

Nilu Singh, Vs. State of West Bengal

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Court : Kolkata

Decided On : Mar-17-2006

Reported in : 2006(2)CHN455

Judge : Amit Talukdar and ;Sankar Prasad Mitra, JJ.

Acts : Evidence Act - Section 6; ;Indian Penal Code (IPC) - Sections 34, 109, 366 and 376(2); ;Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Cr. A. No. 310 of 1998

Appellant : Nilu Singh, ;bapi Das and Tulsi Prasad Shaw

Respondent : State of West Bengal

Advocate for Def. : Ashoke Mukherjee, Adv.

Advocate for Pet/Ap. : Jayanta Chatterjee, Adv.

Disposition : Appeal dismissed

Judgement :

Sankar Prasad Mitra, J.

1. This appeal is directed against the judgment dated 11th September, 1998, passed by the learned Sessions Judge, VI Bench, of the City Civil & Sessions Court, at Calcutta in S.C. No. 9 of 1997, S.T. No. 1 of February, 1998, whereby the

appellants were convicted under Section 376(2)(g) of IPC and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 2,000/- each and in default to suffer rigorous imprisonment for two months. They were also convicted under Section 366 of IPC and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 2,000/-each in default to undergo rigorous imprisonment for two months.

2. The epitome of the prosecution case is that on 13th November. 1996 at about 10.30 p.m. the de facto complainant, Santoshi Shaw went near Lal Mandir, at Jyotindra Mohan Avenue carrying food to feed her husband, she met her husband and after serving dinner while she was returning home at about 11 p.m. on the way one autorikshaw stopped by her side and there were 5 persons in the autorikshaw including the autorikshaw driver and they forcibly lifted the victim Santoshi Shaw into the autorikshaw and proceeded to Central Avenue and ultimately reached in a lane to the back side of Hadua where she was sexually assaulted. Out of five persons, one fat man forcibly removed her Pajama and sexually intercoursed with her and the other person wearing white trouser and blue ganji also forcibly intercoursed with her. In the meantime, the local people rescued her and apprehended three miscreants out of five as others manage to flee away from the place. The persons apprehended by the local people were namely, Nilu Singh, Bapi Das and Tulsi Prasad Shaw. When the police arrived at the spot the victim Santoshi Shaw narrated the incident which was recorded by the Police Officer Ziaul Kader, P.W. 13 and this has been treated as FIR (Exhibit 6).

3. Considering the materials on record charges under Section 366/376(2)(g) of IPC were framed against the accused Nilu Singh. That apart charge under Section 366/376(2)(g)/109 of IPC were framed against the accused Bapi Das and Tulsi Prasad Shaw. The accused persons in answer to the charges pleaded not guilty and claimed to be tried.

4. However, the prosecution in order to prove their case had examined 14 witnesses, namely, P.W. 1, Santoshi Shaw, P.W. 2, Dilip Shaw, husband of the victim, P.W.3, Subha Narayan Mahato, P.W.4, Nikilesh Ghosh, P.W.5, Debashis Som, P.W. 6, Dr. Sipra Roy, P.W.7, Dr. Krishna Paul, P.W. 8, Ratan Moitra, who

informed the police over telephone regarding the incident, P.W. 9, Abhijit Dutta, P.W. 10, Kanailal Dutta, P.W. 11, Soumenda Roy, P.W. 12, Rakesh Sharma, P.W. 13, Sk. Ziaul Kader, who initially visited the P.O. and recorded the statement of Santoshi Shaw and arrested the accused persons and P.W. 14, Ajit Kumar Chowdhury (I.O.). In addition to this, prosecution has exhibited several documents i.e. seizure list, Exhibit 1, in connection with seizure of wearing apparel of the victim and accused, Nilu Singh. Report of medical examination, Exhibit 2, report of medical examination, Exhibit 3, result of examination, Exhibit 4, medical report, Exhibit 5, forwarding letter, Exhibit 5/1, written complaint being the statement of Santoshi Shaw dated 14th November, 1996, Exhibit 6, G.D. Entry No. 1040, Exhibit 7, formal FIR, Exhibit 8, seizure list showing seizure of autorikshaw, Exhibit 9. However, defence of the appellants as appearing from the trend of cross-examination witnesses as well as their examination under Section 313 of Cr. PC is that they are innocent but they did not adduce any evidence in support of their defence.

5. The learned Trial Court considering the evidence of P.W. 1, victim, P.W. 2, husband of the victim, medical evidence as also the evidence of neighbours, namely, P.W. 8, P.W. 9, P.W. 10 and P.W. 11 and the evidence of P.W. 12 and P.W. 13 (I.O.) came to a conclusion that the victim was kidnapped by the accused persons from Lal Mandir to a lane nearby Hadua and thereafter the victim was raped firstly by a fat man and then by Nilu Singh when Bapi Das and Tulsi Prasad Shaw, driver of the autorikshaw were standing nearby and guarding the place having common intention to commit gang rape upon the victim. The appellants were accordingly convicted and sentenced by the learned Trial Judge as indicated above.

