

(2004) 12 CAL CK 0009

Calcutta High Court

Case No: C.R.A. No. 19 of 2001

Sankar Patra

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Dec. 15, 2004

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313
- Evidence Act, 1872 - Section 114
- Penal Code, 1860 (IPC) - Section 376

Citation: (2005) 3 CHN 303

Hon'ble Judges: Pravendu Narayan Sinha, J

Bench: Single Bench

Advocate: Ashim Kumar Roy and Jayanta Narayan Chatterjee, for the Appellant; Swapan Kumar Mallick, for the Respondent

Judgement

Pravendu Narayan Sinha, J.

This appeal is directed against the judgment and order of conviction passed by the learned Additional Sessions Judge, 1st Court, Howrah in Sessions Trial No. IV (July) of 2004 in connection with G. R. Case No. 408 of 2000 arising out of Jagatballavpur P.S. Case No. 24 dated 8.3.2000 and sentencing the accused appellant to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 2,000/- in default to suffer further rigorous imprisonment for three months for offence u/s 376 of IPC.

2. The prosecution case took its birth when Nirmala Dhonk (P.W.1) lodged the FIR (Ext. 2) on 8.3.2000 at 7.05 p.m. at Jagatballavpur P.S. alleging that on 3.3.2000 her youngest daughter Dolon Dhonk (P.W.2) went to bring goat at Samirdanga at about **** p.m. At that time the appellant Sankar Patra of same village putting cloth on her mouth dragged away her to nearby bush and committed rape on her. Thereafter, in order to disappear evidence the appellant tried to murder the victim by throttling. The victim became senseless and seeing it the appellant fled away. As

P.W.2 did not return, her mother P.W.1 went to Samirdanga for searching her and found her lying inside the bush in naked condition and she was bleeding. P.W.1 then called "para" people and the victim Dolon Dhonk was brought to her house. Village doctor Jagannath Chine (P. W. 11) examined her and the said doctor advised to admit the victim at Jagatballavpur Health Centre. On the basis of the FIR lodged by P.W.1 Jagatballavpur P.S. Case No. 24 dated 8.3.2000 u/s 376 of IPC was started against this accused appellant. After completing investigation chargesheet u/s 376 of IPC was submitted against the accused. The trial that followed ended in conviction of the appellant and the sentence mentioned earlier.

3. It is evident from the materials on record that in order to prove its case the prosecution examined 18 witnesses in all and, the accused appellant himself examined as defence witness being D.W.1. P.W.1 Nirmala Dhonk is the FIR maker and mother of victim. P.W.2 is the victim. P.W.3 Samar Samanta is a person who was passing through the path and heard the shouting raised by P.W.1. P.W.4 Jatan Dhonk is the elder brother of victim. P.W.5 Smt. Padma Bala Porel is "jaa" of P.W.1 whereas P.W.6 Bedana Bala Porel is a co-villager. P.W.7 Smt. Sakhi Rong is the married sister of victim and P.W.8 Mukunda Mondal is another co-villager. P.W.9 Madan Porel was the scribe of FIR (Ext. 2) and he wrote it according to instruction of P.W.1. P.W.10 Smt. Sumitra Roy is a witness of seizure of wearing apparels of the victim and the "saree" which was given to the victim by her mother to wear after the incident.

4. P.W.11 Jagannath Chine is the village doctor who examined the victim and advised to remove the victim to a better doctor. P.W.12 Dr. Kashi Nath Maity is another doctor who examined the victim on 5.3.2000. P.W. 13 Dr. P. K. Nath Barbhuiya is a doctor of Howrah District Hospital and on 24.3.2000 he examined the victim. P.W.14 Dr. Jawaharlal Barman is another doctor who on 27.3.2000 examined the accused Sankar Patra. P.W.15 Dr. J. Chatterjee is another doctor attached to Howrah District Hospital and on 24.4.2000 he held ossification test of the victim and opined that age of the victim on the date of examination was 11/12 years. It establishes that victim was a minor on the date of incident. P.W.16 Subhas Kr. Kar is Judicial Magistrate, 5th Court, Howrah and on 27.3.2000 he recorded statement of the victim u/s 164 of Cr. PC. P.W. 17 Dr. Jharna Mondal is another medical officer who was attached to Jagatballavpur Rural Hospital and on 5.3.2000 she examined the victim who was admitted at the said hospital on that day at 1 p.m. P.W.18 Sanat Kr. Bhattacharya is the Sub-Inspector of Police and the Investigating Officer (in short I. O.) of the case. D.W.1 Sankar Patra is the accused who deposed himself for his defence to establish that he was a minor at the time of incident.

