

(2014) 03 TP CK 0021
In the Tripura High Court
Case No : Criminal A. (J) NO. 14 of 2012
Sri Suman Barman VsThe State of Tripura

Date of Decision : 18-03-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 374
Penal Code, 1860 (IPC) — Section 341, 366, 376, 376(1), 511

Citation : (2014) 3 GLD 210 : (2014) 2 GLT 607

Hon'ble Judges : S.C. Das, J

Bench : Single Bench

Advocate : R. Purkayastha, for the Appellant; A. Ghosh, Public Prosecutor, for the Respondent

Judgement

S.C. Das, J.—This criminal appeal u/s 374 of Cr.P.C. is directed against the judgment and order of conviction and sentence dated 28.09.2010 passed by learned Sessions Judge, West Tripura, Agartala, in case No. S.T. 89/2009, whereunder, the learned Sessions Judge found the accused-appellant guilty of committing offence punishable u/s 376 read with Section 511 of IPC and sentenced him to suffer RI for five years and to pay a fine of Rs. 5,000/- (rupees five thousand), in default of payment of fine to undergo further RI for six months and for commission of offence u/s 366 of IPC further sentenced him to suffer RI for three years and to pay a fine of Rs. 2,000/- (rupees two thousand), in default of payment of fine to suffer further RI for two months. Learned Sessions Judge, however, directed that both the sentences shall run concurrently. Heard learned counsel, Ms. R. Purkayastha for the appellant and learned P.P., Mr. A. Ghosh for the State respondent.

2. Prosecution case, in short, is that on 21.06.2008 at about 12.00 noon, Arpita(actual name kept concealed)(PW6), went to Lake Chowmuhuni market to search for her mother, Sikha Dutta(PW8), who had gone to market for some purchase. In the market Arpita met a boy who allured her to go with him to his residence at Indiranagar and, accordingly, the boy took her to his rented house at Indiranagar, in the house of one Nantu Saha. The boy collected the keys of the house from his neighbor, Jyotsna Saha(PW9), opened the door and took the

victim girl in the hut, stripped off her garments and committed rape on her.

It is also the case of the prosecution that Dilip Debbarma(PW7), a tenant of Sankar Lal Datta, the informant(PW5), father of Arpita, while on the way found Arpita with a boy near Abhoynagar bridge but he thought that the boy might be a relative and, therefore, did not ask anything to Arpita. When he returned home, i.e. the house of the informant, he found mother of Arpita(PW8) visibly nervous and told him that Arpita was missing. Dilip disclosed the fact that he found Arpita with a boy passing through Abhoynagar bridge and, therefore, Dilip with the son of the informant, i.e. the brother of Arpita, went out to search for Arpita and recovered her from the hut of the accused and, thereafter brought them to the office of the Lake Chowmuhuni Market Committee since the accused was a vegetable vendor of the said market. Arpita disclosed that she was raped by the boy whose name was disclosed as the accused, Suman Barman.

3. Police was informed and PW5, Sankar Lal Datta lodged FIR in writing and, accordingly, Agartala Women PS Case No. 93/2008 u/s 376 of IPC was registered and SI Santi Debbarma was entrusted with the charge of investigation.

4. On the date of occurrence itself, the victim prosecutrix was examined by the IO and her wearing apparels were seized. She was immediately taken to IGM Hospital, Agartala for her medical examination and at 1905 hours, PW11, Dr. Basudeb Majumder, a gynecologist, examined Arpita medically and submitted report. The accused was arrested from Lake Chowmuhuni Market Committee's office and his undergarment was also seized. The victim prosecutrix was produced before the Magistrate on 23.06.2008 and her statement was recorded by PW16, Judicial Magistrate, First Class, Prakash Chandra Biswas. The victim was also placed before Dr. Ashok Majumder(PW10), a radiologist, for determination of her age and the doctor submitted report stating that the victim was aged about 14/15 years at the relevant point of time. The accused was also examined by Dr. Jayanta Sankar Chakraborty(PW15) and the doctor submitted report that the accused was capable of having sexual intercourse.

5. I.O. examined material witnesses and recorded their statements. Out of them, PWs 1 and 9 were the residents of the neighbourhood of the accused and both of them were declared hostile by the prosecution and their previous statements recorded by I.O. proved as Exbts. 1 and 7. PW2 was a shopkeeper of Lake Chowmuhuni market and he was reported about the occurrence by the mother of Arpita. PWs 3 and 4 were also vegetable vendors of Lake Chowmuhuni market and they were also declared hostile by the prosecution and their statements recorded by the I.O. were proved as Exbts. 2 and 3. PW12 is the maternal aunt of Arpita. PW13 is the police officer, who registered the case formerly and PW14 is the I.O. of the case who submitted charge sheet after investigation.

