

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CRA 341 OF 2007

**KHOKAN DEBNATH
VS**

THE STATE OF WEST BENGAL

For the Appellant : Mr. Francis Samson Correa, Adv.

Mr. Sunny Nandy, Adv.

Ms. Sneha Singh, Adv.

Ms. Yamini Tiwari, Adv.

For the State : Ms. Rituparna Ghose, Adv.

Mr. Santanu Talukdar, Adv.

Last heard on : 18.06.2025

Judgement on : 25.07.2025

CHAITALI CHATTERJEE DAS, J. :-

1. This criminal appeal has been filed against a judgement and order of conviction and sentence dated April 30, 2007 passed by the Learned Additional District and Session Judge, Fast Track Court, Alipurduar, Jalpaiguri in Sessions Case No 79/2006 whereby the order of conviction was passed against the appellant under Section 342 of the Indian Penal Code and sentenced him to suffer Rigorous Imprisonment for 1 year and further

convicted under Section 506 of the Indian Penal Code and sentenced to Rigorous Imprisonment for 1 year and also convicted under Section 376 /511 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 5 years and to pay a fine of Rs.1000 in default to suffer Rigorous Imprisonment for 1 month more.

Case of prosecution

2. The prosecution case as per the F.I.R qua the written complaint as was submitted by Paritosh Debnath on September 5, 2006 against the present appellant alleging that on September 11, 2005 at about 6 P.M. before the (Shamuktala Police Station) when his minor daughter i.e. the victim girl went to watch the T.V programme at the house of his neighbour Khokan Dennath then by taking advantage of the absence of any one in the house, he tried to commit rape on his daughter. It was further alleged that he pressed a piece of cloth on his daughter's mouth and she could not shout however she somehow managed to run away from his house. After that she narrated the entire incident to her mother which was informed to his relatives and neighbours. It was further mentioned in the written complaint that the de-facto complainant was asked to resolve the dispute within the village and accordingly a salish was called but no solution could be arrived resulting a delay in filing the complaint.
3. On the basis of the said written complaint the Shamuktala P.S. case No 87/2005 dated October 3rd, 2005 under Section 342/376/511/566 IPC started against the appellant and after completion of investigation the I.O. submitted the charge sheet on 31.12.2005 under Section 342/376/511 /506 against the present appellant. The charges being triable exclusively by the Session Court

the case was committed before the Learned Session Judge which was subsequently transferred to the court of Learned Additional District And Session Judge 1ST Fast Track Court, Alipurduar, Jalpaiguri where the charges were framed by the Learned Court considering the materials on record under Section 342/376/511/506IPC against the accused person and he pleaded not guilty and claimed to be tried. Hence the trial commenced. The Learned court after hearing the parties and after assessing the evidences adduced on behalf of the prosecution passed the order of conviction against the present Appellant. Being aggrieved thereby this appeal has been filed.

Submissions

4. The learned Advocate appearing on behalf of the appellant took the point of inordinate and unexplained delay in lodging the F.I.R. It is argued that the date of incident as alleged was on 11.09.2005 when the complaint was lodged on 5.9.2006 therefore there is a delay of 23 days and to substantiate the delay ground of Salishi has been taken but failed to prove the same by any cogent evidence. It is further submitted that the prosecution has failed to prove that the complaint was lodged by the de-facto complainant at the police station by him because of the glaring inconsistencies in the evidence adduced by the de-facto complainant, his wife PW3, the scribe P.W. 7 and the I.O. It is argued that each of the witnesses in their testimony disclosed about different location where the F.I.R was prepared and at whose instance, which definitely creates sufficient cloud over the prosecution case. Further argument advanced to that extent that the evidence of the victim girl is not reliable as it is patently absurd that in presence of others in the house of the accused he will try commit rape on the victim and also that she shouted and no one turned up. The alleged

persons who were present therein on that fateful day has not been cited as witness by the prosecution.

5. It is strenuously argued by the Learned Advocate for the appellant that the wearing apparels of the victim were not seized or sent to FSL for any expert analysis, more so in the evidence of P.W. 9 the treating Doctor he did not find any scratch mark or injury mark in the body, breast or in the private part or any foreign body was found on her private part. The Doctor failed to mention in his report about the condition of the wearing apparels of the victim. It is further submitted that the prosecution case is riddled with contradiction and improbabilities. Furthermore the mother herself failed to support the case of prosecution. In order to support the prosecution story the Learned Advocate has relied upon a decision reported in¹ (***State of Himachal Pradesh vs Rajesh Kumar***) in this regard.

