
(2018) 07 CAL CK 0150
In the Calcutta High Court
Case No : Criminal Appeal No. 730 of 2008

Habibur Rahaman, Habai

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 26-07-2018

Acts Referred:

Indian Penal Code, 1860 — Section 342, 376, 376(2), 376(2)(g)
Code of Criminal Procedure, 1973 — Section 164

Citation : (2018) 07 CAL CK 0150

Hon'ble Judges : ASHA ARORA, J

Bench : Single Bench

Advocate : Anasuya Sinha, Rajiv Lochan Chakraborty, Debapratim Guha, Priyajit Kundu, Pratick Bose

Final Decision : Disposed Off

Judgement

Asha Arora, J.

This appeal is directed against the judgment and order of conviction and sentence dated 10/9/2008 and 12/9/2008 passed by the learned Additional

Sessions Judge, 1st Fast Track Court, Berhampore, Murshidabad in Sessions Trial No. 3(1) of 2005 arising out of Sessions Serial no. 837 of 2003

convicting the appellant/accused for the offence punishable under section 376 IPC and sentencing him to suffer rigorous imprisonment for seven years

and to pay a fine of Rs. 15,000/- in default of which to suffer rigorous imprisonment for a further period of six months for the aforesaid offence.

Prosecution case in brief as alleged by the prosecutrix in the FIR lodged by her on 13/7/2002 at 15.25 hrs. at Rejinagar Police Station is as follows:

On 2/1/2001 the accused (appellant) Habai Sk., a neighbour of the prosecutrix, came to her house during the absence of her family members and

committed rape on her. When the prosecutrix cried out, the accused pressed a cloth on her mouth and asked her not to disclose the incident to anyone

as he would marry her. Thereafter the accused had sexual intercourse with the prosecutrix on several occasions with the assurance that he would

marry her. On 10/5/ 2002 when the accused refused to marry the prosecutrix, she divulged the incident to her parents and the villagers pursuant to

which there was a village salish. The accused refused to abide by the decision of the salish and fled away which prompted the prosecutrix to lodge the

FIR.

On the basis of the FIR (exhibit 1), a proceeding being Rejinagar P.S. Case No. 64 of 2002 dated 13/7/2002 under section 376 IPC was initiated

against the accused. After due investigation charge-sheet was submitted against the accused under section 376 IPC. The trial Court framed the

charge for the offence punishable under section 376 IPC against the accused who pleaded not guilty to the arraignment and claimed to be tried.

In course of trial prosecution examined twelve witnesses. PW1 is the prosecutrix, PW2 is the mother of the prosecutrix, PW3 is a formal witness who

scribed the FIR as dictated by the prosecutrix, PW4 was the Headmaster of Takipur High Madrasah School where the prosecutrix was studying in

class VII at the relevant time. In his capacity as the Headmaster of the aforesaid school, this witness issued a certificate dated 1/4/2002 (exhibit 3) in

favour of the prosecutrix certifying therein her date of birth as 6/9/87 according to the entry in the admission register (exhibit 4) maintained by the

school in the official course.

PW5 is a co-villager who was called by the prosecutrix's father on 10/5/2002 and after hearing about the incident from the prosecutrix, he went to

the house of the accused/appellant who, according to PW5 admitted the factum of rape upon the prosecutrix but expressed his inability to marry her

as he was unemployed at that time. PW6 is the Medical Officer who medically examined the accused on 22/7/2002 and found him to be capable of

sexual intercourse. PW7 is another co-villager who was a member of the Gram Panchayat at the relevant time. PW7 testified regarding the fact that

he was called by the prosecutrix's father on 10/5/2002 and on reaching his house he found PW5, another panchayat member from CPM party

present there. PW7 testified that the prosecutrix narrated the incident to him

whereafter he and PW5 went to the house of accused but did not find him. According to PW7, even on subsequent occasions the accused was not available in his house when they went there.

PW8 was the Officer-in-Charge of Rejinagar P.S. at the relevant time who received the FIR from the prosecutrix and registered the case on the basis

thereof. He endorsed the case for investigation to S.I. Ujjal Kumar Dutta (PW11). PW10 is the Medical Officer who medically examined the

prosecutrix on 22/7/2002. PW11 is the Sub Inspector of police who held investigation and PW12 is the Judicial Magistrate who recorded the statement

of the prosecutrix under section 164 CrPC which has been marked exhibit 2/2. Besides the oral evidence of the witnesses referred, prosecution relied

upon several documents which were tendered in evidence.