6. In the course of trial, learned Sessions Judge framed charges against the accused for commission of offence punishable u/s 341 and Section 376(1) of IPC to which the accused pleaded not guilty and claimed to be tried.

7. Defence case is that of a denial of the prosecution case. The accused in course of examination u/s 313 of Cr.P.C. stated that he went to his shop at Lake Chowmuhuni market in the afternoon and at that time he was handed over to police. He alleged that Partha Roy(PW2) who was the Secretary of the Lake Chowmuhuni Market Committee had some allegations against him and he hatched a conspiracy with the parents of Arpita and instituted a false case. He further stated that when he came out of jail, Partha Roy and mother of the victim proposed him to marry the girl or to pay Rs. 5.00 lakhs(rupees five lakhs).

8. It is submitted by learned counsel, Ms. Purkayastha that the prosecution has utterly failed to prove the charges framed against the accused. The accused has been acquitted from the charge u/s 341 of IPC and 376(1) of IPC but he has been convicted u/s 376 read with Section 511 of IPC and also u/s 366 of IPC for which no charge was framed. She has further contended that the prosecutrix made a clear statement that she was raped by the accused. She was aged 14/15 years at the relevant point of time and it may be presumed that she was quite mature to understand what amounts to rape. Her statement that she was raped by the accused was supported by her parents. She was examined by the medical officer on the very night of the occurrence and the medical officer opined that no sexual intercourse was committed. She has further submitted that PW7 is the only star witness of the prosecution who allegedly found the victim Arpita going with the accused and it is the case of the prosecution that Arpita was recovered along with the accused from the hut of the accused but PW7 made a contrary statement. It is emphatically submitted by Ms. Purkayastha that, learned counsel that according to the prosecution the victim was taken to Indiranagar to the rented hut of the accused but PW7 stated that she was recovered from Abhoynagar. Both the places are different as reflected in the evidence of I.O. The trial Court ignored that discrepancy and put reliance on the evidence of PW7. It is further submitted that according to the prosecution PW6, Arpita was a dull girl having below average intelligence level but there is no expert evidence to that effect. Her statement recorded by the Judicial Magistrate proved as Exbt. 5/1 and her statement before the Court makes it abundantly clear that she was not a dull girl, at least, no such observation recorded by the I.O. or the learned Magistrate. There is no observation of trial Court also that she was a dull girl. She vividly narrated about the fact which is not supported by other relevant facts and circumstances. It was quite unnatural on the part of such a grown up girl to accompany an unknown boy to his house and she raised no alarm when she was taken inside the hut and her garments were stripped off. This conduct of the prosecutrix makes it clear that a false story was cooked up, submitted learned counsel, Ms. Purkayastha. It is also submitted that brother of the victim who alleged to have accompanied PW7 at the time of alleged recovery of the victim and the accused has not been examined and no explanation was given. In the circumstances, the story narrated by the prosecutrix, since improbable, the accused must be given, at least the benefit of doubt.

9. Learned P.P. Mr. Ghosh, with all his fairness, has submitted that the

prosecutrix was a bit a dull girl though aged about 14/15 years and it is evident in the evidence of the parents and relatives of the prosecutrix. PW11, the medical officer also stated that her intelligence level was below normal. So such a girl might accompany the accused who was unknown to her, due to allurements by the accused. She made a vivid statement as to what happened to her from Lake Chowmuhuni market to the house of the accused. While her statement inspires confidence, no other corroboration is required. He has, however, fairly submitted that rape might not have been committed by the accused since PW11, the medical officer opined that there was no sign of rape. The trial Court considered the facts and circumstances and rightly arrived at a conclusion that the accused kidnapped the victim girl and made an attempt to rape. Discrepancy what is found in the evidence of PW7 and the victim may be ignored since it is a case of rape.

10. It is the cardinal principle of criminal jurisprudence that the prosecution is to stand on its own leg. Burden is on the prosecution to prove the case beyond reasonable doubt. It cannot take aid or advantage of the shortcomings in the defence case. Even if an accused remains silent and not cross-examined the prosecution witness, the prosecution has to discharge its own liability to prove the case beyond reasonable doubt.

11. In a case of rape, the victim prosecutrix is always a star witness of the occurrence. She is the only witness to say what happened to her. If her statement itself is found to be worthy of credence and is not shaken in cross-examination or otherwise and her statement is found to be truthful and inspires confidence, based on such evidence of the prosecutrix, punishment for rape, is permissible.

