
(2011) 07 CAL CK 0053
In the Calcutta High Court
Case No : C.R.A. No. 377 of 2008

Kashmir Sk. @ Sk. Kashmir

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 29-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Evidence Act, 1872 — Section 77
Penal Code, 1860 (IPC) — Section 376, 493, 90
Probation of Offenders Act, 1958 — Section 4

Citation : (2011) 07 CAL CK 0053

Hon'ble Judges : Syamal Kanti Chakrabarti, J

Bench : Single Bench

Advocate : Himangshu De, for the Appellant; Alope Roy Chowdhury, for the Respondent

Final Decision : Allowed

Judgement

Syamal Kanti Chakrabarti, J.—The present appeal is directed against the order of conviction dated 26.05.2008 and sentence dated 27.05.2008 passed by the learned Additional Sessions Judge, Fast Track Fifth Court, Malda in Sessions Case No. 51 of 2007 (Sessions Trial No. 27(2) of 2007). By such order the learned Additional Sessions Judge has convicted the Appellant Kashmir Sk. @ Sk. Kashmir u/s 376 IPC and sentenced him to suffer rigorous imprisonment for seven years and to pay fine of Rs. 1,000/-, in default to suffer simple imprisonment for three months.

2. The prosecution case in short is that on 05.10.2005 at about 8 p.m. one Rahima Khatun, minor sister of the complainant Md. Harun Sheikh went outside to attend nature's call while accused Kashmir Sheikh took her to a desolate place and committed rape upon her with a promise of marrying her. Thereafter, he took her to another married sister of the complainant namely, Anguri Bibi in Milki and then fled away. Over the issue there was a Salish in the locality. But the accused refused to accept the verdict of the Salish. On the basis of such complaint, the

case was initiated being No. EBPS Case No. 500 of 2005 dated 12.10.2005 under Sections 493/376 IPC which resulted in filing of charge-sheet on 03.04.2006. Charge was accordingly framed u/s 493/376 IPC, read over and explained to the accused who pleaded not guilty. The prosecution has tendered 13 witnesses and adduced and exhibited nine documents to prove the case while no defence witness has been tendered. The defence case appears to be a denial of the above allegation.

3. From the impugned judgment of the learned Trial Judge it appears that he has carefully examined the testimony of all the 13 witnesses tendered by the prosecution along with the documents exhibited in this case.

4. PW 1, Md. Harun Sk. is the de facto complainant who has reiterated the allegations made in the FIR (Exhibit 1). PW 2, Anguri Bibi is the elder sister of the victim Rahima Khatun. She has corroborated the allegation of rape as well as the incident of local Salish over the issue in presence of co-villagers. PW 3, Rahima Khatun, is the victim. In her statement she has claimed that on the date of occurrence she was forcibly caught hold by the accused person who proposed to marry her but she asked to inform his parents but the accused declined. From her testimony it also transpired that the accused was previously not known to her. She has categorically stated that the accused committed rape upon her by removing her wearing apparels forcibly in the said garden behind their house where she went to attend nature's call. Thereafter, the accused took her to her elder sister's house (PW 2) on the plea of marrying her. On arrival the accused asked the PW 2 to arrange for marriage and to call a Moulabi. When her elder sister's husband went to call Moulabi, the accused went outside with torch light and a badnion the plea of attending nature's call and fled away. On the next morning her elder sister took her to her father's house and reported the incident to her parents and brother. She also corroborates the attempt to settle the dispute through local Salish which yielded no result so the matter was reported to police. In her statement recorded u/s 164 Code of Criminal Procedure (Exhibit 2) she has reiterated the same incident. PW 4, Dr. Kalyan Mishra examined the victim on 14.10.2005 and found absence of hymen from which it could be presumed that the girl has experienced sexual intercourse (Exhibit 4). PW 5, Piaru Sk. has admitted the holding of a Salish in 2005 over the incident at the instance of Aruf Sk., father of the victim Rahima Khatun and also claims that in such Salish accused confessed his guilt and agreed to marry Rahima but on condition that her father will have to pay a sum of Rs. 40,000/- in cash and a piece of land measuring 2 cottahs to the accused. As the poor father of the victim could not concede to such demand, no decision was arrived at in such Salish. He has also averred that at the time of occurrence the victim was about 14/15 years old. PW 6, Abdul Kuddus has corroborated PW 5. It also appears that PW 7, Aatur Sk. and PW 8, Sattar Sk. have been declared hostile. PW 9 Aruf Sk. is the father of the victim who has also corroborated the prosecution case. PW 10, Dr. P. B. Roy conducted Ossification Test (Exhibit 3/1) of the victim and assessed her age as 16 years + 2 years. PW 11, Dr. Debnath Sarkar conducted

the capability test of the accused and prepared a report accordingly which has been marked as Exhibit 5. PW 13, SI, Atreyi Sen is the IO in this case who conducted the investigation, proved the FIR (Exhibit 6), Rough Sketch Map with Index (Exhibit 7), Seizure List in respect of the vaginal swab of the victim (Exhibit 8) and Seizure List in respect of seizure of semen of the accused (Exhibit 9).

