

(2010) 08 CAL CK 0092

Calcutta High Court

Case No: CRR No. 4070 of 2006

Mrs. Sandha Saha

APPELLANT

Vs

Uttam Biswas and Another

RESPONDENT

Date of Decision: Aug. 9, 2010**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 401, 482
- Penal Code, 1860 (IPC) - Section 376, 415, 417

Hon'ble Judges: Kalidas Mukherjee, J**Bench:** Single Bench**Advocate:** Ranjit Kumar Ghosal, for the Appellant; Swapan Kumar Mallick, for State, for the Respondent**Final Decision:** Dismissed

Judgement

Kalidas Mukherjee, J.

This is application u/s 401/482 Cr.P.C. is directed against the judgment and order of acquittal passed by learned Assistant Sessions Judge, 2nd Court, Krishnanagar, Nadia in Sessions case No. 95(9) of 2005 corresponding to Sessions Trial No. V (December) 2005 whereby the accused person was acquitted of the charge u/s 376 I.P.C.

2. The case of the prosecution, in short, is that the victim girl lodged the F.I.R. alleging that she was aged about 16/17 years and the accused Uttam Biswas, a co-villager, cohabited with her on the promise of marriage. The victim conceived, and the accused caused her abortion. Ultimately the accused refused to marry her. After completion of investigation charge sheet was submitted. The charge was framed u/s 376 I.P.C. to which the accused person pleaded not guilty and claimed to be tried.

3. The learned Trial Judge recorded an order of acquittal holding that the victim girl had sexual intercourse with the accused person for one year. It was held that the

prosecution could not prove that at the time of incident the victim girl was under 16 years of age. The learned Trial Judge held that the evidence adduced by the prosecution in support of the charge was not sufficient to warrant conviction of the accused.

4. Mr. Ghosal appearing for the petitioner submits that the finding of the learned Trial Judge regarding the age of the victim girl was erroneous. It is contended that there was promise of marriage and thereafter the accused made sexual intercourse with the victim. It is submitted that the learned Trial Judge was not justified in not relying on the evidence of the witnesses who are relatives of the victim. It is contended that the assurance of marriage given by the accused was false.

5. Mr. Ghosal has referred to and cited the decisions reported in 2004 Cri.L.J. 3913 [Lakshmana Naik v. State of Karnataka] and 1996 SCC (Cri) 316 [State of Punjab v. Gurmit Singh and Ors.].

6. Mr. Mallick appearing for the State submits that State did not prefer appeal against the impugned judgment of acquittal. It is submitted that from the evidence on record it would appear that the victim was not a minor and P.W. 9 i.e. the doctor has specifically stated that the victim girl was aged 20 years. Mr. Mallick submits that there is no evidence that the victim girl was under 16 years of age. Mr. Mallick submits that from the evidence of P.W. 4, P.W. 5, P.W. 6 and P.W. 9 it would appear that alleged rape was not proved. It is contended that there is no evidence to show the consent was obtained in a deceitful manner. It is submitted that the victim girl knew that the accused was married having wife and children. Mr. Mallick contends that there is no scope of re-appreciation of evidence and there is no scope of interference with the order of acquittal.

7. P.W. 1, P.W. 2, P.W. 3 were declared hostile.

8. P.W. 4 is the victim girl. She has stated that the accused used to live in their house and she had love affairs with him; the accused used to make sexual intercourse with her as a result of which she became pregnant; accused person took her to Hanskhali Hospital and caused abortion. She has stated that the accused assured her to marry, but, ultimately she refused to marry her. In the cross-examination she has stated that accused Uttam is a married person having wife, one son and one daughter. In the cross-examination she has further stated that Uttam is staying in his house with his father, mother, wife and children.

9. P.W. 5 is the father of the victim girl. In the cross-examination he could not say about the activity of her daughter. He has also stated that he did not know anything regarding this case.

10. P.W. 6 is the mother of the victim. She has stated that there was love affairs between her daughter and the accused; Uttam used to come to her house to teach her sons and daughter as a private tutor; accused Uttam assured her daughter to

marry, but, subsequently refused; the accused caused the abortion of her daughter. P.W. 6 has also stated that accused Uttam lived in her house for a period of one year and during those days he mixed freely with her daughter and made sexual intercourse with her.

11. P.W. 7 has stated that accused was the private tutor and he developed love affairs with the victim; the accused used to sleep in the same bed with the victim; the accused aborted the foetus of the victim twice.

12. P.W. 9 is a doctor who examined the victim girl. He has stated that victim was aged about 20 years as mentioned in his report.

13. The I.O. P.W. 11 has stated that the victim girl did not disclose to him regarding her abortion and he did not make any investigation regarding abortion of the victim lady.

14. In the case of *State of Punjab v. Gurmit Singh and Ors.* (Supra) it was held that in case of evidence of a victim of sexual assault, corroboration is not necessary and conviction can be founded on her testimony alone unless there are compelling reasons for seeking corroboration.

15. In the case of *Lakshmana Naik v. State of Karnataka* (Supra) it was held that the prosecutrix was induced by the accused to have sex with him on a ward being given by him that he will marry her and on such a promise the accused took advantage of the situation but did not marry her and it is within the ingredient of Section 415 I.P.C. In that case the accused was acquitted of the charge u/s 376 but convicted u/s 417 I.P.C.

16. In the instant case it has been alleged in the complaint that the victim was aged 16/17 years. No ossification test was done. No school certificate was produced in support of the age of the victim girl. From the medical report (Ext. 2) it appears that the age of the victim girl was 20 years as noted by the Doctor (P.W. 9).

17. Considering the circumstances, I find that there is no ground to interfere with the finding of the learned Trial Judge that the prosecution failed to prove by adducing cogent evidence that the victim girl was below 16 years age on the date of incident.

18. From the evidence of the victim girl it appears that she had developed love affairs with the accused and used to cohabit with him, as a result of which she became pregnant. There was, therefore, cohabitation preceded by love affairs. It is in her evidence that the accused took her to Hanskhali Hospital and aborted her foetus there. Thereafter she stated that Uttam assured her to marry, but, ultimately he refused to marry her. In the F.I.R. also it has been stated that she had cohabitation with the accused for about one year on the promise of marriage. It is in the evidence of P.W. 4 that she was aware of the fact that the accused was a married person having wife and children. From the evidence it is clear that she is a full grown

girl and consciously cohabited with the accused knowing that he is a married person having wife and children. There is no evidence to the effect that the promise of marriage was given by the accused from the very beginning and that it was known to the accused to be false. The decisions cited by Mr. Ghosal would not come in the aid of his contention raised in this application. It appears that the learned Trial Judge considered all the points on the basis of the materials on record. It cannot be said that the finding of the learned Trial Judge was perverse. It cannot also be said that there was gross illegality or miscarriage of justice. Such being the position I find that there is no ground to interfere with the judgment of acquittal recorded by the learned Trial Judge.

19. The application u/s 401/482 Cr.P.C. stands dismissed.

20. Let a copy of this order along with the L.C.R. be sent to the learned Court below immediately.

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