

(2010) 09 CAL CK 0062

Calcutta High Court

Case No: C.R.A. No. 45 of 2003

Hiren @ Hirulal Ghosh

APPELLANT

Vs

The State of West Bengal and
Others

RESPONDENT

Date of Decision: Sept. 14, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 161, 164, 164A, 376, 417

Citation: (2010) CriLJ 4795 : (2011) 7 RCR(Criminal) 1840

Hon'ble Judges: Raghunath Ray, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Santimoy Pahari and Prabir Chatterjee, for the Appellant; Minoti Gomes, for the Respondent

Final Decision: Dismissed

Judgement

Ashim Kumar Banerjee, J.

COMPLAINT:

Jamuna (not real name) aged about eighteen years lodged a complaint on December 4, 2000 with the Indpur Police Station in the District of Bankura. According to the complaint, Hirulal Ghosh, the appellant above named, promised her to marry and, on such assurance, he had sex with the complainant and as a result of which the complainant became pregnant. While she was on her family way complainant requested Hirulal to marry when he refused. As she was illiterate she took the help of one Swapan Kumar Pal who scribed the complaint.

2. CHARGE:

The learned Additional Sessions Judge, 2nd Court, Bankura framed the charge implicating Hirulal u/s 376 of the Indian Penal Code. Hirulal pleaded innocence and

opted to be tried.

3. PROSECUTION OF THE EVIDENCE :-PW-1 (victim):

She worked as the domestic help in the house of the appellant for two years. At about two years before the date of making deposition she used to stay from morning to evening and would do all domestic work including fetching of water, cleaning of utensils etc. During her working hours, one day while she was cleaning the room, the appellant got hold of her face from behind and forcibly laid her on the floor and removed her apparels. The appellant ravished her without her consent. The appellant assured Jamuna that he would marry her. However, he did not keep his promise. They had entered into sexual relationship for about ten times before she delivered a female child. She did not disclose initially this fact to any one until she delivered her child as the appellant promised her to marry. After being refused by the appellant, she disclosed the entire fact to her parents and the villagers. The appellant fled away from the village compelling her to record the complaint with the Police Station. She got herself examined by the doctor at the instance of the prosecution. Swapan Kumar Pal, the scribe was her brother in-law. She was staying ten kilometers away from her house. She lodged the complaint after village compromise had failed. She was actually fourteen years old. However mistakenly she was described eighteen years old. In cross-examination, she once again narrated the incident that was consistent with her complaint.

PW-2 (Ananta Lal Ghosh):

The witness was the father of Jamuna. The incident took place on last Baisakh (April - May of 2000). The witness came to know that Jamuna was in her family way having child in the womb for seven months. He also came to know that Hirulal was responsible for the same. The witness had three children namely Jharna, Sridam and Jamuna. Jamuna was the youngest, aged about fifteen years. The witness informed his elder brother and started searching the whereabouts of Hirulal who was not available in his house. Villagers held a village compromise where Hirulal was not present. Hence, no final decision could be taken. When village compromise failed he lodged complaint with the Police Station through his daughter. On 26th Pous (November-December, 2000) Jamuna gave birth to a female child. In cross-examination, the witness explained the delay in lodging the FIR. According to him, he was waiting for the village compromise.

PW3 (Puspa Ghosh):

This witness was the mother of Jamuna. She deposed that when Jamuna was on her family way for having seven month's pregnancy she disclosed to her that with the promise of marriage Hirulal cohabited with Jamuna as a result she conceived. Hirulal, however, did not keep his promise, as a result they had no option to inform the Police as Hirulal was absconding and villagers advised them to do so.

PW-4 (Swapan Kr. Paul):

This witness was the brother in-law (husband of cousin) of Jamuna. On December 24, 2000 witness went to Police Station along with Jamuna and others. He scribed the complaint. The complaint was written as per the instruction of Jamuna. Jamuna put her Left Thumb Impression. He deposed that Hirulal was present in village compromise, however denied the charge.

PW-5 (Krishna Pada Ghosh):

This witness was the uncle of Jamuna as well as the accused Hirulal. The witness came to know from PW-2 that Jamuna became pregnant and she was carrying seven month's child in the womb. He also came to know that Hirulal forcibly raped her. Hirulal's family refused to accept the liability. The village compromise failed. In village compromise Jamuna narrated the incident. Jamuna gave birth to a female child in the Hospital. In cross-examination the witness admitted to have stated before the Police that he came to know of the incident in December. He, however, did not disclose that he came to know of the incident from PW-2. He also did not state to the Police that he tried to compromise by calling the accused family.

PW-6 (Tarapada Ghosh):

According to the Public Prosecutor the witness was gained over and, as such, he was discharged without examination.

PW-7 (Laxman Ghosh):

This witness was also gained over.

PW-8 (Smt. Sabitri Ghosh):

Sabitri was a neighbour. According to her, Jamuna used to work as a maid servant in the house of Hirulal. One day Hirulal forcibly cohabited with Jamuna for which Jamuna conceived and ultimately delivered a female child who was aged about one year four months old at the time of trial. In cross-examination, she admitted that Jamuna had a relationship with Hirulal.

PW-9 (Shiba Prasad Singha):

This witness was the Sub-Inspector posted at Taldangra Police Station. On December 24, 2001 he received a written complaint and registered the formal FIR u/s 493 read with Section 376 at the Indian Penal Code as against Hirulal. He visited the place of occurrence and prepared a rough sketch map with index. He examined the victim girl u/s 161 and produced her before the learned Magistrate to record her statement u/s 164. He examined independent witnesses like Tarapada and Laxman. He examined Smt. Puspabala Ghosh who stated to him that Jamuna had disclosed that she had not been keeping well. She was taken to a Homoeopath who declared that she was in her family way.

