

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 513 of 2013

Azad Ali Saha

-Vs-

State of West Bengal

For the Appellant : Mr. Amitabha Karmakar, Adv.

For the State : Mr. Madhusudan Sur, Ld. A.P.P
Mr. Manoranjan Mahata, Adv.

Heard on : 1st and 4th July, 2022

Judgment on : 4th July, 2022.

Joymalya Bagchi, J. :-

The appeal is directed against judgment and order dated 26.02.2013 & 27.02.2013 passed by learned Additional District & Sessions Judge, Fast Track 3rd Court, Contai, Purba Medinipur, in Sessions Trial No. 4/July/2009 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.2,000/-, in default to suffer simple imprisonment for six months more.

Prosecution case as alleged against the appellant is to the effect that the victim, a five year old girl, used to reside alone with her mother in the village. Her father had gone to Gujrat to earn his livelihood. On 22.03.2007 the appellant, who is a neighbour, came to her residence. He offered chocolates to the child, took off his lungi and made the victim lie on the lungi spread on the floor. Then he open her inner-garments and committed rape on her. At that time, mother of the victim who had gone out to collect water from a nearby pump. On returning, she found the appellant committing rape on her daughter. She raised hue and cry and the appellant fled away. Her daughter was initially taken to Digha State General Hospital where she was treated by P.W.16. Thereafter, she was treated at Contai S.D. hospital and released on 25.03.2007. Meanwhile, father of the victim (P.W.8) was informed. He reached the village on 25.03.2007. P.W.1 went to Ramnagar Police Station to report the matter but no criminal case was initiated.

On arrival of the father of the victim (P.W. 8), they approached father of the appellant who drove them away from the village. Thereafter, mother of the victim (P.W. 1) approached the West Bengal Commission for Women who forwarded her complaint to the police station resulting in registration of Ramnagar Police Station Case No. 65 of 2007 dated 01.06.2007 under Section 376(2)(f) of the Indian Penal Code against the appellant.

In conclusion of investigation, charge-sheet was filed against the appellant and charge was framed against him under the aforesaid provision of law. Appellant pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 16 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication. In conclusion of trial, learned trial Judge by the impugned judgment and order convicted and sentenced the appellant, as aforesaid.

Mr. Karmakar, learned Counsel appearing for the appellant submits there is inordinate delay in lodging F.I.R. Complaint lodged at the police station was not produced in Court. No paper relating to salish held in the village between father of the victim (P.W. 8) and the father of the appellant has also been produced in Court. Hymen of the victim was found intact. P.W. 11 opined her hymen ought to have been ruptured in the case of rape. Victim (P.W 2) admitted there was enmity between the parties. Hence, prosecution case has not been proved beyond doubt and the appellant is entitled to an order of acquittal.

Mr. Sur, learned Counsel appearing for the State submits delay in lodging F.I.R. has been duly explained. P.W. 1 deposed on the day of incident she had gone to the police station but no case was registered. Thereafter, victim was treated in hospital till 25.03.2007. On that day, her father (P.W. 8) came to the village from Gujrat. They approached father of the appellant but were driven away from the village.

Ultimately, P.W. 1 lodged complaint at Women Commission and criminal case came to be registered. P.W. 16 treated the victim at Digha State General Hospital and noted injury over vulva as well as abrasion over her left and right thigh. This corroborates the allegation of rape as narrated by the victim (P.W. 2). Hence, the prosecution case is proved beyond doubt.

The instant case portrays an unfortunate saga of harassment of a five-year old child and her family members who had to run from pillar to post to set the criminal law in motion against a rapist. Incident of rape occurred on 22.03.2007. As per victim (P.W. 2) appellant, a neighbour, had come to their house when the victim was alone. Her mother had gone out to collect water from a nearby pump. Taking advantage of the situation, appellant laid her in the kitchen on his lungi, removed her inner garments and committed rape. She felt pain and became senseless. At that time, her mother came and found the appellant committing the offence. She raised alarm and the appellant ran away. The minor was shifted to Digha State General Hospital and was treated by P.W. 16 who deposed he found injuries on the vulva of the child. He also noted abrasions on her left and right thigh. He referred the victim for better treatment at Contai SD Hospital. Victim was treated there for three days. She was ultimately released on 25.03.2007. On that day, her father who was at Gujrat came to the

village. Her parents confronted the father of the appellant who drove them away.

P.W. 1 (Majeda Bibi) states they were driven out of the village. Finally, they got succour when P.W. 1 lodged complaint with West Bengal Commission for Women. The complaint was received on 01.06.2007 and the criminal case came to be started. Aforesaid chronology of events show desperate attempt was made by mother of the victim (P.W. 1) who knocked at every door to seek justice for her child.

Mr. Karmakar, learned Counsel for the appellant contends that complaint before police was not produced.

I find little substance in such submission. P.W. 1, stated she had gone to the police station on the day of occurrence with a local villager, namely, Heda but they were driven away and criminal case was not started. It is not the prosecution case that a complaint was lodged at the local police station. Hence, version of P.W. 1 cannot be improbabilised due to non-production of earlier complaint lodged at the police station. It is also contended that there is contradiction between P.W. 1 and P.W. 8 with regard to subsequent events. While P.W. 1 stated father of the appellant drove them away, P.W. 8 claimed there was a salish in the matter where Santu Jana was 'sabhapati'. Decision was also arrived which was reduced in writing. No paper of salish was produced in Court.

I have considered evidence of P.W. 8 in the backdrop of the entire conspectus of the case.

