IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

CRA 86 of 2013
+
CRAN 3 of 2014 (Old No. CRAN 3012 of 2014)
With
CRAN 4 of 2021
(via video conferencing)

Sariful Sk. & Anr.
Vs.
The State of West Bengal

For the Appellant No.1:	Mr. Md. Asraf Ali, Adv. Mr. R.I Sardar, Adv.
For the Appellant No.2 **Amicus Curiae**:	Mr. Sumanta Ganguly,Adv.
For the State :	Mr.Neguive Ahmed,Learned APP. Ms. Amita Gaur, Adv. Ms. Z.N. Khan, Adv.
Heard on :	15.02.2022
Judgment on:	09.03.2022

Bivas Pattanayak, J:-

1. This appeal is directed against the judgement and order dated 28.01.2013 and 29.01.2013, passed by Additional District & Sessions Judge, Fast Track 3rd Court, Rampurhat, Birbhum in Sessions trial no. 40(9)/2011 arising out

of Sessions case no. 119/2011 convicting the appellants under Section 376(2)(g) of the Indian Penal Code and sentencing the appellants for rigorous imprisonment for life and pay fine of Rs. 20,000/- each in default rigorous imprisonment for a further period of one year for offence punishable under section 376(2)(g) of the Indian Penal Code.

2. The prosecution case against the appellants is to the effect that on 17.05.2011 in the morning while the victim was returning after offering puja at Tulsipur village and had reached near Tulsipur River the appellant no.1 forcibly took her near the canal and committed rape upon her. Victim tried to raise alarm but was threatened by appellant no.1 that he would have her and her son murdered. Appellant no. 2 at the material point of time kept surveillance upon the passer-bys. After committing rape appellant no. 1 took away the golden earing and bangle from the victim and both of the miscreants fled away. In relation to the incident Murarai Police Station case no. 42 of 2011 dated 17.05.2011 under Section 376(2)(g)/379 of the Indian Penal Code was initiated against both the appellants.

3. Upon completion of investigation police submitted charge sheet under Section 376(2)(g) of the Indian Penal Code against the appellants.

4. Thereafter on compliance of legal formalities the case was committed to the Court of Sessions which was incidentally transferred to Additional District & Sessions Judge, Fast Track 3rd Court, Rampurhat, Birbhum for trail and disposal.

5. Charge under Section 376(2)(g) of the Indian Penal Code was framed against both the appellants who pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove the aforesaid charge against the appellants has examined as many as 17 witnesses and proved number of documents. Defence did not adduce any evidence, however the defence case is of innocence and false implications. From the trend of cross-examination it appears that the appellants tried to make out a positive case that due to their protest against the illegal selling of country liquor (*Cholai Mod*) by the husband of the prosecutrix (victim) they have been falsely implicated in this case.

7. Upon consideration of the materials and the evidence on record the trial judge by the impugned judgment and order dated 28.01.2013 and 29.01.2013 convicted and sentenced the appellants as aforesaid.

8. Mr. Md Asraf Ali, learned advocate appearing for appellant no.1 submitted that the evidence of the victim is full of inconsistencies and infirmities and therefore, is not at all reliable to convict the appellants on the basis of the same. Further it is evident from the statement of PW16, Swapan Mondal, who helped her to reach her home after the incident, that PW1 (victim) only stated to him that her *sari* was pulled by somebody nothing more nothing less. Moreover, as per the doctor (PW15) and the medical report of the victim (Exhibit 7) she did not sustain any injuries either to her private parts or other parts of the body to probabilise the occurrence, as alleged. Furthermore he submitted that there is delay in lodging FIR resulting in embellishment and conjectures. He further submitted that the husband of the victim has illegal business of selling country liquor (*Cholai Mod*) in the locality which was objected by the appellants which led to false implication. In view of his above

submissions he prayed that the appeal be allowed and the appellant no.1be acquitted from the case.

9. Mr. Sumanta Ganguly, appearing as *amicus curiae* on behalf of appellant no.2 also submitted in similar fashion and asserted that the case of the prosecution against the appellants has not been proved to the hilt and there are several loop-holes in the prosecution case. He further submitted that the appellant no. 2 as per the prosecution case did not take any active part in the commission of the offence alleged and he was only standing beside the place of occurrence and therefore no culpability is attributed to appellant no. 2. He prayed the appellant no.2 be acquitted from the instant case.

