

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.430 of 2016

Arising Out of PS. Case No.-3 Year-2013 Thana- MAHILA PS District- Jehanabad

Karan Paswan S/o- Lachhan Paswan, R/v- Shankar Bigha, P.S.- Mehandia,
Distt.- Arwal.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 282 of 2016

Arising Out of PS. Case No.-3 Year-2013 Thana- MAHILA PS District- Jehanabad

Munna Paswan Son of late Satendra Paswan Resident of village- Sankar
Bigha , P.s Mahendra Distt Arwal.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 295 of 2016

Arising Out of PS. Case No.-3 Year-2013 Thana- MAHILA PS District- Jehanabad

Vijay Rajbansi Son of Late Bharosa Rajbansi, Resident of Village - Shankar
Bigha, P.S. - Mahendia, District - Arwal.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 552 of 2016

Arising Out of PS. Case No.-3 Year-2013 Thana- MAHILA PS District- Jehanabad

Ledha @ Mantu Paswan S/o late Bishnupat Paswan R/o Village- Shankar
Bigha, PS Mehendia, District Arwal.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 430 of 2016)

For the Appellant/s : Mr. Vijay Kumar Sinha, Advocate

Mr. Arvind Srivastava, Advocate

Mr. S.K. Bhatnagar, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh, APP



(In CRIMINAL APPEAL (DB) No. 282 of 2016)

For the Appellant/s : Mr. Ramakant Singh, Advocate
Mr. Kulanand Jha, Advocate

For the Respondent/s : Mr. A. Sharma, APP

(In CRIMINAL APPEAL (DB) No. 295 of 2016)

For the Appellant/s : Mr. Arvind Prasad Singh, Advocate
Mr. Suresh Singh, Advocate

For the Respondent/s : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 552 of 2016)

For the Appellant/s : Mr. Bachan Jee Ojha, Advocate

For the Respondent/s : Mr. S.B. Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 30-08-2022

Before we proceed to consider rival submissions advanced on behalf of the appellants and the State in relation to the correctness or otherwise of the impugned judgment of conviction and order of sentence recorded by the trial court in the present criminal appeal, we need, at the outset to take into account the most crucial aspect of the matter, in the peculiar facts and circumstances of the case.

2. The date of occurrence, as disclosed in the F.I.R., is 17.01.2013 in respect of which the FIR was registered on 19.01.2013 levelling commission of offence punishable under Section 376G of the Indian Penal Code. On careful perusal of the accusation made in the FIR it can be easily gathered that provision of law was inadvertently wrongly mentioned in the FIR as 376G of



the Indian Penal Code in place of Section 376(2)(g) of the IPC, as the same existed prior to amendment in the Indian Penal Code with coming into force of Criminal Law (Amendment) Act, 2013 (Act 13 of 2013) on 3rd of February 2013. The final form in the nature of charge-sheet was submitted by the police on 23.03.2013 which carried the same mistake of mentioning Section 376G of the IPC in place of Section 376(2)(g) of the IPC. The trial court framed the charge on 24.07.2013 as under:-

“1. Munna Paswan 2. Karan Paswan 3. Vijay Rajwanshi 4. Mantu Paswan

That you on or about the 17th day of January 2013 at evening at village Shankar Bigha near Canal forest, P.S. Mahendia District Arwal, committed rape on Usha Devi by one or more persons constituting a group in furtherance of common intention and thereby committed an offence punishable under Section 376(D) of the Indian Penal Code and within my cognizance.

and I hereby direct that you be tried by me on the said charge.”

3. It is evident on reading of the charge that the appellants were charged for commission of offence of gang rape Section 376(D) of the IPC was incorrectly mentioned in the charge as the penal provision of law under the Indian Penal Code. This is an apparent mistake on the part of the trial court while referring to the provision of law of the IPC in the charge-sheet,



possibly because before framing of charge the amendments were brought in the Indian Penal Code by above mentioned Criminal Law (Amendment) Act, 2013, (Act 13 of 2013) which came into force w.e.f. 03.02.2013, introducing Section 376D as the penal provision for gang-rape.

4. However, wrong mentioning of provision of law in the FIR and in the charge memo, in the Court's opinion, in the present facts and circumstances, which we shall be discussing hereinbelow, cannot be said to have vitiated the trial or finding recorded by the trial court on this score alone nor the same can be said have occasioned any prejudice to the defence. It is mentioned here that after enforcement of Criminal Law (Amendment) Act, 2013, the Legislature provided penalty for offence of gang rape under Section 376 (D) of the Indian Penal Code. The trial court has recorded the conviction of the appellants under Section 376(D) of the Indian Penal Code and has sentenced them to undergo imprisonment for a term of 20 years accordingly.

