

(2006) 11 JH CK 0033

Jharkhand High Court

Case No: Criminal Appeal (DB) No"s. 304 and 377 of 2002

Bijay Kumar Tiwary and Lalan
Choudhary

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision: Nov. 22, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 120B, 376, 395
- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3, 3(2)

Citation: (2007) 1 BLJR 683 : (2007) 1 JCR 583

Hon'ble Judges: Dhananjay Prasad Singh, J; Amareshwar Sahay, J

Bench: Division Bench

Advocate: B.P. Pandey, K.K. Mishra, V.K. Tiwari and P.C. Tripathy, for the Appellant;
Chandra Prabha, APP, for the Respondent

Final Decision: Dismissed

Judgement

D.P. Singh, J.

Both the appeals, arising out of same judgment, were heard together and are being disposed of by this common judgment.

2. Both the appeals are directed against the judgment of conviction and order of sentence dated 3.6.2002 passed by the learned 1st Additional Sessions Judge, Garhwa in Sessions Trial No. 3/2000, whereby and whereunder the learned Sessions Judge held the appellants guilty and sentenced them to serve RI for ten years u/s 376(g), RI for ten years u/s 395 IPC, RI for one year u/s 3(1)(x) of SC ST Act, 1989 and RI for life u/s 3(2)(v) of SC ST Act, 1989. However, sentences were directed to run concurrently.

3. The factual matrix leading to these appeals are that in the night of 8/9 June 99 Tuesday the informant Pratima Devi, PW 2 along with other witnesses and victims were sleeping inside the house situated in village Hasker, P.S. and district Garhwa when at about 11 PM they awoke on beating of doors and abuses hurled upon them. As per PW 2, out of fear they did not open the door but the assailants climbed over their roof and opened the door of their Angan, after which eight persons entered into the house carrying lathi, garasa, bhala etc. According to the informant, the accused persons started assaulting the inmates and took away cash ornaments etc. from their house. Further they entered into the house of one Krishna Ram, who happened to be her uncle and thereafter in the house of PW 4, Gita Kumari and committed dacoity.

4. Not being satisfied with the looted articles, all the accused persons dragged PW 2, Pratima Devi, PW 4, Gita Kumari and Shobha Kumari along with them and committed rape upon them outside the village. All three of them have named five persons, three sons of Shankar Tiwari and one Shankar Choubey including the appellant Bijay Tiwari. She further asserted that due to land dispute between the informant and Tiwari family this incident has occurred. The informant along with two other victims returned to their house in the morning. Thereafter police arrived at the PO and recorded the statement of PW 2 at 9 AM. On the basis of this statement, a case was registered against five accused persons named in the fardbeyan and three unknown as Garhwa P.S. Case No. 99/99. The victims were sent for their medical examination, PO was inspected and finally charge sheet was submitted by DSP Garhwa in this case against these two appellants and one Shyam Sunder Singh u/s 395, 376(g), 120(B) IPC and under Sections 3 (1)(xii)/2(v) of SC ST Act and pending investigation against other persons. The case of the charge-sheeted accused were committed for trial by the court of sessions, where they stand separately charged under Sections 376(g), 395 IPC and Sections 3(x)/3(2)(v) of SC ST Act. Accused Shyam Sunder Singh absconded during trial. Appellants have pleaded not guilty and claimed false prosecution due to previous enmity. Appellant Bijay Tiwari further claimed that he was no present at the time of occurrence while appellant Lalan Choudhary claimed that he was not named in the FIR nor he was identified by the victims. The learned trial court, after examining witnesses and considering the facts on record, found and held both the appellants guilty and sentenced them as aforesaid.

