Araj Sk. Vs State of West Bengal

Criminal R.A. No. 233 of 1998

Court: Calcutta High Court

Date of Decision: Sept. 13, 2000

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 173, 215, 313#Penal Code, 1860 (IPC) â€" Section 212, 375, 376, 419, 493

Citation: (2001) CriLJ 416

Hon'ble Judges: Malay Kumar Basu, J

Bench: Single Bench

Advocate: Ahin Auddy and Tara Charan Mukherjee, for the Appellant;Budipto Moitra, Assistant Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

Malay Kumar Basu, J.
This Criminal Appeal has been filed by the convict, Araj Sk, against the judgment and order dated 5-8-98 passed

by Sri A.K. Mukherjee, Additional Sessions Judge, Katwa, convicting the appellant of an offence u/s 376, IPC and sentencing him to rigorous

imprisonment for seven years and to pay a fine of Rs. 1000/- in default to simple imprisonment for five months in Sessions Case No. 125 of 1997

(S.T.No. 15 of 1998) of that Court.

2. The relevant facts leading to the filing of this appeal may be summarised as follows. Nursubha Khatoon alias Begam, daughter of Nur

Mohammad Sk. of village Ratanpur lodged a complaint with the O.C., Ketugram P.S. on 30th June, 1996 alleging that she had developed love

affair with the accused, Araj Sk. (present appellant) for the last seven years and on getting assurance from him that he would marry her according

to Muslim custo, she closely mixed with him and allowed him to have sexual intercourse with her and as a result she conceived and thereafter when

she asked him to keep his promise by marrying her, he went on deferring the proposed marriage. Ultimately on 25-6-96 through the intervention of

her lawyer Araj executed an agreement to the effect that he would marry her on that day after returning to the village and give her the status of wife

and would look after the child in her womb. ON this plea he took her to his maternal-uncle''s house at village Ratanpur and kept her there and on

the next day, that is, on 26-6-96 he instead of keeping his promise drove her away from her house after beating her severely refusing to marry her.

In the circumstances she was filing this FIR before the police for investigation and punishment of the accused. On the basis of this FIR police

started Ketugram P.S. Case NO. 51/96, dated 30-6-96 u/s 376, IPC against the accused Araj Sk. After the investigation was completed, police

submitted charge-sheet against the accused Araj Sk. and Tazir Sk. under Sections 376, 419, 493 and 212, IPC. The offence of rape being

exclusively triable by Sessions Court the case was committed to the Court of the Additional Sessions Judge, Katwa. That Court framed charges

under Sections 376, 419 and 493, IPC against the accused Araj Sk. and also framed charge against the accused Tazir Sk. u/s 212, I.P.C. Both

the accused pleaded not guilty when the said charges were read over and explained to them. The said Court then held trial of the accused persons.

As many as 15 witnesses were examined by the prosecution. Then the accused were examined by the Court u/s 313, Cr.P.C. Defence did not

adduce any evidence. Thereafter the trial Court on hearing the arguments of both sides delivered the impugned judgments whereunder he found the

accused Tazir Sk. not guilty of the offence with which he was charged and found the other accused, that is, the present appellant, not guilty of the

offences under Sections 419 and 493, IPC but found him guilty of the charge u/s 376, IPC and convicted him thereunder and sentenced him to

suffer rigorous imprisonment for seven years and to pay a fine of Rs. 1000/, in default, to simple imprisonment for five months more.

3. Being aggrieved by this judgment and order of the trial Court the convict, Araj Sk. has preferred the present appeal challenging the same as

illegal and improper and liable to be set aside. The main contention of the ld. Advocate for the appellant has been that the prosecution has

miserably failed to prove the date, place and manner of occurrence as alleged in the charge by cogent evidence. According to him when a girl

above sixteen (16) years voluntarily agrees to sexual intercourse on getting assurance of marriage, the offence cannot be classified as rape.

