
(2016) 11 CAL CK 0009
In the Calcutta High Court
Case No : CRA No. 422 of 2008

Gopal Mondal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 25-11-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, Section 417

Citation : (2017) 169 AIC 767 : (2017) 1 AICLR 227 : (2017) 2 CriCC 397 : (2017) CriLJ 931 : (2017) 2 Crimes 302

Hon'ble Judges : Girish Chandra Gupta and Arindam Sinha, JJ.

Bench : Division Bench

Advocate : Mr. Sekhar Kumar Bose, Sr., Advocate and Mr. Amanul Hossain, Advocate, for the Appellant; Mr. Nequive Ahmed, Advocate, for the State

Final Decision : Partly Allowed

Judgement

Girish Chandra Gupta, C.J. - The appeal is directed against a judgement and orders dated 29th May, 2008 and 31st May, 2008 by which the 5th Court of Additional Sessions Judge, Nadia in Sessions Trial No (iv) of May 2006 arising out of Sessions Case No. 8 of March, 2006 in connection with F.I.R. No.102 of 2001, Karimpur Police Station within the district of Nadia convicted the sole accused for an offence punishable under Section 417 of IPC and sentenced him to suffer rigorous imprisonment for three years and to pay fine of Rs.10,000/- in default to suffer rigorous imprisonment for another two years and also under Section 376 of IPC sentencing him to rigorous imprisonment for a period of 10 years as also to pay a fine of Rs.20,000/- in default to suffer rigorous imprisonment for another 4 years for an offence punishable under Section 376 of the Indian Penal Code.

2. The facts and circumstances of the case briefly stated are as follows:-

The F.I.R. was lodged on 12th August, 2001 alleging that on 10th Falgun, 1407 B.S. corresponding to 22nd January, 2001 while the victim was alone in her

house and was sleeping, the accused entered into her room and forcibly committed rape on her. Her attempt to scream was foiled.

The accused subsequent to the aforesaid incident consoled her by saying that he would marry her. On that pretext, he continued to have sexual intercourse with the victim. She in consequence whereof conceived. The accused, however refused to marry her. The pregnancy was five months old when the F.I.R. was lodged. Charges were framed under Section 376 and 417 of IPC. Ten witnesses were examined which include the victim (P.W.1), her father (P.W.4), her mother (P.W.5), Dr. Patra (P.W.7), Mr. Pramanik, Sub-Inspector of Police (P.W.9) and Mr. Das (P.W.10), the investigating officer. Rest of the witnesses were the co-villagers: Netai Pahari (P.W. 2), Kajal Pahari (P.W.3), Subodh Kumar Dey (P.W. 6) and Naru Haldar (P.W. 8). Each one of them turned hostile.

3. Mr. Basu, learned senior advocate appearing for the appellant made the following submissions:-

(a) The incident took place on 22nd February, 2001 whereas the F.I.R. was lodged on 12th August, 2001. He submitted that the delay in lodging the F.I.R. makes the case of the prosecution unbelievable.

(b) There is an admission by the victim during her cross-examination that the accused never gave any assurance to marry her.

(c) The victim during her cross-examination also admitted that she did not state in her written complaint that the accused used to have sexual intercourse with her, in consequence whereof she became pregnant.

(d) He submitted that the case of the accused is that the victim was married twice prior to the alleged incident which though was denied by the victim has been admitted by P.W. 6, during his cross-examination by the defence.

(e) The P.W.2 was also suggested as regards earlier marriages of the prosecutrix which he denied but the I/O during his examination admitted that the P.W.2 had told him during his examination under Section 161 that the victim was married twice prior to the alleged incident.

(f) The victim was a married woman. She was 20 years old at the time of the alleged incident. The learned Trial Court has also in its judgement referred to the victim as a married women.

(g) No scientific test was conducted to establish that the accused was the biological father of the child born to the victim.

4. Mr. Ahmed learned advocate appearing for the State has disputed the submissions made by Mr. Basu. He submitted that the victim, in this case is an illiterate rustic woman. She, as a matter of fact, is a tribal. According to him, the evidence taken as a whole proves the case of prosecution both under Section 417 and 376 beyond reasonable doubt.

