

**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. 147 of 2015

Krishna Kumar Gurung

Versus

The State of West Bengal

For the appellant	:	Mr. Amlan Jyoti Sengupta, Adv. Mr. Abhijit Pal, Adv. Mr. Soumen Mandal, Adv.
For the State	:	Mr. Saswata Gopal Mukherjee, Id. PP Mr. Saryati Datta, Adv.
Heard on	:	22.11.2022
Judgment on	:	15.12.2022

Ajay Kumar Gupta, J:

1. Appellant has assailed the judgment and order of conviction and sentence dated 10.12.2014 and 11.12.2014 passed by the Learned Additional Sessions Judge, 1st Court, Darjeeling in Sessions Case No. 12 of

2013 arising out of Pulbazar P.S. Case No. 11 of 2012 dated 14.11.2012, thereby convicting the appellant under Section 376 (2) (g) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and pay fine of Rs.1,00,000/- which would be applied in compensating the victim, in default, he would further suffer imprisonment for two years.

PROSECUTION CASE:

2. Bereft of details the allegations brought by way of the complaint by the de facto complainant, inter alia, to the effect that on 13.11.2012 at about 10.00 P.M. his daughter aged about 11 years along with her friends went to play 'vailo' (play performed as part of local custom at the night of Laksmi Puja) at Bhotay Gaon, at the residence of the appellant. She was dragged to the room by the appellant with the help of Binod Chettri and Deo Kr. Gurung. Thereafter, appellant committed rape upon the victim girl. Pulbazar P.S. Case No. 11/12 dated 14.11.2012 under Section 376 (f) (g) of the I.P.C. was registered against Krishna Kr. Gurung, Binod Chettri and Deo Kr. Gurung. On completion of investigation, the investigating officer submitted charge sheet against all the three accuseds under Section 376 (2) (g) of the I.P.C.

PROCEEDINGS:

3. The case was committed to the Ld. Court of Sessions. Subsequently, same was transferred for trial before the Learned Additional Sessions Judge, 1st Court, Darjeeling.

4. Charge was framed under Section 376 (2) (g) of the I.P.C. against the appellant along with two others who pleaded not guilty and claimed to be tried. In order to prove the case, prosecution examined 20 witnesses as well as exhibited a number of documents as Exhibit 1 to 23 and material exhibits I and II respectively.

5. Defence of the appellant was that he is innocent and has been falsely implicated. During the questioning by the court under Section 313 of the Cr.P.C., the appellant made a simple denial, though incriminating materials both oral and documentary were brought to his notice.

6. After appreciation of the oral evidence and considering the documents exhibited by the prosecution, the Trial Judge, by impugned judgment and order, convicted and sentenced the appellant as mentioned above. By the selfsame judgment, co-accuseds Binod Chettri and Deo Kumar Gurung were convicted and sentenced to suffer imprisonment for three years and each to pay fine of Rs. 10,000/-, in default, to suffer simple imprisonment of two months more. They have not appealed against their conviction and sentence.

ARGUMENTS:

7. The learned Advocate appearing on behalf of the appellant strenuously submitted that prosecution has miserably failed to prove the case beyond reasonable doubt because the victim girl did not support the prosecution case. Victim was examined as P.W. 6. She did not depose anything against the appellant. She was declared as a hostile witness. Furthermore there are

inconsistencies in the deposition of other witnesses. As such prosecution has failed to establish the case against the appellant. Appellant is entitled to get the benefit of doubt and is liable to be acquitted.

8. On the other hand, learned Advocate appearing on behalf of the State vehemently submitted though the victim (P.W. 6) did not support the prosecution case but on questions being put by the Ld. Court she has deposed that she went to play 'vailo' at the night of Laxmi Puja along with Minuka, Samjana, Minagma Chaki. She also identified her signature on the statement recorded under Section 164 of the Cr.P.C. by the Magistrate. Minuka, Samjana, Minagma Chaki examined as witnesses corroborated the prosecution case. Medical evidence also corroborated the allegation of rape. Accordingly, the learned Trial Judge rightly convicted and sentenced the appellant.

APPRECIATION OF ORAL AND DOCUMENTARY EVIDENCE:

9. I have gone through the oral and documentary evidence brought on record by the prosecution. It is true that the victim girl did not support the prosecution case. However, she narrated during her examination that she went to play 'vailo' on the occasion of Laksmi Puja along with her friends, namely, Minuka, Samjana and Minagma Chaki.

