

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 750 of 2019

Sambhu Das

Vs.

The State of West Bengal & Anr.

For the Appellant: Mr. Suman De.

For the State: Ms. Faria Hossain,
Ms. Baisali Basu.

Heard on: 10 and 11 February, 2022.

Judgment on: 07 April, 2022.

BIBEK CHAUDHURI, J. : –

1. The instant appeal is by the accused person who stood trial in Sessions Trial No.2(7) of 2013 arising out of Haldia P.S Case No.3 of 2012. The appellant stands convicted and sentenced for committing offence under Section 376 of the Indian Penal Code.

2. Charge was framed alleging commission of offence punishable under Section 376 of the Indian Penal Code against the accused. The court below found that the charge was established on the basis of the evidence adduced by the witnesses on behalf of the prosecution. The accused was sentenced to undergo rigorous imprisonment for 7 years to

pay fine of Rs.5000/- in default to suffer further rigorous imprisonment for a period of one month for the offence found to be punishable under Section 376 of the Indian Penal Code.

3. On the basis of a written complaint submitted by the prosecutrix to the effect that on 3rd January, 2012 at about 1 pm she went to take bath in a pond situated near Haldia Bandar Station by the side of the pitch road. At that time, the appellant suddenly came to her and embraced her forcefully and dragged her to the jungle by the side of the pond. Then he committed rape upon her inside the jungle and fled away. The defacto complainant returned to her home and informed the incident to local people. On 4th January, 2012 she identified the offender who was roaming near Bandar Station in the afternoon. The local people apprehended him and assaulted him. In the mean time police appeared at the spot. The accused was taken to the police station and subsequently the defacto complainant lodged the complaint on 4th January, 2012. It was further stated by the defacto complainant that as her husband was not in the house on the date of commission of offence, the FIR was lodged on the next date of incident.

4. The learned Advocate appearing for the appellant impeached the finding of the court below on appreciation of evidence and resultant findings as to the guilt. It is submitted by the learned Advocate for the appellant that from the written complaint it is learnt that on 4th January, 2012 the appellant was identified by the defacto complainant and the local people apprehended and assaulted him. In the mean time, police

came and took the appellant to the police station. Thus, it is submitted by the learned Advocate for the appellant that the statement made by the unidentified local people who caught hold of the accused is the first information to the police and the subsequent information in writing by the defacto complainant is hit by Section 162 of the Code of Criminal Procedure.

5. It is also submitted by the learned Advocate for the appellant that the prosecution failed to explain delay in lodging the FIR and therefore the prosecution case becomes suspect. The content of the FIR is also doubtful in view of the fact that though the victim did not know the name of the accused, she stated her name and father's name in the written complaint. Subsequently, however, the defacto complainant could not state the name of the accused before the medical officer at the time of her medico legal examination.

6. The medico legal examination does not support the prosecution case in as much as the Medical Officer did not find any injury in or around the private part of the victim. Moreover, according to the victim, she was dragged inside a jungle situated by the side of the pond by the accused and the offence was committed there. He submits that if the prosecutrix was dragged by the accused forcibly inside the jungle, there would obviously be some injury on the lower parts of her body. However, the medical officer did not find any such injury on the person of the defacto complainant.

7. It is further submitted by the learned Advocate for the appellant that the prosecution failed to establish the place of occurrence during trial of the case. In the written complaint as well as in course of examination of the victim under Section 164 of the Code of Criminal Procedure, she stated that the place of occurrence was inside a jungle situated by the side of the pond. But in the injury report prepared by medical officer (Exhibit-3) the victim stated that the offence was committed on 3rd January, 2012 at her home.

8. It is further urged by the learned Advocate for the appellant that in order to prove a charge under Section 376 of the Indian Penal Code, it is the incumbent duty of the prosecution to prove that the accused was potent and capable of performing sexual intercourse. In the instant case, the medical examination report of the accused was not proved during trial and the medical officer was not examined.

9. Learned Advocate for the appellant concludes submitting that coupled with the above mentioned lacuna in the prosecution case the specific defence plea was ignored by the court below. The accused claimed himself to be a khalasi by occupation. He used to work under the husband of the defacto complainant. Due to dispute between the appellant and the husband of the defacto complainant over monetary transaction, a false complaint was lodged against him by the wife of the defacto complainant.