5. In all 14 documents were marked as exhibits and all are not important for discussion. Out of it Ext. 2 is the FIR. Seizure list marked as Exhibit 1 is the birth certificate of victim showing her date of birth on 10.1.1988. Ext. 3 is the medical report of P.W.12 and Ext. 4 is the medical report of P.W. 13. Ext. 7 is the ossification

test report of the victim to show her age according to medico-legal opinion. Ext. 8 is the 164, Cr. PC statement of the victim. Ext. 11 is another medical report of Jagatballavpur Rural Hospital.

6. Mr. Ashim Kr. Roy, learned Advocate for the appellant contended that the FIR is belated because, it was lodged on 8.3.2000 whereas the incident took place as alleged on 3.3.2000. The explanation for the delay mentioned in the FIR differs from the evidence of P.W.1 herself. There was no injury on the back of the victim though it was the prosecution story that the appellant dragged away the victim and fell her on the ground and committed the alleged incident. Absence of injury on her back proves that the incident as alleged is not believable. P.W.4 stated that at about 3 p.m. he learnt from Mukunda Mondal about the incident of rape on his sister by the appellant. It proves that prosecution story is false as all the witnesses stated that the incident took place after 4 p.m. Evidence of P.W.4 rather indicates that the incident was not true and the appellant was falsely implicated in this case.

7. Mr. Roy further contended that P.W.17, the medical officer attached to Jagatballavpur Rural Hospital examined the victim on 5.3.2000, but it is strange that she did not report the incident to police station. If it was a case of rape, the medical officer had the duty to report the matter to police station as the incident invited starting of police case being a cognizable offence. Before P.W.17, the victim could not give history of assault properly and the person who accompanied her gave the history of assault and identity of the person was not established. It establishes that the story introduced by the prosecution is not believable when the victim before the first available Government medical officer could not give history of assault. The I.O. did not examine all the available witnesses. Evidence of P.W. 12 and P.W. 13, the doctors are important and their evidence do not prove rape on the victim. The main witnesses, besides the victim, heard about the incident and their evidence are hearsay and not reliable and trustworthy. The wearing apparels of the victim were not seized and adverse presumption u/s 114(g) of the Evidence Act should be drawn against the prosecution.

8. Mr. Roy further contended that the accused appellant was a minor at the time of incident. In his examination u/s 313, Cr. PC, the appellant stated his age as 16 and the said examination was held on 6.9.2000 and the alleged incident was on 3.3.2000. The appellant examined himself in the Trial Court as D.W.1 and produced one school certificate to prove his age. The learned Judge did not take pain to enquire as to whether the appellant was a minor or not on the date of incident. It was the duty of the learned Trial Judge to make necessary enquiry to ascertain his age when in examination u/s 313 of Cr. PC the accused stated his age as 16 and by examining himself as D.W.1 he produced one school certificate. The learned Judge did not admit the certificate into evidence and marked it as "X" for identification. It was the duty of the learned Judge to summon any teacher of the concerned school from which the certificate was produced by the accused in Court and examination of

either the Headmaster or any authorised person of the school could have proved what was the age of the accused at the time of trial and on the date of incident. The learned Judge after 313, Cr. PC examination and evidence of D.W.1 should have sent the accused for medical examination or ossification test to ascertain his age. As the accused was a minor he was entitled to be governed under the provisions of Juvenile Justice Act, 1986. The appellant is still now in jail and has already served out 4 years 5 months. In the meantime he has attained majority and he cannot be tried afresh in the regular trial. Accordingly, the order of conviction should be set aside as medical reports proved that the prosecution story of rape on the victim is unbelievable. Moreover, the accused being a minor on the date of incident is entitled to be governed under the Juvenile Justice Act and he cannot be sentenced to suffer imprisonment. As he has attained majority by this time he cannot be sent to reformatory school, even assuming for the sake of argument that conviction is sustainable. In support of his contention Mr. Roy cited the decisions reported in [Gopinath Ghosh Vs. The State of West Bengal](#), , Pradeep Kumar v. State of U.P., reported in 1995 SCC (Cri) 395, Bhola Bhagat v. State of Bihar, reported in C Cr. LR1998 (SC) 82, Umesh Singh v. State of Bihar, reported in 2000(3) Crimes 89 (SC) and Bhoom Ram v. State of U.P., reported in 1989 SCC (Cri) 486.