10. Menuka Chettri examined as P.W. 2 narrated the incident on 13th November, 2012 she along with victim girl, Amrita Chhetri, Minagma Chheki

Sherpa went to play 'vailo' at about 9.30 p.m. They played 'vailo' at the house of the appellant. Appellant told them he wanted to pay them money, but he did not have change. Victim went near the appellant to give change in lower denominations. Thereupon, appellant pulled the victim girl inside the room. At that time somebody was chasing them and throwing stones at them so they fled away. Thereafter, lot of villagers assembled and rescued the victim. She was very much scared and the villagers were saying victim girl was raped and there were three persons. Menuka also identified her signature appearing on the statement recorded under Section 164 of the Cr.P.C. (marked as Exhibit 4). During cross-examination, she admitted she had no personal knowledge about rape.

11. Amrita Chhetri examined as P.W. 3, Minagma Chekki examined as P.W. 10 and Samjana Chhetri examined as P.W. 18 stated the incident in the same manner that they went to play 'vailo' in the house of the appellant. It was the night of Laksmi Puja. At that time Deo Kumar and Binod Chhetri were present. They played 'vailo' at the residence of appellant. Appellant firstly caught hold of Samjana Chhetri but the victim girl separated them. Thereafter, appellant caught hold of the victim girl and took her inside the room. They tried to take out the victim girl from his room. At that time appellant and Binod threatened them and chased them away. They ran away from that place and hid beside an amliso bush. They returned to the place of occurrence to rescue the victim girl but again Binod Chhetri chased them. Thereafter, other villagers also came to the house of the appellant and

rescued the victim girl. Witness made statement under section 164 of the Cr.P.C. before the Magistrate and identified her signature on the statement as exhibit 5.

12. P.W. 1, complainant, father of the victim girl narrated the incident that on 13.11.2012 on the occasion of Laksmi Puja at about 10 p.m. her daughter aged about 12 years (on the date of examination) along with her friends went to play 'vailo' at Bhotay Gaon at the residence of the appellant. She was dragged into the room with the help of Binod Chhetri and Deo Kumar Gurung and raped. He was informed about the incident over phone by Hemraj Chhetri and he was told to rush to the house of Menuka Chhetri. Then he rushed the house of Menuka Chhetri. A lot of people had already assembled there. Upon enquiry, his daughter narrated entire story. Thereafter, he lodged a written complaint. His daughter was referred to the Bijanbari Rural Hospital and subsequently to the Sadar Hospital, Darjeeling for examination. He identified his signature on the written complaint (Exhibit 1/1) which was written by Pronita Chhetri as per his instruction. He stated that the police seized wearing apparels of his daughter after preparing the seizure list. He proved the seizure list marked as Exhibit 2/1. Police also seized the wearing apparels of the appellant after preparing the seizure list. He identified his signature on the seizure list marked as Exhibit 3/1.

13. Anita Sherpa, P.W. 4 a co-villager also narrated the incident of 13.11.2012. She stated the victim girl and her friends had gone to play 'vailo' near the house of the appellant. She along with others heard a noise 'Bachao Bachao', they went there and found pant and shawl of the victim girl was opened. At that time Deo Kumar and Binod came there and quarrelled with them. She further stated victim girl told her that appellant raped her in his house.

14. Tankamaya Chetri, one of the co-villagers examined as P.W. 5 also deposed that she heard the cries of victim girl for help. She along with others went there and saw she was crying and was almost naked. Victim girl told appellant had raped her inside the room.

15. P.W. 7 Narbu Tamang, P.W. 9 Raju Chettri, and P.W. 11 Hemraj Chettri have corroborated the prosecution case.

16. P.W. 12 deposed that he had taken appellant to Sadar Hospital for potency test. Another witness P.W. 14 lady constable Atuja Chhetri deposed she took the victim girl to Bijanbari P.H.C. for medical examination on 14.11.2012. After examination she handed over the victim girl to her father. She had also taken victim girl and two other witnesses before the Magistrate for recording their statement under Section 164 Cr.P.C.

17. It reveals from the examination of Dr. Pinaki Baidya (P.W. 16) that the victim girl was healthy and fit; no neurological deficit was found; external

geneterian was found normal in size and shape. No congenital deformity was found. Secondary sexual characteristics were well developed. The report was marked as Exhibit 12.

