

[2010] 6 S.C.R. 495

UTPAL DAS & ANR.

v.

STATE OF WEST BENGAL
(Criminal Appeal No. 800 of 2007)

MAY 07, 2010

[B. SUDERSHAN REDDY AND AFTAB ALAM, JJ.]

Penal Code, 1860: ss.376/34 – Conviction under – Held: Evidence of eye-witness supporting prosecution case – There was no material contradiction in the evidence of prosecutrix and eye-witness in order to disbelieve them – Prosecutrix was a grown up lady with 2 children and in such circumstance absence of injuries on her private parts would not in any manner support the case of defence – Plea of consensual sex, raised for the first time before Supreme Court, thus not sustainable – Crime against women – Rape.

Code of Criminal Procedure, 1973: s.164 – FIR and s.164 statement – Evidentiary value of, when attention of witness not drawn to the contents thereof.

Prosecution case was that on the fateful night at about 8 p.m., the prosecutrix-victim (PW-14) was travelling in a rickshaw. The appellants-accused and other accused persons surrounded the rickshaw and told PW-6, the rickshawpuller to divert the destination. Thereafter they forcibly took PW-14 inside a house under construction and committed rape on her one after another. They also threatened to kill her if she raised voice. Thereafter, victim was taken to a nearby tea stall and locked in it. After some time PW-1, PW-2 and others came there and rescued her. Trial court acquitted all the accused on the ground that prosecution had failed to prove its case beyond reasonable doubt. The High Court upon re-appreciation of the evidence and the totality of

- A circumstances held that the trial court had extended benefit of doubt to the appellants under misconception of facts and wrong appreciation of evidence and held the appellants guilty of the offence punishable under Section 376/34 IPC. However, the High Court confirmed the
- B acquittal of the other accused. The order of acquittal of those accused attained its finality since there was no appeal preferred by the State.

- C In appeal to this Court, it was contended for the appellants that the prosecutrix made improvements in her statement about certain facts which were not mentioned in the FIR; that there was no acceptable evidence of the appellants committing any rape as the Medical Officer who examined the victim did not find any
- D injuries on her person as were likely to be found had she been subjected to forced sexual intercourse; that the medical evidence and the reports of the chemical examination would at the most suggest that the victim was a party to a sexual intercourse in recent time; and in alternate it was contended that there was no evidence
- E to suggest that the intercourse was without her consent or against her will or that she had been forcibly violated by any person.

Dismissing the appeal, the Court

- F HELD: 1. The FIR does not constitute substantive evidence. It can, however, only be used as a previous statement for the purposes of either corroborating its maker or for contradicting him and in such a case the previous statement cannot be used unless the attention
- G of witness was first drawn to those parts by which it was proposed to contradict the witness. In this case, the attention of the witness (PW-14) was not drawn to those parts of the FIR which according to appellants were not in conformity with her evidence. Likewise statement
- H recorded under Section 164 Cr.P.C. could never be used

as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. The statement made under Section 164 Cr.P.C. can be used to cross examine the maker of it and the result may be to show that the evidence of the witness was false. It can be used to impeach the credibility of the prosecution witness. In the present case it was for the defence to invite the victim's attention as to what she stated in the FIR and the statement made under Section 164 Cr.P.C. for the purposes of bringing out the contradictions, if any, in her evidence. In the absence of the same the court cannot read Section 164 statement and compare the same with her evidence. [Para 13] [503-D-H]

2.1. There was no reason to disbelieve the evidence of Prosecutrix who meticulously narrated the sequence of events as to what transpired on that fateful day from 8.00 p.m. onwards till about her lodging the FIR on the next day. There was nothing on record to disbelieve her evidence. The only suggestion made to her was that she was tutored by the police at the *thana* and she had set up a false story to implicate the appellants in the case. No reasons were suggested for such false implication. There was nothing to disbelieve the version given by PW-1 which supported the prosecution's case. The evidence of PW-6 who was the rickshaw puller was also very crucial. There was no reason whatsoever to disbelieve his statement as he was totally an uninterested witness. [Paras 14-16] [504-A-B, E; 505-A-B]

2.2. The evidence of PW-14 and PW-6 showed that there were no material contradictions so as to disbelieve their evidence. The version given by PW-14 received complete corroboration from the evidence of PW-6. The High Court rightly expressed its indignation as to the manner in which the trial court completely misread the vital medical evidence. PW-8 examined the victim a day

A after incident. On examination, he opined that the victim was habituated to sexual intercourse and therefore he could not express his firm opinion in his report about the commission of rape at the time of medical examination. But in the evidence, he clearly stated after considering the report of FSL regarding stains on victim's clothing, that there was sufficient proof of recent sexual intercourse. This cannot in any manner support the case of the defence. [Paras 17, 18] [505-B-G]

