

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CRA 667 OF 2014

SWAPAN MODAK

VS

THE STATE OF WEST BENGAL

For the Appellant : Mr. Debabrata Ray, Adv.
Mr. Prabir Majumdar, Adv.
Ms. Sarbani Mukhopadhyay, Adv.
Mr. Soumik Mondal, Adv.
Mr. Debraj Seal, Adv.

For the State : Mr. Ranadeb Sengupta, Adv.

Last heard on : 29.07.2025

Judgement on : 04.09.2025

CHAITALI CHATTERJEE DAS, J. :-

1. This criminal appeal is filed by the applicant challenging an order of conviction passed on September 17, 2014, by the learned Additional Session Judge, 3rd Court, Nadia, Krishna Nagar in Sessions Trial Number VII (April) 2014 arising out of sessions case no. 8(4) 2014, convicting the appellant under section 354/323 of the Indian penal code and sentencing him to suffer rigorous imprisonment for two years and to pay fine of ₹5000 in default to suffer rigorous imprisonment for 6 months for the offence punishable under section 354 of the Indian penal code and to suffer, regardless imprisonment for one

year and to pay fine of ₹1000 in default to suffer further R.I for two months for the offence punishable under section 323 of Indian Penal Code and that the sentences shall run concurrently.

2. The prosecution case in a nutshell is that on July 25, 2012 at about 20.00 hours, the accused person tried to commit rape upon the victim in the house of the victim at village, Subarna Bihar, Modak Para, under Police Station Kotwali, District, Nadia and the complaint was lodged on 28th July, 2012 by the victim herself against the present petitioner alleging that the accused entered into her room and embraced her from her back and took off her sari, torn her blouse forcibly and attempt to rape her, and she tried to recuse herself anyway, and during scuffle her 'sankha' (bangle used by married Hindu woman of right hand) was broken, and then she cried out, and the accused assaulted her with blows on her chest and fled away. She further alleged that she became sick and began to vomit, later on when her husband returned home she narrated the entire incident and then he brought her to Shakti Nagar Hospital for treatment and there is a delay to lodge the complaint due to the treatment of her. The investigating officer after completion of investigation submitted the charge-sheet under Section 376/511/323 of the Indian penal code and the matter being exclusively triable by a Session court transferred before the learned District Judge, Nadia on commitment and subsequently before the learned court of Additional Session Judge, 3rd Court, Nadia, Krishnanagar. On perusal of the materials on record and after hearing the prosecution, the Learned Court framed the charge under Section 376 IPC read with Section 511 and 323 of IPC against the accused person which was

read over and explained to him to which he pleaded, not guilty and accordingly trial commenced.

3. In order to prove the charges, the prosecution adduced as many as 10 witnesses and exhibited certain documents. The Learned Trial Court after assessing the evidences adduced by the prosecution witnesses and considering the exhibited materials and after hearing the prosecution and the defence counsel passed the order of conviction against the accused person under Section 354/323 IPC. Being aggrieved, thereby the instant criminal appeal has been preferred by the appellant.

Submissions

4. The Learned Advocate representing the applicant took the point of delay in lodging the FIR and sending the FIR to the Magistrate without any plausible explanation for such delay. In this regard, reliance has been placed in the decision reported in ***Ishwar Singh versus state of Uttar Pradesh*¹**, ***Balaka Singh and others versus State of Punjab*²**, ***Gulu Shanra @ Ghulu Shanra versus state of West Bengal*³**.

