

Tapas Ghosh Vs. the State of West Bengal

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Court : Kolkata

Decided On : Aug-04-2009

Judge : S.P. Talukdar and ;Prabhat Kumar Dey, JJ.

Acts : Indian Penal Code (IPC) - Sections 375 and 376; ;Code of Criminal Procedure (CrPC) - Sections 164, 164(5), 313 and 428

Appeal No. : C.R.A. No. 310 of 2003

Appellant : Tapas Ghosh

Respondent : The State of West Bengal

Advocate for Def. : Asimesh Goswami, ;Ratna Ghosh and ;J.N. Chatterjee, Advs.

Advocate for Pet/Ap. : Kazi Safiullah, ;Somnath Banerjee and ;Madhuri Das, Advs.

Judgement :

S.P. Talukdar, J.

1. The instant appeal is directed against the judgment and order dated 29th March, 2003 passed by learned Court of Sessions Judge at Howrah in Sessions Trial Case No. 108 of 2002. It relates to Shibpur Police Station Case No. 276 of 1998 dated 5th of November, 1998 under Section 376 of the Indian Penal Code.

2. The present appellant was found guilty of the offence under Section 376 of Indian Penal Code and the learned Trial Court convicted him accordingly. He was sentenced to suffer rigorous imprisonment for life and further sentenced to pay a fine of Rs. 1,000/- - in default, to suffer imprisonment for another six (6) months.

3. Mr. Safiulla appearing as learned Counsel for the appellant submitted that the judgment and order under challenge suffers from misappreciation of evidence.

4. It appears that the father of the alleged victim girl submitted a written complaint before Officer-in-charge of Shibpur Police Station. In the said complaint, he alleged that the daughter of the complainant was admitted for private tuition in the Educare Coaching Centre which used to be run by one Tapas Ghosh. After about 7 days of her studying there, the said Tapas Ghosh came to the residence of the complainant and told his wife that her daughter required some private tuition in order to enable her to overcome her deficiencies.

5. The daughter of the complainant used to go to the said Coaching Centre along with Tapas Ghosh everyday at about 4-30 P.M. No other student used to be there at the time in the Centre. The complainant's daughter reported that Tapas Ghosh after closing all the doors and windows used to commit rape upon her. She alleged that the parents as well as brother of Tapas used to help him in this regard. Tapas used to threat the victim girl saying that in case of this incident getting publicized, she would be killed. On the basis of such written complaint, F.I.R. 276 dated 5th November, 1998 was made and accordingly, Shibpur Police Station started a case under Section 376 of the Indian Penal Code.

6. Police authority after completion of investigation submitted charge sheet. The case was subsequently committed to the Court of Sessions. Learned Sessions Judge, Howrah, framed charge under Section 376 of the Indian Penal Code against the accused, Tapas Ghosh.

7. The prosecution in order to prove the charge examined as many as 12 witnesses. Of them, P.W.1 is the victim girl who in her evidence in chief sought to support the allegations as made in the written complaint, which was treated as F.I.R. From her evidence in chief, it appears that being assured by the accused,

Tapas, her mother decided to send her and her younger sister to the Coaching Centre of the accused, named Educare Coaching Centre. P.W.1 gave her date of birth as 4th May, 1985. She stated that at the relevant time i.e. on 5th November, 1998, she was a student of Class VI. Her younger sister was in Class II at that time.

8. P.W.1 further stated that the Coaching Centre was in the ground floor of the house of the accused. The accused on the plea of giving special tuition to P.W.1, asked her mother to send her in between 4/4-30 P.M. P.W.1 accordingly went there. She deposed that the accused thereafter came to the room and closed the door. As soon as P.W.1 shouted, the accused closed her mouth by his hand. He tied her hand with the help of her 'Yorna'. P.W.1 was then undressed by the accused who himself took off his dresses. Thereafter, he committed rape on her by entering his penis in the vagina. P.W.1 further deposed that the accused also forcibly pressed her breasts. He used to suck her ear, face and other parts of the body. P.W.1 could not raise any alarm since her mouth was pressed by the accused with his hands. The accused told her to attend such Coaching Centre every alternate day. He used to repeat such act. P.W.1 categorically mentioned that she was only 13 years and a few months of age at that time. P.W.1 continued to suppress this from her parents. In the process,