9. Mr. Swapan Kr. Mallick, learned Advocate appearing for the State contended that P.W.2 is the victim and after the incident the appellant threatened her with murder if she tells the incident to anybody. It was the appellant who told the victim to introduce the story that she was chased by monkey and she was running to save herself from the said monkey when she fell on a bush and a "kanchi" poked into her vagina. This story is unbelievable as no other witness stated that monkey was there or that monkey of that area are in the habit of chasing minor girls. Evidence of P.W.1, P.W.3, P.W.4, P.W.5, P.W.6, P.W.7 and P.W.8 corroborates the evidence of the victim (P.W.2). The victim stated to P.W.11, the village doctor, about rape on her. The medical evidence of P.W.11, P.W.12 and P.W.13 proves rape on the victim. P.W.13 denied that such injury as he found in private parts of the victim could have been caused by poking of "kanchi". P.W.15 is the medical officer who held ossification test of the victim and his evidence reveals that the victim was aged between 11 to 12 years on the date of examination. There was no cross-examination of P.W. 15 by the defence regarding his evidence about age of the victim.

10. Mr. Mallick further contended that the victim was in the hospital for nearly 18 days as it appears from materials on record and medical papers. If there was no incident as alleged why the victim would be confined in hospital unnecessarily for 18 days. Evidence should not be considered in parts or piecemeal manner but the evidence should be construed on the whole and totality of the evidence and circumstances requires to be considered. Before the learned Trial Court the accused did not file any application stating that he was a juvenile. It is not permissible to claim juvenile by an accused whenever he desires so. If he wants to claim himself a juvenile he must raise it before the trial or at least during continuation of the trial

and not after conviction. In support of his contention Mr. Mallick cited the decisions in *Khunnu Yadav v. Rajesh Maurya*, reported in 2004 SCC (Cri) 1202 and *State of Punjab v. Ramdev Singh*, reported in 2004 SCC 307.

11. I have duly considered the evidence and materials on record and the submissions of the learned Advocates of the parties. Evidence of the victim (P.W.2) reveals that on the date of incident at about 4 p.m. she was waiting under a "bell" tree and was watching goat when the accused caught her neck, dragged her near the drain and laid her there, torn her pant and raped her. There was bleeding from her private parts. The accused appellant threatened her with murder, if she discloses the incident to anybody and told her to introduce story that she was chased by a monkey and out of fear when she fell down in bush a "kanchi" i.e. bamboo twig poked into her female private part. Her cross-examination establishes that place of occurrence was full with bush and some plants. The contention of the appellant that absence of injury on her back depicts that she has introduced a false case, is unacceptable. Place of occurrence as it appears from evidence was soft land and there were some plants and bushes. Absence of injury on back of prosecutrix is not at all fatal or to disbelieve the prosecution case. In this connection I rely on the decision of the Supreme Court in [Balwant Singh and Others Vs. State of Punjab](#). In this reported case the victim was raped by four persons. There was absence of injuries on her back. It was held by the Supreme Court that absence of injuries on back of prosecutrix does not make the prosecution case unreliable.

12. P.W. 1, mother of the victim stated that when victim did not return she went for her search and found her lying almost naked near a bush at Samirdanga. She found bleeding from the private parts of the victim and the victim, her daughter, stated to her that accused laid her on drain and torn her pant and raped her. It was this appellant who told the victim to introduce the story that she was chased by monkey and one "kanchi" poked into her private parts. Her cross-examination reveals that there was no injury on back of prosecutrix but there was mud on her back. It establishes that the prosecution story was true and there is no ground at all to disbelieve evidence of P.W. 1 and P.W. 2.

13. The evidence of other witnesses namely P.W.3, P.W.4, P.W.5, P.W.7 strengthens the prosecution story and they have corroborated the evidence of P.W.1 and P.W.2, P.W.3, P.W.4 and P.W.7 saw bleeding from private parts of the victim and injury on her throat. P.W.5, P.W.6 and P.W.8 stated that the victim was raped by the accused Sankar Patra and they heard it from the victim. As a result of the incident her private part was ruptured and blood was coming out from her private parts.

