

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

Present:

The Hon'ble **Justice Prasenjit Biswas**

C.R.A. 442 of 2009

Jahangir Sk.

-Versus-

The State of West Bengal

For the Appellant : **Mr. Prabir Majumder,
Mr. Saidur Rahaman,
Mr. Snehansu Majumder,
Mr. Debraj Shil,
Ms. Sangeeta Chkraborty.**

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

Hearing concluded on : **30.04.2025**

Judgment On : **06.05.2025**

Prasenjit Biswas, J:-

1. The judgment and order of conviction passed by the learned Additional Sessions Judge, Fast Track 2nd Court, Lalbagh, Murshidabad in connection with Sessions Trial No. 9(8)08 arising out of Sessions Sl. No. 85/05 dated 19.04.2009 is assailed in this appeal.

2. By passing the impugned judgment and order of conviction the learned Trial Court found this appellant guilty for commission of offence punishable under Section 376/511 and 447 of the Indian Penal Code and sentenced him to suffer three years rigorous imprisonment with fine of Rs. 1000/-, in default to suffer simple imprisonment for further three months for the offence committed under Section 376/511 of the Indian Penal Code and fine of Rs. 300/- and in default to suffer simple imprisonment for one month for the offence committed under Section 447 of Indian Penal Code.

3. Facts which are necessary to dispose of this appeal in nutshell are as follows:-

“The victim girl lodged a written complaint before Islampur P.S. stating that on 10.05.2005 at around 5 P.M. when she was combing her hair for going to see the dead body of her uncle-in-law in his room then suddenly the accused Jahangir Sk. entered into her room wearing lungi and embraced her from behind. The accused applied force on her and this victim could not resist him. Accused Jahangir forcibly opened the sari of the victim and also opened his wearing lungi and tried to commit rape upon the victim. This victim started to shout and on hearing her shout, her sister-in-law rushed to the spot and seeing her the accused Jahangir Sk. fled away from the spot. The husband of the victim had gone to outside work and after four days when he returned

home then this victim disclosed the incident to him. The husband of the victim informed the entire matter to the respectable persons of their village. Although, they assured the victim and her husband to look after the matter but no action had been taken by them. So, the victim girl filed the complaint before the police station.”

4. Over the complaint lodged by the victim a case was started being Islampur P.S. Case No. 55/05 dated 15.05.2005 under Sections 447 and 376/511 of the Indian Penal Code. After completion of investigation charge-sheet was submitted by the prosecuting agency. The charge was framed by the Trial Court under Sections 376/511 and 447 of the Indian Penal Code against this appellant-convict.
5. In this case, eight (8) witnesses were examined by the side of the prosecution and documents were marked as exhibits 1 to 5 on its behalf. Neither any oral nor any documentary evidence was adduced on behalf of the accused.
6. Mr. Prabir Majumder, learned Advocate for the appellant said that there are apparent contradictions and omissions in the depositions of the witnesses and as such, the impugned judgment and order of conviction is bad in law and is liable to be set aside. It is said by Mr. Majumder that the alleged incident was happened on 10.05.2005 at 5 P.M. in the afternoon but the FIR was lodged delaying five days and no plausible explanation was given by the prosecution in respect of delayed FIR. It is

further said by the learned Advocate that the victim girl (PW1) has made a departure in her oral evidence from the allegations as made out in the written complaint. It is said that in the written complaint the victim girl stated that at the time of alleged incident she was shouting loudly but in deposition she did not say that she raised alarm when the appellant tried to commit rape upon her. PW1 stated in his evidence that she suffered injury and also suffered abrasion at different parts of her body but the same has not been supported by the exhibit 5 (injury report). Moreover, it is not stated in the written complaint by the victim that she suffered injury and abrasion at different parts of the body. It is said by the learned Advocate that exhibit 5, the medical document indicates that there was no scratch mark or injury either on the personal or the private part of the victim. It is said by the learned Advocate that PW2 in his examination-in-chief stated that she saw the accused Jahangir was raping on her sister-in-law but in fact, the complaint was lodged by the victim that the accused tried to commit rape upon her. So, as per submission of the learned Advocate this witness did not reflect the true state of fact.

