
(2018) 07 CAL CK 0023
In the Calcutta High Court
Case No : C.R.A. 151, 188 of 2014

Jyotish Bhowmick, Jyotish Chandra Bhowmik	APPELLANT
Vs	
State Of West Bengal & Ors.	RESPONDENT

Date of Decision : 05-07-2018

Acts Referred:

Indian Penal Code, 1860 — Section 376(2)(g)
Code Of Criminal Procedure 1973 — Section 164, 428

Citation : (2018) 07 CAL CK 0023

Hon'ble Judges : JOYMALYA BAGCHI, J;RAVI KRISHAN KAPUR, J

Bench : Division Bench

Advocate : Sekhar Basu, Sandipan Ganguly, Kusal Pal, Saswata Gopal
Mukherjee, Sanjay Banerjee

Final Decision : Dismissed

Judgement

Joymalya Bagchi, J.

By consent of the parties CRA 188 of 2014 is treated as on day's list and taken up for hearing. Both the appeals are heard analogously and are

disposed of by a common judgment and order. Both the appeals are directed against the judgment and order dated 06.01.2014 and 09.01.2014 passed

by the learned Additional Sessions Judge, 2nd Fast Track Court, Raiganj, Uttar Dinajpur in S.T. Case no. 52 of 2012 convicting the appellants for

commission of offences punishable under Sections 376(2)(g) of the Indian Penal Code and sentencing the appellants to suffer rigorous imprisonment

for twelve years each and to pay a fine of Rs.20,000/- each in default to suffer simple imprisonment for six months more.

Prosecution case, as alleged, against the appellants is to the effect that on 26.02.2012 the victim had been taken by appellant Jyotish Bhowmick whom

she affectionately, referred to as â??Daduâ?? from Karnojora Kalibari Bazar and on that night she was raped by him and the other two appellants,

namely, Anil Saha and Sanjit Saha in an empty field near Bogram Pati Mill. In the early hours of the next day, the appellants left her at Siliguri More.

She took refuge in her Auntâ??s house at Hemtabad. She telephoned her father and informed him of her misfortune. After she returned home in the

evening, her mother Sabita Das, P.W.1 lodged written complaint being Raiganj P.S. Case No.184 of 2012 dated 29.02.2012 under Section 376(2)(g)

IPC against the appellants. It is also pertinent to note as the victim had gone missing, in the morning of 27.02.2015, her mother had lodged a missing

diary. In the course of investigation, appellants Sanjit Saha and Anil Saha were arrested. Victim, P.W.2 identified the said appellants in the course of

T.I. Parade.

In conclusion of investigation, charge sheet was filed against the appellants under Sections 376(2)(g) of IPC. The case was committed to the court of

sessions and transferred to the court of Additional Sessions Judge, 2nd Fast Track Court, Raiganj, Uttar Dinajpur for trial and disposal. Charge was

framed under section 376(2)(g) IPC. The appellants pleaded not guilty and claimed to be tried. In the course of trial, the prosecution examined 12

witnesses to establish its case and exhibited a number of documents.

The defence of the appellants was one of innocence and false implication. In conclusion of trial, the trial court by the impugned judgement and order

dated 06.01.2014 & 09.01.2014 convicted and sentenced the appellants, as aforesaid. Mr. Sekhar Kumar Basu along with Mr. Sandipan Ganguly,

learned senior advocates appearing for the appellant namely, Jyotish Bhowmick @ Jyotish Ch. Bhowmick in CRA 151 of 2014 argued that the

prosecution case as narrated by PW2 (victim) suffers from various inconsistencies and does not inspire confidence. It is unclear as to why PW2 did

not raise any objection when she was taken by the appellant namely, Jyotish Bhowmick @ Jyotish Ch. Bhowmick and was kept waiting at Raiganj

railway station. It is also submitted that the conduct of the victim after the alleged occurrence raises doubt as to the truthfulness of the prosecution

case. They seriously doubted the prosecution case on the score of non-production of missing diary lodged by PW1 prior to registration of FIR. They

also submitted that the conduct of the father of the victim (PW3) in not reporting

the incident to the police on 26.02.2012 raises doubt about the authenticity of the prosecution case. Non-examination of the aunt in whose house the victim had first taken refuge adversely affects the unfolding of the prosecution case. Age of the victim has also not been proved beyond reasonable doubt. No ossification test was conducted. Drawing my attention to the medical evidence of PW2 it is submitted as there were no injuries on the back of the victim, it is highly unlikely that she had been ravished by three men in a rough field. It was also argued that the vaginal swab did not contain spermatozoa improbabilising the case of rape. Date of occurrence is incorrectly recorded in the history of assault recorded by P.W.4. Deficiencies in investigation like failure to send wearing apparels of the victim for FSL examination was also canvassed. Hence, it was submitted that the appeal be allowed.