5. We have considered the respective submission and examined the evidence on record from which the following transpired.

I. The victim during her examination-in-chief deposed, inter alia as follows:-

"(a) I am a resident of Routhbari which is within P.S. Karimpur. I stay alone in the house. One year ago at night while I was sleeping in my room, Gopal Mondal (identifies) entered my room, forcibly caught hold of me and committed rape on me.

(b) Thereafter on several occasions accused committed sexual intercourse with me against my will in consequence of which I became pregnant and one male issue was born to me. That son is now 1¹/₂ years old. Excepting the accused no one else had sexual intercourse with me. I reported the incident at Karimpur P.S. in writing. I cannot say the name of the scribe but I put L.T.I. on it after its contents were read over to me.

(c) The accused had sexual intercourse with me on the pretext that he would marry me. After I became pregnant I requested to him to marry me but he refused. The accused married some other girl."

6. We have divided the material portion of her deposition in groups for the convenience of discussion. Her deposition, as regards the forcible rape on 22nd February, 2001 has remained uncontroverted. There is no cross-examination on that aspect of the matter, except for a suggestion that her deposition to that extent was false. The aforesaid deposition of the victim is corroborated by the written complaint which has been marked as Exhibit -2. Absence of any cross-examination whatsoever, on that aspect of the matter is a pointer to show that the learned counsel cross-examining her was conscious of the fact that this part of her deposition was true. He, therefore, avoided to put any question on that aspect of the matter.

7. Reference in this regard may be made to the judgement in the case of A.E.G. Carapiet v. A. Y. Derderian reported in AIR 1961 Cal 713 wherein a Division Bench of this Court quoted with approval the following views from an English judgement.

"To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

In fact Lord Halsbury described the situation as a "perfect outrage" at page 77 of the said report. After quoting the evidence the learned Lord said:

"My Lords, it seems to me that it would be a perfect outrage and violation of the

proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all."

The same view is expressed in the 13th Edition of Odger on Pleading and Practise at page 261 and the 9th Edition of Phipson.

On Evidence at page 497-498"

II. P.W. 6 Subodh Kumar Dey, though turned hostile, had disclosed during his examination under Section 161 Cr. P.C.:- "that on 10th Falgoon, 1407 B.S. in the evening I saw Gopal Mondal fleeing away from the room of Sarathi Pahari at the time when there was none else in her house except Sarathi."

The fact that he had made the aforesaid statement to I/O, P.W.10 would appear from his evidence which is, inter alia, as follows:-

P.W. 6 Subodh Kumar Dey stated to me that on 10th Falgoon, 1407 B.S. in the evening he saw Gopal Mondal fleeing away from the room of Sarathi Pahari at the time when there was none else in her house except Sarathi."

III. Each of the hostile witnesses during their examination under Section 161 had supported the case of the prosecution as regards the sexual assault on 2nd February, 2001 by the accused upon the victim. Though, during evidence in Court they went back on it. The I/O has, however during his examination stated on oath the statements made to him by the hostile witnesses including the P.W.6. The statement of the P.W.6 deposed to by the P.W.10 may not have any evidentiary value *stricto sensu* but the fact that such a statement was made by one of the witnesses is well proved.

IV. At the time of incident, the parents of the victim were not at home. They had gone to visit some of their relations. The deposition of the mother of the victim, P.W.5 inter alia is as follows:-

"I know Gopal Mondal (identifies the accused). Myself and my husband had been to our relative's house and when we returned home Sarathi informed us that Gopal Mondal entered her room, forcibly caught hold of her and had sexual intercourse with her in consequence of which Sarathi became pregnant and gave birth to a son."

There is no cross-examination by the defence with regard to any part of the deposition quoted above.

V. What drives the point home is the suggestion given to the victim on behalf of the accused.

"It is not a fact that I used to purchase articles on credit from the grocery shop

of accid. and subsequently I married him." The suggestion demonstrably is a plea of justification which can lawfully be taken as an admission of guilt.

