SUPREME COURT OF INDIA

Zindar Ali SK

Vs.

State of West Bengal

Crl.A.No.222 of 2009

(Tarun Chatterjee and V.S. Sirpurkar JJ.)

06.02.2009

JUDGMENT

V.S. Sirpurkar, J.

1. Leave granted.

2. This is an appeal against the judgment and order of conviction passed by the Calcutta High Court, whereby, the appeal filed by the accused/Appellant, was dismissed. The accused was convicted by Fast Track, Fourth Court, Krishnagar, Nadia for an offence under Section 376 , as also an offence under Section 417 of the *Indian Penal Code* (hereinafter for short "IPC"). As per the prosecution case, there was another accused Naki Mollick in the matter, against whom the Chargesheet was submitted, but, he being a juvenile, was sent to the Juvenile Court for facing trial.

3. As per the prosecution, accused Zindar Ali SK was trying to marry with prosecuterix Chandmoni Khatoon with the help of Naki Mollick. Prosecuterix was working as a weaver and on the day of incident, when she was returning from her work, the accused caught her, taking advantage of the dark and committed rape on her. The prosecution further alleged that Naki Mollick abetted the commission of the offence and both the accused persons threatened to kill her. The accused committed rape on the prosecuterix several times forcibly and had also falsely assured to marry her. However, the accused refused to marry the complainant/prosecuterix and, therefore, the prosecuterix informed the incident to her family members and neighbours. Salish (a meeting for resolving the dispute) was held in the Village on 24.2.2003, wherein, it was decided that the accused should marry the prosecuterix, however, Zindar Ali refused to marry the prosecuterix. A complaint seems to have been made to the Chief Judicial Magistrate who issued a direction on 10.7.2003 to the police to register an offence. This became necessary as though she had approached the police, they advised her to settle the matter amicably with accused. Ultimately, a Chargesheet was submitted for offences under Sections 376, 417 and 120-B of IPC. However, it was found that the other accused Naki Mollick was a juvenile and his trial, therefore, was separated. As many as 14 witnesses were examined by the prosecution in support of the prosecution case,

including the prosecuterix, her father and mother. Some documents were also filed, including the medical reports, age reports etc. Doctors were also examined and ultimately, the accused abjured the guilt and claimed that he had been falsely implicated, as he had refused to marry the prosecuterix. Ultimately, the Sessions Judge negatived the defence and came to the conclusion that the offences of rape and cheating were proved against the accused, and convicted him on those two counts, however, he was acquitted of the charge under Section 120-B of IPC.

4. As against this, an appeal came to be filed before the High Court, however, the High Court has dismissed the appeal and that is how, the matter has come before us.

5. Shri Bijan Kumar Ghosh, Learned Counsel appearing on behalf of the Appellant, pointed out that the whole prosecution story was extremely unnatural and weak. The Learned Counsel pointed out that the prosecuterix was undoubtedly a grown up girl and though as per the prosecution case, she was raped on 23.2.2003, she not only kept quiet, but had also indulged in sexual intercourse with the accused again on subsequent 2 or 3 days and reported the matter only on 27.2.2003 to the Police Station who did not register the matter and commenced investigation only after 5 months. The Learned Counsel argued that this delay was fatal and further suggested that there was an element of "consent" on the part of the prosecuterix, and as such, there was no question of any rape. The Learned Counsel further suggested that even otherwise, the absence of any injury on the person of the prosecuterix suggests that the prosecuterix had surrendered to the advances made by the accused and engaged herself in the intercourse as per her will, and both the Courts below have failed to consider this important aspect. Lastly, the Learned Counsel contended that in fact, there was no Salish or meeting and there was no question of the accused refusing to marry the prosecuterix during such meeting. The Learned Counsel suggested that there was in fact, no sexual intercourse, muchless, against the consent of the prosecuterix and the accused was falsely implicated on account of his refusal to marry the prosecuterix, who herself wanted to marry him.

6. Both the Courts below have held on the basis of the evidence of the prosexuterix, as corroborated by the other evidences that there was not only a sexual intercourse between the accused and the prosecuterix, but the same was without the consent and against the will of the prosecuterix and as such, the accused was guilty of rape.