5. While examining the evidentiary values of all the aforesaid oral testimonies and documentary evidence on record the learned Trial Court has carefully considered that the testimony of the prosecution witness excepts P Ws 7 and 8 have not been shaken in their cross-examination and credibility of their evidence was beyond all reasonable doubt. The conviction is accordingly based on unimpeachable testimony of aforesaid witnesses.

6. According to the learned Trial Judge the delay in reporting of the incident of 05.10.2005 to the local police station on 12.10.2005 is justified and properly explained in view of local Salish conducted by the affected parties during the intervening period. Regarding age of the victim defence contention is that the FIR-maker has not stated before the Court that the victim was below 16 years of age at the relevant time. PW 5, Piaru Sk. and PW 9, Aruf Sk. who have averred that at the time of occurrence the victim was 14 years old could not tell the exact date of birth of the victim. But the learned Court has relied upon the testimony of the father of the victim, PW 9 who claimed the age of his daughter as 14 years at the time of commission of the offence. Learned Court below has rightly found corroboration of such oral testimony in the Ossification Test report of the victim (Exhibit 3/1) conducted by PW 10, Dr. P. B. Roy. Therefore, discarding the variation of the age of two years on the upper side the learned Trial Court has rightly arrived at a decision that the victim was a minor at the time of alleged offence.

7. Therefore, the alleged offence of rape will come under the purview of 6th Clause of Section 375 IPC. In this connection the learned Trial Judge has considered a document, though not exhibited, i.e., birth certificate issued by Sub-Registrar of Birth and Death, Fulberia Gram Panchayat, English Bazar Block issued on 19.06.2007 as a public document which was produced by the learned Public Prosecutor-in-Charge at the time of argument from which it transpired that the date of birth of the victim is 2nd February, 1991. There is no legal bar to accept such a public document without proof in terms of Section 77 of the Evidence Act. Therefore, after due consideration of the testimony of PW 5, Piaru Sk. statement of the victim herself, her Ossification Test report and the above public document the learned Trial Judge has rightly held that the victim was below 16 years of age at the time of the offence.

8. Before the learned Trial Judge the defence had taken the plea that the victim was a consenting party to the alleged offence with the expectation of her marriage with the accused. Therefore, the alleged conduct cannot be treated as an offence of "rape" within the meaning of Section 375 IPC. While discussing the

issue the learned Trial Judge has also carefully considered this aspect. He has observed that in course of cross-examination no question was put to the victim (PW 3) as to whether there existed any love affairs between her and the accused in course of her cross-examination. She has categorically denied this in chief and claimed that on the date of occurrence while she went outside their house to attend nature's call at the night she was forcibly caught hold by the accused and when the accused proposed to marry her she asked him to inform his parents but the accused declined to pay any heed to it and forcibly committed rape upon her. She has also claimed in chief that the accused was not earlier known to her and this has not been contradicted in cross. Her oral testimony was also corroborated by her statement u/s 164 of the Code of Criminal Procedure on the same line. Therefore, it is proved beyond doubt that the alleged offence was committed without any tacit consent of the victim.

9. On the above context the statement of the victim recorded by PW 11, i.e, the IO to the effect that the victim stated before the police that she had love affairs with the accused, could not be beyond doubt because none of the neighbours had corroborated such claim. Moreover, in his cross-examination u/s 313 Code of Criminal Procedure accused has not taken any such plea. In answer to question No. 3 he has admitted that he knew the victim but simply denied that allegation of rape and subsequent holding of Salish claimed by the prosecution witnesses. Even in answer to question No. 18 he has denied that he committed the offence after promising that he would marry the victim.

10. In the above context learned lawyer for the Appellant submits that in the instant case charge was framed u/s 493/376 IPC but the accused was convicted only u/s 376 IPC. So there is no promise to marry and no misconception of fact. From the medical report it will appear that the victim was capable of sexual intercourse and she was a grown up girl of 16 years at the time of the offence. According to him, it is the sexual intercourse with consent. This should be treated as a mitigating circumstance justifying at least reduction of the sentence, if not guilt, since the convict is now languishing in jail and has for about four years including remission out of the total period of sentence of seven years. He has referred to and relied upon the decisions reported in:

i) 1984 Cri.L.J. Cal 1535

(Jayanti Rani Panda v. The State);

ii) 1990 Cr.L.J. (Cal) 650 (Para 4 and 6)

(Hari Majhi v. The State);

iii) 2003 SCC (Cri) 775 (Paras 16 and 21)

(Uday v. State of Karnataka) and

iv) 2004 Cri L.R (Cal) 945 (Paras 2, 8, 12, 13, 14 and 15)

(Krishnapada Mahato v. State).

