

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 Ajay Kumar Gupta

C.R.A. 4 of 2020

Partha Das
-Vs-
The State of West Bengal & Anr.

For the Appellants : Mr. Arjun Chowdhury, Adv.
Ms. Pratusha Dutta Chowdhury, Adv.

For the State : Mr. Sourav Ganguly, Adv.

Heard on : 22.05.2024

Judgment on : 22.05.2024

Joymalya Bagchi, J.:-

1. Appeal is directed against the judgment and order dated 28.11.2019 passed by the learned Additional District & Sessions Judge, Fast Track Court, Cooch Behar in connection with Sessions Case No.72 of 2017 (Sessions Trial No.2(11) of 2017) convicting the appellant for commission of offence punishable under Sections 376/448/506 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for ten years and to pay fine of Rs.50,000/- (Rupees fifty thousand) in default to suffer simple imprisonment for a further period of six months

for the offence punishable under Section 376 of the Indian Penal Code; to suffer rigorous imprisonment for six months for the offence punishable under Section 448 of the Indian Penal Code and to suffer rigorous imprisonment for eight months for the offence punishable under Section 506 of the Indian Penal Code. All the sentences to run concurrently. 80% fine amount, if realised, be paid to the victim.

Prosecution case as alleged against the appellant is as follows:-

2. On 26.09.2016 at 1.00 PM victim was alone in the house. Taking advantage of the situation, appellant forcibly entered the room. When victim tried to raise hue and cry, he pressed her mouth, forcibly took off her wearing apparels and raped her. After her parents returned, victim narrated the incident to them, her grandmother and other neighbours. On the next day, she lodged written complaint at Cooch Behar Sadar Women Police Station resulting in registration of Women Police Station Case No.207 of 2016 dated 27.09.2016 under Sections 448/376/506 of the Indian Penal Code. In conclusion of investigation, charge sheet was filed and charges under Sections 448/376/506 of the Indian Penal Code were framed against the appellant. Appellant pleaded not guilty and claimed to be tried. During trial prosecution examined 7 witnesses. Defence of the appellant was one of innocence and false implication. Upon assessment of evidence, trial Judge by the impugned judgment and order convicted and sentenced the appellant, as aforesaid.

Arguments at the Bar:-

3. Mr. Chowdhury for the appellant contends evidence of the victim (PW 1) suffers from inherent improbabilities and contradictions. Victim claimed she was sleeping alone in the house. It is unclear how the appellant entered the room. During chief victim claimed she could not raise hue and cry but during cross-examination she stated she had raised hue and cry. Wearing apparels of the victim were not torn. Semen stained wearing apparels were not seized. Though she claimed she suffered injuries in her private part, medical report does not corroborate this fact. Litigation was pending between the father of the victim and grandfather of the appellant. As a result, he was falsely implicated. Hence, he prays for acquittal.

4. Mr. Ganguly for the State submits victim (PW 1) clearly stated the manner in which she had been raped. She is a credible witness. She disclosed the incident to her parents, grandmother and others. A *salish* was also held. Hence, the prosecution case is proved beyond doubt.

5. Nobody appears for the victim.

Evidence on record:-

6. PW 1 is the victim. She deposed two months prior to the incident she had been married. Her husband used to reside in Gujarat. Hence, she was residing at her parental home. On the date of incident she was alone in the house. On 26.09.2016 at 1.00 PM she was lying in the bed. Appellant entered the house and removed her clothes. She tried to raise hue and cry. Appellant pressed her mouth. Then he raped her. Before

leaving the house he threatened her. When her parents returned she disclosed the incident to them, her grandmother and neighbours. On the next date she lodged complaint which was scribed by PW 6. She was medically examined and made statement before Magistrate.

During cross-examination she stated many persons including the appellant reside in and around their house. A village path which is frequented by villagers run in front of the house. Due to scuffle she suffered scratch injuries all over her body including her private parts. When the appellant had entered the house she had raised hue and cry. Local people rushed to the house. Thereafter, she stated no one came to the house. Her wearing apparels were stained with semen of the appellant. A case is pending in Cooch Behar Court between her father and grandfather of the appellant in respect of a pond.

7. PW 2 is the mother of the victim. She stated on the fateful day her daughter was alone in the house. When she returned home her daughter stated that appellant had come to the house and committed rape against her will. Local people advised them to inform the guardian of the appellant. On the next date they lodged First Information Report.

During cross-examination she admitted one and half years after the incident mother of the appellant lodged a criminal case against her and others over lease of pond.

8. PW 3 is the father of the victim. He has corroborated the evidence of PWs 1 and 2.

During cross-examination he stated *salish* was held in the house of the appellant.

9. PW 4 is the grandmother. She stated she was not in the house when the incident occurred. When she arrived she came to know of the incident.

10. PW 5 is the medical officer who examined the victim. He deposed victim stated her neighbour had forcibly raped her. On examination apart from finding an old tear of hymen from marital coitus, he did not find any other injury.

11. PW 7 is the Investigating Officer. He examined the victim, visited the place of occurrence, drew rough sketch map with index. He recorded statements of other witnesses. He collected medical report. He sent vaginal swab for FSL examination. He sent the victim for recording statement before Magistrate. He proved the potency report of the appellant. He submitted charge sheet.

