State of West Bengal Vs Sukesh Naskar alias Pandar

Court: Calcutta High Court

Date of Decision: Dec. 12, 2008

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 161
Evidence Act, 1872 â€" Section 6
Penal Code, 1860 (IPC) â€" Section 376, 457

Citation: (2009) CriLJ 2370

Hon'ble Judges: Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: Subir Ganguli, for the Appellant;Joynal Abedin, for the Respondent

Final Decision: Allowed

Judgement

Girish Chandra Gupta, J.
This Government Appeal is directed against a judgment and order of acquittal passed by the learned Assistant

Sessions Judge, 9th Court at Alipore in Sessions Trial No. 1(12) of 1987 acquitting the accused Sukesh Naskar of the charges under Sections

376 and 457 of the Indian Penal Code.

2. The facts and circumstances of the case briefly stated are as follows:

On 2nd Aghrayan 1391 B.S., corresponding to 18th November, 1984 the prosecutrix, a mother of three children, after dinner had gone to bed in

the covered verandah in front of her east facing room built of mud. The verandah was fenced by darma (made of bamboos). She bolted the door

of the verandah from the inside as would appear from the original written complaint. It was then 7/7-30 p.m. She thereafter fell asleep. She woke

up to see that she had been overpowered by someone who held a piece of cloth firmly to her mouth. Another held her arms. Out of these two

persons she could recognize the accused Sukesh who thereafter lifted her saree and saya and committed rape. After the accused and his

companion had left the place of occurrence the victim shouted. Her near relations who used to reside in the neighbourhood rushed to the place of

occurrence. She narrated the incident to them. Her husband at that point of time was working to Calcutta. He was informed. He came back on the

following day in the afternoon. Thereafter, a written complaint was lodged in the evening at about 19.45 hours on 19th November, 1984. On 20th

November, 1984 the victim was examined by a doctor, the P.W. 8. The accused, Sukesh Naskar, was charged under Sections 457/376 of the

Indian Penal Code. Ten witnesses were examined. The learned trial Judge recorded a finding of acquittal as more fully indicated hereinabove.

3. The reasons and/or the grounds assigned by the learned Trial Judge shall presently be discussed by us.

I do hold on proper consideration that there is sufficient evidence on record to prove that the case was lodged due to the cultivation and looking

after the landed property of Bilasmoni and Kunti by accused Sukesh and litigation over such property between them.

4. Mr. Abedin, the learned Advocate appearing for the accused-respondent drew our attention to the evidence of the P.W. 1 who admitted that

Smt. Bilasmoni is the Khurshasuri (aunt-in-law) and Kuntibala is the Ja (sister-in-law) of the victim. He also drew our attention to the evidence of

the P.W. 2, Pradyut, who is the son of one of the brothers of the husband of the victim, who corroborated the relationship between the victim and

Bilasmoni on the one hand and the victim and Kuntibala on the other.

5. P.W. 2, Prodyut, further admitted that the accused Sukesh cultivated the landed property of Bilasmoni and Kunti. He also admitted that ""There

is litigation over the properties of Bilasmoni and Kunti but it was not there previously"". He also drew our attention to the suggestion given by the

P.W. 5 that the accused Sukesh cultivated the land of Bilasmoni and Kunti by virtue of a power of attorney. He submitted that this goes to show

that there was litigation between the parties and they were inimical to each other and, therefore, the finding of the learned trial Judge is borne out by

the evidence.

6. Mr. Ganguli, the learned Advocate appearing for the State-appellant, submitted that the submission of Mr. Abedin is altogether unmeritorious.

7. The evidence on the record no doubt goes to suggest that the accused Sukesh was cultivating the lands of Bilasmoni and Kunti, There is also

evidence to show that there was litigation over the properties of Bilasmoni and Kunti. But there is nothing to show as to who were the parties to

such litigation. Evidently, Bilasmoni and Kunti are the aunt-in-law and the sister-in-law respectively. Therefore, they are distant relations of the

victim. How was the victim concerned with a litigation concerning the landed properties of those two distant relatives is not at all clear to us. There

is no evidence whatsoever to suggest that the so-called litigation concerning the landed property of Bilasmoni and Kunti would or could have in any

manner affected the right and/or the interest of the victim Paribala.

8. No evidence whatsoever is there to show that Paribala was inimical towards the accused. Suggestions as regards enmity between the accused

and the victim given in the witnesses of the prosecution have all been denied. To be precise the P.W. 2 was suggested as follows:

Not a fact that we are inimical to the accused due to said litigations and as the accused looks after the property of Bilasmoni and Kunti.