6. The Learned Prosecution on the other hand submitted that the complaint was lodged with an allegation of attempt to commit rape on the victim girl and in order to prove the same it was not mandatory to have the medical examination. For non-examination of vaginal swab the gravity of the offence alleged to have been committed never gets diluted. It is submitted that the prosecution in order to prove the case has cited as many as 11 witnesses including the victim herself and her parents to whom she narrated the entire incident. It is further submitted that the victim girl is mild mentally retarded and therefore during adducing evidence she herself by gesture and also by exhibiting have expressed the manner in which the accused made an attempt to ravish her. It is further pointed out that the accused also committed an act

¹ 2025 SCC online 577

of wrongful restrain as it is very much apparent from the nature of evidence adduced by the poor girl who was a minor. She by way of expression and gesture also narrated before the Doctor also about the incident whereby her modesty was outraged at the house of the accused person. It is strenuously argued by the Learned Prosecution that the evidence adduced by the prosecution witnesses including the parents as well as the other witnesses and the victim lady clearly shows that the delay was caused only because there was a salis which held but yielded no result. It is submitted that the minor inconsistencies should not be a weapon to protect the accused who despite having knowledge about this mild mental retardation of the victim girl tried to commit rape on her taking advantage of the situation that none was present at the house on the eve of Radha Astami and accordingly prayed for dismissal of this appeal.

Analysis

7. Heard the submission of both the learned advocates and their rival contentions:

On careful perusal of the materials on record as well as the document exhibited the moot question now falls for consideration is that as to whether the Learned court was right in passing the order of conviction against the present appellant on the charges as levelled against the accused and or whether the prosecution has been able to prove the charges against the appellant beyond the shadow of all the reasonable doubts.

The admitted facts are that the victim girl is mild mentally retarded and was a minor which can be found from her testimony as her deposition sheet reveals that by way of gesture she tried to narrate the manner in which the accused

committed the offence and the Learned Court recorded such gesture in that deposition sheet. In fact, the Learned Court also recorded in the said deposition sheet that *“the witness has (illegible, intelligence quantum and there is mild retardation but object to reply)”*. So the argument advanced by the Learned Prosecution that the matter would have attract POCSO had the Act been promulgated at that time since the victim was minor and mentally retarded becomes very much acceptable.

Further corroboration can be seen from the testimony of P.W. 1 the father of the victim who proved his handicapped certificate from the District Handicapped Rehabilitation Centre which was marked as Exhibit 2. In this case the de facto complainant being the father of the victim girl learnt about the incident from his wife to whom the victim girl narrated the entire fact. It is the version of the P.W. 1 that he informed the incident to the village people and tried to settle the matter but no settlement could be arrived at and as such there was delay in lodging the FIR which was written by Krishna Debnath where he put his signature. According to the defence Counsel this incident of Salish is taken as a plea in order to cover the long delay which has caused in lodging the FIR in respect of the alleged incident. The de facto complainant during his cross specifically denied the suggestion put to him that no Salish was held earlier related to his daughter. On careful scrutiny of the evidences adduced it could be seen that the victim girl herself deposed as P.W. 2 and no question was put to her regarding this Salishi. P.W. 3 the mother of the victim girl who came to know about the incident from her daughter deposed that she discussed the entire fact with her husband and she went to panchayat and informed the incident. She also said that Salishi was held but no settlement

could be arrived. In her cross-examination she said that the Panchayat Pradhans and others attended the salish which held after 6 to 7 days from the incident at the house of accused. A member of Gram Panchayat Kamal Kr. Sarkar deposed before the Court as P.W. 8, that the incident occurred about a year ago and on one day in the evening the parents came to his house with the victim girl who expressed by way of gesture about the incident happened with her and then he told them that a Salish would be held on the next evening. He further deposed that in the Salish the accused refused to admit guilt hence no decision could be taken and then the witness advised the parents to take recourse of law. Now the question arises regarding the admissibility of his evidence since this witness was declared hostile .This Court is unable to accept the contention of the Learned Defence Counsel that since the witness was declared hostile the evidence he adduced before he was declared as hostile will also lose its evidentiary value and not to be treated as a reliable evidence in the eye of law in view of settled law. P.W. 10 Pankaj Sherepa who was a police officer and filled up the formal FIR, in his cross examination deposed that as per FIR the occurrence of the offence took place on 11.09.2005 when he enquired about the delay in lodging the FIR and found that the delay was due to conducting a village salish. Therefore upon culmination of this above nature of evidence of the prosecution witnesses the issue of Salishi whether took place or not can be said to be affirmative in favour of the prosecution even though no written resolution may be seen or found to be seized by the I.O.

