

Criminal Revision

PRESENT: THE HON'BLE MR JUSTICE KALIDAS MUKHERJEE

Judgment on 26.08.2010

CRR NO. 1652 OF 2009

Smt. Subhadra Bhandari

Vs.

The State of West Bengal & Anr.

Points:

Scope of revision- Private complainant filed revision- Government has no right to appeal against the order impugned-Scope of revisional jurisdiction conferred on the High in such case- Code of Criminal Procedure, 1973 S.401

Facts:

The victim was facing financial stringency with her children after the death of her husband took the job of maid servant in the house of the accused. After some days the accused proposed to marry her by way of registration. The accused also proposed to transfer two bighas of land in her favour and bear the costs of maintenance of her children. With this proposal the accused cohabited with the victim for five years. The victim conceived twice, but, the accused caused abortion in the nursing home. The victim deposited her wages to the tune of Rs.38,909/- with the accused. When she demanded her wages, the accused quarrelled with her and drove her out. The learned Judge upon consideration of the materials on record acquitted the accused person holding that complainant being a married woman having children indulged in sexual relationship with another married person having wife and five daughters for a considerable period and such conduct amounted to an act of promiscuity and not rape. The learned Judge further observed that the

complainant cannot be said to have given her consent under misconception of fact.

Held:

From the evidence on record it is clear that the victim with her consent started living with the accused. The prosecution case as alleged in the F.I.R. and in the evidence of P.W. 1 is that she accepted the proposal of accused and started living with him and made cohabitation for a considerable period of time. It is in her cross-examination that the accused lives with his wife and children. Since, the victim allegedly agreed to the proposal of the accused, the provision of Section 90 of the Indian Penal Code will not be applicable in this case. The learned Trial Judge under such circumstances observed that it was an act of promiscuity on the part of the victim. Para 16 The learned Trial Judge also considered exhibit 'A' and 'B' regarding the sale of land and the P.W. 1 in her cross-examination admitted the receipt of the same for the sale of such land. The instant application has been preferred against an order of acquittal. The State has not preferred any appeal. In a case of revision preferred by the private complainant the scope of interference with the order of acquittal is very limited. In the instant case the learned Trial Court considered all the aspects of the case and also considering all the materials on record the learned Trial Judge recorded the order of acquittal. There is no scope of interference with the findings of the learned Trial Judge. Para 21

Cases cited:

2009(1) Supreme 617 paragraph 13 [Zinder Ali Sk Vs. State of West Bengal & Anr.]; 2009(5) Supreme 233 [Rajinder @ Raju Vs. State of H.P.; V AIR 1951 SC 196 [D. Stephens Vs. Nosibolla]; AIR 1970 SC 272 [Khetra Basi

*Samal and another etc. Vs. State of Orissa etc.]; 2009(5) Supreme 233
[Rajinder @ Raju Vs. State of H.P.]*

For the Petitioner : Mr. Sumit Kumar Roy

For the O.P. No. 2 : Mr. Satyajit Mandal, Mr. Suranjan Mandal

For the State : Mr. Swapan Kumar Mallick

KALIDAS MUKHERJEE, J.:

1. This Revisional Application is directed against the judgment of acquittal passed by learned Additional Sessions Judge, 2nd Fast Track Court, Diamond Harbour in Sessions Trial No. 6(6) of 2008 arising out of Sessions Case No. 19(10) of 2006 corresponding to G.R. Case No. 258 of 2006 acquitting thereby the accused person of the charges under Section 376/406/323/506 of the Indian Penal Code.

2. The prosecution case, in short, is that the victim lodged complaint with Raidighi P.S. alleging that her husband died on 15.10.1991. The victim was facing financial stringency with her children after the death of her husband. She took the job of maid servant in the house of the accused. After some days the accused proposed to marry her by way of registration. The accused also proposed to transfer two bighas of land in her favour and bear the costs of maintenance of her children. With this proposal the accused cohabited with the victim for five years. The victim conceived twice, but, the accused caused abortion in the nursing home. The victim agreed to the proposal of the accused having regard to the future of her children. The victim deposited her wages to the tune of Rs.38,909/- with the accused. When she demanded her wages, the accused quarrelled with her. In order to misappropriate the said sum the accused drove her out after assaulting her on 12.7.2003 and

discontinued her job as maid servant. The victim informed the villagers and the police station and a G.D. entry was made bearing No. 549 dated 13.7.2003. After a long time under the direction of the O.C. the victim attended the Local Police Camp and in presence of others the accused returned the sum of Rs.8,800/-, but, forcibly got a receipt signed by the victim to the effect that the victim had received the entire amount. As a matter of fact out of Rs.38,909/- the victim got the refund of Rs.8,800/-.

