

(2011) 01 CAL CK 0064

Calcutta High Court

Case No: C.A. No. 84 of 1992

Sekhar Naskar

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision: Jan. 11, 2011**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313, 428
- Evidence Act, 1872 - Section 6
- Penal Code, 1860 (IPC) - Section 376

Citation: (2011) 2 CALLT 22**Hon'ble Judges:** Raghunath Ray, J; Girish Chandra Gupta, J**Bench:** Division Bench**Advocate:** Subir Chowdhury and Tapas Kumar Dey, for the Appellant; Minoti Gomes, for the Respondent

Judgement

Girish Chandra Gupta, J.

The subject matter of challenge in this appeal is a judgment and order dated 18th February, 1992, by which the learned Additional Sessions Judge, 9th Court, Alipore, convicted the Appellant, Sekhar Naskar, for an offence u/s 376 of the Indian Penal Code, and by his order dated 21st February 1992, he sentenced him to suffer rigorous imprisonment for a period of eight years subject to allowance u/s 428 of the Code of Criminal Procedure and also to pay fine of Rs. 2000/-, in default of payment of fine to suffer further rigorous imprisonment for a period of two years.

2. Briefly stated the facts and circumstances of the case are that the prosecutrix, a mentally retarded young woman abandoned by her husband, was living with her mother. She on 9th June, 1988, at about 7 a.m. in the morning went to the place of occurrence for the purpose of collecting Babla fruits in order to make provision for goats. The place was lonely. The accused Appellant took the fullest opportunity. He embraced the prosecutrix and forcibly laid her down on the muddy earth and raped

her. She tried to resist and also raised a hue and cry when her mouth was gagged by a piece of cloth. She came back home weeping. On her way back, some of the witnesses had met her. She narrated the incident to them. Thereafter, attempt was made for a mutual settlement which did not yield any fruitful result. It is in evidence that in the assembly of the villagers where a salish was sought to be held, the accused was trying to hide. The prosecutrix traced him out and slapped on his face. The accused retaliated and also slapped on the face of the victim. Since no settlement was possible, the matter was reported to the police by 4 p.m. on 9th June, 1988.

3. At the trial, eighteen witnesses were examined. The learned trial Judge, who had the opportunity of watching demeanour, recorded in the deposition of the victim, dated 14th May, 1992. that "the witness appeared to be half idiot".

4. The de facto complainant, mother of the victim, was examined as the P.W.1. From her evidence it appears that the victim was a mentally retarded woman and had on that account been abandoned by her husband. She narrated the story which was relayed to her by the victim herself.

5. The P.W.2, Prasata Halder, had met the victim on her way back to home. He found her wearing apparels stained with mud. The victim was accompanied by Maya and Sunil, who had already met her on the way to home and had been informed about the misery which had befallen her. Maya told the P.W.2, Prosanto Halder, that the victim had been raped by the accused.

6. The P.W.3 is the victim herself. She narrated the incident. During cross-examination, she deposed that when she raised alarm, the accused gagged her mouth by a piece of cloth. After the rape was over and the victim was released and the accused took to his heels, the first person, who appeared at the scene, was Sunil Parui (P.W. 11). He deposed that he had seen the accused "was escaping". During her cross-examination she was suggested to be a consenting party which she denied.

7. The second person to meet the victim, was Maya Parui wife of Bimal Parui (P.W.4), on her way back home. In order to keep the records straight it is clarified that in the paper book she has wrongly been described as Manju Parui. We have checked up with the original records and seen for ourselves that she in fact is Maya Parui. The P. W. 4 deposed in Court as to the condition in which she found the victim and the incident reported to her. She also deposed about the futile salish. What transpired thereat may best be described in her own words which were as follows:

Thereafter a salis was arranged. At the salish Sekhar hid himself but Pratima finding him went to him slapped on his face and Sekhar retaliated by slapping on her face.

8. In her cross-examination the aforesaid aspect of the matter was not even touched. During her cross-examination, an alibi was suggested to her which reads

as follows:

Not also a fact that no incident took place on 9.6.88 at Deremath involving Sekhar and Pratima or that on that day Sekhar with Lakhman Haider went to Natunbadh for excavation of earth, or that at the instance of police I have deposed falsely.

9. It is significant that this alibi was not spelt out by the accused himself during his examination u/s 313 of the Code of Criminal Procedure.

10. The P.W.5 is Ashok Haider, another co-villager. He, after having heard a halla, came out of his house and enquired of the victim when she narrated the incident to him.

11. The P.W.6 is Sudhir Haider. He has also deposed as to the information which he received from the victim after the event was over on the fateful day itself. He has also given graphic details of the various names by which the place of occurrence is known.

12. The P.W.7, Laxman Haider, did not choose to help the case of the prosecution. He deposed that he did not hear anything from the victim. But he, during his cross-examination, sought to create an alibi for the accused by deposing as follows:

I was engaged in the work of excavation of earth at Natunbadh. Sekhar also was engaged in that work with us.

13. The accused himself however during his examination u/s 313 of the Code of Criminal Procedure did not take any such alibi. This alibi in any event is not of much significance because the incident happened at 7 a.m. in the morning. The accused may very well have joined the work subsequently. The P.W.7 did not disclose the time when the accused had allegedly joined the work.

14. The P.W.8, Bimal Haider, was merely tendered and cross-examination was declined.

15. The P.W.9 is Dr. Priya Nath Saha, a Radiologist. He deposed that based on the X-ray findings, the age of the victim on 9th June, 1988, was between 16 and 17 years. During his cross-examination he was suggested that the victim was a major.

