
(2011) 02 CAL CK 0010

Calcutta High Court

Case No: C.R.A. No. 55 of 2008

Goutam Mondal

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: Feb. 2, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 156(3)
- Penal Code, 1860 (IPC) - Section 376

Citation: (2011) CriLJ 2037

Hon'ble Judges: Ashim Kumar Banerjee, J

Bench: Single Bench

Advocate: ; Shataroop purkayastha, Sambuddha Dutta, Amrita Chel, Rashbihari Mahata and Kalyan Moitra, for the Respondent

Final Decision: Allowed

Judgement

Ashim Kumar Banerjee, J.

Kantha Mondal was working as a daily labour. For the purpose of work he used to stay out-station. Kantha had two daughters, paro Mondal (not real name) and Kanchan mondal. They used to stay in their house alone. On the fateful day they were sleeping in their house when the accused, the Appellant above named forcibly entered the room and committed rape upon paro. When paro tride to raise alarm, accused fell on her feet and besieged her not to inform the incident to anyone and assured paro that he would marry her after his father would come back from work. Accused used to cohabit with her subsequently on repeated occasions on the assurance of marriage. Paro became pregnant. She gave birth to a stillborn baby. When Kantha came back to his house from his work-place Paro narrated the incident. They ultimately lodged complaint with the Police as accused denied to marry Paro in a village compromise (Salish). The Police initially did not take any action. Kantha approached the learned Magistrate and prayed for a direction upon the Police to investigate into the crime u/s 156(3) of the Code of Criminal Procedure .

The Police took cognizance as per the direction of the learned Magistrate. Police arrested the accused and submitted charge-sheet. The accused pleaded innocence and faced trial.

2. The learned Additional District and Sessions Judge (Fast Track, 5th Court), Malda apprised the evidence and ultimately came to conclusion vide his judgment and order dated November 29, 2007 that the accused was guilty of the offence committed u/s 376 of the Indian Penal Code. The learned Judge convicted the accused and sentenced him for rigorous imprisonment for seven years coupled with a fine of rupees one thousand and, in default, to suffer three months' simple imprisonment. Hence, this appeal by the convict.

3. Mr. Shataroop Purkayastha, learned Counsel appearing for the Appellant contended as follows:

i) There were substantial anomalies and/ or contradictions in the deposition of the victim as well as her relatives.

ii) The learned Judge failed to appreciate that the inordinate delay in lodging the FIR would obviously raise suspicion in the mind of the Court on the veracity of the allegation made by the victim and/or her relatives.

iii) Learned Judge failed to appreciate that the medical evidence did not support the alleged offence alleged to have been committed by the accused.

iv) The victim was a minor girl and the alleged co-habitation, even if taken place, would be a consensual act and would not amount to any offence which could lead the Appellant to conviction.

4. To elaborate his argument Mr. Purkayastha took me to the entire evidence to highlight the anomalies which, according to him, were apparent on the face of the record.

5. Opposing the appeal, Mr. Rashbihari Mahatb, learned Counsel appearing for the prosecution contended as follows:

i) The victim was an illiterate girl. She was a rustic villager. Minor anomalies in her statement would not absolve the Appellant from the heinous crime that he committed.

ii) Even the subsequent co-habitation was considered as consensual, the single incident of rape was sufficient enough to implicate the Appellant u/s 376 of the Indian Penal Code.

iii) The victim deposed that the accused used fists and blows while assaulting her. Hence, the plea of consent was belied by such piece of evidence.

iv) The plea of consent did not come up in evidence. No such plea was taken while giving suggestion to the witnesses.

v) The relatives of the victim being her father and sister were also illiterate rustic villagers and would obviously commit mistake in deposing before the Court of law. Such mistake should not be fatal in the case of the prosecution.

vi) Once the victim came forward and narrated the incident in detail her statement was enough to convict the accused particularly in absence of any previous enmity.

6. I have considered the rival contentions. Kantha was not there at all during the commission of crime. Hence, his evidence was not much relevant. If we consider the statement of the victim and her sister being P.W. 5 we would find that they were not consistent on their stand. The victim in her complaint stated that her father was out of station for work. She stayed in her house along with her sister. On December ..17; 2005 being the first day of Poush at about 11.00 p.m. she was sleeping in a room whereas her sister was sleeping in another room. The accused entered into the house and forcibly committed rape upon her. She tried to resist but the accused started assaulting by fists and blows and tied her mouth with a towel (Gamcha) and ravished her. Thereafter when the victim started shouting the accused fell on her feet and assured her to marry as soon as the victim's father would come back from work. On such assurance the accused started co-habiting with her on repeated occasions. Ultimately, he refused to marry in a village compromise after return of her father. She also stated that the accused was not personally present in the village compromise and took an indifferent stand in the matter. When the victim deposed before the learned Judge she improved her complain a lot. She deposed that Gautam used a Chaku (knife) and on the point of such weapon he committed rape upon her. The theory of weapon was not mentioned in the complaint. In cross-examination, she stated that on the next day of rape she informed the incident to her neighbours and one Salish was held when the accused refused to marry her. If her statement before the learned Judge was correct why no contemporaneous complaint was lodged by the Police, remains unexplained. Moreover, as per the complaint the accused continued cohabiting with her on the assurance that he would marry her after return of her father. Hence, so long as her father did not return question of denial could not arise.

