

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 953 of 2013
CRAN 3 of 2014 (Old CRAN 3693 of 2014)

Sk. Ali Hossain @ Sk. Ali
-Vs-
State of West Bengal

Amicus Curiae : Mr. Mainak Bakshi, Adv.

For the State : Mr. Sudip Ghosh, Adv.
Mr. Apurba Kr. Dutta, Adv.
Mr. Bitasok Banerjee, Adv.

Heard on : 11.02.2022

Judgment on : 11.02.2022

Joymalya Bagchi, J. :-

The appeal is directed against the judgment and order dated 16.8.2013 and 17.8.2013 passed by the learned Additional Sessions Judge, 1st Court, Tamluk in S.T. no. 09(7)/2005 convicting the appellant for commission of offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 10

years and to pay a fine of Rs.5,000/-, in default to suffer simple imprisonment for three months more.

The prosecution case as alleged against the appellant is to the effect that on 15.1.2005 in the evening victim girl, PW 2 aged around 12 years had gone out of her residence to answer nature's call. The appellant taking advantage of the situation, caught hold of the victim, took her to the bank of the pond and gave indecent proposal. When the victim refused, he showed a knife and threatened to kill her. Under threat, she was disrobed and raped. Thereafter appellant told the victim not to disclose the incident to anyone lest she would be killed. Due to fear, the victim remained mum for some days. Finally, on 19.2.2005 she disclosed the incident to her mother, PW 10 and her father, PW 1 who thereafter filed a petition before the Magistrate against the appellant alleging offence under section 376/506 IPC. Pursuant to the direction passed by the Magistrate, Tamluk PS case no. 32 of 2005 dated 1.3.2005 under section 376/506 IPC was registered for investigation. In the course of investigation, the victim was medically examined. She made statement before Magistrate. The appellant was arrested and medically examined. Upon conclusion of investigation, charge sheet was filed against the appellant. Charge was framed under section 376 IPC and the appellant pleaded not guilty and claimed to be tried. During his examination under section 313 Cr.P.C., appellant took a plea that marriage proposal with the victim was made to him. As he refused, he has been falsely implicated

in the instant case. Prosecution examined 11 witnesses and exhibited a number of documents to prove its case. Appellant did not examine any witness to probabilise his defence. In conclusion of trial, learned trial judge by the impugned judgment and order dated 16.8.2013 and 17.8.2013 convicted and sentenced the appellant, as aforesaid.

Mr. Bakshi, learned Counsel who is requested to appear as amicus curiae argues that the prosecution case bristles with improbabilities. Although the incident occurred on 15.1.2005, victim remained mum for more than a month. Though it is contended that the victim had been threatened, in the interregnum she went to school alone. Thus the explanation for delay is improbable and the prosecution case appears to be a concocted one. It is further contended that the place of occurrence was near the factory of the appellant and was visible to all due to electric lamps which used to burn in the factory. It is also contended age of the victim has not been proved beyond doubt. While admission register records her date of birth as 5.10.1993 which making her 12/13 years old at the time of incident, medical examination of the victim by the radiologist, PW 8 shows she was above 15 years but less than 17 years on the date of examination. Hence, prosecution case is liable to be dismissed and the appellant is entitled to an order of acquittal.

On the other hand, Mr. Dutta, learned Counsel appearing for the State submits that the version of the victim PW 2 is corroborated by her parents, PWs 1 and 10 and other witnesses. PW 9 medically examined the

victim girl and found her hymen was ruptured. Victim (PW 2) has explained the circumstance which prevented her from informing her parents about the alleged act of rape earlier. Recording in the admission register as well as the evidence of her parents clearly establish that the victim girl was between 12/13 years of age at time of occurrence. Hence, the appeal is liable to be dismissed.

P.W. 2 is the victim in the present case. She deposed on 15.1.2005 she had gone out in the night to answer nature's call. While she was returning home, appellant accosted her and took her to the north-eastern corner of a pond. He wanted to have sex with the victim but she refused. Thereupon the appellant brought out a knife and placed it on her neck and threatened to kill her. Victim was paralyzed with fear. Then, the appellant removed her wearing apparels and committed rape on her. After the incident the appellant again threatened her not to disclose the fact to anyone. If she did so, she will be murdered. She stated as she was afraid and had been threatened by the appellant, she did not disclose the incident earlier. Finally, after one month she narrated the incident to her mother. There were tube lights in the factory of the accused person which was situated beside the pond. She identified the appellant in that light. She made statement before Magistrate. In cross examination, she stated on the night of the incident she felt unwell and did not have dinner. She told her mother that she was unwell. However, due to fear she was unable

to disclose the incident earlier. Subsequently, she narrated the incident to her parents.

