

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Rabindranath Samanta

C.R.A. 580 of 2015

Ujjal Das & Ors.

-Vs-

State of West Bengal

For the Appellant : Ms. Debpriya Mitra, Adv.

For the State : Mr. Partha Pratim Das, Adv.
Ms. Trina Mitra, Adv.

Heard on : 08.02.2022

Judgment on : 08.02.2022

Joymalya Bagchi, J. :-

On 17th November, 2014 the victim, a 14 year old girl, was invited over phone by her friend Ujjal Das, appellant No.1 to attend his birthday party. He requested the victim to come to Kaltala Dighirpar. Accordingly, the victim went to the spot and Ujjal took her to a field namely, Srimath, Tentultala. The victim was perplexed and asked Ujjal why he had brought her to a field to celebrate the birthday party instead of his residence. The victim found three other persons present. They

were friends of Ujjal and through conversation the victim came to know of their names as Sentu Barik @ Sentu, Pankaj Chowdhury @ Pankaj and Susanta Mondal @ Susanta, that is, appellant Nos. 2,3 and 4 herein. While she was talking with them, Ujjal suddenly took off her clothes and forcibly raped her. Thereafter, she was repeatedly raped by the other appellants. Then, the appellants fled away and she complained of the incident to her mother and uncle who recovered her. Her mother lodged written complaint at Haringhata police station resulting in registration of Haringhata P.S. case No. 446 of 2014 dated 18th November, 2014 under Sections 376(I)/376D of the Indian Penal Code read with Section 4 of the POCSO Act.

In the course of investigation, the victim was medically examined and also made a statement before the Magistrate. The appellants were arrested and charge-sheet was filed against them. In the course of trial, prosecution examined nine witnesses and exhibited a number of documents. Defence of the appellants were one of innocence and false implication. On conclusion of trial, the learned Additional District & Sessions Judge, 2nd Court, Krishnanagar, Nadia by judgment and order dated 6th July, 2015 & 7th July, 2015 convicted and sentenced the appellants for the commission of offence punishable under Section 376 IPC and under Section 4 of the POCSO Act and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each, in default, to suffer rigorous imprisonment for three months more.

Ms. Mitra, learned advocate appearing for the appellants submits that the prosecution case is full of contradictions and inconsistencies. Although the victim claimed that she had suffered injuries and blood was oozing out from her private parts, no injury in her private parts had been noted by the medical witnesses, namely, P.W. 2 and P.W. 6. It is further contended that the circumstances in which the victim was called to the place of occurrence or recovered appear to be improbable. Victim is silent with regard to any telephonic conversation between her mother or uncle. But, her uncle P.W. 5 claims that she talked with him over mobile phone. It is also argued that her wearing apparels had not been sent for FSL examination. No Test Identification Parade was held to identify appellant Nos. 2 to 4 who were unknown to the victim. Hence, the prosecution case has not been proved and appellants ought to be acquitted.

On the other hand, Mr. Das with Ms. Mitra appearing for the State argues that the deposition of the victim girl (P.W. 1) is corroborated by her mother (P.W. 3) and her uncle (P.W. 5). Evidence of the victim is plausible and in view of the statutory presumption under Section 29 of the POCSO Act, the prosecution case stands proved. Absence of injuries or minor contradictions in the prosecution evidence cannot be a ground to disbelieve the version of a minor victim of sexual assault. Victim had ample opportunity to identify the appellant Nos. 1, 3 and 4 during the

incident. Hence, their identification in Court cannot be said to be improbable. Appellant is liable to be dismissed.

P.W. 1 is the minor victim. She deposed she was aged around 14 years and a student of Class IV of Saraji Girls High School. On the fateful day around 7 p.m., she received a phone call from her friend Ujjal to come at Kaltala Dighirpar to attend his birthday celebration. When she went there, Ujjal took her to Srimath, Tentultala which was a vacant field. She was surprised and questioned to Ujjal whether birthday celebration was to be held in an open field instead of his house. Thereafter, she noticed three other persons namely, Sentu Barik, Pankaj Chowdhury and Susanta Mondal present at the spot. They started talking with one another. Suddenly, Ujjal opened her wearing apparels and committed rape on her. Thereafter, others also committed rape on her. Then the accused persons fled away. She narrated the incident to her mother and to her uncle. Her mother lodged written complaint at Haringhata PS. She was examined by doctor of Jaguli Primary Health Centre and thereafter referred to Kalyani JNM Hospital. She made statement before the Magistrate. She proved her signature on the statement. In cross-examination, she initially stated that she had no mobile phone. Later on, she clarified that she had one phone which had been handed over to Mohanpur IC. Kaltala Dighidhar was at a 1/1 ½ minutes' walking distance from her house. She had not seen the other accused persons apart from Ujjal prior to the incident. She received

injuries and blood was coming on her vagina. Her wearing apparels were stained with blood. After the incident, she wore her wearing apparels. She clarified that her mother had called her through the mobile phone of her uncle.

