

Sl. No. 31

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 941 of 2013

Manick Sardar
-Vs-
State of West Bengal

For the Appellant : Mrs. Karabi Roy, Adv.

Amicus Curiae : Mr. Arani Bhattacharyya, Adv.

For the State : Mr. Parthapratim Das, Adv.

Mrs. Manasi Roy, Adv.

Heard on : 11.02.2022

Judgment on: 11.02.2022

Joymalya Bagchi, J. :-

The appeal is directed against judgment and order dated 18.09.2013 and 19.09.2013 passed by the learned Sessions Judge, Nadia in Sessions Trial No. III of August, 2013 arising out of Sessions Case No.4(8) of 2013 convicting the appellant for commission of offence punishable under Section 376(2)(f) of the Indian Penal Code and sentencing him to suffer

rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-, in default, to suffer further rigorous imprisonment for six months more with a further direction that if the fine amount is recovered, 50% of the same shall be paid to the victim.

The prosecution case as alleged against the appellant is to the effect that on 14.04.2013 PW1 had gone out for work as a domestic help leaving behind her minor daughter aged around 7 years and her one year old son at home. Taking advantage of her absence, the appellant, who is a neighbour, came into the house and raped the minor girl. When PW1 returned around 2.30 P.M., she found the appellant coming out of her house wearing a *gamchha*. Upon entering the house she found her daughter was crying and her pant had been removed. Upon questioning, her daughter stated that the appellant after forcibly pressing her mouth took off her pant and raped her. Upon raising hue and cry, local people assembled at the spot and apprehended the appellant. On the written complaint of PW1, Kaliganj Police Station Case No.235 of 2013 dated 14.04.2013 under Section 376(2)(f) of the Indian Penal Code was registered for investigation. In course of investigation, the victim girl was medically examined. Her statement was recorded under Section 164 of the Code of Criminal Procedure. The accused who had been apprehended soon after the incident, was also medically examined and charge sheet was filed. Charge was framed under Section 376(2)(f) of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 11 witnesses and exhibited a number of documents. In conclusion of trial, the learned trial Judge by the judgment and order

dated 18.09.2013 and 19.09.2013 convicted and sentenced the appellant, as aforesaid.

Initially, nobody appeared on behalf of the appellant. Today, Mrs. Karabi Roy, learned advocate has appeared on behalf of the appellant through video linkage. In order to facilitate the hearing of the appeal, we have requested Mr. Arani Bhattacharyya, learned advocate, to assist this court as *Amicus Curiae*.

Mrs. Roy, learned advocate, appearing on behalf of the appellant along with Mr. Arani Bhattacharyya, *Amicus Curiae* argued that the FIR has not been proved. PW1 stated that the complaint was written at Matiari Police Camp by the officer on duty. However, Investigating Officer (PW11) does not disclose the identity of the person who had drafted the complaint. It is also argued that allegation of forcible rape on a seven year old child appears to be improbable as no injuries were found on the private parts of the victim. Hence, the prosecution case is wholly improbable and liable to be dismissed.

Mr. Parthapratim Das with Mrs. Manasi Roy, learned advocates, appearing for the State submits that the minor who was examined as PW3 has succinctly depicted the manner in which she had been subjected to sexual assault. Her deposition has been corroborated not only by her mother but other local witnesses namely, PWs 4, 5, 6 & 9. All these witnesses stated that they had seen the appellant come out of the room wearing a *gamchha*. Soon thereafter the appellant was apprehended and handed over to police. These circumstances corroborate the prosecution case. The victim was a minor and helpless girl aged about seven years.

She was unable to resist when she was suddenly subjected to sexual assault by the appellant. Absence of injuries, under such circumstances, cannot be a ground to disbelieve her version. Accordingly, the appeal is liable to be dismissed.

From the arguments made at the Bar and on perusal of the evidence on record, I note PW3 is the minor victim and the most vital witness in this case. She was aged about seven years at the time of the incident. Trial court put different questions to her in order to determine her capacity to depose in court. Upon being satisfied, her deposition was recorded. PW3 stated while her mother had gone outside for domestic work, appellant had come to the house and asked her to remove her pant on the lure of giving her ten rupees. She took off her pant and the appellant committed rape on her. At that moment, her mother returned home and the appellant left the room. She made statement before the Magistrate. She was cross-examined but no contradiction or inconsistency could be brought out during cross-examination.

On the other hand, deposition of the victim girl is corroborated by her mother, PW1. She stated that on the fateful day she had gone out for work. Upon entering the room she found appellant was raping her daughter. Seeing her, the appellant fled away. She raised hue and cry. Local people caught the appellant and took him to the police camp. She proved her LTI on the written complaint.

