

Criminal Appeal

Present:

The Hon'ble Mr. Justice Ashim Kumar Banerjee

And

The Hon'ble Mr. Justice Kishore Kumar Prasad

C.R.A. No. 364 of 2005

Syed Sabuj Khandakar

-Vs-

The State of West Bengal & Another

With

C.R.A No. 515 of 2005

Akkas Ali Khan

-VS-

The State of West Bengal

With

C.R.A. No. 365 of 2007

Kalo Khan

-VS-

The State of West Bengal

Judgment on: February 23, 2010

Point:

TESTIMONY OF VICTIM: Testimony of rape victim contrary to medical evidence- Whether Court can rely upon such testimony of the victim - Indian Penal Code, 1860, S. 376.

Fact: The appellants preferred the instant appeal challenging an order passed by the Ld. Sessions Judge whereby all the appellants were held guilty of the offence of rape and they were convicted under Section 376(2)(g) of the Indian Penal Code and were sentenced to suffer Rigorous Imprisonment for life coupled with a fine of Rs.10,000.00 each and in default, to suffer simple imprisonment for one year more.

Held: To decide a rape case the Court could rely upon the sole testimony of the victim even if it is contrary to medical evidence. What is required, is to see that such sole testimony is trustworthy

considering the surrounding circumstances as came out in evidence. This ratio, should be applied in the case of a like nature particularly when there was no eyewitness to the incident. A married woman having a child may not sustain injury during commission of such offence by the accused on her private parts. Even if minor injuries are caused those may be hilled up in passage of time and may not be found in medical examination if it is done after forty-eight or seventy-two hours.

Paragraph – 6

Lot of criticism was made on two counts i.e. inconsistency with regard to the time of lodging of FIR and absence of injury being found out in medical examination. The evidence that a girl of twenty-one years married at a minor age was deserted by her husband when she was carrying. She gave birth to her child. She continued to stay with her parents. For a mother, child is the only asset which she claims to be of her own particularly when she is deserted by her husband. When she is threatened with dire consequence that if she does not agree to the proposal of the accused her son would be killed. One would not expect the victim to resist such crime being committed on her. Three adult persons committed such heinous crime on her one after the other. Such situation must have weaken her both physically and mentally. She was unconscious. She was escorted to her house in the next morning. It was difficult for her to move out for two days. She was examined after about forty-eight hours. The physical injuries might not be there but the trauma she was undergoing, could well be inferred. The matter can be viewed from another angle. The doctor admitted that being a married a lady there might not be aberration and/or injuries on the private parts even if such crime was committed without her consent. Paragraph – 8

Three statements were made by the victim at different stages i.e., first one before the police on February 14 two days after the incident, the second one before the Magistrate in April and the third one before the learned Sessions Judge at the time of trial. All those three statements made at

different times Court would not find any material discrepancy. There might be some minor anomalies. Such minor anomalies however did not demolish her positive statement that all the three accused did commit rape on her on the fateful day after dragging her out from her residence in presence of her family members. Paragraph – 9

Cases: Ronald Kiprono Ramkat –VS- State of Haryana reported in 2001, Supreme Court Cases (Criminal), Page-1034.

Raghunath –VS- State of Haryana and Another reported in 2003, Supreme Court Cases (Criminal), Page-326.

Sudhansu Sekhar Sahoo –VS- State of Orissa reported in 2003, Supreme Court Cases (Criminal), Page-1484.

State of Punjab –VS- Ajaib Singh and Others reported in 2005, Supreme Court Cases (Criminal), Page-43.

Sevi and Another –VS- State of Tamil Nadu and Another reported in All India Reporter, 1981, Supreme Court, Page-1230

T.T. Antony –VS- State of Kerala and Others reported in 2001, Supreme Court Cases (Criminal), Page-1048.

Ram Kumar Pande –VS- The State of Madhya Pradesh reported in All India Reporter, 1975, Supreme Court, Page-1026.

Jang Singh and Others –VS- State of Rajasthan reported in 2002, Supreme Court Cases (Criminal), Page-1027.

