

Affai Vs. the State

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Court : Kolkata

Decided On : Jul-09-1993

Reported in : (1994)1CALLT51(HC)

Judge : Umesh Chandra Banerjee and ;Arun Kumar Dutta, JJ.

Acts : [Evidence Act, 1872](#) - Sections 3 and 154; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 164; ;Indian Penal Code (IPC) - Section 376

Appeal No. : Crl. Appeal No. 3 of 1993

Appellant : Affai

Respondent : The State

Advocate for Def. : R. Shiv Saroop and ;C.S. Chauhan, Adv.

Advocate for Pet/Ap. : A.S. Roy and ;S.K. Mondal, Adv.

Judgement :

Arun Kumar Dutta, J.

1. This appeal is directed against the Judgment and Order of conviction and sentence passed by the learned Sessions Judge at Port Blair on 17.12.92 in Sessions Case No. 5 of 1991 before him.

2. The accused-Appellant Affai had been tried by the learned Sessions Judge for having allegedly committed rape on Kumari Minoti Dhali at Tugapur No. 2, within P.S. Maya Bunder, on the 20th day of August, 1988, punishable under Section 376, I.P.C.

3. Shortly put, it is the prosecution case that the P.W. 1 Minoti Dhali, a teacher of Anganwadi at Tugapur, within P.S. Mayabunder, had been returning back home from her school on 10.8.1988 around 1-30 P.M. Getting down from the bus at Lal Tikri crossing she was proceeding along the Block Road. Reaching near the culvert on the way to her house, she had heard a sound from behind; and turning back could find the accused Affai, a resident of Tugapur No. 1, proceeding towards her along the pathway. She started proceeding ahead, and the accused quickened his pace and came closer to her. He asked her whether she had been Appuji. She had replied in the negative. But the accused Affai went closer to her just by her side. She moved to the right on the edge of the path. The accused tried to catch hold of her, who had moved backwards. He had thereafter gone to her and held her arms with his hands whereupon she had cried saying 'Bachao, Bachao.' But there was none to come to her rescue. The accused pushed her and she had fallen on the bush by the side of the road. As she had fallen down, the accused had sat upon her and strangled her holding her neck with his hands. He had then started pressing her breast violently with one hand holding her neck by the other. He tore away her blouse and brassier, pulling those with force, and had violently bit her left breast with his teeth and had committed rape on her against her will and despite her protests. The victim Minoti had thereafter started running away towards Lal Tikri. Proceeding a little distance ahead, she met one Bobia Bai and Phookmani Mahali, and holding Bobia she cried trembling and had stated to them that the accused Affai had committed rape on her. The accused fled away towards the jungle saying that he had done nothing to her. Bobia had thereafter taken her (Minoti) to her house. Nepal Thakur of Tugapur No. 2 was returning to his house from Tugapur No. 1 around that time, and was called by Bobia, who had requested him to take Minoti to her house, which he did. Reaching her house, Minoti at first did not tell her mother about the incident out of shame and hatred but had been weeping all the time. On repeated enquiries from her mother she narrated the incident to her around 8 or 9 at the night on that day (20.8.88). Owing

to heavy rains she could not go to the police station on 20.8.88 or on 21.8.88. She went to the police station on the following day, i.e. on 22.8.88, along with her brother Shankar Dhali and had lodged the F.I.R. at about 10-40 hours.

4. On the FIR being lodged by her, the police had started the relevant case, arrested the accused Affai; and after completion of investigation had submitted charge-sheet before the learned Magistrate. The learned Magistrate had committed the case to the Court of Sessions as the alleged offence is exclusively triable by a court of sessions. The learned Sessions Judge on trial had found the accused Affai guilty to the alleged offence punishable under Section 376, IPC, and had convicted him therefor, sentencing him to suffer rigorous imprisonment for seven years for the reasons recorded at length in his judgment and order.

