

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 152 of 2015

Ashim Dutta

-Vs-

State of West Bengal

For the Appellant : Mr. Arnab Chatterjee, Adv.
Ms. Dhanasree Biswas, Adv.

For the State : Mr. Sanjoy Bardhan, Adv.
Mr. Palash Ch. Majhi, Adv.

Heard on : 04.08.2022

Judgment on : 04.08.2022

Joymalya Bagchi, J. :-

Appellant has assailed the judgment and order dated 03.03.2015 and 04.03.2015 passed by learned Additional Sessions Judge, 2nd Court, Bongaon, North 24 Parganas in Sessions Trial No. 2(10) of 2003 arising out of Sessions Case No. 7(9) of 2002 convicting him for commission of offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for one year more.

Prosecution case as alleged against the appellant is as follows:-

Victim was a 14-month old girl. On 20.05.1999 around 3 p.m. she was sleeping in her house. Her mother (PW 1) had gone to the house of a neighbour. Suddenly, she heard cries and rushed to her residence. She saw the victim in the lap of the appellant who had pressed her private parts on his body. PW 1 called upon the appellant to hand over the child but he refused. Appellant finally handed over the child to PW 9, niece of PW 1. They noticed marks of injury and blood oozing from the vagina of the child. Appellant was assaulted and taken to the police station. PW 1 lodged FIR which was scribed by PW 7. On the strength of her written complaint, Bagda P.S Case No. 56 dated 20.05.1999 under section 376 IPC was registered against the appellant. Child was initially taken to Bagda Primary Health Center and examined by Dr. Uma Pada Das, PW 13. She was referred to Bongaon SD Hospital for better treatment. PW 3 examined the victim girl at Bongaon Hospital. She was admitted under gynaecologist Dr. N Biswas who treated her.

In conclusion of investigation, charge-sheet was filed against the appellant. Charge was framed under Section 376 of the Indian Penal Code. The appellant pleaded not guilty and claimed to be tried. Prosecution examined as many as 14 witnesses to prove its case. Defence of the appellant is one of innocence and false implication. It was his specific defence that the victim had fallen from the cot on jute sticks and suffered injury. To probabalise his defence, he examined four witnesses.

Upon analysis of the evidence on record, trial Court disbelieved the defence version and convicted and sentenced the appellant, as aforesaid.

Mr. Chatterjee, learned counsel for the appellant argued the prosecution case suffers from various improbabilities and inconsistencies. PW 1, mother of the victim did not support the prosecution case in cross-examination. There is delay in lodging FIR. Place of occurrence is not fixed. PW 1 stated her daughter was sleeping on a chatai on the veranda but her aunt (PW 2) claimed she was sleeping on the cot inside the room. PW 13 medical officer who examined the victim at Bagda Primary Health Center opined injury may be caused on her private parts due to jute sticks. No injury was found on the body penis of the appellant. These circumstances militate against the allegation of forcible rape on the minor. Defence of the appellant was probalised by examining witnesses. Trial Judge mechanically rejected their version and convicted the appellant. Hence, the appellant is entitled to an order of acquittal.

On the other hand, Mr. Bardhan, learned counsel for the State submits presence of appellant at the place of occurrence has been proved. Appellant was found in the room holding the child against his chest. His wearing apparels were stained with blood. PW 2 had seen the appellant commit rape on the minor. Medical evidence on record proved forcible rape beyond doubt. Hypothetical opinion that similar injury may be caused by jute sticks is not probalised through other attending

circumstances like absence of injuries on the other parts of the body of the victim. PW 1 had been won over at the time of cross examination. Hence she did not support the prosecution case. On the other hand, medical evidence proves the charge of rape. Accordingly, appeal is liable to be dismissed.

I have analyzed the evidence led on behalf of the prosecution and defence in the light of the aforesaid submissions.

PW 1, mother of the victim supported the prosecution case in chief. She unequivocally stated her child was sleeping in the verandah on a chatai. She was chatting with a neighbour. Suddenly she heard cries of her child and rushed to the spot. She found the appellant pressed her daughter against his body. She asked him to hand over the child but he refused. He finally handed over the child to her niece, PW 9. She found bleeding injury in the private parts of her child. Appellant tried to escape but was detained by local people. He was taken to police station. She lodged written complaint which was scribed by Surendra Nath Das (PW 7). Her daughter was taken for medical examination. Police seized the 'chatai' under a seizure list. She signed on the seizure list. After her examination in-chief, her cross-examination was deferred for two days. On the adjourned date, she committed a volte face and did not support the prosecution case. She even denied the presence of the appellant at the place of occurrence.