P.W. 4 Rohit was suggested as follows:

Not a fact that as Sukesh looks after the cultivation of Bilasmoni and Kunti, there is enmity between Paribala and Pradyut on the one side and

Sukesh on the other side.

P.W. 5 Monoranjan, was suggested as follows:

I do not know if there is dispute and enmity between Paribala and Sukesh as Sukesh looked after the cultivation of Bilasmoni and Kunti.

9. The suggestions given to the witnesses of the prosecution noticed above were not admitted by any of the witnesses. The suggestions given to the

victim herself are even curious. She was not suggested that there was any enmity between herself and the accused. She on the contrary was

suggested that she was jealous of the accused and that she had involved the accused at the instance of her-in-laws. To be precise those

suggestions are as follows:

Not a fact that we had dispute over the property of Bilasmoni and Kunti.

Not a fact that we are jealous against the accused as he looks after the cultivation of Kunti and Bilasmoni.

Not a fact that we have involved the accused in this Court falsely at the instance of my Bhasur and Bhasurpo. Bilasmoni has not son daughter or

husband.

10. We have scanned the evidence thoroughly but did not find any material whatsoever on the basis of which one can hold that there was enmity

between the prosecutrix and the accused. What has transpired from the suggestions is that the defence was seeking to amuse itself by suggestions

of various nature and taste which had no basis in reality. The prosecutrix, as a matter of fact, was also suggested that the accused was her brother

by blood relation which was obviously denied by her. This goes to show the hollowness of the case run by the defence. We are surprised that the

learned Trial Judge arrived at a finding that the accused was falsely implicated due to cultivation of the land of Bilasmoni and Kunti by the accused

and also due to the litigation concerning the landed property. We are sorry to say that this findings of the learned Trial Judge is perverse.

11. The second reason advanced by the learned Trial Judge in acquitting the accused may best be noticed in his own words which reads as

follows:

P.W. 1 has further stated in the Thana that the accused committed rape upon me for 3 minutes after lifting her saree and saya. This piece of

evidence is not supported by P.W. 9. He Had examined Paribala but she did not state before him that rape was committed upon her for 3 minutes.

12. A statement u/s 161 of the Code of Criminal Procedure can be used only for the purpose of contradicting the maker of such statement. Even

assuming that the prosecutrix during her examination u/s 161 of the Cr.P.C. did not disclose that she was raped for three minutes that does not, in

our view, contradict any of the statements made by her. Whether the rape continued for three minutes or for a minute is altogether besides the

point. Slight penetration is enough in law to constitute a rape,

13. The third reason assigned by the learned Trial Judge is as follows:

P.W. 2 is Pradyut Naskar as per his evidence he went to the daba of Pribala after hearing her cry and found that the door made of darma of the

daba was opened but this piece of evidence is not stated by Paribala in her evidence. She has kept maintain silence as regards the door of the

daba or as to how the accused entered into the daba.

14. We have perused the original written complaint which goes to show that the prosecutrix after dinner had gone to bed. The door of the bamboo

fencing had been bolted by her from inside. She thereafter fell asleep. She woke up to find herself overpowered by two persons. One of them is

the accused. P.W. 2 has deposed that hearing the cry of the P.W. 1, the prosecutrix, he rushed to the place of occurrence where he found the

door of the verandah open. This goes to corroborate the evidence of P.W. 1 that she woke up to find herself overpowered by two persons, one of

whom is the accused. They had obviously opened the door forcibly and had gained access to the verandah where the prosecutrix was sleeping.

That is why the door of the verandah was found open by the P.W. 2. On behalf of the defence, obviously no cross-examination on that point was

made when the prosecutrix was in the box. We are surprised that the learned Trial Judge found this to be a weakness in the case of the

prosecution.

15. The fourth reason advanced by the learned Trial Judge is that none of the near relations of the prosecutrix saw the alleged occurrence. It is not

the case of any of the witnesses-examined by the prosecution except for the prosecutrix herself that they were present at the time of the incident.

Therefore, the question of the witnesses except the prosecutrix herself seeing the incident would not have arisen.

16. The fifth and the final reason advanced by the learned Trial Court is lack of injury on the person of the prosecutrix. To be precise the finding of

the learned Trial Judge in this regard is as follows:

She has further stated that due to resistance and restlessness at the time of commission of rape by the accused, there were marks of violence and

she felt pain in her body but 1 find that this piece of evidence has been contradictory to the evidence of P.W. 8 Dr. S.S. Chatui. As per evidence

of P.W. 8 he examined Paribala Naskar and he found no marks of violence on her body or private parts.

