

Shamsad Ali Vs. State

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Court : Kolkata

Decided On : Jan-19-2004

Reported in : (2004)2CALLT231(HC),2004(2)CHN427

Judge : Narayan Chandra Sil, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Section 376

Appeal No. : Cr. A. No. 7 of 2003

Appellant : Shamsad Ali

Respondent : State

Advocate for Def. : R.S. Saroop, P.P.

Advocate for Pet/Ap. : H.R. Bahadur and ;A.S. Zinu, Adv.

Disposition : Appeal allowed

Judgement :

Narayan Chandra, Sil, J.

1. This appeal has been preferred against the judgment and order of conviction dated 14.4.2003 passed by Shri N.N. Ghosh, learned Sessions Judge, Andaman and Nicobar Islands, in connection with Sessions Case No. 03 of 2000 corresponding to Sessions Trial No. 1 of January, 2002.

2. The learned Sessions Judge found the accused/appellant, Shamsad Ali, guilty of the offence committed under Section 376 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for a term of seven years and also to pay a fine of Rs. 2,000/- in default to suffer imprisonment for a further term of six months.

3. The facts of the case in brief are that the accused/appellant was the brother's friend of the victim girl Ms. Saroj Minj and this was what opened the opportunity for the accused/appellant to have frequent visits at the house of the victim girl. Thus, on one of such occasions i.e. 23.3.96 at night (in the deposition of the prosecutrix the time of commission of offence has been described as at 8.00 p.m. while in the FIR the time was shown as at 11.00 p.m.) when the prosecutrix was alone in the house only with the accused/ appellant, the accused/ appellant approached her for sexual intercourse which was refused by the prosecutrix, but she was forcibly pulled to their bed room where despite resistance of the prosecutrix the accused/appellant committed rape on her. Thereafter, on another occasion i.e. on 25.3.96, in the absence of all the other members of the family, the accused/appellant did the same thing with the prosecutrix. On both the occasions, after the incident of sexual intercourse, the accused/appellant assured the victim girl not to be worried as he was going to marry her. Subsequently, the tentacles of the incident spread through a number of days, if not months in the culmination of giving birth of a female child by the prosecutrix.

4. Thus, the main question posed by the learned Counsel for the accused/ appellant before me is that the prosecutrix was a consenting party to the intercourse committed by the accused/appellant.

5. In the instant case, as many as nine witnesses had been examined by the prosecution and out of them all, but the P.Ws. 3, 4 and 6, were cross-examined by the defence. The P.Ws. 3, 4 and 6 were declined to be cross-examined by the defence.

6. It is contended by Mr. H.R. Bahadur, learned Counsel appearing with Ms. A.S. Zinu, learned Advocate for the accused/appellant, that the prosecutrix was absolutely a consenting party and this aspect was ignored by the learned Sessions

Judge in his judgment. It is also argued by him that the case was instituted after long lapse of time from the date of occurrence. In order to substantiate his claim, the learned Counsel for the accused/appellant has drawn my attention to some letters (Exhibit 'A' collectively) admittedly written by the prosecutrix to the accused/appellant. The learned Counsel for the appellant has referred to the ratio decided in the case of Uday v. State of Karnataka, 2003 Cr LJ 1539 : 2003 C Cr LR (SC) 555. I shall discuss the said judgment at the appropriate point of time.

7. Mr. R.S. Saroop, learned Public Prosecutor, submits that the consent theory, as propounded by the learned Counsel for the accused/appellant, has no legs to stand and in this connection he has drawn my attention to the evidence of the prosecutrix in particular. Mr. Saroop has also argued that the learned Sessions Judge has shunned this consent theory and the purported love affairs between the parties in the incident.

8. In order to apprise of the situation as posed in the instant case, I feel it necessary to refer the definition of rape which is incorporated in Section 375 of the Indian Penal Code which reads as below :

'375. Rape.--A man is said to commit 'rape' who, except in the case hereinafter excepted, has 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 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 backdrop of the definition of rape it is now required to enter into the facts which are more elaborate in deposition of the prosecutrix herself. Thus, Ms. Saroj Minj is the P.W. 1. She has given the elaborate descriptions of the incidents which run into pages. I will just quote some of the relevant portions of her deposition. It appears from her evidence that the incident of rape was caused twice first on 23rd March, 1996 and then after two days on 25th March, 1996. According to her, the incidents of 23rd March, 1996 and 25th March, 1996 happened as under:

