(2012) 07 CAL CK 0201

Calcutta High Court

Case No: C.R.A. 155 of 2010

Sukchand Sheikh @ Mondal @ Sukchand Sk.		APPELLANT
	Vs	
The State of West Bengal		RESPONDENT

Date of Decision: July 23, 2012

Acts Referred:

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

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Partha Pratim Das for Amicus Curiae, for the Appellant;Binoy Kr. Panda for the State, for the Respondent

Final Decision: Dismissed

Judgement

Kanchan Chakraborty, J.
The challenge in this appeal is to the judgment dated 9/10th February, 2010 passed by the learned Additional Sessions Judge, Fast Track Court, Berhampore in Sessions Trial No. 8 (1) of 2006 thereby convicting the appellant Sukchand Sheikh @ Mondal @ Sukchand Sk. for committing offence u/s 376 of the I.P.C. and sentencing him to suffer R.I. for 7 years with a fine of Rs. 20,000/-. Sukchand Sheikh, the appellant assailed the judgment on the following grounds;

a) that there was inordinate delay in lodging the F.I.R;

b) that there are discrepancies on the material points in between the statement of the prosecutrix and her mother over material issue;

c) that the alleged ''Salish'' was not at all established;

d) that the learned Trial Court did not apply his judicial mind at all and failed to appreciate the evidence on record in its true and proper perspective;

e) that the judgment being otherwise bad in law, is liable to be set aside.

2. This criminal prosecution against the appellant was initiated on 3.1.2002 by Taj Mohammad Sk., the father of the victim by lodging a F.I.R. It was alleged that the appellant being a neighbour used to visit his house and one day he, in absence of any member of the family, committed rape on his minor daughter Arjina Khatun after putting a gag in her mouth and also threatened her with dire consequences. The matter was reported to him and others by Arjina. The local people were also informed and a village meeting was called on wherein the appellant pleaded his guilt and assured to marry Arjina with a hope that the appellant would marry his daughter Arjina. The father of Arjina or any member of his family did not go to the Police Station to report the incident. But, ultimately, the appellant did not agree to marry the victim Arijina and the father of the victim had to file the F.I.R. through Court, which has been marked as Ext.1. Arjina became pregnant by this time.

3. The appellant was arrayed to face charges u/s 376 of the I.P.C. for committing rape on Arjina Khatun on 29th June, 2001 at 10.00 P.M. He pleaded not guilty to the charge and, as a consequence, the trial commenced.

4. In the trial, 10 witnesses were examined on behalf of the prosecution including the prosecutrix. The defacto complainant, the father of the prosecutrix, who lodged the F.I.R., however, was not examined. Formal F.I.R., signature thereon, medical examination report, statement of the prosecutrix u/s 164 of the Cr. P. C. and sketch map with index prepared by the I.O. were admitted into evidence and marked exhibits on behalf of the prosecution. No witness has examined nor any document was filed on behalf of the defence in course of trial. Upon consideration of the evidence on record, oral and documentary, the learned Trial Court came to a conclusion that the prosecution brought home the charge u/s 376 of the IPC against the appellant. Accordingly, the impugned judgment of conviction of sentence has been recorded.

5. Mr. Partha Pratim Das, learned Amicus Curiae appointed on behalf of the appellant contended that there was inordinate delay in lodging the F.I.R. which cast shadow of doubt in the prosecution case. He also contended that the father of the prosecutrix who initiated the case by lodging the F.I.R. was not examined. The learned Trial Court did not apply its mind inasmuch as the grounds for delay mentioned in the F.I.R. was not supported by the facts and circumstances of the case. He contended further that there are discrepancies in the statement of prosecutrix, P.W.4 and her mother, P.W.3 on material points. He contended that according to the prosecutrix, the appellant put gag inside the mouth of the victim and, as a result, she could not shout. But, according to the P.W.3, the mother, hearing the shouting of prosecutrix, she and her husband returned back home from the relative''s house and found Arjina was crying. Mr. Das contended further that in the cross-examination, the P.W.3 stated that some of his close relations, in consultation with her, contemplated to file the complaint against the accused in

order to teach him a good lesson and that the local leader of the C.P.I.M. party also instigated her to lodge the complaint. Mr. Das contended that this fact was overlooked by the learned Trial Court.