Ram Narain –VS- The State of Punjab reported in All India Reporter, 1975, Supreme Court, Page-1727.

Amar Singh & Others –VS- The State of Punjab reported in 1987, Calcutta Criminal Law Reporter (Supreme Court), Page-173.

Dilip And Another –VS- State of Madhya Pradesh reported in 2002, Supreme Court Cases (Criminal), Page-592

Surjan And Others –VS- State of Madhya Pradesh reported in 2004, Supreme Court Cases (Criminal), Page-471.

Radhu –VS- State of Madhya Pradesh reported in 2008, Volume-II, Supreme Court Cases (Criminal), Page-207.

Bibhishan –VS- State of Maharashtra reported in 2008, Volume-III, Supreme Court Cases (Criminal), Page-163.

Lalliram And Another –VS- State of Madhya Pradesh reported in 2009, Volume-I, Supreme Court Cases (Criminal), Page-17.

Bir Singh Mahato And Others –VS- The State of West Bengal reported in 2010, Volume-I, Calcutta Criminal Law Reporter (Calcutta), Page-168.

All India Reporter, 1983, Supreme Court, Page-753 (Bharwada Bhoginbhai Hirjibhai –VS- State of Gujarat) and 1996, Criminal Law Journal, Page- 1728 (State of Punjab –VS- Gurmit Singh and Others)

All India Reporter, 1973, Supreme Court, Page-2622 (Shivaji Sahebrao Bobade and Another –VS- State of Maharashtra).

All India Reporter, 1987, Supreme Court, Page-1080 (Balwant Singh and Others –VS- State of Punjab) and All India Reporter, 2006, Supreme Court, Page-3098 (Santosh Kumar –VS- State of Madhya Pradesh

2003, Supreme Court Cases (Criminal), Page-356 (Joseph –VS- State of Kerala) and 2006, Volume-I, Supreme Court Cases, Page-283 (Vishnu Alias Undrya –VS- State of Maharashtra).

Brajeswar Sarkar –VS- The State of West Bengal reported in 2009, Volume-II, Calcutta Criminal Law Reporter (Calcutta), Page-593.

For the Appellant in	:	Mr. Prabir Mitra
C.R.A. No. 364 of		Mr. Achin Jana
2005		Ms. Sujasha Mukherjee
For the Appellant in	:	Mrs. Chandreyi Alam
C.R.A. No. 515 of		Ms. Runu Mukherjee
2005		

For the Appellant in	:	Mr. Joy Sengupta
C.R.A. No. 365 of		
2007		

For the State	:	Mr. Pushpal Satpathi
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The Court:

1. Basanta Roy was residing at the material time in a Kachha house within the Police Station of Bagnun in the District of Howrah along with his family members being his wife Sandha Roy, his son Sambhu and married daughter, the victim and her minor child aged about one and half years. On February 12, 2004 Basanta and Sambhu were sleeping on the outside room whereas Sandha and the victim along with her child were sleeping in the inner room. At about 02:30 / 03:00 a.m. when they were in deep sleep they certainly woke up hearing a sound of repeated knocking on the wall made of bamboo sticks. Initially they did not respond. Sandha tried to put resistance by holding the door. Such resistance failed. Three persons kicked and broke open the door and entered the room having torch light in their hand. They were Sabuj Khandakar, Kalo Khan and Akkas Khan. The accused belonged to Kachari Para an adjacent locality. Sabuj and Kalo had sword in their hand. Sabuj threatened the victim to kill her. They initially tried to drag her out of the room by

pulling her hands. The victim initially tried to resist them when Sabuj threatened her that he would kill her minor child. The other inmates of the house could not put resistance out of fear. There was no other house in the near vicinity. Sabuj dragged her out of the house and took her to the Hijloke Burning Ghat about 30-40 cubits away towards north-eastern side. They committed rape on the victim one after the other by pressing her mouth. At least one of them in rotation guarded the door of the house so that no one could come outside. This continued for an hour and a half. At the time of Ajan the victim's parents brought the victim girl who was lying almost unconscious and necked. She regained her sense subsequently. She was in acute pain and could not freely move for two days. On 16th February, her parents took the victim to the police station and thereafter to the hospital for treatment. A local leader accompanied them whose wife was a panchayat member. All the three accused were arrested. They were found to be potent on being medically examined. They were charged under Section 376(2)(g) of the Indian Penal Code. All of them pleaded innocence and faced trial.

