

(2005) 07 CAL CK 0024
In the Calcutta High Court
Case No : C.R.A. No. 144 of 2003

Ram Prasad @ Kajal Deoghoria

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 11-07-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 376

Citation : (2005) 3 CALLT 227 : (2005) 4 CHN 335

Hon'ble Judges : Debiprasad Sengupta, J;Arun Kumar Bhattacharya, J

Bench : Division Bench

Advocate : Sekhar Basu and Ashok Biswas, for the Appellant;Asimesh Goswami, for the Respondent

Final Decision : Dismissed

Judgement

Arun Kumar Bhattacharya, J.—The hearing stems from an appeal preferred against the judgment and order of conviction and sentence passed by the Id. Additional Sessions Judge, 2nd Court, Bankura in Sessions Case No. 8(11) of 1999 [Sessions Trial No. 1(4) of 2000] on 29.03.2003.

2. Shortly put, the prosecution case is that on 03.03.1998 at about 4.30 p.m. the accused who is a neighbour of the defacto complainant (P.W. 1), on inducing with a promise of offering toys committed rape in his house upon the complainant's five years old daughter Puja (P.W.2) who after coming back to house narrated the incident and complained of severe pain in her private parts. When the matter was reported to the parents and elder brother of the accused, they threatened the complainant and neighbourers with dire consequences and asked them to suppress the matter. Hence, the accused was charged u/s 376 IPC.

3. The defence case, as suggested to P Ws., as contended by the accused during his examination u/s 313 Cr. PC and as deposed by D Ws. 1 to 3, is that on that date in the morning while the accused was away in the market, Puja went to their house and during her play with Shilpi, niece of the accused, they pushed

tamarind seeds into each others vaginas and as the said seeds could not be brought out an altercation took place between the members of both families. The complainant being a doctor could remove the seed from the private of his daughter while Papiya @ Shilpi was removed to nursing home of Dr. Jagannath Ganguly who removed the seed. Due to long standing hitch with the family of the accused, the present case has been filed at the instance of Nemai Dhabal (P.W.5) and others, for teaching a good lesson to the family of the accused.

4. 14 witnesses were examined on behalf of the prosecution, while four witnesses were examined on behalf of the defence and after considering the facts, circumstances and materials on record, the Id. Court below found the accused guilty u/s 376 IPC, convicted him thereunder and sentenced him to suffer rigorous imprisonment for ten years and to pay fine of Rs. 10,000/-i.d. to S.I. for one year.

5. Being aggrieved by, and dissatisfied with, the aforesaid order of conviction and sentence, the accused has preferred the present appeal.

6. All that now requires to be considered is whether the Id. Court below was justified in passing the above order of conviction and sentence.

7. The important witnesses in this case are P.Ws. 1 to 6, 8 to 10, 13 and 14, others being formal.

8. According to the evidence of Smritikana Mukherjee @ Puja (P.W. 2), aged about 8 1/2 years, now a student of class-IV, about 3/4 years back while she was a student of class-I, she went to the house of the accused which is intervened by one house from their house, to play, but at that time barring accused no other person of his family was present. The accused called her to the first floor saying that a doll would be given to her for play, and accordingly she went to the first floor room when the accused closed the door and windows from inside, placed her on the cot in lying condition, removed her panty and began to rub his penis on her vagina as also annus followed by pushing his penis into her vagina and discharge of some white adhesive type of material on her vaginal area. She felt pain on her vagina due to such sort of activities and at that time the accused helped her to wear her panty and she left the room. While she was coming down from the first floor, he asked her to come on the next day as he would offer her a pen and would arrange for showing her a circus. After coming back to house she reported about the whole incident to her mother (P.W. 3) who scolded and assaulted her, removed her panty and throw it on the floor of their well. After hearing the entire episode from her mother as also from her, her father informed about the matter to the local people. When police came her mother showed the said panty. On that night her father took her to local P.H.C. and on the next day she was produced before the Court when she narrated the incident to Magistrate who recorded the same. From Magistrate's room she was sent to Bankura Hospital where she was admitted for three days. The above evidence is supported in material particulars by P.Ws. 1 and 3. P.W. 1 stated that on