P.W. 8 (Rahim Saha) father of the victim, was not present when the incident occurred. He was at his place of employment in Gujrat. P.W. 1 informed him with regard to the incident and he rushed back to his village. Upon reaching the village, he along with his wife confronted father of the appellant. He contends a salish was held and an agreement was arrived at. His wife, however, states that father of the appellant drove them away from the village. Non-production of salish between the parties, in my estimation, does not affect unfolding of the case. Both the parents deposed incident occurred on 22.03.2007 and the child was hospitalised for three days. P.W. 8, father of the victim, arrived at the village on 25.03.2007 and had confronted father of the appellant. Even if one accepts his version with regard to salish, the same does not contradict his wife (P.W. 1) that they had been driven out of the village thereafter. Finally, on the intervention of the Women Commissioner, F.I.R. came to be registered.

Thus, I am of the opinion contentions raised on behalf of the appellant do not improbabilise the prosecution case with regard to the indifference of the local police administration in promptly responding to a case of child rape and the ominous atmosphere prevailing in the village which compelled the family to take shelter elsewhere. These

circumstances appear to have been proved and duly explain the delay in lodging the F.I.R.

P.W. 2, the minor victim, has graphically narrated the incident of rape. She stated on 7th Chaitra, 1413 B.S. she was alone at her residence. At that time the appellant came to their house and offered her chocolates. Then he spread his lungi on the floor of their kitchen and made her lie down on the kitchen floor. Thereafter, he opened her inner garments and committed rape. She felt pain and became senseless. After she regained sense she informed the incident to her mother. She was hospitalised.

Her deposition is corroborated by her mother (P.W. 1). She stated on the fateful evening she had gone out to collect water from a nearby pump. On returning home, she found the appellant committing the offence. She raised alarm when the appellant fled away. Victim narrated the incident to her mother and she was shifted to Digha State General Hospital and thereafter at Contai SD Hospital. Mother of the victim (P.W. 1) informed her husband who was in Gujrat. He arrived in the village on 25.03.2007.

Mr. Karmakar contends neighbouring people who had arrived at the spot after the incident has not supported the case. In spite of repeated notices to the victim by the investigating agency she was not produced before the magistrate to record her statement. These circumstances militate against the genuineness of the prosecution case.

He also contends there was boundary dispute between the appellant and the family of the victim as admitted by the victim herself. Hence, he was falsely implicated.

Version of the victim is corroborated by her mother PW 1. She had gone out to collect water and on returning home she found appellant committing the offence. It is true neighbours i.e PWs 4 to 7 have not supported the prosecution case. They were declared hostile and during cross examination were confronted with their earlier statement before police while exposes their prevaricating stance. Reason for the local villagers not supporting the prosecution case is not too far to seek. A hostile atmosphere was prevailing in the village which compelled the family of the victim to leave their residence. It had its adverse impact on the neighbouring witnesses too. Accordingly, they turned hostile and did not support the prosecution case. Moreover, the indifferent conduct of the local police administration in the matter had generated apprehension with regard to their fairness in the mind of the mother of the victim. This prompted her not to produce the child for recording her statement on the basis of their notices.

With regard to plea of pre-existing enmity, I am constrained to observe both parents of the victim girl PW 2 have stoutly denied the suggestion. Even suggestion with regard to 'salish' over the matter was denied by them. No document with regard to boundary dispute was adduced by the appellant during trial. He also did not examine any

defence witness to probabalise such fact. A stray sentence coming from the mouth of a minor victim with regard to boundary dispute would not suffice in the absence of clear and unequivocal evidence relating to such dispute which ordinarily would result in institution of collateral proceeding or lodging of complaints *inter se*. No contemporaneous document to probabalise such dispute has been produced on behalf of the defence and I am, therefore, not inclined to give credence to the defence plea of enmity prompting false implication.

With regard to medical evidence on record, Mr. Karmakar submits PW 11 who treated the victim at Contai S.D hospital did not note injury in her private parts. The said witness also stated hymen of the victim was not ruptured. Hence, she may not have been raped. It is also contended injuries on the inner side of thigh were due to itching.

PW 16 is the doctor who treated the victim first at Digha State General Hospital. He found injuries on her vulva as well as abrasions over the inner aspect of her thighs. He noted in the referral card (Ext. 7) it was a case of suspected rape. In cross-examination, he clarified vulva is a part of vagina. Hence, injury on the private part of the victim had been noticed by the doctor who had examined her at the first instance.

Opinion of PW 11 in the course of cross examination that abrasions in her thighs may be due to itching are hypothetical in nature. Hypothetical possibility of such injuries being caused due to

itching is wholly ruled out in the light of the unequivocal evidence of minor victim, PW 2.

It is trite law evidence of a victim of rape is to be treated on par with an injured witness and her deposition would prevail over the possible hypotheses regarding injury coming from a medical person.

A combine reading of a medico-legal evidence on record categorically shows injuries on the vulva as well as inner aspect of thighs of the victim which probabalise a case of rape. Slight penetration is sufficient to constitute rape. Non-rupture of hymen as noted by PW 11 is to be assessed in the light of the aforesaid proposition of law. Hence, non-rupture of hymen of a minor child would not wholly ruled out a case of rape.

In this backdrop, I am of the opinion medico-legal evidence on record supports the version of rape of the minor and proves the prosecution case beyond reasonable doubt.

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

The appeal is, accordingly, dismissed. In view of disposal of the appeal, connected applications, if any, also stand disposed of.

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

Bail Bond of the appellant is cancelled and he is directed to forthwith surrender and serve out the remainder of the sentence, failing which the trial Court shall issue appropriate processes to execute the sentence in accordance with law.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

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

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)