2.3. The mere fact that no injuries were found on private parts of her body cannot be the ground to hold that she was not subjected to any sexual assault. Victim was a married grown up lady with two children and in such circumstances the absence of injuries on her private parts was not of much significance. The proposition canvassed for the first time across the bar regarding the consensual sexual intercourse was absolutely untenable and unsustainable. There was not even a suggestion made to the victim that she had consented to sexual intercourse. The sequence of events clearly apparent from the evidence of PW-1, PW-6 and PW-14, leading to the sexual assault completely ruled out the possibility of consensual sex. The High Court rightly observed that the victim made no mistake in identifying the two appellants, and that, based on the evidence of PW-1, PW-6 and the victim (PW-14) herself, it is satisfactorily proved that the two appellants were actually the persons who committed rape on the victim. [Paras 19 and 20] [505-G-H; 506-A, C-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 800 of 2007.

From the Judgment & Order dated 26.02.2007 of the High Court at Calcutta in G.A. No. 25 of 1989.

Chanchal Kumar Ganguli, Debesh Panda for the Appellants.

Tara Chandra Sharma, Neelam Sharma for the Respondent. A

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. This appeal by special leave is directed against the judgment of the Calcutta High Court setting aside the acquittal of the appellants herein under Section 376 IPC and sentencing them to suffer rigorous imprisonment for five years and to pay a fine of Rs. 2,000/-, in default of payment of fine to further undergo two months rigorous imprisonment. B C

2. The prosecution story, briefly stated, is that on 28.4.1984 at about 8.00 p.m. one Sitarani Jha (PW-14) got down from a train at Burdwan Railway Station alone and hired a rickshaw to go to the Badamtola bus stand as she had to take a bus for Satgachia. On reaching at Badamtola bus stand she learnt that the last bus for Satgachia had already left. She then told the rickshaw puller, Bipul Samaddar (PW-6) to take her to a girl of her village who lived at nearby place, Kalna Gate. It is alleged that when the victim was about to leave Badamtala bus stand she was intercepted by four or five persons who forcibly took her to a house under construction and thereafter two of them forcibly committed rape on her one after another against her will. One of them had a knife in his hands. The victim further alleged that after commission of rape she was taken to a nearby tea stall and locked there in a small room by the appellants. After sometime one Parimal Babu (PW-2), Probal Babu (PW-1) and Bipul Samaddar (PW-6) and some other people rescued her from that shop, to whom she narrated the whole incident. Thereafter the victim took shelter for night in the house of one Joydeb Prajapati (PW-4) a distant relative of her. It is further alleged that on the following morning i.e. 29.4.1984 local people brought Utpal Das (appellant no. 1 herein), Haradhan @ Bhalta Sutradar (appellant no.2 herein) and one Banshidhar Dawn before the victim and she identified Utpal D

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A and Haradhan @ Bhalta Sutradhar as the persons who committed rape on her and at that time Haradhan @ Bhalta managed to flee away. This, in fact, is the story given out by the prosecutrix – Sitarani Jha while she lodged the FIR (Ex. 9) with Burdwan (Sadar) Police Station at 10.45 a.m. on B 29.4.1984.

3. Based on the report (Ex.9) the Police Station Burdwan registered a case under Sections 366, 368 and 376 read with Section 34 of the IPC against the appellants.

C 4. During the course of investigation, site was inspected, the seizure list was prepared, the prosecutrix and the appellants were got medically examined and the medical examination reports of the prosecutrix (Ex.P-2) as well as Ex. P-3 and Ex. P-4 of the appellant nos. 1 and 2 respectively were obtained.

D 5. After completion of the investigation, the police filed charge sheet against the appellants under Sections 366, 368 and 376 read with Section 34 of the IPC. The prosecution altogether examined 17 witnesses (PW-1 to PW-17) and 09 E documents were got marked (Ex. P-1 to P-09). The statements under Section 313 Cr.P.C. of the appellants were recorded in which they pleaded their false implication.

F 6. The learned Additional Sessions Judge upon consideration of the evidence and material available on record held that prosecution has failed to prove its case beyond reasonable doubt and accordingly acquitted all the accused of the charges framed against them.