5. It is further argued that P.W.3 Swapna Modak and P.W.4, Chhobi Rani Modak being relatives of P.W.1 and P.W.2 and resides in the same premises did not support the prosecution case though P.W. 2 in examination in chief said about her shouting out of fear and P.W. 4, after hearing trouble in the shop, rushed there instead of alleged place of occurrence. That apart in absence of any witness mere suspicion cannot take place of legal proof and in this regard,

¹ (1976) 4 SCC 355

² 1975 SCC (cri) 601

³ (2025) (2) Cal Cr LR 616

reliance is placed in the decision reported in 2013 (7) SCC 192 paragraph number 16-20, 27.4 to 27.6. **and Majenderan Langeshwaran vs The state of (NCT of Delhi.) & ors⁴.**

6. It is further argued that when two views are available in which the accused is being favoured shall be taken into consideration and furthermore the examination under section 313 of the code of criminal procedure, 1973 was not proper as the injury report being a vital piece of evidence was not placed before accused as an incriminating material. In this regard relied on the decision of **Rajkumar Singh @ Raju @ Batya versus the state of Rajasthan⁵**, paragraph 25 & 36, **Sujit Biswas versus the state of Assam⁶** paragraph 22 to 23, **Ashutosh Das versus state of West Bengal⁷**, paragraph 32, **K.Gopal Reddy versus – state of Andhra Pradesh⁸**, para 9.

7. It is further argued that the evidence of interested witnesses should be carefully scrutinised and relied upon decision in this regard **Esakkimuthu versus state represented by the Inspector of police⁹** at paragraph 17, 21, 22, 33.

8. The last argument advanced on behalf of the Learned Defence Counsel that the Learned Court when did not find any material against the accused person to attract 376/511 of Indian Penal Code passed the order of conviction under Section 354 IPC without considering that there was no criminal antecedent attached with the accused person and the benefit under Section 360 and 361 of the Code of Criminal Procedure, 1973 ought to have been extended. In this

⁴ (2013) 7 SCC 192

⁵ (2013) (5) SCC 722

⁶ (2013) (12) SCC 406

⁷ (2009) SCC online Cal 613

⁸ (1979) (1) SCC 355

⁹ (2025) INSC 880

regard also relied upon decisions reported in ***Om Prakash versus the state of Haryana***¹⁰ , paragraph 4. ***Jagabandhu Biswas versus the state of West Bengal***¹¹ para 9.

9. The prosecution on the other hand support judgement and order of conviction as passed by the Learned Trial Court as the complaint lodged by the victim herself and P.W.2 all through corroborated the content of the FIR. Moreover, the statement made before the Magistrate under Section 164 further corroborates the case of prosecution . No cross examination was made to the Doctor who adduced evidence as P.W. 8 supported the content of the injury report with the name of accused mentioned .That apart the delay in filing the written complaint was due to hospitalisation of the victim which was clearly established in course of evidence. Even if it is considered that no question was put to the accused about the injury report during the evidence of the accused persons under Section 313 of Cr.Pc that would not vitiate the trial as it is a rectifiable defect. Accordingly prayed for dismissal of the Appeal.

Analysis

10. Having heard both the learned counsel and considering the facts and circumstances of the case, in view of the evidence adduced and documents exhibited the seminal issue falls for consideration is that as to whether the Learned Trial Court rightly passed the order of conviction under Section 354/323 IPC and or whether the prosecution was able to bring home the charges beyond the shadow of reasonable doubt. At the outset it is seen that though the charge was under 376/511 IPC the learned court passed the order

¹⁰ (2001) (10) SCC 477

¹¹ CRA 662 of 2018

of conviction under Section 354 IPC which was not challenged by the prosecution.

11. In order to ascertain the truth, it is necessary to assess the testimonies given before the Learned Trial Court by the prosecution witnesses. In this case P.W.1, Amol Modak being the husband of the victim lady deposed that on July 25, 2012 after 20.00 hours in his house, the incident took place when he was not in his house and the victim was alone. On his return about 20.30 hours, his wife told him that the accused, who is a tenant of his shop entered into the room embraced her from her back and removed her sari and blouse, and tried to rape her, and as she started shouting, then he assaulted with fists and blows on her chest and fled away. He further deposed that on return to his house, he found the victim vomiting and he took the victim to the Shakti Nagar hospital where she remained admitted and treated for four days. He identified the accused present in court. During his cross, it has come that the accused was a tenant under him in respect of his shop and he paid rent regularly to him. He did not issue any rent receipt. His testimony further reveals that six other tenants were inducted in his 6 shops except the shop of the accused person. It is further stated that he gave the history of assault to the doctor in the hospital. He denied the suggestion given to him that an incident took place over the spitting on their gate at any point of time. P.W.2, the de-facto complainant and the victim of the case deposed that when she was alone at our house on 25th July, 2012 at about 20.00 hours in her room and was watching TV the accused suddenly entered into her room and hold her from her back and then scuffling started between them as a result, the sankha on her right hand was broken, and then he removed the upper portion of her sari

