

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.R.A. 602 of 2011

Kshitish Roy

Vs.

The State of West Bengal

For the Appellant : Mr. Saswata Gopal Mukherji, Sr. Adv.,
Mrs. M. Chakraborty, Adv.

For the State : Mr. Debasish Roy, Ld. P.P.,
Ms. Amita Gaur, Adv.

Heard on : 03.03.2025

Judgment on : 03.03.2025.

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 14.09.2011 and 15.09.2011 passed by the learned Additional Sessions Judge, 1st Court, 2nd Court, Jalpaiguri in Sessions Trial No.10/2007 arising out of Sessions Case no. 498/2003 convicting the appellant for commission of offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.50,000/- in default to suffer rigorous imprisonment for three

years more. Fine amount, if paid, was directed to hand over to victim as compensation.

Prosecution case:

2. Prosecution case as alleged against the appellant is as follows:-

On 25.12.2002 the victim, a 15-year-old mentally challenged girl had gone to the house of the appellant to pluck flowers for worship. At that time, the appellant caught hold of her, took her to his room and raped her against her will. One Sefali Barman (PW 3) saw the incident. She raised hue and cry. Mona Roy (PW 11) also came to the spot. Mother of the victim (PW 9) was informed about the incident. She took her daughter to the hospital where she was admitted. She lodged written complaint resulting in registration of Kotwali P.S. Case No. 412/02 dated 26.12.2002 under Section 376 IPC.

3. During investigation appellant was arrested. Victim was medically examined. Her age was determined through ossification test. After conclusion of investigation charge sheet was filed against the appellant. Charge was framed under Section 376 IPC. To prove its case prosecution examined 13 witnesses including the victim as PW 1. Defence of the appellant was one of innocence and false implication.

4. In conclusion of trial, the trial Judge by the impugned judgment and order sentenced the appellant as aforesaid.

Evidence on record:

5. PW 1 is the minor victim. She deposed she had gone to the house of the appellant (around 2 P.M.) for plucking flowers. Appellant caught

hold of her, gagged her mouth and took her to his room. There he raped her. Appellant threatened her not to disclose the incident to anyone. She returned home weeping. Sefali (PW 3), a neighbour had witnessed the incident through the window. She narrated the incident to her mother. She identified the appellant in Court. During cross-examination PW 1 stated house of the appellant consists of four rooms. Two rooms were used as bedroom. Another room was occupied by appellant's elder brother and his wife. She was in the room for two to four hours.

6. PW 9 is the victim's mother. She deposed her daughter had gone out to collect flowers. She returned weeping. Initially, she did not disclose anything but started vomiting. Sefali and Mona disclosed the incident to her. She went to the house of the appellant but could not find him. She took her daughter to hospital where she was admitted. Her deposition remained unshaken during cross-examination.

7. PW 10 is the victim's father. He has corroborated his wife PW 9.

8. PW 3 (Sefali Barman) is the appellant's neighbor. She stated she had gone to the appellant's house to fetch water. She heard some sound in the appellant's room. Through the window she saw appellant undress the victim and rape her. She informed the incident to Mona Roy who was brought by PW 3 and also witnessed the incident. She disclosed the matter to the victim's mother. During cross-examination, she stated she and Mona witnessed the incident for one hour.

9. PW 11 (Mona Roy) stated Sefali narrated the incident to her. She inturn narrated the incident to the victim's mother.

10. PW 8 (Jagesh Roy) is the husband of PW 3. He has corroborated his wife.

11. PW 12 (Dhruba Ray) is another neighbor. He stated around 2.45/3 P.M. hearing hue and cry he came to the appellant's house. He heard victim had been raped by the appellant from Sefali Barman and the victim's parents.

12. PW 5 (Dr. Netai Mukherjee) was posted at Sadar Hospital, Jalpaiguri as Gynaecologist. On 26.12.2002 he examined the victim. She was admitted with history of pain in private parts. Victim was a psychiatric patient. She stated she was forcibly raped by the appellant. He could not detect any injury on the internal surface of her lower parts. He was unable to opine whether the victim had been sexually assaulted.

13. PW 4 (Dr. A. Roychowdhury) conducted radiological test on the victim and opined the victim was between 15 and 16½ years on the date of examination i.e. 08.01.2003.

