
(2015) 07 CAL CK 0014
In the Calcutta High Court
Case No : C.R.A. 606 of 2006 and 12 of 2007

Saroj Banerjee and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 10-07-2015

Acts Referred:

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

Citation : (2015) CriLJ 4893 : (2016) 1 Crimes 548

Hon'ble Judges : Nadira Patherya, J;Indrajit Chatterjee, J

Bench : Division Bench

Advocate : Navanil De, Sangita Chatterjee and Khalid Hasan, for the Appellant;
Manjit Singh, Ld. P.P. and Pawan Gupta, Advocates for the Respondent

Final Decision : Allowed

Judgement

Indrajit Chatterjee, J—These appeals are directed as against the judgment and order of conviction passed by the Additional Sessions Judge, 4th Fast Track Court at Barrackpore, District: 24-Parganas (North) on 17.08.2006 and 18.8.2006 in respect of Sessions Trial No. 8(3) of 2005 arising out of Sessions Case No. 10(12) of 2001 in which the Trial Court was pleased to convict both the appellants before us in respect of the Charge punishable under Section 376(2)(g) of the Indian Penal Code (Code) and both were sentenced to suffer rigorous imprisonment for 10 years and they were also directed to pay fine of Rs. 5,000/-, in default, to suffer further rigorous imprisonment for a period of one year.

2. It may not be out of place to mention that both the appellants have already served out the sentence and as such our effort is almost academic in nature, in respect of appellant No. 2 but the appellant No. 1 Saroj Banerjee wanted to proceed with this appeal as his service benefits are at stake in view of this order of conviction and sentence.

3. The appellant No. 2, Sahadeb Paul, did not appear and from the Legal Aid Panel, the learned counsel, who was representing the appellant No. 1, was

appointed also to represent the appellant No. 2. The case of the prosecution made out in the F.I.R., can be stated in brief, thus:

4. That one F.I.R. was lodged by one Nitya Karunananda Abadhut on 12.5.1997 with Noapara Police Station, North 24-Parganas at about 14.35 hours giving rise to Noapara P.S. Case No. 32 dated 12.5.1997 wherein he alleged that on 11.05.1997 between 9 P.M. to 9.30 P.M. one local postal peon, i.e., the appellant No. 1 came to Mahanirban Math Ashram with one unknown woman aged about 20 or 21 years and disclosed that the said woman had come there in search of a job. He requested the de facto complainant to keep that woman with him on that night in that Ashram. The de facto complainant accepted the request of the appellant No. 1, in the presence of Hiralal Das and Dibakar De both of whom were present in the said Ashram at that point of time and the said woman was taken inside the said Ashram. On the next day, that is on 12.05.1997 at about 7 A.M. or 7.30 A.M. one Usha Biswas, who was working in the said Ashram, reported to the de facto complainant that the victim alleged that she was ravished by two persons last night (11.5.1997) at about 8 P.M. to 8.30 P.M. in the courtyard in front of the Mandir of that Mahanirban Math Ashram. Thereafter, the FIR maker informed the two persons who were present at the time the victim was brought to the Ashram and the victim when asked by them also admitted the correctness of what she had divulged to Usha (P.W.7) and relying on this, the F.I.R. was lodged. The victim was taken to the Judicial Magistrate for recording her statement under Section 164 Cr.P.C. on the very next day and her statement was duly recorded. She was, however, taken to the doctor for her medical examination on 20th March, 1997. F.S.L. report was collected by the I.O. The appellants were examined by the doctor on the next day of their arrest. Report of the Serologist was also collected and after investigation the I.O. submitted Charge Sheet against both the accused persons in respect of the offence punishable under Section 376(2)(g) of the Code. It may be mentioned that at first the appellant No. 1 was arrested on 12.5.1997 and as per his identification the second appellant was also arrested on the same day even before the F.I.R. was lodged.

5. The case was committed to the Court of Sessions and ultimately it was transferred to the Additional Sessions Judge, Fast Track Court IV, Barrackpore and charge was framed against both the accused persons to which they pleaded not guilty and claimed to be tried and as such the trial was conducted before the Trial Court.

6. Before the Trial Court as many as 13 witnesses were examined. The prosecution also proved some documents like the medical reports, Serologist Report etc. and we have already stated regarding the fate of the trial and also the sentence.

7. It was argued on behalf of the defence that the prosecution had utterly failed to prove the charge against the accused persons. It was submitted that the evidence of P.W.1 cannot be believed to secure confidence of the Court to convict

the accused persons as she herself had contradicted the place of occurrence, the time of the incident and even the date of the incident. It was further submitted by learned counsel that nothing was disclosed to the doctor and he placed the medical report of the victim to show that no injury could be detected on her person. From the medical reports of the two accused persons also no injury could be detected even though they were produced before the said doctor on the very next day of arrest. He further submitted that the evidence of P.W.1 is in sharp variation vis-à-vis her statement recorded under Section 164 Cr.P.C. and also with the F.I.R. It was also submitted that P.W.7, Usha, to whom the victim allegedly disclosed the offence first, even did not come to support the prosecution story. It was further submitted that Hiralal, who was allegedly present as per F.I.R. at that time when the woman was taken inside the "Math" by the de facto complainant, did not support the case of the prosecution that he was present at that time. Hiralal was examined as P.W.3. and as per F.I.R., one Dibakar Dey was also present at that point of time when such handing over took place but unfortunately this PW.2 only described himself to be the scribe of the F.I.R. and did not use a single line that when the victim was taken to the Ashram he was present there.