from her body, and thereafter he opened his pant and tried to rape her, then, out of fear, she shouted, and thereafter the accused assaulted her with fist and blows with force on her chest and then left. She also said that then she started vomiting and her husband returned to her house and she narrated the entire incident, then she was taken to Shakti Nagar Hospital for treatment where she was admitted on 25 July 2012 in the night and on 28.7.2012 in the morning she was discharged from that hospital.

12. She further stated that after discharge she along with her elder brother went to the Police Station and lodged the FIR, which was written and signed by her. She also made statement before the Magistrate. She further deposed that police seized the torn blouse from her under a seizure list. During her cross-examination, it has come that her eldest ja chhobi, Rani Modak, and the eldest sister-in-law of Chhobi Rani Modak, Swapna Modak also lived in the room lying adjacent to her bedroom. She denied that there was any dispute between her or any person over throwing dirty materials on her gate. She stated that she told the incident to the doctor of the hospital and further that in the FIR, she did not mention about scuffling and breaking of Shanka for that reason. The police did not seize the broken Shakha.

13. In view of the above nature of evidence, it is necessary to look into the evidence as adduced by the Doctor Who deposed as witness number 8. On 25th July 2014, P.W.8 was posted as M.O surgeon at Bangur Hospital and treated and examined the de-facto complainant on that day and found tenderness over right, anterior chest wall, right shoulder, left thigh, and right lumbosacral region. The doctor on complain of pain on her neck and low back region with vertigo advised x-ray of cervical and Lumbosacral. He further

deposed that the name of the assailant is mentioned but the report does not contain the name of the informant disclosed the history of assault. His cross examination was declined. The bed ticket manifest only injury on assault. In the daily clinical note dated 25 July 20 history of physical assault at 8 P.M. by Swapan Mondal is only found mentioned. It is a fact nowhere in the bed ticket, nor in the clinical examination the history of vomiting or sexual assault is found and also not that the accused tried to commit rape on her. More so when according to the victim there was a scuffling and her sankha was broken some bruises or tenderness or minor cut injury ought to have been present but nothing could be seen from the injury report. In the above situation, the statement made under Section 164 of Cr.Pc. by the victim made before the magistrate discloses certain facts which which were never mentioned in the FIR and or in the evidence adduced by her. She stated before the Magistrate that the tenant being the accused since long was annoying her with indecent proposal and also tried to allure her to give her money and she informed the same to the member of the village, who is the uncle of the accused, but no step was taken and on the particular day when she was watching TV and her husband and son were not present the accused came suddenly and hold her from her back, removed her sari and there was a scuffling as a result, her blouse was torn, and when she tried to release herself from the clutches of the accused, the accused opened his pant and tried to commit rape on her. Then she shouted when the accused assaulted her with fist on her chest and then fled away.

- 14.** It is now settled that the evidence of the victim of sexual assault and the injured carries more weight than the other witnesses, and if it is otherwise

trustworthy, further corroboration may not be necessary, and that itself is sufficient to pass an order of conviction. In this case, since there is a deviation of the description of the incident as narrated before the Learned Magistrate than that has been mentioned in the FIR or the evidence before the Court and also not giving the history of sexual assault while naming the accused person as an assailant before the doctor certainly raises certain doubts over the prosecution case and hence further corroboration is necessary. P.W.3 Swapna Mondal is the ja of the victim and according to the evidence of the victim, she also resides in the same house and she only deposed that she knows nothing about the incident and , she was declared as hostile witness. P.W.4, Chhobi Rani, Modak whose name also was taken by the victim P.W.2 is the sister-in-law of P.W. 3 deposed that she was enjoying one TV serial and heard about one dispute in the shop of the accused person and she went there and saw the husband of the victim to assault the accused person. She further deposed that someone threw dirty things on the gate of the victim and for this reason he was assaulted. She denied to have any knowledge about attempt to rape on the victim and she was never interrogated by the police. In her cross-examination, she deposed that she along with the victim resides under the same premises and there are many showrooms near the gate of the victim. No prayer was made to declare this witness hostile when her evidence could have demolish the case of the prosecution.

