

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 486 of 2018

ARAJ SK.
VS.
THE STATE OF WEST BENGAL

For the Appellant	: Mr. Milon Mukherjee, Sr. Adv. Mr. Pratip Kumar Chatterjee, Adv. Mr. Soumya Majumder, Adv.
For the State	: Mr. Bidyut Kr. Roy, Adv. Ms. Sima Biswas, Adv.
Hearing concluded on	: 7 th February, 2023
Judgement on	: 7 th February, 2023

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal challenges the judgment and order of conviction passed by the learned Additional Sessions Judge, Kandi, Murshidabad in Sessions Trial No. 01(11)2016 arising out of Bharatput Police Station Case No. 324/2014 dated 19.08.2014 under Section 376 of the Indian Penal Code.
2. By the impugned judgment, learned trial court recorded order of conviction directing the appellant to undergo rigorous imprisonment for seven years and to pay fine of Rs.5,000/- with a default clause for committing an offence under Section 376 of the Indian Penal Code.

3. Briefly stated, the victim lady set the criminal administration of justice into motion by informing the Officer-in-Charge of Bharatpur Police Station in writing on 19th August, 2014 about the alleged offence of rape. It is stated that she has been staying in her house with her two children for last six months. Her husband is in Arab country.
4. The accused, Araj Sk on 11th August, 2014 at about 9-00 p.m. trespassed into her house and gave her illicit proposal. She voiced her protest, the accused person gagged her and keeping a knife on her throat, he put her into fear of being killed, even threatened to kill her children. Thereafter, he committed rape on the victim and before leaving the house threatened the victim with dire consequence in case she disclosed the incident.
5. The victim kept mum but after few days having found her weeping, her brothers could smell that something was wrong. She then disclosed the incident to her brothers.
6. The information since disclosed offence cognizable in nature, Bharatpur police station Case No. 324 of 2014 dated 19th August, 2014 was registered under Section 376 of the Indian Penal Code.
7. Police took up investigation which culminated into submission of charge-sheet against the accused person. The trial of the case commenced on 3rd November, 2016. The accused person stood trial pleading his innocence.
8. To bring home the charge prosecution examined as many as five witnesses and one person was examined as defence witness. Learned

trial court after considering the evidence on record both oral and documentary, was pleased to hold the accused person guilty for committing offence under Section 376 of the Indian Penal Code and the impugned judgement was passed.

9. Mr. Milon Mukherjee, learned senior counsel representing the appellant draws my attention to the fact that the alleged incident took place on 11th August, 2014 and the police was informed on 19th August, 2014. There was delay of eight days. The FIR was brought to the notice of learned jurisdictional Magistrate on 23rd August, 2014. Thus, according to Mr. Mukherjee, there is infraction of provision of Section 157 of the Code of Criminal Procedure.
10. Drawing my attention to the testimony of PW-1, the victim, it is submitted that she is not getting support from any other witness. Mr. Mukherjee points out that the Doctor who attended the victim was not examined by the prosecution but the medical examination report has been admitted into evidence. Thus, the contents of medical report cannot be read into evidence. Even if for the sake of argument, the medical report can be said to be relevant and admissible under the law, then also the attending doctor could not give any opinion as to whether the victim was sexually assaulted.
11. Drawing my attention further to the attending circumstances as it is appearing from the cross examination of PW-1, Mr. Mukherjee submits that admittedly the entrance door fitted with collapsible gate was kept open in the night although the lady was living in the said house with her minor children.

12. The children of the victim were eight years and five years of age respectively. But none of the children particularly the older one was examined by the prosecution.
13. It is further contended that apart from PW-1, the other witnesses did not have any direct knowledge of the incident. The testimony of witnesses other than the I.O. are inadmissible being hearsay. The sole testimony of the victim suffers from infirmity but the learned trial court invoking the provision of Section 114A of the Evidence Act draws the presumption against the accused person. While provision of Section 114A has specific purpose, it can be invoked in a prosecution for rape under Clause (a) to (n) as laid down under sub-Section 2 of Section 376 of the Indian Penal Code and this case of prosecution does not fit in the provision of sub-Section 2 of Section 376 of the Indian Penal Code.
14. Drawing my attention to the testimony of defence witness, Nurul Islam it is argued that the victim is being used by her brothers who borrowed money from the accused person. The accused person is a contractor by profession who has lent a sum of Rs. 48,000/- to the brothers of the victim who run the shop of mobile phone. The accused person when demanded the money, he was told to come back after one month and to escape the liability of repayment of loan the brothers of the victim used her and made her file the case. Prosecution is attended with mala fide and the learned trial court committed error in passing the judgment impugned.

