

(2013) 12 CAL CK 0042

Calcutta High Court

Case No: CRA No. 66 of 2007

Prasanta Pramanik

APPELLANT

Vs

The State of West Bengal

RESPONDENT

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**Date of Decision:** Dec. 17, 2013**Citation:** (2014) CriLJ 1300 : (2014) 1 Crimes 245**Hon'ble Judges:** Subal Baidya, J; Jayanta Kumar Biswas, J**Bench:** Division Bench**Advocate:** Tapan Dutta Gupta and Mr. Bodsapriya Roy, for the Appellant; Manjit Singh, Public Prosecutor and Mr. Atif Ahmed Siddique, for the Respondent**Final Decision:** Partly Allowed

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### Judgement

Jayanta Kumar Biswas, J.

The appellant is aggrieved by a judgement of the Sessions Judge, Bankura dated November 29, 2006 in ST No. 2(8) of 2005 convicting him under ss. 376/323 IPC and the order of the Judge dated November 30, 2006 imposing the sentences. The sentencing part of the order is quoted below:--

...that the convict Prasanta Pramanik, on being found guilty of the offence u/s. 376 /323 I.P.C., is convicted & is sentenced to suffer rigorous imprisonment for 10(ten) years and to pay fine of Rs. 5,000/- (Rupees five thousand), in default, to suffer rigorous imprisonment for one year for the offence u/s. 376 I.P.C., and the convict is also sentenced to suffer simple imprisonment for one year and to pay a fine of Rs. 500/-, in default to suffer simple imprisonment for one month for the offence u/s. 323 I.P.C.

Both the sentences shall run concurrently. Previous detention, if any, shall be set off u/s. 428 Cr.P.C.

2. The FIR No. 16/2004 was registered at Onda police station in the district Bankura on February 12, 2004 at 6.05 p.m. under ss. 376/511/325 IPC. It was registered on the basis of a written information of the victim's elder brother dated February 12,

2004 to the officer in charge of the police station.

3. The de facto complainant alleged as follows. On February 11, 2004 his sister was grazing cattle in the village field. It was around 12 noon when the appellant of the same village went there and gave his sister indecent proposal. When his sister disagreed, the appellant intending to rape her felled her and stripped her naked, and also wounded her physically. His sister had come to the police station in wounded condition on February 11, 2004 itself. She was sent to Krishnanagar hospital, wherefrom she was transferred to Gobindanagar hospital in Bankura. Since he was busy at sister's treatment, the information was being given on February 12, 2004.

4. The appellant was arrested on February 26, 2004 and produced in court on February 27, 2004. The victim's statement was recorded under s. 164 Cr.P.C. on February 27, 2004. The charge-sheet dated May 29, 2004 was submitted under ss. 376/325 IPC on June 3, 2004; cognizance was taken on that same day. By an order dated August 4, 2005 charges were framed under ss. 376/511/325 IPC. On October 25, 2005 alternative charge was framed under s. 376 IPC. The appellant pleaded not guilty and claimed to be tried.

5. Between September 12, 2005 and November 2, 2006 the prosecution examined the following witnesses:--PW1-the de facto complainant; PW2 - the victim's mother; PW3 - a villager; PW4 - a villager; PW5 - the primary health centre medical officer; PW6 - a hospital doctor; PW7 - a hospital trainee doctor; PW8 - the victim; PW9 - the magistrate who recorded the victim's statement under s. 164 Cr.P.C.; PW10 - a hospital interne; PW11 - a hospital student; PW12 - the investigating officer; and PW13 - the doctor who examined the appellant.

6. The prosecution exhibited the following documents:--Ex. 1-written information leading to FIR; Ex. 2-the victim's health centre injury report; Ex. 3 - the hospital report recording cause of the injury and results of examination; Ex. 4 - the victim's s. 164 statement; Exs. 5 & 6 - the hospital treatment sheets; Ex. 7 - the victim's hospital record; Ex. 8 - the FIR; Ex. 9 - a sketch map of the scene of the crime; and Ex. 10 - the appellant's medical examination report;

7. The appellant was examined under s. 313 Cr.P.C. on November 7, 2006. He did not say anything significant except claiming innocence and saying that the allegations were false.

8. As to the charge under s. 325 IPC, the court below concluded that the evidence of PW8 (the victim), PWs5,6 & 7 (the doctors) and the injury reports (Exs. 3, 5, 6 & 7) proved that the appellant intentionally caused the injuries on the person of the victim; and pointing out the absence of the ingredients of s. 320 IPC it held as follows:--

Therefore, though charge against the accused was u/s. 325 I.P.C. but on scanning the evidence, I am of the view that charge u/s. 325 I.P.C. has not been proved against the accused but the offence u/s. 323 I.P.C. has been duly proved against the accused Prasanta Pramanik.