15. P.W. 5 Arun Mondal, who is the elder brother of the victim, signed on the seizure list and proved his signature. In his cross, he only said that he did not find the seized blouse in the court. P.W.6 Bidhan Biswas, deposed of having no knowledge about the victim but on the date of the incident, the accused

person spat on the gate of the victim for which the dispute took place between them. This witness was interrogated by the police. In his cross-examination, he only deposed that he is having a shop at the side of the shop of accused person. P.W.7 also identified the accused but deposed of having no knowledge about the victim but his testimony also supports the case of P.W 6 as over the spitting on the gate of the victim, the victim and her son and husband assaulted the accused person of this case. His cross examination was declined. P.W.9 who received the FIR from the de-facto Complainant and started the case. P.W. 10 is the I.O who prepared the rough sketch map with index of the place of occurrence and also recorded the statement of the available witnesses. In cross, he only said that he did not make an enquiry regarding the delay caused in lodging the FIR.

16. Therefore, from the above testimonies it can be gathered that excepting the husband / P.W.1, who took her at the hospital no one has supported the case of the prosecution . The elder brother who accompanied the victim to the police station has not stated anything about such fact excepting that the blouse was seized where he put his signature. Therefore the evidence of prosecution witnesses manifests a different story made out by the prosecution by adducing evidence which raises the possibility of the dispute having taken place over the issue of spitting on the gate followed by an assault by the husband of the victim and the son to the accused person who is a tenant in respect of a shop under the P.W.1/husband and who pays the rent regularly but the P.W.1 did not issue any receipts. The son of the victim aged about 17 years and resides with them has not been cited by the I.O . The decision of the Hon'ble Supreme Court in ***Balaka Singh and others versus State of***

Punjab.(supra) dealt with a case where four of the nine accused included by the informant in the FIR, were not included in his brief statement to the investigating officer and in the inquest report and no explanation came for such omission. While discussing the appreciation of evidence, it was observed that *‘a perusal of the evidence of the prosecution witnesses would show that the prosecution case against the appellants and the four accused is so inextricable that it is not possible to sever one from the other. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then the principle that the court must separate the grain from the chaff cannot apply.’* Section 134 of the Indian Evidence Act clearly lays down that no particular number of witnesses shall in any case be required for the proof of any fact. The court is required to assess whether prosecution could establish the guilt of an accused person on the basis of the quality of evidence and not the quantity. In this case PW3 has been declared as hostile, but before she was declared hostile, she deposed about one dispute between the accused person and the victim of the case about three years ago and P.W. 4, who narrated a different story altogether was not declared hostile .

17. Therefore credibility of both the witnesses are disputed and create enough suspicion about the occurrence of the offence. The sketch map prepared by the I.O. shows the PO which is adjacent to A1 and A2, those two are the shop showrooms and C is a house, but name of the resident of those houses are not

mentioned . The adjacent tenant of the shop rooms deposed about an incident, which is no way connected or bearing to the case under consideration, but not declared hostile. The learned trial court discussed the decision of the Supreme Court in **State of Punjab versus Gurmeet Singh and others** ¹²reported in, where it was said that *‘the court must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour, such as is involved in the commission of rape on her. The testimony of the victim in a case of sexual offence is vital and unless there are compelling reasons which necessitate looking for corroboration of first statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict and accused where heart testimony, inspire confidence and is found to be reliable.’*