Defence version is innocence, complete denial of the prosecution story and false implication of the accused. No evidence has been led in support of

the defence plea. Upon hearing the learned counsel for the parties and after perusal of the evidence on record the learned trial Judge found the

accused guilty of the offence punishable under section 376 IPC. He was accordingly convicted and sentenced as aforesaid.

Ms. Sinha, learned counsel appearing for the appellant argued that the inordinate delay in lodging the FIR has not been explained. It is pointed out that

the alleged incident occurred on 2/1/2001 but the prosecutrix disclosed the incident to her parents on 10/5/2002 when the accused allegedly refused to

marry her whereas the FIR was lodged on 13/7/2002 without any explanation accounting for such delay. Referring to the cross examination of the

prosecutrix wherein she admitted that she lodged the FIR against the accused so that he may marry her and she had demanded one lac twenty

thousand from the accused, learned counsel for the appellant sought to impress that the prosecutrix was a consenting party so the conviction of the

appellant for the offence of rape is not justified.

It has also been pointed out that the medical evidence of PW10 who examined the prosecutrix does not support the prosecution story of rape. It has

further been argued that the prosecutrix was not a minor at the time of the incident as contended by the prosecution in view of the fact that under the

Mohammedan Law a girl attains the age of majority on attaining puberty. According to the learned counsel for the appellant, the prosecutrix was not a

minor as she had attained puberty at the time of the incident. Another branch of argument is that the present case is an appropriate one for invoking

the proviso to section 376 IPC for imposing a lesser sentence considering the special reasons that the case is an old one and the fact that the appellant

married the prosecutrix during the pendency of the appeal and they have two children. To buttress her submission learned counsel for the appellant

placed reliance upon the case of Baldev Singh and others versus State of Punjab reported in 2012 (2) Supreme Court Cases (Cri) 706 and Ravindra

versus State of Madhya Pradesh reported in 2015(4) Supreme Court Cases 491.

It is well settled that in a case relating to sexual assault, mere delay in lodging the FIR does not render the prosecution version doubtful. Delay per- se

is not a mitigating circumstance for the accused where the offence of rape is involved. In the instant case the delay has been reasonably explained in

the FIR as well as in the evidence of the prosecutrix (PW1) who categorically stated that "there was delay in lodging the complaint on the ground

of village salish." PW1 did not disclose the incident to anyone since the accused promised to marry her.

On 10/5/2002 when the accused refused to marry her she disclosed the incident to her parents and to some villagers pursuant to which there was a

village salish. The evidence of the prosecutrix in this regard has been corroborated by PW5 and PW7 the two co-villagers and panchayat members

who were called by her father on 10/5/2002 to settle the matter. In normal course a victim of sexual assault is reluctant and hesitant to disclose an

incident of rape even to her family members much less before the police.

There is a tendency to conceal such an incident because it involves the reputation of the victim as well as the honour of the family. Therefore

prosecution version cannot be disbelieved on account of delayed FIR. It is equally well settled that the evidence of the victim of sexual assault is

entitled to great weight absence of corroboration notwithstanding. In the case of Om Prakash versus State of Uttar Pradesh reported in 2006 CRILJ

Supreme Court 2913 the Supreme Court held as follows in paragraph 13 of the judgment:

"13. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from

any other evidence including the evidence of a doctor. In a given case even if the

doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix.â??

The prosecutrix (PW1) recounted her ordeal in her evidence in the following manner which is quoted hereinbelow:

â??An occurrence of rape took place on 2.1.01 at about 7/7-30 PM inside our own house. At that relevant time my parents were not present in our house. Taking advantage of the absence of our parents, Habai Sk. of our village came to our house and called me as his sister and asked me where my parents were. I replied that my mother went to a different village and my father went to work as a labourer and did not yet return home. At that time I was sitting in our room and was engaged in reading my books.

At that time he entered my room where I was engaged in my studies and suddenly caught hold of me and removed my wearing apparels (Salowar and Kamij) from my body and he also removed his wearing pant and penetrated his penis into my vagina and started rubbing and ejaculated himself on my private parts Then I began to raise shout but I was prevented from shouting by gaging my mouth with a napkin and by giving me assurance that he would marry me and on that assurance of marrying me I did not raise any shout. He raped me in this way against my will. Since there after I did not disclose such occurrence to anybody as he assured to marry me and I concealed the matter from my parents. Thereafter on 10.5.02 he refused to marry me. Then I disclosed the incident of rape to my parents.â??

The prosecutrix withstood the test of extensive cross- examination. No dent could be made in her testimony which remained unscathed. Nothing could be elicited in the cross examination of PW1 to demolish her evidence. The defence plea of false implication does not appeal to reasoning. There was no apparent reason for a minor girl to falsely implicate the accused by putting her reputation at stake. Above all, it is incredible and improbable that the parents and relatives of a girl of tender age would bring dishonour to their family by inventing a false charge of rape against an innocent person.