Analysis and findings:-

Is the victim (PW 1) a credible witness ?

12. PW 1 is the victim. It is trite law conviction may be based on the sole testimony of a victim of sexual crime. Prior to relying on her version to record conviction it is incumbent on the court to see that the same does not suffer from inherent improbabilities. Accordingly, I have made an endeavour to evaluate whether her version is a credible one in the backdrop of attending circumstances of the case.

a) Access to the room:-

13. PW 1 deposed on the fateful day she was sleeping in the room alone. It was around 1.00 PM. Appellant entered the room and committed rape. However, she is silent how the appellant got access to the house. In the FIR it is alleged appellant had made forced entry. Prosecution has failed to place on record how the appellant had forced himself in the house. It is nobody's case that any door or window of the house was broken and the appellant had entered. It is also improbable that PW 1 would be sleeping alone in the room keeping the door open.

14. Mr. Ganguly sought to salvage the situation by claiming that the appellant was known to PW 1 and had been permitted to enter. I am unable to accept his submission as that would amount to making out a new case in appeal. Neither in the FIR nor in the deposition of PW 1 did the victim state that she had permitted the appellant to enter.

15. In these circumstances PW 1's version in the FIR with regard to forcible entry appears to be patently improbable.

b) Raising hue and cry:-

16. During examination-in-chief PW 1 stated when she found the appellant in the house she tried to raise hue and cry but appellant pressed her mouth. During cross-examination she changed her stance and stated that she had raised hue and cry which had attracted local people. Soon thereafter she rectified herself and stated inspite of hue and cry no local people arrived at the spot. The contradictory stance taken by PW 1 with regard to her reaction when she saw the appellant inside the

room is also fraught in mystery. Did she raise hue and cry at all or was prevented from doing so is left to one's imagination. Evidence has come on record that the house was situated on a busy road and in a populated area. Had she raised hue and cry as claimed by her during cross, it is most unnatural that local people would not have assembled and apprehended the appellant. To rectify the situation she immediately corrected her statement and claimed inspite of raising hue and cry no one came to the post.

17. I am constrained to hold prevaricating stance of the victim with regard to her reaction when she saw the appellant in the room raises serious doubt with regard to the credibility of her narration regarding the incident.

c) Use of force and injury on the victim :-

18. PW 1 claimed that she had scuffled with the appellant during the incident. The scuffling had continued for half an hour. As a result she suffered nail scratch marks in her body including her private parts. Strangely, the medical report Ext.2/1 does not show any mark of injury apart from ruptured hymen from marital coitus.

19. I am conscious mere absence of injury may not be a ground to disbelieve lack of consent. However, in the factual matrix of the case when the version of the victim relating to other aspects of the prosecution case viz., entry of the appellant in the room, raising hue and cry upon seeing the appellant, stand on shaky foundation, absence of injuries

corroborating the victim's claim of scuffling and nail scratches causes further dent to the credibility of the prosecution case.

d) Wearing apparels not seized:-

20. PW 1 claimed her wearing apparels were torn and was stained with semen. She did not produce wearing apparels before police and no forensic examination was done to corroborate her version.

Prior enmity:-

21. Apart from the inconsistencies in the version of the victim as aforesaid, the prosecution case must also be tested on the anvil of prior enmity. PW 1 admitted there was a case pending in respect of a pond in Cooch Behar Court between her father and grandfather of the appellant.

22. Mr. Ganguly contends the case was registered one and half years after the incident. I am unable to accept this contention. PW 2 stated a criminal case has been registered against her by the mother of the appellant one and half years after the incident. This is a separate criminal case than the one referred to by PW 1. Their evidence on record gives an impression of multiple cases pending between the families over a pond. Pre-existing dispute and litigation between the families lends support to the defence plea of false implication.

Salish:-

25. Mr. Ganguly further contends PW 3 claimed after the incident there was a *salish* in the house of the appellant. On the other hand, Mr. Chowdhury contends the appellant was falsely implicated in the rape case and attempt was made to extort money. No evidence with regard to

the deliberation in the *salish* has come on record. Independent witnesses present during the *salish* have also not been examined.

Conclusion:-

23. In the light of the aforesaid discussion, I am constrained to hold that PW 1's version with regard to forcible entry and rape suffers from numerous improbabilities and contradictions. Evidence has also come on record there was dispute between the families over a pond.

24. In this backdrop, I am constrained to hold prosecution has failed to prove its case beyond reasonable doubt and the possibility of false implication owing to prior enmity cannot be ruled out.

25. Accordingly, I am inclined to extend the benefit of doubt to the appellant.

26. Conviction and sentence of the appellant are set aside.

27. Accordingly, appeal is allowed.

28. Appellant shall be discharged from his bail bonds after expiry of six months in terms of Section 437A of the Code of Criminal procedure.

29. Lower court records along with copies of the judgment be sent down at once to the trial Court as well as the Superintendent of Correctional Home for necessary compliance.

30. Photostat certified copy of this judgment, 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.)