- 8.** It is now necessary to see how far the prosecution has been able to prove the charge under Section 376/511 IPC .The complaint lodged by the De-facto Complainant discloses only an attempt to commit rape without giving any

further details. The victim girl in her deposition both verbally and by way of gesture expressed the manner in which she was sexually assaulted which reveals that at 6pm when she was watching T.V the accused opened his pant and torn her frock, touched her breast .He also pressed her mouth with napkin (gamcha) he wore after he became naked and laid her down in chowki and inserted his private part (labra) on her private part (labra) and she showed the act by gesture. She further said he touched her breasts, forcibly detained her and she resisted and shouted and the accused fled away. She further deposed that she sustained pain in her private parts and breast, and she further showed the same with her hands and gestures to express herself in the way she felt comfortable. On this factual score the relevant provision be looked in. Section 375 of IPC which defines Rape and reads as follows.

"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 descriptions:-

Firstly.- 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.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

In this case admittedly the offence of Rape was not committed but the preparation and intention to commit the offence was very much present. **In *Madan Lal v. State of J & K*,²** the Supreme Court observed as under para 12,

"12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undressed himself and

² (1997) 7 SCC 677

then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with 511 IPC. In the facts and circumstances of the present case the offence of an attempt to commit rape by the accused has been clearly established and the High Court rightly convicted him under Section 376 read with Section 511 IPC."

The fact of this case is almost identical with the case in hand. The difference between 'attempt' and 'preparation' in a rape case was further considered in **Koppula Venkat Rao v. State of A.P.**³, where the Hon'ble Supreme Court observed as under para 10 & 11;

"10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit

³ (2004) 3 SCC 602

a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect."

- 9.** In the instant case the nature of evidence adduced by the Victim girl and to support her contention the evidence adduced by the mother along with the evidence of other witnesses the preparation and an attempt to commit rape can be said to be well founded. It is undisputed that there is no medico legal report to support her case as narrated and no mark of injury or scratch in the body or in the private parts of the victim was found by the doctor Admittedly

there was a delay in lodging the F.I.R of 23 days and from the manner in which the incident has been described there is less possibility of sustaining injury on account of the force applied and the Doctor P.W. 9 when examined the victim on 6th of October, 2005 did not find any scratch mark or injury mark on her body or breast or private parts in bare eyes in the outer part of private part but in the cross-examination he himself admitted that if any attempt is made for commission of rape, mark of injury may or may not be present in the person of the victim girl or in her private part. So in the instant case other than the victim's statement and that of her mother no other evidence can be found. The Hon'ble Supreme Court in the case of **State of Punjab vs Gurmit Singh**, reported in⁴, while considering the reliability of the statement of the victim has held that;

“minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault was enough for conviction and does not require corroboration unless there were compelling reasons for seeking corroboration. The Court may look for some assurances of her statement to satisfy judicial conscience”.

In **Pappu vs. State of Uttar Pradesh**, reported in⁵ also this view has been reiterated.

⁴ (1996) 2 SCC 384

⁵ 2022 SCC Online SC 176

10. The mere inconsistencies as argued before this Court in respect of the mother of the victim regarding the time when the victim narrated the incident to her mother cannot be said to be fatal for the prosecution or can be said to be sufficient to impeach the credibility of testimony the victim girl. In the case of **Ganesan vs State Represented by its Inspector of Police**⁶ the Hon'ble Supreme Court after taking note of several judicial pronouncements observed that when the deposition of the victim is found to be trustworthy, unblemished, credible and her evidence is of sterling quality an order of conviction can be passed on the sole testimony of the victim. It is settled law that the sole testimony of the victim lady of sexual offences if found otherwise trustworthy enough is sufficient to pass an order of conviction without seeking for further corroboration. In the decision reported as **State of Himachal Pradesh v. Asha Ram** ⁷ the Hon'ble Supreme Court highlighted the importance to be given to the testimony of the prosecutrix as in para 5:

5.It is now well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no

⁶ (2020) 10 SCC 573

⁷ AIR 2006 SC 381

difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.” (emphasis added)

11. The argument as advanced by the Learned Defence Counsel that it is patently absurd that in absence of others in the house of accused he will try to ravish the victim and she shouted and no one came , appears to be a very weak analogy that is drawn since she never said that her brother or Chumki, Mampi, or Priyanka were also present when she was watching TV or when the incident happened more so she was gaged with napkin and specifically said there was none present at the house apart from Khokan Debnath, and she resisted and also shouted and obviously with a napkin in the mouth how far such shouting can be audible from the adjacent house is of big question. Moreover both the mother of the victim and P.W. 3 deposed that on account of Radha Astami no one was present in the home. The contention that certain inconsistencies are there in the testimony of the mother and hence cannot be taken for consideration also do not find any leg to stand on and hence the

decision on relied upon in this regard in the case of Himachal Pradesh(supra) and the facts of the said case is distinguishable with this case and this Court find no reason to disbelieve the version of the victim.

