

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. 76 of 2018

Ujjal Sarkar

-Vs-

The State of West Bengal

W I T H

C.R.A. 29 of 2018

Lankeswar Sarkar

-Vs-

The State of West Bengal

W I T H

C.R.A. 30 of 2018

Nirmal Sarkar

-Vs-

The State of West Bengal

For the Appellant : Mr. Sekhar Kr. Basu, Sr. Adv.
[in CRA 76/2018] Mr. Rajdeep Majumder, Adv.
Mr. Pritam Roy, Adv.
Ms. Shyanti Poddar, Adv.

For the Appellant : Mr. Debasis Roy, Adv.
[in CRA 29/2018]

For the Appellant : Mr. Kallol Mondal, Adv.
[in CRA 30/2018] Mr. Debdas Khanna, Adv.
Mr. Krishan Ray, Adv.
Mr. Souvik Das, Adv.
Mr. Anamitra Banerjee, Adv.

For the State : Mr. Madhusudan Sur, Id. APP.
Mr. Manoranjan Mahata, Adv.

Heard on : 04.01.2023, 10.01.2023 & 19.01.2023

Judgment on : 19.01.2023

Joymalya Bagchi, J. :-

1. Appeals are directed against judgment and order dated 18.12.2017 & 20.12.2017 passed by learned Additional District & Sessions Judge, Fast Track Court, Tamluk-I, Bongaon, North 24-Parganas in Sessions Trial No.2(4)/2012 arising out Sessions Case No. 06(11)/2011 convicting the appellants for commission of offence punishable under Section 376(2)(g) of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for fifteen years and to pay a fine of Rs.25,000/- each, in default, to suffer rigorous imprisonment for one year more.

Prosecution case:-

2. Prosecution case as alleged against the appellants is to the effect that the survivor is a married lady whose husband used to work in Dubai. On the fateful day i.e. 28.04.2010, her mother-in-law had gone to a relation's house. She was alone with her five-year old daughter. At night around 9:00/10:00 P.M. she put her daughter to sleep. She went out to tie the calf at the cowshed and entered the house. Thereafter, she had a bath and was about to lock the main

door when Lankeswar Sarkar and Nirmal Sarkar forcibly barged into the room. Lankeswar gagged her mouth and made her lie on the ground inside the room and told Nirmal to do whatever he wanted. Thereafter, they disrobed her. She was only wearing a petty coat. First Nirmal raped her and thereafter, Lankeswar also raped her. The accuseds told her to keep quiet otherwise she would be killed. Out of fear, she kept quiet. After the incident, Lankeswar left the room.

3. She somehow ran out of the room and found Ujjal was outside the door. Ujjal caught hold of her and tore her petty coat and threw it in the courtyard. He tried to assault her. As a result, she again entered the room.
4. Her mother-in-law returned after 2-3 days. After consultation with her mother-in-law, she lodged written complaint at police station on 02.05.2010 which resulted in registration of Bongaon Police Station Case No.195 of 2010 dated 02.05.2010 under Sections 376(2)(g)/506 of the Indian Penal Code against Lankeswar Sarkar, Nirmal Sarkar and Ujjal Sarkar i.e. the appellants herein.

Proceedings before the trial Court:-

5. In the course of investigation, the survivor was medically examined. Her statement was also recorded before Magistrate. In conclusion of investigation, charge sheet was filed and charges were framed against the appellants under section 376(2)(g) and 506 of the Indian

Penal Code. In course of trial, prosecution examined six witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication.

6. In conclusion of trial, learned trial Judge by the impugned judgment and order convicted and sentenced the appellants, as aforesaid.