8. In the case of State of Haryana v. Jinder Singh & Ors. reported in (1997) 4 SCC 180 what had happened was that Ram Singh was murdered by Jinder Singh, Baldev Singh and Ranjit Singh. At the trial Hazara Singh son of the deceased deposed that a few months prior to the occurrence the elder brother of the accused Jinder Singh was beaten by the deceased Ram Singh and his son Avatar Singh for committing rape upon the young and blind wife of Dhyan Singh the elder brother of deceased Ram Singh. The witness was suggested that the wife of Dhyan Singh was a lady of easy virtue.

9. Their Lordships opined as regards the value of the suggestion as follows:-

"...but no challenge to this piece of evidence was made. On the contrary, from the suggestion made to the witness Hazara Singh in cross-examination that the young wife of Dhyan Singh was a lady of easy virtue and was once found in a compromising position with one Amar Singh, indicated that the accused did not dispute the earlier occurrence with Kulwant Singh. These facts undoubtedly do provide a motive for the crime. But surprisingly enough the High Court rejected the same by mere vague observation that there was no impelling motive for the appellants to commit the crime which is erroneous on the fact of it, being against the weight of evidence on record."

VI. With respect to the subsequent acts of sexual intercourse by the accused with the victim on the pretext that he would marry her, it is true that the victim deposed during her cross-examination that:-

"Gopal Mondal never gave me any assurance that he would marry me."

She, however maintained that on the pretext of marriage the accused continued to have sexual intercourse with her as regards which there is no cross-examination. The other pieces of evidence are as follows:-

10. The father of the victim (PW 4) deposed as follows:-

"I know accused Gopal Mondal (identifies) who is my covillager.

Gopal Mondal used to visit our house. He also used to stay in our house sometimes. My daughter Sarathi gave birth to a son in consequence of sexual intercourse with accused Gopal Mondal. Sarathi's son's name is Bishal Pahari.

Gopal Mondal did not marry my daughter Sarathi although he promised to marry her.

I cannot say for how long there was sexual relation between Gopal and Sarathi. Gopal Mondal used to threaten me so out of fear I used to allow him to stay in my house."

During cross-examination he also deposed that:-

"I would not have filed this case if Gopal Mondal married my daughter."

The P.W.5, mother of the victim during cross-examination deposed, inter alia as follows:-

"I was interrogated by the I/O. in connection with this case. I stated to the Police Officer that Gopal Mondal sometimes used to visit my daughter and cohabit with her, in consequence of which she became pregnant. We filed this case since Gopal Mondal refused to marry my daughter although he had assured her that he would do so."

The delay in lodging the FIR is explained by the aforesaid pieces of evidence coming from the parents of the victim. Though, on behalf of the defence it was suggested that the victim was married twice prior to the incident, there is no dependable evidence in that regard, nor is there any suggestion that the accused had any physical relationship with anyone except the accused. There is dependable evidence of the victim and her parents that the accused after the initial incident frequently used to have physical relationship with the victim, in consequence whereof she conceived. Omission to state the aforesaid fact in the written complaint cannot be fatal because it is well-settled that the written complaint is not expected to be an encyclopaedia of all the facts. It is true that the learned Trial Court referred to the victim as a married woman. But there is no evidence in that regard. Even Mr. Basu was unable to point out any. It is true that no scientific test was conducted to ascertain the identity of the biological father of the child born to the victim. During the course of hearing this Court enquired of Mr. Basu as to whether he would agree to a DNA test at this stage to which he replied in the negative.

Now we shall proceed to deal with the cases cited by Mr. Basu. The first judgement cited by Mr. Basu in the case of Jayanta Rani Panda v. State of West Bengal & Anr. reported in 1984 Cr LJ 1535 has no manner of application to the case in hand because the prosecutrix in that case was a consenting party as would appear from paragraph 7 of the judgement wherein the Division Bench opined as follows:-

"Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is that if she had really been assured of marriage by the accused who was visiting her house and in whose promise she had faith, why should she keep it a secret from her parents if really she had belief in that promise."