5. Being aggrieved by the judgment and order of conviction and sentence passed by the learned Sessions Judge, the accused Affai has preferred the instant appeal before this Court.

6. The point for consideration here before us is how far the learned Sessions Judge was justified in finding the accused guilty to the aforesaid charge and convicting and sentencing him therefor, the way he did.

7. The prosecution appears to have examined 15 witnesses in all, including the Investigating Officer, in support of the Prosecution case. Let us scan their evidence to see for ourselves how far the learned Sessions Judge was justified in disposing of the relevant case, as he did.

8. The P.W. 1 is the alleged victim Minoti Rani Dhali who had stated in details how rape was allegedly committed on her by the accused-appellant on the relevant date and time and at the relevant spot. She had further stated that she had reported the incident weeping to the two Ranchi women Bobia and Phoolmani, whom she had met first while running away from the place of occurrence soon after the incident. The P.W. 3 Bobia Bai and the P.W. 5 Phoolmani also fully corroborated her evidence on the aforesaid points.

9. The P.W. 3 had stated that after cooking meals around 9 A.M. she and Phoolmoni had gone to the field with their goats for grazing. They were returning with the goats around 2 P.M. As she was waiting for Phoolmoni to come and shouted asking Phoolmoni to join her, a girl came running from the bushes and had held her. She was weeping and trembling. On her asking why she was weeping, the said girl, whom they used to call 'Madam', as she was teaching in Anganwadi, had started to her that Affai had committed rape on her Phoolmoni had also come near, in the meantime. Affai, who was found going towards the preek, told them that he had done nothing to the girl. The P.W. 3 had thereafter taken the girl with her to her house, alongwith Phoolmoni. At that time she found a man of Tugapur No. 2 returning from duty. The girl was sent to her house with that man as they were residents of the same bustee.

10. The P.W. 5 Phoolmoni had as well stated with clarity that she went to the field for grazing goats with Bobia Bai after having her breakfast. While returning around 2 P.M., Bobia went ahead with the goats and she had fallen behind. Bobia had called her asking her to go quickly. At that time 'Madam', the P.W. 1 Minoti Dhali, came running and held Bobia. She was termbling and weeping. On their asking, Madam had told them that she had been raped by Affai. She went on weeping. Affai had said that he had done nothing to her, and went towards the creek by the side of the bush. A resident of Tugapur No. 2 came that way, and Madam, the P.W. 1, was sent to her house with him. The P.W.s 3 and 5 not only corroborate the evidence of the P.W. 1, but their own evidence is also corroborated by each of them.

11. The P.W. 7 Nepal Thakur also appears to corroborate the evidence of the P.W.s 3 and 5 in all relevant particulars. He had stated that on 20.8.88 around 2-30/3 P.M. he was returning to his house at Tugapur No. 2 from his place of work at Tugapur No. 1. As he was proceeding along the Block Road and reached near the house of one Ranchi woman at Lal Tikri, he was called by the woman from the house. Going there he had found Minoti Dhali weeping, sitting in front of the house of that Ranchi woman. He had asked her what had happened, but she did not tell anything to him. On being requested by the Ranchi woman to take Minoti to her house, he had escorted her to her house at Tugapur No. 2. Leaving Minoti in the

custody of her mother, he went back to his house.

12. The P.W. 6 Rukmini Dhali is the mother of the alleged victim girl Minoti Dhali. She had stated that about 4 years back (from the date of her examination on 13.11.92) her daughter Minoti did not return from her school in the afternoon as usual. Sge came with Nepal Thakur to the house before evening when there was none else in the house. Minoti was weeping. Nepal Thakur left leaving Minoti in the house. She asked Minoti why she was weeping, but she did not give any reply thereto and went on weeping. After some time she had taken her bath. She was lying on her bed without taking any meal and did not tell anything till 8 or 9 in the night. On her repeated asking as to what had happened to her, Minoti told her that Affai had committed rape on her. Saying this, she started crying loudly. Neither she nor Minoti took their meals at night. On Minoti's disclosing the incident to her, she woke up her husband, who had returned in the evening and was sleeping, and had told him about the incident. Her husband told her that nothing could be done at that hour of the night, and steps would be taken in the next morning. There was heavy rain on that night, and the nullah was filled up with rain water.

