

(2015) 11 PAT CK 0024

Patna High Court

Case No: Criminal Appeal (SJ) No. 371 of 2014

Tipu Kumar

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: Nov. 26, 2015

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 376

Hon'ble Judges: Gopal Prasad, J.

Bench: Single Bench

Advocate: Dharendra Kumar Sinha and Yashpal Yadav, Advocates, for the Appellant; Bipin Kumar, A.P.P., for the Respondent

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 under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 20,000/- and in default of payment of fine to undergo simple imprisonment for three months.

3. The prosecution case, as alleged in the written report by the informant Afsana Khatoon (P.W.3), is that on 03.01.2014 at about 7:30 A.M. she after taking her food went to sleep on the cot inside the house and her father had gone to attend Namaj in the mosque. Finding her alone, the appellant, son of Kayum entered into her house and started quarreling with her. When she protested, he untied the rope of her Salwar and threw her on the cot and committed rape upon her. After the incident, when she raised hulla, her neighbour came and caught the appellant and the villager gave the information to the police and he was brought at the police station. She also came at the police station and gave her written report.

4. On the basis of the written report of the informant/victim Afsana Khatoon (P.W.3) First Information Report was lodged, investigation proceeded, police after investigation submitted charge-sheet, cognizance taken and case committed to the Court of Sessions. During trial, after framing of the charge for the offence under Section 376 of the Indian Penal Code, six witnesses were examined by the prosecution.

5. P.W.1 Md. Rahul Ansari has been declared hostile as he has not supported the prosecution case and his evidence is to the effect that he has no knowledge about the occurrence.

6. P.W.2 Ruksana Khatoon is the sister of the victim. She has also deposed that she has no knowledge about the occurrence and has been declared hostile.

7. P.W.3 Afsana Khatoon has supported the prosecution case about the rape upon her and on hulla the villagers collected and then the appellant fled away and when she went to lodge the case she learnt that the boy was Tipu Kumar. She has further stated that the person present in Court was the person who had committed the rape and she identified him. Hence, her evidence suffers from the infirmity that though in the First Information Report she has stated that the appellant was caught and brought to the police station where her statement was recorded but she said that the accused fled away and she learnt that the accused was Tipu Kumar and she identified the accused. She was taken to the hospital where she was examined by the doctors and her statement was also recorded before the Magistrate and has proved her signature on the statement before the Magistrate marked as Ext. 1/1. She has further stated that the accused was not caught at the spot on the place of occurrence and she has been declared hostile by the prosecution. Particularly on this part of the evidence, her attention has been drawn and she has disclosed that it is not a fact that in her written report as well as in her statement under Section 164 Cr.P.C. She stated that at the time of occurrence the villagers came and caught hold of Tipu Kumar at the place of occurrence. However, in her further cross-examination she has stated that she is meeting/seeing the accused for the first time in Court. She has further stated that she did not know whether the boy is resident of her Mohalla or not. She has further stated that at the instance of the villagers she has disclosed the name of the appellant as Tipu Kumar.

8. P.Ws.4, 5 and 6 are the doctors who examined the victim. However, their evidence is primarily, in fact, that the victim was 18 years old and opined that no positive sign of rape was found, but at the same time they found that the possibility of rape could not be ruled out and hence, opined that it could not definitely be said the rape had been committed. The documentary evidence was proved as Ext.1, signature of Afsana Khatoon on the written report.

9. The trial court, taking into consideration the evidence of the witnesses as well as the doctors that the hymen ruptured, physical assault present and the statement of

the victim as well as her statement under Section 164 Cr.P.C. supporting the prosecution case regarding rape by the appellant, convicted him as mentioned above holding that the prosecution has proved the case beyond reasonable doubt for the offence under Section 376 of the Indian Penal Code.

