
(2022) 12 CAL CK 0032
In the Calcutta High Court
Case No : Criminal Appeal No. 264 Of 2021

Maradona Seikh @ Mara Sk.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 14-12-2022

Acts Referred:

Indian Penal Code, 1860 — Section 376, 511

Code Of Criminal Procedure, 1973 — Section 161, 164, 313, 428

Citation : (2022) 12 CAL CK 0032

Hon'ble Judges : Debangsu Basak, J;Md. Shabbar Rashidi, J

Bench : Division Bench

Advocate : Prabir Kumar Mitra, Prabir Majumder, Snehansu Majumder, Ariba Shahab, Avishek Sinha

Final Decision : Dismissed

Judgement

Debangsu Basak, J

1. A police complaint was lodged at Kotwali Police Station of Nadia District on September 29, 2018 relating to the rape of the victim. The police complaint was lodged by the brother of the victim. It was alleged in such complaint that, the appellant took the victim to the Sadar Hospital pretending to visit the wife of the de facto complainant. After visiting the wife of the de facto complainant at the Sadar Hospital the appellant told the victim that he would drop the victim at her house by a Maruti Vehicle. After boarding the Maruti Vehicle the appellant constricted the mouth of the victim by a handkerchief and went with her to Bishnupur. After alighting the vehicle at Bishnupur the appellant took the victim into a garden and raped her. The incident occurred at 7 PM in the evening.

2. On the basis of such written complaint, the police registered a First Information Report being Kotwali Police Station, F.I.R No. 462/18, dated September 28, 2018 under Section 376 of the Indian Penal Code, 1860.

3. On conclusion of the investigation, the police filed charge sheet being No.

610/2016 dated December 19, 2018 against the appellant under Section 376 of the Indian Penal Code, 1860. The Court framed a charge under Section 376 of the Indian Penal Code, 1860 against the appellant. The charge stated that on September 27, 2018 at about 3 PM at noon, in the field of village Kanai Nagar, Belar Math, behind the Bishnupur Hospital over the land of one Sampad Raha under Kotwali Police Station, the appellant committed rape on the victim and thereby committed an offence punishable under Section 376 of the Indian Penal Code, 1860. The appellant pleaded not guilty and claimed to be tried.

4. At the trial, the prosecution examined 16 witnesses. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code where, the appellant claimed innocence. He also claimed that, there was no nexus between him and the alleged crime and that he was falsely implicated in the case. He, however, did not adduce any evidence.

5. The brother of the victim deposed as PW 1. He stated that, on the relevant day at about 8 PM to 8:30 PM he received a phone call from his maternal uncle. His maternal uncle informed him that, the appellant left the victim at the mango garden in serious bleeding condition. After receiving such information, he along with his parents went to the house of the maternal uncle. Thereafter, they took the victim to the police station. They came to the hospital for treatment of the victim. The victim was admitted at the hospital. Thereafter, they returned to the police station and lodged a written complaint before the police. The written complaint was written by one Amit Saha as per his instruction. He identified the written complaint which was marked as Exhibit 1. He stated that the wearing apparel of the victim were handed over to the Police Officer on the next day. Police Officer made a seizure list which was tendered in evidence and marked as Exhibit 2. His signatures on the label in respect of the wearing apparel were tendered in evidence and marked as Exhibit 3.

6. In cross-examination PW 1 stated that, the appellant is a friend of his brother-in-law. Prior to the incident, the appellant visited their house only once. He stated that, they went to the police station for lodging complaint at about 1 AM in the night, thereafter they went to the hospital. After admitting the victim to the hospital they rushed to the police station to lodge the complaint.