3. After the receipt of the complaint the Raidighi P.S. Case No. 28 dated 11.3.2006 was started under Section 376/493/325/506/420 of the Indian Penal Code.

4. The charges were framed against the accused person under Section 376/406/323 and 506 of the Indian Penal Code to which the accused pleaded not guilty and claimed to be tried.

5. The learned Judge upon consideration of the materials on record acquitted the accused person holding that complainant being a married woman having children indulged in sexual relationship with another married person having wife and five daughters for a considerable period and such conduct amounted to an act of promiscuity and not rape. The learned Judge further observed that the complainant cannot be said to have given her consent under misconception of fact. It was observed that the prosecution failed to prove that complainant was raped by the accused.

6. The learned Judge observed that none of the witnesses alleged that the victim used to work in the house of the accused as a maid servant at a monthly salary of Rs.700/- and there was no evidence on record to show that the complainant had kept Rs.38,800/- in the custody of the accused and later the accused refused to pay back the amount.

7. The learned Judge also considered Exhibit A & B which showed that the victim had received Rs.11,000/- from the accused Mangal Chandra Bera and Tara Pada Halder as the price of two bighas of land on 28th Chaitra, 1410 B.S. and that there was another paper dated 20.7.2003 which showed that she had withdrawn all the allegations which she had brought against the accused. It was observed by the learned Judge that no copy of the G.D. bearing No. 549 dated 13.7.2003 of Raidighi P.S. was produced to prove the incident of assault and threat upon the victim by the accused. Considering all the materials on record the learned Trial Judge recorded an order of acquittal.

8. The learned Counsel for the petitioner submits that the assurance was given by the accused that he will give shelter to the victim and would transfer some land to her and on such promise he started cohabiting with the victim. It is submitted that in the house of the accused cohabitation followed for considerable period and on 13.7.2003 the accused drove her out. It is contended that the consent was given on misconception of fact. It is contended that the promise given by the accused was false from the very beginning to his knowledge and the learned Trial Court overlooked this aspect of the matter. It is submitted that the sole testimony of the victim is sufficient to prove the charge against the accused person. The learned Counsel for the petitioner has referred to and cited the decisions reported in *2009(1) Supreme 617 paragraph 13 [Zinder Ali Sk Vs. State of West Bengal & Anr.]*; *2009(5) Supreme 233 [Rajinder @ Raju Vs. State of H.P.]*.

9. The learned Counsel appearing for the accused, that is, O.P. No. 2 herein submits that the re-appreciation of evidence in this Revisional Application is not permissible under the law. It is submitted that the victim was not

examined by the Medical Officer. It is contended that the learned Trial Judge considered all the points and there is no ground to interfere with the findings of the learned Trial Judge. It is submitted that the decisions cited by the learned Counsel for the petitioner are not applicable in the facts of the instant case. The learned Counsel appearing for the accused O.P. No. 2 has referred to and cited the decisions reported in *AIR 1951 SC 196 [D. Stephens Vs. Nosibolla]*; *AIR 1970 SC 272 [Khetra Basi Samal and another etc. Vs. State of Orissa etc.]*; *2009(5) Supreme 233 [Rajinder @ Raju Vs. State of H.P.]*.

10. The learned Counsel appearing on behalf of the State submits that the husband of the victim died on 15.10.1991 and thereafter she used to work in the house of the accused as maid servant; the victim is the mother of one daughter and six sons. It is submitted that she knows the consequences of her acts. It is submitted that in the facts of the instant case Section 90 of the Indian Penal Code will not have any application. It is submitted that the complaint was lodged in the year 2006 and from the year 1991 the victim allegedly lived with the accused and cohabited with him. It is submitted that the impugned judgment is not assailable.

11. The victim P.W. 1 has stated that her husband died about 10/11 years ago; she has six sons and one daughter; the accused had taken her to his house to work as a maid servant at a monthly salary of Rs.700/-; after a few days, the accused told her that he would marry her and would gift two bighas of land and alluring her in such way, the accused had sexual intercourse with her continuously for six years. It is in her evidence that due to such copulation she became pregnant twice and on both such occasions the accused terminated her pregnancy in a nursing home at Krishnanagar.

