

THE HIGH COURT OF TRIPURA
AGARTALA

Crl. Rev. P. No.132 of 2007

Sri Pratul Sukla Baidya,
son of late Pabitra Sukla Baidya,
Resident of South Ganganagar,
P.S. Dharmanagar,
District – North Tripura

..... **Petitioner**

- **Vs** -

The State of Tripura

.....**Respondent**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner	: Mr. A. Bhowmik, Advocate
For the respondent	: Mr. A. Ghosh, Public Prosecutor
Date of hearing and delivery of judgment & order	: 23.04.2015
Whether fit for reporting	: NO

JUDGMENT & ORDER (ORAL)

Heard Mr. A. Bhowmik, learned counsel appearing for the petitioner as well as Mr. A. Ghosh, learned Public Prosecutor appearing for the respondent.

02. This is a revisional petition filed under Section 397 read with Section 401 of the Cr.P.C. against the judgment and order dated 28.09.2007 delivered in Criminal Appeal No.13(2) of 2007 by the Addl. Sessions Judge, North Tripura, Dharmanagar.

03. By the said judgment dated 28.09.2007, the judgment of conviction dated 19.04.2007 as returned by the Asstt. Sessions Judge,

North Tripura, Dharmanagar in Sessions Trial Case No.ST 26(NT/D) of 2006 convicting the petitioner herein under Section 376(1) of the IPC has been upheld on wholly agreeing with the reasoning given by the trial court. Even the sentence of rigorous imprisonment for 7 years with fine of Rs.10,000/- with the default sentence has not been interfered with.

04. The relevant facts, for the purpose of appreciating the challenge, may be noted at the outset.

One Amar Sukla Baidya, PW1, filed a complaint on 10.06.2005 in the Court of the Sub-Divisional Judicial Magistrate, Dharmanagar, North Tripura disclosing that the petitioner has committed rape on her daughter on 05.09.2004 and she was carrying pregnancy of 9 months at that time. For the delay in lodging the complaint, PW-1 has explained that since the panchayat was intervening in the matter and the petitioner was taking care of his daughter, they could not lodge any complaint earlier. But when the petitioner stopped looking after his daughter, they lodged the complaint. It has been also disclosed that his daughter has been provided medical check up by the petitioner. For the purpose of record, the statement made at the fag end of the complaint, may be extracted.

"Presently, the accused does not take any information of her (the said complainant's daughter) and with a view to escape himself from the responsibilities at the complainant's daughter he had been fleeing. After occurring the incident once the accused had agreed to take the full responsibility of the said complainant's daughter and subsequently he has denied the same and that is why little delay has been caused in lodging the ejahar against the accused."

05. The Sub-Divisional Judicial Magistrate without taking cognizance of the offence so disclosed and having regard to the materials available in the complaint, asked the officer-in-charge of Dharmanagar PS to register the case and investigate the matter.

06. Having received the papers (the complaint) and the order from the Court of the Sub-Divisional Judicial Magistrate, Dharmanagar PS Case No.68/05 under Section 376/493/417 of the IPC was registered and taken up for investigation.

07. On completion of the investigation, the charge-sheet was filed against the petitioner herein, under Section 376 and 417 of the IPC. Thereafter, the police papers were committed to the Court of the Addl. Sessions Judge, North Tripura, Dharmanagar, as the offence punishable under Section 376(1) of the IPC is exclusively triable by the Sessions Judge. The said sessions judge, however, transferred the said trial to the court of the Asstt. Sessions Judge, North Tripura, Dharmanagar, who in turn framed the charge against the petitioner under Section 376(1) of the IPC for committing the offence of rape on the victim (name withheld for protecting her identity) at about 7 p.m. on 05.9.2004. The petitioner herein pleaded total innocence and claimed to face the trial.