8. It was the further submission of the learned counsel that even P.W. 6, the de facto complainant, did not say that he instructed P.W.2 to scribe the FIR and he candidly deposed that he just put his signature on the F.I.R. without knowing the contents. It was also submitted by the learned counsel that the evidence of the witnesses are in variance to each other as regards documentary evidence like the FSL report, Serologist Report etc. It was submitted that nothing has come out of their evidence. He submitted that it is true that the evidence of a victim in a case of this nature is enough to prove the case but her evidence must inspire confidence of this Court. Thus, it was his submission that the order of conviction and sentence passed by the learned Trial Court be set aside.

9. In counter to all this, learned counsel appearing on behalf of the State, submitted that the evidence of P.W. 1 is very important in this case, she being the victim of a sexual crime and that too under Section 376(2)(g) of the Code. He submitted by taking us to the various facets of evidence to convince this Court that she being one illiterate woman might have done some mistakes while answering questions but her evidence is to be read as a whole and if it is taken into consideration as a whole, only one irresistible conclusion will follow that it was these appellants who ravished the victim. Learned counsel further argued that it is true that there may be some defects in the investigation but that cannot injure the prosecution case, it is not a case of tutoring and what has come out from the mouth of P.W.1 is enough to affirm the findings of conviction and also sentence imposed. On this point, he cited the decision of the Apex Court in 1995 SCC (Cri) 977. He submitted that P.W.1, being a victim of a rape case cannot be treated as an accomplice and her evidence should not be discarded and no corroboration be asked for. On this point he cited the decision of the Apex Court as reported in 2006 Cr.L.J. (S.C.) P.139. It was also suggested by the learned

counsel that there may be minor contradictions, but those contradictions cannot be treated fatal for the prosecution.

Now, let us discuss in brief what has come out from the version of P.W.1, the star witness of this case. She deposed that "Khukimoni" entrusted me in a house to work as maid servant, where from I fled away. I was then taken away by two boys in a house of Dadu. There is a Mandir in front of house of Dadu. Since long they took away me in the house of Dadu. Those two boys were remained with me at night. In the morning they told me at night that they would purchase apple, bedana for me. On the next morning they told me this area is a good fine area for staying and requested me to stay there. They told me at night that they will purchase apple, Bedana for me as they would like to stay with me at night . I did not disclose to any body that they . At that time of incident I was wearing churidar . At that time I was wearing red coloured pant. (Lower Pant). At that time I was wearing black-red printed camiz (upper part)."

10. We are also not unmindful of the cross-examination of this victim when she deposed: "Today I have stated that those two persons were remained with me at night and then told me at night that they would purchase me apple Bedana for development of case for the first time. Today I have stated before the court that they told me that this area is a good area for stay and they requested me to say there for the first time. I did not disclose before daroga babu that they took my . There was a bag lying with me at the relevant point of time, but there was nothing with the bag. Seized article is not produced before the court. I had not seen the accused persons prior today. Police brought me to Doctor. I did not state before Doctor the names of accused persons. I did not disclose the identification (physical description) of the accused persons to any person." Thus, on reading and rereading the evidence of this witness, it appears that the alleged crime took place inside one room and at least not in the courtyard which was the case before the trial Court. These two appellants were never known to this witness and unfortunately for the prosecution no Test Identification Parade was made in respect of the present appellants through this P.W.1. She candidly deposed that she for the first time saw the appellants in the Court when she was being examined.

11. P.W.2 is a formal witness being the scribe (at least as claimed by him) P.W.3 even though was important at the time of filing of the F.I.R., but had proved to be a damp squib before the trial Court when he did not say that he was not present at the time when the victim was taken inside that Ashram. The evidence of P.W.4 is also hearsay and not only that he also tried to improve the story. P.W.5 came to that Ashram hearing hue and cry.

12. P.W.6 is the de facto complainant of this case. What knowledge he derived, he allegedly derived from Usha, that is P.W.7 as we get from the F.I.R. and also from his evidence. Thus, his evidence needs corroboration from the evidence of Usha. Unfortunately, for the prosecution, Usha even though supported the prosecution case regarding other matters that is her stay at the Ashram etc, but

did not say a single line that the victim stated to her that she was ravished a day before. P.W.1 complained to P.W.7 that she was undergoing menstrual cycle. P.W.8 is a formal witness who only registered the case. P.W.9 is the doctor about whom much was argued by the defence who examined the victim on 20.05.1997 at 4.40 p.m. On examination of the victim, this doctor did not find any injury either on her body or on her private parts. No recent rupture was found on her private parts and there were old ruptures on her private parts. It is suggestive of something else and that doctor candidly deposed and opined as follows:

"Undoubtedly she is habituated for sexual intercourse."

