

(2020) 12 PAT CK 0016

Patna High Court

Case No: Criminal Appeal (Sj) No. 925 Of 2017

Sanjit Kumar

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision: Dec. 3, 2020**Acts Referred:**

- Indian Penal Code, 1860 - Section 375, 376, 376(1), 376(2)
- Code Of Criminal Procedure, 1973 - Section 164
- Evidence Act, 1872 - Section 114A

Hon'ble Judges: Birendra Kumar, J**Bench:** Single Bench**Advocate:** Soni Srivastava, Ravi Bhardwaj, Bipin Kumar, Ravi Shankar Pankaj**Final Decision:** Dismissed

Judgement

1. The sole appellant-Sanjit Kumar faced trial in connection with Arwal (Mahila) P.S.Case No.26 of 2015 corresponding to Sessions Trial No.324 of

2016 for the charge under Section 376 I.P.C. before learned Additional Sessions Judge-II, Jehanabad. The appellant was found guilty for the aforesaid

offence and was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.50,000/- out of which Rs.30,000/-would go to the

victim. In default of payment of fine, rigorous imprisonment of 6 months was awarded. The aforesaid judgment of conviction dated 14.02.2017 and

order of sentence dated 17.02.2017 are under challenge in this appeal.

2. The prosecution case as disclosed in the written report of the victim girl is that on 22.10.2015, the victim was sleeping in her house. At about 5.00

A.M. the appellant entered into the house and ravished her. The victim made alarm and the appellant fled away. Mother of the victim saw the appellant fleeing.

3. On the basis of written report (Ext.1), the aforesaid P.S.Case was registered and after investigation, the police submitted chargesheet. During investigation, statement of the victim girl was recorded under Section 164 Cr.P.C. on 28.10.2015 wherein she stated that on 22.10.2015, she was sleeping in her house alongwith mother. At about 5.00 A.M. mother went to answer the call of nature towards field side. At the same time, the appellant came and ravished her. Till the mother returned, the appellant had fled away and the victim disclosed everything to her mother. Villagers came to her house, and a Panchayati was convened but the appellant fled away. She stated that the appellant is her cousin uncle in the Army and at the time of occurrence he had come to the village on leave. Ext.-2 is the statement of the victim girl under Section 164 Cr.P.C.

4. During trial, the prosecution examined altogether eight witnesses. P.W.1-the victim girl consistently supported the allegation levelled against the appellant in the FIR as well as in her statement recorded under Section 164 Cr.P.C. The cross-examination of the witness does not create any doubt on the trustworthiness of the witness. However, some facts brought on the record at the time of cross-examination of this witness would be necessary to be noticed. The victim stated that during occurrence some sperm fall on her cloths, however she had taken a bath. She further admitted that no blood had come from her private parts though sign of assault was there. She specifically admitted that no sign of offence was there on the bed. The Investigating Officer (P.W.5) has stated that he did not find any notable material at the bed of the victim. P.W.2- Permanand Singh deposed that on the date of occurrence he heard that the victim was ravished by the appellant. Since the appellant did not attend the panchayati, no decision could be taken. P.W.3- Usha Devi is mother of the victim girl. She deposed that the victim disclosed about the occurrence to her and she had herself seen the appellant fleeing from the house. The victim had also stated that she had disclosed to her mother about the occurrence. To that extent the prosecution

