

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

**C.R.A. 70 of 2019
with
CRAN 2 of 2023**

**Moloy Roy
-Vs-
State of West Bengal & Anr.**

For the Appellant : Ms. Sreeparna Das, Adv.

For the State : Mr. Noguive Ahamed, Id. APP
Ms. Trina Mitra, Adv.

Heard on : 30.01.2024 & 07.02.2024

Judgment on: 07.02.2024

Joymalya Bagchi, J. :-

1. Appellant is the father of the victim who is a 14 year old girl. Prosecution alleges the minor girl used to reside with her father i.e. the appellant. Her mother used to stay in the house of one Susanta Halder where she worked as a nurse. On 30th October, 2016, mother of the victim (PW 1), stated her daughter informed her that for the last one year her father had subjected her to penetrative sexual assault on a number of

days. Out of fear, shame and trauma she did not inform the incident earlier. Hearing this horrible news PW 1 became outraged and confronted her husband i.e. the appellant. They had a quarrel. Thereafter, she informed her sister-in-law, PW 10 who, in turn, had informed the incident to the brothers of PW 1, that is, PW 6 and PW 8 respectively.

2. PW 1 lodged written complaint resulting in registration of Chandannagar Police Station Case No. 266 of 2016 dated 30.10.2016 under Section 376(2)(f) of the Indian Penal Code. Appellant was arrested and charges were framed under Sections 376(2)(f)/506 of the Indian Penal Code and Section 6 of the POCSO Act. Appellant pleaded not guilty and claimed to be tried.

3. In the course of trial prosecution examined ten witnesses. During examination under Section 313 of the Code of Criminal Procedure appellant denied the incident. Only after entering his defence appellant examined himself as DW 1 and one Manoj Mukherjee as DW 2. During his deposition the appellant made out a new defence case that his wife (PW 1) had an illicit relationship with one Pacha. This resulted in an altercation between them. Hence, he was falsely implicated in the case. DW 2 was examined to probabalise his alibi that the appellant was not in his residence and had gone elsewhere for work. The witness stated appellant used to stay away from his residence in connection with constructing pandels at various places. Vouchers in connection with such construction work were also exhibited.

4. On analysis of the evidence on record learned Trial Judge relied on the evidence of the minor child (PW 2) and disbelieved the belated defence version. Accordingly, by the impugned judgement and order he convicted the appellant under Sections 376(2) of the Indian Penal Code and 6 of the POCSO Act and sentenced him to suffer rigorous imprisonment for life and to pay fine of Rs.2,000/- and in default of payment of fine to suffer simple imprisonment for two months for commission of offence under Section 376(2) of the Indian Penal Code and Rs. 3,00,000/- to be paid to the victim as compensation.

5. Learned Counsel for the appellant submits PW 2 is not a reliable witness. During her deposition she could not tell the dates on which she had been raped. Victim had not disclosed the incident to her mother immediately though the latter used to stay in the same locality. Even the circumstances in which the mother came to know of the incident are unclear. Victim admitted that her younger brother used to reside in the same house. Presence of the brother in the house improbabilises the allegation of rape. Prosecution has not examined her brother during trial. After registration of FIR, victim declined medical examination. Trial court ought to have drawn adverse inference against the prosecution case on such account. PW 7 (maternal uncle of the victim) claimed the victim's mother (PW 1) had stated the victim had been taken to a doctor after the incident. The said doctor has also not been examined. On the other hand, appellant examined himself as DW 1. He stated PW 1 (mother of the victim) was having an illicit affair with one Pacha. He protested and was

falsely implicated on such score. He also stated he was away from his residence owing to his work and the allegation of rape is patently absurd. DW 2 corroborated him.

6. Mr. Ahamed, learned Additional Public Prosecutor submits appellant is the father of the minor victim. Instead of protecting her he preyed on her and repeatedly raped her. Out of fear, shame and trauma the victim was unable to disclose the incident earlier. She became sullen and incommunicate. Then, the matter was reported to her mother, PW 1. The latter informed her sister-in-law (PW 10) who in turn informed PWs 6 and 8. Their evidence corroborate the version of the minor and her mother. During examination of the prosecution witnesses particularly PW 1, appellant kept mum with regard to the so-called illicit affair. Even during his examination under Section 313 of Code of Criminal Procedure the appellant did not raise this plea. Belatedly and presumably on legal advice appellant came out with a new case of false implication at the behest of his wife who was having an illicit affair. He sought to corroborate the same through DW 2. Alibi resorted to by the appellant during his defence also does not pass muster. Hence, the appeal may be dismissed and the conviction and sentence be upheld.

7. PW 2 is the minor victim. She stated her mother and her younger brother used to reside with their father. Her mother was a domestic help and used to live in the house of one Susanta Halder. She was a student of Class-VII. Taking advantage of the absence of her mother, her father raped her on a number of occasions in the afternoon as well as at night.

She did not disclose the incident to anyone as she apprehended if she did so her mother would not return. Finally, one day after Kalipuja in 2016 she disclosed the incident to her mother. Her mother lodged FIR. Her statement was recorded before the Magistrate.

