

Item No. 26
21.11.2022
Crt. No. 12
Sourav/b.r.

C.R.A 321 of 1985

In the matter of : **Sk. Asgar Ali**
 -versus-
 Aleya Khatoon

Mr. Partha Sarathi Bhattacharyya
Ms. Swarnali Saha
.....for the appellant.

Mr. Sanjoy Bardhan
Ms. Baishali Chatterjee
Ms. Debjani Dasgupta
..... For the State.

1. Heard Mr. Partha Sarathi Bhattacharyya, learned senior counsel appointed as amicus curiae and Mr. Sanjoy Bardhan, learned counsel appearing for the State.
2. The present appellant was charged under Sections 354 and 376 IPC and was convicted under Section 376 IPC only. Consequently, he was sentenced to suffer R.I. for eight years and to pay fine of Rs.500/- in default to suffer further R.I. for three months more. Hence this appeal.
3. The occurrence happened in the night of 18/19.04.1984. It was 12.15 a.m. in the night. The victim came out of her house to attend call of nature. At that time, the present appellant caught hold of her hands and made indecent proposal to which the victim objected and refused. Thereafter the present appellant held her by her hands, threatened her not to shout otherwise he would kill her by throttling. In such fashion, the appellant took her to a nearby danga land surrounded by bamboo clumps. There he ravished her

despite her protest. The scream of the victim attracted the attention of P.W.s 3 and 5. Having come to the spot, P.W.s 3 and 5 saw both the appellant and the victim in naked condition. The victim narrated before them the factum of ravishment by the appellant and the appellant also admitted his guilt before them. In course of time, many other villagers including the father (P.W.8) and uncle of the victim came to the spot. In the next morning, the victim lodged FIR in the Bowria Police Station.

4. Investigation was taken up. The victim and the appellant were sent for medical examination. The victim refused medical examination but the appellant was medically examined by the medical officer, (PW-4). Witnesses were examined, incriminating articles, i.e., wearing apparels of both the appellant and the victim were seized and on completion of investigation, charge-sheet was filed.

5. Prosecution has examined eight witnesses to prove the charge against the appellant. PW-1 is the victim, PWs 3 and 5 are the immediate post occurrence witnesses, PW8 is the father of the victim, PW-2 is another post occurrence witness, PW-6 is the medical officer who conducted ossification test of the victim and opined that the age of the victim is between 16 to 18 years, PW 4 is the Medical Officer, who examined the appellant on police requisition and PW 7 is the I.O.

The defence plea is one of complete denial and false implication, but no witness was examined by the defence.

6. From the impugned judgement, it is found that learned trial Court relying on the evidence of the victim PW-1, post

occurrence evidence of PWs 3 and 5 and alleged extra judicial confession made by the appellant before the medical officer, PW-4 during his medical examination and before the immediate post occurrence witnesses, i.e., PWs 3 and 5 have returned the finding of guilt against the appellant under Section 376 IPC.

7. Mr. P. S. Bhattacharyya, learned Counsel for the appellant taking us through the evidence of PWs, 1, 3 and 5 and especially denial of the victim to be subjected to medical examination submits that it is a clear case of consent and learned trial Court having categorically held that the victim in her deposition having testified her age to be 19 years old, the consent is very much relevant and material in the present case.

Mr. Bardhan, learned counsel for the State on the other hand submits that the victim having corroborated the FIR in material particular and the law being well-settled to the effect that the victim's evidence in a case of rape should not ordinarily be disbelieved unless it strikes at the very root of the prosecution case, the impugned judgement is to be affirmed and the conviction and order of sentence are to stand and the appeal be dismissed.

8. Having heard the learned counsel for the parties, we deem it just and proper to revisit the scene of occurrence as testified by the witnesses.

9. The victim being PW1 has testified that she had come out of the house to attend the call of nature at 12.15 a.m. At that time, the appellant came, caught hold her hand and asked her to accompany him. She refused. The appellant then threatened her not to shout and told, if she shouts he would throttle her to death.