Arguments at the Bar:-

7. Mr. Debasis Roy and Mr. Kallol Mondal, learned Advocates for the appellants viz. Lankeswar Sarkar and Nirmal Sarkar respectively submit the survivor (PW1) is not a reliable witness. There is a delay of four days in lodging FIR. Father of the survivor had come to the residence on the next day. It is unclear why she had to wait for the arrival of her mother-in-law to lodge FIR. Though she claimed she suffered injury on her hand, Medical Officer (PW4) who examined her did not find marks of injury. Incident occurred in a populated area. PW1 claimed she had cried '*bachao bachao*'. No local people assembled at the spot. This also improbabilises her version. There was enmity between the mother-in-law of the survivor (PW1) and Ujjal Sarkar. This had prompted them to falsely implicate the appellants. Hence, the appellants are entitled to an order of acquittal.
8. Mr. Sekhar Basu, learned senior Advocate for the appellant viz. Ujjal Sarkar submits his client was not present before or during the

incident. In all probability hearing cries of the survivor, he had come out and tried to save her. This finds corroboration from the statement of the survivor before Magistrate. Though she alleged she suffered injuries when Ujjal had scuffled with her, no injury was detected on her hands. It cannot be said Ujjal was a member of the group which shared common intention to commit rape. Accordingly, he prays for acquittal of Ujjal Sarkar.

9. Mr. Madhusudan Sur, learned Additional Public Prosecutor submits PW1 has graphically narrated the incident of gang rape on her. On the fateful night, she was alone in the house. Taking advantage of the situation, Lankeswar and Nirmal had forced themselves into the house and raped her. Nirmal had misbehaved with her earlier. As one of the appellants viz. Lankeswar was related to her, she waited for her mother-in-law to return. Thereafter, FIR was registered. In this factual matrix, delay stands explained. Evidence of the survivor does not suffer from inherent improbabilities or inconsistencies. Her version is corroborated by her father (PW2). She was medically examined after four days. Hence, absence of injury would not militate against the probability of the prosecution case.

Evidence on record:-

10. PW1 is the survivor. She deposed on 28.04.2010 she was alone with her minor daughter. Her husband used to work in Dubai. Her

mother-in-law had gone to her relation's house. At night her daughter went to sleep. She went out to tie the calf. After she returned, she bathed. Then she went to the door to lock it. At that time, Lankeswar and Nirmal forced themselves into the house. They gagged her mouth, disrobed her and committed rape upon her. She was wearing a petty coat. She somehow escaped and as she came out of the room she saw Ujjal standing outside the door. Ujjal caught hold of her and tore her petty coat. She again returned to the room. During the incident, Lankeswar and Nirmal threatened her with dire consequences. She further deposed couple of days earlier Nirmal had teased her. She complained about the incident to Nirmal's mother. Her mother-in-law returned after 2-3 days. Thereafter, she lodged complaint. She proved the complaint. She made statement before Magistrate. She was medically examined.

11. PW2 is the father of the survivor. He corroborated her evidence. He deposed police seized the petty coat. He proved the signature on the seizure list. In cross-examination, he stated he heard about the incident from his daughter on the next day. He stayed at her in-laws house for 3-4 days.
12. PW4 (Keshba Nanda Goswami) medically examined the survivor. He proved the history of assault which implicates the appellants. He did not find any injury on the survivor.

13. PW5 (Rina Talukdar) recorded her statement under Section 164 of the Code of Criminal Procedure (Ext.2).
14. PW6 (Susanta Mukherjee) is the Investigating Officer of the case. He went to the spot. He drew up rough sketch map. He arrested the accused persons. Statement of the survivor was recorded before Magistrate. She was medically examined. He submitted charge sheet.

Delay in lodging FIR:-

15. Learned Advocates for the appellants have assailed the prosecution case on the ground there is delay in lodging FIR. Incident occurred in the night of 28.04.2010. The survivor (PW1) was alone in the house with her minor daughter. Her husband was working in Dubai while her mother-in-law had gone to a relation's place. Lankeswar and Nirmal had trespassed into the house and committed rape upon her. Lankeswar and Nirmal had also threatened her with dire consequences. As she was alone, she could not muster courage to lodge criminal case. It may not be out of place to note the appellants are close neighbours. One of them viz. Lankeswar is also a relation of the survivor.
16. It is strenuously argued father of the survivor (PW2) had heard the incident on the next day and had come to her matrimonial home. Still then, PW1 did not lodge FIR.
17. I am unable to accept the aforesaid submission.