5. Learned counsel appearing on behalf of the appellants has submitted that in view of the provision under Article 20(1) of the Constitution of India the appellants could have been convicted of an offence and imposed punishment available for the offence as on the date of commission of the offence. He has submitted that, in



any event, the conviction and sentence imposed by the trial court for commission of offence of gang rape by referring to Section 376(D) of the IPC is wholly unsustainable and deserves interference by this Court appropriately in exercise of its appellate jurisdiction. He has submitted that Section 376(D) of the Indian Penal Code as the same existed on the date of commission of offence provided for punishment in case any person being on the management of a hospital or on being the staff of a hospital taking advantage of his position established any sexual intercourse with a woman in that hospital. He has submitted that Section 376(D) was apparently wrongly mentioned in the charge memo by the trial court and his conviction for the offence punishable under Section 376D of the IPC for gang-rape is manifestly unsustainable.

6. The prosecution's case, as disclosed in the written report of informant, is that on 17.01.2013, the victim had left for her matrimonial home without informing the family members. She was mentally unstable. She could not be found despite search made by the informant. She had gone to her paternal home. On next date i.e. 18.01.2013 he found some indication based on scribblings on an empty match box dropped in the informant's house. He accordingly proceeded to village Sharkar Bigha with his brother and cousin where he could locate his wife (the victim). The



victim was brought back to her matrimonial home on 18.01.2013. She however, disclosed to her in-laws on 19.01.2013 about the rape having committed by the four persons including appellant Munna Paswan of Cr. Appeal (DB) No. 282 of 2016.

7. As has been noticed at the very outset, the date of occurrence is 17.01.2013. On plain reading of the FIR it is evident that the accusation made therein constituted commission of offence punishable under Section 376(2)(g) of the Indian Penal Code. Section 376 of the Indian Penal Code as it existed on the date of occurrence i.e. 17.01.2013 read as under :-

“376. Punishment for rape.-(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,—

(a) being a police officer commits rap—



(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape.

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a



sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.- "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.- "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

8. By Criminal Law (Amendment) Act, 2013, significant amendments were introduced in Sections 375 and 376 of the Indian Penal Code. Various provisions were added including Section 376(D) which provides for punishment for gang rape. Section 376(D) of the Indian Penal Code, which came into force w.e.f. 03.02.2013, reads as under:-

“376(D). Gang rape.-*Where a woman is raped by one or more persons constituting a group or acting in*



furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim."

9. At this juncture it would be useful to refer to Article 20(1) of the Constitution of India which reads as under:-

"20(1) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

10. Article 20(1) of the Constitution of India leaves no scope for discussion on the point that no person can be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence nor can be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.



Section 376(2)(g) of the IPC provided for punishment for an offence of gang rape as on the date of commission of offence as quoted above. The said provision prescribed that a person who commits gang rape would be punished with rigorous imprisonment for a term not less than ten years but that may be for life. Subsequent to amendment in the Indian Penal Code w.e.f. 03.02.2013, the punishment for gang rape has been enhanced to a period not less than 20 years, that may extend to life which shall mean imprisonment for the remainder of that person's natural life with fine. Further, in the old provision, Section 376(2) contained a *proviso* that the Court might for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of description for a term of less than ten years.

11. Evidently thus, whereas after amendment in the Indian Penal Code by the Criminal Law (Amendment) Act, 2013 no punishment can be imposed for commission of offence of gang rape for a term less than twenty years, the old provision provided for imposition of punishment for a term of not less than ten years with a *proviso* that the court might for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than ten years.



12. In view of the clear language of Article 20(1) of the Constitution of India, we have no hesitation in coming to a definite conclusion that for the accusation, as disclosed in the FIR, the appellants in relation to an offence committed on 17.01.2013 could be tried/ convicted/ sentenced for the offence punishable under Section 376 (2)(g) of the Indian Penal Code as the same existed prior to amendment by the Criminal Law (Amendment) Act, 2013 w.e.f. 03.02.2013. The finding of guilt recorded by the trial court of the offence punishable under Section 376(D) of the IPC and imposition of sentence on that basis is patently erroneous.