Mr. Kushal Pal, learned advocate appearing for the appellants in CRA 188 of 2014 adopted the submissions of Mr. Basu. He further submitted that

the victim P.W.2 did not state to the police the features of the appellants Sanjit and Anil and therefore, their identification during TI Parade and in

court is highly improbable. Test Identification Parade was conducted belatedly and suffers from various infirmities. Furthermore, the Investigating

Officer (P.W.12) stated that the victim had told him that she had met the other appellants, namely, Sanjit and Anil while she was returning from the

field. Hence, the appellants could not have ravished her and are liable to be acquitted.

On the other hand, learned Public Prosecutor with Mr. Sanjay Banerjee, learned advocate appearing for the State submitted that the evidence of

P.W.2 establishes a close and trusting relationship between her and the appellant, Jyotish Bhowmick @ Jyotish Ch. Bhowmick whom she

affectionately referred to as 'dadu'. Jyotish took the victim away and thereafter sexually exploited her along with the other two appellants in

CRA 188 of 2014. Narration of P.W.2 with regard to the incident of rape upon her is corroborated by the medical evidence of P.W.4, K.C Banerjee

who noticed extensive injuries in her private parts. Nonproduction of the missing diary does not militate against the genuineness of the prosecution

case as the FIR was promptly recorded on the return of the victim and in view of the fact that the victim had been advised to wash herself by her

father (P.W.3) prior to medical examination, absence of spermatozoa does not improbabilise the act of forcible rape which is wholly corroborated by

injuries found in her private parts. He also submitted that non-examination of aunt does not affect the unfolding of the prosecution case which is fully

established through the deposition of the victim and her parents as well as the medical evidence. Hence, the appeals are liable to be dismissed.

P.W.2 is the victim and the most vital witness in the instant case. She deposed that six months ago an incident occurred. She had gone to Karnojora

Kalibari Bazar which is near to our house to purchase some articles. At the market she met Jyotish Bhowmick who asked her to accompany him. She

accompanied Jyotish Bhowmick who took her to Raiganj Railway Station. Jyotish was known to her and used to fondly refer to him as 'Dadu'.

At the railway station, Jyotish threatened her that if she raised her voice, he would kidnap her and sell her to another person. Around 11.00 P.M. he

took her by a rickshaw to Siliguri More. Then he took her to Bogram from Siliguri More on foot. They reached a lonely field on the western side of

Bogram. He received a phone call on his mobile. After that two persons came to the spot. Jyotish along with the two persons raped her. She did not

know the name of the persons. At 4.00 A.M. she was taken to Siliguri More by foot. The miscreants threatened her with dire consequences and left

her there. She went in an auto to Hemtabad and took refuge in the house of a known person whom she referred to as 'Kakima'. She did not

disclose the incident to her Kakima. She telephoned her father and narrated the incident to him. Her father asked her to return home. After returning

home, she narrated the entire incident to her parents. She was produced before the Magistrate. She made a statement. She was also taken to Raiganj

Hospital. She went to Raiganj District Correctional Home and identified the appellants, Sanjit and Anil. She proved her signature on the statement

made before the Magistrate. She identified all the appellants in Court.

In cross-examination, she stated that her father's native place was in Bangladesh. After coming from Bangladesh, her father initially resided at

Kanki and thereafter at Karnojora. She did not know the name of Kakima. She noticed police personnel in the platform. Some trains crossed the

station while she was at the platform. The persons who came to the place of occurrence were wearing winter garments including muffler. She was

admitted to Class-V of Karnojore High School by Bablu Prodhan.