8. PW 1 is the mother of the minor child. She stated one day after Kalipuja her husband called her over telephone and informed that her daughter was unwell. She returned home and found her daughter had withdrawn herself and was incommunicative. Upon much persuasion on the next day she revealed the incident. Thereafter she confronted her husband and assaulted him. She informed her sister-in-law (PW 10) about the incident. Her brothers PWs 6 and 8 accompanied her to the police station. She lodged written complaint at the police station scribed by PW 6. She proved her signature on the complaint. Police seized the birth certificate of her daughter. During cross-examination no question was posed to her with regard to any illicit relationship between herself and Pacha. On the other hand, it was suggested that there was domestic trouble between PW 1 and her husband due to economic distress.

9. PWs 6 and 10 are the relations of PW 1, sister-in-law of PW 1, corroborated her version. She stated PW 1 disclosed the incident to her. She informed the incident to her husband.

10. PW 6, brother of PW 1 stated he heard the incident from her sister (PW 1). He took her to the Chandannagar Police Station and scribed the written complaint (Ext. 6).

11. PW 8, another brother of PW 1, corroborated PW 6.

12. PW 3 is the wife of Susanta Halder, employer of PW 1. She stated PW 1 used to work at their house as a domestic help. She heard from PW 1 that the appellant had raped her daughter. She admitted a complaint had been lodged against PW 1 by her father in law.

13. PW 9 is the investigating officer. He stated he went to the place of occurrence and prepared rough sketch map with index. He examined witnesses. He sent the victim girl and her mother for recording their statements before Magistrate. He seized the birth certificate of the victim. On 19.11.2016 the girl was produced for medical examination but her mother did not consent to her examination. On completion of investigation he submitted charge sheet.

Defence witnesses:-

14. Appellant examined himself as DW 1. He deposed his wife had an illicit relationship with one Pacha of Niranjannagar, Santipally. In 2011 he had caught her red handed. They shifted their residence but his wife continued the relationship. On 3rd August 2016 he had left for Lucknow. He returned home during Durga Puja. His wife stated her daughter was in his in-laws house. He found an unknown SIM card in his wife's custody. There was an altercation. His wife assaulted him and pressurized for divorce. She even threatened him with false implication. During cross examination appellant was unable to explain why he did not come out with this defence earlier during his examination under section 313 Cr.P.C.

15. Appellant also examined one Manoj Mukherjee as DW 2. He stated he is the President of Chandernagore Ideal Cultural Center. He deposed appellant was a man of good character. He also deposed that appellant's wife had developed an extra marital affair and had threatened to implicate him in false cases. On recall, he produced vouchers in the name of 'Subham Decorators' and 'Mousumi Electronics'.

Is victim a reliable witness?

16. Learned counsel for the appellant has assailed the version of the victim PW 2 on multiple scores.

17. Firstly, it is contended throughout the incident, PW 2 had access to her mother. She used to reside at the house of one Susanta Halder in the same locality. But she had kept mum for a year and did not come out with the incident for over a year. This unnatural conduct improbabilises her version. Prosecution case involves the heinous act of rape by the father on his own daughter. Evidence on record shows the child comes from a poor marginalised family. Her father was mostly unemployed and her mother used to work as a domestic help. Owing to her work as domestic help, her mother used to stay at her employer's house. The minor child resided with her father and minor brother. Taking advantage of the situation, her father i.e the appellant had raped her on a number of occasions. When a daughter is subjected to such a horrible act of sexual predation by her own father, it is natural that she would be stunned and traumatized. Due to shame and trauma she kept silent. She was utterly confused by the betrayal of trust by her father. In court she gave vent to

her confession and stated she could not come out with this fact earlier as she apprehended the disclosure would outrage her mother and she would go away. This painful and traumatized narration of the child more than explains the reason why she remained mum while the appellant had subjected her to repeated sexual assaults.

18. Secondly, it is argued the circumstances disclosed in FIR how PW 1 came to know about the incident are at variance to her deposition in court. In FIR, PW 1 alleged one day her daughter came crying to her and narrated the incident. But in court she stated her husband called over telephone and stated her daughter was unwell. She rushed home and found her daughter incommunicado. Upon much persuasion she divulged the incident. The aforesaid variation is a minor one and does not go to the root of the prosecution case. Either way it shows the victim was traumatized out of fear and could not disclose the incident earlier. Finally after a year of sexual torture, she narrated it to her mother.

19. Thirdly, learned counsels criticized the child's version on the score she had not disclosed the exact dates on which she was raped. PW2, the victim has narrated the continuous saga of victimization. On various dates her father had raped her in the afternoon or at night while her brother was sleeping. As the offence was repeated on a number of days on a minor child by her closest relation i.e. father it is impractical to expect she would remember the exact dates on which she had been victimized. It may not be out of place to note that the appellant being the father of the victim ordinarily had access to her. It would have been

different if the offender had been an outsider. In such case it would be incumbent on the prosecution to disclose the exact dates of commission of the offence in order to establish the offender had access to the victim on those dates. But in the present case, the father raped his daughter at his residence. He ordinarily had access to his daughter during the period the offence was committed. Under such circumstances, failure of the victim to disclose the exact dates does not either render the prosecution case improbable or prejudice the defence of the appellant.

