

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 128 of 2009
Rabi Saha @ Sarkar
-Vs-
State of West Bengal

For the Amicus Curiae : Mr. Pritam Ray

For the State : Mr. Aivishek Sinha

Heard on : 13.12.2022

Judgment on : 03.02.2023

Ananya Bandyopadhyay, J. :-

1. The instant appeal is preferred against the judgment and order of conviction dated 20.11.08 passed by Sessions Judge, Dakshin Dinajpur at Balurghat in Sessions Trial no. 63/07 arising out of Sessions Case no. 254/07 convicting the appellant under Section 376/511 of The Indian Penal Code sentencing him to suffer rigorous imprisonment for five years and to pay a fine of Rs.3000 i.d to suffer further rigorous imprisonment for six months.
2. The prosecution case emanated out of complaint filed by the mother of the minor victim inter alia stating that on

07.05.2007 at about 6:30 pm, she learnt from her neighbours that the opposite party i.e Rabi Saha tried to rape her eight year old daughter. Her minor daughter disclosed to her that the said opposite party fed her with ice-cream and lured her to give more food and took her to the corner of Friends Union Ground, removed her pant, placed his hand on her vagina and forcibly grounded her, trying to rape her. The minor victim shouted in order to raise alarm whereby many people rushed to the spot and caught the opposite party who was beaten up by the mob and admitted at Balurghat Hospital. The complainant's daughter narrated the incident to her and the neighbours. The opposite party admitted his guilt and disclosed his name and address. The complainant prayed for investigation and punishment of the miscreant.

- 3.** Based on the above complaint, Balurghat P.S case no. 129/07 dated 07.05.07 under Section 376/511 Indian Penal Code was instituted. Investigation was initiated and on completion, charge sheet was filed under the aforesaid Sections against the appellant. Charges were framed against him, to which he pleaded not guilty and claimed to be tried.

4. The prosecution in order to establish its case cited 8 witnesses and exhibited certain documents.
5. Ld. Amicus Curie, Mr. Pritam Roy submitted the evidence of PW1 and PW2 will reveal that the ingredients to constitute the offence under Section 376/511 had not been established. The appellant was assaulted by a mob and the actual reason was not stated by PW1 and PW2 distinctly. No Test Identification Parade was held to identify the appellant who was unknown to PW1 and PW2. PW1 accepted the ice-cream from the appellant who was unknown to her and surprisingly followed him at his instruction. The deposition of PW4, the doctor who had examined the private parts of the victim was not considered. The wearing apparel of the victim was not ceased. The prosecution failed to establish its case and accordingly the appeal shall be allowed.
6. Mr. Avishek Sinha, Ld. Advocate for the State submitted under the facts and circumstances of the case the elements necessary to comprise the offence under Section 376/511 are present. The intention of the miscreant to commit the offence was proved by the prosecution and the appeal should be dismissed.
7. A circumspection of the prosecution witnesses revealed PW1 to be the mother of the minor victim girl. PW1 on

return from her work searched for her daughter and heard a clamour. She approached towards the spot of commotion and found one person trying to kidnap her daughter. Her daughter disclosed to her that the opposite party asked her daughter to accompany him towards Khandi by the side of Tripol made by Circus party, luring her with an ice-cream. The minor victim girl was made to lie down, at the first instance she ran away, however, the appellant chased her and caught her and made her lie on the ground. The daughter of PW1 cried aloud and consequently a number of people assembled and apprehended him. During her cross-examination, PW1 stated *"I cannot say how my daughter was taken by the accused but my daughter disclosed before me that she was taken away by the accused with the temptation of giving ice. The wearing apparels of my daughter were not submitted to the police."* She further stated there was no mark of injury on the person of her daughter.

- 8.** PW2, the minor victim stated the incident took place about 5/6 months ago at 7pm when she was standing near the toys, when the appellant held her hand and took her away to Khandi and asked her to open her pant, which she refused and ran away crying. The appellant caught her again and laid her on the ground and opened

her pant. PW2 cried out. Several people came to save her and assaulted the appellant. Her mother came to the spot and took her to a shop. Thereafter the incident was disclosed to her grandfather and other relatives.

