
(2012) 06 GAU CK 0066
In the Gauhati High Court
Case No : Criminal Appeal No. 2 of 2010

Sri Simal @ Maru Datta

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 08-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 164(5), 222
Penal Code, 1860 (IPC) — Section 11, 354, 376, 376(1), 511

Citation : (2012) 3 GLD 522

Hon'ble Judges : Subhasis Talapatra, J

Bench : Single Bench

Advocate : P.K. Ghosh and Mr. S. Ghosh, for the Appellant; R.C. Debnath, Spl. PP., for the Respondent

Final Decision : Allowed

Judgement

Subhasis Talapatra, J.—Heard Mr. P K Ghosh along with Mr. S Ghosh, learned counsel, appearing for the appellant and Mr. R C Debnath, learned Special Public Prosecutor, appearing for the State-respondent. This appeal is presented against the judgment & order of conviction and sentence, dated 17.12.2009, passed by learned Sessions Judge, South Tripura, Udaipur, convicting the appellant to suffer Rigorous Imprisonment (RI) for 10 years and to pay a fine of Rs.1,000/- (Rupees one thousand) and in default to suffer further R.I for 2(two) months punishable u/ s 376 of Indian Penal Code (I.P.C).

2. The prosecution case, as transpired from the records, is required to be encapsulated and noticed briefly.

One Rabindra Das, PW.4, filed a written ejahar to the Officer-in-Charge, Birganj Police Station, Amarpur stating that one Simal Datta alias Maru, a neighbour of the complainant, enticed her minor daughter in one of the rooms while Kirtan (religious hymns) was being performed in their house and closing the door Shimal Datta alias Maru raped his minor daughter and also threatened that she should not disclose the occurrence to anyone. The said minor daughter (name

concealed), the prosecutrix, did not say anything at once out of fear. When the complainant had seen some suspicious materials in her inner-garment he pressurized her to disclose what happened, then the prosecutrix narrated in detail how the appellant had committed rape. In the ejahar the complainant had stated that there were allegations previously also against the appellant that he committed such type of incidence in the past. On the basis of this complaint Birganj Police Case No.31/2008 u/s 376 of I.P.C was registered.

After completion of the investigation, the Police submitted charge sheet against the appellant for the offence punishable u/s 376(1) of I.P.C. Since the offence was exclusively triable by the Court of Sessions the case was committed to the Court of Sessions by the learned Judicial Magistrate, 1st Class, Amarpur, for trial.

The learned Additional Sessions Judge, South Tripura, Udaipur, framed the charge against the appellant as under:

That you, on or about the 13th day of May, 2008, at Santipalli, P.S. Birganj, South Tripura committed rape on.....(name concealed)...., a minor girl and that you thereby committed an offence punishable U/S.376 of the Indian Penal Code and within the cognizance of this court.

The appellant pleaded not guilty and claimed to be tried and thus the trial commenced.

3(a). During investigation statement of the prosecutrix u/s 164(5) of the Code of Criminal Procedure, 1973 (Cr.P.C in short) was recorded.

In the said statement the prosecutrix stated thus:

Two days ago, one day, at about 7.30 P.M, I went to the adjacent house of Amulya Datta with my paternal grandmother for the purpose of seeing (listening to) `Kirtan" (hymns sung in praise of God). On going there, (my) paternal grandmother was sitting and listening to the `Kirtan" and I too was sitting on a cot inside the room and was listening to the `Kirtan". Meanwhile, paternal uncle (Kakku) namely, Maru Datta (Shimul Datta) came and called me and on pulling me to an adjacent room, all on a sudden, (he) closed the door of the room. Thereafter uncle made his penis touch my vagina. Uncle kept my mouth pressed with his hand. At this I could not raise alarm. Uncle told me not to tell my father and mother about all these matters. Uncle opened the new panty on my wearing and inserted his penis inside my vagina. At this I started feeling severe pain. Thereafter, there was much semen/fluid ejaculation from my uncle's penis and it fell on my pant and cloths. Uncle told me that if I told my father and mother about this matter, then he would kill me. On saying this, uncle set me free.