G 7. Aggrieved by the order of acquittal, the State of West Bengal preferred an appeal before the High Court. The High Court upon reappraisal of the evidence and the totality of circumstances held that the trial court has extended benefit of doubt to the appellants under misconception of facts and wrong appreciation of evidence and accordingly came to the

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conclusion that the appellants are guilty of the offence punishable under Section 376/34 of the IPC. However, the High Court confirmed the acquittal of the other accused. The order of acquittal of those accused has attained its finality since there is no appeal preferred by the State. Hence, the appellants are before us in this appeal challenging their conviction and award of sentence by the High Court under Section 376/34 of the IPC. A
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8. We have heard the learned counsel appearing for the appellants as well as for the State and perused the material available on record. C

9. Shri Chanchal Kumar Ganguli, learned counsel appearing on behalf of the appellants submitted that the High Court failed to appreciate that there was no acceptable evidence of the appellants committing any rape as the Medical Officer who examined the victim did not find any injuries on her person as are likely to be found had she been subjected to forced sexual intercourse. The medical evidence and the reports of the chemical examination may at the most suggest that the victim was a party to a sexual intercourse in recent time. But there is no evidence to suggest that the intercourse was without her consent or against her will or that she had been forcibly violated by any person. The counsel thus submitted that essential ingredients of the offence of rape under Section 376 IPC are not present in the case. It was also submitted that the evidence of prosecutrix suffers from material contradictions. Her version was not supported by any of the prosecution witnesses. She is not a truthful witness and it may be unsafe to rely upon her evidence and convict the appellants for the offence punishable under Section 376 IPC. An attempt was also made by the learned counsel for the appellants to read the statement of the victim recorded under Section 164 Cr.P.C and to compare the same with her evidence. It was also submitted that PW-2, PW-3, PW-4 and PW-5, were declared hostile by the prosecution and the prosecution is left with no evidence other than the statements of Rikshaw Puller (PW-6) and the victim who contradict each other. D
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A 10. Learned counsel for the State submitted that evidence
of the victim (PW-14) itself is sufficient to convict the appellants
and at any rate, her version is completely supported by the
evidence of PW-6, whose evidence cannot be rejected for
whatsoever reasons. It was further submitted that there is
B nothing in the medical evidence which supports the case of the
appellants as contended by the appellants.

11. In order to consider as to whether the prosecution
established the case against the appellants beyond reasonable
doubt, we are required to critically scrutinize the evidence of
C the prosecutrix and Probal Babu (PW-1), Bipul Samaddar (PW-
6) and also the evidence of Dr. A. Chakravorty (PW-8) as the
entire case turns upon their evidence.

12. In exhibit P-9 (report) the prosecutrix (PW-14) alleged
D that on 28.4.1984, at about 8.00 p.m when she was going in a
rickshaw towards Kalna Gate all of a sudden the appellants and
other accused surrounded the rickshaw and told the rickshaw
puller to divert the destination and they forcibly took her to a
nearby house under construction and tried to rape her. She
E made an attempt to save herself and requested them to free
her. The appellants did not heed to her request but forcibly
committed rape on her one after another. She was prevented
from raising her voice as they threatened her to kill. One of them
was holding a knife. Thereafter, the accused took her to a
F nearby tea stall and locked her inside it. That after about 15/
20 minutes one Asok Babu, Parimal Babu (PW-2) and Probal
Babu (PW-1) and many others came there and rescued her
from that shop after unlocking the door. She narrated the entire
episode before them. Thereafter all of them took her away to
G the house of Joydeb Projapati where she took shelter in the
night. Next day morning PW-1, PW-2 and others who rescued
her came along with the accused where she identified the
appellants as the one who committed rape on her. She also
stated that she experienced pain in her private parts and all
H over her body.

13. The Prosecutrix more or less reiterated the same facts in her evidence. In the cross examination she stated that one of the miscreants "jumped" on the rickshaw and threatened her at the point of knife that she would be killed if she raises any hue and cry. She identified appellant No.2 in the court as the one who threatened her with the knife. Relying on this part of the statement in the cross examination, learned counsel submitted that this part of the story of appellant no.2 'jumping on the rickshaw and threatening her at the point of knife etc. was not stated by her in the first information report given to the police. This one circumstance according to the learned counsel for the appellants belies the evidence of the Prosecutrix as she went on making improvements. We find no merit in this submission for the simple reason that the contents of the first information report were never put to the victim. It is needless to restate that the First Information Report does not constitute substantive evidence. It can, however, only be used as a previous statement for the purposes of either corroborating its maker or for contradicting him and in such a case the previous statement cannot be used unless the attention of witness has first been drawn to those parts by which it is proposed to contradict the witness. In this case the attention of the witness (PW-14) has not been drawn to those parts of the FIR which according to appellants are not in conformity with her evidence. Likewise statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. The statement made under Section 164 Cr.P.C. can be used to cross examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness. In the present case it was for the defence to invite the victim's attention as to what she stated in the first information report and statement made under Section 164 Cr.P.C. for the purposes of bringing out the contradictions, if any, in her evidence. In the absence of the same the court cannot read 164 statement and compare the same with her evidence.