11. The second judgement cited by Mr. Basu in the case of Uday v. State of Karnataka reported in 2003 SCC (Criminal) 775 was also a case of a consenting prosecutrix as would appear from paragraph 3 of the judgement wherein their Lordships narrated the facts of the case as follows:-

"In the last week of August 1988 or the first week of September 1988 at about

12 o'clock in the night when she was studying, the appellant came to the window of the room and called her out to talk to her. Since she was deeply in love with him, she responded to his invitation and thereafter they went to the place where the house of the appellant was under construction. The appellant talked to her and thereafter kissed her and embraced her and promised to marry her. He also had sexual intercourse with her. She was not willing to have sexual intercourse, but in the circumstances she consented to the sexual intercourse because the accused had promised to marry her. They continued to meet thereafter and went out frequently. During this period as well, the appellant had stated many times that he would marry her. She also admits that she had sexual intercourse with him about 15-20 times and that they used to have sexual intercourse once or twice a week. She also admits that they were both noticed together by several persons whom she has named in her deposition. When one Vanamala, who had noticed her, questioned her about the affair, she had told her that they were madly in love with each other and that the appellant had promised to marry her. She also requested her not to reveal this fact to anyone."

12. The third judgement cited by Mr. Basu in the case of *Vijayan v. State of Kerala* reported in (2009) 3 SCC (Criminal) 585 was a case where both the learned Trial Court and the High Court based conviction under Section 376 on the basis of the sole testimony of the prosecutrix. The Supreme Court interfered solely on the ground of delay as would appear from paragraph 5 of the judgement wherein their Lordships opined as follows:-

"The present case wholly depends upon the testimony of the prosecutrix. The incident in the present case took place seven months prior to the date of lodging the complaint as a realisation dawned upon her that she has been subjected to rape by the appellant-accused. No complaint or grievance was made either to the police or the parents prior thereto. The explanation for delay in lodging the FIR is that the appellant-accused promised her to marry therefore the FIR was not filed. In cases where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, specially when the prosecutrix could venture to wait for seven months for filing the FIR for rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for seven months for filing the FIR it will be very hazardous to convict on such sole oral testimony.

Moreover, no DNA test was conducted to find out whether the child was born out of the said incident of rape and that the appellant accused was responsible for the said child. In the face of lack of any other evidence, it is unsafe to convict the accused."

13. The fourth judgement cited by Mr. Basu is in the case of *K. P. Thimmappa Gowda v. State of Karnataka* reported in (2011) 4 SCC 475 in that case one of

the reasons which weighted with the Supreme Court was that:-

"the appellant has stated in an affidavit filed in this Court that he has agreed to transfer two acres of land situated in Palavanahalli due to breach of promise to marry Rathnamma and she has given her consent to accept the same."

14. The fifth judgement cited by Mr. Basu is in the case of Narendra Kumar v. State (NCT of Delhi) reported in (2012) 7 SCC 171, the Supreme Court in the aforesaid case interfered with the concurring views of the High Court because:-

"The given facts and circumstances make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances along with other evidence on record, in which the offence is alleged to have been committed, we are of the view that her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime. In such a fact situation, the appellant becomes entitled to the benefit of doubt."

15. The sixth judgement cited by Mr. Basu is in the case of Karthi alias Karthick v. State Represented by Inspector of Police, Tamilnadu reported in AIR (2013) SC 2645. Far from assisting the defence of the respondent, this judgement militates against him as would appear from paragraph 14 wherein their Lordships held as follows:-

