

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 95 of 2013

Sri Manasa Malik

-Vs-

State of West Bengal

For the Appellant : Mr. Tapas Kumar Ghosh, Adv.
Mr. Tanmoy Chowdhury, Adv.

For the State : Mr. Avik Ghatak, Adv.
Mr. Arijit Ganguly, Adv.

Heard on : 06.09.2022

Judgment on : 06.09.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 31.01.2013 passed by the learned Assistant Sessions Judge, 2nd court, Hooghly, in Sessions Trial Case No. 10 of 2003 arising out of Sessions Case No. 121 of 2003 convicting the appellant for commission of offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer

rigorous imprisonment for nine years and to pay fine of Rs.25,000/-, in default to suffer further rigorous imprisonment for one year more.

Prosecution case as alleged against the appellant is to the effect that the victim was 13 year old girl and used to stay and work in the house of the appellant as a maid-servant. Taking advantage of her vulnerable status, appellant subjected her to forcible sexual intercourse on a number of occasions. In the month of Bhadra and Aswain i.e. August and September, 2001 the victim came out with the incident to her mother and grandmother. They informed her father and uncle. At that time victim had become pregnant. Matter was taken up by the local people and the appellant confessed his guilt. PW 1, uncle of the victim, lodged written complaint at the local police station resulting in registration of Polba Police Station Case No. 96 of 2001 dated 26.11.2001 under Section 376 of the Indian Penal Code. In the meantime, victim gave birth to a male child.

In conclusion of investigation, charge-sheet was filed against the appellant and charge was framed under Section 376 of the Indian Penal Code. In the course of trial, prosecution examined 20 witnesses and the Court examined Dr. Archana Bhattacharya, a gynaecologist who examined the victim at Hooghly Imambara Sadar Hospital as CW 1 and Anup Kumar Ghosh, headmaster of the primary section of Akhna Junior High School as CW 2.

Upon assessment of the evidence on record the learned trial Judge convicted and sentenced the appellant, as aforesaid.

Mr. Ghosh, learned Counsel for the appellant argued prosecution case has not been proved beyond doubt. Date of occurrence has not been established. Evidence of PW 2 suffers from various contradictions and improbabilities. In chief, she stated she had been ravished in Chaitra, 2001. But during cross-examination, she contended that she was carrying 4½ months at that time. P.W. 19, medical officer who examined the victim on 20.11.2021 opined she was 9 months pregnant which improbabilises the prosecution case. Manner and circumstances in which the incident occurred is also improbable. Appellant stayed in a two roomed house with his wife and three adult sons. Under such circumstances, it was impossible for him to have committed rape on the girl. Age of the victim had also not been established beyond doubt. Ossification report showing the victim was aged 15 to 17 years is an approximation and would yield to one to two years latitude on either side. There is inordinate delay of three months in lodging F.I.R. Evidence has also come on record that there was dispute between the father of the victim and the appellant due to political reasons as well as over rearing of fish in a pond. Possibility of false implication of the appellant on such score cannot be ruled out. Hence, the appellant is entitled to benefit of doubt.

Mr. Ghatak, learned Counsel for the State submitted victim was a minor girl who was around 13 to 14 years old at the time of incident. Ossification report shows victim was between 15 to 17 years old at the time of examination. Range mentioned in the ossification report takes care of the approximation which even on the higher side would not show that

the victim was major at the time of occurrence. Victim was a young girl who was working as a maid-servant. Appellant was her employer and had overwhelming control over her. Due to his supervening control over the victim, the latter was unable to come out and protest with regard to the incident earlier. When she became pregnant she brought up the issue to the notice of her mother and thereafter the matter was taken up at the village level when the appellant confessed his guilt. Due to salish at the village level there was some delay in lodging F.I.R. which does not militate the truthfulness of the prosecution case. Opinion of PW 19 with regard to the age of pregnancy is a tentative one and would not improbabilise the prosecution case in the face of a clear finding by CW 1 that the victim was 7 to 8 months pregnant in December, 2001. Hence, prosecution case has been proved beyond doubt.

PW 2 is the victim. She deposed she and her elder sister used to go to the house of the appellant and do household work. They were given food. She used to stay in the house at night. Appellant cohabited with her on a number of occasions. As a result she became pregnant. When she used to raise hue and cry appellant pressed her mouth with his hands and threatened her. Out of fear she could not disclose the incident to anyone. When she was pregnant for 4½ months she disclosed the incident to her mother and grandmother. They informed her father and uncle. A meeting was held in the presence of para people where the appellant admitted his guilt. She made statement before police as well as Magistrate. She was examined by doctor. A male child was born to her. In

cross-examination, she denied the suggestion that she worked as maid-servant in the house of Ananda Mohan Patra or any other person. She also denied the suggestion that her father used to rear fishes in a pond which was subsequently purchased by the appellant. She stated the house of the appellant consisted of two rooms. One was bed room and other was a kitchen. Incident occurred during the night around 1.00/2.00 A.M. She tried to resist him but failed. She had suffered bleeding injuries.