7. We have gone through the evidence led on behalf of the prosecution. The prosecuterix was examined as PW-1 and deposed that the accused was after her, requesting her to marry him, so also his friend, the other accused also used to tell her that the accused wanted to marry her. She, however, refused to oblige. She further deposed that the accused forcibly caught her and put napkin inside her mouth and committed sexual intercourse against her will and consent. She also further deposed that the accused had threatened her and also raped her subsequently for 2 or 3 days. Her wearing apparels were also torn. She deposed that due to fear of her life, she did not disclose the incident of rape to anybody, however, after 2/3 days of incident, when the accused refused to marry her, she came home and reported the incident to her parents. As per her deposition, a Salish was held, where, the accused declined to abide

by the decision taken in that meeting of about his marrying the prosecuterix. She identified her wearing apparels, which were seized by the Police. She also identified the accused. There is no effective Cross-Examination to this witness. One question was asked about her clinical and physical examination. It was suggested firstly that she had suffered injuries on her private parts and person. The witness, however, stated that there was no bleeding injury, meaning thereby, that the injuries were insignificant considering that she was medically examined after about 6 months. Such admission is meaningless. Her version regarding rape, however, has gone unchallenged. She was asked about the workplace and the boys being there, however, non-disclosure to the boys would only be a natural behaviour and cannot lead us to the conclusion that she had consented for the sexual intercourse. There was no reason for the poor girl to falsely implicate the accused. There is no suggestion of any love-affair with the accused also. Her version that she was raped by the accused, goes totally unchallenged.Her version that she was forcibly caught and a napkin was put inside her mouth before the accused had committed rape on her, was a little exaggerated, but it does not demolish her version that she was raped by the accused.

8. PW-2, Moshar SK, in his deposition, had spoken about the Chandmoni and her father, telling him that Chandmoni was raped by the accused. He had also spoken about the village meeting, where, it was decided that the accused should marry Chandmoni. Again, there is no Cross-Examination of this witness. Of course, this witness had stated that he had not made any statement to the Police, as he was not interrogated. Anther witness PW-3 Tajem SK (Mallick) also spoke about the village meeting, which was held at the instance of Markam Ali SK, father of the prosecuterix. He also claimed that he was not interrogated by the Police. In his Cross-examination itself, it has come that there were about 200-250 persons present in the village meeting, where, it was decided that the accused was guilty. The other witnesses examined on the question of the village meeting were Saheb Ali SK and Markam Ali SK, the father of the prosecuterix. It will not really be necessary for us to go to the evidence of the village meeting, where, the accused allegedly admitted that he had the sexual intercourse, particularly because the evidence of the prosecuterix on that subject has remained completely unchallenged and is sufficient to nail the accused. PW-11 Noorjahan Bibi, who is the mother of the Prosecutrix specifically spoke about the prosecuterix' reporting to her about the forcible sexual intercourse committed by the accused Zindar Ali. She also spoke that when she saw her torn cloths etc., she asked her as to what had happened, whereupon, the prosecuterix told her about the rape committed by the accused, however, she was not able to identify the clothes. She had also spoken about the village meeting. There is again no Cross-examination of the witness.

9. As for the medical evidence, from the evidence of the Dr. P.K. Roy, PW-7, it becomes apparent that the girl was major. The medical certificate granted by the Doctor suggests that the Hymen was torn at 6'O clock position and the rugosity was lost and that the Prosecutrix suggested that she was assaulted by Zindar Ali SK, about 6 months back. It is to be noted that the girl was produced for medical examination only on 8.8.2003. The Sessions Court, as well as, the High Court have rightly accepted the evidence of the prosecuterix.

10. Shri Ghosh, Learned Counsel for the appellant, pointed out that allegedly, though there was a village meeting Salish, but there was nothing on record about the same and therefore, an uncorroborated testimony of the prosecuterix should not have been accepted by the Courts below.