6. Let us now consider whether the judgment dated 11th September, 1998 passed by the learned Trial Judge should be sustained by this Court or not?

7. Learned Advocate Mr. Joyanta Chatterjee appearing amicus curiae for the appellants drawing our attention to the testimonies of witnesses including the documents exhibited in this case, submitted that the appellants were not arrested from the spot and they did not commit any rape upon the victim Santoshi Shaw. It

is also submitted by him that appellant Tulsi Prasad Shaw was not the driver of the autorikshaw and that P.W. 1 Santoshi Shaw never implicated Tulsi Prasad Shaw as rapist. It is also submitted by him that the I.O. did not prepare any sketch map of the place of occurrence and in view of the contradictions revealed by the prosecution witnesses the appellants should not have been convicted and sentenced by the Trial Judge. Mr. Chatterjee also submitted that all the material questions were not put to the appellants during their examination under Section 313 of Cr. PC and as a result they have been prejudiced. It is, therefore, submitted by him that in the circumstances, the judgment passed by the learned Trial Judge should be set aside by this Court.

8. On the other hand, the learned Prosecutor, Mr. Ashoke Mukherjee appearing on behalf of the State drawing our attention to the evidence on record submitted that minor contradiction should be ignored by this Court and the evidence of prosecutrix should be believed. It is therefore submitted by him that in a case under Section 376(2)(g) of IPC presence of accused person at the P.O. is sufficient to incur liability under that Section even if the rape is committed not by all of them. Mr. Mukherjee further submitted that the evidence of P.W. 8 to P.W. 10 should be relied upon because their evidence is not hearsay and it is admissible under Section 6 of the Evidence Act.

9. Mr. Mukherjee further submitted that the appellants were arrested from the spot and the autorikshaw was also seized from the spot. That apart the victim was found inside the autorikshaw with Nilu Singh whereas Bapi Das and Tulsi Prasad Shaw were found outside the autorikshaw and this fact has been divulged by P.W. 1, P.W. 2 and P.W. 8 to P.W. 13. Mr. Mukherjee further submitted that the victim was overpowered by the appellants and she became frightened and she was subjected to rape. It is therefore submitted by Mr. Mukherjee that in view of the convincing evidence adduced by the prosecution, the learned Trial Court had rightly convicted the appellants and sentenced them accordingly. He, therefore, submitted that in the circumstances, the judgment passed by the learned Trial Court should be upheld by this Court.

10. We have gone through the evidence on record adduced by the prosecution P.W. 1, Santoshi Shaw, victim, wife of P.W. 2, Dilip Shaw has narrated the incident of forcibly kidnapping and rape upon her first by fat man and then by the appellant, Nilu Singh when Bapi Das and Tulsi Prasad Shaw guarded the spot by standing outside the autorikshaw. P.W. 2, husband of the victim who saw the incident of kidnapping of his wife followed the autorikshaw and alerted the local people and as a result the local people assembled there and caught the appellants on spot and the victim was recovered. The police was informed by P.W. 8 and as such P.W. 13 of Battala P.S. went to the spot and recorded the statement of the victim, apprehended the accused persons and took the victim and the accused persons including the autorikshaw to Bartala P.S. P.W. 8, P.W. 9, P.W. 10, P.W. 11 & P.W. 12 were the residents of the locality where the alleged incident had occurred. From their evidence it transpires that they found the victim in frightened condition and they also found the appellants there. Their evidence further shows that the victim along with accused persons including the autorikshaw had been taken to Bartala P.S. by S.I. P.W. 13. Since the Bartala P.S. had no jurisdiction to start a case, the accused persons and the victim and the autorikshaw were handed over to P.W. 14, S.I., Ajit Kumar Chowdhury of Shyampukur P.S. who on the basis of written complaint (Exhibit 6) filled in the formal FIR and started a case vide Exhibit 8. The auto-rikshaw was seized vide Exhibit 9, G.D. Entry No, 7 was made and the victim and the accused Nilu Singh were examined by the doctor. It is true that there were minor contradictions in the testimonies of P.W. 8, P.W. 9, P.W. 10, P.W. 11, and P.W. 12 but, these contradictions do not in any way shake the credibility of the witnesses as those contradictions are not vital so as to disbelieve the incident of taking away of the victim forcibly from Lal Mandir to the place of occurrence. That apart, these witnesses are men of the locality from where the victim was rescued from the hands of the appellants. There is nothing on record to show that these witnesses had any prior acquaintance with the appellants or they are enemies of the appellants. The G.D. Entry No. 1040 dated 13th November, 1996 vide Exhibit 7, corroborates alleged incident of kidnapping the victim as stated in the FIR (Exhibit 6). It is true that some questions were not asked to the accused persons (appellants) during their examination under Section 313 of Cr. PC. But that did not cause any prejudice to them because they enjoyed

