
(2012) 10 GAU CK 0003
In the Gauhati High Court
Case No : Criminal Appeal No. 59 of 2007

Sambhu Chakraborty

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 11-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164(5)

Evidence Act, 1872 — Section 65

Penal Code, 1860 (IPC) — Section 109, 164(5), 366, 375, 376

Citation : (2013) 2 GLD 330 : (2013) 2 GLT 442

Hon'ble Judges : Subhasis Talapatra, J

Bench : Single Bench

Advocate : R. Dutta, for the Appellant; P. Bhattacharjee, Addl. PP, for the Respondent

Final Decision : Allowed

Judgement

Subhasis Talapatra, J.—Heard Mr. R. Dutta, learned counsel appearing for the appellant as well as Mr. P. Bhattacharjee, learned Additional Public Prosecutor appearing for the State. This appeal by the convict is directed against the judgment of conviction and order of sentence dated 14.12.2005 as passed by the Additional Sessions Judge, South Tripura, Belonia in Sessions Trial No. 32(ST/B) of 2005 whereby the appellant has been convicted u/s 376/366 IPC and sentenced to suffer five years rigorous imprisonment for commission of offence punishable u/s 366 of IPC and seven years rigorous imprisonment with fine of Rs. 30,000/- in default to suffer one year S.I for commission of offence punishable u/s 376(1) IPC.

2. The essential fact that will be necessary for appreciating the appeal is briefly narrated hereunder:

On the basis of the complaint of the prosecutrix where she alleged of commission of rape on her by the appellant with the help of the other accused persons. The prosecutrix stated in the complaint dated 15.11.2004 which had been registered

as P.R. Bari P.S. Case No. 47 of 2004 u/s 366/376(2)(g) of the IPC that on 14.11.2004 which was a Sunday at about 2.00" O'clock night while she was going to Gabtali bazaar for watching theatrical performance (Yatra) the accused persons namely, Kami Sutradhar took her to one sweet-meat shop and offered her sweet and later on with the assistance of Kanu Sutradhar she was taken to some distance along the road on the southern side of that bazaar. Her mouth was gagged with a "muffler" and thereafter she was taken to the house of Parimal Sutradhar of Nripendra Nagar where the accused persons had tortured and raped her. On receipt of the complaint, the police started investigation and in the course of the investigation, the statement of the prosecutrix was recorded u/s 164(5) of the Cr.P.C. by the Sub-Divisional Judicial Magistrate, Belonia, South Tripura on 19.11.2004 where the prosecutrix stated:

My name is ***** (name concealed). I am. 19 years old (my) house is at Gabtali. I have a love affairs with Sambhu Chakraborty of Niharnagar for the last 1(one) year. On the night of Sunday last. I went to Gabtali with Smti. Kanu Sutradhar in order to watch Yatrapala (theatrical performance). While the yatrapala was going on Sambhu Chakraborty went there and brought me. We had sweets in the shop. Thereafter Sambhu and I came to a secluded place at Nripendra Nagar by a motorcycle. We had sexual intercourse twice over there.

After investigation the police filed the charge sheet against the appellant and two others accused persons namely, Sri Kanu Sutradhar and Debasish Majumder @ Asish Pandit u/s 366/376/109 of the IPC. On taking cognizance the matter was committed to the Court of the Sessions at Belonia who framed the following charges against the appellant and other accused persons:

Firstly that you on or about the 15.11.04 at about 02.00 hrs. At Nripen nagar, kidnapped a woman to wit...(the prosecutrix, die name is concealed) in order that the said woman will be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse and thereby committed on offence punishable u/s 366 of the IPC and within the cognizance of this Court.

Secondly that you on or about the same, date, time and place committed rape on....(the prosecutrix, the name is concealed) and thereby committed an offence punishable u/s 376 of the IPC and within the cognizance of mis Court of Sessions.

That Sri Sambhu Chakraborty on 15.11.04 at about 0200 hrs. At Nnpennsaer. and that you at Gabtali on 15.11.04 abetted the said Sambhu Chakraborty in the commission of the said offence of kidnapped and rape which was committed an offence punishable u/s 109 read with Sec. 366 of the IPC and within the cognizance of this Court of Sessions.

3. When the trial commenced the prosecution examined as many as 14 witnesses including the prosecution her father, the medical officer who examined the prosecutrix and the appellant amongst the other persons who had some knowledge of the occurrence.

4. The PW-1 namely, Gouranga Pal is a seizure witness who exhibited ghagra, one frock and one panty as seized from the prosecutrix by the Investigating Officer.

5. The PW-2 namely, Ashutosh Pal is a hearsay witness but at the same time is witness to the seizure. He admitted the signature in the seizure list, Ext. P(2).