Furthermore the incriminating materials were duly placed before the accused person while examining him under Section 313 of Cr. Pc. and excepting “no”, “or I am not guilty” only said that on that date of incident he was in the weekly hut held on Wednesday and Sunday being a vegetable seller with his family but unfortunately the defence failed to build up any such case either during the cross-examination of the prosecution witnesses and/or by citing any other defence witness.. Therefore this defence has got no force to discredit the evidence adduced by the victim herself.

12. In this case other than the victim and her parents P.W.4 adduced evidence and stated that she heard the incident from the victim herself that on the relevant day the accused put her on bed, gagged her mouth with napkin, touched her breast and opened her pant and she was telling NOONGRA KATHA Which means dirty words. This can be interpreted, the manner in which the accused tried to ravish her. So the witness did not listen to her. This witness was declared hostile by the prosecution. In her cross also she denied the suggestion put to her that “it is not a fact that Parbati did not tell her about the incident. So far the evidentiary value of a hostile witness in the case of **Bhagwan Singh vs The State Of Haryana** ⁸, it was observed

“We have carefully perused the evidence of Jagat Singh, who was examined in the trial after more than a year of detection of the case. The prosecution could have even

⁸ AIR 1976 Supreme Court 202

avoided requesting for permission to cross-examine the witness under section 154 of the Evidence Act. But the fact that the court gave permission to the Prosecutor to cross examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.”

13. The Court cannot remain oblivious of the fact that the alleged incident happened on 11.09.2005 when the medical examination was held on 6th of October, 2005 that is approximately 23 days after the incident. Therefore from the above facts and circumstances and the nature of evidence adduced and considering the aggravating factor that the offence was heinous and perpetrated upon a minor victim despite having knowledge that the victim girl is having mild retardation and minor the accused tried to ravish her and such act has been proved by the prosecution witness including the victim herself. The unimpeached testimonies of the victim girl along with the other corroborative evidences coupled with the testimony of her mother there leaves is room to give benefit of doubt to the accused.

Conclusion

14. In this case the order of conviction is affirmed so far the charge of 376 IPC is concerned. In the light of the above discussion Section 511 IPC is a general provision dealing with attempts to commit offences which are not made

punishable by other specific sections of the Code and it provides, inter alia, that,

“whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both”.

In that circumstances the sentence levelled against the accused for the offence committed under Section 376/511 can no way be interfered with and is hereby affirmed.

15. So far Section 342 IPC is concerned I am unable to concur with the findings of the learned Trial court in view of the absence of essential criteria to attract the said section. Therefore this goes in favour of the accused and he is acquitted from the charge under Section 342 IPC. So far the charge under Section 506 IPC regarding threatening by the accused to the victim and her family the de-facto complainant mentioned the same in his written complaint. In course of evidence the P.W 3 said that they had to leave the place of

residence as they were threatened by the accused and this fact has been corroborated by P.W No 5 Manju Sarkar who deposed in her cross examination that *"they were not allowed to stay at the village due to their behaviour"*. The member of Gram Panchayet P.W 7 has further corroborated that the victim and her family are not residing at that village. So from the above it can be seen that till the complaint was lodged they resided at that village and no case was made out about any bad behaviour of any of the family members of the de-facto complainant but once the salish failed and the de-facto dared to lodge the complaint ,they had to leave the village .Therefore the observation made by the learned trial court in this regard is absolutely correct and it goes against the appellant however the sentence passed by the learned court for the commission of offence under section 342 IPC is reduced 3months instead of 1year .

16. Thus the appeal stands allowed in part.

17. The judgment of the learned Trial court is hereby affirmed with certain modification as follows;

The order of conviction passed under section 376/511 and 506 I.P.C against the appellant is hereby affirmed. The period of sentence for commission of offence under section 506 I.P.C is reduced to R.I of 3 months in place of 1year.The appellant is acquitted for the commission of offence under section 342 I.P.C.

18. The respondent is directed to surrender within 6 weeks and serve the remainder of his sentence as awarded by the Trial Court. The TCR along

with a copy of this judgement be sent down to forward the same to Learned Trial Court for necessary action.

19. The appeal stands disposed of in the above terms.

20. Urgent certified copy of this judgement if applied shall be made available upon compliance of all formalities.

(CHAITALI CHATTERJEE DAS,J.)

