

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 822 of 2013
Dipak Singha
-Vs-
State of West Bengal

Amicus Curie : Mr. Pawan Gupta, Adv.
For the State : Mr. Saswata Gopal Mukherji, Ld. P.P.
Ms. Amita Gaur, Adv.
Heard on : 14.02.2022
Judgment on : 14.02.2022

Joymalya Bagchi, J. :-

Appeal is directed against judgment and order dated 28th June, 2013 and 29th June, 2013 convicting the appellant for commission of offence punishable under Section 376(2)(f) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for ten years and also to pay a fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for one year more.

Prosecution case, as alleged against the appellant is to the effect that on 20.05.2010 at 11 p.m. in the night when family members of the

victim girl aged around 11 years had gone to attend 'Namsankritan', the appellant came into the house and embraced her. Thereafter, he committed rape on her. Hearing shouts of the victim, local people came to the spot. Written complaint was lodged by the mother of the victim girl (P.W. 1) resulting in registration of Bishnupur P.S. Case No. 236 of 2010 dated 21.05.2010 under Section 376 (2)(f) of the Indian Penal Code against the appellant. In course of investigation, the victim was medically examined and her statement was recorded before Magistrate. Appellant was arrested and charge-sheet was filed. Charge was framed under Section 376(2)(f) of the Indian Penal Code.

In conclusion of trial, prosecution examined 12 witnesses to prove its case. Defence of the appellant was one of innocence and false implication. In conclusion of trial, the trial Judge by judgment and order dated 28th June, 2013 and 29th June, 2013 convicted and sentenced the appellant, as aforesaid.

Nobody appears for the appellant. Mr. Pawan Gupta, appearing as Amicus Curiae draws our attention to the evidence of the victim girl (P.W. 3) and submits that the victim girl had not spoken of penetration. Lack of penetration is corroborated by medical officer (P.W. 7) who did not find any injury on the private parts of the victim. Hymen was also found intact. Hence, he prayed for acquittal.

Ms. Gaur, learned Advocate appearing for the State submits that the evidence of the P.W. 3 is corroborated by other witnesses including a

neighbour. Lack of injury simplicitor cannot be ground to disbelieve the prosecution case. Hence, the appeal is liable to be dismissed.

I have considered the rival submissions at the bar.

P.W. 3, is the victim girl. She was aged around 11 years at the time of occurrence. She deposed on 20.05.2010 around 11 p.m. her parents along with her elder brother and sister had gone to their neighbour's house to hear devotional songs. She was sleeping alone. Suddenly, she woke up and found that the appellant was lying beside her. He forcibly kissed her, placed his penis over her vagina after opening her underwear. She shouted and the appellant fled away from the room. She narrated the incident to her mother. In cross-examination, she stated that the appellant attempted to rape her but as she protested he could not commit the offence.

P.W. 1, Kalpana Karan, is the mother of the victim girl and informant in the instant case. She has corroborated the deposition of her daughter. She proved her signature on the First Information Report.

P.W. 2, Sunita Karan @ Goswami, is the elder sister while P.W. 4, Tulsi Karan is the father of the victim girl. Both the witnesses have corroborated P.W. 1. P.W. 4 stated that the appellant tried to rape the victim.

P.W. 6, Jagannath Khamaru, is a local witness who stated that on that night the victim had come to Harinamtala and stated that the appellant had outraged her modesty.

P.W. 10, Ashok Kr. Singha, is the Head Teacher of Khiristala F.P. School. He proved the date of birth of the victim as 20.07.1998 as per entry in the school register.

P.W. 12, Malay Kr. Chatterjee, is the Investigation Officer of the case. He visited P.O., recorded statements of the witnesses, seized wearing apparels of the victim and sent the victim for medical examination as well as recording her statement before Magistrate under Section 164 Cr.P.C. He submitted charge-sheet.

I note that the version of the victim to the extent that on the night of 20.05.2010 the appellant had entered her room and misbehaved with her is proved beyond doubt. Her deposition in this regard is corroborated not only by her relations but also an independent witness, P.W. 6. However, it is argued that the evidence of the victim does not make out a case of rape. I have given anxious consideration to such submission. P.W. 3 in her deposition stated that the appellant had embraced and kissed her. Thereafter, he removed her panty and placed his male organ on her vagina. However, she does not speak of penetration. In fact, in cross-examination she clarifies that the appellant attempted to rape her but could not do so as she shouted for help. Deposition of the victim with regard to an attempt is also corroborated by her father (P.W. 4) who stated that her daughter stated that the appellant tried to rape her forcibly but could not do so as she shouted for help and the appellant fled away.

It is settled law penetration even of the slightest degree is necessary to establish the offence of rape. An analysis of the evidence on record

shows no case of penetration has been deposed either by the victim or other witnesses. Although absence of injuries or non-rupture of hymen is not a sine qua non to prove the offence of rape, in the factual matrix of the case where the victim herself states that the appellant attempted to rape her absence of injuries in her private parts corroborate the conclusion that the case was one of attempt to commit rape. In the light of the aforesaid discussion, I convert the conviction of the appellant to one under Section 376(2)(f) read with Section 511 of the Indian Penal Code instead of 376(2)(f) of the Indian Penal Code.

Coming to the issue of sentence, I note that the appellant has undergone more than 8 years of imprisonment. Under such circumstances and in view of the alteration of his conviction as aforesaid, I modify the sentence imposed on him and direct the appellant be sentenced to suffer imprisonment for the period already undergone and to pay a fine of Rs.10,000/- in default, to suffer rigorous imprisonment for six month more.

The appeal is accordingly disposed of.

Period of detention, if any, undergone by the appellants during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

Copy of the judgment along with LCR be sent down to the trial court at once.

Urgent photostat certified copy of this order, if applied for, shall be given to the parties, as expeditiously as possible on compliance of all necessary formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)