03.03.1998 at about 4.30 p.m. her daughter, then aged about 5 years 3 months, went to the house of the accused to play and returned at about 5/5.30 p.m. when he and his wife (P.W. 3) were present in the house. After return she talked with her mother in low voice. On his query, his wife reported that taking chance of absence of any member in the house the accused raped her on inducing to offer her toys and she complained of pain in her vagina, was weeping and discharging urine off and on and she showed her panty stained with marks of semen. He went to the house of the accused and asked about the incident when he denied of the allegation and threatened him not to disclose. On seeing the above conduct of the accused when the matter was reported to his parents, uncle and brother, they became furious and threatened the local people to assault and thereafter he lodged FIR (Ext. 1) with the P.S. With the slip issued by the police with a direction to go to the local P.H.C., he with his daughter had been to local P.H.C. where his daughter was examined and thereafter he went to Bankura Medical College and Hospital. P.W. 3 deposed that on that date at about 4/4.30 p.m. her daughter P.W. 2 went to the house of the accused for play and returned at about 5/5.30 p.m. while she found her itching repeatedly at her vaginal area and attending bathroom frequently. On her query, she (P.W. 2) informed that when she went to the house of the accused, there was no other member barring the accused in the house who on saying that he would offer her toys, took her to the room in the upper floor, caused her to lie in the cot, took out her trouser and started to rub his penis on her urinal passage and annus and at last penetrated his penis into nor urinary passage, kissed her face and dropped his semen in her urinary passage followed by putting on her trouser. She (P.W. 2) also narrated the incident to her father (P.W. 1) and thereafter her husband went to the house of the accused. On being called by P.W. 1, P.W. 4 had been to their house at about 8/8.30 p.m. on that date when P.W. 1 reported the matter to him. Thereafter P.W. 1 accompanied by him, Sankar Chakraborty (P.W. 6), Nemai Dhabal (P.W. 5) and others went in front of the house of the accused and reported about the incident to the accused and also his father who denied the allegation and threatened them, followed by lodging FIR by P.W. 1 at the P. S. Similar is the evidence of P.Ws. 5 and 6 with this deviation that while P.W. 5 did not complain of any threat by the accused or his father, P.W. 6 deposed about such threat and showing tangi to them. The victim made a statement which was recorded by the Magistrate (D.W.4) u/s 164 Cr. PC, but the said piece of evidence cannot be taken into consideration as it was not put to the accused during his examination u/s 313 Cr. PC. However, the victim was examined by as many as three doctors viz PWs. 10, 9 and 8, all of whom found injuries on her genital region. PW. 14 on account of death of the previous I.O. Shyamapada Chatterjee took up further investigation pf the case, collected FSL Report and submitted chargesheet against the accused u/s 376 IPC.

9. The defence case, as stated above, is self-contradictory relating to the time of incident, since it was suggested to P.W.I that on that date and time (03.03.1998 at about 4.30 p.m.) during play Puja (P.W. 2) and Papiya (D.W. 2) pushed

tamarind seeds in their respective vaginas, whereas the accused during his examination u/s 313 Cr. PC contended that on that date during morning when he was away in the market, Puja went to their house and while playing an obscene game with his niece Shilpi (D.W. 2), they inserted tamarind seeds in each others vaginas.

10. Onus to prove alibi is on the accused, as it is within his special knowledge and such plea of alibi when taken by an accused must be proved by him and he is to substantiate and make it reasonably possible which is well-settled. He must lead evidence to show that he was so far off at the moment of the crime from the place when the offence was committed and he could not have committed the offence. Here, no evidence was adduced on behalf of the accused regarding his alleged absence from the P.O. on that date and time nor it was suggested to P.W. 2 or P.W. 3. Plea of alibi disclosed for the first time in statement u/s 313 Cr. PC without being suggested in cross-examination does not become of any aid to the defence.

11. The statement of an accused u/s 313 Cr. PC though not strictly evidence in the case may be taken into consideration in judging the guilt or innocence of the accused. In the present case, it was further contended by the accused during his examination u/s 313 Cr. PC that when tamarind seeds were stuck in the vaginas of P.W.2 and his niece (D.W. 2), both became frightened, that his elder brother's wife (D.W. 1) took Shilpi who was suffering from pain and whose vagina was inflamed, to the nursing home of Jagannath Ganguly who removed the tamarind seed from the private parts of his niece. D.W. 1 stated that his daughter Papiya @ Shilpi, now aged about eight years and Puja are of same age group. One day during play as patient and doctor, Puja asked her daughter to insert tamarind seed into her vaginal canal and Puja will push tamarind seed in her vagina. After a while her daughter came and reported that Puja pushed a tamarind seed into her vaginal canal. She unsuccessfully tried to bring out the tamarind seed and went to Dr. Jagan-nathbabu, since deceased, who removed the same and issued a certificate (Ext. B). As per evidence of D.W. 2 a few years ago while she was playing a new type of game with Puja in their house as patient and doctor, Puja pushed a tamarind seed into her own vaginal canal and similarly as per her direction she pushed a tamarind seed into her vaginal canal, for which she felt pain, became afraid, rushed to her mother (D.W. 1) and narrated the incident. Her mother unsuccessfully tried to remove the tamarind seed and she was taken to the chamber of Jagannathbabu who removed the same. The above evidence is quite contradictory to the said evidence of D.W. 1 and contention of accused u/s 313 Cr. PC, which thus belies the entire defence story. That apart, the time of incident, as suggested to P.W. 2, is 10.00/10.30 a.m., but no such suggestion was given to P.W. 3 that Puja had been to the house of the accused at about 10/10.30 a.m. It is the evidence of D.W. 1 that Puja used to go to their house almost everyday to play with her daughter which is also admitted by the accused during his examination u/s 313 Cr. PC. Playtime of the children is normally in the afternoon. There is nothing to indicate in the evidence of D.W. 1 or D.W. 2 that