"The factual submission advanced at the hands of the learned counsel for the appellant was that the prosecutrix Poomari (PW1) was a consenting party to the sexual relationship which the accused-appellant Karthick had with her. That may be so at a subsequent stage, yet it is not possible for us to accept the instant submission advanced at the hands of the learned counsel for the appellant for his exculpation. The facts as they unfold from the statement of the prosecutrix Poomari (PW1) are, that even before the first act of sexual intercourse, the accused-appellant Karthick used to tease her. He also used to tell her, that he wished to marry her. The fact that he had sexual intercourse with her, when the prosecutrix Poomari (PW1) was all alone in her house, is not disputed. The prosecutrix Poomari (PW1) has confirmed in her deposition, that at the time of the first sexual intercourse with her at her house, the accused-appellant Karthick had gagged her mouth with his right hand he had promised to marry her, by placing his hand on her head, after having ravaged her. The subsequent acts of sexual intercourse, were actions of actively cheating her, by giving her the impression that he would marry her. The occurrence at the Murugan temple, is of significant importance. At the temple, for the first time the accused-appellant Karthick told the prosecutrix Poomari (PW1), that he would not marry her. The instant factual position has been confirmed by Chandran (PW()) and Ilangovan (PW10). Despite lengthy cross-examination, the accused-appellant has not been able to create any dent in the testimony of the prosecutrix Poomari (PW1). In the aforesaid view of the matter, we confirm the concurrent determination of the courts below, that the accused appellant Karthick committed deceit with the prosecutrix Poomari (PW1) by promising to marry her. On the strength of the

said deception, in the first instance persuaded her not to disclose the occurrence to anyone, and thereafter, repeatedly had sexual intercourse with her. Therefore, in the facts and circumstances of this case, it is not possible for us to accept the contention advanced on behalf of the accused-appellant Karthick, that sexual intercourse by the accused-appellant Karthick with the prosecutrix Poomari was consensual. Obtaining consent by exercising deceit, cannot be legitimate defence to exculpate an accused."

16. The last and the seventh judgement cited by Mr. Basu is in the case of Kaini Ranjan v. State of Kerala reported in (2014) 1 Cal.Cr LR (SC) 105. The evidence of the prosecutrix in that case as also of her parents was found lacking in credibility as would appear from the paragraphs 18 & 19 which are as follows:-

"The place of the alleged incident and the time is very crucial, so far as this case is concerned. It was early morning at 8.30 AM and the place of the alleged incident was on the side of a public road. If she had made any semblance of resistance or made any hue and cry it would have attracted large number of people from the locality. Further the first information report, as already indicated, was lodged after a period of 10 months of the alleged incident. All these factors cast some shadow of doubt on the version of PW 2.

Behaviour of the parents of the prosecutrix viz. PW3 and PW4 also appears to be strange. On their evidence they stated that they came to know about the relations between the appellant and the prosecutrix when they found her pregnant. Prosecutrix had told them that the appellant had agreed to marry her. They knew the appellant and his family already. However, there is not even a whisper that they approached the appellant or his family members for marrying the prosecutrix. The straightaway went to the police station to lodge the report, that too after the birth of the child. All these factors cast a doubt on the prosecution version. The version of victim, in rape commands great respect and acceptability, but, if there are some circumstances which cast some doubt in the mind of the Court of the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape."

17. Considering the material-on-record we have no doubt in our mind that the first incident was clearly an act of sexual assault perpetrated forcibly against the victim.

18. We are also of the opinion that the appellant is the biological father of the child born to the victim. Absence of a medical report does not pose an unsurmountable difficulty. The evidence of the victim and her parents taken as a whole coupled with reluctance of Mr. Bose to have the DNA test conducted leave no manner of doubt as regards that.

19. There is, however, uncertainty as to whether the subsequent acts of sexual intercourse were consensual or were based on deception played by the accused/appellant on the pretext of marriage.

20. In that view of the matter, we set aside the conviction under Section 417 of the IPC. The learned Trial Court has awarded rigorous imprisonment for three years under Section 417 and 10 years under Section 376 to run concurrently. Since we have set aside the conviction under Section 417, it would in our opinion, be fair to reduce the sentence for the offence under Section 376 of the IPC to a period of 7 years. The amount of fine shall, however remain unchanged. In case the fine is realised, the same shall be made over to the prosecutrix.

21. The appeal is, thus partly allowed.

Let a copy of this judgement be forwarded by the Registry to the learned Trial Court for necessary steps.

Arindam Sinha, J. - I agree.