13. The P.W. 13 Shankar Dhali is the brother of the alleged victim Minoti. He had also clearly stated in his evidence that the incident had taken place on 20.8.88. On that day he had returned home late in the evening and went to sleep after having his meals, served by his wife. The next morning his mother told him that Affai had committed rape on his sister Minoti. His mother asked him to take Minoti to the police station where she would be lodging the report with the police. There was heavy rain on 21.8.88, as a result of which they could not go to the police station crossing the nullah. There was incessant rain from the night of 20.8.88 and the nullah which was overflowing could not be crossed for strong currents. They could cross the nullah on 22.8.88 and went to Mayabunder Police station by the 7 A.M. Bus. Reaching the thana, Minoti had lodged report there.

14. Let alone the evidence of the P.W. 1 Minoti, the alleged victim girl, P.W. 6, her mother Rukmini, and the P.W. 7 Shankar Dhali, her brother, the P.Ws. 3, 5 and 7 all appear to be independent, non-partisan, competent and qualified witnesses on' the points deposed by them all. None of them seem to bear any malice, grudge,

and/or ill-will against the accused Affai so as to depose falsely against him. No such suggestion either appears to have been put to any of them during their cross-examinations on behalf of the accused. The only suggestion put to them all during their cross-examination on behalf of the accused is that they had all deposed falsely on being tutored by the police.' But it would be naive to believe that they would all depose falsely, merely because they had been tutored by the police to do so, so as to falsely implicate an innocent man, a resident of neighbouring bustee, not totally unknown to them, with such a heinous crime to ruin his career and life. There is neither any such suggestion against any of the aforesaid three P.Ws on behalf of the accused so as to render their evidence unworthy of credit. There is nothing on record to refuse to reply upon their evidence as such.

15. The P.W. 1 Minoti is the alleged victim herself. The P.W. 6 Rukmini is her mother. The P.W. 7 Shankar is her brother. No malice, grudge, and/or ill-will either appears to have been imputed against any of them on behalf of the accused. No suggestion whatsoever either appears to have been put to any of them as to why they will all falsely implicate the accused with such a crime for nothing. The only suggestion put to them all during their crossexamination on behalf of the accused is that they had all deposed falsely on being tutored by the police.' It is beyond belief and beyond comprehension that they would all falsely depose against him merely because they had been tutored by the police to do so, to their own detriment, prejudice and peril, inviting social stigma for the girl herself and the entire family. It would also be wild to suggest that Minoti, a school teacher, would either fabricate such a false case against the accused for nothing inviting humiliation to her in public. There seems little reason to refuse to rely upon their evidence as such. The P.Ws. 1,3, 5, 6, 7 and 13, such as they are, would, therefore, clearly seem to bear out the prosecution case. The evidence of the P.W. 2 Dr. Mohammed Shameem and P.W. 4 Dr. Jaya Biswas would lend further point thereto. The prosecution case appears to be amply established by the evidence presented by the aforesaid P.W.s.

16. As against that, the accused Affai appears to have affirmed and reaffirmed with more than usual clarity and conviction, while examined under Section 313 of the Code of Criminal Procedure, that he did not go out of the house at all on the

relevant day (20.8.88), seeking to take a sort of a plea of 'alibi'. An accused in a criminal trial is not obliged to take any defence. It is for the prosecution to prove the guilt of the accused beyond all reasonable shade of doubt. But once a defence is taken by the accused, it is for him to establish the same. But sadly for the accused Affai, no evidence has been presented by him in support of his aforesaid meek and feeble defence. And he, further had clearly stated, while examined under Section 313 of the Code, that he had no witness to examine. The defence, belatedly sought to be made out by the accused, had not been established by him. The prosecution case stands out as such.