12. P.W. 1 has further stated that she had kept her salary amounting to Rs.38,000/- with the accused and when she demanded that money, the accused became agitated and assaulted her. She has stated that she has not received back the money from the accused. It is in her evidence that Police Officer detained the accused in Thana and, as such, he returned Rs.8,000/- to her, but, he has not paid back the balance amount.

13. It is in the cross-examination of P.W. 1 that the accused lives with his wife and five daughters in his house. She has stated in cross-examination that she is a supporter of SUCI and accused was a supporter of CPIM and at present he is a supporter of Congress Party. She has stated that she has not filed any Civil Suit for recovery of money. She has admitted her signatures on Exhibit 'A' and 'B'. She has admitted that she was paid Rs.6,000/- & Rs.5,000/- by the accused and Tarapada against sale of two bighas of land. It was suggested to P.W. 1 that the accused did not engage her as maid servant in his house and that the allegation of sexual intercourse as alleged was false. The victim has denied such suggestion, but, as the sexual intercourse has been denied, the decisions referred to by the learned Counsel for the petitioner are not applicable here.

14. P.W. 2, P.W. 3 and P.W. 4 were declared hostile by the prosecution.

15. P.W. 5 is a Doctor who examined the accused. P.W. 6 is the Police Officer who investigated the case and submitted charge sheet. It is in his cross examination that he did not make any prayer before the Court for recording the statement of the victim under Section 164 Cr.P.C. and did not send the victim girl for her medical examination. It is in his evidence that he did not make any seizure of the medical papers of the victim from the nursing home.

16. From the evidence on record as discussed above it is clear that the victim with her consent started living with the accused. The prosecution case as alleged in the F.I.R. and in the evidence of P.W. 1 is that she accepted the proposal of accused and started living with him and made cohabitation for a considerable period of time. It is in her cross-examination that the accused lives with his wife and children. Since, the victim allegedly agreed to the proposal of the accused, the provision of Section 90 of the Indian Penal Code will not be applicable in this case. The learned Trial Judge under such circumstances observed that it was an act of promiscuity on the part of the victim.

17. In the case of *Jindar Ali Sk Vs. State of West Bengal & Anr. (Supra)* it has been held that the evidence of the prosecutrix, if remains unchallenged, is sufficient to nail the accused. It has further been held in the aforesaid case that the promise of marriage in order to sexually exploit the prosecutrix may not amount to cheating if she succumbed to that promise.

18. In the case of *Rajinder @ Raju Vs. State of H.P.(Supra)* it has been held that when the act of sexual intercourse is admitted, there remains no necessity to consider the medical evidence at great length.

19. In the case of *Khetra Basi Samal and another etc. Vs. State of Orissa etc. (Supra)* it has been held that the revisional jurisdiction should be exercised by the High Court only in exceptional cases. The observation of the Apex Court in the said case made in paragraph 11 is set out as hereunder:-

“11. In K. Chinnaswamy Reddy V. State of Andhra Pradesh, 1963-3 SCR 412 at P. 418 the Court proceeded to define the limits of the jurisdiction of the High Court under Section 439 of the Criminal Procedure Code while setting aside an order of acquittal. It was said:

“..... this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice..... It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence 276 which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court or where the acquittal is based on a compounding of the offence, which is invalid under the law”

20. In the case the D. Stephens Vs. Nosibolla (Supra) it has been held that the revisional jurisdiction conferred on the High Court is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal against which the Government has a right of appeal. It has been further held that it could be exercised only in exceptional cases where the interests of public justice required interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice and this jurisdiction is not ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record.

21. The learned Trial Judge also considered exhibit ‘A’ and ‘B’ regarding the sale of land and the P.W. 1 in her cross-examination admitted the receipt

of the same for the sale of such land. The instant application has been preferred against an order of acquittal. The State has not preferred any appeal. In a case of revision preferred by the private complainant the scope of interference with the order of acquittal is very limited. In the instant case I find that the learned Trial Court considered all the aspects of the case and also considering all the materials on record the learned Trial Judge recorded the order of acquittal. There is no scope of interference with the findings of the learned Trial Judge.

22. There is no merit in this revisional application and the same stands dismissed.

23. Let a copy of this order be sent to the learned Court below immediately.

24. Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

(Kalidas Mukherjee, J.)