P.W. 8 has further said in evidence that in case of rape on a woman having multiple children, there can be no sign of injury and that he had found

signs of child bearing on examination of Paribala but in his cross-examination he has admitted that he considers Modi as authority on Medical

Jurisprudence and marks of violence on breast and chest and lower part of abdomen limbs and back as a result of resistance at the time of rape is

opined by Modi in his Medical Jurisprudence and Toxicology.

17. Mr. Abedin emphatically contended that the marks of injury on the person of the prosecutrix in the normal circumstances would have been

there had there been any truth in the story of alleged rape.

18. We are not impressed by this submission. The Apex Court in the case of Rafiq Vs. State of U.P., has held that presence or absence of injury

on the person of the prosecutrix is not decisive.

Counsel contended that there was absence of corroboration of the testimony of the prosecutrix, that there was absence of injuries on the person of

the woman and so the conviction was unsustainable, tested on the touchstone of case-law. None of these submissions has any substance and we

should, in the ordinary course, have desisted from making even a speaking order but counsel cited a decision of this Court in Pratap Misra and

Others Vs. State of Orissa, and urged that absence of injuries on the person of the victim was fatal to the prosecution and that corroborative

evidence was an imperative component of judicial credence in rape cases.

We do not agree. For one thing, Pratap Misra''s case (supra) laid down no inflexible axiom of law on either point. The facts and circumstances

often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people''s lifestyles may fluctuate, and so,

rules of prudence relevant in one fact-situation may be inept in another. We cannot accept the argument that regardless of the specific

circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must

mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law,

but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural

complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest

rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good

regarding the presence or absence of injuries on the person of the aggressor or the aggressed.

19. Reference may also be made to the judgment in the case of State of Tamil Nadu Vs. Ravi @ Nehru, the relevant portions whereof read as

follows:

We may also notice the opinion expressed by Modi in Medical Jurisprudence and Toxicology (21st Edn.) at p. 369 which reads as thus:

Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of

hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda, with or without emission of semen, or even an attempt at

penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any

injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not

give his opinion that no rape had been committed. Rape, is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made

by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual

activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

In Parikh''s Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

Sexual intercourse - In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen.

It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

In Encyclopaedia of Crime and Justice (Vol. 4) at p. 1356, it is stated:

...even slight penetration is sufficient and emission is unnecessary.

It is now well-accepted principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling

reasons for seeking corroboration. It is also well-accepted principle of law that corroboration as a condition for judicial reliance on the testimony

of the prosecutrix is not a requirement of law but a guidance of prudence. A woman or a girl subjected to sexual assault is not an accomplice to the

crime but is a victim of another person''s lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her

as if she were an accomplice. (See State of Punjab Vs. Gurmit Singh and Others,).

So also in Ranjit Hazarika v. State of Assam this Court observed that non-rupture of hymen or the absence of injury on the victim"s private parts

does not belie the testimony of the prosecutrix.

The evidence of a victim of sexual assault stands on a part with the evidence of an injured witness. Just as a witness who has sustained an injury is

the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offender is entitled to great

weight, absence of corroboration notwithstanding. (See Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat,).

Reverting back to the facts of the present case the evidence of P.W. 2, the prosecutrix remains unimpeached There is no iota of evidence or even

a suggestion that the accused has been falsely implicated because of animosity. Similarly, the evidence of P.W. 2 has been corroborated by the

evidence of P.Ws. 1, 3, 5, 6, 7, 8 and 9. In the present case, the ocular evidence of P.Ws. is well corroborated with the medical evidence.

20. We are not suggesting that injury cannot be there in any case. Injury or absence thereof would depend upon the type of resistance offered, the

type of violence resorted to, age, motherhood and many such considerations. What amount of violence is needed to overpower a person cannot

be stated with mathematical accuracy. It depends upon various factors including the mental make up and the surrounding circumstances. A person

may be overpowered by a mere threat. Another may not be overpowered by a blow, yet another may not be overpowered even by a stab injury.

Still, it cannot be said that the person, who was overpowered just by a threat, was not, in fact, overpowered. In the present case, during the cross-

examination of the prosecutrix, the following evidence was elicited.

It is a fact that when I was caught by the culprit I became restless.

It is a fact that my breast was molested pressingly repeatedly.

It is a fact that I was trying to remove such hands of the culprit.

It is a fact that I was resisting while the accused was trying to commit rape upon me.