10. Mr. Neguive Ahmed, learned Additional Public Prosecutor appearing for the State submitted that as per the statement of the victim there are specific allegations against appellant no. 1 of committing forcible rape upon the victim and the appellant no. 2 contributed to the offence by threatening the victim and also keeping watch on the local people who were crossing the place of occurrence. Thus, both the accused persons have concert and they shared common intention in committing the offence upon the victim. Furthermore, the statement of the victim in the FIR and before the magistrate is corroborative of what she has stated before the court during her deposition. He further submitted that although as per the medical report the victim did not sustain any injuries, yet such aspect does make the prosecution unreliable as presence of injuries is not *sine qua non* for establishing an offence of rape. Further the defence did not lead any evidence to probabilise false implication. Moreover the FIR has been lodged on the day of occurrence

itself and there is nominal delay of few hours which does not at all affect the prosecution case. Therefore, when the evidence of the victim is intrinsic and reliable it should be acted upon to reach a logical conclusion in a prosecution of rape and thus in the facts and circumstances of the case the conviction and sentence of the appellants made by the trial judge should be affirmed.

11. In the present case the appellants are charged with the offence of gang rape. It is trite law that in a prosecution of rape the testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should not find any difficulty in acting on such testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. In the aforesaid backdrop the evidence of the victim (PW1) is to be analysed in order to ascertain the extent of its reliability.

11.1.PW1 (victim) deposed that on 17.05.2011 at about 2 PM while she was returning after offering puja at Tulsipur village and was crossing the river by walking, since there was little water, at that time appellant no. 1 caught hold of her hand and appellant no. 2 caught hold of the hand of her minor son aged about two years and thereafter appellant no. 1 undressed her, torn her blouse and committed rape upon her. She further deposed that appellant no.2 threatened her of killing the victim and her son by putting '*hasua'* on the throat of her son. Although the victim did not state either in her written complaint or statement under section 164 of the Criminal Procedure Code that of the above role played by appellant no.2 yet such are minor discrepancies in view of the fact that the aspect of threat upon her has been

stated in both her aforesaid statements. The presence of the appellant no.2 during the occurrence is well established. Further there are evidence that both of them fled away after the incident. The victim (PW1) has been extensively cross-examined, however, no such notable contradictions or infirmities is seen in her cross-examination as regards her statement made in-chief against the appellants save and except which has been indicated above.In the written complaint (Exhibit 1/1) and statement made before the Magistrate under Section 164 of the Criminal Procedure Code the victim also disclosed similar circumstances and the manner in which the rape was committed upon her at the instance of the appellants. Before PW15, Dr Nirapada Das the victim stated about the involvement of the appellant no. 1 in perpetration of rape upon her during her medical examination.

11.2. The victim (PW1) also deposed that she informed the incident to her mother-in-law, sister-in-law and thereafter her mother-in-law also informed the matter to her elder brother-in-law, who in turn informed it to her husband. She further deposed that when her husband returned home she along with her husband and sister-in-law went to Murarai police station and lodged written complaint. She proved her signature on the written complaint marked Exhibit 1.The prosecution has examined the husband (PW2), the sister-in-law (PW 3) and the brother-in-law (PW4).

PW2, Satya Narayan Bhakat husband of the victim deposed that he came to know of the incident from his elder brother Kali Prasad Bhakat and further stated that his wife (victim) narrated to him that the appellant no. 1 committed rape upon her and appellant no 2 was standing nearby.

PW3, Felurani Jaiswal deposed that on the date of incident after returning from Tulsipur village, the victim (PW1) narrated the incident to her alleging of forcible rape committed upon her by the appellants and also of intimidation meted out to her. She also deposed that as per instruction of the victim (PW1) she scribed the written complaint. She proved the written complaint marked Exhibit 1/1.

PW4, Kali Prasad Bhakat who is the elder brother-in-law of the victim stated that he came to learn from her elder sister (PW3) about the incident of rape upon the victim by the appellants which occurred by the side of Tulsipur River. There is discrepancy as to the source of information of this witness to the extent he deposed that he got information from his elder sister while victim (PW1) deposed that her mother-in-law informed PW4(brother-in-law). Be that as it may, it is quite natural for PW4 (brother-in-law) to receive information of the incident from any of the family members. Whether information is received from his mother or elder sister is of hardly any consequence.

Upon going through the cross-examinations of the aforesaid witnesses it is found that there are no notable contradictions or inconsistencies in their statements. All the aforesaid witnesses have corroborated the evidence and version of the victim (PW1).

11.3. The victim (PW1) also deposed that she handed over her *"saya"* and torn blouse which she was wearing at the time of incident to the police and she proved her signatures on the seizure list (Exhibit 2).PW17, Brajendranath Maity (investigating officer) also deposed that he seized the wearing apparels

of the victim. PW5, ASI Sunil Kumar Dey and PW6, Constable Amal Kumar Saha who are witness to the said seizure also supported the fact of seizure of such wearing apparels of the victim by the investigating officer. Further PW5, ASI Sunil Kumar Dey also identified the said torn blouse of the victim marked Mat Exhibit I. The aforesaid seizure list has been marked as Exhibit 2/4. Thus the seizure of the wearing apparels is supportive of the version of the victim (PW1).