4. The ld. Trial Judge has found that the prosecution has been able to prove that the accused cohabited with the victim girl regularly for a

continuous period and as a result thereof the victim girl conceived. His further finding is that the consent which the victim girl being aged 18/19

years gave to the sexual intercourse which the appellant had with her should be treated as no consent at all, inasmuch as, being a village woman

and coming of a poor illiterate family she was for all practical purposes a girl immature in mind and hence minor, though technically major in age.

According to ld. Trial Judge, the consent of a girl who is thus mentally immature amounts to no consent and, therefore, it follows that the accused

Araj had sexual intercourse without her consent and in this way the ingredients of the offence of rape came to be fulfilled and from, that point of

view Ld. Judge found the charge proved beyond all reasonable doubt against the accused.

5. The main contention on behalf of the appellant has been that the prosecution has received a serious set-back by failing to prove that the accused

committed the offence in the manner and at the time as alleged in its charge. My attention has been drawn to the charge itself wherein the accused

has been charged in express terms to the effect that he committed the offence of rape on the victim, Nursubha Khatoon, on or about the 30th day

of June, 1996. Mr. Auddy has been emphatic in canvassing his point that on the said date, namely, 30th June, 1996, the FIR was lodged and

nowhere within the four corners of the documents u/s 173, Cr.P.C. this has been shown as the date of occurrence. According to Mr. Auddy, thus

the charge containing a wrong date of occurrence and none of the witnesses having supported such a date of commission of offence in their

testimony, but they having given a different date or period in which the offence was allegedly committed by the appellant, one cannot but escape

the conclusion that the prosecution has failed to observe the basic principle of criminal jurisprudence that it has to prove the commission of any

offence by the accused just in the manner and at the time as has been alleged by it in the charge and not in any other way or at any other time. In

other words, according to Mr. Auddy, since here the witnesses have all testified to a period during which the alleged occurrence took place which

does not tally with the date or period that has been mentioned in the charge as the date or period of occurrence, it must be concluded that on that

score alone the prosecution has miserably failed to substantiate its charge.

6. It is a cardinal principle as embodied in Section 215 of the Code of Criminal Procedure that no error in stating either the offence or the

particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as

material, unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice. The illustration (d) given under

this Section of the Cr.P.C. is a case on this point and it serves as a guidelines for solution of the above question raised by Mr. Auddy. It is stated

that in a case in which A is charged with the murder of Khoda Baksh on 21st January, 1882, though in fact the murdered person''s name was

Haidar Baksh and the date of murder was the 20th January, 1882, if A was never charged with any murder but one, and had he heard the enquiry

before the Magistrate which referred exclusively to the case of Haider Baksh, the Court may infer from fact, the A was not misled and the error in

the charge was immaterial. In the instant case the position is similar. During the trial which was held in the presence of the accused-appellant all the

witnesses referred to a period of occurrence which was different from that mentioned in the charge and the appellant was not charged with any

other case of rape and, therefore, it can be held that the mentioning of a wrong date of occurrence in the charge did not in any way mislead him

and, for that matter, the same has not occasioned a failure of justice. Therefore, the contention of Mr. Auddy is without any merit.

7. On a perusal of the statements of the prosecution witnesses particularly, the P.W.2 (the victim girl herself), the P.W. 3 (victim girl''s father),

P.W. 5 Rohima Bibi (victim girl''s mother), P.W. 10 (Dr. S.B. Bute, the Chief Medical Officer, Burdwan and P.W. 15, Dr. Sima Mukherjee, the

Medical Officer of Burdwan Hospital), I am of the firm opinion that the prosecution has been able to prove beyond any shadow of doubt that the

appellant had sexual intercourse with the victim woman, Nurshubha, for a prolonged period and as a result thereof she conceived.

8. The next question which falls for determination is whether thereby the appellant can be said to have committed the offence of rape as defined u/s

375, IPC. It lays down that a man is said to commit ""rape"" who, had sexual intercourse with a woman under circumstances falling under any of the

six following descriptions :-

First - Against her will.