- 9.** PW3 was declared hostile by the prosecution.
- 10.** PW4 examined the minor victim at the Balurghat Hospital and found the victim to be conscious and alert with stable vitals. Evidence of violence or external injury was absent on her body or local parts. The vulva and vagina were healthy. The hymen was intact. The uterus was normal in size without any foreign body to be seen. During his cross-examination, PW4 stated that the victim girl was accompanied by her mother who did not disclose any history of assault before him.
- 11.** PW5, the grandfather of the minor victim heard the incident from his granddaughter.
- 12.** PW6 had endorsed the case to PW7 for investigation.
- 13.** PW7 visited the place of occurrence, examined the available witnesses in connection of this case. He sent the victim girl for medical examination, got her statement recorded under Section 164 Cr.P.C and collected the same. He arrested the appellant from the hospital and forwarded him to the Court on 13.05.07. He collected the medical examination report of the victim girl and on

completion of the investigation submitted the charge sheet.

14. Out of eight prosecution witnesses, PW1 and PW5 were the related witnesses. PW4 turned hostile. The prosecution failed to examine any other independent witness to corroborate the fact amidst the mob which assembled to assault the appellant on the relevant date and time. The evidence of the minor victim in absence of enmity between the parties is of prime importance and cannot be discarded. The victim girl narrated the incident before the Ld. Magistrate which was recorded under Section 164 Cr.P.C. She described the incident before Court without major deviations. However, on both the occasions, she did not mention any kind of penetration into her private parts. In her statement under Section 164 Cr.P.C, the victim stated that the appellant asked her to remove her pant which she refused. When the appellant himself wanted to open her pant, she shouted and the appellant clasped her mouth. Having heard the victim's mother's call, the appellant released her. During her examination-in-chief before the Court, the victim girl stated the appellant opened her pant and on her cry several people assembled and assaulted the appellant.

15. Section 375 of IPC states 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 failing under any of the six following descriptions:

First – 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 intercourse necessary to the offence of rape”.

16. Section 511 states as follows:

“ 511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment - 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 the offence, or with both”.

17. In State of Madhya Pradesh Vs. Mahendra @ Golu¹

the Hon’ble Supreme Court inter alia, observed as follows:

“It is a settled proposition of Criminal Jurisprudence that in every crime, there is first, Mens Rea (intention to commit, Secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. ‘Attempt’ is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission.

18. There is a visible distinction between ‘preparation’ and ‘attempt’ to commit an produced in a case. The stage of ‘preparation’ consists of deliberation devising or arranging the means or measures which would be necessary for the commission of the offence Whereas an ‘attempt’ to commit the offence, starts immediately after the completion of preparation. ‘Attempt’ is the execution of mens rea after

¹ 2021 S CC Online SC 965

preparation. 'Attempt' starts where 'preparation' comes to an end, though it falls short of actual commission of the crime.

13. However, if the attributes are unambiguously beyond the stage of preparation then the misdemeanours shall qualify to be termed as an 'attempt' to commit the principal offence and such attempt in itself is a punishable offence in view of Section 511 IPC. The preparation or attempt to commit the offence will be predominantly determined on evaluation of the act and conduct of an accused, and as to whether or not the incident tantamount to transgressing the space between preparation and attempt. If no overt act is attributed to the accused to commit the offence and only elementary exercise was undertaken and if such preparatory acts cause a strong guilt of reparation to commit the crime, which may or may not be punishable, depending upon the intent and import of the penal laws”.

18. In the instant case, the appellant lured the victim by giving an ice-cream who being a minor child could not control her temptation innocently went with the stranger appellant to the open ground. The appellant had no reason to provide an ice-cream to the minor victim except with an ulterior motive of quenching his sexual gratification. The first stage of enticing the victim with an ice-cream and distancing her to an isolated area was preparatory in nature. Thereafter asking the victim to remove her pant and in defiance the appellant himself removing it justifiably signifies an attempt to commit the offence of rape. The action of removing the undergarment

of the victim covering and protecting her private parts and forcibly made her lie down on the ground cannot be for any other oblique reason but indubitably for the purpose of ravishing her. The minor child cannot be said to be pampered or mollycoddled by asking to remove her pants and reclining her against her wish. The relationship between the parties was not acrimonious, obliterating the element of false indictment. The appellant who could have been the protector owing to his age conducted such reprehensible act towards the minor victim child, which if accomplished in its entirety would have impacted her life inconsolably to bear the wretched stigma throughout her life.

- 19.** In view of the above discussions, this court does not find it prudent to interfere with the order of conviction.
- 20.** 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.
- 21.** I record my appreciation for the able assistance rendered by Mr. Pritam Ray, learned advocate, as *amicus curiae* in disposing of the appeal.

- 22.** Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.
- 23.** Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)