9. P.W.1 conceived. She was reluctant to attend Coaching Centre after Durgapuja vacation. Her mother, however, forced her for attending the Coaching Centre. P.W.1 disclosed such act of the accused person to her parents. Her father lodged a complaint. The statement of P.W.1 was recorded by Magistrate. P.W.1 identified her signature in such recorded statement, which was marked Exbt.1/1. She was medically examined in the hospital. She underwent X-ray as well as other medical tests. She identified her signature on the clinical examination report. P.W.1 denied to have any consent in such sexual activity. P.W.2 is the father of the victim girl. He produced the birth certificate of P.W.1, which had been marked Exbt.5. In his evidence in chief, P.W.2 sought to corroborate the evidence of his daughter, P.W.1 on all material points. He categorically denied in his cross-examination that he procured the birth certificate from the Howrah Municipal Corporation concealing the actual date of birth of his daughter, P.W.1. P.W.3 is the mother of the victim

girl. She joined her husband, P.W.2 in corroborating the evidence of the victim girl, P.W.1. P.W.4 stated that on 7th November, 1998 when he was attached to Howrah District Hospital, he examined P.W.1 and found the following injuries:

1. Hymen - Old tear.
2. L.M.P. - Two months prior to the test.
3. Vagina - Admits 2 finger.
4. Due to obstruction the size of the Uterus could not be assessed.

10. Such P.W.4 advised pregnancy test. In response to query, he answered that the victim girl was habituated with sexual intercourse. There was no mark of violation in private part nor any injury detected in the vaginal wall. P.W.4 proved the report, marked Exbt.3. P.W.4 further deposed that if a lady is subjected to continuous intercourse for a period from June to October normal symptoms may be available in her body as the examination was made long after the date of actual intercourse. P.W.4 also proved the discharge certificate, which was marked Exbt.7. In cross-examination P.W.4, stated that he was told by the patient that she was subjected to intercourse from July 1998 to 1st November, 1998. He further clarified in his cross-examination that in case of any intercourse by violent manner, some injuries could be available in the private parts of the victim girl. Referring to the particular case, P.W.4 stated that the patient was accustomed to intercourse.

11. P.W.5 is the Judicial Magistrate who recorded the statement of the victim girl under Section 164 of the Code of Criminal Procedure. Such statement had been marked Exbt.1.

12. P.W.6 is the police personnel who took the accused to Howrah General Hospital for his medical examination. P.W.7 is another doctor who examined the accused and found that he was quite capable of performing sexual intercourse. The report prepared by him had been marked Exbt.8.

13. P.W.8 is the Radiologist. On 14th November, 1998 he conducted Ossification test of the victim girl. He stated that from the Radiological point of view, the

approximate age of the victim girl was about 15 years but below 16 years. He proved the report, which had been marked Exbt.4. In his cross-examination, he added that the estimation of age may vary 'plus minus two years'. P.W.9 is the Dealing Assistant of the school where the victim girl used to study. Referring to the admission register and other relevant papers, P.W.9 deposed that P.W.1 was admitted in the school on 5th May, 1997. Name of her father was recorded as Praydut Sadhukhan. The date of birth of the girl was recorded as 4th of May, 1985. Being identified by him, such relevant entries in the admission register had been marked Exbt.9 series. In his cross-examination he stated that prior to taking admission in Howrah Rabindra Vidyalaya, Purnima was a student of Howrah Deshbandhu Balika Vidyalaya.

14. P.W.10 in her evidence in chief corroborated the evidence of P.W.1, P.W.2 and P.W.3 on all material points. She stated that on 5th November, 1998 when Purnima was reluctant to go for private tuition, her mother assaulted her. She intervened. She was told by Purnima that when she used to attend the Coaching Centre at 4-30 P.M., she used to be taken to a room by her master. Doors and window of the room used to be kept closed. Tapas used to sexually enjoy her against her will. Since there is no clear evidence of P.W.1 that she narrated the incident to her grandmother, P.W.10, evidence of P.W.10 could lend very little support to the prosecution case. P.W.11 is the police officer who investigated the case. He in his evidence gave details of the various steps taken by him during investigation. P.W.12 is the police officer who after completion of investigation submitted charge sheet in the case.

15. The accused was examined under Section 313 of the Code of Criminal Procedure. He pleaded innocence. None was examined as defence witness.

16. Learned Trial Court thereafter by the impugned judgment found the accused person guilty of the offence under Section 376 of the Indian Penal Code and convicted him accordingly.

17. Mr. Safiullah while analyzing the evidence on record submitted that the girl, P.W.1 was a consenting party and as such, even assuming the evidence on record to be true and correct, there could not be any offence under Section 376 of

the Indian Penal Code.

18. Oral evidence of P.W.1 had been effectively corroborated by her father, P.W.2 and her mother, P.W.3. All the said three witnesses stood the test of cross-examination well. Their oral evidence leaves very little scope for controversy. It satisfactorily establishes the fact that the accused/appellant used to have sexual intercourse with P.W.1 ----- practically on regular basis. While analyzing the evidence on record, it is not necessary to deal with 'ifs and might have - beens'. The evidence of P.W.5 lends further support and strength to the evidence of the victim and her parents. The opinion of the doctor (P.W.4) that the victim girl was habituated with sexual intercourse fits well with the evidence of the victim. It is clearly the prosecution case that the appellant/accused person used to have sexual intercourse with P.W.1 on a rather regular basis. As a result, she conceived. This, no doubt, indicates that P.W.1 had consent in such sexual activities. The statement of the victim girl as recorded by the Learned Magistrate under Section 164(5) of the Code of Criminal Procedure further supports the prosecution case. Evidence of P.W.6 and 7 clearly suggests that the appellant/accused person was physically competent to have such sexual intercourse.