18. The Learned Court further discussed the decision of **State of Madhya Pradesh versus Doyal Shahu**¹³ as reported in where it was also observed that *‘once the statement of the prosecutrix inspires confidence and accepted by the courts as such, conviction can be passed only on the solitary evidence of the prosecutrix and no corroboration would be required unless they are compiling reasons which necessitate the courts for corroboration of her statement.’* Despite the observation made by the learned court that there is nothing in the cross-examination of the victim to disbelieve her statements made by her in court and in the F.I.R, the court had to held that the statements of the victim are not cogent and sufficient enough to hold that the accused person tried to rape her

¹² AIR 1996 (SC) 1393

¹³ 2005 Cri. L.J. page 4375 (SC)

at the time of the incident but curiously held the above statements of the victim sufficiently proved that the accused person outraged her modesty accordingly hold that the prosecution has failed to prove the charge under Section 376 / 511 of the IPC. The learned court accepted part of the evidence of the victim to be proved when refused to accept the version of the same witness about commission of a graver offence without considering that once the victim failed to inspire the confidence of the court about the presence of the accused person at the place of occurrence and it is shown that the entire truth was not narrated before the court the said evidence cannot be the basis for passing an order of conviction. The Learned Trial Court on the basis of such evidence on record came to a finding that the accused person committed an offence under Section 354 of IPC only on the basis of the sole testimony of the victim along with the evidence of P.W.1 and P.W.8, the doctor. The learned court relied upon the evidence of the doctor, but failed to consider that no history of vomiting was mentioned in the medical papers when it was the specific case of the P.W.1, that on seeing the victim vomiting, he took the victim to the Shakti Nagar Hospital where she was admitted and treated for four days. In this regard, it is pertinent to mention the decision reported in ***Kali Ram versus State of HP***¹⁴, which has been taken note by the Supreme Court in ***Rajkumar Singh Alias Raju Alli Batya State of Rajasthan (supra)*** where it was observed at paragraph 25,

25. Another golden thread which runs through the web of the administration of Justice in criminal cases, is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his

¹⁴ (1973) 2 SCC 808

innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.'

19. The other point raised regarding putting all the incriminating material before the accused the decision of the Hon'ble Supreme Court in Sujit Biswas vs State of Assam (supra) observed that "the purpose of examining the accused person under section 313 of CrPC is to meet the requirement of the principles of natural justice i.e audi alteram partem .This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him and the court must take note of such explanationThe circumstances which are not put to the accused person in examination under section 313 CrPC cannot be used against him and must be excluded from consideration . The said statement cannot be treated as an evidence Act as the accused cannot be cross-examined with reference to such statement".

20. In this case as found the injury report was not placed as an incriminating material before the accused person and the said injury report is considered by the learned Court for passing the order of conviction. In view of the above decision the said injury report lost its credibility.

Conclusion

- 21.** So the above factual matrix manifests that some of the prosecution witnesses have make out a different version of the case and in absence of any reliable evidence to corroborate the case of the prosecution narrated in the F.I.R and also the evidence of victim, being not trustworthy enough and negated by the other resident of the same premises certainly creates possibility of two views in the mind of court and in view of the decision in **Raj Kumar Singh alias Raju alias Batya (supra)** this Court has no other option but to opine that the favourable view towards the accused is to be accepted and therefore hold the prosecution has not been able to prove the case beyond the shadow of all reasonable doubt that the petitioner committed the offence under Section 354 IPC on the relevant day and time and hence the order of conviction passed by the learned court is liable to be set aside.
- 22.** Accordingly this criminal Appeal stands allowed.
- 23.** The judgement and order passed by the learned trial court in Sessions Trial No. VIII (April) 14 is hereby set aside .The Appellant shall be discharged from his bail bond in terms of section 437A of the code criminal procedure corresponding to 481 of the BNSS,2023.
- 24.** The accused person is released from the bail bond.
- 25.** Urgent certified copy if applied by any of the parties to be supplied subject to observance of all formalities.

(CHAITALI CHATTERJEE DAS,J.)