Secondly - without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another

man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him

personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to

which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

9. In the present case apparently none of the above six Clauses are found attracted. The sexual intercourse allegedly committed by the accused-

appellant with the victim woman was neither against her will nor without her consent. As per the prosecution case her consent to such cohabitation

was obtained by the accused on giving a promise that he would marry her. On carefully going through the provisions of the Section 375, I get the

impression that the definition of the offence of rape does not cover a case like this. The fourth clause requires that such consent is given by the girl

on the belief imported to her that he is her lawfully married husband, although he knows that he is not her husband. It is thus clear that the situation

facing us in the instant case is not covered under this clause. Here the victim woman gave her consent not because she took the accused to be her

lawfully married husband but because the accused gave word to her that he would marry her in future. Similarly the fifth clause which requires that

the consent given by the victim was as a result of her inability to understand the nature and consequence of the act to which she had given consent

by reason of unsoundness of her mind or intoxication or the administration of stupefying of unwholesome substance. Clearly, here there is no such

question at all. Therefore, the prosecution charge of rape against this appellant receives an initial set-back when one makes a plain interpretation of

the language of the provisions of the Section under which the accused has been charged and finds that the same are not attracted at all to this case.

10. The Trial Court, however, has arrived at its finding of guilt judging the case from a different angle of vision. According to Ld. Judge the consent

which the victim girl gave to the sexual intercourse was practically equivalent to no consent since she had not the requisite mental maturity or power

of understanding of the consequences of such consent given by her. The Ld. Trial Judge had drawn a distinction between the educated, enlightened

ladies of the urban area and the poor, uneducated, unsmart women of the rural region of our country and has come to the conclusion that the latter

always lags behind in so far as their intelligence and power of understanding are concerned and the consent which they may give in such matters

may be the product of immature mental make-up and hence such consent practically is no consent at all and consequently the sexual intercourse

which the accused had with her should be taken as being without her consent.

11. It is difficult to accept such a logic. From the evidence on record it transpires that the victim girl Nursubha had fallen in "deep love" with the

appellant and allowed him to co-habit with her when he promised to marry her and even he accompanied him to different places including hotel

and used to spend nights with him here and there (vide the deposition of the P.W. 2 victim girl herself). The victim girl appears to have intelligently

answered well all questions put to her in her examination-in-chief as well as in the cross-examination and she has never given any impression that

her level of intelligence or power of understanding was in any way of inferior standard not only at the time of her examination but also at the time

when the occurrence took place. She has never said that when she allowed the accused to have sexual intercourse with her, she had any lack of

awareness or consciousness about what was going to happen to her or what consequences might ensue therefrom or her giving of consent was not

free due to any kind of misunderstanding on her part. Learned trial Judge appears to have been influenced by the observation of the Apex Court

reported in Rafiq Vs. State of U.P., to the effect that the Court cannot cling to a fossil formula and judicial response to human rights cannot be

blunted by legal bigotry and chronological age of an idiot or moron should not get primacy over his mental age where he or she is below the line of

average i.e. it is to be noted here that in the present case the evidences nowhere give the slightest indication that the victim girl was mentally

deficient or her I.Q. (intelligence quotient) was below the standard or she had not the maturity of mind, far less an idiot or mental retarded person.

Neither the prosecution makes out any such case anywhere. On the other hand, her testimony and the testimonies of her father and mother as well

as the other witnesses for the prosecution have combined to portray her as a woman of normal prudence and average intelligence. This finding is

strengthened by another piece of evidence, namely, the expert-opinion of P.W. 15, Dr. Sima Mukerjee, given in her cross-examination to the

effect that the victim girl gave birth to another child previously and there were some marks thereof in her abdomen and that child was not living.

This revelation also is very vital since it highlights that she was not a novice in such respects and her giving of consent to sexual intercourse with the

appellant could not be an act of immature understanding.

