

**(2006) 09 CAL CK 0062**

**Calcutta High Court**

**Case No:** C.R.A. No. 229 of 2001

Kamal Mondal and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Sept. 8, 2006

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 164
- Penal Code, 1860 (IPC) - Section 34, 375, 376

**Citation:** (2007) 2 CHN 87

**Hon'ble Judges:** Pravendu Narayan Sinha, J; Partha Sakha Datta, J

**Bench:** Division Bench

**Advocate:** Debabrata Dhar, Ranendra Nath Biswas and P. Roy, for the Appellant; Parul Banerjee, Swapan Kumar Mullick and P. Satpathi, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Partha Sakha Datta, J.

By this appeal the three appellants assail the judgment and order dated 30.11.2000 passed by the learned Assistant Sessions Judge, 1st Court, Alipore whereby they were convicted u/s 376 IPC read with Section 34 IPC and sentenced to suffer rigorous imprisonment for 10 years each and a fine of Rs. 1,000/- each in default to suffer rigorous imprisonment for another six months each.

2. The victim's mother Bakuli Begum lodged a complaint with the O.C., Bishnupur P.S. at 10.25 hours on 2.7.1998 alleging that at 8.30 p.m. on 26.06.1998 when her daughter, the victim was coming back from the grocery shop the three appellants took her to an empty room after putting a cloth into her mouth whereupon the three raped her daughter one after another and carried on physical tortures on her throughout the night. She had been in search of her daughter in the night of 26.06.1998 itself and it was at 6 a.m. in the following morning (27.06.1998) when one Milan Bag told her that a girl was lying in a room beside his room she went there

and found her daughter lying naked, unconscious and bleeding. After some basic treatment she regained her senses whereafter she narrated the incident to her. The victim was then taken to police station when bleeding was still coming out and she was shouting out of pain. On this written complaint Bishnupur P.S. Case No. 185 dated 2.7.1998 was registered u/s 376/34 IPC and chargesheet was submitted against them under the aforesaid section of the law and the learned Trial Court, as said above found them guilty of the charge and passed the aforesaid sentence.

3. The victim's mother Bakuli Begum who is the P.W.2 in this case says in her evidence that at 10 p.m. accused Kamal called her daughter from the shop of her aunt (Pishi) on the pretext that her mother (P.W.2) had been calling her, and when the victim came out Kamal pressed her mouth by handkerchief and took her to a vacant house of one Allahadi and then the appellants Bapi Mondal, Kallo Sk. and Kamal Mondal raped her daughter. Though she had searched for her daughter in the night she could not find her and in the next morning Milan Bag informed her that her daughter had been sleeping in his house being unconscious. In the evening she narrated the incident to the police station and from the police station she was taken to hospital where she had remained admitted and thereafter she lodged complaint. P.W.3 Sk. Sahabuddin is the father of the victim and the husband of P.W.2. He says that his wife told him that she could not trace out her daughter and as it was midnight all slept and in the following morning his daughter was taken to police station while she was without senses and informed the police of the incident. His daughter stated to him the names of the accused persons who, as narrated by his daughter, took her to the house of Allahadi after pressing her mouth and did "bad" work with her. In his examination-in-chief it has further transpired that two days before his daughter was discharged from the hospital she narrated to him about the incident. The cross-examination of this witness has been too cryptic since it is confined only to the suggestion that he did not state to the I.O. that he came to know the names of the accused persons from his daughter two days prior to her discharge from the hospital and that he did not state to the I.O. that the accused persons took his daughter to the house of Allahadi and raped her. P.W.4 is Allahadi Mondal and the landlady of the house where the incident took place. Police according to her took her to that house where the incident had taken place concerning the daughter of P.W.1 and P.W.2 and after going there she saw pool of blood with victim lying unconscious and naked in a nearby hut. Cross-examination of this witness also has been short in this that she was simply suggested that she did not see the pool of blood with the victim in a nearby hut in an unconscious state and that she did not state to the I.O. that the police took her to her house so as to see the victim in a nearby hut. The first suggestion she denied, while affirming the second suggestion. P.W.5 Smt. Kajal Singh is a very important witness because, according to her, the victim came to her house to see TV. When accused Kamal came there and asked the victim to go home as her mother was calling the victim came out on being despatched by P.W.5. One hour after P.W.2 came to her house in

