

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Apurba Sinha Ray

C.R.A. 27 of 2019

Haridas Ray
-Vs-
The State of West Bengal & Anr.

For the Appellant : Mr. Partha Pratim Sarkar, Adv.

For the State : Mr. Aditi Shankar Chakraborty, Id. A.P.P.
Mr. Abhijit Sarkar, Adv.
Mr. Subhasish Misra, Adv.
Mr. Arjun Chowdhury, Adv.

Heard on : 08.12.2023

Judgment on : 08.12.2023

Joymalya Bagchi, J. :-

Prologue:-

1. A nine-year old child of a hapless widow (who eked out her living by selling *roti sabji* from a makeshift stall) was raped by a police personnel – a regular customer at her mother's shop. Owing to their precarious socio-economic condition the mother remained mum to such brutal assault. Had it not been for the timely intervention of

conscientious teachers in the school which the child attended this heinous crime would have remained unheeded and justice buried forever.

Genesis of the case :-

2. The cruel saga perpetrated on the child unfolded on 06.09.2017. Appellant, a police personnel who used to visit her mother's stall came to the stall in the morning and had a cup of tea. He told the child to bring his food i.e. *roti sabji* to the barrack. Accordingly, the child went to the barrack where she was raped. She was stunned and out of fear she could not immediately come out with the incident. She remained depressed and stayed at home. On the next day, her physical condition deteriorated and she revealed the incident to her mother (PW 2). Thereafter, her mother took her to Dinhata hospital where she was admitted for a day. Being a poor widow and presumably intimidated by the fact that the perpetrator was a man in uniform, the mother remained silent. After the child had recovered she went to her school on 16.09.2017. One of her teachers (PW 3) enquired why she had remained absent. Initially she gave evasive replies. Finally, she told the incident to a lady teacher (PW 7). The teachers called her mother. Thanks to the encouragement and support of the teachers, the mother mustered courage and lodged the criminal case against the appellant. Appellant was arrested and charged under Section 376(2)(a)(ii) of the Indian Penal Code and Section 6 of the POCSO Act.

3. In course of trial, prosecution examined 15 witnesses. Defence of the appellant was one of innocence and false implication. In conclusion of trial, learned Judge, Special Court (POCSO)-cum-Additional District & Sessions Judge, Dinhata by judgment and order dated 29.08.2019 & 30.08.2019 in POCSO Case No. 30(D) of 2017 (POCSO Trial No. 01(01) of 2019) convicted the appellant for commission of offence punishable under Section 376(2)(a)(ii) of the Indian Penal Code read with Section 6 of the POCSO Act and sentenced him to suffer imprisonment for life and to pay fine of Rs.2,00,000/-, of which 90% amount was directed to be paid as compensation to the victim, in default of payment, to suffer rigorous imprisonment for one year more.

Arguments at the Bar :-

4. Mr. Partha Pratim Sarkar, learned Advocate for the appellant contends the prosecution case has not been proved beyond doubt. It is alleged the incident occurred in the police barracks between 10.00-10.30 A.M. There were other police personnel in the barrack as would appear from the evidence of PWs. 8, 9 & 14. This improbabilises the allegation of rape. No injuries were found by the medical officer (PW 10) who examined the victim. Medical papers relating to the treatment of the victim at Dinhata hospital immediately after the incident have not been produced. Prosecution suffers from various deficiencies and contradictions. Hence, the appellant is entitled to an order of acquittal.

5. Learned Additional Public Prosecutor contends that the victim is a nine-year old child. She came from an impoverished background. Her mother was a tea-stall owner. Victim was raped by police personnel. Owing to the superior status of the accused and the weak socio-economic condition of the victim's family, they were afraid to knock the doors of justice. After support from the teachers in the school mother of the victim (PW 2) lodged the case. Version of the victim is corroborated by her mother (PW 2) as well as the teachers (PW 3 to PW 7). It is improbable that the victim was able to come out with the exact time when the incident occurred. Presence of other police personnel at the place of occurrence is to be assessed in the light of the aforesaid fact that it was not possible for the victim to come out with the exact time when the incident occurred. Hence, the appeal is liable to be dismissed.

Version of the victim child (PW 2) – whether reliable :-

6. The case involves rape of a nine-year old child by a police personnel. In such cases where the perpetrator is a man in uniform and the minor comes from a poor socio-economic background, hesitation to knock the doors of justice is all too natural.