19. Mr. Safiullah in such background sought to assail the impugned judgment on the ground that how could it be held that the appellant/accused person committed rape.

20. We are afraid, this submission attempts to ignore the fact that victim girl (P.W.1), even assuming that she was a consenting party, was below 16 years of age at the relevant time. She herself gave her date of birth as 4th May, 1985. This was effectively substantiated by her father who again was equipped with the birth certificate (Exbt.5). P.W.3, as the mother of the victim girl virtually left no further scope for confusion. Evidence of P.W.8 who as Radiologist conducted Ossification test supports the claim of P.W.1 and other witnesses regarding her age. P.W.8 categorically stated that from the Radiological point of view, the approximate age of the victim girl was about 15 years but below 16 years.

21. Mr. Safiullah invited attention of the court to the evidence of the said P.W.8 in cross-examination that the estimation of age as given by him may vary 'plus minus two years'. Mr. Safiullah, thus sought to add 2 years to the age as found by the Radiologist on Ossification test. But in the factual backdrop of the present case, we do not think it just and proper to extend such elasticity or flexibility. The consistent, cogent and convincing evidence of P.Ws 1, 2, 3 and P.W.9, the birth certificate i.e., Exbt.5 and other relevant materials do not leave any scope for exercise of any discretion. P.W.8, in fact, had strengthened such stand that the victim girl was under 16 years of age at the relevant time. The materials on record also do not permit us in taking any lenient view on the plea that the victim, though not a major, reached the age of discretion.

22. The definition of 'rape' under Section 375 of the Indian Penal Code makes the consent of the victim girl irrelevant when she is less than 16 years of age.

23. Considering all such facts and circumstances, we find absolutely no merit in the grievances as ventilated on behalf of the appellant/accused person. Mr. Safiullah then referred to the fact that in the peculiar backdrop of the present case, the sentence of imprisonment for life is far too harsh. Learned Counsel, Mr. Safiullah, in this context submits that the backdrop of the case may certainly demand reduction of sentence. In this context, it is perhaps necessary to mention that the offence of rape is perhaps one of the grievous crimes that can be conceived in a civilized world. It not only reflects the perversity of the offender but indicates the helplessness of the unfortunate millions of girls living in an otherwise unjust society with the failure on the part of the authority to provide them with the minimum security. The trauma of a victim of the offence of rape perhaps knows no bound. It may be a source of permanent unhappiness and deprivation. Mr. Safiullah submitted that the victim girl (P.W.1) has since been happily settled in her married life with two children. This, by itself does not dilute the gravity of the crime. But it cannot also be denied that 'if every saint has a past, every sinner has a future'.

24. It was also brought to our attention at the time of hearing of the case that the appellant/accused too got married. He has his wife and family. After taking into

consideration all relevant facts and circumstances and having regard to the materials available on record, we think that interest of justice will be best served if the term of imprisonment is reduced to 10 years.

25. While awarding punishment, the court is required to consider the nature of the crime, circumstances of its commission and particularly, the impact on the society or, the members of the public. There could be no second opinion in regard to the fact that the offence of rape is perhaps one of the gravest crimes. It does not merely harm the body of a girl. It virtually destroys the mind of the victim. Even our society is not always equipped with the proper frame of mind to consider the victim as well as her future in the right manner. But, as indicated earlier, the offender in the present case does not seem to have any criminal antecedent. Gone are the days of 'tooth for a tooth and eye for an eye' approach.

26. Considering all these facts and circumstances, the judgment under challenge is modified to the limited extent by way of reducing the sentence to 10 years imprisonment.

27. It is worth mentioning that the learned Trial Court imposed punishment on the very date of delivering the judgment whereby the present appellant/accused person was found guilty of the offence under Section 376 of Indian Penal Code. It thus appears that the learned Trial Court did not apply its mind and the appellant/convict was thereby denied an opportunity to make his submission in regard to the punishment. However, in view of the aforesaid discussion, the judgment dated 29th March, 2003 and the order of conviction passed by the learned Trial Court stand affirmed. The appellant is thus convicted and be sentenced to suffer rigorous imprisonment for a period of 10 years only and to pay a fine of Rs. 5, 000/- only ----- in default, must also suffer imprisonment for a further period of two (2) months. The period of detention undergone by the appellant/convict be set off against the term of imprisonment as per Section 428 of the Code of Criminal Procedure.

28. Send a copy of this judgment to the Learned Trial Court for information and necessary action.

29. Trial Court Record be sent back as well.

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