

(2010) 09 CAL CK 0091
In the Calcutta High Court
Case No : C.R.A. No. 768 of 2004

Prasanta Das @ Prasan

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 10-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 375, 376, 376(2), 376G

Citation : (2011) CriLJ 410 : (2011) 11 RCR(Criminal) 2038

Hon'ble Judges : Raghunath Ray, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Jayanta Narayan Chatterjee, in CRA 768 of 2004, Partha Sarathi Bhattacharyya and Ranjit Sanyal, in CRA 769 of 2004, for the Appellant;Ashimesh Goswami, Minoti Gomes and Pinaki Bhattacharya, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—BACKDROP THAT REVEALED FROM THE COMPLAINT AS ALSO THE EVIDENCE:

1. On March 11, 2001 Radha (not real name) was proceeding to her aunt's house to attend her cousin's wedding. Prosanta, Rono and Samir stopped her on the midway and dragged her to a nearby banana bush. Samir pressed her mouth, Rono spread her legs and held them, Prosanta ravished her. They threatened Radha with dire consequence. When Radha requested them to release her she was released on the assurance that she would come back after returning the wrist watch to her sister in-law. After being free Radha came back to her own house and was weeping. By that time her parents and relatives started searching her and while searching her they met her in her own house. On being pressed and rebuked by her mother she narrated the incident. On that night they discussed among themselves. Next day early in the morning at about 6''O clock they went to the nearby Police Station and lodged a diary. At the relevant time

Radha was working as a domestic help in the house of Samir Ganguly, an advocate of Barasat Court. His clerk Jayanta helped her in lodging the complaint. Jayanta scribed the complaint. Prasanta and Rono were arrested. Samir was absconding. He was ultimately apprehended on December 19, 2002.

2. CHARGE:

All the three accused were charged with the offence committed u/s 376-G of the Indian Penal Code. They all pleaded innocence and opted to be tried.

3. EVIDENCE:-PW-1 (Jayanta Ghosh):

Jayanta scribed the complaint. He had no personal knowledge of the incident.

PW-2 (Victim):

Radha was an illiterate girl. On the fateful day she went out after wearing sari for attending her cousin's wedding (Masi's son). Aunt's house was situated beside the rail line in Kadambagachi. On her way Prosanta, Samir and Rono caught her and forcibly took her to banana clump. She shouted for help. However they overpowered her. Her mouth was closed. Prosanta raped her with the help of Rono and Samir. After Prosanta ravished her she was about to go to her aunt's house when the accused forced her to put off her sleeper, ear ring and chain and threatened her with dire consequence. They asked her to return within a gap of ten minutes. She admitted that her house was surrounded by hundred odd houses. She admitted to have stated to Police that after wearing sari she was about to cross the entrance door of her house when she was captured by the accused. She however clarified that the reality was, she was captured on her way to her aunt's house. She received bleeding injury while trying to save herself from their clutches. However her wearing apparels were not torn. On the following day at about 6 a.m. she reached the Police Station and lodged the complaint. Her family members were supporters of one political party whereas the accused persons belonged to different political party. She was unable to give the exact date of the incident.

PW-3 (Gita Das):

The witness was the mother of Radha. She was a post occurrence witness. She corroborated what Radha had said in her evidence. She added that Radha was untraced. She could be found at about 10.30/11 p.m. She was then weeping. She divulged the incident to the witness and her husband, her uncle and aunt. The witness found bleeding injury on her person, however the wearing apparels were not torn. The banana bush belonged to one Vivek.

PW-4 (Ajit Kumar Payra):

The witness was the Sub-Inspector of the Police, then posted at Barasat Police Station. he registered the FIR lodged by Radha.

PW-5 (Alo Das):

The witness was the aunt of the victim. She also corroborated the victim and her mother. She however did not notice any bleeding injury. She confirmed that the wearing apparels were not torn. Her husband was a supporter of Rikshaw Puller Union. Prasanta and Rono belonged to the same locality whereas Samir was staying little away from their locality.