It is further testified by the P.W. 1 that the appellant forcibly took her in a danga land surrounded by bamboo clumps. He then forcibly laid her down on the ground and out of force he entered his penis into her private part and committed sexual intercourse. As she was feeling pain in course of the act of intercourse, she appealed to the appellant to release her. Out of pain, she shouted for help when Akbar and Alimuddin (PWs 3 and 5) came there and caught hold of them in naked condition, they asked the appellant to marry her (victim) but he (appellant) refused.

In her cross-examination the victim (P.W.1) has testified that the act lasted for five minutes; when he (appellant) discharged his semen, she shouted out of pain.

P.W. 2, Yar Ali Halder has testified that the victim is his Bhaiji. He having heard a shout, went towards the spot from where the shout was coming as that spot was close to his house. He has testified that by the time he went there, he saw the victim, Aktar, Kamaluddin and many others. Amongst them the appellant was also there.

P.W. 3 is Sk. Aktar, who had gone to the spot immediately in course of the occurrence. He has testified that he was working in Tori Karkhana; at 12.15 a.m. at the night as it was a sultry night he came out of the house for a stroll; it is further testified by him that he heard an **Agony** of a woman coming from the farm side; hearing the said sound, he with his brother Kamaluddin went to the bamboo clumps and they had a torch with them; then P.W. 3 has testified that he and Kamaluddin saw the victim and the appellant in naked condition. Appellant's "Lungi" was lying by his

side and he was completely naked. Victim's cloths were rolled up on her chest and the lower portion was naked; the blouse was open and breasts were visible. Victim then narrated that she had came for urination, appellant caught her, threatened her to kill if she shouted and then brought her there and did sexual intercourse by force. He has further testified that the appellant admitted his guilt by saying that he did the intercourse.

P.W. 5 is Kamaluddin who had gone to the spot along with P.W. 3. He has testified that he heard cries coming from the side of their latrine near the bamboo clumps. He has narrated the incident as had been narrated by P.W. 3.

10. The evidence of P.W.s 1, 3 and 5 shows that the victim had not stated before P.W.s 3 and 5 that while PW-1 came for urination, she was forcibly dragged to the spot and she was ravished. On this vital point of material corroboration PW-1 is totally silent. She (PW-1) has testified that P.W.s 3 and 5 caught hold them in naked condition and asked the appellant to marry her, to which the appellant refused.

She (PW-1) has further testified in her examination-in-chief that appellant did not tell anything to the two persons (PWs 3 and 5) who caught them.

Evidence of PW 3, therefore, to the effect that the victim (PW-1) narrated the incident before them and said that she came out for urination; appellant caught hold of her, threatened her to kill if she shouted and then brought her there and did sexual intercourse by force cannot be held to be trustworthy and believable.

Similarly evidence of PW-3 to the effect that the appellant admitted his guilt by saying that he did the intercourse also merits no consideration as it does not commend to us in view of specific evidence of PW-1. In this regard PW-3 is not even corroborated by PW-5.

Evidence of PW-5 to the extent as to what was told to them (PWs 3 and 5) by PW-1 when they caught both the appellant and victim in naked condition, merits no consideration on the analogy *supra*.

PWs 2 and 3 have testified that appellant was there at the spot but PW-5 has testified that wearing his lungi, the appellant jumped in the tank, when many persons gathered at the spot. PW-8, father of the victim has also testified that when he reached the spot the people gathered there had detained the appellant.