evidence finds corroboration. P.W.3 stated that on the date of occurrence she was sleeping alongwith the victim. At about 5.00 A.M. she went towards the field side to ease herself after shutting the flanks of the door of the house. During cross-examination the witness is specific that no male member of the family was there in the house, as the husband was at Patna and the son had gone to visit Dussehra fair. In the cross-examination the witness is specific that panchayati was not for imposing any fine on the appellant or for arranging marriage between the appellant and the victim, as the marriage between the two was not possible. Rather Panchayati was called for making everyone aware about what had happened with her daughter. P.W.4-Chandeshwari Devi is neighbour of the victim. She has deposed that she saw the appellant fleeing from the house of the victim at about 5.00 A.M. Thereafter the victim came weeping and disclosed about the act of the appellant. There is nothing in the cross-examination of the witness to disbelieve what she has stated in her examination-in-chief. P.W.5-Kumari Babita is Investigating Officer of the case. She has supported the investigation done by her. She further deposed that during investigation she ensured statement of the victim recorded under Section 164 Cr.P.C. as well as medical examination of the victim. In the cross-examination she was asked whether the Medical Officer, who had examined the victim, were interrogated by this witness or not and she denied to have interrogated the expert witnesses.

P.W.6-Dr. Mahendra Sharma had deposed that on 24.10.2015 he was posted as Medical Officer at Sadar Hospital, Arwal. On that day a Medical Board was constituted by Deputy Chief Medical Officer wherein this witness was also a member. Other two members of the Board were Dr.

Kumari Jyotsana (P.W.7) and Dr. Md. Sadique (P.W.8). On that day, the Board had examined the victim, daughter of Binod Thakur. Thereafter, he

has referred about the physical examination of the victim and -x-ray report. The Doctor found secondary sexual characters well develop. On internal

sexual character, hymen was found ruptured, there was sign of sexual contact, the victim was menstruating at that time so there was swelling due to

bad contact. Vaginal swab was collected and sent to the laboratory for its chemical examination. Report showed that no sperm was found in it. The

age of the victim girl was assessed between 18 to 20 years and in the opinion of the Doctor there was evidence of sexual contact but recent sexual contact could not be confirmed. The defence suggestion to the witness that it is the examination report is collusive one has been denied. Evidently, the defence was aware of the availability of medical examination report. Hence, no prejudice was there if the original of the same was not brought on the record. P.W.7-Kumari Jyotsana deposed that she was also a Member of the Medical Board. The Board did not find any recent sign of sexual intercourse, however, there was sign of prior sexual intercourse. She deposed that the Medical report was written by Dr. Mehendra Sharma(P.W.6) and she had also signed on the same. In the cross examination she admitted that she is giving evidence on the basis of carbon copy of the medical report available with the case diary. She further stated that she cannot say the whereabouts of the original medical report. P.W.8-Dr. Md.Sadique has supported that he was also a member of the Medical Board alongwith Dr.Mahendra Sharma (P.W.6) and Dr. Kumari Jyotsana (P.W.7). On the date of examination of the victim by the Medical Board, her age was in between 18 to 20 years. There was no recent sign of sexual intercourse but there was sign of previous sexual intercourse. This witness was cross-examined only to the extent that original medical report was not with him. However, there is no suggestion to any of these witnesses as to under what manner, the defence has prejudiced only due to non-availability of the original medical report.

5. The defence also produced three witnesses. D.W.1-Chunmun Kumari admits that she had not given any statement to the police. She simply stated that she had not seen the appellant coming out of the house of the victim. However, this witness is not specific that she was there nearby the place of occurrence at the time of alleged occurrence. Hence, her evidence has no value to disbelieve the prosecution case. D.W.2- Satendra Pandit deposed that he had not heard that the appellant had done anything with the victim. In the cross-examination this witness admitted that there are forty houses in between the house of the victim and that of this witness-Satendra Pandit. In the circumstance, if this witness did not hear about the occurrence, that

cannot give an inference to disbelieve the prosecution witnesses of the occurrence. D.W.3-Ram Prasad Rajak deposed that there was land dispute between the parties and a Panchayati had taken for settlement of the dispute. Panchayati document of the year 2013 was brought on the record as

Ext.A.