5. Both the appeals have been preferred on the ground that the trial court has evaluated the evidence on record mechanically by not considering the fact that there were serious land dispute pending between the father of appellant Bijay Tiwari and father of the informant. It is also asserted that the learned trial court has not considered the fact that one of the alleged victims Shobha Devi and probable witnesses Satyanarayan Ram, Ramdeni Ram, Sahodari Devi and Krishna Ram, who are said to be eye witnesses, have not been examined during trial. It is also submitted that non-examination of the 10 in such facts has materially prejudiced the

defence raised by the appellants. Therefore, the trial court should have drawn adverse inference against the prosecution case. It is also asserted that PW 1 Manmati Devi has asserted that the dacoity was committed in presence of all the witnesses and even one Munia Devi was assaulted resulting in fracture of her finger but she has not been examined during the trial.

6. Mr. Pandey, learned senior counsel for the appellant Bijay Tiwari, submitted that PW 4 Gita Kumari has named only Shyam Sundar Singh, absconder during her examination before the police. However she has later on developed the story to implicate the appellant Bijay Tiwari and others. The non-examination of probable witnesses, who were admittedly present during the occurrence, has been highlighted. Learned Counsel further pointed out that admittedly PW 4 has named only Shyam Sundar Singh when her statement u/s 164 Cr.P.C. was recorded by the Magistrate. Therefore, question of identifying other appellants does not arise. It is also submitted that PW 2 asserted that Shankar Tiwari, a person aged about 60-70 years, raped her repeatedly but the said Shankar Tiwari has not faced trial as he was already dead. The learned Counsel has accordingly drawn our attention towards the contradictions in the statement of witnesses examined u/s 164 Cr.P.C. during trial to highlight the improbability and involvement of the appellants. It is also asserted that PW 6 Deonath Ram, PW 7 Pradip Ram, both father and brother of the victim Gita Kumari, have contradicted her statement. It is also asserted that none of the male witnesses have named any of the appellants to have participated in the occurrence. Therefore, the conviction of appellant Bijay Tiwari deserves to be set aside.

7. The learned Counsel for the appellant Lalan Choudhary, Mr. P.C. Tripathy submitted that he was neither named in the FIR nor named by any of the victims to have committed the alleged rape on them. It is also submitted that in spite of this fact the learned trial court convicted the appellant only on suspicion based upon conjecture and surmises. Therefore, appellant Lalan Choudhary deserves to be acquitted of the charges.

8. Learned APP opposed this contention on the ground that the dacoity in the house of victims has been committed by the appellants along with other accused persons. It is further asserted that all the victims including PWs 2, 4 and one Shobha Devi, were subjected to gang rape by the appellants along with others just because they opposed the highhandedness of Shankar Tiwari and his family in the village. Learned APP further pointed out that in such cases of gang rape committed upon the weaker section of the society, the court need to be more strict and harsh upon the offenders.

9. Since both the appeals were heard together and are being disposed of by this common judgment, we would like to discuss the case of appellant Lalan Choudhary in Cr. Appeal No. 304/2002 separately from Bijay Tiwari, appellant in Cr. Appeal No. 377/2002. The point raised by Mr. Tripathy that the appellant Lalan Choudhary has not been named in the FIR, his case has to be considered with evidence on record.

The FIR has been proved as Ext. 3 by the prosecution. Admittedly name of Lalan Choudhary did not find place in this FIR and in the fardbeyan. On perusal of evidence of PW 1 Manmati, it appears that she has not attributed any overt act on this appellant. She has admitted that she was examined u/s 164 Cr.P.C. by the Judicial Magistrate. She has identified the absconding accused Shyam Sundar Singh in the court. Her statement recorded u/s 164 Cr.P.C. marked as Ext.6/5, did not name this two appellants in her statement. PW 2 the informant Pratima Devi named appellant Bijay Tiwary and four others to have committed dacoity and rape upon them, however, she has not named appellant Lalan Choudhary as one of the assailants. PW 3 Amrawati Devi similarly does not name the appellant Lalan Choudhary to have participated in any offence. PW 4 Gita has named this appellant in her examination in chief vide para 2 that she was raped by Lalan Choudhary along with Shyam Sundar Singh, Bijay Tiwary and Uday Tiwari. She specifically mentioned vide para 9 and 10 that she was dragged by one black short statured person, who was lateron identified as Shyam Sundar Singh. PW 6 Deonath Ram named this appellant in his examination in Chief vide para 2. During cross examination he admitted that accused Shankar Tiwari and Shankar Choubey have been murdered in which witnesses Sahodari Devi and Krishna Ram are absconding. It is asserted that he has named this appellant also as one of the assailants in his statement before the police and magistrate. He further asserted vide para 11 that he identified appellant Lalan Choudhary whom he knew from before vide para 12 and 13. PW 7 Pradip Ram also named this appellant vide para 2 of his examination in chief and identified him in the dock. PW 8 Augaust Ram identified the appellant in the dock during his examination in Chief on 18.1.2002. He asserted that during cross examination he has named the appellant Lalan Choudhary along with other appellants before the Judicial Magistrate. PW 11 has not named this appellant. PW 12 asserted that she was informed by the victims of rape that this appellant has participated in committing rape upon them.