6. Mr. Das further contended that the alleged Salish, in fact, had never taken place. Therefore, there was no reason to lodge the F.I.R. three and half months after the incident. The testimony of the prosecutrix is not credible, consistent and trustworthy. Therefore, Mr. Das contended that the learned Trial Court ought not have recorded conviction on the basis of sole testimony of the prosecutrix.

7. Mr. Panda, learned Counsel appearing on behalf of the respondent/State of West Bengal contended that this a well proved case and there was no reason for the learned Trial Court to discard and disbelieve the testimony of the prosecutrix. The delay in lodging the F.I.R. has been properly explained not only in the F.I.R. but also from the evidence on record as well as the facts and circumstances of the case. There are evidence enough to show that the local people tried for settling the dispute by way of Salish which ultimately failed. The delay in lodging the F.I.R. was caused simply because the Salish failed time and again.

8. Mr. Panda further contended that there was some discrepancy about the evidence of P.Ws.3 and 4 but those discrepancies are not fatal to the prosecution and not sufficient enough also to disbelieve the testimony of the prosecutrix and her mother. He contended that the prosecutrix was 15 years old at the relevant period of time. She was a minor and her minority was not challenged seriously by the appellant in course of trial. The statement of the P.W.3 in her cross-examination does not necessarily change the substratum of the prosecution case of rape on the prosecutrix by the appellant. Therefore, Mr. Panda contended that the judgment is not required to be interfered with in this appeal.

9. Mr. Das, Amicus Curiae for the appellant contended that there was inordinate delay in lodging the F.I.R. The incident allegedly had taken place on 29.6.2001 but the F.I.R. was lodged with the Police Station on 3.1.2002, i.e., about 7 months after the alleged incident.

10. The F.I.R. was marked Ext.1 in course of trial. A bare reading of the F.I.R. makes it abundantly clear that the prosecutrix party, immediately after the alleged incident, had taken the matter to the village Salish. In the Salish, the appellant acknowledged his guilt and assured to marry the victim. With a hope that the appellant would marry the victim, the prosecutrix party had to wait for an uncertain period because the appellant lingered the mater on many pretext. The matter was again referred to a village Salish but the appellant did not appear in that Salish. Thereafter, the prosecutrix party had to lodge the F.I.R. By that time, the victim Arjina became pregnant.

11. Generally speaking unexplained delay in lodging the F.I.R. is fatal to the prosecution. In the instant case, there is inordinate delay in lodging the F.I.R. and

there is no dispute as to that fact. However, in the F.I.R., the reason which caused the delay in lodging the F.I.R. has been explained categorically. It should not be forgotten that it is a case where sex offence is involved in respect of a minor girl. In such a case, delay stands generally explained because in Indian society it brings a scandal to the family of the prosecutrix and time is unnecessarily wasted to decide if the scandal should be made public. In rural areas, victim of sex offence and her family members always go for settlement initially so that the victim gets a social status otherwise she would carry a stigma for ever. When the F.I.R. contains specifically and precisely that the delay was caused because of initial Salish and assurance of the appellant to marry the victim which was deferred time to time by the appellant on many pretext and ultimately did not appear in the final Salish, the prosecutrix party had to wait to bring the matter into the Police Station. In my estimate, in such a case, even this inordinate delay can be said to have been explained which is not only acceptable but appears to be natural in the factual background of the case. Therefore, I do not accept the proposition of Mr. Das on this point.