The prosecutrix also examined, as PW.1, by the prosecution where she stated in examination-in-chief thus:

on 13.05.2008, in the evening at around 7.30 P.M I along with my grand-mother Kanan Bala Das had gone to the house of our neighbor Amulya Datta to hear

kirtan song and when myself and my grand-mother were hearing kirtan song sitting on a cot inside the room of Amulya Datta, at that time, Simal Datta called me to come outside the room and when I came out and went near to him, he dragged me to another room of their house and bolted the door of the room from inside. Then, Simal undressed me and rubbed his penis over my vagina and thereafter, put his penis into my vagina. As a result, I felt severe pain on my vagina. I tried to raise alarm but Simal gagged my mouth by his hand. Simal after satisfying his lust threatened me not to disclose this incident to my parents otherwise he would kill me. My under-garment was also stained with whitish semen and he advised me to wash the whitish semen. Simal also told me to go to my house and returned to his house after changing my under-garment. Accordingly, I came to my house and changed my under-garment and put on another under-garment, again I went to the house of Simal to hear kirtan song. In the night, I disclosed the entire incident to my mother.

Prosecutrix identified the appellant in the dock.

However, in the cross-examination, she admitted that she did not state to the Investigating officer (I.O) that the appellant advised her to go to her house and to change her under-garment stained with whitish semen. While the statement u/s 161 was recorded she also admitted that she did not state to anybody else. In the night she disclosed the entire incident to her mother. She confirmed that the appellant forcibly put his penis into her vagina and kept it for about 2/3 minutes for which, she felt severe pain in her vagina and as a result of intercourse semen was discharged inside her vagina. She also stated that about 2/3 days prior to the incident an altercation had taken place in between the appellant and her parents.

3(b) Mother of the prosecutrix namely, Sabita Das, was examined by prosecution, as PW.2, who corroborated the statement of the prosecutrix stating in the examination-in-chief that on 13.05.2008, her daughter along with grand-mother had gone to the house of their neighbor Simal to hear Kirtan and after some time, she returned back to her home and again left leaving behind her under garment in the room. Her husband on his return from market noticed that the under-garment left by her daughter was stained with semen. In the night around 9.00 PM when the prosecutrix came back on inquiry she told that the appellant put his penis into her vagina and as a result, she felt pain on her vagina. Then she reported the matter to the elders of the CPI(M) Party and on the following day, her husband lodged complaint with the O/C, Birganj P.S. After lodging the F.I.R, their daughter was medically examined. I.O also seized one under-garment of her daughter in presence of the witness. She also identified the appellant in the dock.

In the cross she did not state anything to benefit the defence.

3(c). One Smt. Kananbala Das, the grand-mother of the prosecutrix appeared and posed as PW.3. She only corroborated that she along with prosecutrix

attended the Kirtan in the house of the appellant. Later on, she came to know from her son that the appellant called the prosecutrix in another room and committed sexual assault on her. She also stated that she saw the under-garment of the prosecutrix stained with semen. She also identified the appellant.

In the cross-examination she did not state anything which might support the defence.

3(d). The complainant, father of the prosecutrix, was examined by the prosecution, as PW.4, who narrated the incident as he heard from her daughter, PW.1 and admitted the ejahar (Exbt.P/1). He corroborated that the prosecutrix was medically examined by the medical officer of Amarpur Hospital and they also sent her to T.S.D Hospital, Udaipur for further medical examination. He further stated that her daughter made statement before the Magistrate about the incident. He also identified the appellant in the dock.

In the cross examination, he admitted that he did not state to the Investigating Officer that he found seminal stain in the under-garment of the prosecutrix but he stated that he mentioned in the F.I.R that suspicion arose seeing her wearing apparel. However, his statement to the effect that the Maru committed rape on his daughter was not found in the statement as recorded by the I.O u/s 161 of Cr.P.C. He denied the suggestion of implicating the appellant in a false case out of the previous enmity.