12. The fact that the victim girl did not disclose to anybody about the alleged promise given by the appellant to her before having coitus with her is

very significant. Her mother''s testimony (vide deposition of the P.W. 5) that she came to understand that her daughter had been pregnant on

seeing her swollen abdomen and she interrogated Nursubha who then disclosed such facts to her and coming to know this, she became angry and

she rebuked her. If she had acted in consideration of the promise given by the accused to the effect that the latter would marry her on a future date,

then it is in the nature of thing that would disclose such a serious matter touching her life to her parents or guardians or near and dear ones before

having further cohabitation with the man for a continuous period till her becoming pregnant. But her remaining totally silent during this long period

while sharing bed with the accused does not lead us to believe that the consent which she gave was as a result of any misconception of fact or due

to her power of understanding being affected by an immature mind. In an earlier case of identical nature Jayanti Rani Panda Vs. State of West

Bengal and Another, a Division Bench of this Court has held that if a full grown girl consent to the acts of sexual intercourse on a promise of

marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuousness on her part and not an act induced

misconception of fact and Section 90, IPC cannot be called in aid in such a case to pardon the act of the girl and fashion criminal liability on the

other, unless the Court cannot be assured that from the very inception the accused never really intended to marry her. Had it been the allegation

that the consent was obtained by creating a belief in her that they had been already married, such consent could be said to have resulted from a

misconception of fact. Here that is not the case. The prosecution case here is that the accused procured the consent of the girl by making a

promise that he would marry her in future. Such a case does not come within any of the clauses of Section 375, IPC which defines the offence of

rape. In view of the foregoing reasons it is difficult for me to arrive at a finding of guilt. The reasoning which has prompted the Trial Judge to bring

this case within the purview of the definition given u/s 375, IPC does not appear to be a sound one when there is absolutely no such case made out

by the defence that the victim girl was in idiot or that her power of understanding and level of intelligence was deficient or her state of mind was

immature in any way. Nor the evidence on record anywhere gives rise to any such inference. It is highly surprising and unwarranted that the Ld.

Trial Judge of his own accord would import such a third story not whispered by any of the parties. The consent which the victim girl admittedly

gave to the sexual intercourse that the accused had with her day after day for a prolonged period appears to my mind to be a consent given by a

full grown woman with a free mind and there is nothing found from the materials on record on the basis of which one can draw the conclusion that

such consent was equivalent to no consent because of the fact that the said woman had not the necessary maturity of mind to understand the

implication of such consent. Neither, as I have shown above, such consent can be declared as being obtained by fraud so as to bring it within the

mischief of Section 90, IPC by categorising it as misconception of fact.

13. This will find further support from the ruling given in another Division Bench judgment of this Court reported in Sudhamay Nath alias Bachhu

Vs. State of West Bengal, wherein it has been held under identical facts and circumstances that the fact of the victim girl''s giving consent to the

sexual intercourse was on the basis of a false promise given by the accused that he would marry her, would not vitiate the consent so given by her

because she gave it after fully understanding the nature and implication of the act involved therein. It was further held by the Division Bench that it

was not that the girl consented to the act on any understanding or misunderstanding that the concerned person was her husband (as distinct from

''would - be'' husband) or that she had any misconception about the nature of the act who which she consented and in that view of the matter it

could not become a case of rape since she consented to the act of sexual intercourse fully knowing the nature of implication thereof and being fully

aware that the person concerned was not yet her husband, even though he had proposed to marry her. The Court observed that from the moral

and humanitarian angle of view, the inhuman conduct of the appellant in abandoning the unfortunate girl to face her fate all alone after making her

pregnant might be highly reprehensible indeed, but, yet it must be held that such conduct by itself did not become a ground for holding the accused

guilty of a charge of rape u/s 376, IPC.

14. In the result, therefore, I am constrained to hold that the appellant cannot be found guilty of the charge u/s 376, IPC and the impugned orders

of conviction and sentence passed by the Court below cannot be sustained and are hereby set aside. The appeal be allowed and the appellant

being acquitted of the charge be set at liberty.