PW-10 (Dr. Dipankar Guha Ray):

This witness was the Associate Professor in Bankura Sanmiloni Medical College and Hospital. He examined Hirulal and found him potent. Hirulal was aged about twenty-four/twenty-five years.

PW-11 (Dr. Mrs. Subrata Kundu):

This witness was the Demonstrator in Bankura Sanmiloni Medical College. She examined Jamuna who was found to be pregnant. Jamuna was habituated with sexual intercourse.

4. EXAMINATION OF THE ACCUSED:

The learned Judge examined Hirulal alias Hiren and placed all incriminating evidence that came out during trial as against the accused being the appellant above named. The appellant in answer to question No. 3 stated that Jamuna was not a maid servant in their house. He also denied having fled away from the village. In reply to question No. 7 he, however, admitted that he had gone away for about four days. He knew that Jamuna gave birth to a child, however denied any relationship. Jamuna's house was three houses away from the house of the accused. The accused also admitted in reply to question No. 17 that he was present in village arbitration and thereafter ran away from the village out of fear of getting physically assaulted. Hiren @ Hirulal denied the other allegations.

5. JUDGMENT:

Examining the evidence that came out during trial the learned Judge held Hiren @ Hirulal Ghosh guilty of the offence u/s 376. However, the accused was acquitted from the charge brought against him u/s 417 of the Indian Penal Code. The learned Judge imposed a sentence of ten years rigorous imprisonment coupled with a fine of Rs. 10,000/- and in default to suffer one year simple imprisonment. Hence, this appeal by the accused.

6. CONTENTION OF THE APPELLANT:

Mr. Santimoy Pahari appearing for the appellant contended as follows :

- i) No corroborative evidence came out during trial to support the prosecution story that Jamuna was working as a maid in the house of the appellant.
- ii) The villagers did not support the prosecution story.
- iii) The victim's age was in dispute. She was major and was in a position to consent.
- iv) There had been unusual delay in lodging the complaint. Such delay was not explained.
- v) Only when the victim conceived she lodged the complaint and not before.

vi) Taking a sum total of the evidence it was clear that even if the incident could be said to have been proved the same could not attract the mischief of Section 376 as the victim was a major one who did not protest contemporaneously meaning thereby she was a consenting party.

vii) The recording of the statement u/s 164 was not properly done as per Section 164-A and as such could not be relied upon.

In support of his contention Mr. Pahari relied on the Apex Court decision in the case of Vijayan v. State of Kerala reported in 2008 XIV SCC 763.

7. CONTENTION OF THE PROSECUTION:

Ms. Minoti Gomes, learned Counsel appearing for the prosecution contended that the victim was a minor and as such question of giving consent or waiving her right to object, did not and could not arise in absence of ocular evidence from the eye-witnesses. The statement of the victim must be taken as sacrosanct as it inspired the confidence of Court. Ms. Gomes prayed for dismissal of the appeal.

8. REPLY:

Mr. Pahari reiterated what he had submitted earlier, in addition he contended that whether the victim was a minor or not, was highly disputed. Such dispute was not resolved through any scientific process. He reiterated that the victim was a consenting party as would be evident from the evidence. He prayed for acquittal of the appellant.

9. OUR VIEW:

If we analyse the entire evidence we would find that there is no discrepancy or anomaly in the prosecution evidence. There is nothing on record to guide us to disbelieve the victim. The victim being an unmarried girl coming from economically depressed family would hardly venture to put her chastity on peril to accuse the appellant. Neither anything came out in evidence nor any suggestion was put indicating previous enmity between the appellant and the victim. We unhesitatingly opine that the victim's statement has inspired confidence in us and we prefer to believe her what she narrated. There is one more significant factor. During examination u/s 313 of the Criminal Procedure Code the appellant admitted that there had been a village compromise and out of fear he had fled away. That would rather strengthen our confidence in the victim's statement. In case of rape, there would be hardly any eye-witness. Hence, to decide a case u/s 376 and to punish the wrong doers the Court must rely on the statement of the victim after judging its veracity. We are a part of the society. In our Indian culture and heritage it is hard to believe that an unmarried girl would unnecessarily accuse a man having committed such heinous offence putting her chastity on peril and that too, without having any inimical background. In case of rape, the departure from the usual rule of a criminal trial is permissible to such extent. Otherwise the Court of law would not be in a

position to decide a case brought u/s 376 or of the like nature. The learned Judge, in our view, approached the problem in the right direction. His judgment is well-reasoned and accurate. We would be failing in our duty, if we do not record one more significant factor. In course of hearing, we enquired from Mr. Pahari that to prove his innocence whether he was prepared to go for a DNA test. Matter was adjourned by us to enable Mr. Pahari to take appropriate instruction. On the next adjourned date, Mr. Pahari expressed his inability to get any positive instruction on that score. This would also strengthen our stand as discussed above.

10. RESULT:

The appeal fails and is hereby dismissed.

11. DIRECTION:

The appellant is now in jail. He is directed to serve out the remaining part of his sentence as imposed by the learned Trial Judge.

A copy of this judgment be sent to the correctional home, where the appellant is suffering their 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.

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

Raghunath Ray, J.

I agree.