

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.327 of 1999

Arising Out of PS.Case No. -null Year- null Thana -null District- PATNA

=====

Lala Yadav, son of Ramchandra Yadav, resident of village Rani Sarai Bighapar,
P.S. Bakhtiarpur, District Patna

.... Appellant

Versus

The State of Bihar

.... Respondent

=====

Appearance :

For the Appellant/s : Mr. Ranbir Singh, Advocate (amicus curiae)

For the Respondent/s : Mr. Bipin Kumar, APP

=====

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 26-10-2018

Sole appellant has preferred this appeal against the judgment and order dated 12.10.1999 passed by Sri Rakeshwar Dayal, the then Additional Sessions Judge-I, Barh in Sessions Trial No. 1191 of 1998 by which he has convicted the appellant under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years.

2. In this case as nobody appears on behalf of the appellant to argue this appeal on repeated calls, Mr. Ranbir Singh, Advocate has been appointed as amicus curiae to assist this Court.

3. It further appears that in this case a plea of juvenile has been taken by the sole appellant and as such a report has been called for on the point of age of the appellant at the time of occurrence and from the report of learned Principal Magistrate, Juvenile Justice Board, Patna City, Patna dated 25.9.2018 it appears that the after



taking into consideration the report of the Medical Board, Juvenile Justice Board is of the opinion that the age of the appellant was 12 years 07 months 13 days on the day of occurrence, i.e., on 01.04.1998.

4. Prosecution case as per the statement of Braj Bhushan Prasad (PW 6) recorded on 2.4.1998 at Bakhtiarpur Police Station at 9.15 A.M., in short, is that wife of the informant Sunaina Devi (PW 5) and his mother-in-law Indu Devi (PW 4) had disclosed him that on 1.4.1998 at 10 A.M. they had gone to collect dry leaves of Shisam tree in Shish Bandi Garden at village Mahmoodpur along with his daughter Dolly Kumari, who was playing at a distance of 15-20 yards from them and appellant and one Taragena Yadav, who were present there and on hearing of cry of Dolly Kumari they went towards the place and found the appellant and Taragena Yadav both fleeing away from the place of occurrence and Dolly Kumari was found in unconscious condition and it is also alleged by his mother-in-law and his wife that both the appellant and Taragena Yadav had committed rape upon her due to which her private part was bleeding and she was brought to the house and they were waiting for the informant and in the night after discussing the same with the informant the information was given to the Police Station and as such there is delay in lodging the FIR.

5. On the basis of the aforesaid written report Bakhtiarpur P.S.Case No. 55 of 1998 was registered against the appellant and one



Taragena Yadav under Section 376/34 IPC. Police after investigation submitted charge sheet against both the accused persons, cognizance for the offence has been taken and after commitment, the case ultimately traveled to the file of Sri Rakeshwar Dayal, the then Additional Sessions Judge-I, Barh for trial and disposal.

6. It further appears that accused Taragena Yadav was found to be aged 14 years at the time of occurrence and as such his case was kept for by Juvenile Court, A.C.J.M., Barh, whereas the case of the appellant has been committed to the court of sessions vide order dated 18.8.1998 and after commitment the trial of appellant proceeded.

7. During trial charge has been framed under Section 376 IPC against the sole appellant and prosecution in order to substantiate its case has examined altogether nine witnesses, they are PW 1 Sukhdeo Sao, PW 2 Ashok Sao, PW 3 Indramani Prasad, PW 4 Indu Kumari, mother of the victim, PW 5 Sunaina Devi, Nani of the victim girl, PW 6 Braj Bhushan Prasad, informant of this case, PW 7 Sri Ragho Chandra Rai, the I.O., PW 8 Dolly Kumari, the victim and PW 9 is Dr. Kiran Kumari, who has examined the victim Dolly Kumari.

8. Apart from that, the following documents have been brought on record as exhibits : Ext.1- signature of Braj Bhushan Prasad on fardbeyan, Ext.2- Fardbeyan, Ext.3- formal FIR, Ext.4- injury report of the victim and Ext.4/1- X-ray report of Dolly Kumari.