PW-6 (Sristipado Das):

The witness was the father of the victim. Radha was her daughter. About three years before the date of making deposition the incident had happened. Samir, Prasanta and Rono detained Radha and forcibly took her to the banana bush. Samir covered her mouth with the help of cloth whereas Rono caught her leg, Prasanta ravished her. The witness further deposed that after commission of offence Radha requested them to let her go to deliver the watch to her sister in-law. They took her sleeper, flower and ear-ring and allowed her to go on condition that she would have to return after sometime. Radha reached her house and broke down with tears. They were then in the said house searching Radha. Radha narrated her plight when her mother was about to beat her for not attending the marriage house. Such narration was made in presence of Gita, Renuka and Suklal. The witness clarified that the victim group and the accused group initially belonged to one political party, however after the incident they parted with. The witness also deposed that initially Radha persuaded them to leave the house for the marriage ceremony assuring them that she would go little later after dressing her up.

PW-7 (Suklal Das):

The witness was the uncle of Radha. He also corroborated the victim, as also the post occurrence witnesses discussed above. He was a supporter CITU. He stated to Police that Prasanta gave feast blow twice on the person of Radha before the incident. He also told the Police that Radha told them that she would attend the marriage house after wearing sari and dressing her up.

PW-8 (Amit Chakraborty):

The witness was the Judicial Officer before whom Radha made her statement u/s 164 of the Criminal Procedure Code.

PW-9 (Brojo Kishore Saha):

The witness was the Superintendent of Barasat District Hospital. He examined the accused Prosanta. He did not find any injury on his person. He certified that Prosanta was potent. He also examined Samir who was also found to be potent. Samir also did not have any injury on his person.

PW-10 (Dr. Himadri Shekhar Sanyal):

The witness examined Rono who was found to be potent and did not have any injury on his person.

PW-11 (Jaya Chatterjee):

The witness was the lady Officer posted at the Police Station. She took up the investigation. She seized the wearing apparel of Radha. She arrested the accused persons except Samir. Initially, the accused persons were absconding. She could apprehend Prosanto and Rono. Samir was then absconding. Last raid, she conducted before her transfer to other Police Station, was on July 10, 2001. On July 31, 2001 she handed over charge to her successor. In cross-examination she admitted not having sent the seized articles for chemical examination. Despite her best effort she could not collect statement of the neighbours.

PW-12 (Dr. Sukumar Chatterjee):

Dr. Sukumar Chatterjee, examined Radha on March 13, 2001. On examination he found her hymen ruptured, may be due to rape committed upon her. According to him, if the victim would take proper bath there might not be any foreign body available. On examination her vaginal canal was found to be small. Rapture could be caused by actual or attempted penetration. The witness further deposed that forcible intercourse might not give birth to any injury.

PW-13 (Paritosh Kr. Ghosh):

The witness was the Sub-Inspector of Police, subsequently took charge of the investigation. On December 19, 2002 he arrested Samir. He collected Report of medical examination of Samir. The victim was fourteen years old as disclosed to him.

PW-14 (Sarbani Roy):

The witness was the lady Police Officer who conducted several raids for apprehension of Samir but failed. She conducted last raid on December 25, 2001. The witness was the Investigating Officer in between PW-11 and PW-13

4. EXAMINATION OF THE ACCUSED:

All the three accused denied each and every allegation brought against them. Prosanta, in addition, asserted that the victim was fifteen to sixteen years old at the time of incident. Rono, in addition, asserted that the relationship was bad all along. Samir asserted that the victim was sixteen/seventeen years old at the time of incident. He also asserted that the relationship was bad all along and became bitter for "last five/six years". Pertinent to note, the incident occurred on March 12, 2001 whereas the accused were examined on August 19, 2004.