11. We have seen that the prosecuterix has very specifically spoken about the rape. It is, undoubtedly true that the First Information Report in this case was lodged late, however, it has come on record that the prosecuterix had filed a petition under Section 156(3) of the Code of Criminal Procedure on 27.2.2003, on the basis of which, the direction was issued by the Chief Judicial Magistrate, Krishnagar, Nakashipara Police Station, for calling investigation into the said allegation. We fail to understand this unusual stance of police. They high handedly advised the Prosecutrix to "settle" the matter amicably. The High Court has, in our opinion, very rightly criticized that the First Information Report should have been registered only on 19.7.2003 and the direction issued by the Chief Judicial Magistrate, Krishnagar on 10.7.2003 should not have been followed for good long more than 17 days. All this, undoubtedly, resulted in the prosecuterix being sent for the medical examination only after 6 months of the offence. Very important evidence was therefore, lost. However, the High Court came to the finding, on the basis of the evidence of PW-7 Dr. Roy and the evidence of the prosecuterix, that prosecuterix was subjected to sexual intercourse. We do not find anything wrong with that finding. Once that position is obtained, the only question is whether the said sexual intercourse was by the accused and whether it was without consent and will of the prosecuterix. We feel that since the evidence of the prosecuterix is acceptable, those findings would definitely go against the accused.

12. It is tried to be suggested that the girl did not complain about rape even to the medical officer PW-7 and instead, complained only that she was "assaulted", and that PW-7 had deposed that the tear was not injury, as there was no bleeding. We cannot forget that the girl is an uneducated rustic person, who had to work to sustain the family. It cannot also be ignored that she had disclosed the facts to her parents whose version has again gone unchallenged. She had also asserted that she had told about the rape in the Village Meeting which version was supported by her parents and other witnesses. Besides, her medical examination was conducted after 6 months of the incident. We would, therefore, choose to go on the basis of the evidence of the prosecuterix. In our view, though the High Court has given a finding about the village meeting, which was supported by the evidence of PW-2 Moshar SK, PW-3 Tajem SK (Mallick), PW-4 Saheb Ali, as also by PW-6 Markam Ali, the father of the girl, it is really not necessary to go to that aspect in view of the clinching evidence by the girl. We would, however, use that evidence as corroborating the fact of immediate disclosure of rape by the girl. It cannot be forgotten that the girl stuck to her statement made before the Chief Judicial Magistrate on 13.9.2003, though that statement is not a substantive statement, which would only show the consistency in the evidence of the girl.

13. The shabby quality of investigation was severely criticized by the learned counsel. There can be no dispute that the investigation in this case is not at all satisfactory. There are discrepancies galore. However, in this case, the truthful version of the prosecutrix cannot be

ignored. It is trite law that the defence cannot take advantage of such bad investigation where there is clinching evidence available to the prosecution as in this case. We, therefore, confirm the finding of the High Court that the accused is guilty of the offence under Section 376 of IPC.

14. We cannot, however, persuade ourselves to agree with the High Court about the offence of cheating. The evidence about the cheating is of slip-shod nature and not believable. It is also self-effacing. After all, the first act of the sexual intercourse was without the consent and the accused had thereby, committed rape, however, the version that he gave a marriage promise, would really go against the prosecution, whereby, it would mean that the subsequent acts were done with the consent of the girl on account of the promise of marriage. We do not think that such could be the approach. After all, if the promise of marriage was given and the girl had succumbed on that account, by itself, may not amount to cheating. Besides this, the girl has very specifically stated that even subsequently, she was ravished against her wishes. Therefore, the theory of promise of marriage and the consent for sexual intercourse will wither away. We, therefore, acquit the accused of the offence under Section 417 of IPC.

15. This takes us to the last argument about the quantum of sentence. The Courts below have awarded 10 years of imprisonment and a fine of Rs.5,000. In our opinion, considering the fact that the incident took place about 6 years back and the fact that the accused is behind the bars for last about 5 years, as also poverty on the part of the accused, we feel that the sentence already suffered would be sufficient. The sentence of fine is however, confirmed. Fine, if recovered shall be paid to the Prosecutrix. She shall be intimated by sending notice to her. We, accordingly, modify the sentence. The appeal is disposed of with this modification.