place of occurrence and record the statement of the witnesses. This statement of the I.O. is enough to show that there was no investigation and only at the

instance of the police authorities, the complaint was lodged against the present appellant alleging commission of a serious offence by this Appellant. It is contended that no cogent evidence was forthcoming in order to pass an order of conviction under Section 354 IPC and accordingly prays for Acquittal.

6. Per Contra it is the submission of the learned prosecution that the heinous offence was committed by the appellant which was intimated to the police by the father of the victim girl and on the basis of which the investigation started culminated into filing of charge sheet. Since it was exclusively triable by a Session Court the same was committed before the learned session court, when the charge was framed against the appellant was read over and explained to him to which he pleaded not guilty and claimed to be tried. Accordingly, the trial commenced and the prosecution cited 11 witnesses including the victim and the I.O. It is submitted that mere delay in filing the complaint cannot be fatal against the prosecution as it has been clearly stated by the de-facto complainant that they were threatened by the appellant and his father, and therefore he did not complain on the date of the incident. It is further submitted that the victim girl being a village girl may not be certain about the exact age but her age was in between 17 to 19. There is no denial that there was a medical examination of the victim after the incident and to the report of the P.W.2. There was hymen injury, and such report was proved and marked with exhibit. The learned Court relied upon the statement of the victim who admitted about an incident which took place on the date of on the relevant date when she went to the river and on our way back to home, the appellant placed his hand on her body near a

Doba, and her statement given under Section 164 of the Code of Criminal Procedure 1973 when she specifically stated about commission of rape on her.

7. Further, more the appellant was medically checked and found capable of performing sexual intercourse. The learned Sessions Judge, considering the medical evidence and the statement of victim rightly observed that the scuffling between the victim girl and the appellant is proved and therefore even if the charges under Section 376 of the Indian Penal Code is not proved the prosecution has been succeeded in proving the accusation under Section 354 beyond all reasonable doubt. Therefore, there is no reason to interfere with the judgement and order passed by the Learned Sessions Court and this criminal appeal is liable to be dismissed.

ANALYSIS

8. Heard the submission of both the learned advocate

The seminal issues which falls for consideration is that?

- a) Weather the prosecution has been able to prove the case beyond all reasonable doubt.
- b) Weather the Learned Court was writing, passing the order of conviction against the accused under Section 354 of IPC.

9. In this case, in order to set the motion, the complaint was lodged by the father of the victim on 3rd of April 2009 alleging an incident happened on 30 March 2009. The said complaint was written by Nandu Chatterjee who was not cited as a charge sheet witness. The I.O. submitted the charge sheet on 16.8.2010 being CS number 56 /10 under Section 376 of Indian Penal

Code. The I.O. recorded the statement of 14 witnesses who were named as charge sheet witnesses however; the prosecution examined 11 witnesses out of said 14 witnesses. In this case, the victim gave 164 statements before the Learned Magistrate on 9 April 2009 that is after nine days from the date of alleged incident. She stated her age as 16 years and specifically stated that the appellant assaulted her physically despite her objection, touched her inappropriately and ultimately raped her. The medical examination was done on 16th of April 2009 that is 16 days after the alleged date of incident when it was said by the doctor that no foreign body or private part was found and no injury mark was found on our body excepting hymen injury. It is a settled law that FIR is neither substantive evidence nor an encyclopaedia of the prosecution case. It is from the nature of the FIR and other surrounding circumstances that it has to be seen whether there was any scope for any contradiction at the time the informant gave it or it was a version, which meditated explanation at the trial. At the same time, the information when recorded is the basis of the case made out by the informant and therefore it is an extremely vital and valuable piece of evidence for the purpose of corroborating.

10. The importance of lodging F.I.R is the first information of an incident given to the police first in point of time on the basis of which the investigation commences. In the instant case, the written complaint was lodged, by none other than the father of the victim and therefore it is quite acceptable that he will narrate the exact incident happened with his daughter before the police authorities since it is his daughter who has faced traumatic incident. The de-facto complainant/P.W. 4 while adducing evidence neither before the

Learned Trial Court nor in the written complaint said that it was written as per his instruction by Nadu Chatterjee. While adducing evidence he made a total departure than what he put in the written complaint.

- 11.** An incident of scuffling can be found between his daughter and the appellant from his testimony. He deposed before the Court that the officer in charge asked them to write something on paper and then to put his signature but he never divulged the name of the scribe during his evidence and the said scribe also never adduced evidence. P.W. 4 the father was declared hostile and was cross examined by the prosecution where he said that he had no knowledge about the incident of commission of rape upon her daughter and denied about the content of the written complaint lodged on March 30, 2009. Not only that he also specifically denied about any threatening given by the Appellant or his father as narrated in the F.I.R. Prosecution has miserably failed to prove the F.I.R itself as it creates serious doubts pertaining to the occurrence of the incident as narrated. Most interestingly, the mother of the victim PW5 also denied to have any knowledge about any incident relating to her daughter and the accused person and also about lodging of any complaint before any authority by her husband regarding such incident when according to the F.I.R the mother went to find out her daughter since it was late and saw the Appellant running away from the Doba and then discovered her daughter from the Doba. P.W. 6 the victim whose evidence is the most vital piece of evidence if considered carefully it would come, she failed to identify the victim though in the statement given before the Magistrate she took the name of the Appellant specifically committing rape on her. In the court she denied that

the accused committed rape upon her, but deposed that he came to her and placed his hands on her body. This evidence primarily shows either the victim tried to suppress something or the entire story was made with some other purpose. When the victim said that the accused put a hand on her body how she failed to identify the accused. She even didn't say that any resistance was there by her side and any force applied on her by the appellant.