Puja went to their house on that date in the morning at about 10.00/10.30 a.m. to play with D.W. 2. The very suggestion to P.W. 1 that on that date and time i.e. 03.03.1998 at about 4.30 p.m. Puja and Papiya pushed tamarind seeds in their respective vaginas indicates that the time of incident at about 4.30 p.m. is not disputed. It is the specific evidence of P.W. 1 that his daughter went to the house of the accused at about 4.30 p.m. which is about 4/4.30 p.m. as per evidence of P.W. 3 and after coming back to house she narrated the incident to them at about 5/5.30 p.m. which is supported by P.W. 2 who stated that she went there in the afternoon, and there is no denial of it in their cross-examination. So, all the above aspects lead to show that the incident took place in the afternoon at about 4.30/5.00 p.m. when the accused was very much in the house and his plea of alibi that he was away in the market in the morning is immaterial. Therefore, the question of relying upon the certificate (Ext. B) issued by Dr. Jagannath Ganguly, since deceased, and proved by his son D. W.3 which runs to the effect that foreign body (tamarind seed) in the vaginal canal in front was removed by him on 03.03.1998 at 12.00 noon is out of the way, the same being palpably false. The falsity of defence case undoubtedly does not establish the prosecution case but it may be taken into consideration in deciding if the charge has been brought home against the accused and when other circumstances point unfailingly to the guilt of the accused, it can be considered as a link in the chain of circumstantial evidence to make it complete, as a false plea put forward by the accused rebounds on him and the prosecution case gets strengthened. In this connection, the case of Shankarlal Gyarasilal Dixit Vs. State of Maharashtra, may be relied upon.

12. So far as the evidence of P.W. 10 who first examined the victim at about 1.30 a.m. on 04.03.1998 and found reddish oedematous on genital region with complaint of frequent micturition and painful micturition due to sexual assault by the accused and presence of white stain in front of garment of the victim is concerned, there are some interpolation, penning through and rewriting in the injury report (Ext. 5) without bearing any P.S. case No. On being directed by the Court, the said injury report with hospital register was produced, and why the I.O. did not collect and seize the above vital document is not clear. Nevertheless, in view of those defects, we are of the considered view that it will be unsafe to rely upon the evidence of the above witness, and the contention of Mr. Baau, Id. counsel for the appellant, for excluding the above dubious document from consideration appears to be appreciable.

13. The victim was admitted on 04.03. 1998 under P.W. 8 who was then Assistant Professor of Gynaecology and Obstetrics at Bankura Medical College and Hospital and she was examined by Dr. B. N. Majhi (P.W.9). It is his opinion that penetration of a little finger in the vagina of a girl of five years old is generally difficult. In other words, he did not rule out the possibility of rape upon a girl of five years of age. P.W.13, Principal and Head of the FSM Department of the said College, to whom the matter was referred by P.W. 8 for his opinion, on examination of the victim on 04.03.1998 found (1) oedema and congestion in

labia majora, (2) no scratch mark or bleeding in the vaginal canal and (3) hymen intact. He, however, did not submit any specific opinion of rape. P.W. 9 who is an M.B.B.S., M.D. (G and O), on examination of the victim on 04.03.1998 found labia majora slightly oedematous, reddish -- hymen not ruptured and no other external injury nor any bleeding in private parts. The patient complained of dysuria (difficulty in passing urine) and frequency of micturition (passing of urine). He opined that the said injuries might be caused due to sexual assault. To a query by the Court, he stated that it is not possible to push a single finger within vaginal canal of any girl of five years of age. Modi in his well known work "Medical Jurisprudence and Toxicology", states: "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains....," This observation was approved in Madan Gopal Kakkad Vs. Naval Dubey and Another, . In other words, in a rape case while there must be penetration in the technical sense, slightest penetration without rupturing hymen is sufficient to constitute rape and the depth of penetration is immaterial. Absence of marks of violence on private parts or elsewhere on the person of the prosecutrix merely suggests want of violent resistance on the part of the prosecutrix which is wholly inconsequential in case of a prosecutrix aged about five years. Mark of semen on the panty, as was found by P.W. 1 and P.W. 10 is negated by the FSL Report (Ext. 7) which speaks that neither semen nor any spermatozoa could be detected in vagina or in any of the items. As a matter of fact, absence of semen or spermatozoa cannot be a factor in all cases to disprove sexual molestation of the victim. It would appear from the above that both P.Ws. 9 and 13 found injuries on the genital organ of the victim. Though P.W. 13 did not give any specific opinion of rape, the opinion of P.W. 9 who is an expert on the subject is acceptable as labia majora was slightly oedematous and reddish and there was congestion of labia majora and there was complaint of dysuria and frequency of micturition, which is suggestive of penetration, might be slightly and thus the act on the part of the accused comes within the mischief of rape.