6. Mrs. Soni Srivastava, learned counsel for the appellant contends that the present case is based on sole testimony of the victim girl. Conviction is

possible on sole evidence of the victim of rape, if the victim is found to be a sterling witness. In this case, the following proved circumstances taken

together creates serious doubt on the prosecution case and conviction cannot be sustained on the sole testimony of the victim girl which suffers from

several infirmities. Learned counsel submits that the land dispute between the parties is motive for false implication so that the appellant may get his

job lost. The prosecution has not proved the original medical report of the victim girl. There is delay of 24 hours in submission of the report to the

police, hence, chances of concoction and deliberation cannot be ruled out. The scribe of the first written report has not been examined and the

prosecution has not explained any reason for the same. The reaction of the mother of the victim in convening the Panchayat for such a serious

offence does not inspire confidence. The victim has admitted that the sperm was there on her cloth after rape. The said cloth was not seized by the

police nor the Doctor had found any injury of resistance on the person of the victim which creates serious doubt on the trustworthiness of the

statement of the victim. One of the Panches has admitted that a panchayati paper was signed but no such paper was brought on the record. Learned

counsel for the appellant has relied on the judgment in Santosh Prasad @ Santosh Kumar Vs. State of Bihar reported in (2020)3 SCC 44,3 State of

Karnatka Vs. Mapilla P.P. Soopi reported in (2003)8 SCC 202, Munna Vs. State of Madhya Pradesh reported in (2014)10 SCC 25 4and Sunil Kundu

and Anr. Vs. State of Jharkhand reported in (2013)4 SCC 422.

7. Mr. Bipin Kumar, learned Additional Public Prosecution for the State assisted by Mr. Ravi Shanker Pankaj, learned counsel appearing for the

informant, contends that the victim girl is consistent in her statement regarding the occurrence and her statement finds corroboration from the medical

evidence as well. Learned counsel contends that on careful perusal of the evidence on record, it would be evident that there is no lapse on the part of the Investigating Officer. Since the original medical report was not on the record on the date of examination of the Doctors rather copy of the same was available, hence, it was not marked as exhibit. However, the details of the statement of the Doctors and non-cross-examination on the point raised at the time of argument as well as no material to show prejudice to the appellant, the same cannot come in the way to rely on the testimony of the victim girl. Learned counsel contend that there is drastic change in the definition of the word rape in Section 375 I.P.C. incorporated prior to the date of occurrence and Explanation-2 to Section 375 I.P.C. says that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact be regarded as consenting to the sexual activity. Moreover, the defence has come forward with a definite suggestion that no rape was committed rather for land dispute, the false case has been lodged alternatively as suggested to P.W.1 during cross examination, that just to drag money, she has lodged the false case. Learned counsel contends that it has come in the evidence that father and brother of the victim were not at home on the date of occurrence and only female member was the mother. It depends upon person to person as to how he or she reacts after some occurrence. If the mother convened Panchayati to make the villagers aware of the act committed by the appellant, it cannot be said that reaction of the mother after the occurrence was unnatural or unusual.

8. On careful consideration of the prosecution evidence briefly referred above, it is evident that the victim has consistently supported the occurrence of rape committed against her by the appellant. There is no material contradiction or shifting in the statement of the victim girl. Her statement is corroborated by P.Ws. 2, 3 and 4 who heard about the occurrence either from the victim or otherwise and claims to have seen the appellant fleeing from the house of the victim just after the occurrence. The witnesses are reliable. The victim further finds corroboration from the medical evidence.

The substantive evidence of all the three members of the Medical Board is there on the record, hence, only for the absence of the original medical

report, the solemn statement of the victim cannot be thrown away or doubted. Now the question is whether the trustworthy evidence of the victim girl be discarded for the reasons raised by learned counsel for the appellant and noted above.

9. None of the prosecution or defence witnesses have stated that there was land dispute between the parties persisting on the date of occurrence.

