

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 545 of 2017
CRAN 1 of 2019 (Old No. CRAN 828/2019)

Sushen Barman @ Susen Barman
-Vs-
State of West Bengal & Anr.

For the Appellant : Dr. Jyotirmoy Adhikari, Adv.

For the State : Mr. Madhusudan Sur .. Ld. Addl. Public Prosecutor
Mr. Manoranjan Mahata, Adv.

Heard on : 30.11.2021

Judgment on: 30.11.2021

Joymalya Bagchi, J. :-

The appeal is directed against the judgment and order dated 29th July, 2017/31st July, 2017 passed by the learned Additional Sessions Judge, Fast Track Court, Coochbehar in Sessions Trial No. 12(II)11 (Sessions Case No. 146 of 2011) convicting the appellant for commission of offence punishable under Section 376 of the Indian Penal Code and

sentencing him to suffer rigorous imprisonment for ten years and to pay fine of Rs.5,00,000/-, in default, to suffer rigorous imprisonment for one year more for the offence punishable under Section 376 IPC with a further direction that the fine amount, if realised, will be paid to the minor daughter (PW6) for maintenance.

The prosecution case as alleged against the appellant is to the effect that on 23rd January, 2010 at about 11:00 P.M. the appellant broke through the fencing of the house of the victim (PW6) and entered the room and forcibly raped her. When PW6 raised alarm, the appellant fled away. An effort was made for amicable settlement but no settlement was arrived at. Under such circumstances, mother of the victim girl (PW1) lodged FIR resulting in registration of Mekhliganj Police Station Case No.15 of 2010 dated 01.02.2010 under Sections 456/376 IPC. In conclusion of investigation, charge-sheet was filed against the appellant. The case was committed to the Court of Sessions and transferred to the Court of the learned Additional Sessions Judge, Fast Track Court, Coochbehar for trial and disposal. Charges were framed under Sections 323/376 IPC against the appellant. The appellant pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 10 witnesses including the victim girl. In conclusion of trial, the trial Judge by the impugned judgment and order dated 29th July, 2017/31st July, 2017 convicted and sentenced the appellant, as aforesaid.

Dr. Jyotirmoy Adhikari, learned counsel appearing for the appellant submits that the allegation of forcible rape of the victim girl is patently and

inherently improbable. Version of the victim girl before the police officer and the Magistrate were at variance with her deposition in court. Place of occurrence has shifted and there is delay in lodging the FIR. Panchayat Pradhan was not examined to prove the plea that a *salish* was proposed to be held but failed. Thus, the prosecution is wholly improbable and liable to be rejected.

Mr. Madhusudan Sur, learned Additional Public Prosecutor, appearing for the State, submits that the evidence of PW6 is corroborated by her relations PW1 and PW2 as well as neighbours namely, PW3, PW5, PW7 and PW8. Hence, the appeal is liable to be dismissed.

PW6 is the victim and the most vital witness. She deposed on 23rd January, 2010 around 11:00 P.M. she was sleeping in her house. At that time the appellant broke the fencing wall of the house and entered her room. He forcibly raped her. She raised alarm. Hearing her shouts, her mother, grandmother and others rushed to the room. They caught hold of the appellant and detained him. Neighbouring people came to the spot and saw that the appellant was detained in the house. Neighbours informed the incident to the local Panchayat Pradhan. Before the Panchayat Pradhan could reach, the appellant forcibly ran away. Thereafter, a talk of compromise was held between the family members but the appellant failed to turn up. Her mother lodged complaint at Mekhliganj Police Station. She was medically examined at Mekhliganj S.D. Hospital. She made statement before the Magistrate. She was pregnant at the time of the incident. She gave birth to a female child on 2nd October, 2010.

She was extensively cross-examined particularly with regard to the departure from her earlier statements made to police and the Magistrate. She admitted that she did not tell the Investigating Officer that upon raising alarm her mother, grandmother and others came to the house and caught hold of the appellant and detained him. The Magistrate had not been examined in the instant case and the statement of the victim girl before the Magistrate was not exhibited and proved. However, from the cross-examination of PW10, Investigating Officer it appears that during interrogation, the victim had told PW10 that prior to the occurrence, she had gone out of her room to attend nature's call whereupon the appellant got hold of her and took her to kitchen.