PW 1 is the defacto complainant. He deposed the victim was her niece. She was a school going girl and was 13 years old. She studied in Akhna Primary School. She used to reside in the house of the appellant. In the month of Bhadra and Aswin the victim stated she was pregnant. Incident had occurred in the month of Chaitra of 2001. She narrated the incident in presence of local people. Appellant confessed his guilt.

PWs 3 and 4 are the parents of the victim. They have deposed in similar lines. They stated that their daughter was around 14 years at the time of occurrence. She used to stay in the house of the appellant. One day when PW 4, her mother, noticed menstruation of her daughter had stopped she enquired about the matter. Thereupon, the victim narrated the incident. Thereafter, PW 4 took her daughter to a doctor who confirmed that she was pregnant.

PW 5 is the grandfather of the victim. He deposed there was a salish over the issue and the appellant had admitted his guilt. His granddaughter was 13-year old at the time of occurrence and was a

student in a school in the village. Police had seized the school certificate of the child.

PWs 6, 7, 8 and 10 are local villagers. All of them stated there was a salish over the issue where the appellant had admitted his guilt.

Dr. Sukhendu Mukherjee (PW 16) is the medical officer who held radiological examination of the victim girl. He deposed on 15.02.2002 the victim girl was above 15 years but below 17 years on the day of examination. He proved his report as Ext. 3.

Ms. Ghosh vehemently attacked the evidence of the minor victim, PW 2. He contended though it is the prosecution case that the appellant had raped the minor in the month of Chaitra, victim in cross examination claimed she was 4 ½ months pregnant at that time. PW 19 who examined the victim stated she was nine months' pregnant in November 2001 which improbabilises the prosecution case. He also contended in view of the topography of the house and the number of inmates residing therein it was impossible for the appellant to commit the offence.

Sole evidence of a victim of sexual crime is sufficient to record conviction against the offender. However, prior to recording conviction on the sole deposition of a victim it is important to test her version on the anvil of broad probabilities of the case. If the version of a victim is patently absurd, wholly improbable or suffers such gross contradictions or inconsistencies that it does not inspire confidence, it would be unsafe to record a conviction on her deposition alone. While this proposition is uncontestable, it is also relevant to bear in mind that a victim of sexual

crime is to be treated on par with an injured witness¹. Her evidence must be appreciated with more sensitivity and compassion than that of an injured witness. Other attending circumstances like age and vulnerable status of the victim, relationship of the victim with the predator are also relevant consideration while assessing her version and conduct during and after the occurrence.

I proceed to assess the evidence of the victim in the light of the aforesaid legal parameters. Victim is a minor girl who was employed as a maid servant in the house of the appellant, a middle aged man. She was not given remuneration but was given meals and permitted to reside in the house. The manner and circumstances in which the victim was employed to do household work in the house of the appellant shows his superior economic status vis-à-vis the family of the victim. In view of the supervening control of the appellant over the victim arising out of his dominant position, it is not unusual that the victim kept mum when the appellant started taking advantage of her vulnerable status and predated on her. Only when she became pregnant and her mother questioned her on such score she came out with the incident. At that time victim had already become pregnant and the family members instead of rushing to the police station, due to fear of social ostracism raised the matter at the village level. A salish was held where the appellant confessed his guilt. PWs 6, 7, 8 and 10 are villagers who corroborate the version of the victim and her family members on this score. In the meantime, victim gave birth

¹ Moti Lal vs. State of M.P., (2008) 11 SCC 20; State of H.P. vs. Asha Ram, (2005) 13 SCC 766

to a male child. At this stage, family members brought the matter to the notice of the police and FIR came to be registered. These circumstances clearly explain the delay in lodging FIR in the case.

Alleged inconsistency in the version of the victim with regard to the incident of rape in the month of Chaitra must be assessed in the background of her entire evidence. Reading the evidence of victim as a whole it appears she had not been violated on a single day. This was a regular event. P.W. 2 stated that the incident used to occur around 1.00 A.M. to 2.00 A.M. at night. Naturally, all the inmates of the house were sleeping. Taking advantage of the situation, raped the victim who, as a made servant, who in all probabilities would be sleeping in the kitchen. Owing to the threats held out by the appellant, victim was unable to protest or report the matter immediately. A stray sentence that she had become pregnant in the month of Chaitra when seen in the aforesaid factual conspectus does not discredit her entire version.