14. The ocular version of these witnesses have been well-corroborated by the medical evidence also. P.W.11 examined the victim on 3.3.2000 and he found injury on her neck and also found blood stains on her cloth. He heard about the incident from P.W.1. He of course did not examine private parts of the victim. P.W.12 is another medical officer who examined the victim and heard the history of assault

from P.W.1. He examined the private parts of the victim and he found small tear on the right side of the vulva and also found serosanguinous (fluid) mixed with blood from her private part. There was no active bleeding from her vagina at that time and he examined the victim on 5.3.2000, two days after the incident. P.W.13 is the doctor of Howrah District Hospital and on 24.3.2000 he examined the victim. He found fourchette and hymen recent tear which bleeds on touch. He heard the history of sexual assault from the victim herself. He stated that if she was forcibly raped by any person such injury is possible into her private parts. He denied the defence suggestion that such injury may be caused by fall on "kanchi" and due to poking of "kanchi" into private part. His evidence rather establishes that such injury is possible if the victim is raped. His cross-examination reveals that hymen of the victim was ruptured. P.W.15 is another doctor who held ossification test of the victim and his evidence reveals that victim was aged about 11 to 12 years. Even if two years plus or minus is taken into consideration the victim was a minor at the time of incident as her age at the time of incident cannot exceed 13 years if two years plus is considered. P.W. 17 is another doctor who examined the victim on 5.3.2000 at Jagatballavpur Primary Health Centre. On examination she found that genital organ of the victim was torn. Such injury is possible if she has been raped. This lady doctor heard the history of sexual assault on the victim from her though, the victim could not give history of assault properly and the person who accompanied her completed the history of assault. Evidence of P.W. 1 reveals that she accompanied victim to Jagatballavpur Primary Health Centre.

15. The evidence of the abovestated witnesses prove beyond all reasonable doubts that the prosecution story has been convincingly proved beyond all reasonable doubts. The defence story that the victim sustained injury into her private parts by fall when a "kanchi" poked therein after she was chased by a monkey, is unbelievable. P.W. 14 is a medical officer attached to Howrah District Hospital and on 27.3.2000 he examined this accused-appellant and found that he was capable of performing sexual intercourse. This evidence apparently may not be relevant but, if it is considered along with the evidence of P.W. 1, P.W. 2 and other witnesses including the evidence of the doctors it would establish that prosecution story of rape on the victim by this appellant has been established beyond all reasonable doubts. The argument that wearing apparels of the victim were not seized is not true as the seizure list marked as Ext. 14 proves that on 9.3.2000 from female ward of Jagatballavpur Rural Hospital the frock and the pant of the victim were seized and with it the I. O. also seized the "saree" which was given to her by her mother for wearing and the seizure list reveals that the said "saree" also contained stains of blood. The pant of the victim also was with stains of blood. The pant of the victim does not show any perforation to establish the defence case that being chased by a monkey the victim fell on the bush and a "kanchi" poked into her private part. The victim was wearing a pant and if a "kanchi" enters into her female private part or genital organ there must be perforation on her pant and without such perforation

first on her pant, the "kanchi" cannot enter into her private parts. Absence of any hole or perforation on the pant of victim establishes that defence alibi is wholly unbelievable. On the other hand, evidence establishes that after tearing her pant the appellant forcibly raped the victim and as she was a minor there was bleeding from her private parts and her pant and the "saree" given to her by her mother contained stains of blood. From evidence it has also been established that menstruation of the victim did not start at all when the incident took place. The tearing of her hymen, injury on vulva and bleeding from her private parts clearly proves that the victim was subjected to rape and she was raped by none else than this appellant. The medical evidence as well as the evidence of other witnesses convincingly established the prosecution case. The witnesses are reliable and trustworthy and the discrepancies as pointed out by the learned Advocate for the appellant in evidence are minor and ignorable.

16. The delay in lodging FIR is not at all fatal in this case as it has been established that the victim was admitted into Jagatballavpur Rural Hospital on 5.3.2000 and before that she was examined by a private doctor (P.W.11) on 3.3.2000 when he advised admission of victim into hospital. There was a "salish" in the village also and when nothing materialised in the "salish" P.W.1 lodged the FIR on 8.3.2000. Five days delay has well been explained by P.W.1 and explanation is also there in the FIR itself which is reasonable, proper and acceptable.

17. In this connection, I intend to refer some of the decisions which will establish that the witnesses are believable and trustworthy and the story of rape on the victim is well-acceptable and has been convincingly proved. The Supreme Court in [Ravulappalli Kondaiah and Others Vs. State of Andhra Pradesh](#), [Tameshwar Sahi and Others Vs. State of U.P.](#), [Labh Singh and Others Vs. State of Punjab](#), and [Sat Paul Vs. Delhi Administration](#), has held that statement of relatives and interested persons, if found by the Court to be trustworthy and reliable, can be acted upon to base conviction. In this case the evidence of P. W. 1, P.W.4, P.W.5 and P.W.7 who are relatives of victim are trustworthy and reliable. The evidence of prosecutrix if found by the Court to be acceptable and trustworthy no corroboration is necessary. In the case of [Rafiq Vs. State of U.P.](#), and [State of Maharashtra Vs. Chandraprakash Kewalchand Jain](#), the Supreme Court held that evidence of prosecutrix need not require corroboration if her evidence found by the Court trustworthy. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. In the instant case the evidence of P.W.2, the victim and a minor girl of 11/12 years cannot be disbelieved and there is nothing to come to the conclusion that out of grudge or enmity she falsely implicated the appellant in this case. In [Krishan Lal Vs. State of Haryana](#), the victim was minor and her complaint to parents and presence of blood on her clothes were held by the Court as testimony which warrants credence and the conviction was upheld. In the present case the victim was also a minor and she complained to her

