
(2011) 05 CAL CK 0015

Calcutta High Court

Case No: CRA No. 89 of 1999

Debendra Paikar

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: May 18, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 366, 376

Citation: (2011) 3 CHN 634

Hon'ble Judges: Raghunath Ray, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: S.K. Basu, J. Bagchi and A. Sinha, for the Appellant; Minoti Gomes, for the Respondent

Judgement

Girish Chandra Gupta, J.

This appeal arises out of a judgment and order dated 16th March 1999 passed by the learned Assistant Sessions Judge, 2nd Court, Midnapore in Sessions Trial No. XXVI of July 1998 in connection with Belda P.S. Case No. 133 of 1996 dated 15th November 1996 by which the learned Trial Court convicted the sole accused Debendra Paikar of offences under Sections 366 and 376 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for 7 years as also to pay a fine of Rs. 500/-, in default to suffer further simple imprisonment for three months for the offence u/s 366 and further sentenced him to suffer rigorous imprisonment for a period of 10 years as also to pay a fine of Rs. 1000/-, in default to undergo further simple imprisonment for a period of six months for the offence u/s 376 of the Indian Penal Code. Both the sentences were however directed to run concurrently.

2. The facts and circumstances of the prosecution case briefly stated are as follows:

The prosecutrix, a student of class X, was abducted on 8th November 1996 by her private tutor the accused herein, who also is a neighbour, while she was returning

home from her coaching centre. She was taken to various places including the matrimonial home of the married sister of the accused whereat she was raped. She was taken from there to the house of another acquaintance of the accused where again she was raped. Both the victim and the accused were brought back to the village by one Tapas but the victim was not restored to the custody of her parents. She was confined at some place in the village particulars whereof are not fully available except that she was confined for some time in the house of Tapas Jana the saviour. After her final release she was kept by her parents in the house of her brother-in-law for safety as would appear from suggestions given to the P.W. 2. By this time an FIR had already been lodged. A salish was held. She was pressurised to marry the accused but she did not agree. She was also pressurized to withdraw the case as a condition precedent to her liberty which also she refused to do. From the order sheet of the lower Court it appears that the victim, after she was produced before the learned Magistrate, was asked whether she would like to marry the accused to which her reply was in the negative. The learned Magistrate in the circumstances directed that her statement should be recorded u/s 164 of the Code of Criminal Procedure which was done on 3rd March 1997.

3. Mr. Basu, learned Advocate appearing in support of the appeal submitted that the victim was deeply in love with the accused and that precisely was the reason why she eloped with him. He submitted that the allegation as regards abduction is baseless. He in support of his submission relied on exhibit "A" a letter written by the victim.

4. Exhibit "A" is a letter which was never disclosed by the accused during investigation. This letter was for the first time shown to the victim during her cross-examination when she admitted that it was in her handwriting but she added that she was coerced to write the letter after she had been abducted and while she was in the custody of the accused. Mr. Basu contended that had any such coercion been exercised, the victim was expected to disclose about the same before the learned Magistrate when he recorded her statement u/s 164 of the Code of Criminal Procedure.

5. We are unable to accept this submission because a mere child reading in class X after having experienced a trauma of the nature indicated above could well have missed out to refer to the letter during her voluntary statement. What lends assurance to the Court in this regard is the fact that the date written on the body of the letter is in different ink and in different handwriting that probably was the reason why the learned cross-examining Counsel asked the witness to tell the Court the date contained in that letter but he did not ask her as to whether that date was written by her. We have no doubt in our mind that the date was subsequently inserted by somebody else. We are also inclined to believe, after having read and re-read the contents of the letter, that the same was written by the victim under coercion.

6. The victim in her evidence deposed that after abduction she was taken to various places by the accused. But there is no cross-examination as to why did the victim not raise a hue and cry which goes to explain that the learned cross-examining counsel was mightily aware of the fact that any question in that regard was likely to be responded by a volley of answers. He therefore merely contented himself by suggesting that neither the accused nor anybody else had abducted her. What lends further assurance to the Court is her conduct after she was brought back to her village. She wanted to go back to her father's house but she was not allowed to do that.