The dispute raised regarding the age of the prosecutrix is also of no avail for the simple reason that in her evidence PW1 and her mother (PW2)

categorically asserted that at the time of the incident the prosecutrix was 13 ½ years old and was studying in class VII. Their evidence is

corroborated by exhibits 3 and 4 proved by PW4 who was the Headmaster of

Takipur High Madrasa School at Rejinagar where the prosecutrix was studying in class VII at the relevant time. Exhibit 3 is the certificate of age issued by PW4 on the basis of the date of birth of the prosecutrix as mentioned in the school admission register(Exhibit 4).

The date of birth of the prosecutrix as per entry in the admission register is 6/9/1987. Under the Mohammedan Law a girl becomes a major on attaining puberty which is presumed to be reached at the age of 15 unless there is evidence to show that puberty was attained earlier. In this context it is significant to refer to the cross- examination of PW1 wherein it has emerged that at the time of the occurrence her menstruation had not started. It is therefore evident that the prosecutrix was a minor at the time of the incident. The argument that the prosecutrix was a consenting party is wholly devoid of merit for the simple reason that a minor's consent if any, is of no consequence.

The residual point for determination is whether it is a fit case for invoking the proviso to section 376 IPC (as it stood prior to its amendment by Act 13 of 2013) for imposing a lesser sentence for "adequate and special reasons". In Baldev Singh's Case (Supra) the appellants were convicted under section 376(2)(g) and section 342 IPC and sentenced to ten years rigorous imprisonment and to pay a fine of Rs. 1000/- each and the sentence was upheld by the High Court. On appeal before the Supreme Court an application on affidavit was filed stating that the appellants and the prosecutrix are married (not to each other) and the prosecutrix has two children. The parties want to finish the dispute, having entered into a compromise and that the appellants may be acquitted. Considering the aforesaid aspects the Supreme Court held as follows in paragraph 4 of the judgment:

"4. Section 376 is a non compoundable offence. However, the fact that the incident is an old one, is a circumstance for invoking the proviso to section 376(2) (g) and awarding a sentence of less than 10 years, which is ordinarily the minimum sentence under that provision, as we think that there are adequate and special reasons for doing so."

In the same context in Ravindra's case(Supra) the Supreme Court observed that the case of the appellant is a fit case for invoking the proviso to section 376 for awarding lesser sentence as the incident is 20 years old and the parties are married (not to each other) and have entered into a

compromise, are adequate and special reasons. The relevant paragraphs 17 and 18 of the judgment in Ravindra's case reads as follows:

17. This Court has in Baldev Singh v. State of Punjab, invoked the proviso to section 376(2) IPC on the consideration that the case was an old

one. The facts of the above case also state that there was compromise entered into between the parties.

18. In light of the discussion in the foregoing paragraphs, we are of the opinion that the case of the appellant is a fit case for invoking the proviso

to Section 376(2) IPC for awarding lesser sentence, as the incident is 20 years old and the fact that the parties are married and have entered into a

compromise, are the adequate and special reasons. Therefore, although we uphold the conviction of the appellant but reduce the sentence to the

period already undergone by the appellant. The appeal is disposed of accordingly.

In the present case the incident occurred more than 16 years ago. A supplementary affidavit affirmed by Hasina Bibi has been filed on behalf of the

appellant stating that during the pendency of this appeal the appellant married the prosecutrix in the year 2009 and their marriage was registered on

10/9/2009. In support of such contention a copy of the marriage registration certificate has been produced. It has also been averred in the

supplementary affidavit that out of the wedlock the prosecutrix gave birth to two children in the year 2011 and 2013. A copy of the birth certificate of

the son Raj Rahaman and daughter Muskan Parvin have been brought on record to substantiate such contention.

It has further been stated in the supplementary affidavit that Hasina Bibi is residing in her matrimonial home with her husband and children. The fact

that the prosecutrix and the appellant are married (to each other) and have settled in life with their children appears to be adequate and special

reason for imposing lesser sentence. Considering the facts and circumstances hereinabove discussed and in view of the aforesaid decisions, I am of

the opinion that the present case is an appropriate one for invoking the proviso to section 376 IPC for imposing lesser sentence.

For the reasons aforesated, although the conviction of the appellant is upheld, the sentence is reduced to the period already undergone by the

appellant. The appeal is thus disposed of. Lower court records along with a copy of this judgment be sent down to the trial court. Urgent photostat

certified copy of this judgment, if applied for, be furnished to the applicant upon compliance of requisite formalities.