18. PW1 had been raped at the matrimonial home. One of the assailants viz. Lankeswar was her relation. They had threatened her with dire consequences. Naturally she waited for her mother-in-law to return before she initiated criminal action against the accuseds, one of whom was her relation.
19. One cannot lose sight of the fact that even in present times, freedom and agency of a married woman at the matrimonial home is restricted. Ordinarily a married woman would not even go to her parental home without intimation or permission from her in-laws. The present case portrays a brutal act of sexual assault on her by the neighbours and a distant relation. Her husband was working abroad. In this scenario, it is not unnatural that she waited for the arrival of her mother-in-law before lodging FIR.
20. Delay in lodging FIR particularly in sexual offences require to be assessed bearing in mind the impact of the offence on the psyche of the survivor and its ramifications in society. Judged from this perspective delay of four days in lodging FIR owing to the absence of mother-in-law is probable and does not affect the credibility of the prosecution case.

Whether the version of the survivor (PW1) is credible:-

21. It is trite law a conviction may be founded on the evidence of the survivor alone. She is to be treated on par with an injured witness. Furthermore, her deposition has to be assessed with adequate

sensitivity bearing in mind the scars an act of sexual trauma leaves behind on the survivor.

22. I have examined the deposition of PW1 from that perspective. Lankeswar and Nirmal were known to her. Infact, Lankeswar was a distant relation. When she was about to lock the door and retire for the night, both of them barged into the house. They dragged her into a room, gagged her mouth and committed rape upon her repeatedly. They also threatened her with dire consequences. Her deposition with regard to the act of rape by Lankeswar and Nirmal is substantially corroborated in the FIR as well as in her statement before Magistrate.
23. It has been strenuously argued no injuries were found in her private parts. PW1 deposed that she had been overpowered by Lankeswar and Nirmal. While one gagged her, the other raped her. Being so overpowered, she was unable to resist. She herself stated in Court she had not suffered injuries during rape.
24. In this backdrop, absence of injuries on her private parts cannot be a ground to disbelieve her version.
25. When two adult males overpower and rape a helpless woman, she would be unable to resist. Under such circumstances, absence of injuries can neither improbabilise the incident nor signify consent on her part.

26. It has also been argued PW1 cried '*bachao bachao*' but none of the neighbours came to the spot. There were homes and a club room around the place of occurrence. Reading the evidence of PW1 as a whole it appears at the time of commission of rape she had been gagged and was unable to raise alarm. After the incident, she cried out '*bachao bachao*' and ran out of the room. There she met Ujjal. I would deal with the role of Ujjal in the incident later.
27. Learned Advocates also referred to minor contradictions and/or embellishments in her deposition in court. Crux of the offence of gang rape by Lankeswar and Nirmal is consistently appearing in the FIR, statement of the survivor before the Magistrate as well as in her deposition in court. Her deposition is a ring of truth and I am unwilling to discard it by reference to such minor contradictions.
28. In this backdrop, I am of the opinion version of the survivor does not suffer from patent absurdities or inherent improbabilities so as to render her deposition improbable.

Corroboration of the Survivor's version:-

29. Evidence of the survivor is corroborated by her father (PW2). On the next day, he heard about the incident. Fearing security of his daughter, he stayed at the matrimonial home till her mother-in-law arrived. This circumstance demonstrates the fear and trauma which overawed the survivor after the incident. The case discloses a further disturbing feature. In course of cross-examination,

appellants brazenly exhibited affidavits (Exts.6 & 7) claimed to be signed by the survivor and her husband. In the affidavits it is averred she does not have any allegation against the appellants. In cross-examination, she categorically stated that she was misled to give signatures on documents.

30. I have examined the documents. Tenor of the documents and the cryptic manner in which they have been prepared clearly show that the documents were manufactured and the survivor and her husband were compelled to sign them. The malevolent influence of the appellants on the survivor and her family is evident and also lends justification to the reasons for delay in setting the criminal law in motion.

Prior enmity:-

31. It is also argued appellants have been falsely implicated due to prior enmity with Ujjal. Reference is made to payment of compensation by Ujjal to the mother-in-law of the survivor over breaking of a branch. The issue raised on behalf of the defence is a minor one and cannot by any stretch of imagination be believed to give rise to hostility of such nature which would lead to false implication of all the appellants. It must be borne in mind that the role ascribed to Ujjal is a minimal one. If the survivor had been prompted by the so-called enmity, why would she ascribe a minimal

role to Ujjal and implicate the others, i.e. Lankeswar and Nirmal in the act of rape.