08. In order to substantiate the charge so framed, the prosecution adduced as many as 10 witnesses and introduced some documentary evidence, Exbt.1 to 5. After the prosecution evidence was recorded in the trial, the petitioner was examined under Section 313 of the Cr.P.C. to have his response on the incriminating materials that

had surfaced in the evidence. The petitioner denied those materials as true and claimed that he has been falsely implicated by PW-1 in the case. On the purported appreciation of the evidentiary materials so placed by the prosecution in the record, the petitioner was convicted under Section 376(1) of the IPC, as stated.

09. The petitioner carried out an appeal under Section 374(3) of the Cr.P.C. in the Court of the Addl. Sessions Judge, Dharmanagar, North Tripura who upheld the said finding of conviction by the impugned judgment and order.

10. Mr. A. Bhowmik, learned counsel appearing for the petitioner has seriously criticised the impugned judgment as the said judgment according to him is a product of non-appreciation of the evidentiary materials. Mr. Bhowmik, learned counsel for the petitioner has taken this Court to the testimonies of the witnesses, particularly the testimonies of PWs.1, 2 and 3, to contend that if the testimonies of those witnesses are read together, it would be apparent that the victim and the petitioner had consensual sex and that cannot be termed as rape within the meaning of Section 375 of the IPC. Mr. Bhowmik, learned counsel has further submitted that from the testimonies of the PWs.1 and 3, it would be apparent that the victim and the petitioner got married and they lived as husband and wife for one and half years with their daughter. Mr. Bhowmik, learned counsel has pointed out that the birth certificate which has been relied on to arrive at the finding that the victim was minor was never introduced in the evidence. But in the judgment, that has been recorded as Exbt.1 series.

11. From the other side, Mr. A. Ghosh, learned PP appearing for the State has submitted that the conduct of the PWs. 1 and 3 cannot be explained reasonably, but if the testimony of the prosecutrix is believed, there cannot be any escape from the finding that the petitioner committed rape on her against her will, even if she is not considered minor at the relevant point of time.

12. On the face of the rival contentions projected by the learned counsel for the petitioner and for the State, the pertinent question that arises for consideration is that whether there was 'rape' within the meaning of Section 375 of the IPC or the petitioner and the victim was having consensual sex. There cannot be any amount of debate that in the latter case there cannot be any criminal prosecution against the petitioner, if, of course, the victim is not minor. For having the answer to this question, this Court has to scrutinise the evidence appropriately.

13. Sri Amar Sukla Baidya, PW-1, father of the victim/the prosecutrix has stated that the petitioner raped her daughter and she became pregnant and later on she had given birth of a female child. He has admitted that the accused had married his daughter on the pressure of panchayat. They lived as husband and wife for one month and 12 days. According to him, at the time of occurrence, his daughter was 12 years of age. In the cross-examination, he has further submitted that his statement was recorded by the Judicial Magistrate, Dharmanagar. In the cross-examination, he has admitted categorically that he cannot say in which year his daughter (the victim) got admission in the school. Later on, he has stated that she got admitted

at the age of 6 years. Even he has stated that he cannot recollect her date of birth. Most surprisingly, suddenly he has made a statement *"In that meeting my daughter stated the name of one Lalit Suklabaidya as rapist"*.

PW-2, the victim has stated that the petitioner committed rape against her will. When she raised alarm, her mother came. Then the accused after bowing his head on the leg of her mother assured that he would marry her and requested her not to disclose the fact to anyone. Even, on the very date, her father was informed about the said occurrence. According to her, her father informed the incident to the neighbouring people including the panchayat and subsequently the panchayat meetings were held on different dates. She had also participated in the panchayat meetings. She has stated that the accused has raped her and she gave birth of a girl child at Dharmanagar Hospital. The petitioner took her to Makunda Hospital for her medical check up. The panchayat arranged their marriage and after marriage the petitioner took her and her child with him in his place of service in Brajendra Nagar, where they stayed together as husband and wife for one month and 12 days. But thereafter the petitioner keeping her at her parental house, did not maintain liaison whatsoever. She has admitted in her cross-examination that the petitioner was known to her from before. He used to visit their house. At the time of occurrence, their hut was dark. Door and windows were closed. Even the accused took her to Makumda Hospital for medical check-up. She denied her age to be 19 years.