6. The PW-3 namely, Srikanta Kr. Das is the father of the prosecutrix who turned hostile and did not support the prosecution case. He stated that there was a dispute with the appellant and other accused persons and that had been sorted out amicably. The prosecutrix was examined by the prosecution as the PW-4 who deposed that when she went to attend the theatrical performance Kanu Sutradhar called her for going to sweet-meat shop where they had sweets with Sambhu Chakraborty and Debasish Majumder @ Pandit Kanu also offered her betel-leaf but she refused. Thereafter she was taken to a place at a distance from the sweet-meat shop where the appellant and other two accused stayed and Sambhu gagged her mouth with muffler and thereafter she was saddled in the motor cycle and taken to the house of Kanu Sutradhar. Thereafter she was taken to a place at Nripendra Nagar where she was raped but she did not resist. She was rescued from the road side by her cousin namely Krishna Das (PW 5) to whom she disclosed everything in detail. Thereafter she lodged complaint in the P.R. Bari Police Station (Ext. P-1). In the cross-examination she had however categorically admitted the statements as recorded u/s 164(5) of the Cr. P.C and deposed that she narrated to the Magistrate that the accused gagged her mouth by "muffler" at the time of elopement Attention was drawn to the said statement, but no such statement was found, however she admitted that she stated the Magistrate that she had love affairs with Sambhu Chakraborty for one year and they came to a lonely place by motor cycle. They went to the house of Kanu Sutradhar. But no such statement was also found. She also stated that, she did not state to the recording Magistrate that she consented to the sexual intercourse. Rather she stated that she was raped by force. She denied the statement that there had been settlement. She confirmed that her age was 19 years at the time of occurrence.

7. Krishna Kr. Das, the cousin brother of the prosecutrix who deposed as the PW-5 stated that the prosecutrix stated him that the appellant and other accused persons gagged her mouth by muffler and taken her by a motor cycle to a place at Nripendra Nagar area. He had written the first information report as per the dictation of the prosecutrix. He also deposed that prosecutrix stated him that the appellant "raped her two times", He also admitted that though there was initiative of amicable compromise of the matter but ultimately that was not struke.

8. One Pradip Das (PW-6) stated that he saw the prosecutrix with Sambhu Chakraborty, Kanu Sutradhar and Pandit (Debasish Majumder) to take chop and singara (samosa) from his shop and thereafter they went out.

9. The PW-7 namely, Swapan Das did not reveal anything of material importance. He also saw the appellant, Pandit (Debasish Majumder) and the prosecutrix coming out from the house of Kanu Sutradhar. However, he admitted that he did not tell the Investigating Officer that the appellant and Debasish Majumder came out from the house of Kanu Sutradhar. But in the cross-examination he deposed that he confronted those persons including the prosecutrix. He saw the prosecutrix coming out from the house after sometime.

10. Kartik Debnath and Kartik Debnath (name sake) who were examined as P.Ws. 8 and 9 did not reveal anything of material importance. However, they exhibited the seizure list, Ext. P(2).

11. One Mono Rn. Bhowmik who was examined as the PW-10 was a Head Constable of P.R. Bari police station who arranged the medical examination of the prosecutrix and prepared the seizure list.

12. The Medical Officer, Dr. Arup Datta, who examined the prosecutrix, was examined as PW-11 categorically stated that:

On examination one blackish mole above right side of upper lip found. Multiple blood stain present over the skirt. No injury found in the breast. On gynecological examination, public hair present and blood stain found on the vulva. Bleeding from the tear found. Labia minora was tendered. Two ringers admitted. On examination, I opined that there is recent evidence of sexual intercourse. Regarding age of the victim girl she was sent to Udaipur Hospital. Vaginal swab also sent and handed over to the Investigating Officer. This is the medical report submitted by me on 23.11.2004. Medical report is exhibited and marked as Exbt. P-6.

The PW-11 also examined the appellant and found some injury marks on various parts of his body. Even he was asked to give swab for pathological test.

13. One Pulin Ch. Mitra (PW-12) who was Headmaster of the Gabtali H/S School who produced the School Certificate (Ext. 10) and proved that the date of birth of the prosecutrix as recorded therein was 15.04.1990. In the cross-examination he admitted that the said certificate was not written by him and entry in the admission register was made by one Dwijendra Ch. Majumder, the then Headmaster.

14. Pranab Debnath, who was the Investigating Officer (P.W-13) narrated how he conducted the investigation including how he got the statement of the prosecutrix recorded u/s 164(5) of the Cr.P.C., her medically examined by the competent doctor, conducted the search and caused the seizure as recorded. He also admitted the statements of Krishnadhan Das (Ext. D/1). He deposed that he collected the CFSL reports. The report was negative and i.e. why the said report was not brought on the record.

15. The PW-14 namely, Gopal Ch. Kar, Sub Divisional Judicial Magistrate, Belonia at the relevant point of time, was examined. He stated that he recorded her

statement which was made voluntarily and the prosecutrix signed the said statement on being explained and read over the same which has been exhibited as the Ext. P.6.

16. The medical examination report is available at Ext. P-7 and the School Certificate is at Ext. P-8. The prosecutrix laboured hard to say that at the time of commission of rape she did not attain the consenting of age as per provision of Section 375 of the IPC which provides that a man is said to commit rape who had sexual intercourse with a woman under the circumstances falling under any of the six descriptions as provided in the said section including "with or without consent, when she is under sixteen years of age."