3(e). One Subrata Karmakar, the scribe, was examined by the document as per the dictation of PW.4. He did not divulge anything further of material consequence.

3 (f). One Samir Dhar Roy, deposed as PW.6, stated that on the following morning of occurrence PW.4 came to CPI(M) Party Office at Amarpur and stated that on the previous night one of his neighbour raped her daughter. However, it is stated that he cannot recollect the name of that boy, who committed rape on his daughter but the title of that boy was Datta. Then he advised PW.4 to lodge complaint with the Police Station. He stated in his presence that the I.O seized one under-garment of the prosecutrix being produced by Rabindra by preparing a seizure list where he signed as the seizure witness. He admitted his signature in the record as Exbt.p/1. PW.6 also marked the under-garment seized by the police as Exbt.M.O.1. He did not state anything in examination -in-chief which might give any benefit to the appellant.

3(g). PW.7 is the Judicial Magistrate, who recorded the statement and read over the contents of the same to the prosecutrix. Thereafter, the prosecutrix signed the statement as in his presence. Learned Magistrate admitted that the statement as recorded u/s 164 of Cr.P.C (Exbt.-p/3 and P-3/1) respectively.

3(h). Dr. Subhankar Nath, a Sr. Scientific Officer of Tripura Forensic Science Laboratory (SFSL), Tripura, Agartala appeared as PW.8 on 21.05.2008 and deposed that the Director of Tripura State Forensic Science Laboratory received a

parcel containing some exhibits in connection with Birganj P.S Case No.31/2008 u/s 376 of I.P.C., for examination and on that day itself the exhibits were handed over to him for examination. He examined those exhibited articles and submitted Biology Report and Serology Report. He identified the Biology and Serology Reports respectively as Exbts.4 and 5.

3(i). One Sri Pranab Debnath, who was the Officer-in-Charge of the Birganj Police Station, deposed as PW.9 and simply stated that he registered Birganj PS Case No.31/2008 u/s 376 of I.P.C, on receipt of a complaint from the PW.4 and endorsed the case to Shri Rakesh Jamatia, SI of police for investigation. Signature on the FIR and FIR Form respectively were marked as Exbt.P-1/3 and P-1/4.

3(j). PW.10, Dr. Mamata Majumder, Medical Officer of the Amarpur Sub-Divisional Hospital, is a vital witness since the said Medical Officer examined the prosecutrix. She deposed that the prosecutrix was 71/2 years at the relevant point of time. In connection with Birganj P.S Case No.31/2008 u/s 376 of I.P.C. she examined the prosecutrix. She found no external injury over her body. On vaginal examination she found that no oedema, swelling or injury over labia region. She also found that hymen was intact with only mild oozing of blood from right lateral aspect of upper part. Finger can be introduced through hymen into the vaginal canal. After examination she opined that there was no sexual intercourse or rape. She also opined that truth in regard to sexual intercourse can be ascertained through the chemical examination. She admitted Exbt.P/6. However, she confirmed on examination that the appellant was capable of intercourse and that report was also admitted at her existence as Exbt.P/7.

3 (k). One Ganesh Shil, neighbor of Rabindra Das, examined as PW.1. He deposed that one year back he could learn that the appellant committed rape on the daughter of Rabindra Das. His evidence is of no relevance for finding the truth.

3(l). PW.12, the I.O., Rakesh Jamatia deposed before the Court and stated how he conducted the investigation. He stated that he prepared the hand-sketch map on 14.05.2008, i.e. on the date of filing the written ejahar and endorsement of the case for investigation. He examined 7 material witnesses and recorded their statements u/s 161 of Cr.P.C, seized the under-garment stained with semen on preparing the seizure list in presence of the witnesses. He identified the Exbt.M.O.1 materials. He also stated that he arrested the appellant and thereafter, having found prima facie case established, filed the charge sheet u/s 376 of I.P.C. He also identified the accused in the dock.