The vital testimony in this case is of PW-3, Smti. Malati Sukla Baidya who is the mother of the victim. She has stated that the petitioner bowed down his head and requested her repeatedly not to disclose the fact to anybody and assured that he would marry her daughter. At the time of occurrence, her husband was absent from their house. On his return, she stated the entire fact to him. On the following day, her husband informed the incident to the neighbouring people. The Panchayat meeting was held where she along with her husband and the victim were present. She has also confirmed that the petitioner married the victim as per decision of the panchayat and they lived as the husband and wife at the place of the posting of the petitioner for some time. In the cross-examination, PW-3 has stated "I cannot say the date of marriage of the victim with the accused, her date of birth, date of Panchayat meeting and the date on which accused had taken the victim to his place of posting and returned her to our house." But she has confirmed that marriage between the petitioner and the victim was solemnized by exchanging garland but without observing all legal formalities. From the cross-examination, it further transpires that the PW-3 has stated "Just after the occurrence no neighbours came in our house and I did not ask them to come. We have not enmity with the accused. Accused used to visit our house, from the childhood of the victim." In this regard, what is important to point out is that in the complaint it has been alleged that the petitioner committed rape on the minor daughter of PW-1 on several occasions on alluring her to marry.

PW-4, Sri Prafulla Sukla Baidya has been declared hostile as he did not support the prosecution case. PW-5, Dr. Bimalendu Deb has stated that he examined the victim on 02.06.2005. PW-6, Sri Subodh Sukla Baidya heard about the occurrence from PW-1, but he was present in the panchayat meeting, where according to the statement of PW-6, the petitioner confessed his conduct and prayed for mercy. He has further stated that in his presence and in the meeting, the petitioner confessed that he 'raped' the victim after the dusk in her her house. In the cross-examination, he has admitted that he got information about the occurrence after 'five months'. He has further explained that PW-1 had stated that the panchyat assured him to mitigate the matter amicably. Even in that meeting, it was disclosed that the victim was by that time nine months pregnant.

PW-7, Sri Subrata Sukla Baidya came to know about the occurrence on 28.05.2005 and there had been a panchayat meeting on 29.05.2005 that is almost after eight months of the occurrence and only then, he came to know about the occurrence. Later on, he heard that the village panchayat arranged the marriage of the victim and the accused. PW-7 has identified his signature on the seizure list, Exbt.2 and also identified the seized documents which were marked Exbt.1 series. He has categorically stated that in his presence only the medical prescriptions and the medical certificate were seized from the possession of the informant but those do not speak of the birth certificate.

PW-8, Sri Bijit Chakraborty, is the scribe. He did not make any other statement. PW-9, Dr. Mrinmoy Das examined the victim on

23.06.2005 and he found that the victim was carrying nine months pregnancy. He identified the medical certificate and the discharge certificate (Exbt. MO I series). PW-10, Sri Samir Roy investigated the case having been so entrusted and he narrated how he had conducted the investigation including how he facilitated recording of the statements of PWs.1 and 3 under Section 164(5) of the Cr.P.C. Though, he has stated that he seized the school certificate but that certificate was not marked specifically. He submitted the charge-sheet against the petitioner, when he found that a strong prima facie case had surfaced of commission of the offences punishable under Sections 376/417 of the IPC. But in the cross-examination, he could not specify from whom he seized the birth certificate. But he admitted that he did not seize the school register.