P.W. 3 is the mother of the victim. She stated that her daughter left the house upon receiving a phone call from Ujjal. Her daughter was recovered around 8 p.m. from Srimath. Her daughter narrated the incident to her. She lodged written complaint, which was scribed by P.W. 4. She proved her signature on the written complaint. Her daughter was examined at Jaguli PHC and Kalyani JNM hospital.

P.W. 5 is the uncle of the victim. He stated that the victim was traceable. He made a phone call to the victim, who stated that she was at Srimath. Thereafter, her phone was switched off. Subsequently, she again made a phone call and the victim stated that she was at Talpukur. Subsequently, victim was recovered by her mother. The victim stated that Ujjal and others had raped her.

P.W. 4 is the scribe of the written complaint which was treated as FIR. He proved the F.I.R. (Exhibit 3/1).

P.Ws. 2 and 6 are the medical witnesses. P.W. 6 deposed that he had examined the victim at Haringhata BPHC on 18.11.2014. He found no injury on her private parts. Hymen was not intact. No foreign body was found on her private parts. He found whitish stain and dry grass

and handed over her under garments to the escort party. He referred her to Kalyani JNM hospital. He proved the medical report (Exhibit 4).

P.W. 2 examined the victim at JN hospital Kalyani. She found her wearing apparels were stained with mud and dust. No external injuries were found except small abrasion over areola of right breast. No obvious external injury was found over genitalia. However, hymen was not intact. Vaginal swab was taken and handed over to the escort party. She proved the medical report (Exhibit 2).

P.W. 8 is a Judicial Magistrate at 6th Court, Krishnagar, Nadia and had recorded the statement of the victim under Section 164 Cr.P.C. She proved her signature on the statement (Exhibit 1/2).

P.W. 9 is the Investigating Officer of the case. He deposed that during investigation, he visited the place of occurrence and prepared rough sketch map with index (Exhibit 7). He recorded statement of witnesses under Section 161 Cr.P.C. He sent the victim as well as the accused persons for medical test and collected the medical reports. He sent the victim for recording statement before the Magistrate under Section 164 Cr.P.C and subsequently collected her statement. He submitted charge-sheet. In cross examination, he stated that on 19.11.2014 he prayed for identification of the suspects. He had not sent the wearing apparels and vaginal swab for FSL examination.

Referring to the medical evidences of P.Ws. 2 and 6, Ms. Mitra has strenuously argued that the evidence of the victim P.W. 1 is unreliable.

Although the victim claimed that she had suffered injuries in her private parts and the wearing apparels were stained, no injuries were found in her genitalia. Blood stains were also not noticed on the wearing apparels of the victim. Evidence of a victim of sexual assault particularly that of a minor victim must be examined with due care and circumspection. One must bear in mind that a victim of sexual assault stands on par with an injured witness. Keeping the aforesaid parameters in mind, I have evaluated the evidence of P.W. 1 in the light of the aforesaid submissions made on behalf of the appellants. P.W. 1, in her deposition, has succinctly narrated how she was lured by the first appellant to come to the place of occurrence. Appellant no. 1 was a friend of hers and the victim had no reason to disbelieve him when she was invited to attend his birthday celebration. On such allurements, the victim was brought out from her residence; thereafter, she was taken to a deserted field, where she was repeatedly raped by the appellant No.1 and his friends. The circumstances narrated by P.W. 1 are neither unnatural nor improbable. On the other hand, her deposition with regard to leaving her residence on the invitation of first appellant is corroborated by her mother P.W. 3. Soon after the incident, the victim narrated traumatic experience to her mother P.W. 3 and uncle P.W. 5.

It is argued with reference to cross examination of the victim, P.W. 1, that neither the victim nor her mother has a mobile phone. This issue was clarified by P.W. 1 who explained communications after the incident

between herself and her mother was through the mobile phone of her uncle, P.W. 5. Victim also clarified that she had a mobile phone which had been handed over to the police after the incident. From the aforesaid evidence on record, it appears narration of the incident by the victim girl is not only convincing but also corroborated by other prosecution witnesses and materials on record. It is true that the victim stated about the injuries on her private parts in the course of cross-examination. This may be a case of embellishment which, however, does not go to the root of the prosecution case so as to improbabilise its genesis and the unfolding of the case.