16. The P.W. 10 is Prodyut Kumar Mondal who organised the salish which proved futile.

17. The P.W. 11 is Sunil Parui about whose evidence we already have indicated above.

18. The P.W. 12 is Nemai Mondal. He is another witness who met the victim on her way back to home from the place of occurrence. He corroborated the deposition of the P.W. 11, Sunil Parui, by deposing as follows:

I found that Sekhar (accd. identified on dock) was running towards west. I found that Pratima (victim girl Pratima Haider identified as that Pratima) was standing there and weeping.

19. The P.W. 13, Dr. S.S. Chatterjee, who was the Chief Medical Officer of Health, South 24-Parganas, examined the victim on 13th June, 1988. She deposed that upon examination she found old rupture in the hymen of the victim. She also was of the opinion that in the case of a married woman, old rapture in hymen can be found. She added that in case of a married woman, in the event of a rape, injury in the hymen was not generally possible.

20. The P.W. 14, Bharatjee Singh, is a constable who took the victim to the Diamond Harbour Hospital.

21. The P.W. 15 is Raghunath Kundu, Inspector of Police, attached to Kulpi Police Station, who recorded the written complaint of the P.W.I.

22. The P.W. 16 is D. K. Chatterjee, a learned Judicial Magistrate, who recorded statement of the victim u/s 164 of the Code of Criminal Procedure. The statement has been tendered in evidence and marked Exhibit 4.

23. The P.W. 17, Jiban Kumar Nandi, was the sub-Inspector of Police who took the alamats to the forensic science laboratory.

24. The P.W. 18, Nirmal Singh Deb, is another Sub-Inspector of Police who had investigated into the matter.

25. These are the witnesses examined in this case.

26. There is a report of the Forensic Science Laboratory which has been marked Exhibit (2). The wearing apparels of the victim, amongst others, were sent for scientific test. The wearing apparels included a pink coloured saya contained in packet marked (A). As regards packet marked (A), the finding of the Forensic Science Laboratory is "Semen with spermatozoa was detected in the stain on saya contained in packet marked "A".

27. The case of the prosecution and the evidence adduced have thus been briefly summarised.

28. Mr. Subir Chowdhury, learned Counsel, appearing for the Appellant, submitted that no sexual intercourse had, in fact, taken place and in any event, the victim was a consenting party wherefore necessary ingredient of rape is lacking.

29. We are unable to accept this submission of Mr. Chowdhury, learned Counsel, for the Appellant. The following circumstances corroborate the evidence of the P.W.3 the victim:

(a) The P.W. 11 and P.W. 12 both saw the accused escaping from the place of occurrence;

(b) The deposition of the P.W.2 Prasanta Haider, P.W.4 Maya Parui, P.W.5 Ashok Haider, P.W. 6 Sudhir Haider and P.W. 10 Pradyut Kumar Mondal, is so connected with the fact in issue that it formed part of the same transaction. Their evidence has the added benefit of Res gestae. Reference in this regard may be made to Section 6 of the Evidence Act. Statutory illustration (a) to Section 6 of the Evidence Act is apposite which reads as follows:

A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(c) The victim during her evidence admitted the fact that there had been hailstorm on the last night and, therefore, the soil was supposed to be muddy. The wearing apparels of the victim were found mudstained by almost all the witnesses and also by the F.S.L.;

(d) The F. S. L. report being Exhibit (2) contains unmistakable evidence as regards sexual violation of the victim;

30. For the aforesaid reasons, we are unable to accept the submissions advanced by Mr. Chowdhury, learned Counsel, appearing for the Appellant, that there has been no sexual violation of the victim.

31. As regards the second point urged by Mr. Chowdhury that the victim was a consenting party, there is no iota of evidence to probabalise that. On the contrary, the following facts and circumstances militate against the proposition:

(a) The victim deposed that she was laid down on the earth. When she raised hue and cry, she was gagged by a piece of cloth by the accused.

(b) At the salish the accused was trying to hide. The victim, according to the evidence given by the P.W.4, Maya Parui, traced him out and slapped on his face.

32. This was nothing but an outburst of the injured victim and the attempt to hide on the part of the accused was betrayal of his guilt.

(c) A mentally retarded woman was in any event incompetent to consent.

33. We are, therefore, unable to accept the submissions that the victim was a consenting party.

34. The last submission advanced by Mr. Chowdhury, learned Counsel, for the Appellant, was that the victim is now happily married. The accused was already married at the time when the incident took place. Therefore, the sentence inflicted upon the Appellant should adequately be reduced.

35. We have no evidence before us to show that the victim is now happily married. True, however, it is that this appeal has been pending before this Court since the year 1992 which is long enough a gap covering almost two decades. We, therefore,

are inclined to reduce the sentence of rigorous imprisonment from eight years to rigorous imprisonment of five years but the amount of fine and the default clause shall remain unaltered. The judgment under challenge including the conviction is, thus, upheld. The sentence is however modified to the extent indicated above.

36. In the result, this appeal is partly allowed.

37. The Appellant is directed to forthwith surrender to serve out the sentence as modified by this Court. In the event, the Appellant does not surrender, the learned trial Court shall see that the Appellant is taken into custody at once. The learned trial Court is directed to issue revised jail warrant.

38. The concerned Department of this Court is directed to send down a copy of this judgment and order to the concerned learned Trial Court under Chapter XI Rule 8 of the Appellate Side Rules of this Court forthwith.

39. The concerned Department of this Court is also directed to send down the lower Court records of this case with a copy of this judgment to the concerned learned trial Court forthwith.

Let urgent xerox certified copy of this order, if applied for, be delivered to the learned Counsel, for the parties, upon compliance of all usual formalities.

Raghunath Ray, J.-I agree