

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 782 of 2015

Soumen @ Nemai Patra

-Vs-

State of West Bengal

For the Appellant: Ms. Pronoti Goswami.

For the State: Mr. Ranabir Roy Chowdhury,
Mr. Mainak Gupra.

Heard on: January 27th, 2021.

Judgment on: 05th March, 2021.

BIBEK CHAUDHURI, J. : –

1. This is an appeal filed by the convict/appellant against the judgment and order of conviction dated 26th November, 2015 and sentence dated 27th November, 2015 passed by the Additional District and Sessions Judge, 2nd Court at Contai at Purba Medinipur in Sessions Trial No.6(8) of 2012 arising out of Sessions Case No.223(8) of 2012 whereby the appellant was sentenced to suffer rigorous imprisonment for three years and also to pay fine of Rs.4000/-, in default, to suffer simple imprisonment for six months.

2. Patashpur P.S Case No.90/2009 dated 5th September, 2009 under Sections 376/511 of the Indian Penal Code was initiated on the basis of a written complaint submitted by one Manoranjan Dalui alleging, inter alia, that on 4th September, 2009 at about 6 pm, taking opportunity of the absence of the informant and his wife, the appellant tried to commit rape upon her deaf and dumb daughter by tearing her wearing apparels. They came to know about the incident after returning home from outside.

3. Police took up the case for investigation and on completion of investigation filed charge sheet against the appellant under Sections 376/511 of the Code of Criminal Procedure.

4. The said case on being committed to the learned Court of Sessions, was transferred to the Fast Track 3rd Court of the learned Additional Sessions Judge at Contai for trial. It is found from the lower court record that the learned Trial Judge framed charge against the appellant under Sections 376/511 of the Indian Penal Code on 27th August, 2012. Again on 28th February, 2014 the charge was altered and alternate charge under Section 376 of the Indian Penal Code was framed against the accused/appellant. As the appellant pleaded not guilty, trial of the case commenced.

5. In order to establish charge against the accused, prosecution examined as many as nine witnesses. Series of documents are marked as exhibits which I propose to refer subsequently in the body of the judgment.

6. The learned Trial Judge on due consideration of evidence on record found the accused guilty for committing offence under Sections 376/511 of the Indian Penal Code and convicted and sentenced him accordingly.

7. Learned Advocate for the appellant at the outset draws my attention to the FIR submitted by PW1 Manoranjan Dalui. In the FIR the informant stated the name of the offender as Sonai Patra. However in his examination-in-chief he stated that the name of the accused is Nemai Patra and he wrongly described the accused as Sonai. From the cross examination of PW1, it transpired that at the time of the alleged occurrence the victim girl was aged about 16 years. She was deaf and dumb. When the incident took place he and his wife were not present in the house. When they came back, they found the victim girl crying sitting in her room. On being asked she expressed by making certain signs that she was raped by the accused. It is specifically pointed out by the Advocate for the appellant that after the incident, PW1 went to the house of the appellant and informed the matter to the family members of the accused. They told the informant to sit and settle the dispute. But the father of the accused abused them and did not agree to talk to them. So on the next day he lodged the FIR. According to the learned Advocate for the appellant if the evidence of PW1 is accepted on its face value, then a reasonable suspicion arises on the issue as to why the father of the victim initially wanted to settle the dispute amicably. If his girl is ravished by the accused, he would certainly file complaint before the police without unnecessary delay. However, in the instant case the FIR was lodged after

more than 24 hours of the incident. It is further submitted by the learned Advocate for the appellant that the de-facto complainant alleged in her written complaint that the accused admitted to commit rape upon her deaf and dumb daughter. But in his evidence he stated that her daughter was raped by the appellant.

8. PW2 Naru Gopal Majhi is a neighbour of the de-facto complainant. According to him he heard the incident from the de-facto complainant.

9. PW3 is also a neighbour of the de-facto complainant. His evidence is of no important being in the nature of hearsay.

10. PW5 is the victim girl. Her oral testimony was interpreted by PW4 Sandipan Sinha who is a teacher of deaf and dumb school at Contai. In her evidence in chief, the victim girl proved her signature on her statement recorded under Section 164 of the Code of Criminal Procedure which was marked as exhibit-2/1. Signature of the victim girl on medical examination report was marked as exhibit-3.

11. Learned Advocate for the appellant submits that the name of the appellant was stated by the de-facto complainant (PW1) as Sonai Patra. However, during investigation it transpired that the name of the appellant is Nemaï Patra. In view of such discrepancy, the investigating authority ought to have made arrangement for TI Parade of the suspect. However, the Investigating Officer did not take any step for holding TI Parade of the suspect. Therefore, identity of the appellant as the perpetrator of the offence remains doubtful. The learned trial judge did not consider the said aspect of the identification of the offender. It is further pointed out by the

learned Advocate for the appellant that in a case under Section 376 of the Indian Penal Code or attempt to commit such offence, solitary evidence of the victim girl is sufficient if her evidence is held to be trustworthy. In order to appraise as to whether evidence of the victim is trustworthy or not in a case of sexual abuse, the medical evidence is of great importance. In the instant case the offence was alleged committed on 4th September, 2009. The victim girl was medically examined on 5th September, 2009. The medical examination report was exhibited as exhibit-3 during the trial of the case. At the time of medical examination, the victim girl stated the name of the appellant as Sonai Patra. The Medical Officer found one biting mark on the lip of the victim and nail marks on the left side of the chest, forearm and left breast. He did not find any injury or marks of violence on the genital organ of the victim girl.