15. Drawing my attention to the cross-examination of PW-1, Mr. Bidyut Kr. Roy representing the State submits that the victim was put under threat of being killed and the accused person also threatened her to kill her two children and, thus, she was compelled to surrender to the lust of the accused persons. This fact comes within the purview of definition of rape as laid down under Section 375 explanation thirdly. Therefore, there is no infirmity in the judgement impugned.
16. PW-1 is the victim lady. Generally testimony of a rape victim is given due credence and is considered with utmost sensitively, like an injured witness. However, at time it demands higher degree of circumspection and scrutiny as well depending on the factual matrix.
17. Her children fell asleep on the bed, victim went to wash room before going to bed. Coming back to her bed room she found the accused person. Thereafter, she narrated how she was compelled to surrender herself to the lust of the accused person.
18. According to PW-1, she found the accused person in the room after coming back from bathroom and it is her further evidence that she was pulled down from the bed by the accused person and was taken to the floor. This is undoubtedly not a minor discrepancy. She stated to have washed the floor stained with semen and thus destroyed her evidence.
19. PW-1 stated during her cross-examination that as it was not too late in the night, she kept the door open, which she would have

closed. But she also stated that she wanted to go to sleep after coming back from bath room.

This conduct indicates two possibilities even if we ignore the discrepancy in the testimony of victim, as I have pointed out herein before. They are:-

1. She allowed the accused to enter into the room or
2. The accused sneaked into the room with a guilty mind and committed offence.

When two views are possible one that tilts in favour of accused is to be accepted.

20. In **RAI SANDEEP VS. STATE (NCT OF DELHI)** reported in **AIR 2012 SC 3157** Hon'ble Apex Court held:-

"22. In our considered opinion, the "sterling witness" should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation."

21. In **KRISHAN KUMAR MALIK VS. STATE OF HARYANA** reported in **AIR 2011 SC 2877** wherein Hon'ble Apex Court held:-

"It is observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

With the aforesaid decisions in mind, it is required to be considered, whether is it safe to convict the accused solely on

the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality?

22. It is rightly pointed out by Mr. Mukherjee that Section 114A of the Evidence Act cannot be pressed into service in this particular case to hold that victim did not give consent.

23. Section 114A Evidence Act envisages:-

“Section 114A in The Indian Evidence Act, 1872

1/114A. Presumption as to absence of consent in certain prosecutions for rape.—In a prosecution for rape under clause [\(a\)](#) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.]”

24. Hon’ble Apex Court in **RAJU VS. STATE OF M.P.** reported in **AIR 2009 SC 858** held:-

“Reference has been made in Gurmit Singh's case to the amendments in 1983 to [Sections 375](#) and [376](#) of the India Penal Code making the penal provisions relating to rape more stringent, and also to [Section 114A](#) of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that [Sections 113A](#) and [113B](#) too were inserted in the [Evidence Act](#) by the same amendment by

which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under [Section 114A](#) is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

25. The sole testimony of victim, it is trite law to say, could be sufficient to record an order of conviction if it inspires confidence in the mind of court. But in this particular case, I do not find any ring of truth in what has been disclosed by the victim lady in her oral testimony.
26. The prosecution has failed to prove the charge beyond reasonable doubt and extending of benefit of doubt, I record an order of acquittal reversing the order of conviction passed by the learned trial court.
27. The appeal is thus accepted and allowed. The accused person is acquitted, subject to execution of bond under Section 437A of the Criminal Procedure Code for six months.
28. Let a copy of this judgment along with LCR be sent down to the learned Trial Court for information and necessary compliance.

29. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)