A culture of compromise is prevalent in our society. Owing to various reasons like threat, intimidation, poverty or other compelling

socio-economic conditions, witnesses including near and dear ones turn hostile and do not support the prosecution case which leads to unjustified acquittals. Lamenting such culture, the Apex Court in

Ramesh And Others vs. State of Haryana¹ observed as follows:-

“48. Apart from the above, another significant reason for witnesses turning hostile may be what is described as “culture of compromise”. Commenting upon such culture in rape trials, Pratiksha Bakshi has highlighted this problem in the following manner:

“During the trial, compromise acts as a tool in the hands of defence lawyers and the accused to pressurise complainants and victims to change their testimonies in a courtroom. Let us turn to a recent case from Agra wherein a young Dalit woman was gang-raped and the rapist let off on bail. The accused threatened to rape the victim again if she did not compromise. Nearly a year after she was raped, she committed suicide. While we find that the judgment records that the victim committed suicide following the pressure to compromise, the judgment does not criminalise the pressure to compromise as criminal intimidation of the victim and her family. The normalising function of the socio-legal category of compromise converts terror into a bargain in a context where there is no witness protection programme. This often accounts for why prosecution witnesses routinely turn hostile by the time the case comes on trial, if the victim does not lose the will to live.

In other words, I have shown how legality is actually perceived as disruptive of sociality; in this instance, a sociality that is marked by caste based patriarchies, such that compromise is actively perceived, to put it in the words of a woman Judge of a District Court, as a mechanism for ‘restoring social relations in society’.”

49. In this regard, two articles by Daniela Berti delve into a sociological analysis of hostile witnesses, noting how village compromises (and possibly peer pressure) are a reason for witnesses turning hostile. In one of his articles, he writes:

“For reasons that cannot be explained here, even the people who initiate a legal case may change their minds later on and pursue non-official forms of compromise or adjustment. Ethnographic observations of the cases that do make it to the criminal courtroom thus provide insight into the kinds of tensions that arise between local society and

¹ (2017) 1 SCC 529

the State judicial administration. These tensions are particularly palpable when witnesses deny before the Judge what they allegedly said to the police during preliminary investigations. At this very moment they often become hostile. Here I must point out that the problem of what in common law terminology is called “hostile witnesses” is, in fact, general in India and has provoked many a reaction from Judges and politicians, as well as countless debates in newspaper editorials. Although this problem assumes particular relevance at high-profile, well-publicised trials, where witnesses may be politically pressured or bribed, it is a recurring everyday situation with which Judges and prosecutors of any small district town are routinely faced. In many such cases, the hostile behaviour results from various dynamics that interfere with the trial's outcome — village or family solidarity, the sharing of the same illegal activity for which the accused has been incriminated (as in case of cannabis cultivation), political interests, family pressures, various forms of economic compensation, and so forth. Sometimes the witness becomes “hostile” simply because police records of his or her earlier testimony are plainly wrong. Judges themselves are well aware that the police do write false statements for the purpose of strengthening their cases. Though well known in judicial milieus, the dynamics just described have not yet been studied as they unfold over the course of a trial. My research suggests, however, that the witness's withdrawal from his or her previous statement is a crucial moment in the trial, one that clearly encapsulates the tensions arising between those involved in a trial and the court machinery itself.”

“In my fieldwork experiences, witnesses become “hostile” not only when they are directly implicated in a case filed by the police, but also when they are on the side of the plaintiff's party. During the often rather long period that elapses between the police investigation and the trial itself, I often observed, the party who has lodged the complaint (and who becomes the main witness) can irreparably compromise the case with the other party by means of compensation, threat or blackmail.”

The instant case is a glaring example of such malady.

P.W. 1 is a poor helpless lady. Owing to her poverty she was vulnerable to allurements and influence. As a result, she was won over and in the course of her deferred cross-examination, she did not support the prosecute case.

Under such circumstances, an unenviable task is cast upon the Judge to pierce the web of falsehood and reach the truth. In such endeavour the most reliable forensic tools available to him are the irresistible circumstances which refuse to get washed away in spite of prevarication of lying witnesses.

In view of the prevarication of PW 1, I have made an endeavour to examine whether her version in-chief is corroborated by other evidence on record.

PW 2, Dipti Bairagi is the aunt of the victim girl. She deposed she heard a sound of crying and rushed to the spot. She found the appellant holding the victim against his body. Appellant was brought to thana. She accompanied PW 1 to thana. She had seen the appellant commit rape on the victim. In cross-examination, she stated at the relevant time she was cooking. Her kitchen is situated at the side of the courtyard. She could see what was happening inside the room from the courtyard. Child was lying inside the room in a cot.

Mr. Chatterjee contends as per PW 2 child was sleeping inside the room in a cot but her mother (PW 1) claimed her daughter was sleeping on the veranda. This minor variation with regard to place where the child was sleeping does not affect the unfolding of the prosecution case. Evidence on record shows PW 1 living in a single room with a covered veranda. PW 2 stated she could see the room from the kitchen. Sketch map (Ext 9) prepared by I.O, PW 11 shows house of PW 2 was adjacent to that of PW 1 and the room is visible across the courtyard. This

probabilises the version of PW 2 that she had seen the appellant commit rape on the child and hearing her cries, had rushed to the place of occurrence.

