(2013) 11 CAL CK 0008

Calcutta High Court

Case No: C.R.A. 26 of 2012

Nitai Barman @ Netai Barman	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision: Nov. 12, 2013

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Sourav Chatterjee and Mr. Debapratim Guha, for the Appellant; Panda, for the Respondent

Judgement

Kanchan Chakraborty, J.

The challenge in this appeal is the Judgment and the order of conviction dated 21.12.2011 and 22.12.2011 passed by the learned Additional District & Sessions Judge, Fast Track 2nd Court, Alipurduar in Sessions Trial No. 34/11 arising out of Sessions Case No. 234/10 thereby convicting the appellant u/s 376(2)(f)/511 of the Indian Penal Code sentencing him to suffer rigorous imprisonment of five years and to pay a fine of Rs. 1,000/-, in default, simple imprisonment for three months. Bithika Barman, 8 years old girl while studying in her room on 11.06.2010 at about 7.00 to 7.30 a.m., she was raped by the appellant who allegedly took off the undergarment of Bithika and penetrating his penis inside her vagina causing profused bleeding. The brother of Bithika aged about two/two and half years witnessed the incident. Bithika lost her sense but before that she raised alarm which attracted her mother who rushed to the living room and found Bithika lying unconscious with bleeding private organ, Neighbours gathered and with the help of them, Bithika was taken to Silbarihat Primary Health Centre and thereafter to Alipurduar Sadar Hospital. One F.I.R. was lodged stating the incident committed by the appellant, Nitai Barman and on the basis of the said F.I.R. Alipurduar Police Station Case No. 179/2010 dated 11.06.2010 started against this appellant u/s 376(2)(f) of the Indian Penal Code. The appellant, however, pleaded not guilty to the charge and accordingly, faced the trial. In course of trial, 15 witnesses were examined. The F.I.R., seizure list, medical examination report, statement of the victim recorded u/s 164 Criminal Procedure

Code etc. were admitted into evidence and marked exhibits on behalf of the prosecution. No witness was examined on behalf of the appellant in any form. Upon consideration of the evidence on record, the learned Trial Judge came to the conclusion that the appellant could not succeed in committing rape but made an attempt to commit rape on Bithika. Accordingly, he recorded conviction of the appellant u/s 376(2)(f) of Indian Penal Code and passed the sentence, which is impugned in this appeal.

2. Mr. Debapratim Guha, learned Counsel appearing for the appellant contended that there are discrepancies in the statement of the victim in Court and the statement of the Doctors. The victim was medically examined twice but the Doctors did not find any injury on her private part. No blood was also detected. There was no mark of penetration, as the hymen was found not rapture. He contended further that the prosecution case was developed time to time and it is full of exaggeration and embellishment raising serious doubt as to certainty of the same. Mr. Guha, learned Counsel appearing for the appellant contended that the learned Trial Court recorded conviction basing on possibilities rather than certainties and probable circumstances. Possibilities whatever strong it might be cannot take place of proof. There is nothing on record also that any witness had seen the appellant to enter into that room or to leave the room on the relevant time and date. The Court, according to him, made a great error in relying solely on the testimony of the victim ignoring the material contradictions in the statements of witnesses. This apart, he contended that the learned Court admitted inadmissible evidence while recording and thereby caused great mistake.

3. Mr. Panda, learned Counsel appearing on behalf of the State-respondent contended that the evidence of the victim alone is sufficient to record conviction, there is nothing on record to establish that there was enmity between the family of the appellant and the victim. There was no reason for the victim to make a false statement in Court and before the Magistrate who recorded her statement u/s 164 Criminal Procedure Code. He contended further that there might be some exaggeration but that cannot be the ground for not accepting the prosecution version that the appellant made an attempt to commit rape on Bithika on particular date and time. He contended that the view of the Trial Court is not required to be interfered with in this appeal.

4. I have carefully gone through the entire evidence, oral and documentary, which was considered by the learned Trial Court. I have also gone through the Judgment which is under challenge in this appeal. It appears clearly that the learned Court below did not accept the hearsay portion of the deposition of the witnesses but only the relevant portion which is admissible in evidence was considered by the Trial Court. It is also found that learned Court did not accept the prosecution version to the extent that the victim sustained bleeding injuries on her private part due to forceful penetration by the appellant. The fact that victim was bleeding profusely

has not been accepted by the Doctors who examined her soon after the alleged incident. Again, if it is accepted that the blood was wiped off either by the appellant or by the mother of the victim soon after the incident, the question still remains, in such a case, that the Doctors could have easily detected swelling on the private part of the victim aged only 8 years at that time when appellant was a young boy of 23 years.