search of the victim when she stated to P.W.2 that the victim had gone with Kamal. P.W.2 continued to search for her daughter and in the morning she heard hue and cry and she found the victim in the house of Milan Bag where she was lying in an unconscious state. She has said that after the victim regained senses she told her that the accused persons had raped her. A bundle of suggestions like she did not state to I.O. that in the morning she heard that the victim had been raped in the house of Milan Bag and that she lay unconscious, or that she did not state to I.O. that mother of the victim did not come to her house in search of the victim or that she did not state to I.O. that she would work as prostitute at Bagirhat prostitute's quarters or that she stated to the I.O. that in the morning at 6 a.m. she received an information that the victim was lying in the prostitute's quarters was put to P.W.5. The witness denied all the negative suggestions and admitted the further suggestion that she stated to the I.O. that on hearing the news she along with the parents of the victim had been to the quarters of the prostitute and found the victim lying naked. P.W.9 is the victim who says that when she was watching the T.V. in the house of her aunt (P.W.5), Kamal came there and told that her mother had been calling her. P.W.5 asked her to go with Kamal and when she was passing along a lane after coming out of the house of P.W.5 Kamal closed her mouth by a handkerchief, Bapi took her to a vacant house where she found a light and accused Kallo Sk. standing there. As she entered into the house accused Kallo Sk. showed a knife, Bapi caught hold of her and pressed her mouth and laid her on the cot and then Kamal, Bapi and Kallo Sk. raped her. She saw a black bottle there. The bottle looked like distilled water which Kallo forced her to drink as a result of which she lost senses. On the next morning at 7 a.m. when she regained her senses she found herself in the room of Milan Bag. In one part of the cross-examination it was suggested to her that she indulged herself in the trade of flesh which she denied forthwith. A piece of statement of her that she opened her clothes and there took place intermingling of bodies has been capitalized by the defence to argue that it was not a case of rape, although, at same time, the defence put forward the suggestion that no incident had at all taken place. However, it has appeared from her cross-examination that there are 40/50 quarters of the prostitutes in the area at Bagirhat under Bishnupur P.S. and around the vacant house where she was taken to there were 4/5 other houses.

4. The above is the evidence of P.W.2, P.W.3, P.W.4, P.W.5 and P.W.9 who are material witnesses to the incident. About medical evidence there is Dr. Debashis Bhattacharjee (P.W.6), a Radiologist of Bangur Hospital who upon medical examination of the victim on 6.8.1998 came to the opinion that at the material time the age of the victim was between 15 and 17 years. P.W.7 is Dr. Shila Kayal who examined the victim on 27.06.1998, found no external injury. This witness has stated in her examination-in-chief that the victim stated to her that all the accused persons took her to a house from the house of her "pishi" and raped her. In cross-examination it has been extracted from her that external injuries are expected

in respect of gang rape and she did not find any rupture of vagina during the examination of the victim. Evidence of P.W.8 Dr. P.B. Das, the Superintendent of Police case hospital and A.C.M.O.H., Medico-legal who examined the victim on 20.07.1998 found "abrasion over upper part, right breast, reddish in colour, measuring 1/4" x 1/4", vulva- blackish, partly expressed, hymen rupture (old), vagina--two fingers loose, labia majora and minora more or less in close opposition and there was evidence of sexual intercourse although no foreign body was found". P.W.8 further examined three accused persons and found them capable of making sexual intercourse. P.W.10 Ganesh Ch. Roy, A.S.I, of Police drew up a formal FIR (Ext. 6) and P.W.11 Haradhan Saha is the I.O. of the case.

