

(2010) 06 CAL CK 0015

Calcutta High Court**Case No:** Criminal Appellate Jurisdiction C.R-A. No. 382 of 2005

Shamsul Sheikh and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision: June 11, 2010**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 376, 376(2)(g)

Citation: (2010) 3 CALLT 145**Hon'ble Judges:** Kalidas Mukherjee, J; Ashim Kumar Banerjee, J**Bench:** Division Bench

Advocate: Partha Sarathi Bhattacharyya, Mr. Ranjit Kumar Sanyal and Mrs. Sukla Das Chandra for the Appellant Nos. 1, 2 and 4 and Mr. Kazi Saifuddin Ahmed and Mr. Manas Kumar Das for the Appellant No. 3, for the Appellant; R.K. Ghosal for the State, for the Respondent

Final Decision: Allowed

Judgement

Kalidas Mukherjee, J.

This appeal is directed against the judgment of conviction and sentence passed by learned Additional Sessions Judge, Fast Track Court - II, Krishnanagar, Nadia in Sessions Trial No. IV of December, 2004 arising out of Sessions Case No. 36 of October, 2004 sentencing the appellants to suffer RI for life and to pay fine of Rs. 4,000/- each in default to suffer RI for four months u/s 376(2)(g) of the Indian Penal Code.

2. The prosecution case, in short, is that on 13.6.2004 around 12 at night four persons entered into the house of the victim and by putting cloth on her mouth lifted her away to a nearby field and committed rape upon her. The names of the accused persons are Kurman Sheikh, Shamsul Sheikh, Idrish Sardar and Marfat Sardar. Each of them were armed with pistol and knife and they threatened her with

dire consequences and also to kill her husband if the incident was disclosed to anyone. The victim and some other families reside in a field and, as such, she could not disclose the incident to any other person out of fear. After the said incident, the accused persons attempted several times to commit torture upon her. After receipt of the complaint, the Tehatta P.S. Case No. 158 dated 25.7.2004 was started u/s 376(2)(g) of the Indian Penal Code. The charge was framed against the accused persons u/s 376(2)(g) of the Indian Penal Code. The accused persons pleaded not guilty and claimed to be tried.

3. The learned Trial Judge upon consideration of the materials on record passed the impugned judgment holding that the evidence of the prosecutrix was truthful and worthy of credence and no further corroboration was required when the probability factors echoed in favour of the prosecution. The learned Trial Judge placed reliance upon the evidence of the prosecutrix (P.W.1), the evidence of P.W.2 and the independent and disinterested witnesses, namely, P.W.6 and P.W.7. The learned judge ultimately convicted the accused persons and passed the sentence as stated above.

4. Mr. Bhattacharyya appearing on behalf of the appellant Nos. 1, 2 & 4 submits that there was delay of 42 days in lodging the FIR and this delay has not been reasonably explained. It is contended that there are discrepancies between the evidence of the prosecutrix (P.W.1) and the statements made by her before the learned Magistrate which was recorded u/s 164 Cr PC. Mr. Bhattacharyya contends that in the statement u/s 164 Cr PC there was no mention of holding "salish". Mr. Bhattacharyya submits that the alleged holding of "salish" has been introduced at the time of trial.

5. Mr. Bhattacharyya contends that the seizure was made long after the incident and the I.O. did not send the wearing apparels to the chemical examiner for examination. Mr. Bhattacharyya submits that the papers relating to the alleged "salish" were not produced at the time of trial. Mr. Bhattacharyya contends that the evidence on record does not warrant conviction of the appellants and the learned Trial Judge was not justified in passing the impugned judgment.

6. Mr. Kazi Saifuddin Ahmed appearing on behalf of the appellant No. 3 submits that in view of the serious discrepancies and improbabilities, the learned Trial Judge was not justified in passing the impugned judgment of conviction and sentence. Mr. Ahmed submits that the impugned judgment is not sustainable in law.

7. Mr. Ghosal appearing on behalf of the State submits that the weapons used by the accused at the time of the occurrence were seized and the Prosecutrix is a rustic lady having no knowledge about the legal aspects of the matter. Mr. Ghosal contends that after the incident the prosecutrix went to the Panchayat and her testimony regarding "salish" was also corroborated by other witnesses.

8. It appears from the evidence on record that the incident took place on 13.6.2004 and the information was lodged with the P.S. on 27.7.2004. It is significant to note that there is no whisper in the FIR about the holding of "salish" by the Panchayat. It is only at the time of trial the prosecutrix Introduced such case of holding "salish" at the Panchayat. Not only that the prosecutrix in her statement u/s 164 Cr PC did not state anything about the holding of such "salish". It is true that in a case u/s 376 Indian Penal Code the evidence of prosecutrix itself is sufficient to warrant conviction and corroboration is not necessary, "provided the evidence of the prosecutrix is found worthy of credence and it inspires confidence.

