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(1989) 01 CAL CK 0016

Calcutta High Court
Case No: None

Golam Md. Khan APPELLANT

Vs

The State RESPONDENT

Date of Decision: Jan. 25, 1989

Acts Referred:

• Criminal Procedure Code, 1973 (CrPC) - Section 164

• Evidence Act, 1872 - Section 157

• Penal Code, 1860 (IPC) - Section 376

Citation: (1989) CriLJ 1203

Hon'ble Judges: Shamsuddin Ahmed, J; Pabitra Kumar Banerjee, J

Bench: Division Bench

Judgement

Pabitra Kumar Banerjee, J.

The accused Golam Mohammad Khan has been convicted u/s 376, I.P.C. and sentenced to R.I. for a period of eight years and a fine of Rs. 1000/- in default R.I. for a further period of six months by the learned Assistant Sessions Judge, Midnapore by his judgment and order dated 7th February 1981 in Sessions Trial Case No. III of August 1980. It is this order of conviction and sentence which is under challenge in this appeal.

2. Briefly stated, the case of the prosecution was that on 26-4-79 corresponding to 12th Baisakh 1386 B.S. which was a Thursday, while P.W. 1 Anwara Khatun was bringing back the cattle from the field, the accused Golam Mohammad caught hold of her and tied her face with a napkin and physically lifted her to a bamboo grove at some distance, assaulted her in spite of her resistance and raped her against her will. Anwara returned home weeping and related (narrated) the incident to her mother and brother's wife who in turn reported the incident to her father and brother. That evening a salish was called which was attended to by some neighbours including the accused and his father. The salish proved ineffective and

on the following morning, that is on 27-4-79 the victim girl went to Ghatal P.S. along with her brother Murshed and grandmother Pearon Bibi and made a verbal complaint which was recorded by S.I. Police Saroj Kumar Lahiri (P. W. 10) on the basis of which F. I. R. Exbt. 2 was drawn up and Ghatal P.S. Case No. 12 dated 27-4-79 u/s 376, IPC was started against the accused who had been earlier produced at the P.S. and taken into custody. The S.I. Police who took up the investigation of the case went to village Maricha, visited the place of occurrence, drew up a sketch map Exbt. 3 of the place of occurrence as pointed out by the victim girl and examined some witnesses. The I.O. seized the wearing apparel of the victim girl under the seizure list, Exbt-4 and sent the same to the Chemical Examiner for examination and report. The victim girl and the accused were referred to S.D.M.O., Ghatal Hospital for medical examination. After completion of the investigation, the I.O. submitted charge-sheet against the accused u/s 376, I.P.C. followed by a trial by the learned Assistant Sessions Judge and a conviction and sentence in the manner hereinbefore stated.

- 3. The prosecution case mainly consists of the direct evidence of P.W.s 1 and 2, corroborative evidence of P.W.s 3 and 4 and the medical evidence of P. W.s 7 and 8. P.W.s 5 and 6 have been examined for establishing the fact of salish alleged to have taken place in the afternoon of 26th April. Mr. Chittaranjan Das the learned Counsel for the appellant, drew our attention to certain facts and circumstances appearing in evidence and argued in his usual candidness that the entire prosecution case was a fabrication and the story of the accused committing rape on the victim girl was highly improbable, In support of the improbability, the topography of the place of occurrence was brought to our notice and the medical evidence ruling put the possibility of the girl being a raped victim was referred to. Emphasis was laid on the specific defence case that over some quarrel between the accused on the one hand and the victim"s brother and father on the other regarding supply of irrigation water, the accused was assaulted and wrongfully confined by P.W. 1"s father and brother.
- 4. The prosecutrix Anwara Khatun, a girl of 12/14 years of age had been in the field to take back the cattle in the noon of 26th April 1979. From the evidence of P. W. 10, S.I., Saroj Kumar Lahiri, it appears that Maricha village is 500 yards away from the Nimgaria tank and the place of occurrence as shown by the prosecutrix and noted in the sketch map Exbt. 3 was grassy with bamboo groves here and there. From the evidence of the I. O., it further appears that there are open fields on all sides of the place of occurrence and Bareda Kharar road is about half a mile from the Nimgaria tank. There is no reason to disbelieve the Investigating Officer who had the opportunity to visit the place of occurrence and take note of the surroundings on the day following the occurrence. It is evident from the evidence of P.W.s 1 and 2 that on that summer noon the place of occurrence and the area near about that place were secluded and no cowboy was seen grazing cattle in the field. It was mid-day and under the scorching heat of the sun nobody was expected to roam