P.Ws.1 and 3 are the parents of the victim. P.W.1, Sabita Das is the mother of the victim and the defacto complainant in the instant case. She

deposed that the victim was 13 years of age. They are 'Dhopa' (Washermen) by profession. On 26.2.2012 her daughter went to purchase

something at Karnojore Kalibari Bazar. Jyotish called her daughter and asked her to accompany him. He took her to Raiganj Railway Station. She

came to know of such fact from her daughter. Thereafter, she could not trace her daughter and lodged a missing diary. On 27.2.2012 at 4.00 P.M. her

daughter came back. Her wearing apparels were stained with blood. She told that she had been ravished in a field at Bogram.

Jyotish had gifted her a mobile which was purchased at Raiganj. Before she returned home, she had informed over telephone from Hemtabad that she

was finished. Over the incident, P.W.1 lodged complaint, Ext.1. In cross-examination, she deposed that she could not recollect who made arrangement

to procure birth certificate of her daughter. She did not know the Kakima of Hemtabad. Her daughter was admitted for the first time at Barogonda

Primary School. P.W. 3, Nirmal Das, is the father of the victim. He stated that he is a washerman. On 26.02.2012 he came back from work and did

not find his daughter in the house. They informed Karnojora O.P. and on 27.02.2012 at 3/4 p.m. he received a phone call from his daughter who

stated her misfortune and further stated that she would be unable to show her face to anyone. When she returned, her wearing apparels were full of

mud and stained with blood. He asked her to take a bath. Her daughter narrated the incident to him. In crossexamination, he stated that he went to

Karnojora O.P. and narrated everything. But police did not accept diary on that day as there was bangla bandh.

On 27.02.2012 they lodged missing diary around 10/11a.m. Diary was lodged by P.W.1, Sabita Das. He identified the wearing apparels of his

daughter in Court as material exhibit nos. 1, 2 and 3. The said articles had been seized by the police under a seizure list and had he put his signature

thereon. In cross-examination, he stated that the name of the husband of kakima is Nirmal Mondal. Nirmal had a laundry which had been purchased

by him. His daughter was admitted to a school at Barogonda Kalibari School. After migrating from Bangladesh they stayed at Kanki and therefrom

they came to Raiganj. He could not say how birth certificate of his daughter was procured. Nirmal Mondal had his laundry at Hemtabad. P.W. 4 is

the medical officer attached to Raiganj District Hospital. On 29.02.2012 he examined Nipa Das and found the following injuries:-

Hymen was found torn, tender, red and bleeding was present during examination. P.W.4 collected vaginal swab and sent the same for Pathological examination and also advised for Ossification Test of the victim. He opined that sexual intercourse might have taken place. He proved his report (Ext.

4). In cross-examination, he stated that the injuries found by him might have occurred not more than seven days from the date of examination. He also deposed that if a person was subjected to forcible intercourse in a field by a number of persons some injuries may occur on the back side of the victim.

P.W. 10, Raj Kr. Naiya, was a judicial Magistrate who recorded the statement of the victim under Section 164 of the Code of Criminal Procedure. He

proved the statement marked as exhibit 21. The said Judicial Magistrate also held test identification parade of the appellant Sanjit Saha at Raiganj

District Correctional Home P.W.2 identified the said appellant. He proved the test identification parade marked as exhibit 8. P.W. 11, Sumana Gorai,

another judicial officer conducted the test identification parade of the appellant Anil Saha and deposed P.W.2 had identified the suspect. He proved

the TI Parade report marked as exhibit 9.

P.W. 12, Manoj Kumar Jha, is the investigating officer in the instant case. He drew up the formal FIR (Exbt.8). He went to the place of occurrence

and prepared sketch map (Exbt.9) with index (Exbt.9/1). He seized the wearing apparels of the victim (Exbt.3/1). He also seized the birth certificate

of the victim on 2.3.2012. He proved the seizure list (Exbt.10). He arranged TI Parade of the accused Sanjit and Anil. He collected the TI Parade

reports as well as statement of the victim recorded under Section 164 Cr.P.C. He filed charge sheet. In crossexamination, he stated that he went to

Hematabad to search out the said Kakima and met her. As she did not cooperate with him he did not name her as witness. He did not conduct

ossification test of the victim as he had collected birth certificate of the victim. He did not make any enquiry at Raiganj railway station whether the

victim was waiting for 4/5 hours at the railway station on the date of incident.