11. The principle laid down in Jayanti Rani Panda Vs. State of West Bengal and Another, deals with misconception of fact and consent of sexual intercourse on promise of marriage. In the said case it has been held that the valuation to keep the promise on a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the fact itself. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability upon the accused. The facts of the above case are quite different from the alleged occurrence as discussed above and as such I hold that the above principle will not be applicable in the instant case. On the same ground the principle laid down in Hari Majhi Vs. The State, and 2004 Cri.L.R. Cal 945 are not applicable in the instant case.

12. Therefore, I do not find any illegality or infirmity in the findings of the learned Trial Judge in convicting the accused u/s 376 IPC.

13. The offence of 493 IPC deals with cohabitation caused by a man deceitfully inducing on plea of lawful marriage. In the concluding part of his judgment the learned Trial Judge has rightly held that though charge has been framed u/s 493 IPC the accused cannot be held liable u/s 493 IPC since charge u/s 376 IPC has been proved against him. Therefore, he has only convicted the accused u/s 376 IPC and by necessary implication acquitted the accused of the charge u/s 493 IPC though not specifically mentioned in the ultimate order of conviction.

14. Considering all these aspects I hold that the impugned order of conviction passed by the learned Trial Judge does not call for any interference except specific mention of acquittal of the charge u/s 493 IPC.

15. So far as the sentence is concerned, I find that the learned Trial Judge has held that in view of gravity of the offence the convict is not entitled to get any benefit of Section 4 of the Probation of Offenders Act and there is no scope for considering the offence leniently. Therefore, he has sentenced the convict to suffer rigorous imprisonment for seven years and to pay fine of Rs. 1,000/-, in default to suffer simple imprisonment for three months. He has not considered the age, antecedents and other mitigating factors which should be taken into account before imposing penalty. From the examination u/s 313 Code of Criminal Procedure it appears that the convict was about 22 years old on the date of his examination on 12.03.2008 and actually about 19 years old at the time of commission of the offence on 05.10.2005. From the prosecution evidence no previous conviction has been proved against him. Obviously this is the first offence committed at the tender age of nineteen years.

16. In the FIR the brother of the victim has claimed that tempting his sister of marriage the accused committed rape upon her on 05.10.2005. In her statement u/s 164 Code of Criminal Procedure the victim also admitted that before and

after commission of the offence accused wanted to marry her and dragged her to her sister's house (PW 2) after rape intending to marry her and also expressed his desire to PW 2 and to call Moulabi for the purpose. What appears to me is that the commission of alleged offence was made not with the sole intention of ravaging the body and soul of the victim for which such type of offence is to be dealt with seriously. After the commission of the offence the accused brought the victim to her sister's house with the intention to marry her which according to the near relations of the victim was subsequently denied on account of failure of the parent of the victim to concede to the demand of dowry made by the convict at the time of Salish in presence of co-villagers. This in my view is a mitigating factor for which the convict does not deserve extreme or harsher penalty. Honesty of his purpose was initially reflected in his conduct. Immediately after the offence he has not tried to escape from the place of occurrence and never intended to conceal his guilt rather intended to accept the consequences of such offence and to give marital status to the victim. His participation in subsequent Salish lends a support to such contention. Therefore, instead of long incarceration he should be inducted in the main-stream of the society as early as possible regard being had to the reformatory aspect of punishment as its beneficial object.

17. For the reasons stated above I hold that the sentence should be reduced from seven years rigorous imprisonment to five years rigorous imprisonment with fine of Rs. 1,000/-, in default to suffer simple imprisonment for one month more with the benefit of set off and remission as per rules and this reduced sentence will meet the ends of justice. Therefore, the appeal is partly allowed upholding the conviction u/s 376 IPC with further modification that the accused is not found guilty of the offence punishable u/s 493 IPC and he is accordingly acquitted of the charge. The period of sentence is reduced from seven years to rigorous imprisonment for five years with fine of Rs. 1,000/-, in default to suffer simple imprisonment for one month more with the benefit of set off and remission as per rules.

18. Return the LCR with a copy of this order to the learned Trial Court at once.

19. Urgent certified photocopies of this order, if applied for, be supplied to the parties, on compliance of all requisite formalities.