the liberty of cross-examination of all the prosecution witnesses without disclosing any specific defence which could shake the credibility of the prosecution witnesses. The autorikshaw No. WB-04 A0175 was seized from the P.O. vide Exhibit 9 and the appellants were arrested from the spot. Therefore, the evidence on record and attending circumstances of the case have sufficiently established that the victim Santoshi Shaw was forcibly taken away without her consent by the appellants in an autorikshaw on the night of 13th November, 1996. In order to prove the offence under Section 366 of IPC it has to be proved further that she was forced to illicit intercourse. It is the evidence of the victim, Santoshi Shaw, P.W. 1 that there was sexual assault upon her by Nilu Singh and another although the fat man could not be apprehended. So P.W. 1 is the only witness to prove the allegation of rape. Now the question is if the victim was actually raped. It is the general principle and practice that corroboration is insisted upon to prove the offence of rape. In a case of rape upon the victim it would be adding insult to injury to tell a woman that her story would not be believed unless it is corroborated in material particulars as in the case of accomplice of a crime. It has been held by the Apex Court that in a case of rape the rule is not that corroboration is essential before there can be conviction. In practice, conviction for rape almost depends entirely on the credibility of the victim. It is evidently clear that the victim, Santoshi Shaw is an adult married woman. P.W. 4 who examined the victim did not find any mark of violence of sexual assault upon her and he opined that the victim was habituated in sexual intercourse. But absence of injury by itself is not sufficient to hold that the prosecutrix was a consenting party. May be, being frightened she become unnerved or apprehending fear of being assaulted failed to offer resistance. It is true that there was no mark of injury on her private parts but stains of semen were found on her wearing apparels which were seized by P.W. 14, I.O. vide Exhibit 5 series. The wearing apparel of the accused Nilu Singh was also seized as per seizure list (Exhibit 4/1). The wearing apparels of the accused were identified by the victim P.W. 1 vide Material Exhibits I and II. The seizure was also witnessed by P.W. 3. It is the evidence of P.W. 14, S.I., Ajit Kumar Chowdhury that the wearing apparels were sent for chemical examination and the result of the forensic examination (Exhibit 4) shows that semen was discharged on kurta and pajama as well as on full pant and jangia. The testimonies of P.W. 5, Debashis

Som, who examined the accused Nilu Singh stated that due to presence of smegma full penetration was not possible but slight penetration or mere touching cannot be ruled out. It is true that P.W. 5 admitted in his cross-examination that he did not mention in his report about the possibility of slight penetration by the person examined, still he had deposed that there was slight penetration. Presence of smegma obviously suggest that full penetration was not possible. But it should be noted that the incident of alleged rape occurred within the autorikshaw and as such, full penetration and complete sexual intercourse was not possible. Thus P.W. 5, having honored for truth had rightly stated that there was a slight penetration or mere touching. Therefore, his testimony, in our view, is reasonable and trustworthy. So the medical evidence corroborates the testimony of P.W. 1. Santoshi Shaw with regard to alleged incident of rape upon her by one fat man and then by the accused Nilu Singh when she had been guided by accused Bapi Das and Tulsi Prasad Shaw. It transpires from the evidence on record that the victim being unnerved and apprehending fear of being assaulted failed to raise any alarm initially, but ultimately she succeeded to draw the attention of the local people at the place of occurrence. It is evidently clear that P.W. 1 admitted in her evidence that she deposed in the case as tutored by the police and also denied the presence of Tulsi Prasad Shaw inside the autorikshaw. The conduct of P.W. 1 and the reason for stepping back from the allegation made out against the appellant Tulsi Prasad Shaw requires clarification and it is clarified hereunder:

P.W. 1 was examined on 1st April, 1998 and cross-examined on 4th June, 1998, moreover she is an illiterate woman and subjected to sexual assault. Therefore there is every chance of her being confused. Her cross-examination on behalf of the appellant Nilu Singh, Bapi Das and Tulsi Prasad Shaw was almost not forceful and all the appellants in their examination under Section 313 of Cr. PC simply denied the allegation without disclosing any positive defence. In the circumstances we are of the view that the testimony of P.W. 1 is wholly trustworthy and it is accepted.

11. The charge has been brought about against the accused persons under Section 376(2)(g) of IPC for committing gang rape. Under Explanation 1 of Section 376 which provides 'where a woman is raped by one or more group of persons

acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-Section'. The principle in furtherance of common intention has been defined in Section 34 of the IPC. Common intention implies acting in concert existence of pre-arranged plan which has to be proved either from conduct or from circumstances. Therefore, what is required is element of participation in action. The essence of this Section is that the person must be physically present at the place of actual commission of the crime. In such cases all are guilty of principal offence and not of abatement.

12. The evidence on record and the attending circumstance of the case have clearly established that the appellants had kidnapped the victim Santoshi Shaw and thereafter she was raped forcibly by one fat man who fled away from the place and then by Nilu Singh in presence of the accused Bapi Das and Tulsi Prasad Shaw, who guarded the place having common intention to commit rape. Therefore, considering the facts proved in this case, we are of the view, that the learned Trial Judge had rightly convicted and sentenced the appellants under Section 366/376(2)(g) of IPC and it does not call for any interference by this Court. We, therefore, do not find any merit in the appeal and it is accordingly dismissed.

Amit Talukdar, J.

13. I agree.