The victim did not state to her that Jyotish received a phone call while they were in a field near to Bogram Pati Mill. Bogram Pati Mill is situated at a distance of 75 meters from Raiganj-Karnajora highway. Place of occurrence is situated at 50 meters from the boundary of Bogram Pati Mill. These are the evidence on record.

Evidence of the victim (P.W.2) has been seriously challenged on the ground that she had remained silent while she had been taken away by Jyotish and was kept waiting at Raiganj railway station. Learned Senior Counsel for the appellant submitted that the victim could have protested or run away from the railway station. Most strangely, she kept quiet and did not raise any protest although she had been kept waiting at a public place against her will. Such conduct of the victim militates against the truthfulness of the prosecution case that she had been detained at the Raiganj railway station by threats and thereafter raped. Her version of gang rape in a field near Bogram Pati Mill is also at variance to the medical evidence of P.W.4 who did not find any external injury on her back. It was also argued that no spermatozoa was found in the vaginal swab improbabilising the charge of rape.

The genesis of the prosecution case suffers a jolt as the identity of Kakima in whose house the victim had initially taken refuge has not been disclosed nor the said Kakima was examined in Court. General diary lodged by PW 1 has also not been produced in Court. Hence, the version of the victim is highly improbable and in the face of such infirmities in the prosecution case ought not to be believed.

In the face of such stringent criticism of the victim's version, I have chosen to examine it with meticulous scrutiny. It is true that her exact age has not been medically ascertained as no ossification test was held. Though P.W.12 claimed that he seized the school certificate of the victim but such school certificate does not appear to have been proved in accordance with law. Apart from the evidence of her parents who deposed that the victim was aged about 13 years there is no contemporaneous school records or medical opinion to establish the exact age of the victim. However, it is undeniable that the victim was a young school going teenager at the time of occurrence. She was known to the appellant Jyotish whom she affectionately referred to as 'Dadu'. From the tenor of her deposition it is clear that the victim reposed great trust and faith on the said

appellant. Taking advantage of such trust reposed on him, the appellant Jyotish on the fateful day, that is 26.2.2012 took away the victim from

Karnojora Kali Bari and kept her waiting at Raiganj railway station.

Thereafter, he took her to Siliguri More by auto and thereafter by walking they reached a deserted field near Bogram Pati Mill where she was

ravished by all the appellants. Her evidence has been criticized that she did not raise protest while she was waiting at Raiganj railway station or while

travelling down the road in an auto or on foot. We cannot be unmindful of the fact that the victim girl was a young school going girl and was

accompanied by an elderly person, i.e., Jyotish whom she addressed as her own grandfather. Hence even if the victim had felt uncomfortable and

suspicious of the intentions of the said appellant she did not muster up enough courage to raise protest and cowered to his threats until the most

devastating incident befell her. Judging her evidence from this perspective, I am loathe to disbelieve her on the ground that she did not raise protest

when Jyotish took her to a deserted field and ravished her with the other appellants. On the other hand, the relationship between Jyotish and the

victim, in fact, probablises her helpless surrender to the dictates of Jyotish although she might have felt uncomfortable due to such conduct.

Coming to the act of rape upon the victim I find her version has been corroborated by the medical evidence of P.W.4 who found extensive injuries in

her private parts. My attention was drawn to the fact P.W.4 had recorded in the Ext.4 (injury report) that the victim was bleeding from 25.02.2012

due to sexual intercourse. In all probability the recording of the date of incident as 25.02.2012 appears to be a slip of the pen on the part of the P.W.4

as it is nobody's case that the victim missing on 25.02.2012 or that she had been ravished on that date. On the other hand, P.W.4 found extensive

injuries in her private parts which he opined were due to sexual intercourse. Hence, mere absence of injuries on the back of the victim or absence of

sperms in the vaginal swab (which may have occurred due to the delayed examination of the vaginal swab or the bathing of the victim prior to the

medical examination on the advice of her father, P.W. 3.) does not in my considered opinion militate against the prosecution case that the victim was

forcibly gang raped by the appellants. Evidence of the victim (P.W. 2) has been duly corroborated by her parents P.W. 1 and 3. Their depositions

have been criticized on the score that they had not taken any step on the day on which the victim went missing. P.W. 3 has explained the situation and

deposed although they went to Karnojora Out Post on 26.02.2012 to lodge complaint but since there was a general strike the police officers were busy

with law and order duty and did not register a missing diary.

