

(2010) 10 CAL CK 0037

Calcutta High Court

Case No: C.R.A. No. 533 of 2007

Haren Das

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision: Oct. 4, 2010**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164, 313
- Penal Code, 1860 (IPC) - Section 376

Citation: (2011) CriLJ 785 : (2011) 8 RCR(Criminal) 604**Hon'ble Judges:** Raghunath Ray, J; Ashim Kumar Banerjee, J**Bench:** Division Bench**Advocate:** Bidyut Roy and Aparna Ghosh, for the Appellant; Pinaki Bhattacharjee and Hasi Saha, for the Respondent**Final Decision:** Allowed

Judgement

Ashim Kumar Banerjee, J.

COMPLAINT:

1. Kartick Das of Chao Police Station, Hariharpara in the district of Murshidabad lodged a complaint with the Police on January 2, 2005 that the appellant raped her minor daughter Atosi Das (not real name). According to the complaint, Atosi fell ill on December 30, 2004. At 10.00 p.m. she was taken to Baharampur Sadar Hospital. The doctor after examination told him that Atosi was in the family way having child in the womb for last eight months. On returning home and on being interrogated he came to know that about seven/eight months ago Atosi had gone to the house of Haren to prepare food for him when Haren forcibly raped her after closing the door. Haren threatened Atosi with dire consequence. Out of fear and shame she did not disclose the incident to anyone. On the basis of the complaint, the Police started an investigation and arrested Haren. On January 4, 2005 Atosi gave birth to a male child in Primary Health Centre Haren was charge sheeted u/s 376 of the Indian Penal

Code. Haren pleaded innocence and faced trial.

2. EVIDENCE:

PW-1 (Kartick):

The witness was the complainant. He was consistent with his complaint. He deposed that on December 30, 2004 he had taken Atosi to Berampore Sadar Hospital when the doctor had disclosed him that she had been in the family way. He came to know that Haren committed rape on her as disclosed by Atosi. Haren was related to Kartick. Atosi used to call him dadu (Haren's mother's brother). Atosi went to his house for cooking. None was present in his house. Taking advantage, he committed rape upon her. Out of fear and shame, she did not disclose the incident to anyone. Barhan Islam wrote a complaint as per his instruction. He signed the complaint. At the time of incident Atosi was fourteen years old. Kartick identified Haren on the dock. In cross-examination Kartick disclosed that Haren had three sons and two daughters. Two sons were married. They used to stay in a joint mess. Kartick visited the house of Haren occasionally. He gave a brief idea of the house. He denied the suggestion that Haren never had committed rape upon Atosi or that no such incident had taken place or that they had falsely implicated Haren out of political grudge and "some other dispute".

PW-2 (Atosi, the victim):

Atosi was consistent what her father had said in his complaint as well as deposition. In addition, she stated that none had been present in the house. She went and started cooking. She asked for some green chilly. Haren told her to bring green chilly from his bed room. Atosi went to his bed room. Haren entered the bed room and locked it from inside. Haren forcibly opened her wearing apparel and made her naked and made her lie on the cot and committed rape upon her forcibly against her will. Haren showed her a chopper (Hanso) and threatened her with dire consequence. She returned back home after putting her wearing apparel. He kept mum out of fear and did not disclose the incident to anyone. After about one or two months she felt pain in her belly. She was treated at Student Health Home and Hariharpara Primary Health Centre. After about eight months she was examined by a doctor at Baharampur Hospital. After examination, the doctor disclosed to her father that she was pregnant for about eight months. They returned home. Atosi disclosed the incident to her father. After two days her father lodged a written complaint with the Police Station. Police came and arrested Haren. Atosi was also taken by the Police. She was released subsequently. Two days thereafter she gave birth to a male child at Hariharpara Primary Health Centre. She made confessional statement before the learned Magistrate prior to her delivery. Initially, the doctor of the

Student Health Home advised her to have urine test. She visited Berampore Hospital for urine test when her pregnancy was detected. They were very poor. Their

financial condition was not good. She was aware that due to pregnancy the belly became enlarged. Her grandmother died at the age of ninety years, three years before the date of making deposition. Accused Haren was her brother being three years younger to her. She denied the allegation that they had falsely implicated Haren out of political grudge. She deposed that she had been still prosecuting her study in school. She also denied the allegation that the accused was not capable of sexual intercourse.