5. JUDGMENT:

Learned Additional Sessions Judge, 5th Fast Track Court, Barasat examining the evidence on record held all the three accused guilty of the offence u/s 376(2)(g) of the Indian Penal Code and sentenced them for ten years rigorous imprisonment coupled with a fine of Rs. 5000/- and in default to suffer further simple imprisonment of three months.

6. APPEAL:

Being aggrieved, the appellant preferred the instant appeal which we heard on the above mentioned dates.

7. CONTENTION OF THE APPELLANT No. 1:

Mr. Jayanta Narayan Chatterjee, learned Counsel appearing for the appellant No. 1, Rono Das and Samir Biswas contended as follows:

i) From the evidence of the father it appears that the victim asked her relatives to proceed to the marriage house and she would follow them little later. Hence, she purposely kept herself alone in the house which would indicate that she was a consenting party.

ii) From the medical evidence it was clear that neither she received any injury nor any force was applied to her as would be evident from the medical evidence.

iii) The banana bush being the alleged place of occurrence was surrounded by houses. The bush belonged to one Vivek. Neither any of the neighbours nor Vivek was examined.

iv) The victim narrated the incident to her parents, uncle as well as Renuka who was not examined.

v) Victim initially did not disclose the incident. She narrated the same after being rebuked by her mother which would suggest that she was a consenting party."

vi) The wearing apparels were admittedly not torn.

vii) As per the doctor, the vaginal canal was too small. Hence, in case of penetration there must have been some injury on her private parts.

viii) No ossification test was conducted to find out the actual age of the victim.

ix) The story of return of the wrist watch after giving assurance to come back within ten minutes, was rather unusual and would belie the allegation of rape.

Mr. Chatterjee, in support of his contention relied on the Apex Court decision in the case of Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and Anr. reported in 2003 SCC (Criminal) 596.

8. CONTENTION OF THE APPELLANT NO. 2 & 3:

Mr. Partha Sarathi Bhattacharya, learned Counsel appearing by the appellant No. 2 and 3 adopted submissions made by Mr. Chatterjee on behalf of the appellant No. 2 and in addition contended as follows:

i) The victim in her complaint alleged that she was raped by the accused violently. Such statement did not find support from the Medical Report or from the oral evidence of the doctor.

ii) The victim was not definite as to the date of the incident.

iii) The victim did not disclose the name of the accused to the doctor, at least, not apparent from the Medical Report.

iv) The evidence so came out during trial, did not support the case of "forcible rape".

Mr. Bhattacharya, in support of his contentions relied on the Apex Court decision in the case of Koppula Venkat Rao v. State of Andhra Pradesh reported in 2004 SCC (Cri) 840 and decision of this Court in the case of Tapas Mondal v. The State of West Bengal reported in 2010 (II) Cal Cri LR 137.

9. CONTENTION OF THE PROSECUTION:

Opposing the appeal the learned Public Prosecutor Mr. Asimesh Goswamy contended as follows:

i) In a case of the like nature the age of the victim was not very much important.

ii) Although it could not be said to be a case of gang rape in true sense the element of Section 376(2)(g) did come out from the evidence as the appellant No. 2 and 3 played active role in supporting the appellant No. 1 in committing rape upon the victim.

iii) Assuming there was no physical injury the allegation of rape could not be brushed aside and the Court must consider the mental trauma the victim had suffered soon after the incident.

iv) The punishment imposed upon the accused was adequate and no mercy could be shown to them considering the gravity of the offence.

To support his contentions Mr. Goswami reported the Apex Court decision in the case of Madan Gopal Kakkad v. Naval Dubey and Anr. reported in 1992 SCC (Criminal) 598 also reported in 1992 III SCC 204.