2. The prosecution produced as many as thirteen witnesses. The victim being PW-1 corroborated what she had stated in the complaint. In addition, she narrated in detail, the unfortunate incident that had happened on the night of February 12, 2004. She deposed that she had regained her sense one-hour after arrival when she had narrated the incident to her parents. She also stated that she had narrated the incident to the Officer in-charge of the police station who had recorded her statement where he had put her L.T.I. She also deposed that the Officer in-charge had taken her to the hospital for her medical treatment. She also deposed that three/four years ago Sabuj did the same thing to her. She informed the police station. However the police did not take any step. She

also deposed that she had sustained injury on her face and chest as also on her private parts. She had put her L.T.I. in a “plain paper” on the next day of occurrence at about 10:00 am.

Her statement was corroborated by her parents being PW-2 and 3. There were, however, some minor discrepancies which, however, did not materially affect the main contention of the victim. PW-4 being a local leader helped the family to lodge the complaint. He was a post-occurrence witness. His wife was a member of the Gram Panchayat and he used to supervise the affairs of Gram Panchayat on her behalf. PW-5 another neighbour was also a post-occurrence witness. PW-8, the Judicial Magistrate recorded her statement given contemporaneously under Section 164 of the Criminal Procedure Code.

3. The doctor being PW-12 examined the victim. He opined that there was no definite “nail marks”. He also stated, “if the victim was over-powered at the time of commission of rape, there might not be any mark of nail”. In cross-examination he stated –

“I do not find any kind of injury including its interior. I did not find any kind of injury upon her breast, chest, abdomen and legs.

If anyone forced to such activities, there must be mark of injury. There may be marks of injury if anybody dragged here to there touching the earth. If number of persons raped upon the victim consecutively, there should be marks of injury. There must be mark of injury in case of unmarried woman.” PW-3 being the Investigating Officer narrated in detail what had happened after the complaint had been lodged.

The learned Sessions Judge relying on the evidence so came out during trial, held all the three accused guilty of the offence and convicted them accordingly under Section 376(2)(g) of the Indian Penal Code and sentenced them to suffer Rigorous Imprisonment for life coupled with a fine of Rs.10,000.00 each and in default, to suffer simple imprisonment for one year more.

Being aggrieved, the accused filed the above three separate appeals which were heard analogously.

Mr. Prabir Mitra, learned advocate appearing for Sabuj contended as follows :-

- i) There was unexplained delay in lodging the FIR, so was statement made under Section 164 by the victim.
- ii) A vital eyewitness being Sambhu, the minor brother of the victim was not produced. Hence, adverse inference should be drawn. The villagers were also not examined by the police either at the time of investigation or during the trial.
- iii) The doctor found no injury, which would infer that the victim offered no residence.
- iv) The material exhibits being the wearing apparel, FSL report, medical records pertaining to her treatment on the next day of occurrence were not produced. Hence, prosecution did not permit the learned Judge to adjudicate the case by considering each and every material required for the said purpose.

Elaborating his argument Mr. Mitra contended that victim in her cross-examination stated that on the next day of occurrence she visited the police station and made complaint and her LTI was taken on a plain paper. Such complaint was never produced. Similarly, her treatment record of the very next day of the occurrence at the local hospital as stated by the victim, was also not produced. Mr.