9. As to the charge under ss. 376/511 IPC and the alternative charge under s. 376 IPC, the court below held that the evidence of PW8 (the victim) corroborated by the evidence of PWs. 1, 2, 3, 5, 6, 7, 10 & 11 & Ex. 4 (the victim's s. 164 statement) proved the commission of an offence under s. 376 IPC.

10. By an order dated April 12, 2007 this court ordering that the appeal would be heard, directed notice and called for the lower court records. By an order March 26, 2008 this court rejected the appellant's prayer for suspension of the sentence and release on bail.

11. PW1, the de facto complainant, is the victim's elder brother. His evidence is this. His parents took the victim to hospital and informed him; then he and his parents admitted the victim to the hospital. Next day he submitted the written FIR. His sister was in the hospital for eight days. He did not write in the information (Ex. 1) that the appellant had committed rape on his sister or caused injury to her private parts with his hand. His sister bleeding profusely had narrated the entire incident to his mother.

12. PW2 is the victim's mother. Her evidence is this. The victim told her how the appellant committed rape on her. The victim was bleeding profusely from her private parts when she returned home. The victim pushed the appellant "down" and then the appellant "pushed her finger into the private part of the" victim and tore it. She and her people took the victim to Onda police station. Police sent them to primary health centre that referred the victim to hospital. She and her husband took the victim to hospital. Her son accompanied them to the hospital. She was unable to recollect whether she had stated before the police that the appellant raped the victim. She stated before the police that the appellant "pushed his finger into the private part of the" victim.

13. PW3 is a villager. His evidence is this. On February 11, 2004 at around noon the victim's mother came to his house and took him to her house where he saw the victim "in shivering condition" and learnt from the victim that she had been raped by the appellant who also "pushed his fingers in her private parts and turned it." The victim was bleeding profusely. He told the police that the victim told him that she had been raped by the appellant, and that the appellant tore her private parts by finger.

14. PW4 is also a villager. His evidence is that on February 11, 2004 at around noon the victim's mother came to his house and told him that the appellant had raped her daughter. He admitted that he had never been examined by the police, and that he was deposing for the first time in court.

15. PW5 is the health centre medical officer who examined the victim on February 11, 2004 at 3.30 p.m. He proved the injury report dated February 11, 2004 (Ex. 2) that contains the following writings:--(i) "Send by P.S. Onda;" (ii) "pt accompanied by her mother;" (iii) "as per pt. Prasanta Paramanik S/o. Kanai Paramanik attempted to Rape her, and inserted fingers in the vagina and bites her;" (iv) "laceration over cervix, vagina;" (v) "Bite mark of C6/C7 spine;" (vi) "Seems to serious as profuse bleeding P/V. He said that the victim told him that the appellant had attempted to rape her and opined that the injuries could not be self-inflicted.

16. PW6 is the hospital medical officer who examined the victim on February 11, 2004 at 5.30 p.m. He proved his report (Ex. 3) in which he had written "pt conscious and states that she was rapped on 11/2/04 at noon by Prasanta Paramanik S/o. Kanai Paramanik of same village, in the field when she was looking after the cows, forcefully against her consent." He also wrote that the victim was taken to operation theatre, and that one stitch was given to the injured bleeding private parts.

17. PW7 was a post graduate trainee in the hospital. He examined the victim on February 16, 2004 at around 11 a.m. He wrote the discharge certificate following instructions of his senior medical officer on duty.

18. PW8 is the victim; in examination-in-chief she said as follows:--

On 27th Magh, before two years Prasanta Paramanik committed rape on me while I was engaged in tending cattle at the field. It was then 12 noon. Prasanta was also engaged in tending cattle in that area. He came to me and proposed for cohabitation. He caught me forcibly. He tore my pant and committed rape on me. He put a napkin on my mouth. I pushed him down immediately. The accused then pushed his hand in my private parts and torn it. I was bleeding profusely.

The accd. thereafter fled away. I returned home and narrated the incident to my parents. I was taken to P.S. I reported the incident at P.S. The police-officer witnessed me bleeding and asked me to go to doctor immediately. I was then taken to Krishnanagar P.H.C. I was treated there. I was referred to Bankura Sammilani Medical College and Hospital at Gobindanagar, Bankura. I was admitted there and confined in the hospital bed for eight days.