mother, the FIR maker that, she was raped by the appellant and there was bleeding from her private parts and there was presence of blood on her pant and also on the "saree" which P.W.1 gave to the victim to wear after removing her pant. Evidence of the witnesses including medical experts and circumstances lead to the irresistible conclusion that the appellant was guilty of committing rape on victim and the charge u/s 376 of IPC was well-established against the appellant. Learned Additional Sessions Judge made no mistake by convicting the accused and accordingly there is no ground to interfere with the findings of the learned Additional Sessions Judge regarding conviction of the appellant.

18. Now the question is whether the appellant was a minor at the time of incident as contended by the learned Advocate for appellant and was entitled to be governed by Juvenile Justice Act. From the records it is evident that when this appeal was admitted for hearing the attention of the Court was not drawn regarding minority of the appellant. Had the attention of the Court was drawn, there would have been direction for medical examination of the appellant by ossification test to ascertain his age in support of his claim of minority. That chapter is now over as the said point was not raised at all earlier before the appeal was actually heard and at the time of hearing of the appeal this point has been agitated by the learned Advocate for the appellant that at the time of incident he was a minor. Perusal of the Lower Court Record reveals that before the learned Judge also there was no plea earlier that the accused appellant was a minor. For the first time the appellant during his examination u/s 313, Cr. PC stated his age as 16 years. It appears that the learned Additional Sessions Judge did not realise importance of statement of accused regarding his age and the evidence of the accused as D.W.1 when he produced a school certificate to show his age. The learned Trial Judge did not call for any responsible person of the concerned school from where the certificate was issued showing age of the accused in the said certificate which the learned Judge marked as "X" for identification. If the learned Trial Judge took pains to go through the said certificate he could have found that in the certificate the date of birth of the accused according to school register was 8.9.1984. The incident was on 3.3.2000. If the certificate is believed the accused appellant was below 16 years on the date of incident. Learned Judge made error by not giving importance to the said certificate and not calling any teacher or responsible person from Badebalia Primary School to prove the contents of the certificate and to ascertain its genuineness. It is strange how after such evidence of D.W.1 and production of school certificate marked "X" for identification learned Trial Judge did not take any step for ossification test of the accused to ascertain his age according to medical science. It is settled law that the age mentioned in the school certificate cannot be brushed aside unless there is any contrary convincing evidence to rebut the presumption of age mentioned in school certificate. Even if that certificate is considered as genuine the age of the appellant is now more than 20 years.

19. The position relating to question of minority can be gathered from galaxy of decisions placed before the Court. In Umesh Singh and Anr. v. State of Bihar (supra) the Hon"ble Supreme Court observed that as the appellant was below 18 years of age at the relevant time it was not possible to sustain the sentence and accordingly the Hon"ble Supreme Court while maintaining the conviction of the appellant set aside the sentence. In Bhoom Ram v. State of U.P. (supra) the Hon"ble Supreme Court found that the appellant who was to be governed by the U.P. Children Act and presently reaching more than 28 years of age there was no point referring back to the borstal school and while maintaining the conviction, quashed the sentence and directed release of the appellant. In Bhola Bhagat and Ors. v. State of Bihar (supra) and Pradeep Kumar and Ors. v. State of U.P. (supra), Their Lordships held in similar manner.

20. The appellant who is now definitely above 20 years of age cannot be sent to any borstal school under the provisions of West Bengal Children Act and Juvenile Justice Act. Accordingly, the conviction of the appellant is maintained but his sentence is quashed and the appellant is directed to be released forthwith.

21. The appeal is accordingly disposed of.

22. Send a copy of judgment to the Inspector General of Prisons, Government of West Bengal at Writers' Buildings, Calcutta through the learned Registrar General, High Court, for onward communication to the convict/appellant in the particular Correctional Home where he is lodged at present.

23. Send down the Lower Court Records along with copy of judgment to the learned Additional Sessions Judge, 1st Court, Howrah for information and necessary action.