7. PW 2 is the mother of the victim child. She is a widow and used to earn her livelihood by running a tea stall. The appellant, a police personnel, used to frequent visit the tea stall and had food. He was acquainted with PW 2 as well as her daughter i.e. the victim. On the fateful day he had come to the shop to have tea. He told PW 2 to send

the food to the barrack. As she was busy, she asked her daughter to take the food to the barrack. Accordingly, the child went to the barrack. Appellant was alone in the barrack and raped her. He also told her to insert a brinjal in her private parts. Then he looked at his wrist watch and released the child.

8. Mr. Sarkar has contended that the manner in which the incident is portrayed is most improbable. The barrack was frequented by other police personnel. He referred to the evidence of PWs 8, 9 & 14 in support of his contention.

9. I have given anxious consideration to such submission.

10. PW 8 (Gobinda Barman) claimed that on 06.09.2017 he was posted as a Constable in G.R.O. Court, Dinhata. He further stated between 09.09.2017 and 10.09.2017 he had gone for training at Cooch Behar. Reading his evidence as a whole there is nothing to show that the said witness was present in the barrack on 06.09.2017 when the incident occurred.

11. PW 9 (Nayan Dutta) stated he was posted as Constable at G.R.O. Court, Dinhata. Usually he performed his duties between 10.00 & 10.30 A.M. and prior to entering the court premises he usually visited the barrack for changing his uniform. He did the same thing on 06.09.2017.

12. PW 14 (Ram Chandra Mitra) is a S.I. of Police. He stated he was in the barrack on the date of the incident and left for duty around 11.00 A.M.

13. PW 1 is the minor victim. In her deposition she stated she had come to the barrack between 10.00-10.30 A.M. on the fateful day to give food to the appellant. She did not find anyone in the barrack apart from the appellant. Appellant forced her on the bed and committed rape upon her. She bit him on his hand. Then he told her to insert a brinjal inside her vagina. Thereafter the appellant looked at his wrist watch and released her. The aforesaid evidence of the victim particularly with regard to the time must be appreciated keeping in mind her tender age and other attending circumstances. She was not wearing a watch and her assessment when she went to the barrack is a tentative one.

14. Evidence of the police witnesses i.e. PW 9 and PW 13 (Shyamal Saha) need deep scrutiny on the anvil of broad probabilities before one may rely on their version to improbabilise the rape. PW 9 claimed that he usually went to the G.R.O. Court between 10.00-10.30 A.M. Prior to that he changed his clothes in the barrack. Though he claimed he followed the same practice on 06.09.2017, he does not come out with the specific time when he went to the barrack on the fateful day to change clothes. It is possible that the said witness may have already changed clothes and left the barrack before 10 A.M. and he was not present when the victim had arrived.

15. Similarly estimation of time by PW 14 with regard to his leaving the barrack after 11 A.M. on the fateful day is a tentative one. It must be borne in mind the exact time when the victim had arrived at the barrack is also unclear and based on a general estimation of the minor. Under such circumstances, it would be an incorrect appreciation of evidence to improbabilise the minor's version on the bald assertion of PW 14 that he had left the barrack after 11.00 A.M. It must not be forgotten that PW 14 is a colleague of the appellant (who is another police personnel) and may have been overzealous to protect his comrade in uniform. His deposition therefore, requires to be taken with a pinch of salt and assessed with due circumspection.

16. Version of a minor victim of rape must be given some latitude bearing in mind the nature of the crime and her tender age. It is not possible for a nine year old child to state the exact time when she had visited the barrack. In this background, it would a travesty of justice to reject her version with reference to the evidence of PW 14 regarding the time when he was present in the barrack which is also based on vague estimation and bereft of any contemporaneous documentary evidence.

17. On the other hand, conduct of the appellant who after committing rape looked at his wrist watch and let the victim go corroborates the prosecution case that he had taken advantage of the small window when the barrack was empty to commit rape and quickly let go of the victim prior to the arrival of any of his colleagues.

18. Hence, I am of the opinion version of PW 1 that the appellant was in the barrack and had raped the victim when she come there is credible and inspires confidence.