In the cross-examination he denied the suggestion that he did not send the blood and semen to the Forensic Science Laboratory for examination. He also admitted that besides the prosecutrix, her grand-mother and other villagers were also present in the Kirtan in the house of the appellant but they were not aware of the incident.

4. Learned trial Judge, after appreciating the evidence, returned the finding of conviction holding that there are sufficient evidence to establish the charge against the appellant u/s 376 of I.P.C and he also discarded the defence plea of animus and of impleading the appellant falsely in the case. For returning the said judgment of conviction learned Sessions Judge also relied upon the M.O.1, the S.F.S.L report as well as the statements of the PWs.1, 2, 3, 4, 5 and 6. According to the Sessions Judge, all the statements are quite consistent and there is no contradiction. So, there cannot be any earthly reason to disbelieve the statement. Accordingly, on hearing the appellant, he sentenced him to suffer R.I for 10 years and to pay a fine of Rs.1,000/- (Rupees one thousand), further in default thereto suffer R.I for 2(two) months for the offence punishable u/s 376 of I.P.C.

5. Mr. P K Ghosh, learned counsel, appearing for the appellant, quite strenuously argued that from the Exbts.P.4, 5 and 6 it would be apparent that no case of rape was made out from those reports of the scientific examinations. He referred the exhibit P/6 document where the PW.10 had categorically opined as under:

From the above finding I am of the opinion that these are not enough findings to conclude that there was sexual intercourse or rape. However, circumstantial evidence chemical examination may give clue in this regard.

6. The Biology Report of the Tripura State Forensic Science Laboratory observed that the under-garment of the prosecutrix contained seminal stain/spermatozoa of human origin but the swab collected from the vaginal canal and orifice of victim no spermatozoa of human origin was found. One sealed glass vial contained a piece of gauge cloth bearing dark stain and blood of the victim was found there. In one sealed glass vial bearing blood stain of the accused was found but similarly in the sealed glass vial no seminal stain/spermatozoa of human origin was found due to degradation.

In the Serological Report (Exbt.P/5) it is available that semen was found in the under-garment of the prosecutrix. One sealed glass vial as said to contain the blood of the prosecutrix was found.

Both the Serological and Biological Reports can be collated and there is no finding in conflict.

7. On the basis of such report, Mr. Ghosh, learned counsel for the appellant submitted that there was no penetration and the penetration is sine qua non for commission of rape u/s 376, I.P.C. It is stated that finding of semen in the under-garment of the prosecutrix does not necessarily connect the appellant with the offence as alleged. He further submitted that the prosecutrix (PW.1) has categorically stated that before 2/3 days of the occurrence there had been altercation between her parents and the appellant. Taking clue from the statement, learned counsel contended that there was every possibility of implicating the appellant in the offence to wreak vengeance. Learned counsel vehemently submitted that the medical examination report has shadowed the

testimony of PW.1 and as such, in absence of very strong corroboration the conviction cannot sustain.

8. On the other hand, Mr. R C Debnath, learned Special Public Prosecutor while refuting the submissions made by Mr. Ghosh, Learned counsel for the appellant submitted that there is no circumstances to discredit the sole testimony of the prosecutrix. What the earthly reason might be there that a girl of 7/8 years spoke so loudly about the sexual assault unless she had undergone the said trauma. The defence is found to fail in convincing that due to enmity allegation of such nature can be levelled.

Faintly perhaps, learned Special Public Prosecutor was endeavouring to show that if the enmity was of such nature then it was not expected that the prosecutrix would visit along with her grand-mother to the Kirtan as organized in the house of the appellant. Therefore, the causal statement as made by PW.1 in the Court, cannot meet the basis for discrediting her testimony.

9. Mr. Ghosh, learned counsel for the appellant, relied on a few decisions to support his contention.

In the case of Lalliram and Another Vs. State of M.P., the Apex Court held thus :

10. The trial Court noted that though the prosecutrix claimed that she was raped by several persons at several times there was no injury noticed and doctor has categorically stated that there was no sign of rape and in fact there was no injury.

11. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra and Others Vs. State of Orissa, where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar and Another Vs. State of Haryana, .

12. As rightly contended by learned Counsel for the appellants a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In Aman Kumar's case (supra) it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value it may search for evidence direct or circumstantial.

In the case of Bibhision Vs. State of Maharashtra reported in 2008 CRL.J.721 the Apex Court enunciated the law again. It has been held that when there was no

injury on the body of the prosecutrix and there was no sign of semen on the private part of the body and neither her clothes were torn nor there was presence of hair of the accused on the private part of the prosecutrix and after medical examination of the prosecutrix the doctor deposed that the girl was habituated with sexual intercourse. In view of this evidence the Apex Court was of the opinion that -

The High Court as well as the Trial Court has not correctly appreciated the evidence and has wrongly convicted the accused-appellant. The accused who has been charged u/s 376 read with Section 511 IPC is entitled to benefit of doubt.

7. In the facts and circumstances of the case, we give the benefit of doubt to the appellant- accused as the charges framed against him are not proved beyond reasonable doubt.

Mr. Ghosh, learned counsel for the appellant also relied on the case of Chandan Muhuri and Anr. Vs. State of Tripura reported in 2010 (4) GLT 434 where it has been held that

38.2 In Dinesh Jaiswal (*supra*) as referred to by Mr. Sarkar, the Apex Court after considering the case of Motilal (*supra*) noted that there can be no quarrel with this proposition that a prosecutrix must be believed irrespective of the improbabilities in her story is an argument that can never be accepted. The test always is as to whether the given story, *prima facie*, inspires confidence. We are of the opinion that the present matter is indeed an exceptional one. In Rajoo and Ors. (*supra*) the Apex Court after taking note of Ranjit Hazarika Vs. State of Assam, and considering all the facts of that case held that it cannot be lost sight of that rape causes the greatest distress and humiliation to the victim, but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly, where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis of assuming that the statement of such witness is always correct or without any embellishment or exaggeration. In that case the Apex Court also held that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable, but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be judged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case and others, such as this one, need to be examined.

A similar judgment as rendered in the case of Pallab Das Vs. State of Tripura reported in (2011) 2 GLR 661 was also relied where this Court held that -

6. Mr. Talapatra, learned senior counsel places the evidence of prosecution

witnesses particularly, PW-1, victim girl and also PW-3, Miss Arati Das, cousin sister of PW-1. According to him, the evidence of victim girl is full of exaggeration and serious contradictions. Her evidence is inconsistent, unreliable and unbelievable besides being fanciful and artificial and on the basis of such evidence no conviction can be imposed. It was stated by the victim girl that she was forcefully taken inside the shop of the accused-Petitioner in presence of her cousin sister, PW-3. But from the evidence of PW-3, no such statement is found corroborating the evidence of the victim. Placing the medical report, it has been submitted that there was no sign of rape not to speak of penetration of penis of the accused Petitioner in the vagina of the victim girl. To quote from relevant portion of the medical report

On examination no injury mark is seen anywhere in her body including her private parts. Hymen found intact. No injury mark on her labia majora and labia minora. No foreign material is seen in her private parts except scattered sticky white discharge, which is seen around the vaginal introitus, and her public hairs were matted with the same discharge. Two Nos. vaginal swabs has been taken (one from vaginal introitus and one from outside vaginal orifice). Both the swabs are examined under microscope which shows plenty of dead and few alive spermatozoa along with few epithelial cells indicating of recent sexual intercourse.

In the case of Pallab Das (supra) learned Judge set aside the judgment and conviction u/s 376 of I.P.C but convicted the appellant u/s 354 of I.P.C.