5. In a case of like nature, it is trite law that evidence of prosecutrix is enough to record conviction if it is found trustworthy and acceptable. In the instant case, the victim was 8 years old innocent girl had no intention to implicate somebody in any case falsely. On careful scanning of her oral evidence, i.e. P.W.-2, I find that she had categorically stated that the appellant after entering into her room gave one rupee to her younger brother and told him to go outside to buy biscuit. When brother had gone, he took Bithika away by force. He pressed her mouth, put off her undergarment, he himself put off his pant and, thereafter, inserted his penis into her vagina. When it was bleeding, the appellant left the place. As soon as the appellant left the place, her mother rushed to the room and her brother reported the incident to her. She also reported the incident when she regained her sense. She was taken to local hospital initially and thereafter to Alipurduar Sadar Hospital where she was treated. She also stated that she was produced before Magistrate who recorded her statement. This fact that the appellant entered into the room on the date and time while Bithika was studying and took off her undergarment and pushed his penis in her vagina has been reiterated by Bithika when she made the statement before the Magistrate. However, on perusal of the evidence of the P.W.-2, that is Bithika, I find that she has stated in her cross-examination that her parents taught her what was to be stated before the Magistrate. I find that the learned Trial Court did not accept this portion of version of the prosecutrix. I find that learned Trial Court was quite right in discarding such portion of the statement of the victim because at any point of time from the very inception, the victim did not change her stand that the appellant entered into the room, pressed her mouth, took her on his lap after removing undergarment of himself and the victim, thrusted his penis into her vagina. It is true that he failed to penetrate but the attempt was there.

6. The brother who allegedly had seen the incident at the doorstep was aged about two/two and half years at the relevant time. Naturally, he was not cited as eye-witness. But, the parents, i.e. P.W. -1 and P.W.-3 have categorically stated that the boy somehow narrated the incident to them and that was affirmed by the victim immediately after she regained her sense. The learned Trial Court accepted that portion of prosecution case. I find nothing wrong in doing so in a case of like nature where there was no animosity between two families.

7. Some of the local people, such as the P.W.-5 came forward in course of trial and disposed in support of prosecution case. P.W.-5 stated that she came to the place of occurrence being attracted by hue and cry and found Bithika was lying on bed in

senseless condition while her mother was crying. The brother of Bithika reported the P.W.-1 in presence of P.W.-5 that the appellant put off the pant of his sister and inserted his penis in the vagina of his sister. The P.W.-5 found a cloth stained with blood by which the P.W.-3, i.e. mother of the victim, wiped the blood of Bithika. On perusal of the seizure list I find that the investigating officer seized one white petty coat from the place of occurrence which was stained with blood (exhibit-2).

8. P.W.-6 is a local man also who followed the P.W.-3 and came to the place of occurrence. He found Bithika was crying and her mother was calling their neighbours. However, her statement was not accepted by the learned Trial Court being hearsay. P.W.-4 is the medical officer who attended Bithika, first of all, on 11.06.2010 on the very date the alleged incident had taken place. The patient, Bithika was complaining of pain of lower abdomen. There was a history of attempt to commit rape on her. P.W.-4 referred Bithika to Alipurduar Sadar Hospital where the P.W.-7 examined her on the next date. He stated that the victim informed him that the appellant put his sexual organ into the sexual organ of the victim girl on 11.06.2010 at about 7.00 p.m. to 7.30 p.m. and the victim girl forced herself to free. In his cross-examination, the Doctor said that he did not found any external injury on the private part or any part of the body. He opined that there would have been mark of injury in case she received any bite on her body or injury on her private part in case force was applied to penetrate male organ inside her private part. The evidence of P.W.-13 and P.W.-14, neighbours, were not accepted by the learned Trial Court rightly as it was hearsay evidence.

9. I have perused the exhibit-6, i.e. statement of the victim recorded by the learned Magistrate u/s 164 Cr. P.C. The victim has categorically stated how the appellant committed the crime.

10. It is true that there are exaggeration and embellishment in the prosecution case but the substratum of the prosecution case that on the particular date and time the appellant intended, prepared and attempted to commit rape on Bithika has been established by the direct testimony of Bithika (P.W.-2) both in Court and in course of recording of her statement u/s 164 Cr. P.C.

11. Mr. Debapratim Guha, learned Counsel for the appellant contended that if the prosecution version is tainted with contradiction, exaggeration and embellishment, it should be discarded and disbelieved entirely. It is true that there is a principle that ''falsus in uno-falsus in omnibus'', that is to say when major portion of the evidence appears to be false Court should reject the rest of it. This principle, however, is not applicable in our country. In Dalvir Singh -Vs.- State of Haryana, the Apex Court made it very clear that even if major portion of the evidence is found to be deficient, residue is sufficient to prove the guilt, conviction can be maintained on the basis of such residue evidence. In a case of rape or attempt to commit rape, evidence of victim is the best evidence and in the instant case, in my opinion, the learned Trial Court has rightly believed her statement in Court although it is tainted with some

exaggeration and embellishment.

12. Accordingly, I am of the opinion that the order of conviction challenged in this appeal is not required to be interfered with.

13. However, considering the age of the appellant as well as the victim and considering the fact that they are residing in the same village having their future of their own, while affirming the order of conviction, I reduce the sentence to the period already undergone (two years and some odd months). The sentence is further modified to the extent that the appellant should pay a fine of Rs. 25,000/- instead of Rs. 1,000/-, in default, to suffer rigorous imprisonment for two years. The fine amount, if realised, be given to the father of the victim. The appeal stands disposed of.