32. It may be out of place to mention Lankeswar is a relation of the survivor and is no way connected with Ujjal. Evidence has also come on record a couple of days earlier Nirmal had misbehaved with the survivor. She was compelled to report it to his mother. These facts expose the hollowness of the defence plea regarding false implication.

Role of Ujjal:-

33. Coming to the role of Ujjal in the incident, I note the said appellant was neither present before or at the time of incident. PW1 deposed after the occurrence when she came out of the room she saw Ujjal standing. He caught hold of her and tore her petty coat and threw it in the courtyard. Her deposition in court with regard to Ujjal's role is at variance to her statement before Magistrate. Before Magistrate, PW1 claimed Ujjal had tried to save her. When he caught hold of her, the petty coat came off. Intention of Ujjal to obstruct the survivor or to snatch away her petty coat is not transpiring from the said statement. Even her version that she suffered injuries during scuffle with Ujjal is not supported by medical evidence.
34. In Explanation I of section 376 of Indian Penal Code gang rape is defined as follows :-

“Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention,

each of the persons shall be deemed to have committed gang rape ...”

35. A reading of the definition clause would show when one or more members of a group commits rape, each member of the group who shares common intention to commit the crime is guilty of the offence of gang rape. The punishment is enunciated in **Om Prakash vs State of Haryana**¹ as follows: -

“22.the prosecution must adduce evidence to show that more than one accused has acted in concert and in such an event, if rape had been committed by even one of the accused all will be guilty irrespective of the fact that she has not been raped by all of them. Therefore, it may not be necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. The provision embodies a principle of joint liability and the essence of that liability is in existence of common intention. That common intention presupposes prior concert as there must be meeting of minds, which may be determined from the conduct of the offenders which is revealed during the course of action.

23. After examining the circumstances relied upon by the prosecution to indicate concert, the Court in Ashok Kumar [(2003) 2 SCC 143 : 2003 SCC (Cri) 446] concluded that mere presence of the appellant could not establish that he had shared a common intention with the co-accused to rape the prosecutrix.”

36. Both Lankeswar and Nirmal committed rape on the survivor one after another. The offence is clearly established against them. To prove the offence against Ujjal, prosecution was required to show that he was a member of the group, one of whom committed rape and he shared common intention with the other offender to commit the offence. Admittedly, Ujjal was not seen with the other two

¹ (2011)14 SCC 309

appellants before or during the offence. He was not present in the room when the offence was committed. Even if he was seen in the house immediately after the incident, it cannot be ruled out that hearing the cries of the victim he rushed to the spot and had tried to save her. In his effort to do so, her petty coat came off. This plea finds corroboration from the statement of PW1 before Magistrate.

37. In this backdrop, it cannot be said to have been proved beyond doubt that Ujjal was a member of the group, one of whom had committed rape and he shared common intention with them to commit the offence. Hence, I am inclined to extend the benefit of doubt to him.

Conclusion: -

38. In the light of the aforesaid discussion, conviction of the appellants viz. Lankeswar Sarkar and Nirmal Sarkar is upheld. Conviction and sentence imposed upon the appellant viz. Ujjal Sarkar are set aside.
39. Coming to the issue of sentence imposed upon the appellants viz. Lankeswar Sarkar and Nirmal Sarkar, I note that the said appellants do not have criminal antecedents. No doubt the offence of gang rape is a heinous and deplorable one. However, no physical injuries were found on the survivor. Possibility of reformation and rehabilitation of the appellants cannot be ruled out.
40. Balancing the aggravating and mitigating factors, I modify the sentence imposed upon the appellants viz. Lankeswar Sarkar and

Nirmal Sarkar and direct they shall suffer rigorous imprisonment for ten years and pay a fine of Rs.25,000/- each, in default, to suffer rigorous imprisonment for one year more.

41. Period of detention suffered by the appellants viz. Lankeswar Sarkar and Nirmal Sarkar during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure.
42. With the aforesaid modification as to sentence, CRA 29 of 2018 and CRA 30 of 2018 are disposed of.
43. The appeal being CRA 76 of 2018 is accordingly, allowed.
44. Appellant viz. Ujjal Sarkar shall be discharged from his bail bond upon execution of a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.
45. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.
46. 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.)