7. The victim deposed as PW 2. She stated that, she knew the appellant and identified the appellant in Court. She stated that the incident took place in the evening in the field at Kanai Nagar. She stated that, her daughter-in-law was admitted at the hospital. She went to the hospital to deliver the meal to her daughter-in-law. The appellant accompanied her. She along with the appellant left the hospital between 5 to 6 PM. The appellant told her that he would drive her to her house for which she went with him. The appellant took her to the hospital by his Maruti Vehicle. The appellant took her to the field, disrobed her and, thereafter committed rape upon her. The appellant told her not to shout and that if she shouted he will kill her. She sustained bleeding injury in her private parts. Three stitches were done in her private parts. The appellant after

committing the offence left the mango garden. Her cousin sister, namely PW 8 and Meni found her. They took her to their house. They informed her parents about the incident over telephone. Thereafter, her father, brother and elder sister came to her maternal uncle's home. They took her to the hospital at about 12 midnight to 1 and 1:30 AM. Thereafter they went to the police station. They lodged a complaint with the police station at about 1 AM in the night. They went to the hospital and she was admitted therein. She stated that, her father, elder sister, brother admitted her to the hospital. She tendered her medical examination report which was marked as Exhibit 4. She stated that, she recorded her statement under Section 164 of the Criminal Procedure Code which was marked as Exhibit 5.

8. In cross-examination, she stated that, she cannot remember the number of the Maruti Vehicle by which the appellant took her. She did not shout at the time when the appellant was taking her away to Bishnupur from Sadar Hospital. She acknowledged that Bishnupur area was crowded. She stated that at the time of getting out of the Maruti vehicle she shouted. None rushed to that place. She stated that the time of the incident was about 7 to 7:30 PM. She identified the place of occurrence to be behind Bishnupur Hospital. She stated that the appellant pressed her face for which she could not shout. She claimed that, she scratched the appellant in his face. She also claimed that a scuffle took place and that she sustained injury on her back and that she sustained injury on different parts of her body. She stated that after the incident the appellant took her from the place of occurrence and left her at the garden. She shouted and some people rushed to her. She did not disclose the incident to anybody save an except before the Magistrate, the Doctor and the Court. She denied the suggestion that, her family members created pressure upon the appellant to marry her and that the appellant was not agreeable with such proposal and she denied the suggestion that the appellant was falsely implicated. She also stated that, at the relevant day of the incident, the appellant was driving the Maruti Vehicle and that the door of the vehicle was locked. There was nobody inside the Maruti Vehicle apart from the appellant.

9. The father of the victim deposed as PW 3. He corroborated the statements of PW 1 and 2. The mother of the victim deposed as PW 4. She also corroborated the testimonies of PW 1, 2 and 3.

10. The sister-in-law of the victim deposed as PW 5. She stated that at the relevant point of time she was admitted at Krishnanagar Sadar Hospital for delivery of her baby. She stated that about 3:30 PM, the victim came to the hospital with the appellant bringing rice to her from her mother-in-law. Thereafter, the victim went out of the hospital with the appellant. Thereafter, at about 11:30 PM she came to know from the hospital that the victim was admitted at the hospital as she was raped.

11. The constable who took the victim for her medical examination deposed as PW 6. The defence did not cross-examine him. The constable who took the

appellant from the correctional home to the District Hospital for medical examination deposed as PW 7. The medical examination report of the appellant was tendered and marked as Exhibit 7.

12. Relatives of the victim deposed as PW 8, 9 and 10. PW 9 was declared hostile.

13. The doctor who examined the victim deposed as PW 11. He stated that, on examination he found no injury marks/bruises on the victim. However, there was bleeding from vagina and 1 cm tear present on the fourchette. It was repaired by Vitryl (stitch material). He stated that the victim told him that, she was picked up by the appellant, put into a Maruti Vehicle, took into Bishnupur Valuka Area where the appellant sexually assaulted her. The victim appeared in the hospital at 12 AM on September 28, 2018 and was admitted to the hospital. The medical examination report of the victim was tendered in evidence and marked as Exhibit 6. In cross-examination, he stated that, the bleeding may occur for different reasons one of which is falling down. He stated that, the victim was not used to habitual sexual intercourse.

14. The person writing the written complaint on the instruction of PW 1 deposed as PW 12. The brother of the victim deposed as PW 13. The Judicial Magistrate before whom the victim recorded the statement under Section 164 of the criminal Procedure code deposed as PW 14.

15. The doctor who examined the appellant deposed as PW 14. He stated that, the appellant was examined on October 29, 2018 and that, on examination, he found no injury over the private parts of the appellant. He stated that there was nothing to suggest that the appellant was incapable of sexual intercourse. The medical examination report of the appellant was marked as Exhibit 7/1.