D.W.3-Ram Prasad Rajak deposed that the parties had called for a Panchayati and the Panchayati took place peacefully. The parties were allotted

different portions of land and thereafter there was/is no dispute between the parties. The aforesaid statement had been made with reference to Ext.A

proved by this witness. Ext.A is a document dated 31.01.2013 signed by the Panches and the parties whereby the parties accepted the portion of land

assigned by the Panches. From Ext.-A it is evident that one Anat Thakur had two sons Raj Kishore Thakur and Lal Babu Thakur. Sanjit, Ajit,

Niranjan, Ranjeet and Tulsi Thakur are sons of Raj Kishore Thakur and Sanjit is appellant in this case. Lal Babu Thakur had two sons Binod Thakur

and Kabindra Thakur. Binod Thakur is father of the victim girl. The FIR of Rampur Chauram P.S.Case No.35 of 2013(Ext.C.) was lodged by

Kabindra Thakur against Tulsi Thakur, the full brother of the appellant as well as against the full brother of the victim girl relating to an occurrence of

murderous assault. Thus, the aforesaid FIR cannot be treated as a document of enmity between the parties. Order-sheet of the aforesaid case is

Ext.B and chargesheet submitted in the case as Ext.D. There is no reference in the FIR that occurrence took place for land dispute nor the said

document can be read as a document of enmity between the appellant or his father on one side and the victim or her father on the other. Evidently

there is nothing to establish dispute between the parties for false implication. Moreover, a victim of rape does not speak against the accused only

rather against herself also as the Indian Society is not going to accept her with same honour and dignity which she was commanding earlier especially

the unmarried girl like the victim of the present case would face a lot of problem in getting a life partner. Therefore, it cannot be accepted that there

was dispute between the parties and for that dispute, the victim was speaking false against the appellant.

10. Though original medical report is not on the record, however, the members of the Medical Board deposed on the basis of the carbon copy of the medical report which is available with the case diary. There is no suggestion to any of the members of the Medical Board that due to non-availability of the original, the appellant was in any way prejudiced. The substantive evidence is of the expert and that is already on the record. No prejudice for the aforesaid reason has been ventilated at the time of argument.

11. So far delay of 24 hours in submission of the report to the police is concerned, that is sufficiently explained in the prosecution evidence when the victim and her mother disclosed that male members of the family were not in the house and the mother of the victim had called the villagers to make them aware of the act of the appellant. Moreover, on different factual situation, the witnesses react differently. If the mother of the victim thought it proper to call for the villagers before reporting the matter to the police it was not an unnatural conduct nor there is suggestion to any of the prosecution witness that there was deliberation and concoction before reporting the matter to the police. In *Mukesh Vs. State of Chhattisgarh* reported in (2014)10 SCC 327, identical delay, in lodging the information with the police, was not considered material when the prosecutrix was found trustworthy. Since the Doctors witnesses have opined that though hymen was ruptured and was a case of sexual contact but no sign of recent sexual contact was found.

As already noticed above that the victim has not stated that she made resistance at the time of sexual assault. Apparently, no sign of physical injury would have been found by the Doctors. Moreover, non-resistance at the time of sexual assault would not amount to consent as per proviso to Section 375 I.P.C. Likewise the victim stated that after the sexual assault committed at 5.00 A.M. she had taken a bath as usual. Therefore, other sign of recent sexual assault might have vanished at the time of medical examination of the victim girl. In the circumstance, the Doctors's opinion that there was no sign of recent sexual assault was natural and for that reason the statement of the victim cannot be disbelieved.

12. P.W.1-the victim girl stated that the written report submitted to the police was in the pen of Sanjay Kumar, a friend of her maternal uncle and the

victim signed on that after getting it read over and understanding the contents. On the basis of her statement, written report was marked as Ext.2.

There is no cross-examination of this witness on the aforesaid point. Hence, examination of Sanjay Kumar was not necessary to prove the charge

against the appellant nor was necessary to prove the contents of the written report.