Mitra further contended that when the incident had happened on February 12/13, 2004 it was expected that prosecution would produce the contemporaneous complaint made by the victim. However, complaint produced before the Court was dated February 14, 2004 and that too at the instance of a local Gram Panchayat leader whose wife was a Panchayat member of an adjacent village. Mr. Mitra contended that no explanation was offered why the FIR was delayed. Similarly no explanation was offered why the statement of the victim under Section 164 was made about two months after the incident. He further contended that Sambhu being an eyewitness could have helped the Court to have actual picture of the incident which was deliberately withheld by the prosecution. Similarly, the neighbours were not examined by the police who could throw some light on the incident. Mr. Mitra further contended that the doctor did not find any injury on the person of the victim whereas the victim had claimed that she had sustained injury on her face, chest and private parts. Hence, the statement of victim was not creditworthy.

4. In support of the contention that there had been unexplained delay in lodging the FIR. Mr. Mitra cited four Apex Court decisions which are as follows :-

- i) ***Ronald Kiprono Ramkat –VS- State of Haryana*** reported in 2001, ***Supreme Court Cases (Criminal), Page-1034.***
- ii) ***Raghunath –VS- State of Haryana and Another*** reported in 2003, ***Supreme Court Cases (Criminal), Page-326.***
- iii) ***Sudhansu Sekhar Sahoo –VS- State of Orissa*** reported in 2003, ***Supreme Court Cases (Criminal), Page-1484.***

- iv) State of Punjab –VS- Ajaib Singh and Others* reported in *2005, Supreme Court Cases (Criminal), Page-43.*

On the issue of non-production of the first complaint, Mr. Mitra cited two Apex Court decisions which are as follows :-

- i) Sevi and Another –VS- State of Tamil Nadu and Another* reported in *All India Reporter, 1981, Supreme Court, Page-1230*
- ii) T.T. Antony –VS- State of Kerala and Others* reported in *2001, Supreme Court Cases (Criminal), Page-1048.*

On the issue of withholding of evidence Mr. Mitra cited two Apex Court decisions which are as follows :

- i) Ram Kumar Pande –VS- The State of Madhya Pradesh* reported in *All India Reporter, 1975, Supreme Court, Page-1026.*
- ii) Jang Singh and Others –VS- State of Rajasthan* reported in *2002, Supreme Court Cases (Criminal), Page-1027.*

On the issue of inconsistency in the statement made by the eyewitnesses, Mr. Mitra reported two decisions which are as follows :

- i) Ram Narain –VS- The State of Punjab* reported in *All India Reporter, 1975, Supreme Court, Page-1727.*
- ii) Amar Singh & Others –VS- The State of Punjab* reported in *1987, Calcutta Criminal Law Reporter (Supreme Court), Page-173.*

Mr. Mitra lastly cited the following decisions on the issue of injury being not found in the medical report.

- i) *Dilip And Another –VS- State of Madhya Pradesh* reported in 2002, *Supreme Court Cases (Criminal), Page-592*
- ii) *Surjan And Others –VS- State of Madhya Pradesh* reported in 2004, *Supreme Court Cases (Criminal), Page-471.*
- iii) *Radhu –VS- State of Madhya Pradesh* reported in 2008, *Volume-II, Supreme Court Cases (Criminal), Page-207.*
- iv) *Bibhishan –VS- State of Maharashtra* reported in 2008, *Volume-III, Supreme Court Cases (Criminal), Page-163.*
- v) *Lalliram And Another –VS- State of Madhya Pradesh* reported in 2009, *Volume-I, Supreme Court Cases (Criminal), Page-17.*
- vi) *Bir Singh Mahato And Others –VS- The State of West Bengal* reported in 2010, *Volume-I, Calcutta Criminal Law Reporter (Calcutta), Page-168.*

Mrs. Chandreyi Alam, learned counsel appearing for Akkas, another appellant adopted the submissions made by Mr. Mitra. In addition, Mrs. Alam contended that it was quality and not quantity of evidence that matters. According to her, the prosecution examined no independent witness from Hijloke village. Once the prosecution withheld material evidence the Court should draw adverse inference and give benefit of doubt to the accused. In support of her contention she

relied on two Apex Court decisions reported in *All India Reporter, 1983, Supreme Court, Page-753 (Bharwada Bhoginbhai Hirjibhai –VS- State of Gujarat)* and *1996, Criminal Law Journal, Page- 1728 (State of Punjab –VS- Gurmit Singh and Others)*

Mr. Joy Sengupta, learned counsel appearing for Kalo Khan, the other appellant adopted the submissions made by Mr. Mitra and Mrs. Alam.