11.4. It has been strenuously argued on behalf of appellants as per deposition of PW16, Swapan Mondal, the person who helped the victim to reach home after the incident, the victim only stated that somebody pulled her *sari* and hence no incident of rape took place as alleged. In her examination victim (PW1) deposed that she narrated the incident to one Swapan and thereafter Swapan and one of his relatives reached her to her house at Barua Gopalpur. PW16, Swapan Mondal stated that the victim informed them that someone pulled her *sari* hence she returned to their village. Be that as it may, I am unable to accept such proposition inasmuch as generally a victim of rape would only narrate her terrible and unpleasant experience to the person of her confidant and trust and none else. Accordingly, the victim had inhibition in narrating her trauma of sexual assault to PW16, Swapan Mondal who is an outsider and therefore her not divulging the incident to PW16, Swapan Mondal is quite natural.

11.5. Further it has been vehemently argued on behalf of the appellants that the victim (PW1) did not sustain any injuries either to her private parts or any portion of the body which conclusively establishes the fact that no incident

took place in the manner as has been alleged. PW15, Dr Nirapada Das, who examined the victim, deposed in his cross-examination that he did not find any injuries on the private parts of the victim. He proved the injury report marked Exhibit 7. Upon perusal of the injury report (Exhibit 7) it is found that no injuries are noted either in the private parts of the victim or in any other portion of her body. At this juncture the question arises whether such aspect makes the prosecution case unworthy of acceptance. It is settled principle that mere absence of injury either in the private parts or person of the victim cannot be a ground to hold that no rape was committed and also not an evidence of falsity of the allegation. In the present case the victim is a married grown up lady having a child she was threatened with dire consequences at the time of incident and therefore, it can readily be inferred that during the occurrence she was not in a position to physically resist the appellants in committing the crime due to fear and as such the absence of injury to her private parts or the body is not of much significance.***[See Santosh Kumar versus State of M.P reported in (2006) 10 SCC 595]*** Thus I am not in conformity with such proposition advanced on behalf of appellants.

In view of the above discussion I find that the version of the victim (PW1) is trustworthy, reliable and consistent to act upon. In order to impeach the version of the victim the defence has tried to make out a case that as they protested against illegal selling of liquor *(Cholai Mud)* in the locality by the husband of the victim, she had falsely entangled them in the present case. However it is placed on record that no such evidence is forthcoming from the

side of the defence to probabilise such fact. There is no reason as to why the victim would falsely implicate the appellants. Further PW10, Dr Dipak Kumar Morothi who examined appellant no.1 proved the medical report (Exhibit 5). In the medical report (Exhibit 5) it has been reported that there is nothing to suggest that appellant no.1 is incapable of sexual intercourse.

11.6. It has been vociferously argued on behalf of the appellants that the case of the prosecution is shrouded with suspicion as there is immense delay in lodging of the FIR. The incident took place on 17.05.2011 at 2PM and the FIR has been lodged on the same day at 21.15 hours meaning thereby there has been delay of some hours. Victim (PW1) deposed that after the incident with the assistance of one Swapan and one of his relatives she reached her house at 4 PM from Tulsipur village. Her brother-in-law Kali Prasad Bhakat (PW4) informed her husband about the incident and as per PW2, Satyanarayan Bhakat he received information of the incident at 4.30 PM. After her husband returned home she along with him and her sister-in-law went to Murarai police station at 8.30/9PM. The victim underwent a traumatic experience of sexual assault and was panic stricken. She was confused and disoriented as to what would bring succour to her and naturally she waited for arrival of her husband who was in his office. After the arrival of her husband and on giving a cool thought she went to the police station to lodge complaint in the evening around 8.30/9PM. This obviously has led to delay of few hours in lodging of the FIR. There is no case of embellishment or concoction of facts in the FIR due to such delay. Even otherwise, the mere factum of delay in filing complaint in regard to an offence of this nature by itself would not be fatal so

as to vitiate the prosecution case. ***[See State of Chhattisgarh versus Derha reported in (2004) 9 SCC 699].***Accordingly, the argument advanced in this regard does not stand to reason.