12. Let us first travel through the evidence of the victim prosecutrix Arpita(PW6).

In her deposition she stated that on 21.06.2008 her mother went to Lake Chowmuhuni market for purchasing fish. Around 1200 hrs she also went to Lake Chowmuhuni market in search of her mother. One boy asked the reason of her going to the market. She told him the purpose. The boy then asked her that he would take her to her mother. He offered her chocolate. She believed him and went with him to a house at Town Indiranagar. He took the key of his living hut from the adjacent house and opened the door. Inside the hut he removed her wearing apparels. He then forcibly tried to enter his penis into her vagina. However, both of them were standing. She tried to raise alarm but the boy gagged her mouth. Her brother and Dilip arrived in the house of Suman at about 1230 hrs or after five minutes of her going to the hut of Suman. She felt pain in her body because of rape. Her brother and Dilip Debbarma recovered both of them and took them to the office of the Lake Chowmuhuni Market Committee. Police arrived there and Suman was handed over to police. After two days she was produced before a Magistrate and she gave statement before the Magistrate. She identified her signatures in the statement, marked as Exbt. 5 series. When she met her parents she narrated the facts to them. Darogababu seized her

panty, top and printed half pant and she identified her wearing apparels, marked as Exbt. M.O. 1. She also identified the accused in the dock.

In cross-examination she stated that she went to Lake Chowmuhuni market after half an hour since after departure of her mother for the market. She searched her mother in the market for half an hour. After that she met Suman in the market. Her parents did not teach her that she should not take anything from any unknown person or that she should not listen to them. She also stated that she did not state to IO or to the Magistrate that the boy will take her to her mother. Lake Chowmuhuni market is situated at a distance of 15 minute walk. She did not enquire with her known persons at Lake Chowmuhuni market regarding whereabouts of her mother. She denied the suggestion that the boy did not meet her at Lake Chowmuhuni market and did not tell her that he will take her to her mother. She also denied the suggestion that the boy did not take her to his rented hut and did not commit rape and that her brother and Dilip Debbarma did not find her in the hut of the accused and there from did not take them to market. She stated that when she was produced before the Magistrate her parents escorted her along with police personnel. There was only one person standing in the dock at the time of her recording evidence. On questions by the Court she stated that she was promoted to Class VII in that year. She had forgotten the total marks for which her annual examination was conducted but it was conducted in seven papers. She had forgotten the total marks obtained by her but she secured 64 in Mathematics. Her annual examination was conducted in Bengali, English, Math, Samaj, History, Sanskrit and Social Science.

13. Let us now have a glimpse to the evidence of PW7. The witness stated that on 21.6.2008 he was a tenant in the house of Sankar Lal Datta(PW5) for three years. Arpita was elder daughter of Sankar Lal Datta and she was a little bit dull. On 21.06.2008 he was returning from his school, i.e. Pragati School. On the way, near Abhoynagar Bridge he found Arpita proceeding towards Abhoynagar with a boy. It did not perturb him since he thought she might be going with her relative. When he arrived home, mother of Arpita was found visibly nervous and enquired whereabouts of Arpita. He divulged what he saw Arpita going towards Abhoynagar along with a boy. Immediately, he along with elder brother of Arpita rushed near Abhoynagar Bridge but she was not found available there. They started searching her in the Abhoynagar locality and all on a sudden found her standing by the side of the road. They enquired and she narrated that from Abhoynagar market a boy had taken her to a hut and inside that hut that boy committed rape on her by removing her wearing apparels. She identified the hut. They went to that hut with Arpita and recovered that boy. They brought them to the office of the Lake Chowmuhuni Market Committee since on their query the boy told that he was a vegetable seller in the Lake Chowmuhuni market. In the market they came to know the name of the boy as Suman Barman. He identified the accused in the dock. He found Arpita near Abhoynagar bridge with that boy approximately at about 1215 hrs. He further stated that they recovered Arpita from Abhoynagar at about 1.30 pm. Darogababu seized the wearing apparels of

Arpita by preparing seizure list and he signed it. He proved his signature and also proved Exbt. MO. 1 series.

In cross-examination he stated that Darogababu did not ask him where from he was coming when he saw Arpita near Abhoynagar Bridge and as such he did not state to Darogababu where from he was coming. He denied the suggestion that he was not coming from Pragati School and he did not find Arpita and the accused person near Abhoynagar Bridge. He also denied the suggestion that he did not search for Arpita along with her brother and did not recover her and the boy from Abhoynagar. His attention was drawn to his previous statement recorded by IO regarding the fact that he along with brother of Arpita searched for whereabouts of Arpita and that specific statement was not found. He further stated that it would take 15/20 minutes on foot to reach the place wherefrom Arpita was recovered from Lake Chowmuhuni market.