Due to some resisting and restlessness at the time of commission of rape there were marks of violence and I felt pain in my body.

I repeatedly pushed away the accused and he repeatedly got upon myself to commit rape.

21. The marks violence deposed to by the prosecutrix during her cross-examination may have healed up by the time the P.W. 8 examined her. The

incident took place on 18th November, 1984 and she was examined on 20th November, 1984. The nature of the mark of violence was not

questioned on behalf of the defence. She has in hen evidence deposed that ""at about the midnight I found that someone pressed my mouth with

some piece of cloth. I suddenly woke up from my sleep. Thereafter one person caught my hands and after lifting my Saree and Saya committed

rape upon me forcibly for about three minutes. This offence was committed by accused Sukesh Naskar and I could recognize him in the light of a

lantern

22. When the mouth ''of the victim was pressed with a cloth, she must have suffered pain. She must have suffered intense pain but that might not

have led to creation of prominent marks of injury which could be visible to the doctor after thirty-six hours. If the hands of the victim were gripped

tightly, she must have felt pain. May be intense pain but that may not have left such mark of injury which would be visible to the doctor after thirty-

six hours.

23. We are under the circumstances unable to accept the view of the learned Trial Judge that in the absence of a finding as regards of violence by

the doctor, P.W. 8, the prosecutrix must be held to have resorted to falsehood with an ulterior motive. No one will invite willingly a social stigma

like rape for nothing. It is difficult to believe that a woman, having three children, would willingly take the stigma that she had been raped which is

likely to affect not only her own future but also the future of her children. The circumstance that the semen''s stained saree and saya of the victim

were seized by the police on 20th November, 1984 which is material exhibit 1 lends assurance to the Court that the evidence of the prosecutrix

was truthful. We have evidence of the P.W. 2 before us who rushed to the place of occurrence hearing the cries of the prosecutrix and the

prosecutrix told him the incident including the name of the accused. Similarly, we have the evidence of P.W. 3 who had rushed to the place of

occurrence hearing hue and cry to whom the victim had narrated the incident disclosing the names of the accused. P.W. 4 is an another witness

who had instantaneously rushed to the place of occurrence to whom the victim had narrated the incident. We must point out that P.W. 4 deposed

that the victim told him that the accused had defiled her. P.W. 3 deposed that the victim stated that the accused attempted to commit rape. P.W. 5

who also had gone to the place of occurrence, the victim told her that she had been raped by the accused. The evidence of these witnesses namely

2, 3, 4 and 5 goes to show that the incident was promptly narrated to them before there was any scope for any concoction or deliberation.

Therefore, the evidence of these witnesses has the trappings of res gestae u/s 6 of the Evidence Act. We are unable to attach much importance to

the evidence of P.W. 3 who deposed that the victim told him that the accused had attempted to commit rape for the simple reason that the wearing

apparels of the victim were found semen stained.

24. We are, for the reasons indicated above, of the view that the learned trial Judge was wrong in recording a finding of acquittal. The prosecution

has, as a matter of fact, proved beyond any reasonable doubt that the accused committed rape upon the prosecutrix. He is, therefore, found guilty

u/s 376 of the Indian Penal Code. He is also convicted of the offence u/s 457 of the Indian Penal Code.

25. We have enquired of Mr. Abedin as to his submission on the point of sentence. Mr. Abedin submitted that the accused-respondent is now

sixty years old. His financial position is also unsound and a lenient view should be taken in fixing the quantum of punishment. The accused-

respondent is sentenced to suffer simple imprisonment for five years and as also to pay fine of a sum of Rs. 2,000/-, in default to undergo further

simple imprisonment for a period of three months for the offence u/s 376 of the Indian Penal Code. No separate punishment is awarded u/s 457 of

the Indian Penal Code.

26. The appeal is, thus, allowed.

27. The respondent was earlier directed by this Court to be rearrested and released on bail to the satisfaction of the learned Chief Judicial

Magistrate, South 24-Parganas.

28. The bail bond furnished by the accused-respondent is cancelled. He is directed to surrender to the bail at once and to serve out the sentence

passed by this Court. The concerned learned trial Court is directed to take steps for apprehending the accused respondent, Sukesh Naskar, in

connection with Sessions Trial No. 1(12) of 1987, so that he may serve out the sentence awarded by this Court.

29. Let a copy of the judgment together with the lower Court records be sent down to the learned trial Court forthwith for information and

necessary action.

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

Kishore Kumar Prasad, J.

31. I agree.