about the place. The defence contention that it was improbable that the accused would venture to commit the offence while the pitched road and the tea stall were close to the place of occurrence are not supported by legal evidence. From the defence suggestion that the accused was drawing water with the help of machine and over the supply of the water for irrigation purpose there was some quarrel between him and the victim girl"s brother and father is indicative of his presence in the field on that date and at that hour when the offence is alleged to have been committed. It is probable that the accused considered the situation ideal for the commission of the outrageous act and he fully exploited it. Mr. Das contended that it was impossible for the accused to lift a girl of 12-14 years to some distance and to commit rape in spite of stiff resistance. It is impossible to accept such contention in view of the fact that the accused and the victim girl were of in equal strength and the sexual urge must have given him extra strength to commit the outrageous act at any cost. In her evidence P.W. 1 has given a vivid description as to how the accused caught hold of her, how she was silenced on pain of being severely dealt with and how she was slapped and raped. It must be recalled that Anwara was a teen-ager and there is no reason why this girl should involve herself in such a nasty act at the expense of her virginity. Similarly, there is no reason why her father, mother and brother would support such a cause if they did not believe the statement of the victim girl relating to the outrageous act of the accused. It has never been suggested that either Anwara or her relations wanted to blackmail the accused. The supposed enmity between the two families has not been established. The evidence of the prosecutrix before the Court has been substantially corroborated by her statement in the F.I.R. and further corroborated by the evidence of her mother P.W. 3 Rabea u/s 157 of the Evidence Act. After the alleged occurrence, the victim girl returned home weeping and on being interrogated she related the entire incident to her mother in presence of her brother"s wife soon after the occurrence. The girl went for a bath in the adjoining tank. The conduct of the victim girl is consistent throughout and the conviction can be based on the sole testimony of the prosecutrix. P. W. 2 Anwar witnessed a part of the alleged occurrence and there is no reason to discard his testimony outright, In his statement u/s 164 Cr. P.C. recorded on 7-5-79 P.W. 2 made consistent and rational statements with regard to the alleged outrageous act of the accused. The trial judge

believed his evidence and we find no reason to take a contrary view. 5. P.W. 4 Sattar Ali, brother of P. W. 1 Anwara returned home in the afternoon and after hearing the incident from her mother called P. Ws. Nauser Khan, Emdad Khan and others for salish. Emdad Khan has been examined as P. W. 5 and Nauser Khan as P. W. 6. From the evidence of those two witnesses and that of P. W. 4 it has been Clearly established that there was a salish on that very day and in that salish accused made extra judicial confession in regard to the commission of rape on Anwara. As the accused and his father took time for communicating their reaction, the prosecutrix and her father and brother had to wait till the next morning and

when the accused declined to settle the matter amicably the prosecutrix went to the P.S. to lodge a complaint. The production of the accused at the P.S. on 27th April is a pointer to the fact that whatever has been stated by the prosecution witnesses about the alleged salish and the extra judicial confession made by the accused is substantially correct. The defence case that the accused was assaulted and confined by the brother and father of the prosecutrix cannot be accepted because there is no evidence that at any point of time there was any complaint from the side of the accused and his father and other relations when the accused was being taken to the P.S. by P. W. 9 Gour Kalindi who was the substitute Chowkidar of village Maricha. Is it believable that the accused was completely innocent and had nothing to do with the alleged offence and still no resistance would come from the side of his father and other relations? The criminal case filed by Nur Islam against Nawsher Ali Khan and others was of the year 1976 and the same was dismissed on compromise (Ext. A/A). The other case was initiated by Ali Ahmed Khan against Sattar Ali Khan and others in December 1979 (Ext. A). The initiation of these criminal proceedings does not in any way establish the alleged animosity between the accused and P. Ws. Nawsher or Sattar. The case of December 1979 was presumably launched to counter the charge of rape against accused Gulam.