- 7.** The attention of this Court is drawn to the deposition of PW3 who happens to be the husband of the victim wherein in cross-examination he stated that he made statement before the Darogababu that their attempt for salish was failed. It is said by the learned Advocate that it would be evident from the cross-examination of this witness wherein he

stated that the appellant refused to pay any fine stating that he was innocent. As the appellant did not pay any fine, this false complaint was lodged before the police station. As per submission of the learned Advocate this PW3 is nothing but an interested witness and he heard the alleged incident from the mouth of his wife. This hearsay evidence could not be believed and no order of conviction could be passed upon giving reliance of such evidence.

8. Mr. Majumder further assailed that the evidences of PW4, PW5 and PW6 may not be believed as neither the victim (PW1) nor PW2 stated anything in their evidences that these witnesses had been the place of occurrence at any point of time. It is further assailed by the learned Advocate that PW8, the Investigating Officer stated that in the sketch map he noted the surrounding houses as A, C, D. and those houses belonged to Moslem Sk., Amir Sk., and Islam Sk. but he did not examine those persons or their family members. The victim girl stated that she shouted at the time of incident and these surrounding people or their family members might have heard the shout, but those persons were not cited as prosecution witness. Moreover, Investigating Officer did not seize wearing apparels of the victim girl. PW1 stated that she disclosed the alleged incident to her parents in law but this fact has not been stated in the written complaint. The learned Trial Judge while decided the case proceeded prejudicially to hold this appellant guilty by all means without at all going to the merits of the case. So, as per

submission of the learned Advocate that the impugned judgment and order of conviction passed by the learned Trial Court is not sustainable under the eye of law.

- 9.** Mr. Avishek Sinha, learned Advocate for the State submits that there is no illegality in the impugned judgment and order of conviction passed by the learned Trial Court. It is said that all the witnesses cited by the prosecution support the contentions as made by the de-facto complainant/victim girl in the written complaint. PW4 and PW6 are the witnesses to the incident. PW4 who is the relative of the victim said that about three years, three months ago one day at about 5 P.M. he heard some shouts from the house of his cousin Ainal and at that time he was sitting in a nearby road and then this witness went to the spot and saw this appellant was fleeing away at a high speed. PW6 also stated in the same line of PW4 that on the date of incident when he was coming from working place at that time he heard an alarm from the house of the victim girl and he instantly rushed there. This witness further deposed that on going to the spot he saw another lady who was present there including the victim girl and the appellant was fleeing away from there.
- 10.** It is said by the learned Advocate that the prosecution is able to prove the charge levelled against the appellant and there is nothing to disbelieve the depositions of the witnesses. The testimony of the victim girl is trustworthy and on the basis of such sole testimony of the victim

the order of conviction can be passed. It is further said by the learned Advocate that in this kind of offence where attempt was made to commit rape upon the victim and in that situation the victim may not sustain any injury or abrasion on her person. So, the injury report (exhibit-5) cannot be thrown away on the ground that there was no scratch mark of the injury on the body of the victim. It is said by the learned Advocate that the judgment and order of conviction passed by the learned Trial Court may not be interfered with.

- 11.** I have considered the rival submissions advanced by both the parties. Perused all the materials gathered in the record.
- 12.** The complaint was lodged by the victim girl stating that the alleged incident was taken place on 10.05.2005 at around 5 P.M. when she was combing her hair and at that time this appellant-convict entered into her room wearing lungi and embraced her from behind. Thereafter, this appellant picked up her sari and was ready to do the evil work. This victim was shouting loudly and hearing her shout PW2 entered at the spot and seeing her, this appellant fled away. But immediately after the incident no complaint was lodged before the police station. This victim waited for five days and when her husband came back they informed the matter to the respectable persons of their village as it appears from the contentions of the written complaint. As the village persons did not look after the matter, this victim girl lodged this complaint against this accused person. PW1 stated in his written

complaint that when the appellant attempted to commit rape upon her she was shouting loudly but at the time of giving deposition she did not state that she raised alarm when the appellant attempted to commit rape upon her. PW1 stated that immediate after the incident she disclosed it to her brother-in-law, parents in law and other relatives and villagers but this fact has not been stated in the written complaint.