PW 1 is the father of the victim while PW 10 is her mother. Both the witnesses have substantially corroborated the version of the victim. PW 1 lodged complaint before the Magistrate. He proved his signature on the complaint.

PWs 3 and 4 are the neighbours. They are the reported witnesses. PW 4 stated that the victim had narrated the incident to him also.

PW 6 is the head teacher of Bardkhoda Primary School where the victim had studied to class 1 to class IV. He proved the admission register wherein date of birth of the victim is recorded as 5.10.1993. PWs 8 and 9 are the doctors who examined the victim. PW 8 is the radiologist who conducted ossification test of the victim. He proved the report (Ext 8). He stated that victim was more than 15 years but less than 17 years on the date of examination. PW 9 is another doctor who examined the victim and found her hymen was ruptured. He proved the report (Ext 10).

From the aforesaid evidence I note that the version of PW 2 with regard to forcible rape by the appellant has been corroborated by her parents, PWs 1 and 10. Local residents, PWs 3 and 4, have also corroborated her. PW 9 who medically examined the victim found her hymen ruptured. These circumstances fortify and corroborate the prosecution case of forcible rape by the appellant upon the victim.

It is argued that there is inordinate delay in lodging FIR which improbabilises the case. Delay in lodging FIR in a case of rape has to be viewed with some latitude and would not affect the credibility of the prosecution case unless the version of the victim suffers from inherent improbabilities and/or contradictions and does not inspire confidence. I have examined the issue of delay from such perspective. Victim narrated the circumstances in which she had been forcibly raped in the night of 15.1.2005. She deposed while she was returning after attending to nature's call, the appellant grabbed her and dragged to the north-eastern corner of the pond. Thereupon, he proposed to have sexual intercourse with her. But she refused. Then, appellant took out a knife and threatened to kill her and committed rape on her. He also threatened to harm her if she divulged the incident to anyone. The genesis of the prosecution case as narrated by the victim does not appear to be absurd or improbable. On the other hand, it receives corroboration from other evidence on record. Appellant is a neighbour of the victim and had a factory beside the pond. Hence, the presence at the place of occurrence and commission of rape as contended by the victim is not improbable. Moreover, plea of the appellant that there was a proposal of marriage between the parties does not appear to find place in the deposition of the witnesses. Not even a bare suggestion to that effect had been given to any of the prosecution witnesses including the victim or the parents during trial. Only when he was examined under section 313 Cr.P.C the appellant

came out with this desperate plea. Hence, I am of the opinion there is an intrinsic truth in the version of the victim that she was forcibly raped under threat of death by the appellant on the fateful night. Victim is a young girl of about 12/13 years. She had been subjected to threat by the appellant who was her neighbour. Under such circumstances, it was most likely that the victim laboured under fear and apprehension which compelled her to keep mum for some days. Fact that the victim went to school alone during that period is of little consequence. As she had not disclosed the incident to anyone out of fear she maintained the outward facade of normality and attended school. Finally, she mustered courage and narrated the incident to her mother. It is common knowledge a rape victim suffers from severe mental trauma. As a consequence, she is hesitant to come out and report the incident. The situation is further complicated when she is subjected to threat and coercion as in the present case. Delay in disclosure of the incident, under such circumstances, is understandable and ought not to be a ground to disbelieve her version.

Thus, I am of the view, delay in lodging criminal case has been duly explained and thus such explanation does not appear improbable.

Coming to the discrepancy between the ossification report and the age disclosed in the school records, I am of the opinion it is a little advantage to the appellant. Age disclosed in the ossification report Ext 8 shows that the victim was between 15 to 17 years. On the other hand,

direct evidence with regard to age of the victim comes out from the mouth of her father, PW 1 who stated that she was 12/13 years of age. His deposition finds corroboration from the school records which was exhibited by PW 6 and disclosed her date of birth as 5.10.1993. This makes the victim 12/13 years of age at the time of the incident. Direct evidence of parents corroborated by contemporaneous school records prevails over opinion evidence of doctor with regard to age which is based on approximation with 2/3 years' margin of error. Thus, I am of the opinion prosecution case has been able to prove that the victim was 12/13 years of age at the time of commission of the offence.

In the light of the aforesaid discussion, I hold that the prosecution case has been proved beyond reasonable doubt.

Conviction and sentence recorded against the appellant is accordingly upheld.

The appeal is, accordingly, 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.

I record my appreciation for the able assistance rendered by Mr. Bakshi, learned advocate as amicus curiae in disposing of the appeal.

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

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

tkm/PA