10. ANALYSIS:

Contention of the appellant Our view 1. Victim delayed leaving her house A girl of fourteen/fifteen years wants to attend her cousin's wedding. It is not unusual that she would take due care to dress herself. If she asked her parents to proceed early on the assurance that she would join later after dressing up such conduct of the victim would not suggest that she was a consenting party. 2. Bush was surrounded by houses, It is not clear to us how the owner of the neither the owner nor the neighbours bush would become relevant herein were examined. unless he was staying there, no such evidence came out. It is true that neighbours were not examined. Prosecution is free to choose their own witness, merely because the inmates of the surrounding houses were not examined evidence of the victim could not be brushed aside. 3. The victim narrated the incident to Same as item No. 2 her parents as well as one Renuka who was not examined. 4. The victim disclosed the incident We do not understand what the learned after being rebuked by her mother. Hence counsel

wanted to mean. A girl of she was a consenting party. fourteen years was being rebuked by her mother for not joining the wedding ceremony. At that juncture she disclosed the incident. She was under a mental trauma. She was taken aback as she was not prepared for the unfortunate incident. It is not unusual that she would take some time to come out of the trauma and narrate the incident. 5. Wearing apparels were not torn. Samir closed her mouth so that she could not shout whereas Rono forcibly held her legs. Hence, we can visualize that she was under a complete trauma. She could hardly offer any resistance. Once there was no resistance or there was any feeble resistance the wearing apparel might not be found to be torn. We do not think that such factor would suggest that she was consenting or that there was no such incident. 6. Story of return of the wrist watch Mr. Chatterjee put emphasis on this issue. A girl of fourteen years who was being ravished by three accused was desperate to get herself free. If she took the plea of returning the wrist watch to her sister in-law to get herself free from their clutches it could not be said to be unusual. If we closely analyze we would find that one of the three accused satisfied his lust. At that juncture the accused released her on the assurance that she would come back again. To ensure her re-appearance her belongings were kept back. 7. Medical evidence: There was no evidence that she was consenting. Hence, the age of the victim a) No ossification test was done to was not at all relevant. ascertain the age. The doctor categorically deposed that the b) No injury could be found. incident of rape did not automatically suggest that there would be injury on the person of the victim. From the narration of the incident we could safely infer that there was feeble resistance or no resistance at all from the girl. Hence, chance of physical injury on her person was remote. Similarly, there was hardly any chance of physical injury on the person of the accused.

The doctor opined that the vaginal canal was too small to accept penetration. There might be penetration or attempted penetration, that is not so much important in the facts and circumstances of this case. The doctor also categorically deposed that there might not be any injury on her private parts. In any event omission to notice any injury by the doctor on the person of the victim or on her private parts would not demolish the concrete evidence that came out during trial including the evidence of the victim which inspired confidence of Court. 11. CASE LAW DISCUSSED:

On the issue of penetration the Apex Court decision in the case of Madan Gopal Kakkad (Supra) may be relevant to be referred to. The Apex Court observed, "it is not necessary to enter into any nice discussion as to how far the male organ has entered into the vulva or pudenda of PW-13 since it is made clear that there was penetration attracting the provisions of Section 375 Indian Penal Code."

In the case of Vimal Suresh Kamble (Supra), the Apex Court observed that conviction u/s 376 could be held to be permissible solely on the basis of the testimony of the victim provided it inspired confidence of Court. In our view, the facts involved herein has successfully passed such test.

In the case of Koppula Venkat Rao (Supra), the Apex Court observed that an attempt is punishable although it falls short of success.

In the case of Tapas Mondal (Supra), the Division Bench of this Court considering the facts and circumstances of the said case reduced the sentence. Such special circumstance, in our view, is absent here.

12. RESULT:

The appeals fail and are hereby dismissed.

13. DIRECTION:

The appellants are now in jail. They are directed to serve out the remaining part of their sentence as imposed by the learned Trial Judge.

A copy of this judgment be sent to the correctional home, where the appellants are suffering their sentence, for his information.

Let a copy of this judgment along with Lower Court Records be sent to the Court of learned Trial Judge for information and necessary action.

Urgent xerox certified copy will be given to the parties, if applied for.

Raghunath Ray, J.

I agree.