- 13.** In cross-examination this PW1 (V.G.) stated that Moslem Sk. Amir Sk. resided beside their house and Yadila Sk. living at some distance place but these persons were not cited as witness by the prosecution. PW8, Investigating Officer stated that he prepared the sketch map noting surrounding houses as A, C, D and those house belonged to Moslem Sk. Amir Sk. and Islam Sk. It is said by the victim girl in the written complaint that at the time of the alleged incident she was shouting loudly. So, it is quite common that the surrounding owners of the house or their family members might have heard the shout but those persons were not cited as a witness in this case. In cross-examination the victim girl (PW1) stated that during 'dostadosti' (scuffle) she suffered injuries and abrasions at different parts of her body. Although, the injury report is marked as exhibit but the doctor who issued the injury report was not cited as a witness to the prosecution. The said injury report is marked as exhibit 5 in this case which shows that there was no scratch mark or injury on the personal or private parts of the victim girl. In cross-examination, this victim girl stated that her sari

and blouse were torn and she told Darogababu about this and handed over sari and blouse to Darogababu. PW10 stated that he did not seize any wearing apparel of the victim girl which is contrary to the deposition of PW1 regarding handing over sari and blouse to him.

- 14.** PW2 Morjina Bibi stated that the accused Jahangir was raping her sister in law (victim girl) which does not reflect the true state of fact as alleged by the victim girl in the written complaint. In cross-examination, this PW2 stated that her sister-in-law was not wearing any cloth at the time of alleged incident but he did not state to that fact to the recording officer and for the first time she stated that fact before the Court. It is said by this witness that she went to thana on the date of incident and stated Darogababu everything who had written down as she stated and she put her L.T.I. in a paper, but that paper was not produced before the Court.
- 15.** PW3, Ainal Sk. who happens to be the husband of the victim girl stated in his examination-in-chief that on the relevant date when the alleged incident was happened, he was not present there and went to Kolkata for his work. After returning home the victim girl (wife) told him that the appellant/convict came to her room and raped her. This witness further stated that he and local boys out of their locality proposed to compromise the dispute with some fine but this appellant refused to pay any fine. Thereafter, after delaying five days the FIR was lodged. In cross-examination, this PW3 stated that he made statement before

Darogababu that their attempt for salish failed. So, it is evident from the deposition of this witness that a salish meeting was called for where proposal was made to compromise the dispute with some fine but this appellant was reluctant to pay any fine claiming himself as innocent and as such, the attempt for salish did not materialise. As the salish failed the case was lodged by the victim girl against this appellant. PW4, Golam Sk. who is the relative of the victim girl stated that he was sitting in a nearby road and then went to this spot and saw this appellant was fleeing away at a high speed. This witness was present at the spot by chance as his house is 1 km away from the house of this appellant. More astonishingly this witness denied any salish had taken place regarding the incident as per statement of PW3 (husband of the victim). So, regarding salish meeting this witness deposed contrary to the statement made by PW3.

- 16.** PW5 who is the scribe of the written complaint stated that the complaint was written and drafted by him as per instruction of the victim girl and after writing, the victim girl signed on it. In cross-examination, this witness said that he had no relation with the victim girl and no visiting terms but he knew the victim girl. Whereas PW1 stated in cross-examination that FIR was written by his brother namely, Abdul Mannan (PW5). In cross-examination, this PW5 said that he had no personal knowledge about the incident.

- 17.** PW6, Allauddin Sk. said that the victim girl is his neighbour and when he was coming from the working place on the date of alleged incident at that time he heard an alarm from the house of the victim girl and he incidentally rushed there. But there is nothing in the deposition of PW1 (victim girl) that she raised alarm at the time of alleged incident. In cross-examination, this witness stated that he usually resides at Kolkata and just after two days of the alleged incident he came out from the village and for the first time he is deposing in the Court.
- 18.** PW7 is a Medical Officer who examined the appellant/convict and found that he was capable of sexual intercourse.
- 19.** PW10 is the Investigating Officer who submitted charge-sheet against this accused person after completion of the investigation under Section 376/511 of the Indian Penal Code. In cross-examination, this PW8 said that he did not seize any wearing apparels of the victim girl wherein PW1 (V.G.) said that she handed over sari and blouse to Darogababu. So, the statement of PW1 regarding handing over sari and blouse is not corroborated by PW10. I have already said that the sketch map prepared by the Investigating Officer shows that there are surrounding houses which are marked as A, C and D and those houses belonged to Moslem Sk., Amir Sk. and Islam Sk. but neither those persons nor their family members were cited as witness to the prosecution. It is said by the victim girl in the written complaint that at the time of alleged incident she was shouting loudly and if the victim girl at all was