PW-3 (Subagi Das):

The witness was the unfortunate mother of Atosi. Two years ago, on the plea of cooking Haren called Atosi to his residence. There was none in the house save and except Haren. After about three months, Atosi reported to her about pain in her belly. She was taken to Hariharpara Hospital for treatment and thereafter to Berampore Hospital for better treatment. Five/ six months thereafter it was detected that she was pregnant. The accused Haren was her maternal uncle in-law (Mama Sasur). In cross-examination, she disclosed that at the time of deposition Atosi was a student of class nine. She denied the suggestion that Haren never called her for cooking or that Atosi never suffered any pain in her belly or that she never conceived.

PW-4 (Subrata Sarkar):

The witness was the Sub-Inspector of Police attached to Khargram Police Station. He was attached to Hariharpara Police Station on the relevant date. He received the written complaint from Kartick and registered a formal FIR.

PW-5 (Dr. B. Das):

The witness was the Medical Officer attached to Hariharpara Health Centre. He however expressed his inability to disclose anything about the case without looking into the records.

PW-6 (Dr. Biswajit Ghosh):

The witness was the doctor at Hariharpara Primary Health Centre. Atosi suffered labour pain. On January 4, 2005 she was admitted in the said Hospital. She gave birth to a male child on that date at about 11.50 p.m. The witness proved the discharge certificate which was tendered in as exhibit.

PW-7 (Ms. Sumita Bhattacharjee):

The witness was the nurse attached to Hariharpara Primary Health Centre. She corroborated Dr. S. Das being PW-6 about admission of Atosi and her subsequent delivery of a male child.

PW-8 (Dr. D. Biswas):

The witness was attached to Baharampore Sadar Hospital. The witness examined Haren and found him to be potent and capable of doing sexual intercourse.

PW-9 (Subhas Chandra Ghosh):

The witness was a clerk at B.B. Pal Vidyaniketan, Hariharpara. He produced the register recording the date of birth of Atosi as May 4, 1990. He proved the Birth Certificate issued by the then head master of the concerned school in his usual capacity. He was acquainted with the signature of the headmaster.

PW-10 (Barhan Islam):

The witness was the scribe of the complaint. He was a teacher by profession. He wrote the complaint as per the version of Kartick. He put his signature, so was Kartick. He proved the complaint that was tendered as exhibit. He denied the suggestion of having written the complaint under the influence of a political party.

PW-11 (Indrila Mukherjee):

The witness was a Judicial Magistrate. She recorded the statement made by the Atosi u/s 164 of the Criminal Procedure Code. She proved the said statement tendered as exhibit.

PW-12 (Intaj Ahamed):

The witness was the Sub-Inspector of Police attached to Islampur Police Station. He was attached to Hariharpara Police Station on the relevant date. He conducted the investigation and recorded the statements of the witnesses u/s 161 of the Criminal Procedure Code. He collected Medical Report of the victim girl as well as the accused and got the statement of the victim recorded u/s 164.

3. EXAMINATION OF THE ACCUSED:

The learned Judge examined the accused Haren u/s 313. He denied all the allegations. He also denied having been examined by the doctor. In reply to question No. 22, he stated that he was innocent, he had problems with Kartick regarding monetary issue. For that reason, he was falsely implicated in the said case.

4. JUDGMENT:

The learned Judge, upon appraisal of the evidence, ultimately came to a conclusion that the accused committed rape upon the victim and thus convicted him u/s 376 of the Indian Penal Code. The learned Judge sentenced him to suffer rigorous imprisonment for life coupled with a fine of rupees twenty-five thousand and, in default, to suffer simple imprisonment for one year. Hence, this appeal by the appellant.

5. CONTENTION OF THE ACCUSED:

Mr. Bidyut Kumar Ray Learned Counsel appearing for the appellant contended as follows:

- i) Prosecution story was highly improbable and without any basis.
- ii) Appellant was falsely implicated because of pending land dispute.
- iii) Kartick did not sign complaint. His signature differed from other signature on record.
- iv) FIR was grossly delayed and prosecution did not explain such delay.
- v) Appellant was eighty-seven years old and was not capable of committing rape.
- vi) Victim's age was in dispute. Birth Certificate was not properly proved. Entry in Admission Register was doubtful.