Appearing for the prosecution Mr. Pushpal Satpathi, learned counsel contended that on perusal of the evidence, the contention of Mr. Mitra that there had been delay in lodging of the FIR, would not be tenable. Mr. Satpathi further contended that there had been only one FIR which had been taken by the police and registered on February 14, 2004. There might be some confusion with regard to the date of making the FIR. In this regard, he contended that the victim being twenty one year old and deserted by her husband after giving birth to her child, might have been confused, more so because she was a rustic villager. However her consistent statement with regard to commission of the crime by the accused could not be shaken in cross-examination. Such statement found corroboration from her parents. Hence, the Court below was right in holding the accused guilty of the offence. He relied on the Apex Court decision reported in *All India Reporter, 1973, Supreme Court, Page-2622 (Shivaji Sahebrao Bobade and Another –VS- State of Maharashtra)*. He also contended that the statement of the victim had been corroborated not only by the parents but also by the panchayat leader PW-4 as well as the Investigating Officer being PW-13.

On the issue of medical evidence Mr. Satpathi contended that incident had occurred on February 12 whereas the medical examination had been conducted on February 14, about forty-eight hours after

the incident. The minor injuries, if any, might have been hilled up and could not be found by the doctor. This would, however, not upset her positive statement as against the accused with regard to commission of the crime. He relied on two Apex Court decision being reported in *All India Reporter, 1987, Supreme Court, Page-1080 (Balwant Singh and Others –VS- State of Punjab)* and *All India Reporter, 2006, Supreme Court, Page-3098 (Santosh Kumar –VS- State of Madhya Pradesh)*

With regard to non-production of the brother Sambhu or the villagers Mr. Satpati relied on Section 134 of the Evidence Act and contended that the prosecution was within its discretion as to who would be the best witness to prove the crime. Mere non-production of any witness would not vitiate the trial once the offence is proved by the available witnesses. He relied on two Apex Court decisions in this regard reported in *2003, Supreme Court Cases (Criminal), Page-356 (Joseph – VS- State of Kerala)* and *2006, Volume-I, Supreme Court Cases, Page-283 (Vishnu Alias Undrya –VS- State of Maharashtra)*.

Lastly Mr. Satpati contended that the lodging of the complaint, subsequently making of the statement before the learned Magistrate under Section 164 and thereafter before the learned Judge during the trial the victim consistently stated that the accused had committed rape on her. The accused were identified by the victim. Such definite statement and that too, after being corroborated by other witnesses, was sufficient to hold the accused guilty of the offence. Mr. Satpati relied on the decision of the Apex Court in the case of *Brajeswar Sarkar –VS- The State of West Bengal* reported in *2009, Volume-II, Calcutta Criminal Law Reporter (Calcutta), Page-593*.

He prayed for dismissal of the appeals.

5. Before taking up the issue in hand let us first discuss the law on the subject. Our understanding of the law as decided by the precedents cited and referred to above are as follows :

DELAY :

- i) When there was considerable delay and the delay was not properly explained benefit must go to the defence.
- ii) A rape victim may think seriously before lodging complaint to the police as the “onslaught of a social stigma may haunt her for life”. Hence, delay might be possible in the case of a like nature.
- iii) If the complainant was victim and was injured in the incident delay in lodging the complaint would not be fatal.

NON-PRODUCTION :

When the prosecution deliberately did not produce material witness such non-production must be considered and held against the prosecution.

INCONSISTENCY :

When the oral testimony was totally inconsistent with medical evidence and no reasonable explanation comes from the prosecution to bring harmony “it is sufficient to discredit the entire case”.

