

(2020) 11 PAT CK 0051

Patna High Court

Case No: Criminal Appeal (Sj) No. 222, 228 Of 2015

Lalo Sharma

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision: Nov. 10, 2020

Acts Referred:

- Code Of Criminal Procedure, 1973 - Section 156(3), 164, 386
- Indian Penal Code, 1860 - Section 34, 312, 323, 375, 376, 504
- Juvenile Justice (Care And Protection Of Children) Act, 2015 - Section 94
- Juvenile Justice (Care And Protection Of Children) Rules, 2007 - Rule 12(3)

Hon'ble Judges: Birendra Kumar, J

Bench: Single Bench

Advocate: Anant Kumar, Sanjay Kumar, S.A.Ahmad, Binod Bihari Singh

Final Decision: Partly Allowed/Dismissed

Judgement

1. Both the appeals arise out of the same judgment of conviction and order of sentence, hence both were heard together and are being disposed off by this common judgment.

2. Both the appellants Lalo Sharma and Vijay Sharma faced trial in Sessions Trial No. 26(A) of 2013 before learned Additional Sessions Judge-I,

Madhepura. The trial arose out of Udakishunganj P.S. Case No. 92 of 2012, registered in pursuance of the order passed under Section 156(3) Cr.P.C,

whereby Complaint Case No. 421 of 2012 brought by PW-7 against four persons was ordered to be registered as a police case.

3. The learned trial Judge found the appellant Lalo Sharma guilty for the offence under Section 376 IPC and sentenced him to undergo rigorous

imprisonment of 10 years and to pay a fine of Rs.5,000/- and in default of payment of fine, to further undergo simple imprisonment of one year. The

learned trial Judge further convicted both the appellants for offence under Section 312 I.P.C. and awarded rigorous imprisonment of 7 years and fine

of Rs.5000/- against both the appellants and in default of payment of fine, the appellants were directed to further undergo simple imprisonment of one

year. Sentences against the appellant Lalo Sharma were to run concurrently.

4. The conviction and sentence have been challenged on the ground that there is no allegation or evidence on the record that the appellants caused

miscarriage to a woman, hence the conviction under Section 312 IPC is based on conjectures and surmises.

5. Conviction of the appellant Lalo Sharma under Section 376 I.P.C. has been challenged on the ground that serious infirmities in the prosecution

evidence have been ignored by the learned trial Judge.

6. The prosecution case as disclosed in the First Information Report (Ext.-3) is that the complainant, a girl about 15 years, had gone to cut grass for

feeding the animals, about 3½ months prior to filing of the complaint petition dated 30.04.2012. Both the appellants dragged her inside the crop field.

Accused Jawahar Sharma put his hand on her mouth and appellant Lalo Sharma ravished her. Due to threat by the accused persons on the life of

family members, the complainant did not disclose about the occurrence and later on appellant Lalo Sharma was off and on in physical relation with her

alluring her that Lalo would marry with her. Others also established physical relation with her. The complainant became pregnant and on 21.04.2012,

the accused persons brought her to a doctor to administer medicines for miscarriage, but the complainant refused to take the same and made alarm as

well as disclosed to the public about whatever had happened against her. The date of occurrence is disclosed in between February™2012 to

27.04.2012.

7. During investigation of the case, statement of the victim was recorded under Section 164 Cr.P.C. She has admitted about that statement in her

deposition before the court as PW-7. In the statement before the Magistrate, she stated that only appellant Lalo Sharma had ravished her and others

acted as a C.I.D. (informer) to Lalo Sharma.

8. After investigation, the police submitted chargesheet and the learned trial Judge framed charges under Sections 323, 376, 312 and 504 of the Indian Penal Code. The impugned judgment does not speak about acquittal or conviction under Sections 323 and 504 of the Indian Penal Code. However, by necessary implication, the appellants were acquitted for those offences.

9. During trial, prosecution examined altogether 10 witnesses. PW-1 Charitar Sharma is grand-father of the victim girl and he has supported the allegation as hearsay evidence. PW-2 Prakash Sharma, PW-3 Surendra Sharma, PW-4 Haldhar Sharma, PW-5 Naval Sharma have not supported the prosecution case, as such the prosecution declared them hostile. PW-6 Pawni Devi is mother of the victim girl and she has supported the allegation as hearsay witness on the disclosure statement of the victim.

10. PW-7 deposed consistent with what she had stated in the F.I.R. The cross-examination of the witness does not reveal any infirmity or otherwise untrustworthiness of the witness. PW-7 disclosed her age as 15 years and she was not cross-examined even as suggestion that her age is above the age of majority.