To elaborate his argument, Mr. Roy contended that the appellant was all along willing to offer himself for DNA test but the victim's family caused disappearance of the child. Such fact must go in favour of the appellant. He prayed for setting aside of the order of conviction and corresponding acquittal of the appellant.

6.CONTENTION OF THE PROSECUTION:

Mr. Pinaki Bhattacharjee, Learned Counsel for the prosecution contended that the victim might have concealed the incident out of fear and shame. Once she gave birth to the child the incident of rape got ample proof. He denied that the appellant had ever offered himself for DNA test or that the child had been missing. He contended that even at the appellate stage the appellant did not make any such offer specifically. He contended that the victim was a minor as would be evident from her date of birth recorded in the School Register. She categorically stated before the Magistrate that the appellant had raped her. She was consistent during trial. Her testimony inspired confidence in Court. Court relied on the same while signing on the judgment of conviction. There was no scope for interference.

Mr. Bhattacharjee relied on the following decisions to support his contentions:

- i) AIR 1992 SCC 2004 (State of Rajasthan v. Shri Narayan)
- ii) 2006 Volume-II SCC (Criminal) 1 (Dinesh Alias Buddha v. State of Rajasthan)
- iii) 2006 Volume-II SCC (Criminal) 296 (State of Himachal Pradesh v. Asha Ram)

7. OUR VIEW:

The victim was a minor. She was consistent with her statement that found corroboration from her parents. Neither the victim nor the parents could be shaken during cross-examination. The doctor who examined the victim confirmed that she had been on the family way. PW-6 (Dr. Biswajit Ghosh) attended the victim during delivery of her male child. So was PW-7 (Ms. Sumita Bhattacharjee) who assisted

PW-6 during delivery of the child. The appellant wanted to contend that because of his advanced age he was incapable of having sexual intercourse. The medical evidence foiled such attempt so came out during trial through PW-8, Dr. D. Biswas who examined the appellant. If we narrow down the scope we would find that PW-9 (Subhas Chandra Ghosh) proved that the victim was born on May 4, 1990. Hence, on the date of the incident the victim was admittedly minor. Victim made statement before PW-11 u/s 164 of the Criminal Procedure Code. She was consistent while deposing at the trial. Her parents supported her. Suggestion was put to the scribe that the complaint had been written at the behest of a political party. The scribe being PW-10 strenuously disputed such suggestion. Hence, chain of circumstance was complete. The statement of the victim inspired confidence in Court. The Court, relying on such statement having found corroboration from the parents, wrote the judgment of conviction. We do not find any scope to interfere with the same.

Mr. Bhattacharjee appearing for the State relied on the three Apex Court decisions referred to above. In the case of State of Rajasthan (Supra) the Apex Court was of the view that mere delay in filing the complaint was not sufficient to doubt prosecution version. In absence of any strong reason to falsely implicate the accused the Court should rely upon the victim's statement in a case of the like nature. In the case of Dinesh Alias Buddha (Supra) the Court was of the view, "an accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery."

8. RESULT:

We are of the opinion that the appellant does not deserve any sympathy from this Court. He has committed heinous crime by taking advantage of his relationship with the minor girl. Mr. Roy in course of his argument strenuously argued that the appellant was eighty-seven years old and it was not possible for him to commit such crime. We have discarded such contention. We however find from record that attempt was made to dispute the age of the appellant before the Court below. It was sought to be contended that he was about sixty-five years old and not eighty-seven years. Considering his age, we feel, interest of justice would sub-surve if we modify the punishment by reducing the sentence from life term to ten years rigorous imprisonment. We thus, direct that the appellant would be obliged to suffer rigorous imprisonment for ten years instead of life imprisonment as directed by the Court below.

9. DIRECTION:

Let a modified jail warrant be issued by the learned trial Judge.

The appellant is now in jail. He is directed to serve out the remaining part of his sentence as modified above.

A copy of this judgment be sent to the correctional home, where the appellant is suffering the sentence, for his information.

Let a copy of this judgment along with Lower Court Records be sent to the Court of learned Trial Judge for information and necessary action.

Appeal is disposed of accordingly.

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

Raghunath Ray, J.

10. I agree.