Delay in lodging FIR – whether fatal:-

19. Delay in lodging the FIR has duly been explained. PW 1 stated after the rape she went to her mother's shop collected the keys and went home. She felt unwell and remained in the house. Out of fear she was unable to come out with the incident. As she continued to have abdominal pain on the next day she informed her mother of the incident. On the following day i.e. Friday her mother took her to Dinhata hospital and on medical advice victim was admitted to the hospital on Saturday. She was released from the hospital on Sunday and recuperated at her residence till 15.09.2017. On 16.09.2017 she went to her school. PW 3 (Abhijit Guha Roy) a teacher enquired why she was absent for ten days. Initially she stated she suffered from chest and abdominal pain. On further questioning she divulged the incident to a lady teacher (PW 7). The teachers contacted her mother. The head teacher viz. Amit Nath (PW 5) informed the matter to the S.I. of Primary Education who requested the mother of the victim to lodge criminal complaint. On the encouragement of the teaching staff PW 2 found confidence to lodge written complaint which was scribed by PW 6. These circumstances clearly explain the delay in lodging the FIR.

Medical evidence on record:-

20. Mr. Sarkar further assailed the prosecution case on the ground that the medical officer (PW 10) did not find injuries in the private parts of the victim though the victim (PW 1) during cross-examination contended she had been raped for half an hour and had suffered bleeding injuries. Hymen of the victim was found in tact. Hence, he argued medical evidence does not support the prosecution case.

21. I am unable to accept such contention for the following reasons:-

22. Firstly, in a case of rape particularly that of a minor victim if her version is credible and inspires confidence, mere absence of injuries in the medical report cannot be a ground to disbelieve the prosecution case.

23. Secondly in the present case evidence has come on record that the victim had suffered from abdominal pain and had been medically treated earlier. In fact she was admitted at Dinhata hospital. Evidence of the victim (PW 1) and her mother (PW 2) with regard to admission in the hospital has remained unchallenged during trial. It is a matter of remissness in investigation that the medical records were not seized and produced in court. Lapse in investigation would not be a ground to disbelieve the prosecution case of hospitalisation which is stoutly based on the unchallenged version of the minor victim and her mother.

24. Thirdly, non-rupture of hymen is no ground to disbelieve a case of rape. Even slight penetration is sufficient to prove rape. Moreover, PW 10 had examined the victim 10 days after the incident. Medical witness's view that injuries would take 21 days to heal is in the nature of opinion evidence which is not supported by medical authorities. It is trite that opinion evidence of a doctor has to yield to the ocular version of a rape victim who is on par with an injured witness.

25. For these reasons, I am of the opinion the medical evidence on record does not render the prosecution case so patently absurd and improbable that the version of the minor victim with regard to rape needs to be disbelieved.

Independent evidence corroborates rape:-

26. On the other hand, the minor has been corroborated by other evidence on record. Not only her mother (PW 2) but independent witnesses viz. teaching staff of the school (PWs 3 to 7) have corroborated her version. PWs 3 to 7 are independent witnesses who have no reason to falsely implicate the appellant. Corroboration from the independent witnesses substantially buttresses the prosecution case.

False implication – a myth:-

27. A desperate plea was taken by the appellant during his examination under Section 313 of the Code of Criminal Procedure that

PW 2 proposed marriage which the appellant had refused. As a result, he has been falsely implicated.

28. This defence is wholly improbable and a concocted one. None of the witnesses even hinted of any romantic association between the two. Furthermore, the hollowness of the defence plea is exposed from the fact that the mother of the victim had not on her own lodge FIR against the appellant. It was done on the insistence of the teachers of the school who had no axe to grind against the appellant. I have no hesitation to hold the aforesaid desperate plea raised by the appellant is not worthy of any credence and liable to be rejected *in limine*.

Statutory presumption – not rebutted:-

29. Evidence on record clearly establishes a case of penetrative sexual assault by the appellant on the minor. Defence raised by the appellant is extremely flimsy and does not rebut the statutory presumption under Section 29 of the POCSO Act.

Conclusion :-

30. For these reasons, I am inclined to uphold the conviction and sentence imposed upon the appellant.

31. The appeal is accordingly, dismissed.

32. Bail bonds of the appellant shall stand cancelled and he is directed to surrender forthwith before the Court below failing which trial Court shall be liberty to issue appropriate processes against him in accordance with law.

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

34. Lower court records along with copies of this judgment be sent down at once to the trial Court for necessary compliance.

35. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Apurba Sinha Ray, J.)

(Joymalya Bagchi, J.)