7. PW-2, Kantha Mondal was a post-occurrence witness. He based his deposition on the statement of the victim as told to him. According to Kantha, the Appellant confessed his guilt in the Salish. He also mentioned about registration of marriage. The witness also stated that registration was done before the Registrar. He paid the fee of rupees twelve hundred, however the papers were not given. According to him Registrar also declared the marriage valid and the accused later on declined to acknowledge the marriage. This part of the evidence of Kantha did not find any corroboration from the victim herself.

8. Let us consider the evidence of the sister/According to Kanchan," PW-5 she along with Paro were sleeping on a cot (Chouki) using one blanket and one quilt. Kanchan, however, could not shout as the Appellant threatened her with a knife. She did not

tell the incident to anyone out of fear. Till the day when she deposed before the learned Judge she did not state to Police that the accused had showed her the knife at the time of incident. The evidence of PW-4 (Thakurmoni Mondal) was also significant. PW-4 was aunt of the victim by relation. After hearing the incident she visited the house of Paro on the same night. If she was correct the incident became known to her on the same night itself, even then no complaint was lodged. Other villagers being the neighbours were hear-say witnesses on the issue of rape. They were, however, consistent on the fact that victim was pregnant and gave birth to a still born child. I have closely analyzed the evidence so discussed above. I find that possibly the couple did co-habit on a number of occasions, as a result victim became pregnant. It has also come in evidence that she gave birth of a stillborn baby. However, this part of the evidence would not be sufficient to implicate the accused u/s 376, particularly when the victim was a major girl and there was no contemporaneous complaint. I cannot overlook the fact that few of the villagers came to know of the incident on the same night itself, even then the victim did not lodge any complaint. If I have to believe the victim I will have to hold that there was no eye-witness whereas PW-5 claimed to have witnessed the incident however, due to fear she did not disclose it to anyone. There is one more salient feature. The victim in her complaint talked about repeated co-habitation whereas such fact was consciously omitted during trial. If I examine the evidence of the victim adduced at the time of trial it would appear as a single incident whereas the complaint would indicate otherwise.

9. The learned Judge analyzed the evidence from a different angle. According to the learned Judge, the victim did not disclose it to outsiders to avoid social stigma. Her sole evidence was enough to convict the accused. The relevant part of his judgment is quoted below:

In the instant case it is clear from the FIR story as well as evidence adduced by the complainant /victim and her sister that on the first occasion the accused committed sexual intercourse with the victim forcibly and against her will and after committing sexual intercourse he threatened the victim not to disclose it to anybody else. Though accused made cohabitation with the victim subsequently on the promise of marrying her as it appears from the materials on record, but merely for this reason the earlier offence committed by the accused cannot be treated as condoned. I like to mention once again that FIR and evidence on record disclose that no consent was given during first time and it was against the will of the victim and on threat. It has also come before the Court that subsequently on false pretext of marriage consent for cohabitation was obtained. It is, therefore, no defence that the victim consented after the act and the consent of the said victim to sexual intercourse was obtained subsequently on pretext of marriage. Thus, this cannot be treated as a consent at the time of beginning of sexual relationship.

10. The learned Judge relied on a single Bench decision on the Jharkhand High Court in the case of [Pinki Kumari Vs. State of Jharkhand and Another](#), . The learned single Judge held that sexual intercourse continued for a long time with consent and on the assurance of marriage could attract the mischief of Section 376 in case there was breach of assurance. I am unable to agree with such proposition per se. Each case, in my view, has to be judged considering its peculiarity. In the instant case; even if the story so advanced by the victim is accepted, it would, at best, lead to a breach of promise that could not attract the mischief of Section 376. Here I am unable to agree-with the learned single Judge of the Jharkhand High Court. The prosecution tried to portray that initially co-habitation was without consent-1 fully agree with the learned Judge that the subsequent consensual Cohabitation would not absolve the Appellant from the crime committed u/s 376. Question thus remains, was there anyunwill-ing co-habitation on the fateful day? I do not find any convincing reply as the evidence was self contradictory as discussed above. On a combined reading of the evidence it appears to me that there might have been a consensual relationship which resulted in pregnancy of the victim and subsequent delivery of a stillborn baby by the victim that would not, per se, permit the Court to hold the accused guilty of the offence as the suspicion in the mind of the Court on the veracity of the allegation of rape, was not successfully removed.

11. The appeal succeeds and is allowed.

12. The conviction so imposed by the Appellant vide judgment and order dated November 29, 2007 impugned in this appeal is set aside.

13. The Appellant is now in jail. His Bail Bond is discharged and cancelled. The Appellant be set at liberty, if not wanted in any other case.

14. A copy of the judgment and order along with Lower Court Records be sent at once to the Court of learned Trial Judge for information and necessary action.

15. Urgent xerox certified copy will be given to the parties, if applied for.