9. P.W. 1 in her evidence stated that the incident took place about 5/6 months ago in the month of Jaishta/Ashar around 12 at night; at that time she was lying in the verandah of her house; her two children were also lying by her side and at that time four persons whose faces were covered with cloth came before her and pointed the pistol at her and lifted her from the verandah of her house to a nearby field which was located about 2000 cubits away from her house. It is in her evidence that "patal" plants were grown in the said field and the jute plants were grown on the three sides while banana plants were grown on another side of the said field where the incident took place. She has stated that her wearing apparels, namely, saree and blouse were taken off and thereafter the four persons raped on her one by one. She has stated that after committing rape the four persons brought her in a vacant field nearest to her house and left her there. It is in her evidence that she could identify the said persons, namely, Samsul, Idrish, Kurman and Marfat. She has stated after bringing her in a vacant field, they removed their cloth from their faces and threatened her not to disclose the said incident to anyone and thereafter they left the field.

10. P.W. 1 has stated that she came back home from the said field and she narrated the incident to her husband who was lying on another side of the verandah at the material time when she was lifted by the accused persons. It is in her evidence that her husband was then sleeping. She has stated that subsequently the accused persons came twice/thrice to her house and threatened her not to disclose the said incident to others.

11. P.W. 1 has further stated that after one month of the said incident was reported to the "morols" of the village and one "salish" took place where the four accused persons confessed their guilt and in the said "salish" it was settled that the accused persons would pay Rs. 6,000/- each. P.W. 1 has state that the accused persons ultimately refused to pay the said money and did not obey the resolution of the said "salish" and thereafter the "salishdars" instructed her to lodge complaint with the P.S. It is also in her evidence that she made a statement before the learned Magistrate which was recorded u/s 164 Cr PC.

12. P.W. 1 in her cross-examination has stated that Rafique, Faimuddin and Mansur, the members of the Anchal Panchayat, were the "morols" of the village to whom she

reported the incident. She has stated that Monsur was the member of the Gram Panchayat and he was elected from the Congress Party and the accused persons with their family members were the supporters of CPI(M) Party. P.W. 5 who was present in the alleged "salish" has stated in cross-examination that Aayasa Bibi is his wife who contested the Gram Panchayat election from Congress Party.

13. From the evidence of P.W. 1 it is clear that she made disclosure of the said incident to the "morols" of the village after one month of the incident and thereafter the alleged "salish" was held. This non-disclosure about the incident by the prosecutrix or her husband to the other persons of the village or their abstinence from lodging complaint with the P.S., is not in consonance with the ordinary human conduct. It is also evident from the testimony of the prosecutrix that there was political rivalry between the accused persons and the said "morols" of the village who held "salish" at the instance of the prosecutrix. This political rivalry is also a circumstance which is to be, considered while appreciating the evidence of the prosecutrix and the veracity of the prosecution case.

14. It is in the cross-examination of P.W. 1 that she sustained scratch mark injury on her body due to the said incident and it was shown to the Doctor. But the Doctor (P.W.9) has stated that on 27.7.2004 he examined the prosecutrix and found no injury in any part of her body and the private parts. He opined that the incident of rape could not be confirmed. The statement of the prosecutrix that she suffered scratch mark injuries on her body and that she had shown the same to the Doctor, did not find corroboration from the evidence of the Doctor (P.W.9).

15. P.W.3 is the learned Judicial Magistrate who recorded the statement of the victim u/s 164 Cr PC. In the cross-examination he has stated that P.W. 1 did not state to him that she was brought in a "patal" field which was located about 2000 cubits away from her house or that the place of occurrence was surrounded by jute field in its three sides while there were banana plants in one side of the field. He has stated that the P.W.1 did not state to him that the accused persons threatened her not to disclose the said, facts on the threatening that they would kill her husband. It is also in his evidence that P.W. 1 did not state to him that one "salish" took place at her instance or that the accused persons confessed their guilt in the said "salish" in her presence. This abstinence of the prosecutrix from stating the material facts, gamely, holding of "salish", confession made by the accused persons in the "salish" in her presence and the location of the place of occurrence are bound to be viewed with grave suspicion. It is worth mentioning here that in the FIR the date of incident was stated as 13.6.2004, but, P.W.1 has stated in her chief that the incident took place about 5/6 months ago in the month of Jaishta/Ashar. She could not say the specific date of the incident or the holding of "salish".

