
(2011) 12 PAT CK 0093

Patna High Court

Case No: Criminal Appeal (SJ) No. 72 of 1999

Ganesh Choudhary

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: Dec. 16, 2011

Acts Referred:

- Penal Code, 1860 (IPC) - Section 122, 354, 376, 399, 402

Hon'ble Judges: Gopal Prasad, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Gopal Prasad, J.

Heard learned counsel for the appellant and learned counsel for the State.

2. The appellant has been convicted u/s 376/511 I.P.C. and sentenced to undergo rigorous imprisonment for five years.

3. The prosecution case as alleged by the informant Ranju Devi that she went to attend call of nature and after meeting the call of nature while she was coming then Ganesh Choudhary catch hold of her and thrown her on the ground and catch hold of her breast with ulterior motive and tried to remove her cloths and pressed her body. On protest and hulla witnesses came then accused Ganesh Choudhary flee away. The occurrence alleged to be at 7.30 P.M.

4. On the Fardbeyan, F.I.R. lodged. After investigation, cognizance was taken and case was committed to the Court of Sessions. During trial seven witnesses were examined. However, P.W. 3, 4 and 5 have turned hostile and have not supported the prosecution case. P.W. 1 Doman Sah is father-in-law. P.W. 2 Anil Sah is husband. P.W. 6 is the victim and P.W. 7 is the I.O. P.W. 1 and 2 have stated that on cry they rushed to the place of occurrence and seen the Ganesh Choudhary flee away. However, P.W. 1 and 2 are not eye witnesses to the occurrence.

5. P.W. 6, the victim in her evidence supported the prosecution case that after meeting call of nature while she was returning the accused Ganesh Choudhary came from behind, caught, thrown her and laid down on her body and pressed her breast and remove her cloths from private part. However, in the evidence, there is some development of the prosecution story in the Fardbeyan. In the Fardbeyan, there is no mentioned of lying over the victim after removed of the cloths from private part.

6. However, I.O. P.W. 7 has stated that he did not find any sign of injury or abrasion on the body of the victim nor blouse or sari torn nor he found any soil or mud on her body.

7. The trial court taking into consideration the evidence of the victim in her cross-examination that after removing her cloths appellant Ganesh Choudhary tried to enter inside her vagina and evidence of P.W. 6 and 7 sufficiently established that accused Ganesh Choudhary attempted to commit rape on the person of the informant. The trial court further observed that victim was a rustic uneducated lady and was shy to say before the I.O. (P.W. 7), that accused person tried to enter inside her vagina. Hence the trial court held that he did not find anything in her cross-examination to disbelieve the Prosecutrix and convicted the appellant for offence u/s 376/511 I.P.C.

8. Learned counsel for the appellant however contended that whatever alleged by the Prosecutrix in the Fardbeyan can only be accepted as preparation for offence u/s 376 I.P.C. but there is nothing in the Fardbeyan to show with regard to attempt of rape. The evidence of witness in para 7 of P.W.6 during trial that Ganesh choudhary tried to enter inside the vagina suffer from development regarding penetration and that part of prosecution case cannot be believed and requires to be outright rejected.

9. However, taking into consideration the fact and circumstance of the case, only eye witness of the occurrence is P.W.6 and when the Prosecutrix went to meet call of nature, the appellant Ganesh Choudhary came from behind, and catch hold and thrown her on the ground and pressed her breast and tried to remove her cloth. However, in the evidence, she has deposed that cloths were removed from her private part and start pressing her body and further in her cross-examination, she has stated that after removing her cloth the appellant Ganesh Choudhary enter inside her vagina. However, this part of evidence suffers from development as apparent from the statement of the victim in the Fardbeyan which has been marked as Ext. 1. Hence it is not proper to place reliance at the evidence of the victim which suffer from development as per the earliest version in First Information Report. Hence to this part of occurrence stand as development and contradicted from the statement in the Fardbeyan. However, there is no other witness on the point to attempt rape.

10. Hence taking into consideration the evidence in the statement in the Fardbeyan to the effect that she was thrown on the ground and appellant catch hold of her breast and tried to remove her cloths. However, the prosecution case to that extent attract only Section 354 I.P.C. which is criminal force with intention to outrage her modesty. However, for conviction u/s 376 I.P.C. some more is required that is to proceed in a direction regarding the penetration. However, the trial court taking into consideration the evidence of the Prosecutrix which is suffer from development and contradiction to the statement made by the victim in the Fardbeyan and hence this part of this evidence is suffer from contradiction and requires to be outright rejecting conviction on these evidence cannot sustain.

11. However, taking into consideration the original allegation in the Fardbeyan that she was thrown on the ground and catch hold of her breast and tried to remove her cloths does not indicate an attempt in a direction to suggest that act done with intention to commit rape and with intention to penetration and hence what is required to hold an attempt for offence u/s 376 I.P.C. is missing. However, preparation for an offence is not a crime unless attempt is made. Preparation has been punishable only with regard to the offence under Sections 122, 399 and 402 of Penal Code. However, preparation of other offences is not punishable. It is pertinent to mention with regard to crime, three ingredients are required i.e. intention, preparation and attempt. However, mere intention is not punishable only unless an act is made. However, intention can only be inferred on the basis of the act alleged. However, act alleged under fact and circumstance is only to the effect that it makes offence u/s 354 I.P.C. There is allegation that appellant catch hold of her breast and second act alleged is he tried to remove her cloths. However, mere removing the cloths cannot be said to have been an act for an attempt u/s 376 I.P.C. The ingredient for offence u/s 376 I.P.C. is penetration and unless the act alleged lead to conclusion that it was step toward penetration, it cannot lead to conclusion that the act alleged is an attempt for rape.

12. Hence I find and hold that prosecution has not been able to prove the charges for offence u/s 376 read with Section 511 I.P.C., but offence is made out is only as per allegation u/s 354 I.P.C. and not u/s 376 I.P.C. Hence order of conviction and sentenced recorded by the lower court for offence u/s 376 I.P.C. read with Section 511 I.P.C. is hereby set aside and conviction maintained u/s 354 I.P.C.

13. Since the appellant has remained in jail for four and half months and occurrence is of the year 1998, hence end of justice shall meet by sentencing the appellant for the period already undergone. Hence the appeal is allowed in part.