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A 14. We do not find any reason whatsoever to disbelieve
the evidence of Prosecutrix who meticulously narrated the
sequence of events as to what transpired on that fateful day from
8.00 p.m. onwards till about her lodging the first information
report on the next day. There is nothing on record to disbelieve
B her evidence. The only suggestion made to her is that she was
tutored by the police at the *thana* and she had set up a false
story to implicate the appellants in the case. What are the
reasons suggested for such false implication? None.

C 15. Probal Chakarborty (PW-1), in his evidence narrated
as to what PW-6, told him on that fateful night about the incident.
The rickshaw puller told him that he was carrying a woman
passenger in his rickshaw to proceed towards Kalna Gate and
on the way 4-5 young men at the point of knife directed him to
D divert his rickshaw and that one of them sat by the side of the
girl in the rickshaw. Upon reaching near a house under
construction he was asked by those men to leave the girl with
them. This incident PW-6, narrated to PW-1, within a short time
after the incident. That all of them searched for the girl and
ultimately found the girl in a nearby tea stall where she was
E locked inside. There is nothing to disbelieve the version given
by PW-1 which supports the prosecution's case.

F 16. Bipul Samaddar (PW-6) is none other than the rickshaw
puller whose evidence is very crucial. He in his evidence clearly
stated that on the fateful day at about 8.00 p.m. one woman
hired his rickshaw to Badamtola bus stand. He took his
rickshaw to Badamtola bus stand but on finding that she missed
her bus took her towards Kalna Gate on her instructions. It is
at that time 4-5 young men appeared there and "forcibly got
her down from the rickshaw and took her away. Out of fear he
G rushed towards para" (Mohalla) and reported the matter to PW-
1 and others. Thereafter he along with PW-1 and others went
on searching for the woman and ultimately found her in a tea
stall of one Punjabee from where she was rescued. Thereafter
he along with others took her to one of her relative's house. It
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is also in his evidence that two of the miscreants (appellants) forcibly took that woman away on that night and he identified them in the court. There is practically nothing suggested to this witness in the cross examination. We do not find any reason whatsoever to disbelieve the statement of PW-6 who is totally an uninterested witness.

17. On consideration of the evidence of PW-14 and PW-6, we are of the opinion that there are no material contradictions in their evidence so as to disbelieve their evidence. The version given by PW-14, (victim) receives complete corroboration from the evidence of PW-6. It is not even suggested to PW-6, that such an incident has not taken place on that fateful day. We see no reason whatsoever to disbelieve his evidence.

18. One more aspect that requires our consideration is as to whether the medical evidence does not support the prosecution's case? The High Court rightly expressed its indignation as to the manner in which the trial court completely misread the vital medical evidence. Dr. A. Chakroborty, (PW-8) examined the victim on 29.4.1984. On examination he opined that the victim is habituated to sexual intercourse and therefore could not express his firm opinion in his report about the commission of rape at the time of medical examination. But in the evidence he clearly stated after considering the report of FSL regarding stains on victim's clothing, that there is sufficient proof of recent sexual intercourse. The vaginal swab and smear were sent to Chemical Examiner. Based on the FSL report and the report of Serologist (Ex. 7) he found that the semen was present in the vaginal swab of the victim. We fail to appreciate as to how and in what manner the medical evidence supports the case of the defence.

19. The learned counsel for the appellants however, submitted that the medical examination report of the victim shows that no injuries were found on her private parts or on any

A part of her body. We are required to note that victim Sita Rani
 Jha is a married grown up lady and blessed with two children
 and in such circumstances the absence of injuries on her
 private parts is not of much significance. The mere fact that no
 injuries were found on private parts of her body cannot be the
 B ground to hold that she was not subjected to any sexual assault.
 The entire prosecution story cannot be disbelieved based on
 that singular assertion of the learned counsel. In this regard
 another submission was made by the learned counsel for the
 appellants that the sexual intercourse, if any, was with the
 C consent of the victim. According to him it was consensual
 sexual intercourse. This proposition canvassed for the first time
 across the bar is absolutely untenable and unsustainable. There
 is not even a suggestion made to the victim that she has
 consented to sexual intercourse. The sequence of events
 clearly apparent from the evidence of PW-1, PW-6 and PW-
 D 14, leading to the sexual assault completely rules out the
 possibility of consensual sex. We have no hesitation to reject
 the submission.

E 20. The High Court rightly observed that the victim made
 no mistake in identifying the two appellants, and that, based
 on the evidence of PW-1, PW-6 and the victim (PW-14) herself,
 it is satisfactorily proved that the two appellants were actually
 the persons who committed rape on the victim on that fateful
 day on 28.4.1984.

F 21. For all the aforesaid reasons, we find no merit in this
 appeal and the same is accordingly dismissed.

D.G.

Appeal dismissed.