12. It has been contended by Mr. Das that there are discrepancies in between the statement of the prosecutrix and her mother. The prosecutrix was examined as P.W.4. No doubt, she is the star witness of this case. The incident of alleged rape was not witnessed by anybody. The prosecutrix was examined as P.W.4. She stated that on the fateful night at 10.00 P.M. while she was alone in her residence, this appellant entered into the house and committed rape by applying force against her will by putting gag inside her mouth. She narrated the incident to her parents and a village Salish was held for amicable settlement. The appellant did not attend the village Salish and as a result, her father had to go to police station and lodge the F.I.R. In her cross-examination, she stated that she raised alarm when the accused attempted to commit rape but none could hear her alarm. She stated in her cross-examination that on the following morning, her parents returned back to the house and at that time, she narrated the incident to them.

13. The P.W.3 is the mother of the prosecutrix. She stated that on the fateful date, i.e., on 29th Shravan at about 10.00 P.M. when she and her husband had been to their relative''s house to attend a religious function, the appellant committed rape of Arjina, her daughter aged about 15 yeaRs. In the next morning, she and her husband reported the incident to their relatives and close neighbours and a village Salish was called on wherein the appellant attended and agreed to marry Arjina. Ultimately, the appellant denied to marry. Again a village Salish was called on. But the appellant did not express his willingness to attend the village Salish any further an refused to marry Arjina. In such a situation, her husband had to lodge the F.I.R.

14. In her cross-examination, she stated that in the function she attended, a loud speaker was installed but she could hear the alarm of her daughter. So, she rushed back to her house hearing the alarm but Arjina initially declined to disclose the

name of the miscreant who was responsible for committing rape on her. Thereafter, in the next morning, the matter was reported to the close relations and neighbours and Salish was called on. But in that Salish, the appellant was held not responsible by the members present and it was dissolved on that date. Another Salish was also called on which was attended by all the village members and thereafter, it was decided that the matter would be referred to the police. She also stated in her cross-examination that in order to teach a good lesson to the appellant and in consultation with the local political leader, the F.I.R. was lodged.

15. I have carefully scrutinised the evidence of P.Ws.3 and 4 relating to appearance of the P.W.3 in the scene after hearing the alarm within a few minutes and receiving information from the P.W.4 about the commission of rape on her. But this discrepancy cannot discard the evidence of the prosecutrix that she was raped by the appellant.

16. As far as the prosecutrix version is concerned, she was not in a position to know whether any one could hear her alarm or not. At the same time, as far as the version of the P.W.3 is concerned that even a loud speaker was installed in the function she attended, she could hear the alarm of her daughter and hearing that alarm, she rushed back to the house. The statements do not appear to be matching with each other. This part of the evidence of the P.W.3 cannot be accepted specially when the prosecutrix herself stated that in the next morning she reported the incident because her parents came in the next morning. Now, the question is how this discrepancy in the version of P.Ws.3 and 4 affects the prosecution case.

17. In this case, the prosecutrix statement u/s 164 of the Cr. P. C. was recorded which was marked as Ext.4. A careful perusal of the Ext.4 shows that on the relevant date and time, the appellant put gag inside the mouth of the prosecutrix and raped her. She also stated at that time of recording statement u/s 164 of the Cr. P. C. that the appellant promised her to marry. She became pregnant but the appellant declined to marry her. Nowhere, the statement u/s 164 of the Cr. P. C. she stated that she informed her father or mother or anybody immediately after the incident or that in the next morning nor she stated that it was referred to any Salish. But she stated categorically that the appellant put a gag inside her mouth and raped her and she could not raise alarm because of gag.

18. The P.W.9, the brother of Arjina has also stated that on the relevant date and time, Arjina was alone in the house and all others including himself had to attend a function and when they returned back home, they noticed that Arjina was crying. On being asked she disclosed that the appellant committed rape on her. The P.W.9 further stated that there was a Salish but ultimately no fruitful result yielded. He stated in his cross-examination that on the very date of incident, they came to know about the rape on her sister. Salish was held on the next morning but no resolution was prepared. Ultimately, it was decided that the matter should be taken up by police.