I am emboldened to come to such conclusion in view of the evidence of CW 1, Dr. Archana Bhattacharya a gynecologist who examined her at Imambara Sadar Hospital when she was admitted for child birth. Dr. Bhattacharya found that she was 7/8 months pregnant on 13.12.2001. Her opinion was based on examination of uterus size as well as foetal heart. Her opinion which is based on the aforesaid forensic findings prevails over the tentative opinion of PW 19, another doctor who had examined the victim in November 2001 and opined that she was carrying for nine months. I have examined PW 19's report (Ex 6). From

the report it appears the doctor had not clinically examined the patient but merely noted a query in the column titled 'menstruation history' of the patient that menstruation may have stopped nine months ago. Thus the opinion with regard to the age of pregnancy by PW 19 is a very tentative one based on mere conjecture. Such tentative finding with regard to possible stoppage of menstrual cycle, would by no stretch of imagination prevail over the more detailed finding and opinion of C.W. 1 who stated that the victim was 7/8 months pregnant in December 2001. Opinion of CW 1 that the victim was 7/8 months pregnant in December 2001 clearly probabilises the prosecution case that the appellant had cohabited in the month of Chaitra 2001. As a result, the victim became pregnant and delivered a male child in December 2001. Hence, medical evidence on record corroborates the deposition of PW 2 and her family members with regard to repeated cohabitation by the appellant on the victim including one in the month of Chaitra 2001.

With regard to plea that the appellant could not have raped the victim while in his house where his wife and three adult sons are staying, I have already discussed the incident used to occur around 1/2 a.m. Naturally, at that time the inmates of the house were asleep. Taking advantage of the situation the appellant had ravished the victim. Being over powered by the appellant and out of fear, victim was unable to protest or draw attention. This does not improbabilise the version of the victim with regard to stealthy acts of sexual predation by her employer at his residence in the middle of the night.

On the other hand, evidence of the victim is corroborated by other circumstances. Immediately after she had divulged the incident to her family members, the matter was brought up in a village salish. Local people namely PWs 6, 7, 8 and 10 were present in the salish and deposed that the appellant confessed his guilt. This incriminating fact has been proved beyond doubt and corroborates the version of the victim girl.

Mr. Ghosh argued there was an enmity between the appellant and the family of the victim. Victim was working as a maid servant in other houses. She may have become pregnant due to cohabitation with another person and the appellant was falsely implicated out of grudge.

I am constrained to observe that such wild insinuation with regard to cohabitation with another person is wholly unfounded. PW 2 and her family members have unequivocally refuted such suggestion. Defence counsel referred to the deposition of PW 12 in support of such plea. I wish to give little credence to the deposition of the said witness.

PW 12 is a hostile witness who resiled from his earlier statement to the police. He stated the victim was working in the house of Ananda Patra 2 ½ to 3 years ago.

Version of PW 12 wholly improbable and militates against the overwhelming evidence on record that in 2001 the victim girl was working and staying at the residence of the appellant.

Mr. Ghosh also argued there was dispute between the appellant and father of the victim PW 2 over rearing of fish in a pond. Appellant during his examination under section 313 Cr.P.C stated that PW 3

wanted to purchase the pond from him and had threatened him. None of the witnesses including PWs 9 and 12 had adverted to such proposal. PW 3 and family members of the victim girl denied the suggestion that the appellant used to rear fish in the pond. Even PWs 9 and 12 while stating PW 3 used to rear fish in the pond did not support the version of the appellant that PW 3 had proposed to purchase the pond and there was a dispute between them at the time of occurrence. Thus, I am of the opinion the plea of enmity is a fanciful and desperate one and does not probabilise the defence plea of false implication. Moreover, it defies logic that a minor who had been ravished and had become pregnant would falsely implicate the appellant in order to screen the real offender.

Authorities relied upon by the appellant are inapposite. In ***Santosh Prasad vs. State of Bihar***², prosecutrix was not believed as the circumstances in which rape was committed was not proved. Though she claimed accused came through a broken wall, there was nothing on record that there was a broken wall. Source of light had not been proved. Independent witness did not support the case. On the other hand, version of PW 2 is probable and is corroborated by local witnesses who deposed appellant had confessed his guilt.

In ***Rai Sandeep @ Deepu vs. State (NCT of Delhi)***³, not only was the version of prosecutrix contradictory, even her own relations did not support the case. As discussed earlier, evidence of PW 2 when read as a whole inspire confidence. Stray sentence in cross-examination must be

² (2020) 3 SCC 443

³ (2012) 8 SCC 21

read in the backdrop of her entire evidence and not in isolation. Moreover, her version is not only corroborated by her relations but also by the local people.

In the light of the aforesaid discussion, I am of the opinion the prosecution case has been proved beyond reasonable doubt and conviction of the appellant is liable to be upheld.

Coming to the issue of sentence, I note that the appellant had violated a minor girl who was working in his house. This is an aggravating circumstance. However he is presently 70 years old and is suffering for various ailments

Balancing the aforesaid aggravating and mitigating factors, I consider it prudent to modify the sentence imposed on that appellant and I direct that he shall suffer rigorous imprisonment for 7 years and to pay a fine of Rs. 25,000/- in default to suffer rigorous imprisonment for one year more for the offence punishable under section 376 of the Indian Penal Code.

With the aforesaid modification as to sentence, the appeal is disposed of.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of section 428 of the Code of Criminal Procedure.

Bail Bonds of the appellant are cancelled and he is directed to surrender forthwith and serve out the remainder of the sentence, failing

which the trial Court shall issue appropriate process to execute the sentence in accordance with law.

In view of disposal of the appeal, connected applications, if any, also stand disposed of.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

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

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)