19. In cross-examination PW8 said as follows. On reaching home she narrated the entire incident to her parents. Her mother took her to police station. Police sent her to the health centre. She narrated the incident to her elder brother at Gobindanagar. She raised no alarm when the appellant raped and injured her. She tried to free herself when the appellant caught her. She tried to resist the appellant. She was put down to ground which was full of grass. She was illiterate.

20. PW9 is the magistrate who recorded the victim's statement (Ex. 4) under s. 164 Cr.P.C. PW10 examined the victim on February 11, 2004 at 5.40 p.m. qua a hospital interne. He said that there "was history of an attempt of rape on to the patient at 10

a.m. on 11.02.2004." He proved his treatment sheet (Ex. 5). PW11 was an MD student at the hospital. He wrote the victim's treatment sheet. He proved the treatment sheet (Ex. 6) and said that he did not examine the victim personally.

21. PW12 is the investigating officer. He proved the FIR (Ex. 6) and the sketch map (Ex. 9). In cross-examination he said the following. He visited the scene of the crime on February 12, 2004. He did not find any blood stain or mark of violence there. He did not seize anything. The de facto complainant did not tell him about the rape. The victim's mother did not tell him that the appellant had raped her daughter, or that the appellant "penetrated his fingers in the private parts of the victim." The victim did not tell him that the appellant had raped her.

22. PW13 is the doctor who examined the appellant on March 4, 2004. He said that there was nothing to suggest that the appellant was incapable of performing intercourse. He did not find any injury. He said that the appellant was more than 20, but less than 22. He proved his report (Ex. 10) containing, on its opposite page, the results of the appellant's ossification test that he was more than 20, but less than 22 on March 4, 2004.

23. Mr. Dutta Gupta appearing for the appellant has submitted as follows. There was no allegation of rape in Ex. 1; but only of physical assault. Hence evidence of PW1 that his sister was raped is a development. PW2, the victim's mother, stated a case of rape first while deposing. PW4, a villager, was not examined under s. 161. PW5, the doctor examining the victim first, said that the victim told him that the appellant attempted to rape her. PW6 said that resistance would have left injuries on body parts. Absence of such injuries belies the case of rape. PW8, the victim, did not tell the investigating officer about rape.

24. He has relied on [Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and Another](#), (evidence of a witness - not the victim - becomes unreliable, when the only fact sought to be proved through him was not stated by him during investigation); and [Phul Singh Vs. State of Haryana](#), (to support the submission that even if convicted, the principle stated in the decision should be applied, because the appellant is in custody for 7 years 9 months).

25. Mr. Singh, the Public Prosecutor, appearing for the State has submitted as follows. Ex. 2 proved by PW5 is the first document concerning the victim's medical examination. It fully corroborates the prosecution case. The victim's statement recorded under s. 164 was proved by PW9. It lends full support to the prosecution case.

26. The injury report dated February 11, 2004 (Ex. 2) signed by PW5 at 3.50 p.m. on that same day is the first record concerning the incident. PW5 signed it qua the medical officer of Onda Primary Health Centre at Krishnanagar in Bankura.

27. Ex. 2 shows that the victim was sent by Onda police station; that she was taken to the centre by her mother on February 11, 2004 at 3.30 p.m.; that, according to the victim, the appellant attempted to rape her, inserted his fingers in her vagina and bit her; that the injuries were (i) laceration over cervix, vagina, and (ii) bite mark on C6/C7 spine; that it was a profusely bleeding serious injury; and that the victim was referred to B.S.M.C.H., the Gobindapur hospital in Bankura.

28. The hospital report on cases dated February 11, 2004 (Ex. 3) signed by PW6 on that same day qua the hospital medical officer is the second record concerning the incident.

29. Ex. 3 shows the following. The victim was referred by Onda B.P.H.C. She was taken to the hospital by her parents on February 11, 2004 at 5.30 p.m. According to the victim, the appellant raped her in the field, where she was grazing cattle, on February 11, 2004 at noon. She had received first aid at the Onda centre. There was no external injury on breast or body. There was a blood wetted pack in the vagina. There was no injury on vulva. She was taken to operation theatre. One stitch was given in the posterior wall of the vagina from where bleeding was seen.

30. In the report (Ex. 3) PW6 recorded that the size of the injury was half an inch; that it was in the vagina (posterior wall) at the junction of two-thirds and one-third of vagina; that the injury might be inflicted by forceful coitus (coital injury); and that the injury might be caused by attempted rape.

31. The hospital treatment sheet dated February 11, 2004 (Ex. 5) written and signed by PW10 at 5.40 p.m. on that same day is the third record concerning the incident. PW10 examined the victim qua a hospital interne. He recorded that it was a case of an attempted rape on the victim at around 10 a.m. on that same day. He prescribed the medicines mentioned in the sheet. In his evidence he said that after him two post graduate trainees (one is PW11) examined the victim.