13. The next question which arises before this Court to be considered in the present Criminal Appeals is as to whether based on evidence adduced at the trial the conviction of the appellants for commission of the offence of gang rape as recorded by the trial court is sustainable. That is to say, whether the prosecution was able to establish commission of offence of gang rape by the appellants beyond all reasonable doubts, at the trial.

14. Mr. Vijay Kumar Sinha, learned counsel appearing on behalf of the appellants has submitted that it is evident from the prosecution witnesses that the victim was of unsound mind. He contends that the conviction of the appellants, based on the testimony of the victim in the absence of corroborating medical



evidence, is erroneous. He has drawn our attention to the evidence of the victim examined as P.W.-1 to contend that her demeanor has been noted by the trial court where she is found laughing without any reason. He has also drawn our attention to the evidence of P.W.-2, the husband of the victim who has admitted that the victim was suffering from some mental disorder and was undergoing treatment also for the said disorder. The medical examination of the victim was conducted on 21.01.2013. The medical report, however, does not disclose any sign of rape, inasmuch as, no spermatozoa was found in the vaginal swab of the victim nor any internal injury was found. He further submits that according to the prosecution's case the victim was ravished at two places but no external injury has been found on any part of her body. He contends that the circumstance as disclosed by the prosecution at the trial in which P.W.-2 learnt about the occurrence becomes doubtful in the absence of examination of the brother of the husband of the victim who had also accompanied him to the place where the victim was found.

15. Learned Additional Public Prosecutor representing the State, on the other hand, has argued that the evidence adduced at the trial, particularly, the evidence of the victim prove beyond all reasonable doubts commission of offence of gang rape by these



appellants. She has contended that based on confession and disclosure made by appellant Munna Paswan, other appellants were apprehended by the police and further based on their disclosure broken bangles were recovered from both the places of occurrence. She has submitted that there is no material to suggest that the victim was not in such a mental condition to depose as to what had happened with her. She had identified the appellants during course of the investigation and subsequently at the trial. She, accordingly, submits that based on medical examination conducted four days after the date of occurrence it cannot be inferred that no occurrence had taken place as disclosed in the First Information Report and by the victim herself at the trial.

16. At this juncture, learned counsel appearing on behalf of the appellants, replying to the submissions made on behalf of the State, has submitted that there is no evidence on record to suggest that the broken bangles, which were recovered by the police, were of the victim.

17. We have carefully examined the evidence of the witnesses, particularly, the evidence of P.W.-1, the victim. From the deposition of victim as P.W.-1 it can be easily inferred that she disclosed at the trial that there was an act of penetration by the accused persons who were present in the Court whom she



identified by her as the perpetrators of the offence. Her evidence cannot be disbelieved by this Court and has rightly not been discarded by the trial court on the ground that she was mentally unstable to some extent. She unequivocally and in clear terms deposed as regards forcible act of penetration. According to her, on her way to her paternal home, she had lost the direction and these appellants in the garb of taking her to the right direction took her in the nearby forest and ravished her. During the course of investigation, she had identified the place where she was ravished and from where was subsequently taken back. Both the prosecution witnesses, namely, P.Ws. 1 and 2, in the Court's opinion, appear to be truthful and there is nothing in their deposition for this Court to conclude that they were either telling something which was not true or were trying to exaggerate the facts in order to establish the prosecution's case.

18. In the Court's opinion, on the testimony of the victim only, who identified the appellants, finding of conviction of gang rape cannot be said to be unjustified requiring this Court's interference. We accordingly conclude that the finding recorded by the trial court that the appellants were guilty of commission of offence of gang rape does not require interference.



19. As has, however, been discussed hereinabove, the appellants could be held guilty of commission of offence of gang rape under Section 376(2)(g) of the Indian Penal Code as the same existed prior to 03.02.2013 and not under Section 376(D) consequent upon coming into force of the Criminal Law (Amendment) Act, 2013, (Act of 2013).

20. We accordingly modify the appellants' conviction and sentence. We hold the appellants guilty of the offence punishable under Section 376(2)(g) of the Indian Penal Code as the same existed on the date of occurrence i.e. 17.01.2013. Accordingly we intend to modify the sentence also which stands modified to imprisonment for a term of ten years for commission of offence punishable under pre-amended Section 376(2)(g) of the Indian Penal Code. The impugned judgment and order of the trial court stands modified accordingly.

21. These appeals are allowed in-part.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

Rajesh/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	06.09.2022
Transmission Date	06.09.2022