20. Fourthly, it is contended that the victim and her mother had refused medical examination. Hence, trial Judge ought to have drawn an adverse inference against them. I am unable to accede to such plea for the following reasons. When a child is predated by her father it is most likely that she would be unable to resist. Under such circumstances, it is most unlikely injuries would be found on her body. It is trite absence of injury *per se* on a rape victim is no ground to disbelieve her version. That apart, victim had been raped on a number of occasions over a year. Medical examination was to be held on 19.11.2016 i.e more than one month after registration of FIR. There is substantial time gap between the occurrences of the date of examination. Possibility of noting injuries on the victim is too remote. No question was put to the victim or her mother why they refused medical examination. Refusal to medical examination may be for myriad reasons and in the aforesaid circumstances one cannot invariably lead to an inference of withholding vital evidence attracting an adverse inference against the prosecution case.

21. For these reasons, I hold the victim (PW 2) a reliable witness.

Corroboration from other witnesses:-

22. Her version has not only been corroborated by her mother (PW 1) but other relations too. PWs 6 and 8 are her maternal uncles. PW 10 is the wife of PW 6. PW 10 corroborated PW 1 that the latter had informed her about the incident. She told her husband, PW 6. PW 1's brothers, PWs 6 and 8 took her to the police station. PW 6 scribed the FIR. Even PW 3, wife of her employer corroborated PW 1 and stated she was told about the incident by her.

Non-examination of vital witnesses:-

23. It has been argued that the vital witnesses have not been examined. In support of such plea it is contended brother of the victim used to reside in the same house. He has not been examined.

24. I have given anxious consideration to this plea. It is true the brother used to reside with the victim and the appellant. But he was a mere child. PW 2, victim stated the incidents occurred during afternoon when his brother was absent or at night when he was asleep. Victim was petrified and traumatized. She was unable to cry out for help during the incidents. Out of fear and shame, she kept mum and did not disclose it to her young brother.

25. In this factual matrix non-examination of her brother does not affect the unfolding of the prosecution case.

26. Referring to the evidence of one of the maternal uncles i.e., PW 8, learned counsel contended the victim had been examined by a doctor

after the incident and her stomach was washed. The said doctor has not been examined. It is true PW 8 claimed that her sister (PW 1) told him she had taken her daughter for medical examination but PW1 and the victim (PW 2) are completely silent on this score. Hence, it is unclear whether the victim was at all taken to a doctor immediately after the incident. Accordingly, I am of the opinion, the prosecution case has been established through the reliable evidence of the victim (PW 2) corroborated by her mother PW 1 and her uncles and aunt i.e. PWs. 6, 8 and 10 respectively.

Defence case:-

27. Hollowness of the defence is writ large in the records of the case. Neither during examination of prosecution witnesses nor during his examination under section 313 Cr.P.C did the appellant whisper that his wife PW1 had an illicit affair with one Pacha and he was falsely implicated as he had protested against such immoral conduct. He also did not raise the plea of alibi earlier. Belatedly upon entering his defence appellant deposed his wife had an illicit affair with one Pacha and upon his protesting had threatened to falsely implicate him. During cross examination of PW1 no such suggestion was given. On the contrary it was suggested the relationship between the couple was stained due to economic distress. This belated defence raised as a desperate ploy at the fag end of trial does not inspire confidence. Even the alibi that he was not at his residence between 3rd August 2016 till Durga Puja is an

afterthought. Even if the same is believed it does not improbabilise the acts of rape which took place for one year prior to the incident.

28. For these reasons I am of the opinion the defence of the appellant is clearly an afterthought and has no legs to stand.

Conclusion:-

29. Conviction of the appellant is thus upheld.

30. Coming to the issue of sentence I note the appellant has been awarded the maximum sentence i.e life imprisonment. It is true the offence perpetrated by him is a heinous one. Although the brutal act on his daughter is unpardonable, evidence has also come on record that he used to take care of the education of his daughter and son. This demonstrates a '*Dr. Jekyll and Mr. Hyde*' streak in the appellant. It cannot be said the possibility of reformation of the appellant and his returning to normal social life is wholly ruled out. Though the heinousness of the crime by no means can be ignored, the same requires to be balanced with the mitigating circumstance which shows notwithstanding his diabolical conduct he had discharged his day to day responsibilities. Balancing the aggravating and mitigating circumstances as aforesaid we are of the opinion the maximum indeterminate sentence imposed on the appellant may be modified and he is directed to suffer rigorous imprisonment for 12 years and to pay a fine of Rs. 2000/- in default to suffer simple imprisonment for two(2) months more for the offence punishable under section 376(2) IPC.

31. With the aforesaid modification as to sentence appeal is disposed of.

32. In view of disposal of the appeal, connected application, if any, also stands disposed of.

33. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

34. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)