14. PW5 is the father of Arpita and the informant of the case. The FIR lodged by PW5 is proved as Exbt. 4. In the FIR PW5 stated that the accused Suman Barman enticed away his daughter to the rented house of the accused at Town Indiranagar and that house belonged to Nantu Saha and taking advantage of absence of anybody else in that house he committed rape upon his daughter. Thereafter his(witness) son and his friend found the accused while committing the illicit act and they brought the accused and his daughter to Lake Chowmuhuni Market Committee's office and kept the accused detained there.

Though in the FIR PW5 stated that his son and his friend, i.e. PW7 caught the accused red handed and found the accused committing illicit act but in his deposition he did not state so. In deposition he stated that his son and one tenant of his house namely Dilip Debbarma(PW7) searched for his daughter and recovered her from the hut of the boy.

15. PW8, mother of Arpita stated that on 21.06.2008 at about 1130 hrs. she went to Lake Chowmuhuni market. At about 1.15 pm she returned home and found Arpita was not present in the house. In the meantime, their tenant, Dilip Debbarma(PW7) arrived at the house. She enquired whereabouts of Arpita to which Dilip told her that he found Arpita with a boy near Abhoynagar bridge and he thought that Arpita might be going somewhere with a known person. She scolded Dilip and then Dilip with her son went out to search for Arpita. At about 1.30 pm Arpita and another boy were brought to Lake Chowmuhuni Market Committee office. They were brought by her son and Dilip. After receiving the information that they were brought to the Lake Chowmuhuni Market Committee office she went there and discussed with Arpita to which Arpita told her that the boy detained in the office of Lake Chowmuhuni market offered her chocolate and took her to his rented house at Abhoynagar and there he committed rape on her.

16. According to the prosecutrix and her parents, Arpita was recovered from the rented hut of the accused by PW7, Dilip and brother of Arpita. Brother of Arpita has not been examined by the prosecution.

16.1. PW7 Dilip is the only witness of the alleged recovery of Arpita. The statement of PW7 has already been reproduced above. He nowhere stated that he went to the rented hut of the accused and recovered Arpita from that hut. Rather he stated that when he along with brother of Arpita was searching her at Abhoynagar, they found Arpita at Abhoynagar by the road side and there from Arpita was taken to the hut where the boy took her and recovered that boy from that hut. This is a material discrepancy in the statement of the victim prosecutrix and PW7 as well as the parents of the prosecutrix.

16.2. Further, Arpita and her parents stated that she was taken away from Lake Chowmuhuni market but PW7 stated that when they found Arpita in the road side at Abhoynagar on search, on their query, Arpita told that from Abhoynagar market a boy took her to a hut, which is another material discrepancy which prosecution did not clarify.

16.3. Father of the prosecutrix in the FIR stated that PW7 and brother of Arpita found Arpita and the boy in a compromising position but PW7 stated nothing in support thereof.

16.4. Investigating officer(PW14) in her cross-examination clearly stated that Abhoynagar and Indiranagar are two names of two separate localities. Abhoynagar is situated to the northern side of Lake Chowmuhuni market at a distance and Indiranagar is situated to the eastern side of the market at a distance of 3/4 KMs.

16.5. Arpita made a clear statement that she was taken to a rented hut of the accused at Town Indiranagar, a densely populated area, but PW7 stated that he and brother of Arpita found Arpita standing in the road side at Abhoynagar, which is completely a different place at a different location. If PW7 is believed, the prosecutrix has to be disbelieved.

17. Prosecution examined two witnesses of the neighbourhood of the accused. They are in no way related to the accused. Both of them, PWs 1 and 9 declared hostile.

17.1. PW9 stated that the accused collected the key of his rented hut from her and she found none else with the accused. In her cross-examination she stated that Suman(accused) as a matter of daily routine returns home at around 11.30 am. Two elder brothers of Suman used to reside with Suman. The room of Suman is situated adjacent to her room. For last 4/5 years she knows Suman as a very good boy. She did not state anything that she found the accused with any girl came to his hut. However, her previous statement recorded by I.O. has been confronted to her and marked as Exbt. 7, which she denied.

17.2. PW1 is the close door neighbour of the accused and she also stated that hut of Suman is situated adjacent to 10/8 cubits from her hut and the hut of Jyotsna(PW9) is situated just adjacent to the hut of Suman. Suman opened the windows after entering into the hut on the alleged date of occurrence and he was

alone. She did not support the prosecution case. Her previous statement recorded by I.O. however was confronted with her and that is marked as Exbt. 1, which she denied to have made.