However a missing diary was registered on the next date i.e. 27.2.2012 at 10/11 A.M. It is argued that such missing diary has not been produced. I

am of the opinion that non-production of the said missing diary does not militate against the prosecution case as FIR in the instant case was promptly

lodged immediately upon the return of the victim to the residence completely ruling out the possibility of false implication of the appellants or

concoction of a false case against them. Non-examination of Kakima in whose house the victim initially took refuge also in my opinion does not affect

the unfolding of the prosecution case. P.W. 2 has graphically narrated the incidents as they unfolded on the fateful night and thereafter. After being

raped she had been abandoned by the appellants at Siliguri More. Somehow she reached Hemtabad and took refuge at the residence of her Kakima.

Although she could not tell her name but her father (P.W.3) deposed that he knew her husband, Nirmal. She telephoned her father from the said

residence and informed him that severe misfortune had befallen on her. Such version of P.W.2 remains unsullied in spite of lengthy cross-examination.

P.W.12 (I.O) deposed that he had interviewed Kakima but did not cite her as a witness as she did not co-operate. In the face of the consistent

evidence of P.W.2 which is corroborated by her parents and medical evidence, non-examination of the Kakima for reasons as narrated by the I.O

(P.W.12) does not render the prosecution case unreliable.

Identification of the appellants Sanjit and Anil has been doubted as the victim did not narrate their facial features to the police. Evidence on record

unequivocally shows that shortly after their arrest the appellants were identified in the course of T.I. Parade. This is a case of gang rape where the

victim was raped by all the appellants. It is most likely that a woman who has been subjected to such brutal sexual assault will not forget the physical

features of a man whom she sees at close range when he violated her. Appellant, Sanjit Saha has not even raised any protest with regard to his

identification during T.I Parade although Anil Saha claimed that he was shown to

the victim earlier. However, such plea has not been probalised by way of cross-examination of the witnesses, particularly the victim or the Investigating Officer (P.W.12) by the said appellant.

In the light of the aforesaid discussion, I am of the opinion that the identity of the appellants has been established beyond reasonable doubt. It has been argued that P.W.12 (Investigating Officer) deposed that the victim told him that she had seen the said appellant while returning from the field. One has to appreciate the evidence of the victim as a whole and if such version of P.W.12 is judged from that perspective it merely corroborates their presence even after the occurrence but does not improbabilise their participation in the brutal act of rape upon the victim which is wholly established from the entire evidence on record.

Evidence on record leaves no doubt in my mind that the victim (P.W.2) had been subjected to brutal rape by the appellants on the night of 26.2.2012 in a field near Bogram Pati Mill. Victim has categorically stated that she was forcibly raped. Her version is not only corroborated by her parents but also by the extensive injuries found in her private parts. Her conduct in accompanying the appellant, Jyotish Bhowmik to the place of occurrence without demur is not unnatural as the said appellant was known to her from before and upon whom she reposed utmost trust and used to affectionately refer to him as â??daduâ??.

Under such circumstances, I have no doubt in my mind that the victim had been subjected to gang rape by the appellants in the manner and course as proposed by the prosecution. Convictions of the appellants are, accordingly, upheld. Coming to the sentence imposed on the appellants, I find that the appellants do not have criminal antecedents. Accordingly, I am inclined to reduce the sentence imposed on them and I direct that they shall suffer rigorous imprisonment for ten years each and pay a fine of Rs.20,000/-each, in default, to suffer simple imprisonment for six months more.

With the aforesaid modification as to sentence, the appeals are dismissed. The bail bonds of the appellants, namely, Anil Saha and Sanjit Saha are cancelled and they are directed to surrender forthwith before the trial court and serve out their respective sentences failing which the trial court shall issue appropriate processes for execution of the sentence in accordance with law. The period of detention suffered by appellants during investigation,

enquiry or trial shall be set off under Section 428 of the Code of Criminal Procedure. Copy of the judgment along with LCR be sent down to the trial court at once for necessary compliance. Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.