19. The prosecutrix version was corroborated by P.W.2, a cousin of the victim. His statement, in my view, has thrown some positive light on the prosecution case. He stated that he came to know what happened to his sister when he was going through the village. He had been to the house of his uncle, i.e., the father of the victim and found the father of the appellant there. They disclosed everything to him. He advised for arranging marriage between Arjina and the appellant. But, the father of the appellant was not sure as he was not in a position to arrange such a marriage. He stated further that the appellant denied the allegation in the village Salish but the victim demanded that due to sexual intercourse with the appellant, she became pregnant. There was meeting over the issue but it was dissolved without any fruitful result.

20. Going through the evidence of the witnesses examined on behalf of the prosecution, one matter is appeared to be clear i.e. that Arjina became pregnant and gave birth of a child. According to her, she was raped by the appellant. Her statement that she was raped by the appellant was supported by her mother, P.W.3 and brother, P.W.9 and no otheRs. As regards Salish, it appears that there is sufficient evidence that a Salish was initially called on but that was ended without any result. It is also clear that the prosecutrix party was in a hope that the appellant would marry the victim Arjina. But ultimately, he denied all the allegations and declined to marry her. Another Salish was called on and in that Salish, it was decided that the matter be referred to the police. The F.I.R. was lodged thereafter. This particular fact of Salish etc. has not been placed by the prosecution witness properly and i.e. the reason why Mr. Das has taken this point.

21. Upon consideration of the evidence on record, facts and circumstances of the case and the peculiar standing of the appellant, this Court finds that the prosecution established the fact of rape on the particular date and time on the prosecutrix by the a-appellant. The evidence of the prosecutrix on that particular issue cannot be discarded simply because her mother and brother made statement regarding Salish and etc. which have not tallied with her statement. The fact that the appellant had committed rape on the prosecutrix, in my estimate, has been established. The prosecutrix was a minor and she was alone in the house. A gag was put inside her mouth. She was raped in absence of all the inmates of the house. The time of appearance of the inmates in the scene might be different that what has been stated by her, but that fact alone does not necessarily falsify the statement of the prosecutrix. She became pregnant and ultimately had given a birth to a child. The appellant, who initially agreed to marry her, declined to do so afterwards. The parents of the prosecutrix was hopeful that the appellant would marry their daughter but when it did not take place, they had to consult with their close relations and local political party members who told them to teach the appellant a good lesson. Accordingly, the F.I.R. was lodged. The F.I.R. was lodged because the prosecutrix was raped not because the political party leader or close relations wanted to file a false case. Had not they advised to lodge the F.I.R., the parents of

the prosecutrix could not have lodged the F.I.R. but had to accept their ill luck and sit idle inside their house in such a condition without making any protest. Therefore, that part of the evidence of the cross-examination of P.W.3, in my opinion, does not destruct the substratum of prosecution case of rape on the victim Arjina by the appellant. I find that the learned Trial Court discussed every point elaborately in the impugned judgment and taken assistance of various decisions passed by the Hon''ble Apex Court. It appears also that the learned Trial Court applied his judicial mind and appreciated the evidence in its true and proper perspective.

22. Accordingly, this Court is of considered view that the judgment impugned is not required to be interferred with. It is affirmed. The appeal, accordingly, fails. The learned Trial Court is directed to take steps so that the appellant suffers sentence imposed by it.

23. Mr. Partha Pratim Das, Advocate of this Court has rendered a tremendous job as Amicus Curiae on behalf of the appellant. He deserves some token remuneration for the job rendered by him. Accordingly, Secretary, Legal Aid Service, High Court, Calcutta is directed to pay Rs. 1000/- to Mr. Das towards his remuneration for the service rendered by him. A copy of this order be given to the Secretary, Legal Aid Service, High Court, Calcutta for taking necessary steps. Urgent photostat certified copy of this order, if applied for, be given to the appearing parties upon compliance of necessary formalities.