13. This doctor also examined both the appellants on 13.5.1997 but did not find any scratch marks on their body or any marks of violence on their private parts.

14. Let us now turn our eyes to the scientific examinations conducted during the investigation. As per exhibit-7 no semen could be detected on the items which were forwarded to the FSL. It is true that as per that report blood was detected in some items like Salwar Kamij etc. but we cannot shut our eyes to the fact that the victim was then passing through the menstrual cycle.

15. Exhibit-8 is the report of the Serologist who opined that blood group of the stains of the items forwarded to him would be deciphered and the test was inconclusive.

16. P.W.11 is the first I.O. who took investigation and during the course of investigation prepared the sketch map, seized the wearing apparels of the victim, forwarded her for examination under Section 164 Cr.P.C.. and did other formal works including sending of articles to the FSL. This witness is not that important in a case of this nature considering the evidence on record. Some contradictions were taken by the defence. We have taken note of those contradictions.

17. P.W.12 is a formal witness, who submitted a supplementary charge sheet after getting the F.S.L. report. P.W.13 is another formal witness who recorded the statement of the victim under Section 164 Cr.P.C. being the Judicial Magistrate, Barrackpore at that point of time.

18. Thus, we have covered the evidence on record. We have already stated that in a case of this nature the evidence of P.W.1, that is the victim of this case is very vital and we are to re-appraise her evidence. We admit that the victim is not like one accomplice and she is more than one injured witness. It is also true that no corroboration is necessary to secure conviction in such a case and the Court is free to convict an accused if the evidence of the prosecutrix is convincing and creditworthy.

19. In the instant case before us, the victim came out of Liluah Home either on release or she fled away and engaged herself as a maidservant in a house. Then she came into contact with two persons who were totally unknown to her and it is nobody's case as to why she left the place for an unknown destination. She did not depose that she was allured by those unknown persons to secure a job

for her. She did not support the F.I.R. that she came there in search of a job.

20. As per her evidence, the alleged incident took place at night and if her evidence is scanned it will come out that the incident took place in the house of one "Dadu" and the allurement was that she would be given "apple" and "bedana" (pomegranate). The time as per F.I.R. and the charge as framed, was in between 8-30 p.m. and 9-.00 p.m on 11.05.1997. But, as per her evidence on oath, it happened in the night on the date of her settlement in that Ashram (in the house of that Dadu). She has not mentioned in her evidence the time of the incident. Thus, the place of occurrence and time - the two vital ingredients of a criminal trial are totally at variance in between the evidence on oath and the F.I.R. In view of the aforesaid the benefit ought to have been given to the defence but that was denied.

21. Usha, P.W.7, is another important witness of this case and we have already told that she did not use a single line in her evidence to say that the victim divulged the incident to her in the morning of 12.05.1997. It is true that corroboration was not necessary in such a case had the evidence of P.W.1 been convincing to us. Let us quote what this P.W.7 had deposed: "She woke up and told me she was not in a position to stand. She told me that she was then under menstrual period. On hearing her statement I was afraid and I called the local people. Local people came to Ashram. Local people told me to inform the matter to P.S. but the local people informed the matter to P.S."

22. It is also clear from her evidence that when she came to the Ashram on that night she found the girl in the varandah of the Ashram. Thus, she has not supported the prosecution story that the victim told her as to the incident which is the basis of the F.I.R. and if that basis goes, the prosecution case must crumble down and the appellants will reap the benefit. If the incident at all took place at about 8.00 P.M. to 8.30 P.M. in the courtyard of the temple, before she was brought to the Ashram, it is a question as to why she did not report about the incident even to Usha on that very night and the following day.

23. Admittedly, these two appellants were not known to the victim and she deposed on oath that she for the first time saw those persons in the Court room. It is a million dollar question as to why the Investigating Officer did not pray for Test Identification Parade for the victim to come with a clear picture that it was these accused persons who ravished her. It is true that in a case of defective investigation the accused persons cannot reap the benefit out of that. But, here in the instant case before us, this conduct of the I.O. in not holding of the T.I. Parade will go at the very root of the prosecution story and we cannot fetter our hands from giving the benefit of doubt to the accused appellants. More so, when the evidence of P.W.1 does not inspire confidence and cannot be termed as reliable or credit worthy.

24. Thus, in view of the discussion made, we are convinced that the order of conviction and sentence as imposed on both the appellants, cannot be confirmed

by this Court.

25. The Appeals succeed. No order as to costs.

26. The order of conviction and sentence are both set aside.

27. Criminal Section is directed to return the L.C.R. along with a copy of this judgment to the Court below.

28. This has reference to Barrackpore P.S. Case No. 32 dated 12.5.1997 corresponding to G.R. Case No. 1453 of 1997 (of Noapara P.S. Case No. 32 (5)/1997).

29. Let the seized articles kept as alamats be destroyed after the expiry of the period of appeal.

30. Certified copy of this order, if applied for, be given to the parties on priority basis.

Nadira Patherya, J.

I agree.