17. True it is, there seems to be some minor discrepancies in the statements of the P.Ws. 1, 3 and 5 recorded by the learned Magistrate under Section 164, Cr. P.C., and the evidence given by them in Court. But the same seem to be too minor to be reckoned with. Their aforesaid statements under Section 164 of the Code appear to have been recorded by the learned Magistrate on 25.8.88. But the evidence of the P.W. 1 Minoti, P.W. 3 Bobla and the P.W. 5 Phoolmoni had been recorded by the learned Sessions Judge during the trial on 11.11.92, 12.11.92 and 13.11.92 respectively, after a lapse of little less than four years from the date of recording their statements under Section 164 of the Code by the learned Magistrate. Such minor discrepancies in their statements due to lapse of time cannot be deemed to be anything unnatural. The very fact that their evidence before the Court and their statements before the learned Magistrate about four years back are not exactly the same would clearly seem to suggest that they had not deposed before the court as tutored witnesses. The P.W. 1 Minoti, though a teacher, appears to be a rustic lady. The P.W. 3 Bobia and the P.W. 5 Phoolmoni also appear to be rustic illiterate woman, who had put their thumb impressions on their depositions before the Court. Some minor discrepancies in the evidence of such rustic illeterate women are nothing unusual. The testimony of the P.W. 1 and her statement recorded under Section 164 of the Code must also be considered in the background that she herself is the victim of such a heinous crime subjected to serve mental shock, who is also likely to be hesitant to disclose the entire details of the alleged occurrence. The minor discrepancies in their statements and evidence clearly, therefore, seem to us to be of little moment in the background of the totality of evidence on record.

18. There had indeed been some delay in lodging the FIR by the victim Minoti. The alleged occurrence had taken place on the afternoon of 20.8.88. But the FIR had been lodged by her at about 10.40 hrs. or 22.8.88. It had been unequivocally stated by the P.Ws 1, 6 and 13 that there had been incessant rain from the night of 20.8.88, and there had been heavy rain as well on 21.8.88, as a result of which they could not go to the police station crossing the nullah, which had overflowed. Their evidence that there had been heavy rain during the aforesaid period has not been controverted on behalf of the accused by way of cross-examination. That being so, the delay in lodging the FIR appears to be duly explained. Moreover, in an offence of this nature the victim and her family members have naturally to ponder whether such a matter should be reported to the police to their own detriment, prejudice and peril, inviting social stigma and humiliation for the girl and the entire family, which might as well result in some delay in lodging FIR.

19. Realising the difficulty somewhat tardily, the learned counsel for the accused-appellant, Mr. A.S. Roy, in his ingenuity, had feebly sought to submit that the P.W. 1 Minoti was consenting party to the alleged crime. But unhappily for him, no nearest and faintest suggestion had been put to the P.W. 1 Minoti to that effect during her cross-examination on behalf of the accused. No such indication either appears to have been given by the accused himself while examined under Section 313, Cr. P.C., when the circumstances appearing in evidence had been explained to him by the learned trial Judge. Such a belated defence as to consent without any material on record could hardly be accepted. It is neither for the Court to make out a third case, not stated and/or suggested by any of the parties. The aforesaid submission of Mr. Roy clearly, therefore, seems to us to be entirely ill-made and absolutely disingenuous, liable to be outright overruled.

20. Gauged in the background of the entire materials on record, as discussed above, the learned Sessions Judge appears to us to have been perfectly justified in passing the impugned judgment finding the accused-appellant- Affai guilty to the charge under Section 376, IPC and convicting and sentencing him therefor, the way he did. There seems to be no merit in this appeal, and there is nothing to interfere with the impugned judgment and order passed by the learned Sessions Judge.

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