18. Another doctor, Dr. Tshering Yudon, P.W. 19 examined the victim girl on 14.11.2012. On examination, he found the victim girl was stable. He found small cut marks on left hand. On local examination he found there was bleeding in the vagina and hymen was ruptured. He did not find foreign body in the vagina or any other injury marks. Swab was taken from vagina which was blood stained and sent to the laboratory for examination. The report was marked as Exhibit 15. During cross-examination, he narrated victim girl had said she had been raped by the appellant with the help of Deo Kumar and Binod Chettri. He opined the victim had been raped.

19. P.W. 20 is the Investigating Officer. During investigation, he seized the wearing apparels of the victim girl and prepared seizure list marked as Exhibit 2. He examined the victim, her father and prepared rough sketch map with index marked as Exhibit 17. Thereafter, he sent the victim girl to Bijanbari Hospital for medical examination. Next day he sent the victim girl to Sadar Hospital for further examination as doctor of Bijanbari hospital referred her to Sadar Hospital. Thereafter, victim girl was examined under Section 164 Cr.P.C. and finally after conclusion of investigation, he submitted charge sheet against the accused persons under Section 376 (2) (g) of the Indian Penal Code.

DISCUSSION & FINDINGS:

Upon perusal of the evidence and judgment delivered by the trial Court, I find the trial Court had relied on circumstantial evidence although the victim girl examined as P.W. 6 was declared hostile. The court rightly took into consideration the evidence of other witnesses, who were present at the spot and those who came to the spot later. It is true the victim girl was declared hostile but on perusal of her evidence it appears she went to play 'vailo' at the night of Laxmi Puja along with her friends, namely, Menuka Chettri, Samjana and Minagma Chheki Sherpa. Though the prosecution case is that the victim had been raped by the appellant in his house when she went to play 'vailo' at the night of Laxmi Puja along with her friend, she kept mum about the allegation of rape. She might have been won over or had not disclosed the unfortunate incident due to psychological trauma and/or social stigma. But, all other witnesses including her friends, who had accompanied her to play 'vailo' supported the case of the prosecution. Friends of the victim girl were very much present at the place of occurrence and had fled away from the spot being chased by Binod Chettri and Deo Kumar. Hearing the cries 'Bachao Bachao' villagers arrived at the residence of the appellant and found the victim girl undressed and scared. She disclosed to the witnesses about the rape committed by the appellant who had dragged her into the room. These facts have been proved by P.W.s 2, 3, 4, 5, 10 and 18. They deposed hearing cries of the victim girl they went to the house of the appellant and found the victim in an undressed condition.

At that time, Deo Kumar and Binod Chettri were quarrelling with them. They further deposed the victim girl told them appellant raped her in his house.

With regard to aforesaid evidence the learned Advocate for the appellant vehemently argued the victim girl did not speak about the rape by the appellant, therefore, other evidence do not have value in the eyes of law. Hence, the conviction awarded by the trial Court cannot be sustained and is liable to be set aside.

I am unconvinced with the arguments of the learned Advocate. Though the victim (P.W. 6) turned hostile, all the witnesses have supported the case of the prosecution. Doctor (P.W. 19), who examined the victim girl deposed he found there was bleeding in vagina and hymen was ruptured. He opined the victim was raped. Hence, it is amply clear victim had been raped on the night of Laxmi Puja. Her friends deposed they had gone to play 'vailo' at the house of the appellant. At that time, he had dragged the victim inside the room. They were chased away. Soon thereafter, hearing cries local people came to the spot and found the victim undressed in the room of the appellant. These circumstances along with the medical evidence on record form a complete chain irresistibly establishing the guilt of the appellant and ruling out any reasonable hypothesis of his innocence.

Even the hostile victim (P.W. 6) has supported substantial portions of the prosecution case. Evidence of a hostile witness cannot be rejected in toto. It is the duty of the Court to assess the evidence of a hostile witness on the broad probabilities of the case and accept the portions that are plausible

and reject the remainder. There are innumerable reasons why a witness may turn hostile such as fear, allurements, threats, intimidation, social stigma, future prospect, political pressure etc. Under such circumstances, Courts cannot shirk its responsibility to search out the truth. To do so, it has to apply the time tested methods of shifting and weighing the evidence of the hostile witness to determine which portions are credible and how far it supports or improbabilises the present case.