10. In support of his contention, learned Advocate for the appellant refers to the following decisions of the Hon'ble Supreme Court:-

- (i) **Hem Raj vs. State of Haryana** reported in **(2014) 1 SCC (Cri) 820**: It is held by the Hon'ble Supreme Court in this report that since the evidence of the prosecutrix is placed on a high pedestal, it is the duty of the court to scrutinize it carefully, because in a given case on that lone evidence, a man can be sentenced to life imprisonment. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection, and only after its conscience is satisfied about its creditworthiness, rely upon it. In paragraph 10 of the report the Hon'ble Supreme Court found that the Medical Officer who held medico legal examination of the victim and submitted report was not examined during trial. The Hon'ble Court held this is a serious lapse on the part of the prosecution. In the said report, prosecution was able to prove from medico legal report that hymen of the prosecutrix was torn. The FSL report suggested presence of human semen on the wearing apparel of the prosecutrix as well as on the underwear of the accused. However, it was difficult to infer from this that the prosecutrix was raped by the appellant. Moreover, there was no injury found on the prosecutrix. Under such circumstances and also

considering the fact that the evidence of the prosecutrix is too infirm to deserve consideration, the appellant was acquitted.

- (ii) **Jayalalithaa & ors. vs. State of Karnataka @ Ors** reported in **(2006) 3 SCC (Cri) 373**: In the said report the appellant was acquitted of the charge under Section 376 of the Indian Penal Code when the medico legal examination report suggested that there was no rape upon the victim who was a minor girl about eight years.
- (iii) **Yerumalla Latchaiah vs. State of A.P** reported in **(2006) 3 SCC (Cri) 373**: In the said report the appellant was acquitted of the charge under Section 376 of the Indian Penal Code when the medico legal examination report suggested that there was no rape upon the victim who was a minor girl of about eight years.
- (iv) **Manna vs. State of Madhya Pradesh** reported in **(2015) 1 C Cr. LR (SC) 63**: In the said report it is held by the Hon'ble Supreme Court that while absence of injuries or absence of raising alarm or delay in FIR may not itself be enough to disbelieve the version of the prosecutrix in view of the statutory presumption under Section 114A of the Evidence Act, but if such statement

has inherent infirmities, creating doubt about its veracity, the same may not be acted upon.

- (v) **Bhaiyamiyan @ Jardar Khan & Anr. vs. State of Madhya Pradesh** reported in **(2012) 1 C Cr LR (SC) 350**: In the said report the Hon'ble Supreme Court allowed the appeal and recorded acquittal of the appellant on the ground of delay in lodging the FIR and absence of medical opinion that she was raped.
- (vi) **Radhu vs. State of Madhya Pradesh** reported in **(2008) 2 SCC (Cri) 207**: In this decision, in the absence of medical report the Hon'ble Supreme Court was left with the sole testimony of the prosecutrix. However the evidence of the prosecutrix did not inspire confidence of the Hon'ble Supreme Court and the appellant was acquitted.

11. The learned Advocate for the appellant also refers to a decision of this Court in **Budheswar Barman & Ors vs. State of West Bengal** reported in **(2013) 2 C Cr LR (Cal) 415**, wherein the Division Bench of this Court held that in view of material contradiction in the evidence of the prosecutrix and other witnesses and absence of any external injury in the private part of the prosecutrix, made the prosecution case doubtful and accordingly the appellant was acquitted from the charge. Again in **Biswanath Sarkar & Anr. vs. State of West Bengal** reported in **(2007) 2**

C Cr LR (Cal) 653, the same principle is laid down by the Division Bench of this Court.

12. Ms. Faria Hossain, learned prosecutor on the other hand, submits that the incident took place on 3rd January, 2012 and the FIR was lodged on 4th January, 2012. The defacto complainant gave an explanation to the effect that her husband was not present in the house on the date of occurrence. On the following day he came to the house and the defacto complainant narrated the incident to him. In the afternoon on 4th January, 2012, defacto complainant noticed that the accused was roaming around Haldia Bandar Station. Immediately she identified him. He was apprehended by the local people and they assaulted the appellant. Thereafter police rescued him and took him to the police station. Only then the defacto complainant lodged the complaint before the police. It is submitted by the learned prosecutor that one day delay in lodging FIR is not fatal for the prosecution because of the fact that a village woman is generally hesitant to lodge a complaint of rape in the local P.S. Further she narrated the incident to her husband and the accused was apprehended by the local people, she got the courage to lodge complaint in the P.S. It is further submitted by her that the defacto complainant has corroborated the incident stated in the written complaint in all material particulars. Coupled with the said fact she draws my attention to the evidence of one Bholanath Das, PW3 who was a disinterested witness. It is found from his evidence that on 13th February, 2012 he was working in his agricultural field. He also stated that he was in unlawful possession of

a piece of land of CPT. On the date and time of occurrence he went to the said land to drive away a cow. At that time, a person came to him in a naked condition asked him for water. PW3 declined to give water to him and told him to go to the station to take water from the tube well. Then he left the place and went towards the bush situated in between the land under possession of PW3 and a pond. After sometime he again came near the field of PW3 wearing a jeans pant with one napkin (gamcha) on his neck. He identified the accused in court as the said person whom he saw on the date of occurrence.