16. The Investigating Officer deposed as PW 16. He stated that, on receiving the charge of the investigation, he examined the complainant, recorded a statement under Section 161 of the Criminal Procedure Code. He talked to the Medical Officer at the hospital for recording the statement of the victim. The Medical Officer advised him to come on the next morning to record her statement. Thereafter he visited the first place of occurrence, prepared a rough sketch map with index which was tendered as Exhibit 8 and 8/1. He examined available witnesses and recorded their statements. He went to Valuka and raided the house of the appellant but failed to arrest the accused on September 28, 2018. He examined witnesses. He examined the victim and recorded her statement. He seized the wearing apparels of the victim. He sent the wearing apparels for forensic examination. He collected swab of the victim and sent them for chemical examination. He visited the second place of occurrence which was identified by the victim and prepared the rough sketch map. He sent the victim for recording the statement under Section 164 of the Criminal Procedure Code. He made arrangement for medical examination of the appellant. He submitted the charge sheet on completion of the investigation on December 19, 2018 being charge sheet No. 610/2016.

17. The appellant was examined under Section 313 of the Criminal Procedure Code, where, he claimed innocence. He claimed that he cannot drive a vehicle and that he does not possess a Maruti Vehicle. He admitted that, he visited the house of the victim in answer to question No. 9. In answer to question No. 10, about the incident, he stated that, on that day, the victim told him that, she wanted to go to her maternal uncle's house at Valuka and requested him to go with her. She insisted to marry her. He left the victim at her maternal uncle's house at Valuka and went to his house at that night. On that night at about 11 PM the family members of the appellant came to his house searching for him. He claimed that he was falsely implicated in the cases, he was not willing to marry the victim. He was already married. He came to know from his parents that the father of the victim demanded Rs. 5 Lakhs from his family.

18. By the impugned judgement of conviction dated February 8, 2021, the appellant was found guilty of committing an offence under Section 376 of the Indian Penal Code, 1860. By the impugned order of sentence, the appellant was directed to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 20,000 and in default suffer rigorous imprisonment for 1 year.

19. Learned advocate appearing for the appellant submitted that, the prosecution failed to establish the case beyond reasonable doubt. He contended that, the incident is alleged to take place in a moving Maruti Vehicle. The appellant was mason without owning any Maruti Vehicle. Moreover, assuming but not admitting that the incident took place as described, then also, it is impossible for a person driving a vehicle, to constrict the mouth of the victim so as to prevent her from shouting.

20. Learned advocate appearing for the appellant submitted that, the charge framed against the appellant was defective. In the charge it stated that the incident occurred at 3 PM while the prosecution witnesses claimed that the time of the incident was 7 PM. The prosecution failed to establish the place of occurrence of the incident. The prosecution witnesses contradicted each other on the place of occurrence. In view of such major contradictions of the place of occurrence, he submits that, there was no credibility attached to the evidence led by the prosecution.

21. Learned advocate appearing for the appellant submitted that, the victim claimed that there was a scuffle with the appellant during the incident. The victim suffered injuries, the victim also claimed to inflict injuries on the appellant. The doctor examining the victim at the relevant point of time stated that he did not find any other marks of injuries on the person of the victim. The doctor examining the appellant did not find any injury mark on the appellant also. He relied on 2008 Volume 3 Supreme Court Cases (Criminal) 163 (Bibhishan vs. State of Maharashtra), in support of his contentions.

22. Learned advocate appearing for the appellant submitted that, the wearing apparel alleged to be worn by the victim at the time of the alleged occurrence

were not produced in Court. He referred to the deposition of the victim. He submitted that the evidence with regard to the wearing apparels that the victim was claimed to be wearing at the time of the occurrence are contradictory.

23. Learned advocate appearing for the appellant submitted that, the vehicle which was allegedly used in the incident was not seized by the police. PW 8 was declared hostile. There was no evidence to implicate the appellant.

24. The victim went through places which were crowded and did not raise any alarm. The prosecution did not lead any evidence to establish that any independent witness heard any alarm raised by the victim or responded to the plight of the victim. The absence of such evidence demolishes the creditability of the case of the prosecution. In support of his contentions, learned advocate appearing for the appellant relied upon 2003 Supreme Court Cases (Criminal) 1977 (State of Karnataka vs. Mapilla P.P. Soopi).