10. Learned counsel for the appellant, however, contended that the prosecution has not been able to prove the charge beyond reasonable doubt that the rape had been committed and also took the stand that appellant had not committed any offence. It has further been contended that the victim was the consenting party and she was aged more than 18 years as per the evidence of the doctors and further the fact that the compromise petition has already been filed by the parties and on these basis it can well be considered that the victim was compromising the case for the reasons that she was a consenting party.

11. Learned counsel for the State, however, contended that from the evidence of the victim in her cross-examination and examination in chief itself, it is apparent that she has proved the case, of course, she identified the appellant in Court as a person who had committed rape upon her and hence, contended that the prosecution has proved the case beyond all reasonable doubts.

12. Having regard to the respective submissions of the parties, I proceed to consider the evidence of the witnesses. However, there are six witnesses in the case. P.Ws.4, 5 and 6 are not eye-witnesses to the occurrence and their evidence is only relevant as an opinion of the experts. However, their evidences that the victim was aged more than 18 years and they did not find positive sign of rape though they found hymen ruptured, but they opined that rape could not be ruled out and hence, their evidences are very specific whether the rape was committed or not. However, at the same time it can well be inferred that their evidence regarding the rape is not positive but possibility of rape has not been ruled out if the other evidences are there regarding the rape.

13. P.Ws.1 and 2 have been declared hostile and hence, their evidences have no consequence for the prosecution. The only evidence remains is the evidence of P.W.3 the victim alone. However, neither the Investigating Officer has been examined nor the Magistrate who examined the victim under Section 164 Cr.P.C. to prove the statement recorded by the Magistrate under Section 164 Cr.P.C. and hence, the possibility of any corroboration regarding the evidence of P.W.3 the victim/informant is missing. However, P.W.3 in her evidence has stated that a boy entered into the house and raped her and when she made a cry then the villagers collected but in the meantime the appellant fled away from there and when she went to the police station to lodge a case then the victim learnt that it was Tipu Kumar. However, she identified the appellant in Court as a person who raped. However, the only criticism is to the effect that whether the appellant was caught on the spot or not. She has further stated in her examination-in-chief that the accused was not caught at the time of occurrence or place of occurrence and she has been

declared hostile regarding this fact in view of her statement before the police as well as her statement before the Magistrate and her attention has been drawn with regard to the earlier statement before the Magistrate under Section 164 Cr.P.C. that she has stated before the Magistrate regarding the fact that Tipu Kumar was apprehended by the villagers at the place of occurrence and hence, her evidence suffers from infirmities only to the effect that whether the appellant was apprehended at the spot. However, in her cross-examination she claimed to have identified the appellant in Court as a person who raped her and her evidence to this effect has not been challenged. Whatever has been challenged is whether the accused was caught on the spot or not and the infirmity in this regard or contradiction has been shown. However, the criticism has been drawn that though the victim has been declared hostile with regard to the earlier statement made before the police or before the Magistrate but neither the Investigating Officer nor the Magistrate has been examined to record whether the statement under Section 164 Cr.P.C. recorded by the Magistrate and what was stated before the Magistrate and whether the Magistrate has taken due process in recording the statement under Section 164 Cr.P.C. but so far the identification of the accused in Court she has remained consistent that she identified the accused in Court.

14. Learned counsel for the appellant has drawn attention on her evidence in cross-examination in paragraph 4 that she has seen the appellant for the first time in Court. She has stated that she cannot say whether the boy resides in her Mohalla or not. However, she has further stated in paragraph 5 that at the police station the people disclosed that Tipu Kumar was seen fleeing away and then they disclosed the name of the appellant. However, the defence has taken the two contradicting stands that the appellant has not committed the rape and further the victim was a consenting party. However, no suggestion has been given in the entire cross-examination that the victim was a consenting party. However, to take defence for consent, it amounts to admitting the sexual intercourse. However, there is no circumstance shown except showing that the victim was 18 years old. It has been argued that since the circumstance that father of the victim had gone out and victim did not lock the door from inside and slept keeping the door open cannot be the basis to infer that the victim was the consenting party unless there is some other materials regarding the infirmity that the parties were consenting parties. However, the evidence is otherwise. The further argument is that the case having been compromised but merely because a compromise petition has been filed it cannot be inferred that the victim was the consenting party. Moreover, in a case of rape any compromise is not acceptable and hence, there is no merit in the submission that the victim was the consenting party hence, the argument is out-rightly requires to be rejected.