14. From the evidentiary materials, it is apparent that even though on the very day of occurrence, it was within the knowledge of the PWs.1 and 3 but they did not approach the police and there is no explanation for that part. Only explanation that had been provided is that the panchayat having seized the matter and at the instance of the panchayat, the victim and the petitioner got married and they lived for some time, he did not approach the court earlier. From a plain reading of the testimonies of PW-3, it can be gathered that the victim and the petitioner was intimate to each other and the petitioner used to visit the victim regularly without any objection from PWs.1 and 2. Even though, it has been stated in the complaint, that the petitioner was previously married but since his first wife was unable to look after the domestic needs the petitioner assured after obtaining the consent of

the first wife that he would marry the victim. The prosecution did not take any care to prove that part of the statement as available in the complaint. Even, PW-1 did not support that statement in the trial and most surprising is that from the side of the defence, a total silence has been observed on such statement. Therefore, there had been no charge under Section 393 of the IPC. There had been no police report even under Section 393 of the IPC as even the statement recorded, during the investigation, did not reveal existence of any such marriage. But it has been admitted by PW-1 in the complaint that even after that occurrence, the victim and the petitioner had the sexual intercourse though it has been stated 'as raped'. Here the court finds the real incongruity. How the word 'rape' has been used by PWs.1 and 3 either in the complaint which has been later on treated as the FIR or in their testimonies? Though there had been no endeavour to elicit their understanding or understanding of 'rape' and 'sexual intercourse'. It is apparent on the face of the record, they have substituted the meaning of the sexual intercourse by the word 'rape' and there lies great difficulty in segregating the grain from the chaff. Even when the victim was medically examined by the two medical officers of the Government hospital, she had never disclosed to the doctors who conducted the examination on her that her pregnancy was the result of 'rape'. If the court wades through the evidence it becomes distinctly indicative that the victim and the petitioner were having in a very intimate relation. At one point of time, Mr. Bhowmik, learned counsel appearing for the petitioner has intended to impress this Court to read the statements of PWs.1 and 3 as recorded under Section 164(5) of the Cr.P.C., wherefrom it is found categorically that PWs.1 and 3 have stated in

their statement, as recorded under Section 164(5) of the Cr.P.C. that the victim and the petitioner was enjoying a 'romantic relationship' but this Court is constrained to observe that since those were not brought in the evidence following the procedure, the content of those statements cannot be read by this Court. If the testimonies are read in totality, there cannot be any amount of doubt that what happened on 05.09.2004, it was a consensual sex, not 'rape' as described by PW-1. If other conclusion is drawn, then the conduct of PWs.1 and 3 as well as the other members of the panchayat or the villagers who were attending the meeting cannot be understood in the normal course of action, else they would be charged of harbouring the offender by shielding his offence. But the trial court has not examined that aspect of the matter at all. Therefore, from the circumstances, it has appeared before this Court that it was a pre-marital consensual sex and out of apprehension of ignominy that might fall on the victim, they brought the matter to the notice of the panchayat so that the marriage can be arranged and it has appeared that the panchayat arranged their marriage.

15. Having confronted with this nature of evidence, this Court is unable to accept the inference that has been drawn by the appellate court that the charge of rape has been established by the prosecution beyond reasonable doubt. As such, the benefit must go to the accused. As the defence has categorically accorded to the fact there was marriage, this Court would not even indicate to the remedies, available to the victim.

16. Accordingly, this petition stands allowed. The petitioner is acquitted from the charge under Section 376(1) of the IPC on benefit of doubt. As consequence thereof, the sureties are discharged from their liabilities as Mr. Bhowmik, learned counsel appearing for the petitioner has submitted that the petitioner is on bail.

Send down the LCRs forthwith.

Since Mr. A. Bhowmik, learned counsel has been engaged as the Amicus Curiae for presenting the case of the accused, he shall get a consolidated fee of Rs.5,000/- in total and the Law Department, Government of Tripura shall reimburse that fee within a month when he would raise the bill with a copy of this order. The Registry is directed to supply a copy of this judgment and order, free of cost to Mr. Bhowmik, learned counsel as early as possible.

JUDGE

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