11.7. It is submitted on behalf of appellant no. 2 that as per the prosecution case he did not take any active part in the commission of the offence alleged and was only standing beside the place of occurrence and therefore no culpability is attributed to appellant no. 2.The role attributed to appellant no.2 that he caught hold of the hand of her minor son of the victim aged about two years and threatened her of killing the victim and her son by putting *"hasua"* on the throat of her son is at variance with the earlier statement made by the victim in her written complaint and statement before the magistrate. Be that as it may, such aspect does not absolve appellant no.2 from the offence in view of the fact that as per the victim he was present during the occurrence and after the incident he fled away along with appellant no.1 meaning thereby he shared common intention with appellant no.1. Thus the prosecution has been able to show that both the appellants acted in concert. The conduct of appellant no.2 to remain present during the occurrence and flee away along with appellant no.1 soon after the incident shows his prior concert and meeting of minds with appellant no.1. Explanation 1 to Section 376(2) clearly provides that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Thus where there is meeting of minds and sharing of common intention in such an event all the accused will be

guilty irrespective of the fact that the victim girl has been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. The essence of joint liability is the existence of common intention which presupposes prior concert which may be determined from the conduct of the offenders revealed during the course of action and it could arise and form suddenly but there must be meeting of minds. ***[See Ashok Kumar versus State of Haryana reported in (2003) 2 SCC 143].*** Thus the argument advanced on behalf of appellant no.2 as above is of no substance.

11.8. From the aforesaid evidence on record it is found that the prosecution has been able to establish the following requisites for sustaining an order of conviction under section 376(2)(g):

(i)that more than one person had acted in concert with common intention to commit rape on the victim with prior meeting of minds and with element of participation in action;

(ii)that in furtherance of such common intention one or more persons of the group actually caused rape on the victim.

As from the evidence on record it is found that the appellants in furtherance of their common intention committed rape on the victim lady, the presumption in law under section 114A of the Evidence Act comes into operation. Section 114A of the Evidence Act reads hereunder.

" **Section 114A of the Evidence Act-Presumption as to absence of consent in certain prosecution for rape.-** In a prosecution for rape under clause(a) , clause(b), clause(c), clause (d), clause (e), clause(f) , clause(g), clause(h), clause(i), clause(j), clause(k), clause (l), clause(m) or clause(n) 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 consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

There is no case of the defence that the incident of rape was consensual. The aforesaid presumption in law has also not been rebutted either from the materials on record or by leading cogent evidence from the side of the defence. Thus in view of statutory presumption envisaged in section 114A of the Evidence Act it is presumed that the victim did not consent to such rape by the appellants.

Accordingly, the conviction of the appellants made by the trial court is upheld.

12. Now coming to the aspect of sentencing, the trial court has convicted the appellants for offence punishable under Section 376(2)(g) of the Indian Penal Code for rigorous imprisonment for life and to pay fine of Rs.20,000/- each. At the outset it is noted that the aforesaid offence is a crime against women which is direct insult to the human dignity of the society. Thus imposition of any inadequate sentence in such offence not only results in injustice to the victim and the society in general but also stimulates criminal activities. While considering the appropriate punishment the court has not only to keep in view the rights of the criminal/accused but also the rights of the victim who suffers in the hands of the perpetrator of crime. However, keeping in mind the entirety of the circumstances I am of the opinion that imposition of maximum punishment for rigorous imprisonment for life by the trial court in respect of offence under section 376(2)(g) of the Indian Penal Code needs to be reappraised. Ordinarily sentence should be commensurate with the gravity of offence and should act as deterrent to commission of such offences. Section 376(2)(g) of the Indian Penal Code contemplates punishment with rigorous

imprisonment for a term which shall not be less than 10 years but may be for life and shall also be liable to fine. In the case in hand it is found that there are no such criminal antecedents of the appellants or any previous convictions. Thus keeping in mind the aggravating as well as mitigating circumstances, in my view, a term of 10 years of rigorous imprisonment with fine of Rs.10,000/- each will be commensurate with the nature of offence. Accordingly, the sentence of rigorous imprisonment for life imposed in respect of Section 376(2)(g) of the Indian Penal Code with fine of Rs.20,000/- each against the appellants is reduced to rigorous imprisonment for a term of 10 years with fine of Rs.10,000/- each. The default clause as imposed by the trial court is maintained. The sentence in respect of offence under Section 376(2)(g) of the Indian Penal Code is modified to the aforesaid extent.

The period of detention undergone by the appellants during investigation, inquiry or trial of the case shall be set-off from the substantive sentence in terms of Section 428 of the Criminal Procedure Code.

13. In the light of the above discussion, the conviction of the appellants is upheld and sentence passed by the learned trial court is modified to the extent as aforesaid.

14. The instant appeal, accordingly, is allowed in part to the extent of aforesaid modification in the sentence.

15. The connected CRAN No. 3 of 2014 (Old CRAN No. 3012 of 2014) and CRAN No.4 of 2021 also stands disposed of.

16. Before parting I record my appreciation for the assistance rendered by Mr. Sumanta Ganguly as *amicus curiae.*

17. The instant appeal being no. 86 of 2013 is thus disposed of.

18. Copy of the judgement along with the lower court records be sent down to the learned trial court at once.

19. Urgent Photostat Certified copy of this judgement, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I Agree,

(Joymalya Bagchi,J) **(Bivas Pattanayak,J)**