On the other hand, when the victim is predated upon by her close friend, that is appellant No. 1, it is most likely that she was most perplexed and taken aback and unable to resist the repeated sexual assaults. Such a situation, by no stretch of imagination, to be construed to be a case of consent, but one of helpless surrender. When the incident is viewed from such perspective, the helpless surrender of the victim and her inability to resist the sudden sexual assault at the behest of a known and trustworthy friend, clearly explains her inability to resist and lack of injuries on her private parts. Hence, absence of injuries on private parts of the helpless victim cannot be a ground to improbabilise her version of gang rape. It is settled law that if the version of the victim of sexual assault is reliable, convincing and inspires confidence, mere minor contradictions and/or embellishments would not erode the prosecution

case and conviction may be founded on her version alone. In the present case, version of the victim is corroborated by her mother P.W. 3 as well as her uncle, P.W. 5.

With regard to the identity of the appellant Nos. 2, 3 and 4, it is argued that the victim did not disclose their names before P.W.5. They were not known to her before the incident and no Test Identification Parade was conducted. Hence, their identification in Court ought to be taken with a pinch of salt.

Perusal of the evidence of P.W.2 would show how the victim came to know of the identities of the appellant Nos. 2, 3 and 4. She was brought to the field by her friend Ujjal. Other appellants were friends of Ujjal and all of them started talking with each other. In the course of conversation, she came to know of their names and also their features. Subsequently, all of them raped her. She divulged their names to her mother and the first information report which was promptly lodged discloses the names of the appellant Nos. 2, 3 and 4. In this backdrop, defence plea that the victim did not disclose the names of the appellant Nos. 2, 3 and 4 to P.W. 5 is a minor variation and of little consequence. It is also relevant to note that the victim had come to know of the names of the said appellants while talking with them. She had interacted with the appellants for some time and thereafter had been ravished by them. The proximity between the appellants and the victim and the subsequent carnal attack upon her by them clearly gave ample opportunity to the

victim to see the appellants and identify them in Court. Failure to hold Test Identification Parade in these circumstances does not shake the foundation of identification of appellant Nos. 2, 3 and 4 in Court by P.W. 1.

Non-sending of the wearing apparels and undergarments of the minor girl for FSL examination is a remissness in investigation. As discussed above, the version of the victim is trustworthy and has been corroborated by her relations, P.Ws. 3 and 5. In this backdrop, failure of the investigating officer to send her wearing apparels for FSL examination would not affect the intrinsic truth of the prosecution case

Moreover, the prosecution case as narrated by P.W.1 and corroborated by her mother and uncle viz., P.Ws. 3 and 5 is further fortified by the statutory presumption under Section 29 of POCSO Act. Mere embellishment by P.W. 1 with regard to injuries suffered in the course of sexual assault does not affect the credibility of her version with regard to the unfolding of the prosecution case. Nothing has been brought out in course of cross-examination or by way of leading defence evidence which rebuts the statutory presumption and shows the appellants are not guilty of the offence.

Although the evidence on record establishes a case of gang rape of the minor girl which ought to attract culpability under Section 376D IPC and Section 6 of POCSO Act, conviction has been recorded under Section 376 IPC and under Section 4 of POCSO Act. Ordinarily, I would have

been prompted to issue a rule upon the appellants to show-cause why conviction be not recorded under the graver offences, however, as the appellants have been awarded the maximum sentence of life imprisonment (which I propose to moderate for the reasons recorded herein below), I do not choose to take such a course of action.

With these observations, convictions of the appellants are upheld.

Coming to the issue of sentence, I find the appellants have been awarded maximum sentence of life imprisonment. Although the offence is one of gang rape, I note that the appellant Nos. 1, 3 and 4 are in their twenties while appellant No. 2 is only 19 years of age. They do not have criminal antecedents. The minimum sentence for gang rape is twenty years' of rigorous imprisonment.

Hence, balancing the aggravated and mitigating circumstances, I am of the opinion that the maximum and indeterminate sentence of life may be modified and the appellants are directed to suffer rigorous imprisonment for twenty years each and to pay a fine of Rs.10,000/- each, in default to suffer rigorous imprisonment for three months more.

The appeal is accordingly disposed of.

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

Copy of the judgment along with LCR be sent down to the trial court at once.

Urgent photostat certified copy of this judgment, if applied for, shall be given to the parties, as expeditiously as possible on compliance of all necessary formalities.

I agree.

(Rabindranath Samanta, J.)

(Joymalya Bagchi, J.)