25. Learned advocate appearing for the State submitted that, defect in charge can only be argued by the defence when the same causes substantial prejudice to them. According to him, in the instance case it was absolutely clear that the incident occurred between 7 to 7:30 PM. Moreover, the appellant could not establish any prejudice being caused by reason of the alleged defect in the charge.

26. So far as the place of occurrence and the so called major contradictions in the evidence, learned advocate appearing for the State submitted that, a careful analysis of the evidence led at the trial, it cannot be said that, there was a shift in the place of occurrence or that, there was any contradictions in the evidence.

27. So far as the contention that PWs 8, 9 and 10 did not support the case of the prosecution is concerned, learned advocate appearing for the State submitted that, such witnesses were either neighbour or friends of the appellant and therefore, did not support the case of the prosecution.

28. Learned advocate appearing for the State distinguished the two authorities cited on behalf of the appellant. Referring to the sequence of events occurring on September 27, 2018 learned advocate appearing for the State submitted that, the prosecution was able to prove the case beyond all reasonable doubt. He submitted that, the impugned judgement of conviction and the order of sentence should not be interfered with.

29. The appellant was charged with the offence of raping the victim, tried on such count and sentenced thereon, after finding him guilty of the charge. The incident of rape occurred on September 27, 2018 at about 7 PM in the evening. The evidence of PW 1, PW 2, PW 3, and PW 4 established that, the victim was taken by the appellant from the Sadar hospital at about 5 PM. PW 2 established that, she was raped by the appellant at about 7 PM. The victim stated that, after committing the offence, the appellant left the Mango Garden at Valuka. Her cousin sisters namely PW 8 and Meni found her at that place. They took her to

their house and informed her parents about the incident over telephone. Thereafter, her father, brother and elder sister came to her maternal uncle's house. They took to the hospital about 12 AM to 1/1:30 AM. Thereafter, they went to the police station. The complaint was lodged with the police at about 1 AM. She went to the hospital where she was admitted there.

30. PW 13 and 4 corroborated the statements of the victim as to the timeline of she being taken to the hospital and the complaint lodged with the police. The formal first information report states that the time of the incident was 7 PM on September 27, 2018. The information was received by the police station on September 28, 2018 at 2:15 AM. The doctor who treated the victim at the hospital stated that the victim was brought to him for treatment at about 12 AM on September 28, 2018.

31. The timeline as noted above, as to the time of the incident was occurring and the victim receiving medical attention and the lodgement of the first information report by the written complaint being Exhibit 1 does not provide space for the contention of delay raised on behalf of the appellant to be accommodated with any seriousness. The police complaint was lodged within reasonable time of the incident occurring and the victim being treated by a doctor.

32. PW 5 saw the victim and the appellant together at the hospital where PW 5 was admitted to deliver her baby. The victim in her deposition narrated the offence committed on her. The victim was cross-examined at length. The defence could not elicit anything favourable from her in cross examination. She could not be shaken from the version of the incident spoken of by her in her deposition in court. She did not deviate from her statement recorded under Section 164 of the Criminal Procedure Code, being Exhibit 5.

33. The medical evidence produced by the prosecution at the trial established penetrative sexual assault on the victim. The doctor who treated the victim on September 28, 2018 at about 12 AM, stated that, there was bleeding from the vagina and 1 cm tear was present on the fourchette of the victim which was repaired by stitching.

34. Although, in his deposition, the doctor examining the victim being PW 11 stated that, the victim was not used to repeated sexual intercourse, the basis for the doctor to form such opinion, appears to be dubious. The deployment of the test to form such opinion was deprecated by the Hon'ble Supreme Court. Whether the victim was used to repeated sexual intercourse or not is of no consequence in the facts and circumstances of the present case.

35. There is no material on record to disbelieve the version of the victim. She is an injured eyewitness to the incident. Her version stands corroborated by the medical evidence and other attending circumstances established at the trial. The victim identified the appellant as the perpetrator. The medical examination of the appellant did not negate the possibility of the appellant committing the crime.

36. As rightly contended on behalf of the State, the specification of time in the charge framed as against the appellant did not prejudice the appellant. At the trial, the appellant knew that, the prosecution was establishing the offence of sexual assault to be occurring at 7 PM in the evening. The appellant did not bring any material on record to suggest that he was prejudiced by reason of the charge containing the time of commission of the offence at 3 PM.