Comparison of the deposition of PW6 in court with her prior statement before police, as appearing from the version of the Investigating Officer (PW10), shows a clear departure in the manner and course in which the alleged incident occurred. While in court PW6 deposed that the appellant had broken into the room and committed rape upon her, before the Investigating Officer she stated that she went out of the room to answer nature's call whereupon the appellant held her from behind and dragged her to the kitchen. Moreover the fact that her mother and grandmother had detained the appellant after the incident appears to be an embellishment as she did not narrate such fact to the police.

In this regard, evidence of the mother of the victim (PW1) as well as her grandmother (PW2) is relevant.

PW1, Rina Barman is the mother of the victim. She deposed on the fateful night she heard a hue and cry and saw the appellant running away. She informed the matter to the villagers and a *salish* took place but the appellant did not appear. After seven days she lodged FIR. She put her LTI thereon. Similarly, PW2, Silani Barman also deposed on hearing alarm they woke up and found that the appellant had fled away.

Thus, PW1 and PW2 did not support the version of the victim girl that they had detained the appellant till the neighbours arrived and that the appellant had, thereafter, fled away by dashing them.

Evidence of the neighbours namely, PW3, PW5, PW7 and PW8 are also inconsistent to one another with regard to detaining of the appellant.

PW3, Subal Roy is completely silent with regard to such fact.

PW5, Sarbananda Barman and PW8, Binod Ch. Barman claim that the appellant was detained at the house of the victim till they had arrived and thereafter had fled away by dashing them.

On the other hand, PW7, Sanatan Barman claims that the appellant was tied and remained as such so long he was present at the spot.

Thus, it appears that the prosecution is a divided house whether the appellant had been detained by PW1 and PW2 till the neighbours had arrived and thereafter, had fled away by dashing them. Furthermore, reason for delay in lodging the FIR also has not been proved. Panchayat Pradhan was not examined to probabalise the explanation of PW 1 that a *salish* proposed after the incident but the same failed as the appellant did not turn up. Moreover, it is highly unlikely that PW1 and PW6 would wait

for an amicable settlement when it is alleged that the appellant had forcibly raped the victim and after being tied up at the spot forcibly ran away therefrom. If such conduct of the appellant is believed, then the possibility of an amicable settlement appears to be extremely bleak. It is most improbable that the victim girl and her mother under such circumstances wait for seven days for an amicable settlement before lodging FIR. Hence, the explanation offered for the delay in lodging FIR appears to be artificial and not inspire confidence.

Admittedly, the victim was 18 years of age at the time of the incident and from the materials on record it appears that she was pregnant at the time of the incident. Subsequently, she gave birth to a child. Trial court came to an inference that the appellant was the father of the child on the ground since the appellant during investigation had refused to submit himself to DNA test to determine the paternity of the child. It must be borne in mind that the appellant had been called upon to answer a charge of forcible rape committed on 23rd January, 2010 when the victim girl (PW 6) was already pregnant. Hence, paternity of the child was not a relevant issue to prove the aforesaid charge. Hence, no adverse inference could have been drawn with regard to the culpability of the appellant on the ground of his refusal to submit himself to the DNA examination in the facts of this case.

From the aforesaid discussion, it appears that prosecution has failed to prove the allegation of forcible rape. Under such circumstances, the trial court relied on the statement of the victim girl recorded under section 164

CrPC (which had not been proved and had not been supported by the victim to court) to come to a finding that the appellant had cohabited repeatedly with her on the false promise of marriage and, thereafter, absconded. In view of the aforesaid, the court recorded an order of conviction. I am constrained to observe that the trial court had erred in law in coming to such a finding which was not only contrary to the charge framed but was also not founded on legally admissible evidence.

In the light of the aforesaid discussion, conviction and sentence of the appellant are set aside.

Accordingly, the appeal is allowed.

In view of disposal of the appeal, the connected application being CRAN 1 of 2019 (*Old No. CRAN 828 of 2019*) also stand disposed of.

The appellant shall be released from custody forthwith, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)