5. Having recorded the sum total evidence of the witnesses let us proceed to have a critical appreciation thereof so as to ascertain whether the three appellants committed rape upon the victim on the night of 26.06.1998. The place of occurrence is unquestionably a hut or a vacant room belonging to Milan Bag attached to the house of P.W.4. The entire area around the house or the hut where the incident took place is a prostitute colony of 40/50 persons at Bagirhat under Bishnupur P.S. P.W.2, P.W.3, P.W.4 and P.W.5 all reside within the locality of or precincts of the of the prostitute colony and though denied by P.W.2 it is the defence suggestion that P.W.2 is a prostitute and the victim also was indulged in the trade of flesh. Both the P.W.2 and the victim have denied the suggestion and it can be fairly stated that we have no amount of evidence of legal character to hold that they have been carrying on business of flesh and trial of three appellants u/s 376 IPC has no bearing with the suggestion of the defence. Now the essence of evidence of P.W.2, P.W.3, P.W.4, P.W.5 and P.W.9 is that in the night of 28.06.1998 at 8 p.m. when the victim had come to house of P.W.5 to see T.V. accused Kamal came there and called her out on the pretext that P.W.2 had been summoning the victim. As the victim says, when she had come out and was passing along a lane where nobody moves Kamal closed her mouth by handkerchief and taken her to a empty room where Bapi and Kallo were there, and there she was laid on a cot whereafter at the point of knife held out by the accused Kalio Sk. she was raped by all accused persons one after another. P.W.2 had searched for her daughter but could not find her out and in the following morning Milan Bag told her that a girl like her daughter was in a room by the side of his house. P.W.2 went there. Other witnesses also came there. There was hue and cry, the victim was found senseless, naked with pool of blood. She was nursed and taken to police station wherefrom she was taken to hospital for medical treatment.

6. With the evidence as above the question is whether the prosecution case can be said to have been proved in the midst a volley of questions raised by the defence challenging the veracity of the evidence of the witnesses because of alleged certain inherent contradictions and lapses which according to the defence could not be accounted for by the prosecution. But before we enter into the points raised by the defence it shall be made clear that unquestionably the victim was minor at the time of the incident. The radiological examination conducted by Dr. Debashis

Bhattacharjee, P.W.6 showed that the age of the victim was on 06.08.1998 (date of the incident being 26.06.1998) between 15/17 years old. The doctor denies the defence suggestion saying "I do not admit the suggestion that the age of the victim was more than 20 years at the time of examination". In fact there was no cross-examination on the point. P.W.2 and P.W.3 who are the parents of the victim were not suggested at all that the victim was not minor. Therefore, we are left with no alternative than to accept the evidence of P.W.8 that at the time of the incident the victim was a minor. Consequently, the suggestion of the defence in cross-examination of P.W.9 that she indulged herself in having sexual intercourse with the accused persons or that she enjoyed the night with them is of no consequence in view of the minor's alleged consent which, in fact, has not been here is not the consent recognizable in the law.

7. The first attack against the prosecution case is with the aid of P.W.7 Dr. Shila Kayal who said in evidence that there was no external injuries found and that vagina was not found ruptured and according to this doctor in a gang rape external injuries were expected. Therefore, according to Mr. Debabrata Dhar, learned Advocate appearing for the appellants the story of rape allegedly having been committed upon the victim in the night of 26.06.1998 is an untrue one and if any incident had at all taken place it was a volitional act of the victim instigated by her mother. Now, the incident took place on the night of 26.06.1998 and P.W.7 examined the victim at Amtala rural hospital, as we find from Exhibit 2 at 10.30 p.m. on 27.06.1998 at the first instance, and then on 29.6.1998. Though P.W.7 said in her evidence that there was no external injury, in the injury report (Ext.2a) there is a column of injury below which she has written that on examination she found tenderness over both breasts, bleeding per vagina and tenderness into vagina and prescribed certain medicines with advice that patient should be taken to Calcutta Medical College and Hospital for further management and treatment. In the outdoor slip (Ext.2) though the words "no injury" were written it was yet recorded that she found scratch mark, bruises, biting over chest, breasts, lips, hands, thigh, perineum and labia majora and tenderness on both breasts and the victim was bleeding which are clearly supportive of the evidence of P.W.9 who had disclosed the incident to her parents who are P.W.2 and P.W.3. P.W.7 as per Exhibit 2 again examined the victim on 29.06.1998 and on that day she prescribed certain medicines. P.W.7 has said in her evidence that the victim stated to her that all the accused persons took her to a house from the house of her aunt and she was raped. Now, though in the injury report [Ext.2(a)] there is no specific recording of the victim having told P.W.7 about her being raped by the appellants it has been recorded there as per version of the patient (P.W.9) when she was watching the T.V. the appellant Kamal Mondal called her out and when she came out all the three accused persons tied her mouth by a handkerchief and carried her into a house. This has been recorded in the injury report dated 27.06.1998. This narration of the victim made to P.W.7 on the day following the night of commission of rape clearly makes out the fact that even