MEDICAL EVIDENCE :

- i) When a married woman was subject to gang rape and did not make any complaint contemporaneously and the prosecution did not produce the medical examination report such deficiency must go as against the prosecution.
- ii) When the prosecution case solely rests on the testimony of the prosecutrix and the medical evidence and does not lend any positive corroboration any contradiction would be fatal.
- iii) Sole testimony of the prosecutrix being contrary to the medical evidence without any corroboration is not trustworthy.
- iv) Vital inconsistency in medical evidence and the oral testimony would not lead to conviction. If the version of the prosecutrix does not have support of medical evidence and the whole surrounding circumstances are highly improbable to support the case of the prosecutrix the Court shall not act on the solitary evidence of the prosecutrix.
- v) Opinion of the Medical Officer is to assist the Court as he is not witness to the fact and such evidence is really of a advisory character and not binding.

6. If we bring the legal proposition discussed above in a narrow campus we would find, to decide a rape case the Court could rely upon the sole testimony of the victim even if it is contrary to medical evidence. What is required, is to see that such sole testimony is trustworthy considering the surrounding circumstances as came out in evidence. This ratio, in our view, should be applied in the case of a like nature particularly when there was no eyewitness to the incident. A married woman having a child may not sustain injury during commission of such offence by the accused on

her private parts. Even if minor injuries are caused those may be hilled up in passage of time and may not be found in medical examination if it is done after forty-eight or seventy-two hours.

7. Applying the ratio discussed above in the case before us in hand, we find from the evidence that the victim was consistent all through out that the accused had committed the offence on her after dragging her out of her house in presence of her family members.

8. Lot of criticism was made on two counts i.e. inconsistency with regard to the time of lodging of FIR and absence of injury being found out in medical examination. We find from the evidence that a girl of twenty-one years married at a minor age was deserted by her husband when she was carrying. She gave birth to her child. She continued to stay with her parents. For a mother, child is the only asset which she claims to be of her own particularly when she is deserted by her husband. When she is threatened with dire consequence that if she does not agree to the proposal of the accused her son would be killed. One would not expect the victim to resist such crime being committed on her. Three adult persons committed such heinous crime on her one after the other. Such situation must have weaken her both physically and mentally. She was unconscious. She was escorted to her house in the next morning. It was difficult for her to move out for two days. She was examined after about forty-eight hours. The physical injuries might not be there but the trauma she was undergoing, could well be inferred. The matter can be viewed from another angle. If we closely examine the medical report and the evidence of the doctor we would find that the doctor admitted that being a married a lady there might not be aberration and/or injuries on the private parts even if such crime was committed without her consent.

9. Three statements were made by the victim at different stages i.e., first one before the police on February 14 two days after the incident, the second one before the Magistrate in April and the third one before the learned Sessions Judge at the time of trial. If we examine all those three statements made at different times we would not find any material discrepancy. There might be some minor anomalies. Such minor anomalies however did not demolish her positive statement that all the three accused did commit rape on her on the fateful day after dragging her out from her residence in presence of her family members.

10. We are unable to accept the contention of Mrs. Alam that there had been substantial improvement by her during trial. Such contention would be belied if we read closely those three statements referred to above.

11. On the issue of corroboration, we find that both the parents corroborated the victim. The panchayat leader also corroborated the statement of the victim although he was a post occurrence witness.

12. We are in full agreement with the learned Trial Judge in the matter of conviction and sentence. Accordingly, we confirm the conviction and sentence and dismiss the appeals.

13. The appellants are now in jail. They are directed to serve out the remaining part of their sentence as awarded by the learned Trial Judge.

14. A copy of this judgment be sent to the correctional home, where the appellants are suffering their sentence, for their information.

15. Let a copy of this judgment along with Lower Court Records be sent to the Court of learned Trial Judge for information and necessary action.

16. Urgent xerox certified copy will be given to the parties, if applied for.

Kishore Kumar Prasad, J:

I agree.

[ASHIM KUMAR BANERJEE,J.]

[KISHORE KUMAR PRASAD]