Mr. Ghosh, learned counsel also referred a decision of Jharkhand high Court in the case of Naresh Mahto Vs. The State of Jharkhand, where it is held thus:

7. The defence taken by the appellant has been brought on record as Ext. A and Ext. A/1 in which Gram Panchayat Khutra Case No. 1 of 1992 regarding an occurrence dated 22- 7-1992 took place between Most. Balia and Beni Mahto, Mahendra Mahto and Parmeshwar Mahto etc. This shows that the accused in that case were convicted and sentenced to pay a fine of Rs. 50/- by the Gram Panchayat. According to the appellant, Parmeshwar Mahto, the husband and Beni Mahto, the father-in-law of the informant have been involved in that case filed by his mother Balia. This counter case has been filed on false grounds. The fact remains on record that the Gram Panchayat case was instituted before the registration of the present case. It also appears that the incident as alleged took place in broad day light on 26-7- 1992 just after four days of the incident tried by Gram Kuthchery. It is also found that the prosecution version is not supported by any cogent evidence of rape committed by the appellant as the doctor could not find any injury on the person of the informant on the next day (27-7-1992). The conduct of P.W. 3, the husband of the informant has brought on record in cross-examination that he was informed by his wife when he returned back to his house in the night. He admitted that the matter was reported to him after he took his meals. Admittedly, he has not tried to search the appellant nor informed to the village Chowkidar or any one nor the villagers. P.W. 2 has stated that the matter was reported immediately after the incident to daughter-in-law Munshi

Mahto and some other females. She farther asserted that she went, to the house of village Chowkidar who had gone along with them next day to the police station, which contradicts her son. It has further, been found that P.W. 1 and P.W. 2 have developed the prosecution version by including P.W. 2 as eyewitness to see the appellant fleeing away from the place of occurrence. The father-in-law of the informant has not been examined.

8. In absence of the probable witnesses i.e. village Chowkidar, father-in-law of the informant and further non-examination of the Investigating Officer in the present case, creates a reasonable doubt on the whole prosecution version.

9. Having considered the above-mentioned facts and circumstances of the case, I find and held that the prosecution has failed miserably to bring home the charge u/s 376 of the Indian Penal Code against the appellant beyond all reasonable doubts. Accordingly, I find that the present appeal has got merit and deserves to be allowed.

10. It is settled that there is no rule or law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. However, if the court finds it difficult to accept the version of a prosecutrix on the face of it, it may search for evidence, direct or circumstantial for assurance by way of corroboration.

In the touch stone of this law, for appreciation of evidence, when the prosecution case is based on the sole testimony of the prosecutrix this Court intends to examine the rival contentions. It has been established in evidence that the prosecutrix was subjected to sexual assault by the appellant but whether the prosecutrix was raped or not, has not been established without shred of doubt. The Medical Examination Report (Exbt.6) has overshadowed the testimony of the prosecutrix where the prosecutrix has stated that the appellant inserted his penis into her vagina and retained the same up to 3 minutes and discharged the semen inside the vagina and later on smeared her under-garment with the seminal stain. This minute details of the sexual act as depicted by the prosecutrix of an age of 71/2 years acquired serious suspicion about her testimony.

A possibility however cannot be ruled out that after her disclosure to the parents she was tutored to embellish the version. But the attempt of rape cannot be excluded even if the act of penetration is disbelieved. There is no evidence as regard to the act of penetration and as such, this Court is of the considered opinion that charge of rape u/s 376(1) of the I.P.C has not been established beyond reasonable doubt. Therefore, the appellant cannot be convicted u/s 376(1) of I.P.C. Accordingly, the judgment & order of conviction and sentence, as awarded by learned Sessions Judge, South Tripura, Udaipur, is interfered with and set aside. However, this Court is satisfied that the appellant has attempted to rape the prosecutrix and there is evidence in abundance to establish the charge u/s 376 read with Section 511, I.P.C and accordingly, the appellant is convicted u/s 376 read with Section 511, I.P.C and sentenced to suffer RI for

2(two) years with a fine of Rs.10,000/- (Rupees ten thousand) in default of payment of the fine to suffer further R.I for 2(two) months, in exercise of powers conferred upon the court u/s 222, Cr.P.C., without framing the charge.

11. For the reasons, aforesaid stated, the appeal is partly allowed. LCRs be sent down forthwith.