
(2013) 04 CAL CK 0051
In the Calcutta High Court
Case No : C.R.A. No. 160 of 2008

Budheswar Barman and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 03-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 376(2)(g)

Citation : (2013) 04 CAL CK 0051

Hon'ble Judges : Nadira Patherya, J;Asim Kumar Ray, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharyya, for the Appellant; S. Sanyal and Mrs. A. Sinha, for the Respondent

Final Decision : Allowed

Judgement

Nadira Patherya, J.—This appeal has been filed against the judgment and order of conviction and sentence dated 27th June, 2007 and 28th June, 2007 respectively passed by the Additional District and Sessions Judge, 1st Fast Track Court, Alipurduar, Jalpaiguri in Sessions Trial No. 42 of 2005 arising out of Sessions Case No. 90 of 2004. By the said judgment and order the appellants were sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 3,000/- each in default to suffer R.I. for further three months each for the offence punishable u/s 376(2)(g) IPC. Being aggrieved by the said judgment and order of conviction and sentence this appeal has been filed.

2. The case of the prosecution is that one Shikhil Adhikary lodged a complaint against the accused persons on 5th July, 2004 for the sexual offence committed on his wife on 29th June, 2004 at about 12 noon while returning from toilet. On the basis of the said complaint Kumargram P.S. Case No. 24 of 2004 dated 5th July, 2004 was initiated. The said was followed by investigation and a charge sheet u/s 376(2)(g) IPC was filed. The case was committed for trial to the Court of Sessions Judge, Jalpaiguri who transferred the case to the Additional District

and Sessions Judge, 1st Fast Track Court, Alipurduar, Jalpaiguri. Charge framed against the appellants, was read over and explained to the appellants who pleaded "not guilty" and claimed to be tried. In course of trial 11 witnesses were examined by the prosecution and the appellant was also examined u/s 313 CrPC.

3. On a consideration of the evidence and the exhibits the Additional District and Sessions Judge, 1st Fast Track Court, Alipurduar sentenced the appellants to suffer 10 years rigorous imprisonment and to pay of fine of Rs. 3,000/- each in default to suffer R.I. for further three months each for the offence punishable u/s 376(2)(g) IPC. Hence the instant appeal has been filed.

4. Counsel for the appellants submits that the date of occurrence was 29th June, 2004 and the FIR was filed on 5th July, 2004, therefore there has been delay in filing FIR. In the questions put to the appellants u/s 313 CrPC no questions were put covering the 164 statements. Medical examination was done on 19th July, 2004 and nothing incriminating against the appellants has been found. The Magistrate who recorded the 164 statements of the victim has not been examined and the evidence is full of contradictions.

5. While PW 3 the victim has stated that she after three days of the incident disclosed the fact to her husband. In the 164 statement she stated that she informed her husband of the incident the next day. PW 2 the husband of the victim has stated that his wife told him about the incident on his returning home on the day of incident, while in another place has stated that his wife informed him about the incident after 3 to 4 days. Therefore the day when the information was given is at a variance. In his cross-examination PW 2 has stated that his left thumb impression was taken on a blank paper. This also makes the FIR questionable.

6. PW 6 the mother-in-law has stated in one place that she came to know of the incident when her son namely, PW 2 assaulted Gouri "on that day" and she went to save Gouri and this was three days later as Gouri said that she went to toilet in the jungle 3 days before the incident of assault by PW 2, when she was raped by Nalin, Budheswar and Bisadu. PW 6 in her cross-examination has stated that on the date of the incident she heard of the incident. Although she came to know of the incident she did not tell of the incident to others. Therefore the examination-in-chief and cross-examination of PW 6 differs.

7. PW 7 is the father-in-law of the victim who in his examination-in-chief says that he heard of the incident after 2 to 3 days of the occurrence while in the cross-examination he has stated that he heard of the incident on that day when he returned home in the evening. He also stated that he was told of the incident by his wife but this is not corroborated by the evidence of PW 6 who has stated she did not tell others. PW 9 is the scribe of the FIR and he has written the FIR as per the dictation of Shikhil Adhikary borobabu of the P.S. PW 10 is Nikhil Adhikary the elder brother-in-law of the victim who says that he heard of the incident on his returning home from his mother PW 6 at about 2 PM. This has not

been corroborated by the mother-in-law PW 6.

8. PW 6 has stated that she found bloodstain on the wearing apparels of Gouri and injuries due to scratchings. PW 2 has also said that the clothes of the victim was stained with blood and coated with earth. This will not be borne out from the medical report Ext.-1 wherein no external injuries were found in the private parts of the victim. No marks of violence was found in the genital organs. Therefore the case filed against the appellants is false and due to political rivalry.