16. P.W. 6 Saidul Sheikh has stated that around 12 at night he was coming back home after sprinkling water in the paddy field and in the way back home he found four accused persons in the said field. He has further stated that on query, the four

accused persons told him that they were coming back after hearing songs performed in the village Mirgi. It is in his evidence, that the house of P.W. 1 is situated by the side of his house and after coming back home he heard the cry of P.W. 1, but, did not go to her house during night and on the next morning P.W. 1 on being asked told him that the said four accused persons brought her in a field and committed rape on her. But, P.W. 1 did not state specifically that she told P.W. 6 about the commission of rape upon her by these four accused persons. On the contrary, it is in her evidence that one month after the incident she told the "morols" of the village about the occurrence. P.W.6 has stated that he did not narrate the incident to anyone.

17. P.W. 5 & P.W. 7 who allegedly attended the "salish" did not state about the date and place of holding the "salish". P.W. 7 in chief has stated that after 4/5 days of the incident police officer came to the village and seized some articles from the respective houses of the accused persons. The alleged incident happened on 13.6.2004. According to P.W.7 the seizure was made on 17/ 18th of June, 2004, but, the seizure list (Ext. 5) shows that the seizure was made on 28.7.2004. The FIR was lodged about 44 days after the incident. So, the evidence of P.W.7 that the Police Officer came to the village 4/5 days after the incident cannot be believed.

18. P.W.8 Abu Bakkar Sk. has stated that he signed seizure list at 12 midnight sitting at the house of Ramjan i.e the husband of P.W. 1. The seizure list (Ext. 5) shows that revolver and other articles were seized from the possession of the accused persons at Pratapnagar village. The date of seizure under Ext. 5 is 28.7.2004 from 2.05 hours to 3.15 hours at Pratapnagar village. The evidence of P.W.8 that he signed the seizure list around 12 at night sitting at the house of Ramjan, raises serious doubt as to the time and place of seizure.

19. It is in the evidence of the I.O. (P.W. 11) that he did not send the wearing apparels of the victim to the chemical examiner for examination.

20. As to the evidence of P.W. 2, P.W. 5 and P.W.7 contradictions were taken by the defence in the cross-examination of the I.O. The I.O. has stated that P.W.2 did not state to him that his wife was sleeping in another bed which was a little distance away from his bed in the verandah of his house and that on being informed he reported the entire incident to the "morols" of the village or that "salish" took place over the incident of committing rape on his wife. The I.O. has further stated that P.W.5 did not state to him that he came to know from the said "salish" that all the four accused persons gagged the mouth of the victim and brought her in the field by showing the pistol and bhojali and that the four accused persons committed rape on her. It is in the cross-examination of the I.O. that P.W.7 did not state to him that the victim called one "salish" in the village over the issue of committing rape upon her. It, therefore, follows from the cross-examination of I.O. that the P.Ws introduced the case of holding "salish" for the first time at the time of trial and in their earlier statements they did not state to the I.O. about such holding of "salish".

Their testimony as regards the holding of "salish" made for the first time at the time of trial, therefore, signifies embellishment and fabrication. No paper regarding the resolution taken at the "salish" was produced by the prosecution, although, the P.W. 1 and P.W.7 stated that the resolution taken at the "salish" was reduced into writing.

21. Another significant feature of the case is that P.W. 1 and her husband P.W.2 both were sleeping in the same verandah, although, at a different place but, they did not raise any hue and cry at the time the accused persons allegedly put cloth on the mouth of the victim and lifted her away. It is also in the evidence of prosecutrix that her children were lying with her. The abstinence of the prosecutrix and also her husband who was lying in the same verandah and did not wake up, from raising any alarm, is not in consonance with probability. The disclosure about the incident to the "morols" of the village one month after the incident is also very doubtful. It casts a serious shadow of doubt on the veracity of the prosecution case. Moreover, there was discrepancy on material particulars between the testimony of P.W.I, and her statement recorded u/s 164 Cr PC. In the FIR also there was no mention of holding "salish". The alleged holding of "salish", under the circumstance of the case, therefore, is not credible. The case of holding "salish" has been introduced subsequently at the time of trial and it is an afterthought. We also find that the delay in lodging the FIR has not been reasonably explained and it speaks of fabrication.

22. Having regard to the serious discrepancies and the improbabilities as discussed above we are of the considered view that the evidence of prosecutrix is not worthy of credence and it does not inspire confidence. The learned Trial Judge was not justified in passing the impugned judgment. The prosecution has failed to prove the charge against the appellants beyond reasonable doubt. The appellants are, therefore, found not guilty of charge brought against them.

23. The appeal is allowed. The impugned judgment is set aside. The appellants are acquitted of the charge and be set at liberty, if not wanted in any other case.

24. Let a copy of this judgment be sent to the Correctional Home where the appellants are now detained.

25. Let a copy of this judgment along with the L.C.R. be sent down to the learned Court below immediately.

Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

Ashim Kumar Banerjee, J.

26. I agree