11. From the evidence of all the witnesses, it is found that the appellant was there in the spot and he had not fled away from the spot as testified by P.W. 5. From the evidence of witnesses like P.W.s. 2, 3 and 5, it is clear that residential houses were there near the spot. Defence plea is to the effect that the appellant is a physically handicapped person. If the appellant threatened the victim when she came out of her house and tried to drag her, she could have raised shout then and there to attract the attention of the nearby people, she did not do that. She was allegedly taken to the spot and she was ravished there. P.W.s 2, 3 and 5 have testified that they heard shout of the victim whereas P.W. 3 has testified that he heard **Agony** of a woman so whether that shout or **Agony** or scream whatever it may be was out of pleasure of sex or

a shout to attract the attention of the nearby people to save her, is a question of doubt because there is a great difference between the sound of an **agony** and a shout. We are constrained to take such a view because PW-1 in her cross-examination has testified that the copulation lasted for about five minutes and when the appellant discharged his semen, she shouted out of pain.

It was 12:15 A.M. in the night. In rural area, in the year, in which the occurrence happened, it is dead of night. In this hour of night, silence reigns saving sounds of some wild insects or birds. Calmness is there everywhere in the atmosphere. Even a faint sound at a distance can be heard at such time. The victim (PW-1) has testified that in course of copulation, out of pain, she shouted for help though in her cross-examination she has testified that when the appellant discharged his semen after about five minutes of copulation, she shouted out of pain. PW-3 has not heard any shout for help. He only heard agony of a woman and went towards the spot. PW-5 has heard cry and went towards the spot. Neither PW-3 nor PW-5 has heard any shout for help. When they reached at the spot, everything was over and both the appellant and victim were found in naked condition. The scene itself and the sequence of events make it clear that it is a case of consensual copulation and not rape. The “moan” or “scream” the victim made during such act has been deposed to by PWs 3 and 5 as “agony” and “cries”.

12. Further the scene of occurrence is as deposed to by P.W.s. 3 and 5 is clearly indicative of the fact that the act was consensual and the report has been lodged out of self-preservation

when P.W.s 3 and 5 happened to see the occurrence or saw both appellant and victim in naked condition.

13. Besides the evidence of the victim, P.W. 1, learned Trial Court has relied on the extra judicial confession as made by the appellant before the P.W.s 3 and 5 when they happened to come to the spot in the midst of the act.

In view of our discussion *supra* regarding the contradictions in the evidence of PWs 1, 3 and 5, whatever is alleged to have been stated by the appellant before PWs 3 and 5 cannot be held to be trustworthy and believable. On this score, the finding of learned trial Court regarding extra judicial confession of the appellant before PWs 3 and 5 has no relevance and value at all and the same is accordingly negated.

14. The learned trial Court has taken as extra judicial confession, the statement made by the appellant before the medical officer, P.W. 4 who examined the appellant on police requisition. Such a piece of evidence, however, being related to the history of the case in the medical report, cannot be held to be extra judicial confession under the Evidence Act.

15. So far as the age of the victim is concerned, the Medical Officer (PW-4) on conducting her ossification test has opined that she is between 16 to 18 years old. In her testimony, the victim (PW-1) has shown her age to be 19 years old. In cross-examination, she has *ipse-dixit* asserted that she is 19 years old. If entire evidence of PW-1 coupled with PW-4 is taken into consideration and after giving allowance of 2 years error of margin on either side to the age as opined by the Medical Officer (PW-4), we are of the

view that the victim (PW-1) was more than 16 years old on the date of occurrence and her consent was material to decide the question of guilt of the appellant.

16. Taking into consideration the entirety of events as discussed (supra) coupled with the nature of perfunctory investigation during which the wearing apparels of the victim and the appellant have not been sent for medical opinion or chemical examiner's opinion. We are of the view that the appellant is entitled to be acquitted of the charge.

17. Accordingly, the appeal succeeds. The impugned judgment of conviction dated 05.08.1985 passed in S.T. Case No. VII/April/1985 by learned Assistant Sessions Judge, 3rd Court, Howrah and the order of sentence dated 05.08.1985 passed therein are set aside. The appellant is acquitted of the charge.

18. The present appellant who is stated to be on bail be discharged from the bail bond.

19. Urgent xerox certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)