9. The I.O. PW 11 in his evidence has specifically stated that he sent the wearing apparels of the victim for examination and he received the report being Exhibit-10 but nothing incriminating against the appellants was found. The victim girl was also sent for medical examination and a report was also collected by him Ext.-1. Therefore the oral evidence of PW 2, PW 3 and PW 6 in the light of the medical report and the evidence of PW 1 the doctor cannot be relied on and as the prosecution was not able to prove its case no order of conviction or sentence could have been passed against the appellants and the same be set-aside.

10. Opposing the said appeal counsel for the State submits that the delay in filing the FIR is an admitted fact but in rape cases delay is not fatal to the prosecution's case. The FIR maker came to know of the incident after 2 to 3 days of its occurrence and it is quite possible that because of political enmity between the appellants and the victim no step was taken initially. On the basis of a defective 313 remand can be directed and this cannot be the only ground for setting aside the order of conviction and sentence. Delay is not fatal as held in State of U.P Vs. Chhoteylal,

11. On an evaluation of the prosecutrix evidence the contradictions are minor and even if the investigation was perfunctory the evidence of the prosecutrix ought to be considered as held in (2012) 1 SCC (Cri.) 240 and the order of conviction and sentence be upheld.

12. In reply reliance is placed on the case reported in Rai Sandeep @ Deepu Vs. State of NCT of Delhi, for the proposition that the evidence of a sterling witness can be accepted by the Court without any corroboration for punishing the guilty.

13. Having considered the submissions of the parties the evidence of PW 2, PW 3 victim and PW 6 suffers from contradictions in respect of imparting information regarding the incident. In the examination-in-chief PW 3 the victim, stated that she disclosed the fact of the incident to her husband after three days while in cross-examination she says that on the date of the incident her mother-in-law told about the incident to others. This is not corroborated by the evidence of PW 6 who has stated that she did not tell others. The evidence of PW 10 is nothing but hearsay, as it is not corroborated by the evidence of PW 6. PW 2 in his evidence has said that his wife told him of the incident on his returning home and while explaining the delay in filing the FIR has stated that he was informed of the incident after 3/4 days. PW 3 went to the P.S. after three days of the incident to make statement before police. In spite of visiting the P.S. after three

days of the incident which occurred on 29th June, 2004 no complaint was lodged and the FIR was only filed on 5th July, 2004. She has also said that the 164 statement made before the Magistrate was at the direction of the police. Although she has stated that her sari was torn but the same has not been seized and finds no mention in the seizure list. She has said that she sustained scratch marks and suffered bleeding injury but no scratch mark or bleedings was detected by the Dr. or mentioned in the FSL (Ext.-10). Therefore the evidence of PW 3 the victim cannot be relied upon. She has also stated that she suffered cuts in her private parts. This is neither corroborated by the evidence of PW 1 (Dr.) nor the medical report. PW 1 (doctor) has specifically stated that there was no external injuries detected in her private parts nor was there any mark of violence. The medical examination was conducted on 6.7.2004 and in case there was any mark of scratching the same would have been detected by PW 1 doctor. Bimal and Naren who stay near to the place of occurrence were also not cited as charge-sheet witness by the prosecution and it is quite possible that in case they were examined, they would have made statements contrary to the prosecution's case. PW 9 the scribe of the FIR has stated that PW 2 and the Borobabu of the P.S. dictated to him how to write the FIR therefore the FIR cannot be accepted as a document without blemish. PW 7 the father-in-law of the victim in his chief stated that he heard about the incident after 2/3 days of the occurrence while in the cross-examination he says that the victim informed him on the date of incident when he returned home. He has also said that PW 6 informed him of the incident but this is not corroborated by the evidence of PW 6 who has stated that she did not tell about the incident to others.

14. For all the said reasons therefore the evidence of the victim does not inspire confidence. Although in State of Himachal Pradesh Vs. Asha Ram, , it has been held that the evidence of the victim is the best evidence but as the evidence of PW 3 has not inspired confidence, the judgment and order of conviction and sentence dated 27th June, 2007 and 28th June, 2007 cannot be upheld and are set aside. The appeal is allowed and accordingly disposed off.

15. Let steps be taken to set free the appellants forthwith provided they are not required to be in custody in connection with any other case. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties, as expeditiously as possible.

Patherya, J.

I agree.