14. PW 13 (S.I. D.K. Sen) is the investigating officer.

Arguments at the Bar:-

15. Mr. Mukherji assails the prosecution case on multiple grounds. He submits victim's narration in respect of forcible rape is improbable. She admitted she was in the appellant's room for two to four hours. Medical officer did not note bodily injury and was unable to opine

whether the victim had been subjected to sexual intercourse. PW 3's deposition in Court is contrary to her earlier statement before Magistrate (Exhibit 5). Age of the victim has also not been proved.

16. Ms. Gaur, learned Advocate for the State submits the appeal is liable to be dismissed.

Analysis & findings:

17. I have given anxious consideration to the aforesaid contentions raised on behalf of the appellant.

18. PW 1 is a mentally challenged victim. During deposition she was unable to speak properly and gave reply through gestures. In Court she stated she had gone to the appellant's house to pluck flowers for Puja. Appellant caught her, gagged her mouth and took her to his room. There he undressed and raped her. A neighbour Sefali (PW 3) saw the incident and informed the matter to another neighbour Mona Roy (PW 11).

19. PW 3 supported the victim and stated she had seen the incident through the window of the room. It is contended the witness had stated otherwise before Magistrate.

20. I have gone through her statement (Exhibit 5). In her statement before Magistrate PW 3 stated she had gone to collect water and had seen the appellant do 'dirty work' to the victim. The expression 'dirty work' is a euphemism for rape which the witness clearly deposed on oath during trial. Her deposition corroborates the victim that the appellant had taken her inside the room and subjected her to rape.

21. Mr. Mukherji contends the versions of the witnesses are unnatural. PW 1 claimed she was in the room for two to four hours and PW 3 stated she and PW 11 saw the incident for one hour. If the prosecution case of forcible rape for more than an hour is believed, there ought to be multiple injuries on her body. But none was noted by the medical officer.

22. One must assess the prosecution case from the peculiar vulnerabilities of the victim. Not only was the victim a minor but she was mentally challenged. She also had difficulty in speech which was evident during her deposition. Due to such shortcomings it is natural the victim could not raise hue and cry although she was subjected to sexual intercourse for a considerable time. Assessment of time by the victim (PW 1) or PW 3 may be a bit exaggerated but such exaggeration does not go to the root of the prosecution case that the appellant had caught hold of the victim and dragged her into his room and raped her which was witnessed by PW 3.

23. PW 11 though not admitting herself as an eye-witness corroborates PW 3 and deposed the latter had informed her about the incident. PW 11 in turn informed the mother of the victim, PW 9. Soon after the incident, victim was taken to hospital. PW 5 treated the victim and recorded the history of sexual assault in the medical papers. In the medical papers it was noted appellant had raped the victim. Victim is a minor girl with special needs. She was unable to resist the sexual attack on her. As a result, she did not suffer injuries. Under these

circumstances, absence of injuries by itself would not improbabilise the rape.

24. Finally, ossification report shows the victim was between 15 and 16½ years. This clearly proves that she was below the age of consent at the time of occurrence. Consent of the victim was therefore immaterial.

Conclusion:-

25. In light of the aforesaid discussion, I uphold the conviction of the appellant.

26. Coming to the sentence, we note appellant has been awarded the maximum sentence i.e. life imprisonment. It is true the victim was a minor with special needs. But the appellant also did not have criminal antecedents. No injuries were found on the victim. These mitigating factors ought to have been taken into consideration by the trial Judge.

27. Balancing the aggravating and mitigating factors into consideration and taking note of the fact that the appellant had already suffered imprisonment for about 15 years, we modify the sentence and direct the appellant shall suffer imprisonment for the period already undergone. Fine amount imposed on the appellant shall remain unaltered.

28. Appeal is accordingly disposed of.

29. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of

Criminal Procedure/ Section 468 of the Bharatiya Nagarik Suraksha Sanhita, 2023.

30. In the event the fine amount is deposited, appellant shall be forthwith released failing which he shall suffer the default sentence as per law.

31. Let a copy of this judgment along with the trial court records be forthwith sent down to the trial court at once.

32. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)