32. The treatment sheet dated February 11, 2004 (Ex. 6) written and signed by PW11 at 5.40 p.m. on that same day is the fourth record concerning the incident. PW11 was an MD student at the hospital and he wrote the things following dictation of a doctor who examined the victim. It was recorded in the sheet that the victim said that she had been raped by the appellant when she was grazing cattle in the field; that the police should be informed; and that one stitch was given at junction of upper two-thirds and lower one-third of the vagina where a half-inch lacerated wound was found on the posterior wall of the vagina.

33. The letter of the de facto complainant dated February 12, 2004 (Ex. 1) received by the officer in charge of Onda police station on February 12, 2004 at 6.05 p.m. is the fifth record concerning the incident. The FIR was registered on the basis of the information contained in the letter.

34. The case stated in the letter (Ex. 1) is this. The appellant gave the victim indecent proposal. The victim disagreed. The appellant felled the victim and stripped her naked. He did these intending to have raped the victim. He wounded the victim physically. The victim had come to the police station in wounded condition. She was sent to Krishnanagar hospital, wherefrom she was transferred to Gobindanagar hospital, where she was receiving treatment in a critical condition.

35. Statements of the victim (PW8), her mother (PW2), her elder brother, (PW1), a villager (PW3), and another villager (not examined), it appears from the case records, were recorded by the investigating officer on February 12, 2004; and both the victim and her mother stated that on February 11, 2004 at around 12 noon the appellant attempted to rape the victim, that facing resistance the appellant inserted his hand in the victim's private parts and tore it, and that the injury caused profuse bleeding.

36. The victim's statement (Ex. 4) was recorded by PW9 under s. 164 Cr.P.C. on February 27, 2004. The victim stated that when the appellant felled her, tore her pant and started doing the thing, she pushed him over; and that faced with resistance the appellant forcibly inserted his hand in her that place, tore it and caused a profusely bleeding injury.

37. It is, therefore, evident that evidence of PW8 (the victim) is fully corroborated by the evidence of PWs 1, 2 & 3 and the medical evidence adduced by PWs. 5, 6, 7, 10 & 11 (all doctors) who proved Exs. 2, 3, 5, 6 & 7 (the victim's injury report, case report, treatment sheets). There is no one reason to disbelieve PWs. 8, 1, 2 & 3.

38. The foregoing discussion will clearly reveal that it is wrong to say that the prosecution sought to prove any fact through these PWs or any one of them, that the witness had not stated when examined in course of investigation of the case. Only the cryptic statement of PW1, who had given the necessary facts of the incident in his written information (Ex. 1), does not contain the details of the allegation. That, on the facts, does not taint his evidence with embellishments.

39. Now, the question is what the prosecution evidence proves.

40. The appellant has been convicted of offences under ss. 376/323 IPC. Evidence of PW13 and Ex. 10 clearly prove that at the date of the incident the appellant was between 20 and 22 and was capable of making coitus. Evidence of PWs. 1-4 & 8 clearly proves that the appellant was a resident of the same village. The unshaken evidence of PW8 (the victim), fully corroborated by the facts and circumstances proved by the other PWs and the Exs, proves that the appellant was at the scene of the crime at the time mentioned by PW8 and did the things she stated.

41. The evidence of the PWs and the Exs. overwhelmingly prove that the appellant, a person in his twenties and quite capable of making coitus at the date of the incident, made a violent attempt to rape the victim, a twenty-year old woman, and caused the

serious bleeding injury to the victim's private parts, when the victim put up a strong resistance. It is not a case of rape, but attempted rape and voluntarily caused hurt. There is no evidence of rape and voluntarily caused grievous hurt; but evidence of attempted rape and voluntarily caused hurt is glaringly present.

42. As a result, the appellant could be convicted of an offence under s. 376 /511 IPC, not of an offence under s. 376 IPC. Hence the conviction and sentence both need alteration. His conviction and sentence under s. 323 IPC are, however, fully justified. For these reasons, the appeal is partly allowed. The conviction under s. 376 IPC is altered to one under s. 376 /511 IPC; and the sentence to a five-year rigorous imprisonment and Rs. 5000 fine, in default, a one-year rigorous imprisonment. The conviction under s. 323 IPC and the sentence therefor are upheld. The sentences shall run concurrently, with set off benefit under s. 428 Cr.P.C. The appellant shall be set at liberty at once, if he has already served the sentences. Certified xerox.

Subal Baidya, J.

I agree.