17.3. PW2, a shopkeeper of the market narrated the entire occurrence as reported by mother of Arpita.

17.4. PWs 3 and 4 are the vegetable vendors of the market and both of them stated that they returned home together with the accused. They were also declared hostile and their previous statements recorded by I.O. were confronted to them which they denied and those statements proved as Exbt. 2 and Exbt. 3.

18. There is practically no evidence, except the statement of PW7 that he found a boy with Arpita going towards Abhoynagar. No other evidence that the accused took Arpita to his rented hut at Indiranagar. The previous statements of PWs 1 and 9 cannot help the prosecution since even the statement of PW7 is not supporting those exhibited statements. PW7 nowhere stated that he went to Indiranagar in the rented hut of the accused. He said that he went to Abhoynagar in the rented hut of the accused and both the places are completely opposite according to the statement of I.O. The trial Court utterly failed to consider this aspect of the evidence and arrived at a wrong finding.

19. The prosecutrix made a clear statement that she was raped by the accused. She made such statement to her parents and her parents also supported it. In her statement recorded u/s 164 of Cr.P.C. which is marked as Exbt. 5/1, the prosecutrix clearly stated that the accused raped her. She being a girl aged about 14/15 years may be of short of average intelligence, but so far her statement is concerned, she was matured to understand the meaning of "rape". While she made such definite statement that she was raped but on her examination on the same evening by the medical officer no positive sign of rape was found. PW11, an experienced gynecologist, clearly stated that no sexual intercourse was committed. In her garments which were seized on that day itself were sent for chemical examination. No spermatozoa was found so far the chemical examination report from SFSL was collected. No spermatozoa or seminal stains were also found in her vaginal swab. The under-pant of the accused was also seized and seminal stains/spermatozoa was found in his undergarment. The accused denied the fact. Presence of seminal stains or spermatozoa in the undergarment of the accused cannot be accepted as a proof of the commission of rape unless it is found in the person of the victim or in her wearing apparels.

19.1. According to the prosecution, Arpita was a bit a dull girl. There is nothing that she was insane or imbecile. Might be her intelligence level was below average, what we find in the evidence of PW11, where he stated her intelligence level was below normal. Such a girl of below average intelligence can in no way be said as an abnormal, imbecile or insane. It is not normally expected that a girl of such an age will accompany an unknown boy to his unknown house on allurement of a chocolate or on the allurement of the fact that her mother will be

there. Her statement itself, therefore, cannot earn the confidence to the level of believing her worthy enough to record a conviction on the allegation of rape or kidnapping.

19.2. It is alleged that the accused took the girl from the market but prosecution could not adduce any evidence examining any person from the market who has found the accused with the girl or taking her to his rented house. The sole evidence of PW7 that he found them on Abhoynagar Bridge cannot be relied on since his evidence is found to be different with the evidence of the victim.

19.3. Learned Sessions Judge found the accused guilty of kidnapping but in support thereof there is no cogent evidence. Apart from the fact that there was no charge framed u/s 366 of IPC. While the allegation was of rape, on the same bundle of fact it is very difficult to arrive at a conclusion that there was attempt to commit rape. The accused could not make out any defence story as to why a false allegation made against him. Something might have happened involving the victim girl but in the facts and circumstances of the prosecution case while the prosecution case itself cannot be said to have firmly established, on the ground that the accused could not make out a case in his defence, punishment in a criminal case cannot stand.

19.4. According to the prosecutrix, the accused was not known to her. She could know about the name of the accused afterwards. PW7 who alleged to have brought the accused to the office of the Lake Chowmuhuni market committee came to learn about the name of the accused, according to his deposition after the accused was brought in the office of the market committee. He stated that in the market they came to know his name as Suman Barman.

20. Under such circumstances, the entire prosecution story is based on very poor quality of evidence and based on such evidence it is very difficult to sustain conviction of the accused in a criminal case. Victim's statement, in a case of rape, if inspires confidence is enough to record a conviction but if her statements itself do not inspire confidence and if it is found to be not natural, surrounding circumstances require to be looked into and while such surrounding circumstances do not support the prosecution case, there is no other alternative but to give the accused the benefit of doubt.

21. In view of the discussions made above, in the given facts and circumstances of the case, I am of the considered opinion that the prosecution case is doubtful and, hence, the accused is entitled to get the benefit of doubt. Accordingly, the accused is acquitted on benefit of doubt. It is submitted that the accused is in custody and suffering the sentence. He should be set at liberty henceforth. Send back the L.C. record along with a copy of the judgment.