9. On behalf of defence also four witnesses have been



examined, they are DW 1 Krishna Kumar Singh, DW 2 Pappu Yadav, DW 3 Ram Chandra Singh and DW 4 Shyam Nandan Sahay. Apart from that the defence has brought on record the following documents as exhibits : Ext.A- Execution report of Section 82 Cr.P.C., Exts. B & B/1- certified copy of G.R. Register, Ext.C- attested copy of injury report, Ext.D- petition dated 20.3.1999 filed by the appellant claiming himself to be juvenile and Ext.X- photo copy of certified copy of formal FIR of Bakhtiarpur P.S.Case No. 160 of 1983 and S.L.C. of the appellant for identification,

10. Defence of the accused appellant as per defence witnesses and the statement of the accused under Section 313 Cr.P.C. is of false implication at the instance of one Maheshwar Yadav with whom the appellant has enmity and defence has examined four witnesses in support of its case and also brought on record Exts. A to D.

11. Learned trial court on conclusion of trial has convicted the appellant under Section 376 IPC and sentenced him as stated above.

12. Being aggrieved by the aforesaid impugned judgment and order, the present appeal has been preferred by the appellant.

13. Learned amicus curiae challenging the impugned judgment has contended that in this case there is no eye-witness to the occurrence as PWs. 1 to 3 are hearsay witnesses and they claimed to



have heard the story from PWs. 4 and 5, who are mother and grandmother of the victim Dolly Kumari who are also not eye-witnesses to the actual occurrence and they claimed to have seen the accused persons, fleeing from the place of occurrence from some distance from back of them and as such identification of the appellant and other accused is also doubtful and so far PW 8 Dolly Kumari is concerned, she has been discharged after making query by the court and found her to be not capable to understand the court question put to her and as such there is absolutely no evidence against the appellant for conviction under Section 376 IPC.

14. Further submission of learned amicus curiae is that the Doctor (PW 9) has not found any sign of rape on the victim and even spermatozoa was also not found and as such there is no evidence of holding the appellant guilty under Section 376 IPC. However, learned trial court without considering the aforesaid fact has convicted the appellant under Section 376 IPC, which is not sustainable in the eye of law. Further submission is that in this case the appellant claimed himself to be a juvenile and on the direction of this Court the Juvenile Justice Board on quarry assessed the age of the appellant on the day of occurrence as 12 years 7 months 13 days and as such the trial is vitiated as the appellant has to be tried by juvenile court and not by the trial court and on that ground also the conviction of the appellant is bad in law.



15. On the other hand, learned counsel for the State has supported the judgment of guilt recorded by learned trial court and stated that PWs. 4 and 5 are most natural witnesses in this case as they had seen the appellant fleeing from the place of occurrence just after the occurrence and when they reached there they found Dolly Kumari in unconscious condition and her private part was bleeding and Doctor also found her hymen ruptured and Doctor found her age as 3-4 years and in such circumstances the conviction of the appellant under Section 376 IPC is just and proper and does not require any interference by this Court.

16. In the background of the submission of both the parties on examination of the evidence it appears that PWs. 1 to 3 were not eye-witnesses to the occurrence and their evidence shows that on hulla when they came to the house of the informant they saw Dolly Kumari in injured condition and PWs. 4 and 5 found the appellant and accused Taragena Yadav have committed rape upon her. As such even though they are not eye-witnesses but they had seen the victim in unconscious condition and also injury on her private part.