'In the morning of 23.3.1996 my parents went to our agricultural land in connection with the cultivation work thereon and as there was Basantipuja of the Bengalis on that day, my brothers and sister went to watch the puja during evening hours around 7. The said puja was being conducted at Tugapur No. 7 which was about 1 hour walking distance from our house. At that time I was alone in our house and Shamsad also was in our house. I was engaged in preparing food for all around 8 P.M. At that time Shamsad Ali made proposal to me for a sexual intercourse. I told him that he was the friend of my brother and he should maintain that relation and should not think in that way. But Shamsad Ali then pulled me to the bed room by catching hold of my hand. I tried to resist him and to ask him not to do the same, but he did not listen to me. I was then wearing a midy of orange colour and I had a top or blouse of rose pink colour. He removed my top. I was also having a pantee below the midi and my panty was removed, but midi was not removed. I was trying to resist his work by asking him that he should not do all these things since he was my brother's friend and he should remain also like a brother to me, but he did not listen to me and forcibly caused rape upon me by laying me on the bed. Shamsad then was wearing a blue and white check lungi and a brown colour sando banyan or ganji. The accused continued the rape for about 5 minutes and thereafter I began to cry and he tried to console me and requested me not to disclose the said

incidence to anyone. He further told me that nothing would happen to me and assured to marry me if something would happen to me. By stating that 'something would happen to me' he tried to mean that if my period is stopped.

* * * * *Subsequently around 10 AM on 25.3.1996, my father had been away to his duties and my mother was also away to our agricultural land for cultivation work and my sister was away to her school, and my brothers were also away to their respective works. At that time I was alone in my house and was doing my domestic works and Shamsad Ali also was in our house. I was then engaged in cooking work in our kitchen and at that time Shamsad Ali came to the kitchen and again was putting force upon me for repetition of the same work which was done on 23.3.1996, and in that process he caught hold of me and pulled me to the bed room. I was continuing to resist him and asked him not to repeat the same thing again and I also was shouting at him. Even then he did not listen to me and to my request and committed rape again on me by laying me on the bed in the bed room. He told me that he was liking me and ultimately would marry me and for that reason he asked me not to get worried. I was not in a position to believe him and not even to reject his idea totally that he would marry me. As this time also Shamsad Ali asked me not to disclose the incidence to anyone, I did not disclose the same to anybody about the said incidence on 25.3.1996 also.'

10. After the incidents of those two days the accused/appellant had left the place and the victim girl and in this course a long period lapsed. The victim girl was consistently after the accused/appellant and in the meanwhile, understanding her physical changes for the pregnancy she had to disclose everything to her mother. Thereafter, following a long persuasion the victim girl could contact the accused/appellant and started living with him, of course, with the assurance of marriage. The accused/appellant tried to destroy the pregnancy of the prosecutrix but his attempt was ultimately aborted. The accused/appellant had also tried to give the marriage of the prosecutrix with somebody else but the prosecutrix refused and it could not be materialized. Ultimately, the victim girl came to a firm belief that the accused/appellant would not marry her and she approached the Women Cell. At the intervention of the Women Cell, the accused/appellant gave a written undertaking admitting the liability of the pregnancy but ultimately the

marriage was not materialized. On 21.12.96 the prosecutrix gave birth to a female child and long thereafter on 10.2.1997 she lodged the FIR with the police station. This is what about the evidence of the prosecutrix in her examination-in-chief. In her cross-examination, though she denied repeatedly the suggestions that she had love affairs with the accused/appellant which resulted in intercourse and the prosecutrix was a consenting party, she ultimately admitted in her cross-examination that she had love affairs with the accused/appellant. She deposed as follows :

'I had love affairs with the accused. True it is that the sexual relationship that was established in between myself and the accused was with my consent (Objected to)'

11. The learned Public Prosecutor tried to argue on this piece of evidence appearing in cross-examination of the P.W. 1 that such stray evidence cannot be the guiding factor of the entire prosecution case.

12. I cannot agree with the learned Public Prosecutor that the above quoted piece of evidence of the prosecutrix was made unconsciously or the same has no bearing with the prosecution case for the simple reason that the said piece of evidence has been buttressed by the letters admittedly written by the prosecutrix to the accused/appellant (Exhibit 'A' collectively). I cannot prevent myself from being tempted to the relevant portions of those two letters. The first letter was written on 5.3.1996 and the said date was written in English on the top of the letter by the prosecutrix but the said date has not been incorporated in the English translated copy of the same appearing at page 62 of the Paper Book placed in the Court. The said letter reads as below :

'Dearest Shamsad,

At the outset, you take my love convey my salaam to the elders at home and love to youngsters.

The main reason of writing this letter is that, I can't live without you even for a moment. I am missing you a lot. Probably, you don't know that I want to meet you.

Dear, Day-n-night, I only think of you.

I want to meet you, but I don't know when that moment will come? Dear, if you can avail of your time, please come to Mayabunder atleast once. I want to meet you.

Dear, as soon as you would receive my letter, reply me soon. I will be anxiously waiting for your reply. Please excuse me for any kind of mistake. Take care of yourself and read the letter ignoring any mistake in my writing.

O.K. Khuda Hafeez,

Ever yours

Saroj'

13. The other letter was written on 19.3.1996. This date of the letter has also not been shown in the English translated copy appearing at page 63 of the Paper Book. However, the said letter reads as below :

'Dearest Shamsad,

At the outset, you take my love, convey my salaam to the elders at home and love to youngsters.