11. The doctor (PW-8) who examined the victim medically on 24.08.2012 assessed her age in between 14-16 years and the learned Magistrate before whom her statement under Section 164 Cr.P.C. was recorded, assessed the age of the victim as 15 years. No contrary material is available on the record to suggest that the victim was above 16 years of age. As such, there is no merit in the contention of learned counsel for the appellants that the victim was a consenting party. Consent of a girl under 16 years age was immaterial on the date of offence in view of definition of "rape" under Section 375 of the Indian Penal Code. The medical opinion of the doctor brought on the record by PW-8 was that the victim had given birth to a child recently.

12. Since there is no infirmity in the trustworthy evidence of PW-7 who is corroborated by the medical evidence and the victim was below 16 years of age on the date of alleged offence committed against her, hence even if she consented for subsequent sexual relationship on allurement of marriage by the appellant Lalo Sharma, the offence of rape is clearly proved against the appellant Lalo Sharma beyond doubt. Hence his conviction under Section

376 IPC requires no interference.

13. Section 312 of the Indian Penal Code reads as follows:-

“312. Causing miscarriage.” Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith

for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or

with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to

seven years, and shall also be liable to fine. Explanation.”A woman who causes herself to miscarry, is within the meaning of this section.

14. Evidently, there is no evidence that any of the appellants were involved in causing miscarriage of a woman. As such conviction recorded under

Section 312 I.P.C. with the aid of Section 34 of the Indian Penal Code is not sustainable in law as the conviction is based on no evidence. Therefore,

both the appellants are hereby acquitted of the charge under Section 312 of the Indian Penal Code.

15. In the result, appeal of the appellant Vijay Sharma stands allowed.

16. Mr. Sanjay Kumar, learned counsel for the appellant Lalo Sharma has lastly prayed for reduction of sentence against the appellant Lalo Sharma

passed under Section 376 of the Indian Penal Code to the period already undergone on the ground that the appellant Lalo Sharma is a young boy and

has already undergone more than the minimum sentence of seven years, prescribed for offence under Section 376 IPC, applicable on the date of

alleged occurrence.

17. It appears that appellant Lalo Sharma filed a petition before the court below on 27.04.2013 along with school transfer certificate and claimed that

his date of birth is 15.05.1996. Therefore his case should be transmitted to the Juvenile Justice Board. The learned Magistrate transmitted the record

to the Juvenile Justice Board and the Board entered into an enquiry about the age of the appellant Lalo Sharma. During enquiry, school registers were

produced and the Headmaster of the school, Mr. Arun Kumar, appeared before the Board and supported that in the school register date of birth of the

appellant Lalo Sharma is recorded as 15.05.1996. The statement of Mr. Arun Kumar was consistent with the school register available on the record.

The mother of the appellant Lalo Sharma had filed an affidavit that the date of birth of the appellant Lalo Sharma was 15.05.1996. Her affidavit is dated 02.07.2013 wherein she stated that her son (Lalo Sharma) has crossed the age of 17 years.

18. In spite of the aforesaid material, the court below called for a report from the medical board and the medical board opined that the appellant Lalo Sharma was between 20-22 years on the date of examination. The Court below relied upon the medical board's opinion and by order dated

31.10.2013 held that the appellant was not a juvenile on the date of occurrence.

19. Though the said order got finality, however, this Court is competent to consider the legality of the said order while exercising its power of reduction

of sentence under Section 386 Cr.P.C. Even under Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, there was

consistent provision to that as contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 that while conducting

enquiry to determine the age of the child, the Board shall take into consideration the evidence of the date of birth certificate from the school or

matriculation or equivalent certificate and in absence thereof the birth certificate granted by the Corporation or Municipal Authority and in absence of

both the categories, the ossification test was to be done and Medical aid to be considered for age determination.

20. Learned counsel for the State does not dispute the factual and legal position above, in the matter of claim of appellant Lalo.

21. In the present case, the date of birth certificate from the school was on the record and the same was thoroughly verified and found genuine.

Hence, the court below should have followed the prescribed Rules.

22. Considering the aforesaid legal infirmity in the age determination of the appellant, the sentence passed against the appellant Lalo Sharma is hereby

reduced to the period already undergone. However, the appellant Lalo Sharma shall pay fine as directed by the trial Judge and the same shall be given

to the victim of the crime.

23. With the aforesaid observation, appeal of the appellant Lalo Sharma is partly allowed and partly dismissed.