15. However, taking into consideration the entire facts and circumstances of the case, the only evidence is the evidence of the victim to support the rape and the identification has been challenged that the appellant was not known to the victim.

The prosecution case is that appellant committed rape and the appellant was apprehended and taken to the police station but in her evidence she has stated that the appellant fled away and she learnt that it was the appellant who had committed rape. However, there is no other evidence regarding the specific corroboration of the occurrence alleged to have been committed by the appellant as none has come to depose that he disclosed the name of the appellant to the victim and her evidence suffers from two infirmities. In the First Information Report she has stated that the appellant was caught hold of by the villagers on hulla, then he was brought to the police station and the villagers disclosed the name of the appellant. However, none has come from village to support this fact and hence, there is no corroboration to this part of the evidence and even going through the records, it does not appear that the appellant was arrested on the spot or produced along with the victim in the police station. However, signature of the victim on the written report is marked as Ext. 1 about which she has stated that she made her signature on the report without reading the same. However, written report mentioned that the appellant was caught and produced before the police, then the First Information Report was lodged. She identified the appellant in Court as the person to have committed rape upon her, but great emphasis has been made by the learned counsel for the appellant in paragraph 4 of the cross-examination that she has seen the accused for the first time in Court and hence, has submitted that the statement of the victim that she is seeing the appellant for the first time in Court itself indicates that he was not the person, who raped her and further her evidence that the person who raped had fled away and she disclosed the name of the person in written report on the disclosure by the co-villagers is not acceptable. However, none of the co-villager had come to support or to corroborate the evidence of the victim that they have named the appellant as the person who was seen fleeing away after the occurrence and further the victim in her cross-examination has named and identified the appellant in Court but in her cross-examination she has stated that she is seeing the appellant for the first time in Court and hence, the criticism has been drawn that the identification becomes doubtful as when she is seeing the appellant for the first time in Court then the earlier identification by her has not been established. However, there is neither any corroboration of her earlier statement recorded under Section 164 Cr.P.C. having been proved as neither the Investigating Officer nor the Magistrate has been examined and further the evidence of the victim in cross-examination is that she has seen the appellant for the first time in Court and the victim has supported the prosecution case, but in view of these contradictory evidence and without any corroboration of her statement when neither any villagers have come to support that they did not disclose the name of the appellant or they saw the appellant fleeing away from the place of occurrence nor the Investigating Officer or the Magistrate having been examined to support or corroborate any part of the prosecution story and hence, in view of these facts and circumstances, I find and hold that the appellant is required to get a benefit of doubt. Therefore, I give the appellant benefit of doubt. The trial Court, without going into the said question and

merely on the basis of the statement of the victim recorded under Section 164 Cr.P.C. and without taking into consideration her evidence in cross-examination, convicted the appellant hence, the conviction of the appellant is not sustainable in the facts and circumstances of the case. Hence, I find and hold that the prosecution has not been able to prove the charges beyond reasonable doubt and the judgment of conviction dated 26.06.2014 and order of sentence dated 27.06.2014 passed by Sri Lallan Lal Shrivastava, the learned Ad hoc 1st Additional District & Sessions Judge, Jehanabad in S.T. No. 99/2014/10/2014 arising out of Karpi P.S. Case No. 03 of 2014 are hereby set aside and the appeal is allowed. Since the appellant, namely, Tipu Kumar is in jail, he is ordered to be released forthwith if not required to be detained in any other case.