14. On principle, the evidence of a victim of sexual assault stands on par with the evidence of an injured witness as she is the best witness and is not likely to exculpate the real offender; the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding.... In the Indian setting refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the lid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ?.... A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely

to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society including her own family members, relatives, friends and neighbours", as was observed in the of Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, . The evidence in all such cases is that of the victim herself. In practice a conviction for rape almost entirely depends on the credibility of the woman, so far the essential ingredients are concerned, the other evidence being merely corroborative. In other words, substantial corroboration of prosecutrix's version cannot be insisted upon in all cases of rape. The Court must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. The inherent bashfulness, the innocent naivete and feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. No woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, as was held in Krishan Lal Vs. State of Haryana, ." Still, in the case on hand, the above evidence of P.W. 2 is corroborated in material particulars by her parents (P.Ws. 1 and 3) as also by medical evidence. There are, however, a very few inconsistencies in the evidence of prosecution witnesses which are minor and cannot undo the effect of evidence otherwise sufficient. It is to be borne in mind that the said witnesses are deposing after about 31/2 years of the incident. Memory is apt to be blurred in the passage of time, and so photographic picturisation in regard to co-lateral or subsidiary fact may not always be possible.

15. Mr. Basu, on referring to the evidence of P.Ws. 1 and 4 contended that over the issue of purchase of a plot of land by the father of the accused, the complainant tried to cause delay in execution of the sale-deed and there was a trouble between the two families over the issue of digging of a well by the complainant which gave rise to an animosity and the present case is the outcome of the said enmity. To a suggestion put to P.W. 1 that on 24.04.1995 he gained over Madhu Mondal. Nema Dhabal (P.M. 5) and Goutam Dhabal so that they may not execute the deed which was ultimately executed and registered on 25.08.1995 when the matter was reported to police by the father of the accused, he categorically denied. P.W. 5 also denied the allegation of similar nature. Though P.W.4 spoke about a trouble with the family of Deoghoria over the issue of digging of a well by P.W.1, P.W.1 denied of such trouble. The strained relationship between the parties is no ground for discarding the prosecution story particularly when it appears to have been well-established by the facts, circumstances and materials on record. In this connection, the cases of If Raman Kalia and Another Vs. State of Gujarat, and Babu and Others Vs. State of Uttar Pradesh, may be referred to. The evidence of D.W. 1 reveals that the marriage ceremony of the sister of the accused was held about 4/41/2 years ago. Which, as disclosed from the evidence of P.W. 3 and statement of the accused u/s 313 Cr. PC is eight days and 5/6 days respectively before the date of incident. It is

the specific evidence of P.W. 1 that he attended the marriage ceremony of the said sister of accused which is buttressed by P.W. 3. P.W. 1 further stated that he served food to the invitees on that occasion which remains uncontroverted in his cross-examination, and the accused during his examination u/s 313 Cr. PC admitted it. It is the further evidence of P.W. 3 that prior to the incident there was a visiting term between the two families, about which there is no denial in her cross-examination; on the contrary, it is admitted by the accused during his examination u/s 313 Cr. PC. So, the story of alleged enmity between the two families prior to the incident is totally falsified.

16. In the premises, in the light of the above discussion, the prosecution appears to have brought home the charge against the accused beyond all reasonable doubt, and there is no material to interfere with the decision of the Id. Court below.

17. Accordingly, the present appeal be dismissed on contest. The order of conviction and sentence passed by the Id. Court below in Sessions Case No. 8(11) of 1999 [S. T. No. 1(4) of 2000] on 29.03.2003 is hereby affirmed.

18. Alamats, if any, be destroyed after the period of appeal is over.

19. Let a copy of this judgment along with the L.C.R, be forwarded to the Id. Court below at once.

Debiprasad Sengupta, J.

20. I agree.