shouting then the surrounding people as stated above might have heard that shout. The presence of PW4, PW5 and PW6 at the place of occurrence on the relevant date of time is doubtful as neither PW1 (victim) nor PW2 stated anything about their presence at the place of occurrence. PW3, Ainal Sk. the husband of the victim girl stated that in the salish meeting this appellant claimed to be innocent and as such, he refused to pay any fine immediately. After refusal of giving any fine by the appellant the instant case was lodged by the victim girl delaying five days. PW1 stated that immediately after the incident PW1 disclosed the same to her brother-in-law, parents-in-law and other relatives and villagers which in fact, has not been stated in the written complaint.

- 20.** It would be evident from the contentions of the written complaint that at the time of incident the husband of the victim was not present in the house and the victim girl waited for four days and after returning her husband she disclosed the alleged incident to him. Immediately after the alleged incident the victim girl did not go to police station to lodge complaint against the appellant. They informed the matter to the respectable persons of the village and salish meeting was called on and in that meeting this appellant claimed to be innocent and declined to pay any fine. Thereafter, as per statement of PW3 that he along with his wife and one Abdul Mannan went to lodge the FIR before the police station. It can be seen from the statements of the prosecutrix that she has made several contradictions and variations. The same have neither

been explained by the prosecutrix nor the prosecution which are fatal to the prosecution case indicating that the same is false. The prosecutrix and the prosecution have not been able to give any justification or explanation for the contradictions in her different statements.

- 21.** Where the evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other, then no reliance can be placed upon her evidence. Onus is always on the prosecution to prove and accused is entitled to the benefit of reasonable doubt. Case of the prosecution is to be proved beyond reasonable doubt and cannot take support from weakness of case of defence. In case the evidence is read in totality and story projected by the prosecutrix is found to be improbable, prosecution case becomes liable to be rejected. If evidence of prosecutrix is read and considered in totality of circumstances along with other evidence on record, in which offence is alleged to have been committed, her deposition does not inspire confidence. Prosecution has not disclosed true genesis of crime. The delay in lodging the report raises a considerable doubt regarding the veracity of the evidence of the prosecution and points towards the infirmity in the evidence and renders it unsafe to base any conviction. Delay in lodging of the FIR quite often results in embellishment which is a creature of afterthought. The evidences as cited by the prosecution do not inspire confidence of this Court regarding commission of alleged offence by the

appellant. There are apparent contradictions in the depositions of the witnesses and the same cannot be relied upon. The evidences adduced on behalf of the prosecution are not sufficient and the same could not prove the prosecution case beyond all reasonable shadow of doubt. In the backdrop of settled legal position, when we examine the instant case, the conclusion becomes irresistible that the conviction of the appellant under Sections 376/511 and 447 of the Indian Penal Code is wholly unsustainable.

22. Accordingly, I find that the impugned judgment and order of conviction passed by the learned Trial Court for holding this appellant guilty for commission of the offence punishable under Section 376/511 and 447 of the Indian Penal Code do not stand under the eye of law and as such the order of conviction and sentence passed by the learned Trial Court is liable to be set aside.
23. Thus, the Criminal Appeal being CRA 442 of 2009 is hereby **allowed**.
24. The judgment and order of conviction passed by the learned Trial Court finding this appellant guilty for commission of offence under Section 376/511 and 447 of Indian Penal Code dated 29.04.2009 is hereby set aside.
25. The present appellant is acquitted from this case. The appellant is on bail, he set at liberty at once. The sureties standing in his favour are also being released.

- 26.** Let a copy of this order along with T.C.R. be sent down to the Trial Court immediately.
- 27.** Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)