13. It is a fact that P.W.1 admitted that after rape sperm was there on her cloths, however, she made it clear that since she took bath, it got washed

away. It is evident that the occurrence took place at 5.00 A.M., hence, if the victim took bath as usual she was not expected to act as a legal expert to

preserve the evidence of the offence. For that reason, her testimony cannot be disbelieved. Likewise, if the Panchayati papers were not brought on

the record that were not necessary to prove the charge of rape against the appellant. The investigation officer has not been found negligent in not

taking the cloths curtaining sign of offence especially when the victim has admitted that she had already taken bath after the occurrence. The matter

was reported to the police on the next day and thereafter investigation started. Even in Sunil Kundu's case (Supra) relied upon by the learned

counsel for the appellant, the Hon'ble Supreme Court reiterated the legal principle in paragraph-29 of the judgment as follows:

“29. We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at

the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in

the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the

victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be

ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the

evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution

case, they can be ignored.”

14. The evidence of the Investigating Officer of this case, especially non-cross-examination drawing his specific attention to particular lapses, shows

that the Investigating Officer was not negligent and if any minor irregularity was there, that was not going to the root of the prosecution case to distrust the evidence of the prosecutrix and other witnesses.

15. In the case of Munna Vs. State of Madhya Pradesh (Supra) relied by learned counsel for the appellant, the Honâ€™ble Supreme Court held that testimony of prosecutrix is almost on a par with an injured witness and can be acted upon without corroboration. Para-11 of the judgment is being reproduced below:

â€œ11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecutrix in view of the statutory presumption under Section 114A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376, IPC has to be treated but in the present case the circumstances taken as a whole create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused.â€

16. As has been referred above, there is no infirmity in the evidence of the prosecutrix, her evidence finds corroboration as discussed above, as such, the aforesaid case is distinguishable on the facts of the present case. Likewise, in the State of Karnataka Vs. Mapilla P.P. Soopi (Supra), the medical report was not available and the Doctor, who had examined the victim, made reply to certain queries made by the Investigating Officer, which was held to be not acceptable. In the present case, the Doctors have deposed in the court on the basis of carbon copy of the medical report and correctness of carbon copy was not challenged by the defence.

17. Likewise, judgment of the Honâ€™ble Supreme Court in Santosh Prasad @ Santosh Kumar (Supra) was on quite different factual position of the case. In that case, there was material contradictions in the deposition of the prosecutrix. The veracity of the statement of the prosecutrix was doubted and she was not found to be a â€œsterling witnessâ€. In the case in hand, the prosecutrix is consistent in her statement without fail. Rather her statement finds corroboration from other material witnesses including the evidence of Doctors who had occasion to examine her. Therefore, I am of

the view that the judgment of conviction passed by the learned Trial Judge does not require any interference.

18. On the adequacy of sentence, learned counsel for the appellant submitted that the appellant is a young man. He has already lost his job. No any other criminal act, of the appellant has been brought on the record, past or future. Hence, the sentence be reduced to the minimum prescribed under the law.

19. The learned Trial Judge has taken into consideration the relationship between the parties and violation of human right of the victim as aggravating circumstances. No doubt the sexual assault is assault on the dignity of the victim, however, if the court is going to award more than minimum sentence, there must be some noteworthy aggravating circumstance such as brutality with which the crime was committed. For the offence committed by a person in dominating position either in relationship or otherwise, Sub-Section 2 of Section 376 I.P.C. prescribes different punishment.

While providing minimum sentence of seven years for offence under Section 376(1) I.P.C. the Legislature was conscious of the fact that rape committed against anyone is violation of the human right of the victim.

20. In my view, considering the totality of the factual scenario and in absence of any other aggravating circumstances would be sufficient reason to reduce the sentence of rigorous imprisonment of 10 years to the minimum sentence prescribed under Section 376(1) I.P.C. Substantial justice would meet, if the sentence passed by the learned Trial Judge is reduced to rigorous imprisonment of seven years. Accordingly, it stands reduced. The sentence of fine and the manner of disbursement of the fine is hereby affirmed.

The appellant is already undergoing the sentence.

21. With the aforesaid modification in sentence, this appeal stands dismissed.