7. For the reasons discussed above we are of the view that the first submission advanced by Mr. Basu cannot be accepted.

8. The second submission advanced by Mr. Basu was that there is no evidence to show that the victim was sexually violated. He submitted that according to the medical evidence there was no rupture in her hymen and the P.W. 7 Dr. Madhusudan Laga deposed that he was unable to form any firm opinion as to whether she was raped or not raped.

9. We are unable to accept this submission of Mr. Basu either for the following reasons:

a) The P.W. 7 did not definitely opine that the victim was not raped.

b) By the time the victim came to give evidence she already was married to one Biman Bhattacharjee. She, as a matter of fact, has given the name of her husband. It is difficult to believe that a married woman shall adduce untrue evidence as regards her sexual violation prior to her marriage.

c) What lends further assurance to the Court in this regard is the fact that on behalf of the defence the victim was suggested that she was not forcibly raped. Therefore it is not the case of the defence that she was not sexually violated. The case is that no force was applied. The fact that she was abducted, she was taken from place to place; even in her own village she was not allowed to go back to her parents; she was coerced to write the ext. "A", she was pressurised to marry the accused which she successfully resisted leave no manner of doubt that she was raped forcibly and contrary to her wishes.

10. The third point raised by Mr. Basu is with respect to the age of the victim. He submitted that the evidence of the P.W. 8 Dr. Dey who conducted the ossification test is that on 19th March 1997 she was aged about 16-17 years. He added during his cross-examination that his opinion as regards the age of the victim could vary by two years on either side. Mr. Basu therefore submitted that the victim on the date of occurrence could not have been less than 18 years old.

11. Considering the fact that:

a) the victim was born at Midnapore hospital. Therefore a birth certificate was likely to be there;

b) the victim was a student of class X, therefore the date of birth of the victim should also have been recorded in the school register and

c) P.W. 2 the father of the victim was unable to tell the date of birth of the victim we are inclined to give benefit of doubt to the extent that the victim on the date of occurrence might have been 18 years old.

12. The fourth submission of Mr. Basu was that non-examination of the P.Ws. 3, 4 and 11 who, in fact, were merely tendered, seriously affected the credibility of the prosecution case and is therefore not reliable at all. He in support of his submission relied on a judgment in the case of Sukhwant Singh v. State of Punjab reported in 1995 SCC 524. In the case of Sukhwant Singh important eyewitnesses were not examined in chief and had merely been tendered so that there was no examination of those three witnesses at all. Only other witness in that case was P.W. 3. Court found it difficult to accept his testimony in the absence of corroboration particularly because the empty and the pistol recovered from the accused were not even sent for examination to the ballistic expert. It is in those facts and circumstances that the act of mere tendering of witnesses tilted the case in favour of the defence. In the present case the situation is altogether different. We already have discussed how has the abduction and rape of the victim been satisfactorily established. We do agree with Mr. Basu that the practice of tendering a witness without examining him in chief is not a proper practice to follow. But at the same time considering that there is enough evidence in support of the case of the prosecution we are unable to accept the submission that this shortcoming on the part of the learned public prosecutor has materially affected the credibility of the case of the prosecution.

13. It can also be pointed out that the P.W. 3 is the mother and the P.W. 4 is the maternal grandmother of the victim. They did not in any event have any personal knowledge of the facts and circumstances of this case. P.W. 11 had indeed brought back to the village both the victim and the accused. P.W. 11 could have to some extent thrown light but his evidence was bound to be restricted to the continuing part of the offence. Even without the advent of P.W. 11 the offence was complete. Sight cannot however be lost of the fact that the P.W. 11 Tapas was also instrumental in keeping the prosecutrix confined in his house after recovering her. He in order to save his skin was not likely to tell the truth to the Court. Therefore his non-examination cannot in any event materially affect the case of the prosecution.

14. The fifth submission made by Mr. Basu was that the veracity of the prosecution case is also shaken by the fact that no witness was examined from any of the places where the victim was allegedly taken by the accused. This, in our opinion, is a lapse on the part of the investigating agency and that by no means is an excuse to throw overboard unimpeachable evidence already on the record.