10. This appellant Lalan Choudhary has been charge sheeted by the 10 along with one Bijay Tiwari in September, 99 but he absconded and was brought to trial only in January, 2002 witnesses examined before 8th January, 2002, PW 1 Manmati, PW 2 Pratima, are not being considered as they were not cross examined by the appellant. Thereafter PW 3 Amrawti, PW 4 Gita Kumari, PW 6 Deonath Ram, PW 7, Pradip Ram and PW 8 August Ram have consistently named this appellant as one of the accused involved during the dacoity and commission of rape upon the victims. The plea taken by the learned Counsel for the appellant that he was not named in the FIR and later on falsely implicated by the witnesses does not have any basis. The witnesses cross examined on behalf of appellant Lalan Choudhary did not suggest that he was not known to them and further any reason for false implication along with other appellants. This is a case in which 8-10 persons have participated. The allegation is that a cluster of 8-10 houses belonging to the informant and witnesses were raided by a large number of marauders bursting bombs and breaking open

the door in the night of 8th June, 99 . The victim mostly Dalit were scared and subjected to indiscriminate assault being threatened at the point of annihilation. In that situation some of the male witnesses have taken shelter inside the house and females were subjected to robbing, assault in their presence. In such circumstances they have named assailants specifically Shankar Tiwari and his three sons, Shankar Choudhary and later on this appellant Lalan Chudhary, though late. The police has found his involvement in the alleged offence. Later on this has been reiterated by the victim Gita Kumari and other witnesses, as discussed above. Therefore, the involvement of the appellant Lalan Choudhary in the alleged offences has been proved beyond doubts.

11. This fact has been discussed by the learned lower court in the impugned judgment, vide para 17,19,20,22,23 and 24 in details. We do not find any material on record to disagree with the findings of the learned lower court with respect to appellant Lalan Chouhary. Accordingly, we find and hold that Cr.Appeal No. 304/2002 has got no merit.

12. So far the merit of appeal of appellant Bijay Tiwari is concerned, at the outset we find that this appellant is being named right from FIR till the last witness examined by the prosecution, Dewanti Devi as PW 12. It is admitted fact on record that serious dispute between the family of appellant and informant has resulted in a series of litigations between them for last ten years before this occurrence. The genesis of this occurrence is said to be that land dispute in which Sahodra Devi, mother-in-law of PW 2 and Shankar Tiwari, father of appellant Bijay Tiwari were at daggers drawn. The bone of contention between them was some land, for which claims and counter claims were pursued resulting in number of criminal cases. This has ultimately culminated in killing of Shankar Tiwari and Shankar Choudhary. The mother-in-law of informant and her husband Arun Ram were being searched by the police as they have absconded. In this back ground the present occurrence is said to have been taken place and the victim Pratima, Shobha, Gita are said to have been subjected to gang rape. The victim Shobha has not been examined though her medical examination was brought on record by PW 9 Dr. Sudakshina Lala as Ext.4/1. She has further proved the injury report of PW 2 as Ext.4 and PW 4 as Ext.4/2. The injury reports of PWs 2 and 4 mention that Pratima has got a number of abrasions on her body, neck, shoulder, knee, leg and back, though there was no mark of violence on her private part. However, the injury report of PW 4 mentions that her private parts wore marks of violence, hymen recently ruptured, tender and bleeds on touch. She has further mentioned that spermatozoa were present and opined that she has been raped. The medical evidence along with evidence of these two witnesses, PW 2 and 4 supports the fact that these two witnesses were subjected to forceful sexual intercourse. The testimony of these two witnesses during their lengthy cross examination could not be discredited. They have withstood the cross examination by specifically naming the appellant Bijay Tiwari as one of the participants in the alleged commission of rape along with others.