13. Learned Advocate for the state respondent further submits that the victim is a married lady. She is habituated to sexual intercourse. Therefore absence of any injury in the private part of the victim is not unnatural under the facts of the circumstances of the case.

14. I have duly considered the submission made by the learned Advocates for the appellant and the state respondent. The learned Advocate for the appellant has raised a question as to how the defacto complainant could know the name, father's name and address of the appellant at the time of lodging complaint in the P.S. It is needless to say that in a case under Section 376 of the Indian Penal Code, the evidence of the prosecutrix is most vital. Conviction can be based on the sole testimony of the prosecutrix if her evidence is found to be trustworthy, believable, cogent, reliable and free from material contradictions. In other words, if the sole testimony of the prosecutrix inspires confidence of the court, no corroboration is required to record conviction in a case under

Section 376 of the Indian Penal Code. It has consistently been held by the Apex Court that a victim in a case of rape is not an accomplice. On the contrary, she is at par with the injured witness. At the same time, considering the gravity of the offence the Hon'ble Supreme Court time and again echoed a voice of caution that the evidence of the prosecutrix is to be considered with great care and circumspection. Only when the evidence of the prosecutrix is found to be of "sterling quality", court can rely on her sole testimony to convict the accused. In a subsequent decision in the case of **Rai Sandeep @ Deepu vs. State of NCT of Delhi**, reported in **(2012) 8 SCC 21**, the Hon'ble Supreme Court had the occasion to consider who can be said to be "sterling witnesses". It is observed and held as here under:-

22. "In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the

sequence of it. Such a version should have co- relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

15. Bearing the above principle in mind, let us now appreciate the evidence on record independently. According to PW1 the incident took place on 3rd January, 2012 at about 1 pm inside a jungle situated by the side of a pond at Haldia Bandar Station. From the sketch map prepared by the investigating officer (Exhibit-8) it appears that on the southern side of Haldia Bandar Station there is a pond. On the eastern side of the said pond there is a vegetable garden possessed by PW3 Bholanath Das. On further south of the pond there is a bushy area, or jungle. According to the investigating officer the place of occurrence is inside the said bush on

the southern side of the pond. According to the defacto complainant on 3rd January, 2012 at about 1.30 pm while she was taking bath, the accused embraced her forcibly and dragged her inside the bush and committed rape upon her. A question was raised by the learned Advocate for the appellant that when the accused allegedly dragged the prosecutrix inside the bush she must have sustained some injuries on her legs and lower part of the body. The medical officer did not find any such injury on the body of the defacto complainant.

16. The defacto complainant made a statement before the learned Magistrate on 7th January, 2012 where she stated that the accused took her inside the jungle on his lap, thus she was not dragged by the accused.

17. During investigation of the case the investigating officer seized some pieces of white bangles from the alleged place of occurrence. The defacto complainant identified the said bangles of her own. It is also stated by the defacto complainant that she tried to resist the accused but failed.

18. The prosecutrix was examined by the Medical Officer after 12 days of occurrence. She did not find any marks of violence in her private part or any portion of her body. Had it been a case of forcible rape where the prosecutrix tried her best to resist the accused, there is every possibility of having some kind of injury on different parts of her body. The medical officer did not find any injury in any part of the body of the prosecutrix.

19. Therefore, the evidence of the prosecutrix is not supported by the medical evidence and in such a case it would be highly risky to sustain conviction of the accused.

20. For the reasons stated above, this Court is of the view that the accused is entitled to get benefit of doubt.

21. Accordingly the instant appeal is allowed on contest.

22. The judgment and order of conviction and sentence passed by the learned court below in Sessions Trial No.2(7) of 2013 arising out of Haldia P.S Case No.3 of 2012 is set aside. The appellant be acquitted and discharge from his bail bond.

(Bibek Chaudhuri, J.)