12. A person commits an offence of rape when he fulfils the ingredients as envisaged in Section 375 of IPC which are totally missing in this case, and that is the reason, the learned Trial court could not pass an order of conviction under Section 376 of IPC but passed the order of conviction under Section 354 IPC .

13. Section 354 IPC reads as:

Assault or criminal force to women with intent to outrage her modesty who ever assault or uses criminal force to any woman, intending to outrage or knowingly it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year, but which may extend to 5 years, and shall also be liable to fine.

14. Therefore, as observed by the Hon'ble Supreme Court in ***Rupan Deol Bajaj & another vs State of Punjab and others (1995) 6 SCC 194*** that the ultimate test for asserting whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of shocking. The essential condition to attract Section 354 of the

Indian Penal Code are, there must be an assault on the woman, that accused must use force on her, and the criminal force must have been used with an intention to outrage her modesty.

- 15.** In the instant case, even though the father has turned hostile, if his version before declaring him as hostile is seen at best an incident of scuffling between the appellant and the victim can be found however, on account of such scuffling the victim did not suffer any such external or internal injuries. The victim when adduced evidence before the court was aged about 18 years and therefore matured enough to depose as to whether any criminal force was applied to her or not or there was any intention on the part of the appellant who placed his hands on her body to outrage her modesty, or at all the appellant touched her inappropriately. P.W. 2 the doctor did x-ray to ascertain the age of the victim and opined her age more than 17 and less than 19, so all probabilities her age would be more or less 18 years so it also cannot be said that she was minor during the incident. In ***State versus Gurmeet Singh (1996) 2 SCC3 84*** it was observed by the Supreme Court that *“The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the court should not overlook.”* In the instant case the statement of the victim given before the Magistrate primarily shows certain details of the incident of rape but she totally made a different story while adducing evidence before the Court. The Court is unable overlook the fact that in sexual offences delay in lodging the F.I.R can be due to variety of reasons, particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and of

her family. Keeping in mind the above observation on looking to the delay caused in filing the F.I.R in the instant case, cannot be a factor in passing and order of conviction against the appellant, but when the complaint lodged before the concerned police station by the father of the victim may be few days after the incident, subsequently denied of any such incident and also lodging of the Complaint itself at his own instance, and when the mother also denied of any incident as stated in the complaint with her daughter and when the victim, herself denied of commission of any offence of rape or even using of criminal force or assaulting to outrage her modesty, certainly it weakens the case of the prosecution. It is now well settled that the sole testimony of the rape victim if found trustworthy can be the basis to pass an order of conviction. Therefore it is not about the collection of corroborating evidence from the other prosecution witnesses but about the trustworthiness of the victim herself and also her parents.

- 16.** So in the above factual backdrop what the court could rely is that one Medical report of the victim dated 16.4.2009 with no external injuries or any foreign body in her body or private part but with irregular vertical injury of the hymen at 6,O' clock position, which was marked with exhibit . The vaginal swab was taken and handed over to LHG/130030 Subhadra as it appears from such report. Secondly the statement given by the victim before the Learned Magistrate under Section 164 Cr.Pc narrating the nature of offence committed. After these two important documents and the evidences adduced by the parents and the victim are compared a totally different version can be found which certainly harps the very foundation of the prosecution case. It is further to be considered that the statement given

under Section 164 Cr.Pc is not itself a substantive piece of evidence and can only be used for the purpose of corroboration and contradiction. It is also relevant to note that the victim deposed before the court that she put her signature as per instruction of police. So definitely the Magistrate erred in relying on her said statement, The denial to identify the Appellant by none other than victim herself or the denial of the de-facto complainant of lodging any F.I.R at his instance or nondisclosure of anything about the scribe and the denial by the mother of the victim of having knowledge of any such incident creates serious doubts regarding the involvement of the Appellant in this case. Non recording of any statement by the I.O. further reveals the apathy on the part of the investigating agency in doing proper investigation even in a case where charge has been framed under Section 376 of the Indian Penal Code. So no unimpeachable evidence can be found against the Appellant to pass an order of conviction even under Section 354 IPC

17. Be that as it may this Court considering the above aspect is unable to concur with the observation made by the Learned Trial court as the prosecution has miserably failed to prove the case against the Appellant beyond all reasonable doubts and therefore is of the view that the Judgement and order of conviction passed by the learned Trial court is liable to be set aside.

18. The CRA stands allowed.

19. The Appellant shall be discharged from the bail bonds after expiry of 6 months in terms section 481 of BNSS.

20. Let a copy of this judgement along with the trial court record be forthwith sent before the Trial Court.

21. Photostat copy of this judgement if applied, shall be made available upon compliance of all formalities.

(CHAITALI CHATTERJEE DAS, J.)