17. PW 6 is the informant and father of the victim girl and according to his evidence he was not present there and when he returned the occurrence was narrated to him by his wife and his mother-in-law and thereafter he lodged a case. However, PWs. 4 and 5 appear to be eye-witnesses to the part of the occurrence and the



evidence of PW 4 disclosed that while she was engaged in collecting dry leaves from the orchard situated by the side of railway line, she left her daughter Dolly at the place in the orchard of some distance and thereafter on hearing sound of cry of her daughter Dolly she went there and saw the appellant and Taregana Yadav fleeing away and private part of Dolly was bleeding and thereafter she was brought to the house. This witness has been cross examined and from her cross examination it appears that she reached at the place of occurrence on hearing cry of Dolly and saw the appellant at a distance of 30-40 yards fleeing from there. No doubt, her evidence disclosed that she is not an eye-witness to the prosecution story of commission of rape but she had found her daughter in injured condition and her private part was bleeding and also found appellant and other accused fleeing from there. Same is the evidence of PW 5, who is grandmother (Nani) of the victim girl and she has also supported the evidence of PW 4. There is nothing in their evidence to doubt their presence at the place of occurrence. The victim has also been produced in court and her age was assessed by the court as four years and as such the court has tested her capability to understand court question and answer and after testing the same the court was of the opinion that the witness victim girl was not capable to understand the questions put by the court and so she was discharged without any examination.

18. The Doctor (PW 9) has examined the victim and in her



evidence she has stated that she found the hymen of the victim ruptured, fourchette torn, lacerated infected wound over there and no foreign hair was found. Her evidence further disclosed that vaginal swab was sent for microscopic examination for confirmation of age and she has further stated that rupture of hymen is possible by forcible intercourse and she has found the age of victim girl as 3-4 years. In her cross examination the Doctor has stated that the presence of spermatozoa is one of the factors for determination of rape and vaginal swab was sent for microscopic examination to PMCH and in the report no spermatozoa was stated and as such the evidence of PW 9, who is a member of the Medical Board and examined the victim girl corroborates the prosecution evidence of PWs. 4 and 5 as hymen was found ruptured and the Doctor has opined that it is possible due to forcible intercourse. No doubt there is no finding regarding presence of spermatozoa but the fact remains is that the hymen of the victim girl was found to be ruptured and she was found to be aged 3-4 years and appellant was found fleeing from the place of occurrence.

19. Contention of learned amicus curiae is that they had seen the occurrence from some distance and as such they are not eye-witnesses to the occurrence and identification is also doubtful and the appellant has been implicated because there is enmity between the appellant and one Maheshwar Yadav and at the instance of Maheshwar Yadav, he has been implicated.



20. No doubt, contention has been raised by learned amicus curiae that evidence of DWs and documents brought by the defence clearly disclosed that there was enmity between Maheshwari Yadav and the appellant and the fact remains is that there is no enmity between PWs. 4 & 5 with the appellant and as such it cannot be said that PWs. 4 and 5 were in inimical term with the appellant and furthermore they had reached at the place of occurrence just after the occurrence and seen the accused persons fleeing which is one of the circumstances and Doctor found hymen ruptured and the said circumstances clearly suggest the commission of rape by the appellant.

21. Considering the discussions made above, it appears that the finding of learned trial court regarding conviction of the appellant under Section 376 IPC appears to be just and proper. However, in the present case Juvenile Justice Board (hereinafter to be referred as ‘the JJB’) has found the appellant aged below 16 years at the time of occurrence and he was juvenile and as per Clause (g) of Section 18 of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter to be referred as ‘the Act’) at best the Board may direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformatory services including education, skill development, counseling, behaviour modification therapy, and psychiatric support during the period of



stay in the special home. However, in the present case the appellant has already remained in custody for more than three years and he was in custody since 7.4.1998 and was granted bail by this Court vide order dated 3.10.2001 and this Court is refrained from sending the case to JJB for passing an order of sentence under Section 9(3) of the Act as he has already remained in custody for more than three years.

22. In the said circumstances, the conviction of the appellant under Section 376 IPC in which he is found to be guilty is upheld. However, the order of sentence is set aside.

23. In the result, this appeal is disposed of.

24. Mr. Ranbir Singh, Advocate has assisted the Court as amicus curiae, as such he is entitled for fees as per entitlement by the Patna High Court Legal Services Committee.

(Vinod Kumar Sinha, J)

spa/-

AFR/NAFR	
CAV DATE	
Uploading Date	6.11.2018
Transmission Date	6.11.2018