17. Mr. R. Dutta, learned counsel heavily relied on the statement as recorded u/s 164(5) of the IPC (Ext. P.5) and stated that there cannot be any earthly reason to believe the statement given by the prosecutrix and as such no offence u/s 366/376 IPC has been made out against the appellant.

18. On refuting such proposition Mr. P. Bhattacharjee, learned Addl. Public Prosecutor referring to the 6th exception of Section 375, IPC submitted that from the School Certificate it would be apparent that the prosecutrix was below the age of 18 years at the time of commission of offence of rape. Mr. Bhattacharjee, learned Addl. P.P further referring to the said School Certificate (Ext. P-8) submitted that the prosecutrix was born on 15.04.1990 whereas the incident took place on 14.11.2004 and as such the prosecutrix was just about 14 years 7 months. As such, the plea of the appellant that the prosecutrix had consent for sexual intercourse cannot have any force.

19. On appreciating the rival contentions, this Court finds that the prosecutrix had given different versions at different points of time. Giving one version in the First Information Report (Ext. P-1), she has changed the version with some improvement while her statement was recorded u/s 161 of the Cr.P.C and thereafter given a completely different version while her statement was recorded u/s 164(5) of the Cr.P.C. There had been no corroborating witness except the hearsay evidence. Even the PW-3, father of the prosecutrix turned hostile and did not support the prosecution case. However, the PW-5 a cousin brother of the prosecutrix, transcribed the complaint and stated that on the first instance the prosecutrix stated him that she had been raped by three persons. But the statement of the PW-7 namely, Swapan Das is of paramount importance to analysis the credence of the statement of the prosecutrix. The said PW-7 has categorically stated while deposing in the Court that the appellant was standing in the road side and thereafter the prosecutrix came out from the house of Kanu Sutradhar and he did not observe any suspicious appearance on the face of the prosecutrix. Even the PW-4 has stated that at the first instance the prosecutrix stated that the appellant raped her two times. This incident if properly tuned and read with the statement as recorded u/s 164(5) of the Cr.P.C would demonstrate that the said statement can be relied to unearth the truth. But the question remains if the prosecutrix did not reach the consenting age of 16 years as curved

out in Section 375, IPC whether such consent has any value to exonerate the appellant from the charge. The only evidence that has been relied contrary to the age reflected in the certificate is the statement of the prosecutrix that on the date of occurrence she was 19 years. The said School Certificate is the Ext.P-8.

20. For purpose of appreciating the law in regard to determination of age basing on the school certificate, this Court would refer a decision rendered in Sri Binay Debnath Vs. The State of Tripura., where this Court observed as under:

16. As stated earlier that the Exbt.4 had been admitted in the evidence without following the prescribed procedure as laid down in Section 65 of the Indian Evidence Act, therefore, by appreciating that document in the evidence, the learned trial Court has committed serious illegality and rendered the impugned judgment and order perverse. Even the objection as raised by the defence at the time of admission was not discharged. On the point of consent of a minor girl, a decision of the apex Court may also be referred as rendered in State of H.P. Vs. Suresh Kumar @ Chhotu, where the apex Court observed that, as evident from the document the prosecutrix was more than 16 years of age at the time of occurrence and she accompanied the accused on her own and being a consenting party to the sexual acts. The apex Court further held that the consent would be valid if it is found that there is reason to suppose the prosecutrix is more than 16 years of age.

As such, the said School Certificate has not been properly admitted in the evidence as the school register including the admission form on the basis of which the entry has been made was not produced during the trial. Even though father of the prosecutrix who was examined as the PW-3 no question in the form of the cross-examination or otherwise was put to him as regards the age of the prosecutrix. Therefore, the prosecution has failed to establish the age of the prosecutrix beyond all reasonable doubt. Moreover, the secondary evidence only can be admitted after exhausting the procedure as prescribed in Section 65 of the Evidence Act, but such procedure has been excepted while admitting the evidence i.e. Ext. P-8. As such on the basis of the said documents, in absence of the primary document or any oral testimony of the relevant witness, the findings as regards the age as returned by the trial Court cannot be sustained.

21. Apart that, the prosecutrix was few months short of the consenting age as stipulated u/s 375 of the IPC, even if Ext. P-8 document is entirely relied by waiving its defective admission as discussed, she was mature enough to give the consent, moreover from the medical report it is found that there was no mark of violence except stain of blood over her ghagra exhibited by the Investigating Officer. This of course does not indicate to the commission of rape but to the sexual intercourse. Sexual intercourse with consent cannot come within the definition of rape. Since this Court has found that the versions of prosecutrix varied substantially from one point of time to the other point of time, solely depending on her version to return the findings of the conviction would definitely be unsafe. But on the other hand, the statement that was recorded u/s 164(5) of

the Cr. P.C has projected a version which does not constitute any offence u/s 366/376 of the IPC. Apart that, there is no other material which generate such confidence in the Court to return the finding of the conviction.

22. For the reasons discussed, this Court is inclined to interfere with the impugned judgment of conviction and order of sentence and accordingly the same is set aside. As a result, the appellant is acquitted from the charge on benefit of doubt. He would be set at liberty. The surety(s) would be discharged from the liability. Accordingly, the appeal stands allowed.

Send down the LCRs forthwith.