6. Next we turn to the medical evidence of P. W. 7 Dr. Bimal Chandra Roy and P. W. 8 Dr. Lakshmi Kanta Das who had examined the prosecutrix on 9-5-79 and 27-4-79 respectively. From the report of Dr. Roy, a Radiologist attached to Midnapore Sadar Hospital, it appears that on the findings of the Ossification test the victim girl was between 12 and 14 years of age on the date of her examination. The evidence of the Radiologist considered along with the oral evidence of the victim girl and her mother P. W. 3 Rabea, we can safely come to the conclusion that on the date of occurrence P. W. 1, Anwara was between 12 and 14 years of age. The guestion of the victim girl"s age is of little significance in the instant case because if she is under 16 years of age at the relevant time, her consent is immaterial and there is no suggestion that PW 1 was a consenting party, From the evidence of the other doctor, namely, P. W. 8 Dr. L. K. Das, it appears that he found no injuries on the external part of the body or on the private parts of the rape victim. In his report P. W. 8 had remarked that "the girl cannot correctly defined as raped now". Our attention was drawn to the evidence of P. W. 8 and it was argued that in the absence of any external or internal injury on the person of the victim girl, the prosecution story of the accused committing rape on the victim girl offering resistance, seems to be highly improbable. In answer, to the improbability urged by the learned Counsel for the defence, the explanation and clarification given by P. W.8 would be relevant for the purpose of determination as to whether in fact the victim girl was raped as alleged. From the evidence of P. W. 8, it appears that injuries on the external part of the body are not expected if the girl fails to resist during the rape. Injuries may not appear if rape is committed by lying her down on fallen bamboo leaves or on grassy land. So also, injury on the private part of a raped girl will not invariably appear if

she attains puberty. Again, according to P. W. 8, there may be tenderness but not rupture of the vaginal wall if intercourse takes place without any emotion. In vaginal swab there may be sperm if the discharge is made inside the vagina. We have already found from the evidence of P. W. 10, the I.O. that the eastern bank of Nimgaria tank, where the occurrence is said to have taken place, is grassy and has bamboo groves. The accused who was 26 years of age would have easily overpowered a girl between 12 and 14 years of age and it is in evidence that the girl was silenced when her mouth was tied with a napkin and the accused had also slapped on her cheek when she tried to raise an alarm. There might have been some resistance offered by the victim girl but that was not enough for having any external injury on her person. The medical evidence discloses that the accused was capable of having sexual intercourse with the victim girl. It may be recalled that P. W. 8 had also occasion to examine Golam Mohammad who was referred to by the I.O. in connection with his case. P. W. 8 has categorically stated before the Court that he expressed no opinion as to whether the girl was ravished or not, It should be borne in mind that for Dr. Das (P. W. 8) this was the first case when he was called upon to examine a rape victim and submit a report. Even if there is any unhappy expression in his report, it can be safely reconciled in the light of the direct and circumstantial evidence appearing at the trial. Upon consideration of the medical evidence, our considered view is that the victim girl had been raped by the accused at the place and hour and in the manner alleged by the prosecution.

7. Now, we come to the report of the Serologist Exbt. 5 which discloses that the pant was stained with human semen mixed with blood. The pant which was examined by the Serologist had been seized by the I.O. under a seizure list Exbt. 4. The pant has been identified by P. W. 1 as her pant. Mr. Das contended before us that if the pant had been washed by the victim girl while taking her bath in the nearby pond no stains of semen or blood could be there at the time of the examination by the Serologist. The defence suggestion is that Sattar himself stained the pant with his own semen. It is true that the girl had washed the pant but no soap was used. There is no evidence that stains of human semen or blood could be erased by simply washing the pant casually in pond water. The defence suggestion is absurd in the sense that if Sattar himself had stained the pant with his own semen, then there could have been no stains of blood on the pant.

8. In view of what has been stated above, we can safely conclude that the charge u/s 376, I.P.C. has been proved against the accused beyond all reasonable doubts and the learned Assistant Sessions Judge has rightly convicted the accused for the aforesaid offence. The accused has committed sexual offence on a girl of 12/14 years of age. He therefore deserves severe punishment, There is no extenuating circumstances mitigating the offence. We are not therefore, inclined to interfere with the quantum of sentence passed by the learned trial Judge. The result is that the appeal fails. The impugned order of conviction and sentence is upheld. The accused do surrender to the bail bond to serve out the sentence after setting off the

period already spent by him behind the bar in connection with this case.

- S. Ahmed, J.
- 9. I agree.