12. Referring to the evidence of the victim girl, PW5 and the evidence of the doctor PW9 and exhibit-3, learned Advocate for the appellant argues that the victim girl gave different accounts of instant at different point of time. She stated to her parents that the accused attempted to commit rape upon her. On the next day she stated before the learned Magistrate who recorded her statement under Section 164 of the Code of Criminal Procedure that she was raped by the appellant. Again the Medical Officer did not find any evidence on her person which suggested commission of sexual intercourse.

13. Learned Advocate for the appellant further submits that from the evidence of the victim girl, (PW5) it is ascertained that she used to stay in

her room with her three unmarried sisters. It is not possible for any man to commit such offence inside a room in the presence of the sisters of the victim girl. Learned Advocate for the appellant also draws my attention in respect of contradiction in the evidence on record with regard to place of occurrence. In the written complaint the informant stated that the alleged offence was committed in the room of the victim girl in the evening. But in cross examination, the victim girl stated that before the incident one person had taken her to another place from her house and the appellant committed such offence upon her. Therefore, the place of occurrence shifted from the room of the de-facto complainant to a place outside his house.

14. In view of such circumstances, where there is contradiction with regard to place of occurrence, identity of the appellant, contradiction between the evidence of the victim girl and the evidence of the Medical Officer, conviction of the appellant ought not to have been warranted.

15. Learned P.P-in-Charge, on the other hand submits that leaving aside the evidence of other witnesses, if the evidence of the victim girl and the Medical Officer are considered, this Court cannot take any different view other than the conclusion arrived at by the learned Trial Judge. It is submitted by him that the victim is an unfortunate deaf and dumb girl. She cannot speak or hear. During her evidence she identified the appellant as the accused who committed offence of sexual assault upon her. The Medical Officer found nail marks on her chest, breast, forearm and hand. He also found a biting mark on her leap. The said marks of

violence clearly suggest that appellant attempted to commit rape upon her. It is true that the victim girl stated before the learned Judicial Magistrate in her statement recorded under Section 164 of the Code of Criminal Procedure that she was raped by the accused. Such statement of the victim girl might not be true but for such reason entire evidence of the victim girl which is supported by the medical report prepared by PW9, cannot be thrown away altogether. Accordingly the learned P.P-in-Charge submits that there is no reason to take a different view in the instant appeal and the judgment and order of conviction and sentence against the appellant should be affirmed.

16. Having heard the learned Advocates for the appellant and the respondent and on perusal of the entire evidence on record I like to point out at the outset that the learned Trial Judge committed a grave error in accepting the statement of the victim girl as her evidence in chief. It is needless to say that a statement made by witness under Section 164 of the Code of Criminal Procedure is not inadmissible in evidence but it can be used for limited purpose to corroborate or contradict a statement made in the court in the manner provided under Section 157 and Section 145 of the Indian Evidence Act. The statement made under this section cannot be used as a substantive piece of evidence. But it can be used for the purpose of corroboration or contradiction, it can also be used to cross examine the person who made it to show that the evidence of the witness is false but that does not establish that what he stated out of court in her statement under Section 164 of the Code of Criminal Procedure is true. A

statement made by witness under Section 164 of the Code of Criminal Procedure can be used only for the purpose of cross examining him/her and discredit his/her evidence. In **Phool Chand vs. State of U.P** reported in **2004 Cri.L.J 1904** it is held that statement recorded under Section 164 of the Code of Criminal Procedure cannot be relied on for the purpose of conviction.

17. In the instant case the learned Trial Judge has committed the same mistake in violation of the ratio **Phool Chand's** case (supra) and considered the statement recorded under Section 164 of the Code of Criminal Procedure of the victim girl as substantive evidence in chief. This is absolutely in contravention of the scope of evidentiary value of a statement under Section 164 of the Code of Criminal Procedure and against the principles of examination, cross examination and re-examination of a witness under the Indian Evidence Act. On this ground only, I have no other alternative but to hold that there is no evidence of the victim girl in the instant case in support of the charge framed by the prosecution.

18. It will also not be out of place to mention that the appellant was convicted for committing offence under Section 376/511 of the Indian Penal Code.

19. In view of the catena of judgments of Hon'ble Supreme Court as well as different High Courts, it is abundantly clear that slight degree of penetration of the penis in vagina is sufficient to hold the accused guilty for the offence under Section 375 IPC punishable under Section 376 IPC.

20. In the backdrop of settled legal position, if the evidence on record is examined, the conclusion becomes irresistible that the conviction of the appellant under Sections 376/511 IPC is wholly unsustainable. What to talk about penetration, there has not been any attempt of penetration to the slightest degree. From the medical report it is ascertained that the victim girl suffered some superficial injury of nail marks on her person. There was no sufficient evidence on record to show that the appellant attempted to commit rape on the victim girl. The medical evidence also did not indicate in such attempt. Catching hold of the victim and causing injury on her hand, chest and breast cannot be said to be an attempt to rape.

21. I have given an anxious thought over the question as to whether such act perpetrated upon the victim would amount to assault or force use to outrage the modesty of the victim accordingly. However, in view of giving different description of name of the accused at different point of time during investigation, failure on the part of the investigating officer to conduct test identification parade of the appellant and shifting of the place of occurrence I also cannot hold the accused guilty for committing offence under Section 354 of the Indian Penal Code.

22. For the reasons stated above I come to an irresistible conclusion that the conviction of the accused/appellant for the offence punishable under Section 376/511 IPC is unsustainable.

23. The appeal be and the same is allowed on contest, however, without cost.

24. Accordingly the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court, Contai at Purba Medinipur in Sessions Trial No.6(8) of 2012 is set aside.

25. The accused/appellant is acquitted from the charge under Sections 376/511 IPC, set at liberty and released from the bail bond.

26. Let a copy of this judgment be sent to the learned trial court along with lower court record.

(Bibek Chaudhuri, J.)