37. The Maruti vehicle was not seized. Non-seizure of the Maruti vehicle is not fatal to the case of the prosecution. The prosecution established by cogent and reliable evidence as to the appellant perpetrating the crime at the place of occurrence. The offence of penetrative sexual assault was not committed within the Maruti Vehicle.

38. There is no substance in the contention of the appellant that, the prosecution could not identify the place of occurrence and that there are major contradictions with regard to the descriptions thereof. Each of the prosecution witnesses connected with the incident while describing the place of occurrence stated it to be a field or a garden. They were describing the same place in different words. The victim took the investigating officer to the place of occurrence. The investigating officer prepared rough sketch maps of two places of occurrence. He clarified in cross examination that, he prepared the rough sketch map of the house of the father of the victim thinking that, since the chain of events started from such place, a sketch map thereof should be prepared. He prepared the second sketch map when he was taken to the place of occurrence by the victim.

39. The victim was examined medically at about 12 midnight on the date of the occurrence. The doctor examining the victim stated in his deposition that, the victim was bleeding from vagina and that 1 cm tear was present on the fourchette of the victim which was repaired by Vitryl. The victim therefore suffered injuries which are consistent with the description that she gave of the incident, in her statement recorded under Section 164 of the Criminal Procedure Code which was marked as Exhibit 5 at the trial as also her deposition. The appellant would only be arrested on October 25, 2018. The appellant was examined after about a month from the date of the incident, on October 29, 2018. The incident occurred on September 27, 2018. Natural healing of the scratch marks over the period of time from the date of the incident till the date of the examination of the appellant is a possibility which should not be overlooked. The victim did not describe any injury to be suffered by the appellant in the scuffle, the mark of which is likely to remain over a period of more than a month. Therefore, absence of injury marks on the appellant at the time of his medical examination is not fatal to the case of the prosecution.

40. In cross-examination, the investigating officer as PW 15 stated that, after seizure of the wearing apparels of the victim, they were sealed and labelled properly. They were sent to the Central Forensic Scientific Laboratory. He made efforts for collection of the chemical examination report. He could not collect the same. He denied the suggestion that, he deliberately did not submit the reports

before the court as the reports were against the prosecution. He stated that, he sent the wearing apparels and the swap of the victim to the Central Forensic Scientific Laboratory for chemical examination on November 1, 2018. In view of the injuries suffered by the victim and the evidence led by the prosecution at the trial, the absence of the wearing apparel of the victim at the trial does not visit the case of the prosecution with fatality.

41. In *Bibhishan (supra)* the accused was charged under Sections 376 read with Section 511 of the Indian Penal Code, 1860. On facts, the Supreme Court found that, the victim was habituated to sexual intercourse, there was no sign of semen on the private part of the victim, her clothes were not torn, there was no presence of the hair of the accused on the private part of the victim and therefore, give benefit of doubt to the accused. In the facts of the present case, there are injuries on the private part of the victim consistent with penetrative sexual assault. Moreover, the appellant was charged with rape rather than an attempt to rape.

42. In *Mapilla P.P. Soopi (supra)*, the prosecution did not produce any material to establish that, independent person heard the alarm raised by the victim as claimed by her. Moreover, no injury on the body of the victim was found to indicate any forceful assault on her. There was undue delay in lodging the complaint without acceptable evidence. These factors contributed in doubting the case of the prosecution. In the facts of the present case, as noted above, there are injuries on the body of the victim consistent with penetrative sexual assault. There is hardly any delay in the lodgement of the first information report from the time of the incident till its actual registration. The time gap was sufficiently explained by the prosecution.

43. In view of the discussions above, we find no ground to interfere with the judgement of conviction and the order of sentence. We affirm the same.

44. Accordingly, Conviction and sentence imposed upon the appellant are upheld.

45. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

46. CRA 264 of 2021 is dismissed accordingly.

47. Trial Court records along with a copy of this judgement be sent down at once to the appropriate Court for necessary action.

48. Photostat certified copy of this order, if applied for, be given to the part parties on priority basis on compliance of all formalities.

49. I agree.