Dear, I received your letter and I was so happy after reading your letter that I don't have any words to express it. I am fine here, and pray to God every moment for your well-being. Dear, as I have said you earlier that I want to meet you and want to see you and that you please come to Mayabunder atleast once, but you didn't come.

Dear, I want to meet you and I have to tell you lot many things. Dear, there will be a Fair on 23.3.96, in our village. Everyone in the house will be going to the Fair but I won't be going and will be alone at home. If you truly love me, then you will definitely come to Mayabunder. I will be waiting for you at home. Dear, if you don't come then I will think that you don't love me at all. Nothing more to write down. I am ending the letter here. Take care of yourself and as soon as you receive the letter, start immediately for Mayabunder. I am desperately waiting for you. Good

Bye.

O.K. Khuda Hafeez,

Ever yours,

Saroj'

(Underlined for emphasis)

14. After reading those two letters, there remains no doubt in mind of any person of common prudence that the culmination of the incident on 23.3.1996 and 25.3.1996 was due to the deep love between the parties and there remains no question that the prosecutrix invited the accused/appellant consciously knowing it that she will get the accused/appellant alone at her residence on that date. Now taking these two letters into reckoning if we look back at the incidents as described by the P.W. 1 in her examination-in-chief there appears adequate insinuation towards the consent of the prosecutrix if not provocation for getting the accused/appellant all alone at her residence. The facts of this case further suggest that the prosecutrix was about 24 years at the time of incident and she was quite aware the consequence of intercourse.

15. The facts of the case of Uday v. State of Karnataka (supra) as set out at paragraph 3 of the judgment referred to by the learned Counsel for the accused/appellant are as below :

'In the last week of August, 1988 or the first week of September, 1988 at about 12 o'clock in the night when she was studying, the appellant came to the window of the room and called her out to talk to her. Since she was deeply in love with him, she responded to his invitation and thereafter they went to the place where the house of the appellant was under construction. The appellant talked to her and thereafter kissed her and embraced her and promised to marry her. He also had sexual intercourse with her. She was not willing to have sexual intercourse, but in the circumstances she consented to the sexual intercourse because the accused had promised to marry her. They continued to meet thereafter and went out frequently. During this period as well, the appellant had stated many times that he

would marry her. She also admits that she had sexual intercourse with him about 15-20 times and that they used to have sexual intercourse once or twice a week. She also admits that they were both noticed together by several persons whom she has named in her deposition. When one Vanamala, who had noticed her, questioned her about the affair, she had told her that they were madly in love with each other and that the appellant had promised to marry her. She also requested her not to reveal this fact to anyone.'

16. But in the instant case it was on the invitation of the prosecutrix that the accused/appellant went to her house first on the fateful day i.e. on 23.3.96 and thereafter, in some opportune moment again the intercourse was committed on 25.3.1996. In the instant case, rather it appears that the alleged rape was not committed on the assurance of marriage, but the prosecutrix, on the other hand, invited by letter (Exhibit 'A') the accused/appellant to come to her residence. Here also the parties belong to the different casts.

17. Now keeping all the above in the background, if the definition of rape as appears in Section 375 of the Indian Penal Code is applied, I do not find any scope to satisfy the ingredients of the said definition. The term 'will' or 'consent' has been clarified in as many as six ways in the definition of rape but I fail to apply any of those examples in the facts and circumstances of the instant case.

18. The acts of the accused/appellant are definitely bad in moral and social points of view and the same cannot be supported in any way but what the accused/appellant did is not sufficient to satisfy the definition of rape. That apart the incidents suggest that behind all these the prosecutrix had conscious contribution. The evidence of the P.W. 1 is amply clear that the approach of the accused/appellant for intercourse was mutual. Thus, it is stated in her evidence that Shamsad Ali made a proposal to her for a sexual intercourse. There remains no scope for any nebulous speculation that the intercourse was made even after the strong resistance of the prosecutrix.

19. Their Lordships, in the ratio decided in the case of Uday v. State of Karnataka (supra), were pleased to observe from the facts and circumstances of that case that there were circumstances in the case tend to support the conclusion that the

appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other and it was not disputed that they were deeply in love. They met often and it does not appear that the prosecutrix permitted him liberties, which, if at all, are permitted only to a person with whom one is in deep love. The Hon'ble Supreme Court further observed that it is also not without significance that prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It shall happen in such cases where two young persons are madly in love, that they promised to each other several times that come what may, they will get married.

20. In fact, similar is the situation with us in instant case. The letters (Exhibit 'A') unmistakably suggest the deep love between the parties and the invitation given by the prosecutrix to the accused/appellant to attend her at the opportune moment. There appears no scope to conceive that the prosecutrix was under any misconception as regards the consequence of intercourse before marriage. She was about 24 years old at the time of occurrence and not an illiterate lady as the fact suggests. In the result the appeal succeeds.

21. The appeal is, thus, allowed.

22. The judgment and order of conviction passed by the learned Sessions Judge are hereby set aside. The accused/appellant be set at liberty at once.

23. A copy of this judgment along with the LCR be sent down to the lower Court immediately.