In cross-examination, she stated that local people had handed over the appellant to Matiari Police camp. She reported the incident at the

police camp which was written by an officer on duty as per her instruction.

PW4 (Santana Sardar), PW6 (Puspa Sardar) and PW9 (Sibaji Sardar) are the local residents.

PW4 stated that upon hearing cries she came to the spot and found the appellant leaving the house of PW1. Appellant was bare-bodied and had a *gamchha* wrapped around his waist. Local people arrested the appellant and he was handed over to the police camp.

PWs 6 & 9 have also deposed in similar lines.

PW5 (Sonaka Sardar) another local resident, however, is a post-occurrence witness. She was a witness to the seizure of the birth certificate and the wearing apparels of the victim under a seizure list by Investigating Officer. She identified her signature on the seizure list.

PW7 (Dr. Manik Mani) is the RMO-cum-Clinical Tutor attached to Bankura Medical College. He however, did not find any external injury on the private parts of the victim. Hymen was intact. He proved the report (Exhibit-3).

PW11 (S.I. Prabir Kr. Bhattacharjee) is the Investigating Officer of the case. He took up the investigation, visited the place of occurrence and prepared rough sketch map with index (Exhibit-6). He recorded statements of witnesses and sent the victim for recording statement before the Magistrate under Section 164 of the Code of Criminal Procedure. He collected the statement. Victim girl and accused were medically examined. He collected medical reports and filed charge-sheet.

In cross-examination, he stated that the complaint on which the case was started was written at Matiari Police camp.

Having analysed the aforesaid evidence, I note that the version of the minor girl (PW3) is corroborated by her mother (PW1) and other local residents namely, PWs 4, 6 & 9. It is argued that PW1 had embellished her version in court vis-à-vis her complaint before police. On an analysis of the evidence of PW1 and other local witnesses, I note that all the witnesses have consistently stated that they had seen the appellant come out of the residence of PW1. He was bare-bodied and wearing only a *gamchha*. Soon thereafter, he was apprehended and handed over to the police. Even if one ignores the embellishment made by PW1 in court to the effect that she had seen the appellant raping her daughter, the crux of her evidence along with that of the neighbours provide sound corroboration to the version of the minor girl that on the fateful day, taking advantage of the absence of her mother, appellant had entered the house and upon asking her to remove her pant committed rape on her.

Evidence of the victim (PW3) is reliable and inspires confidence. While appreciating the evidence of a rape victim, it must be borne in mind that her evidence is to be treated on par with an injured witness. It is also relevant to note no reason on the part of the victim to falsely implicate the appellant in the present case appears from the record.

It is argued that FIR has not been duly proved. PW1 has proved her LTI on the FIR. Investigating Officer (PW11) also stated that a criminal case was started on a complaint which was written at Matiari outpost as per the dictation of PW1. He also proved the formal FIR which was drawn

up on the basis of the complaint received at Kaliganj Police Station of which Matihari police camp is a unit. Moreover version of the victim girl has received corroboration not only from the informant (PW1) but from other local residents.

In this backdrop, failure to prove the written complaint, in my estimation, does not go to the root of the prosecution case and affect its credibility.

It has also been strenuously argued that the allegation of rape on a seven year old minor is improbable as no injuries were found on the body of the victim including her private parts. Her hymen was intact. It is trite law mere penetration is sufficient to prove the offence of rape. It is not necessary that penetration must be of such nature that it would cause injuries or rupture the hymen.

In the present case, appellant was an adult person and a neighbour of the victim. He had come into the room and had asked the minor to remove her inner garments on the lure of giving her ten rupees. The victim meekly obliged him. Suddenly, the appellant penetrated his penis into the victim. At that juncture, mother of the victim (PW1) arrived and the appellant left the spot. Judged from this background it is clear that the victim was a helpless minor girl and unable to resist the sudden attack by the appellant who was a full grown person. Moreover, as soon as the appellant had penetrated his penis into the victim, her mother arrived and he left the spot.

In the aforesaid factual matrix, it is clear that there was a slight penetration into the private parts of the victim, which though sufficient to constitute rape, did not result in rupture of hymen.

Thus, I am of the opinion that the prosecution case has fully been proved beyond doubt and cannot be rendered improbable due to absence of injuries being noted on the body of the victim.

In the light of the aforesaid discussion, I am of the opinion conviction and sentence imposed upon the appellant is liable to be upheld.

The appeal is accordingly, dismissed.

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

Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.

I record my appreciation for the able assistance rendered by Mr. Arani Bhattacharyya, learned advocate, as *Amicus Curiae* in disposing of the appeal.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)