13. When the statement of other witnesses regarding the participation of appellant Bijay Tiwari in the commission of dacoity and raping the victims is considered, we find that Pws 1, 2, 3, 4, 6, 7, 8, 11 and 12 have repeatedly named the appellant as one of the assailants during commission of dacoity and thereafter carrying away three females, who later on returned to home and stated the atrocities committed on them. We therefore, do not find any material contradiction in their evidence to find that Bijay Tiwari may not be present at the time of occurrence.

14. Mr. Pandey, learned senior counsel for the appellant Bijay Tiwari has categorically stressed the following point:

(A) That Bijay Tiwari was employed with CRPF and he was not involved in this occurrence. In support of this, Mr. Pandey submitted that since appellant came to now that his name has appeared in FIR, he surrendered before the police next day on 9th June, 99 and cooperated with the investigation. Therefore, the question of his participation in the alleged offence may be ruled out.

(B) Mr. Pandey further pointed out that the appellant Bijay Tiwari was examined medically on 10th June, 99 and the prosecution witness PW 10 Dr. Jawala Prasad did not find any mark of violence on the appellant or on his private parts. Therefore, learned Counsel submitted that as per Modi's Jurisprudence, any person involved in committing rape, using force, it is normal that he should get some mark of violence or injury on his private parts. Therefore, learned Counsel elaborated that this view gets support from Modi's Jurisprudence from which it has been observed that when a female of labour class used to manual activity, is subjected to rape, mark of violence on the private part of rapist is more probable. Therefore the appellant Bijay Tiwari should not be held guilty of the charge u/s 376 IPC.

(C) That due to admitted enmity between the parties, false implication of appellant Bijay Tiwari is most likely and this fact has not been considered by the learned trial court.

15. We have anxiously considered the above mentioned points along with the evidence on record. The presence of appellant Bijay Tiwari in the village on the night between 8-9th June, 99 is not disputed, as he himself surrendered before the police next day just after recording of the FIR. Therefore, his presence otherwise on his duty is ruled out. It is further found that the victims were dragged away to a lonely place where they were subjected to gang rape by a number of armed persons. In such circumstances, where the victims have been forced to undress, lie down and suffer sexual intercourse, it cannot be presumed that they have resisted while being raped. The medical report of PW 4 mentions that she was subjected to forcible rape. A girl lying undressed cannot resist and in that circumstance a full grown man may not have any mark of violence on his private part of body. Therefore, the points pleaded by Mr. Pandey has no relevance in the present case. Learned Sr. counsel Mr. Pandey further pointed out that even if the offence is made out under Sections 395,

376 IPC against this appellant, he cannot be held guilty for offence u/s 3(2) of SC ST Act because the offences were not committed treating the victims Dalit. We do not find any force in the contention of Mr. Pandey, as the evidence on record goes to prove otherwise. The genesis of occurrence itself says that the offences were committed under various provisions of SC ST Act, 1989. All these aspects have been considered by the learned trial court in para 38, 40, 41, 42 of the impugned judgment. We find no reason to differ with the views taken by the learned trial court.

16. Having regards to the above mentioned facts and circumstances, we find no merit in both the appeals and both the appeals are accordingly dismissed. Lalan Choudhary, appellant of Cr.Appeal No. 304/2002, is on bail, his bail bonds are cancelled and he is directed to surrender before the court below forthwith to serve the sentences, failing which the court below shall take all steps for his arrest.

Amareshwar Sahay, J.

17. I agree.