

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. 14 of 2019

Anup Sarkar
-Vs-
The State of West Bengal & Ors.

For the Appellants : Mr. Hillol Saha Podder, Adv.
Ms. Mousumi Das, Adv.

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

Heard on : 20.05.2024

Judgment on : 20.05.2024

Joymalya Bagchi, J.:-

1. Heard the learned Advocate for the appellant.
2. Nobody appears for the victim.
3. Appellant has assailed judgment and order dated 20th June and 26th June, 2019 passed by the learned Additional Sessions Judge, 1st Court, Cooch Behar (NDPS) in connection with Sessions Case No.271 of 2011 convicting the appellant for commission of offence punishable

under Section 376 and 417 of the Indian Penal Code and sentencing him to rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/- (Rupees One lakh) in default to suffer simple imprisonment for one year for the offence punishable under Section 376 of the Indian Penal Code and to suffer simple imprisonment for six months for the offence punishable under Section 417 of the Indian Penal Code; both the sentences to run concurrently. Fine amount, if realised, be paid to the victim.

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

4. Appellant was a neighbour. He was a married man. On 22nd Chaitra 1416 BS when her parents were not present, appellant came to the house of the victim and forcibly cohabited with her. Appellant also promised to divorce his wife and marry her. Thereafter, he again cohabited on 15th Baisakh 1417 BS. On that day too, appellant threatened the victim that he would murder her relations and also promised to marry her. As a result of cohabitation, she became pregnant. When she was eight months' pregnant, she disclosed the incident to her mother (PW 1). A *salish* was held by local villagers and the appellant agreed to marry. Thereafter, appellant fled away.

5. Mother (PW 1) of the victim lodged First Information Report resulting in registration of Kotwali P.S. Case No.872 of 2010 dated 09.11.2010 under Sections 376/212 of the Indian Penal Code. In course of investigation appellant was arrested. DNA examination showed appellant was the father of the child born to the victim (PW 2).

Proceeding before the trial court:-

6. Charge sheet was filed against the appellant and his relations. Charges were framed under Sections 376/417 of the Indian Penal Code against them. Appellant pleaded not guilty and claimed to be tried. During trial prosecution examined 16 witnesses and exhibited a number of documents. In conclusion of trial, trial Judge by the impugned judgement and order convicted the appellant, as aforesaid and other accused were acquitted.

Evidence on record :-

7. PW 2 is the victim. She deposed appellant used to reside in their vicinity. On 22nd Chaitra 1416 BS around 6/7 am, when her parents were away appellant came to their house. He tied her and committed rape. He threatened he would murder her family members, if she disclosed the incident. He also promised he would divorce his wife and marry her. Due to threats she did not disclose the incident. On 15th Baisakh 1417 BS appellant again committed rape. He promised he would marry her. When she was eight months' pregnant, she narrated the incident to her mother. A village *salish* was held. Appellant admitted to marry her but subsequently fled away. She recorded her statement before Magistrate. She was 17 years old at the time of incident. She gave birth to a male child at Cooch Behar Hospital. Appellant is the father of the child.

8. PW 1 is the mother of the victim. PW 3 is her father. Both of them corroborated her. PW 1 lodged written complaint which was

scribed by PW 16. She proved her signature. Other relations viz., PWs 4, 8 and 9 have also corroborated the PW 2.

9. PW 9 stated there was illicit relationship between the appellant and the victim. As a result, victim became pregnant. But appellant refused to marry.

10. PWs 6 and PW 7 are neighbours. They heard about the incident that appellant had sexual relationship with victim and the latter got pregnant. Thereafter, appellant refused to marry.

11. PW 10 is the Headmaster of the School where the victim studied. He produced the school register and proved the date of birth of the victim as 03.10.1993.

12. PW 11 examined the appellant and stated he was capable of sexual intercourse.

13. PW 12 deposed he examined the victim and found her hymen was ruptured. She was pregnant for 36 months.

14. PW 13 is the Junior Scientific Officer (Biology) attached to CFSL Kolkata. He deposed genetic material of the appellant is consistent as the biological father of the male baby born to the victim.

15. PW 14 recorded statement of the victim.

16. PW 15 is the Investigating Officer. He recorded statements of witnesses. He sent the victim for medical examination. He also sent the victim for recording her statement before Magistrate. He collected the transfer certificate of the victim from her school. He arrested the appellant. He took steps for collecting the blood sample of the victim, her

child and the appellant for DNA examination from CFSL Kolkata. He collected report and submitted charge sheet.

Findings of the Court:-

17. Analysis of the evidence on record shows that appellant and victim had cohabited on two days viz. 22nd Chaitra 1416 BS and 15th Baisakh 1417 BS. Victim (PW 2) stated on 22nd Chaitra she was alone in the house. Appellant came to the house. He tied her up and forcibly raped. He threatened to kill his family members. In the same breath she also claimed that the appellant assured her he would divorce his wife and marry her. Out of fear she kept mum. In similar manner, appellant committed rape on 15th Baisakh 1416 BS.

18. Trial judge concluded the initial act of sexual intercourse was forcible. A plain reading of the deposition of PW 2 shows she did not unequivocally state that she was raped on 22nd Chaitra 1416 BS. On one hand she stated she had been tied and threatened, on the other hand she also contended appellant assured he would divorce his wife and marry. This equivocal stance gives rise to serious doubt whether the sexual intercourse was forcible or it was a product of a romantic relationship between the two. PW 9, sister of the victim stated there was illicit relationship between the victim and the appellant and consequentially the victim had become pregnant. These circumstances persuade me to hold the sexual intercourses including the first encounter was a product of romantic relationship between the appellant, a married man and the victim. Victim was aware of the marital status of

the appellant who was her neighbour. When she became pregnant, she disclosed the incident to her mother (PW 1) and others. Thereafter, parents of the victim i.e. PWs 1 and 3 and local villagers convened a *salish* where it is contended appellant had admitted to marry the victim but subsequently declined.

19. Even if one believes there was an assurance of marriage during *salish*, it cannot be said that the appellant had acted dishonestly in not marrying the victim. Marriage between the appellant and the victim could fructify only after divorce from his first wife. Victim as well as her relations were fully aware of such situation but insisted on the marriage as she had become pregnant. Appellant cannot be forced to undergo a second marriage which is contrary to law. Failure to perform an act due to a legal embargo cannot foist dishonest intention on the part of the appellant from the inception of relationship. I am emboldened to come to such conclusion as the evidence on record palpably gives an impression the victim as well as her relations were fully aware that the relationship between them was an illicit one.

Conclusions:-

20. Under such circumstances, I am of the opinion prosecution has failed to prove essential ingredients of the offence punishable under Sections 376/417 of the Indian Penal Code. Sentence and conviction of the appellant are set aside.

21. Accordingly, appeal is allowed.

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

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

24. 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.)

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