though the FIR was a delayed one such delay does not tend to be fatal in view of the fact that evidence of the victim concerning the rape committed upon her gets support from P.W.7 and P.W.8. Secondly, with respect to the rupture of vagina, evidence of P.W.7 appears to have been contradicted by a senior doctor P.W.8 who says in his evidence that apart from abrasion over upper part, right breast reddish in colour measuring 1/4" x 1/4" there was rupture of the hymen and there was evidence of sexual intercourse. Let it be taken note of the fact that P.W.7 examined the victim on 27.06.1998, i.e., the day following the date of the incident when she found tenderness in vagina and bleeding in vagina, tenderness over both breasts and scratch mark, marks and bruises and biting over chest, breast, thigh, perineum, labia majora, while P.W.8 who examined the victim on 20.07.1998 still found abrasion over upper part and right breast measuring 1/4" x 1/4" with old rupture of hymen and the doctor came to the opinion that it evidenced sexual intercourse. Dr. Jhala & Kumar in their treatise "Jhala's Medical Jurisprudence" have held at page 510 that next to hymen in positive importance but more than that in frequency are the injuries on labia majora which are first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. In the authority we find that in case of minor girl where examination of hymen may not always prove useful, examination of labia majora gives conclusive evidence. In the instant case P.W.7 has clearly recorded in the injury report that there was bleeding in vagina, tenderness into the vagina and bruises in the labia majora. Therefore given a conjoined look at the evidence of P.W.7 and P.W.8 vis-a-vis the evidence of P.W.9 it cannot be said that no incident of rape had taken place in the night of 26.06.1998. There is, therefore, clinching evidence of the three accused persons having committed rape upon the minor girl at the time, the place and in the manner as stated by P.W.2.

8. The question raised was why the FIR was lodged on 2.7.1998 when occurrence took place on the night of 26.06.1998 with no plausible explanation of delay. The mother of the victim P.W.2 has said in her evidence that after discharge of the victim from the hospital she lodged the complaint. Be that as it may, though the FIR was delayedly lodged it cannot be said that a manufactured story was got up to implicate the accused persons falsely firstly on the ground that there is no previous enmity between the accused persons and the victim or the victim's family, secondly before P.W.7 the victim narrated a part of the incident namely how she was taken forcibly by the accused persons to a vacant house, thirdly, both P.W.7 and P.W.8 found abrasion, bruises, scratch marks of a certain measurement on breasts which were tendered, thighs, chest, lips, perineum and labia majora with rupture of hymen which all are clearly corroborative of the evidence of P.W.9, fourthly, on 27.06.1998 the victim was taken to police station by P.W.2 and P.W.3 as we have evidence of them and from police station she was referred to hospital although on 27.06.1998 no complaint was lodged. Last but not least, since this is a case of rape it is common knowledge that the parents of the victim usually make deliberation to decide

whether to lodge complaint or not having regard to many reasons therefore but such delay has not become fatal to the prosecution case. In Karnel Singh's case as reported in 1995 SCC 977, there was considerable delay in filing the FIR. The Hon'ble Supreme Court negated the contention of the defence that the prosecutrix was tutored and held that --

the submission overlooks the fact that in India women are slow and hesitant to complain such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false.

9. Reasonably, it can be said that the factum of rape was attempted to be suppressed before P.W.7 by the victim. Telling P.W.7 half of the story by suppressing the factum of rape, medical evidence of P.W.7 and P.W.8 corroborating the substantive evidence of P.W.9, P.W.5 witnessing the appellant Kamal taking away the victim from her house on a false pretext, tracing out the victim unconscious in a pool of blood and naked--unmistakably point to the fact that profuse bleeding was on account of violent sexual intercourse committed by the appellants and secondly that there was initial hesitancy to disclose the matter which as said above was not unnatural in a family but which cannot be attributed to desire to rope in the appellants falsely after consultation; and the consequential delay in lodging the complaint is attributable to these circumstances.