In this regard, I would like to place reliance on the decision of the Hon'ble Apex Court in **Rajesh Yadav & Anr. Vs. State of U.P.**¹:-

“22. On the law laid down in dealing with the testimony of a witness over an issue, we would like to place reliance on the decision of this Court in C. Muniappan v. State of T.N., (2010) 9 SCC 567:

“81. It is settled legal proposition that:

“6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.” (Vide Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389, Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233, Syad Akbar v. State of Karnataka, (1980) 1 SCC 30 and Khujji v. State of M.P., (1991) 3 SCC 627, SCC p. 635, para 6.)

82. In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360: 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or

¹ 2022 SCC OnLine SC 150

the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra [(2002) 7 SCC 543: 2003 SCC (Cri) 112], Gagan Kanojia v. State of Punjab [(2006) 13 SCC 516: (2008) 1 SCC (Cri) 109], Radha Mohan Singh v. State of U.P. [(2006) 2 SCC 450: (2006) 1 SCC (Cri) 661], Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188] and Subbu Singh v. State [(2009) 6 SCC 462: (2009) 2 SCC (Cri) 1106].

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

84. In the instant case, some of the material witnesses i.e. B. Kamal (PW 86) and R. Maruthu (PW 51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.

85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses." Vide *Sohrab v. State of M.P.*, [(1972) 3 SCC 751 : (1972) SCC (Cri) 819 : AIR 1972 SC 2020], *State of U.P. v. M.K. Anthony*, [(1985) 1 SCC 505 : 1985 SCC (Cri) 105], *Bharwada Bhoginbhai Hirjibhai v.*

Sate of Gujrat, [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753], *State of Rajasthan v. Om Prakash*, [(2007) 12 SCC 381 : (2008) 1 SCC (Cri) 411], *Prithu v. State of H.P.*, [(2009) 11 SCC 585 : (2009) 3 SCC (Cri) 1502], *State of U.P. v. Santosh Kumar*, [(2009) 9 SCC 626 : (2010) 1 SCC (Cri) 88] and *State v. Saravanan*, [(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580].”

I also seek reliance from the judgment passed in **Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh**², wherein the Apex Court observed:-

"12. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused..."

20. In the light of the above discussion, I hold prosecution has been able to prove the following circumstances:-

Firstly, the victim girl along with her friends, namely, Menuka Chettri, Samjana and Minagma Chheki Sherpa went to play ‘vailo’ at night at the residence of the appellant on the occasion of Laxmi Puja on the date and time as alleged.

² AIR 1952 SC 343

Secondly, they played 'vailo' at the residence of appellant.

Thirdly, friends, namely, Menuka Chettri (P.W. 2), Samjana (P.W. 18) and Minagma Chheki Sherpa (P.W.10) corroborated that they went to play 'vailo' at the house of the appellant on the occasion of Laxmi Puja on the alleged date and time with victim girl. Appellant dragged the victim into the room. Her friends were chased away.

Fourthly, the villagers heard cries of the victim girl and when they reached the place of occurrence they found the appellant at the place of occurrence.

Fifthly, the victim girl was rescued from the room in an undressed condition.

Sixthly, the Medical Officer also found nothing to suggest the appellant incapable of doing sexual intercourse. He found the victim was raped. He found bleeding from the private parts of the victim girl. Her hymen was ruptured.

Seventhly, RFSL report shows that seized articles bed sheet, jeans pant, vest, panty and cloth piece were found to be stained with blood.

Eighthly, the prosecution also proved that on the date of incident, the victim girl was less than twelve years of age.

21. Accordingly, I do not find any infirmity with the judgment and order dated 10.12.2014 and 11.12.2014. Hence, I uphold the conviction of the appellant.

22. However, considering the entire evidence of the prosecution, appellant's age and as he has no previous criminal antecedents, I am not

inclined to uphold the maximum sentence of life imprisonment as awarded by the trial Court. Accordingly, I modify the sentence and direct the appellant shall suffer rigorous imprisonment for 12 years and pay fine of Rs.1 lakh, in default he shall further suffer imprisonment for one year more.

23. With the modification as to sentence, C.R.A. 147 of 2015 is disposed of.

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

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

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

I Agree.

(Joymalya Bagchi, J)

(Ajay Kumar Gupta, J)