15. The sixth submission made by Mr. Basu was that there has been delay in recording the statement of P.W. 2 and P.W. 7 which is important because the evidence of P.W. 2 is that the victim had come back within 4/5 days. The abduction took place on 8th November. Mr. Basu argued that the victim supposedly came back on 12/13 November whereas the P.Ws. 2 and 7 were examined on 14th March 1997 according to the I.O. Mr. Basu contended that this is a pointer to show that the evidence adduced in this case is not at all believable.

16. We have not been impressed by this submission. P.W. 2 is not an eyewitness. He is the father of the victim. The records revealed that in spite of the fact that the victim had been brought back to the village she was not permitted to go back to her parents for a very long time. The evidence of the victim herself in that regard is as follows:

There, in the night, Debendra made sexual intercourse with me. From didi's house, he took me to Mess owner's house. There also he made sexual intercourse with me. From there he took me to the father-in-law's house of the mess owner. During my stay there, one person named Tapas Jana rescued me from there and took me and accused Deben to his house. He kept both of us for two days at his house. There in the village a salish took place. In the salish my maternal uncle was present and he wanted to take me back on a bond but the salisans did not permit this. Thereafter, I wanted to go to my father's house and villagers took me to my father's house and again took me back in the house of Tapas Jana in the night. There my maternal uncle and aunt went and asked to take me back but villagers did not allow and asked that unless the case is withdrawn, I would not be handed over. Thereafter O.C. of the P.S. called everybody at the P.S. On that day, police came to my house when I was taking bath. When police came I entered into the house of one of the para men. Thereafter my maternal uncle and father went to the P.S. in the night. Tapas Jana and others left me to my house due to fear of police. At 8 P.M. my maternal uncle and father of accused went to P.S. After some days I was sent to court.

17. Except for a few suggestions that the aforesaid deposition of the victim is incorrect there is no real cross-examination touching the meat of the matter. The records reveal that the accused after arming himself with an order granting anticipatory bail surrendered before the learned Magistrate on 26th December 1996 and expressed his willingness to marry the victim. The learned Magistrate immediately granted him bail. On 9th January 1997 the accused appeared before the Magistrate but the I.O. was not there. The learned Magistrate directed that the I.O. should be reminded and the matter was adjourned till 30th July 1997.

18. Evidence of the victim quoted above is that "after someday I was sent to Court". On 3rd March 1997 she was produced in Court. Therefore probability is that even though the victim might have returned to her village on 12th or 13th November 1996 she was kept confined for a very long time and was released only some days

prior to 3rd March 1997 when she was produced in Court. The police, it appears, had also pressurised her to marry the accused. This would appear from the statement u/s 164 Code of Criminal Procedure recorded by the learned Magistrate which has been marked exhibit "5". The I.O. had failed to appear on the appointed day that is 9th January 1997. The hesitant investigating agency appear to have come back to their senses when it was made absolutely clear to them that the victim was not going to marry the accused. It is in those circumstances that on 3rd March 1997 she was produced in Court. In the circumstance we are unable to attach any importance to the delayed examination of the P.Ws. 2 and 7. P.W. 2 did not have any personal knowledge and P.W. 7 is a doctor who examined the victim on 13th March 1997. Therefore there was no scope for his examination in any event before 14th March 1997.

19. The seventh submission made by Mr. Basu was that there was delay in lodging the FIR. The delay in lodging the FIR in the facts and circumstances of this case, according to us, has not affected the case of the prosecution.

20. The eighth and last submission made by Mr. Basu was that the sentence inflicted by the learned Trial Court was harsh and requires re-consideration.

21. The sentence, in our view, is commensurate to the crime. It is a serious offence. Unless this kind of offence is adequately and severely punished repetition of this type of crime is likely to be increased. One of the objects of punishment is to deter the like minded offenders from resorting to similar offence. For the greater object of saving the society any interference with the punishment in our view is not called for. Sight cannot also be lost of the fact that the accused was a teacher of the victim occupying position of trust and confidence. He abused his position to satisfy his lust. He does not deserve any leniency.

22. In the result the appeal fails and is dismissed.

23. The Appellant is directed to surrender forthwith and to serve out the sentence, in default whereof learned trial Court would take appropriate steps in accordance with law in this regard.

24. The concerned department of this Court is directed to send down the lower court records with a copy of this judgment to the concerned learned Trial Court forthwith.

25. Urgent xerox certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

Raghunath Ray, J.

I agree