10. It was, submitted by Mr. Dhar that though the victim says in her evidence in cross-examination that she made a statement before the learned Magistrate no such statement u/s 164 Cr. PC is found to have been admitted in evidence by the prosecution. Mr. Mallick, learned Advocate appearing for the State submits that after ransacking the Magistrate's record there is found a copy of the statement u/s 164 Cr. PC corroborative of the evidence of P.W.9 but for reasons unknown the original statement has not been admitted in evidence in the Trial Court. We find from the record that on 3.7.1998 one learned Judicial Magistrate recorded the statement of the victim u/s 164 Cr. PC. It appears that the prosecution was negligent and not diligent in drawing the attention of the learned Trial Judge to the statement of the victim u/s 164 Cr. PC on 3.7.1998 before the learned Magistrate of Alipore. Be that as it may, the statement on oath of the victim being it a primary evidence does not require corroboration u/s 164 Cr. PC as the victim admittedly has not resiled from the prosecution case and more particularly from her statement u/s 161 Cr. PC.

11. The point was raised as to in whose house or hut--in the hut of Milan Bag or in the hut of Allahadi the victim was found unconscious in the early morning of 27.06.1998. Now, this confusion can be set at rest with the aid of evidence of the

witnesses and the FIR to the effect that the victim was found unconscious near the house of Milan Bag and it was Milan, who informed P.W.1 that the victim was lying unconscious near his house. The matter of the fact is, as we find from evidence of the witnesses, that in a congested locality at Bagirhat which is a colony of the prostitutes there are 50/60 houses and there is in fact no large difference having considered the totality of evidence of the witnesses between the house of Milan and that of Allahadi.

12. It was argued that the victim made no attempt to resist. This can be easily explained away by the situation which the victim was confronted with. She was forcibly taken to the vacant room in the night by the three accused persons at the point of threat and she was forced to succumb to the pressure of the three accused appellants.

13. It was argued by the learned Advocate for the appellants that the FIR was not proved. P.W.2 is an illiterate lady. The FIR was scribed by one Amit Ghosh of Bagirhat and the I.O. did not take pain to cite Amit Ghosh, scribe of the complaint and the learned Magistrate who recorded the statement of the victim u/s 164 Cr. PC as witness in the chargesheet. The result is that they could not be examined. Nonetheless, a written complaint which is not a piece of evidence is only for the purpose of extracting corroboration and contradiction between the FIR and the substantive evidence of the witnesses and that purpose has been fully utilised by the learned Defence Counsel in the learned Trial Court in course of cross-examination of the witnesses. Therefore, non-formal proof of the FIR u/s 154 of the Cr. PC does not demolish a case of the prosecution which is otherwise well-proved. As the defence has not been debarred from using the FIR for the purpose of corroboration and contradiction the FIR not being formally proved is of no consequence. No doubt, there are some contradictions between the statement of the victim on oath and the statement she had made u/s 161 Cr. PC. But those contradictions are not major ones. It is submitted that the victim did not tell the I.O. that she had been to her aunt's house when accused Kamal called her, that Bapi took her to a vacant house, that Kallo Sk. was standing with knife, that first Kamal raped her, then Bapi raped her and then Kallo raped her. It is not that, as the learned Advocate for the State submits, the victim did not tell the I.O. as to her being raped. In the circumstances who first committed rape, who was the second rapist and who was the third rapist might not have been told serially before the I.O. but that does not signify that there was no incident of commission of rape. The matter of the fact is that the victim, a minor girl suffered such a trauma that she could not be expected to furnish a vivid unerring account of the incident in its true sequence minute by minute. By putting suggestion to the victim that she had enjoyed the night by mutual "scuffle the defence has admitted the happening of the incident which cannot be termed otherwise than a rape within the meaning of Section 375 of the IPC.



14. Thus, having regard to the facts and circumstances of the case as well as evidence on record, we are clearly of the opinion that the charge u/s 376/34 IPC was proved without any amount of doubt.

15. Learned Trial Court has upon proper appreciation of evidence found the appellants guilty of the offence quite reasonably and justifiably and we find no merit in the appeal. It is a case where a minor girl was ravished by three young persons in a most heinous way when the girl was quite helpless in the night to get herself rescued from their clutches. Situated thus, the appeal fails and is dismissed. We confirm the judgment and order of the learned Trial Court.

16. Let a copy of this judgment along with the L.C.R. be sent down to the learned Lower Court immediately.