PW 9, Sangi Bairagi is the niece of PW 1. She also rushed to the place of occurrence and saw the appellant with the child. Appellant had handed over the child to her. She found injuries on the child. Appellant tried to flee away but was caught.

PW 6, Indrajit Bairagi, father of the appellant was not present at the time of occurrence. Subsequently, he arrived at the spot. He deposed his wife had lodged FIR. He was present when 'chatai' was seized by police. His daughter has been treated at Bongaon SD Hospital.

PW 14, Bikash Samaddar, a rickshaw-puller, who though declared hostile, had admitted he had carried the child along with the appellant to the police station.

PWs 3, 4, 5 and 13 are the medical witnesses.

PW 13, Dr. Uma Pada Das examined the child at Bagda Primary Health Centre. He found vulva of the child was swollen. There was a tear at the posterior part of the vaginal opening. There was bleeding from that area of the vagina. He proved his report (Ext 15). He also examined the appellant and found marks of injury on his body. He recorded the history of assault as committing rape on the minor girl.

PW 3, Dr. H N Dutta examined the child at Bongaon SD Hospital. Child was admitted under Dr. N Biswas, gynecologist. Child was discharged on 24.05.99. He noted the findings of Dr. Biswas in bed head

ticket in the report prepared by him and marked Ext 3. The injuries noted as follows:-

(1) Central vaginal tear; (2) Two layered repair; (3) Abrasions on labial folds and per vaginal tear; (4) history of forceful coitus. The medical opinion is that she was raped. No foreign body present in the vagina. Hymen of baby was ruptured. He also examined the appellant. He did not find any injury in his penis. He was capable of sexual intercourse.

PW 4, Dr. Kalipada Roy proved the bed head ticket of the child which was marked as Ext 4.

PW 5, Dr. Ramesh Chandra Biswas held ossification test of the child and found that child was above one year and below 2 years. He proved the report (Ext 5).

PW 11, Nikhil Sinha is the investigating officer of the case. He prepared rough sketch map of place of occurrence (Ext 9). He arrested the appellant. He seized the wearing apparels of the appellant and sent it for FSL examination. FSL report shows presence of blood on the shirt of the appellant. He seized bed head ticket, ossification report from Bongaon SD Hospital

PW 12, Chittaranjan Tripathi is the second investigating officer who collected FSL report and submitted charge sheet.

Appellant examined four defence witnesses.

DW 1, Kabita Biswas stated she is a neighbour of PW 1. Hearing cries, she came to the spot and found the baby had fallen down from the cot. A jute stick had entered her vagina and blood was coming out.

Appellant was passing by. She called him. He took the baby on his lap. Mother and other relations came to the spot. Mother took the baby on her lap. Mother of the child told she lodged false case. On her instruction, she is deposing in Court.

DW 3, Karuna Biswas and DW 4, Ganesh Bapari have supported the evidence of DW 1. They also deposed the child had fallen down from the cot and suffered injury in her vagina. DW 2 while corroborating the version of other defence witnesses stated appellant was not present at the spot.

Medical evidence on record clearly improbabilises the version of the defence witnesses. All the defence witnesses in unison stated that the appellant had fallen down from the cot. She fell on the floor made of jute sticks. A jute stick stuck in her vagina causing injury on her private parts. If the victim had fallen down on the floor made of jute sticks, she would have certainly suffered injuries on other parts of the body apart from the vagina. In fact, DW 4 claimed the baby had suffered other injuries on her body.

Medical evidence on record does not show any injury on the body of the child apart from her vagina. Bed head ticket notes injuries on her private parts only. As a result, it was opined victim was raped. In absence of injury on other parts of the body it can safely be concluded injuries on the vagina were due to rape and not due to fall from a cot as contended by the defence. Hypothetical opinion of PW 13 such injury

may have been caused by a jute stick is of little consequence when attending circumstances do not support such conclusion.

Penetration howsoever slight, would constitute rape. Hence absence of injury in the penis of the appellant per se cannot rule out the charge of rape.

In the light of the aforesaid evidence on record, I am of the opinion prosecution has been able to prove that the appellant was in the room when the minor child aged 14 months suffered severe bleeding injuries in her vagina. Medical evidence on record irresistibly concludes such injuries were due to forcible coitus. Absence of injury on the other parts of the body of the minor victim wholly rules out the defence version such injury was due to fall on the floor, made of jute sticks. These circumstances wholly corroborate the ocular version of PW 2 who saw the incident of rape from her kitchen. Delay of three hours in lodging FIR has also been explained. Appellant had been apprehended at the spot and local people were summoned. Thereafter, PWs 1, 2 and their niece, Puspa took the appellant to police station and lodged FIR.

In light of the aforesaid discussion, I am of the view prosecution has been able to prove its case beyond reasonable doubt.

Accordingly, I uphold the conviction and sentence of the appellant.

Appeal is dismissed.

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.

Let a copy of this judgment along with the lower court records be sent down to the trial Court immediately for necessary action and execution of the sentence.

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)

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