

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.473 of 2012

Arising Out of PS. Case No.-82 Year-2010 Thana- BARARI District- Katihar

DILIP MALLIK S/o Nago Mallik Resident of Naugachia, Naya Tola, Police Station- Naugachia, District- Bhagalpur.

... .. Appellant

Versus

The State of Bihar.

... .. Respondent

Appearance :

For the Appellant	:	Mr. Raushan Kumar, Advocate Mr. Praveen Kumar, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and

HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 05-10-2024

The instant appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') against the judgment of conviction dated 09.02.2012 and order of sentence dated 13.02.2012, passed by learned Additional Sessions Judge, F.T.C.-III, Katihar in Sessions Trial No.380/10, arising out of Barari P.S. Case No.82/10 (G.R. No.1362/10) whereby the court has convicted the appellant for the offences punishable under Section 376 of the Indian Penal Code and the appellant has been sentenced to undergo R.I. for life and to pay a fine of Rs.1,000/- (Rs. One Thousand only) and in default of payment of fine, the appellant



has to undergo R.I. for a period of three months.

2. The factual matrix of the present case is as under:-

2.1 *Fardbeyan* of Ranjit Rajbhar came to be recorded on 23.06.2010 at 22:00 hours in Sadar Hospital, Katihar wherein the informant has stated that on 23.06.2010 at about 02:00 p.m., he was present in Railway Station, Barari and got information that when his niece (victim girl), aged about 4 years, was playing in front of the house, Dilip Mallik (appellant) brought her towards west side of Barari Cabin and committed rape upon her. The informant also stated that he came to know that people of Barari Bazar caught Dilip Mallik. After getting the information, the informant reached at Barari and brought his niece to Barari hospital from where the victim was referred to Sadar Hospital, Katihar. The informant and his sister-in-law brought the victim girl to Sadar Hospital, Katihar by ambulance.

2.2. After registration of the formal FIR on the basis of the aforesaid *fardbeyan*, the Investigating Agency started investigation. During course of investigation, the Investigating Officer recorded the statement of the witnesses, collected the documentary evidence and thereafter filed



charge-sheet against the appellants.

2.3 As the case was exclusively triable by court of sessions, the learned Magistrate committed the same to the concerned sessions court where the same was registered as Sessions Trial No.380/10.

2.4 During course of trial, the prosecution had examined 9 witnesses, namely, PW-1 Birendra Yadav, PW-2 Dr. Jyoti Sah, PW-3 Khusboo Kumari, PW-4 Binod Prasad Yadav, PW-5 Ranjit Rajbhar, PW-6 is the victim herself, PW-7 Indradev Paswan, PW-8 Subodh Vyas and PW-9 Matrani Devi. Thereafter further statement of the accused under Section 313 of the Code came to be recorded. After conclusion of the trial, the Trial Court convicted the appellant for the aforesaid offences as stated hereinabove.

3. Heard Mr. Raushan Kumar, learned counsel for the appellant and Mr. Sujit Kumar Singh, learned APP for the State.

4. Learned counsel for the appellant mainly submits that there is no eye-witness to the incident in question and simply relying upon the deposition given by the victim girl, who is aged about 5 years at the time of deposition, the Trial Court has passed the judgment of conviction and order of



sentence. It is submitted that, in fact, the appellant was caught by the mob when he was passing through the place of incident on his bicycle. It is also submitted that from the deposition given by PW-3, sister of the victim, PW-5, informant and uncle of the victim and PW-9, mother of the victim, it is revealed that there are major discrepancies in the deposition of the said witnesses with regard to the manner in which the incident took place. Even otherwise, there are major contradictions, improvement and inconsistencies in the story of the prosecution and, therefore, the judgment of conviction and order of sentence be quashed and set aside.

4.1. Learned counsel would further submit that from the deposition given by PW-7, the Investigating Officer, it transpires that the said witness has admitted that he did not collect the sample of blood from the place of incident nor had he seized the clothes of the victim or the appellant. It is further submitted that the victim did not state before the said officer that the present appellant has committed rape on her. Said aspect has been admitted by the Investigating Officer in his cross-examination. Learned counsel, therefore, urged that the impugned judgment of conviction and order of sentence be quashed and set aside.



4.2. Alternatively, learned counsel for the appellant would submit that the appellant is in custody since June, 2010, i.e., since last more than 14 years and the Trial Court has sentenced him to suffer life imprisonment and, therefore, this Court may modify the sentence imposed by the Trial Court and thereby the total period of custody undergone by the appellant till now be treated as sentence served and now the appellant be released from custody. It is lastly submitted that appellant is a poor person and he has to maintain his family.

5. On the other hand, the learned APP for the State has opposed the present appeal. The learned APP has mainly submitted that, in the present case, the allegation against the appellant is that he has committed rape upon the victim girl, aged about 4 years and he was caught by the village people from the place of incident itself. It is further submitted that victim, uncle (informant), mother and sister of the victim have fully supported the version of the prosecution. Learned APP has also referred deposition given by PW-2, the doctor, who had examined the victim girl. It is contended that medical evidence fully supports that the rape was committed on the victim girl. Learned APP, therefore, urged that the prosecution has proved the case against the appellant-convict beyond



reasonable doubt and, therefore, the Trial Court has not committed any error while passing the impugned judgment of conviction and order of sentence. Learned APP, therefore, urged that the present appeal be dismissed.

6. We have considered the submissions canvassed by learned counsel appearing for the parties, we have also perused the materials placed on record, the evidence led by the prosecution before the Trial Court. From the materials placed on record, it transpires that the prosecution has examined 9 witnesses. At this stage, we would like to appreciate the entire relevant extract of the depositions of the prosecution-witnesses.

7. PW-1, Birendra Yadav has deposed in his examination-in-chief that the occurrence took place on 23.06.2010 at 02:00 p.m. He was at his door. The people were coming making noise that the girl has been killed. The people caught Sunil Mallik who was alleged to have committed rape on a four year old girl. This witness claims to identify the accused.

7.1. The said witness has stated in his cross-examination that his statement was recorded by the police. He had not stated in his statement that the accused was caught



after the police arrived. This witness further stated in his cross-examination that the accused was seen, for the first time, on the day of the incident. This witness has denied the suggestion that the accused was returning after selling ice-cream and was caught on suspicion.

8. PW-2, Dr. Jyoti Sah has treated the victim girl and has deposed in her examination-in-chief that on 26.06.2010, she was posted as Medical Officer, Sadar Hospital, Katihar. She received requisition from Barari P.S. and examined the victim girl. The doctor found injury on her private part, hymen torn, vaginal wall lacerated, perennial tear present, small cotton swab entered in vagina and sent for pathological examination. Bleeding from tear and vaginal wall present. According to pathological report by Dr. R. Suman, Pathologist, no spermatozoa found. It is also stated by this witness in his examination-in-chief that injury to vagina may be due to sexual intercourse, grievous injury to her private part has been made.

9. PW-3, Khusboo Kumari has deposed in her examination-in-chief that the incident took place eight months ago at 02:00 p.m. She was present in her house. Her sister was playing along with others in the field situated in front of the



house. In the meantime, Dilip Mallik came and he was going towards bushes with her sister. She informed her father. When her sister returned, blood was oozing from her private part and she stated that Dilip has done wrong with her. Dilip was caught and police came and took away the accused. Her sister was brought to the hospital for treatment. The witness claims to identify the accused.

9.1. It is stated by the said witness in her cross-examination that when she came outside, the accused was running away with her sister. After that her uncle and village people came with her sister and the accused. This witness has denied the suggestion that the accused sells ice-cream in the village and he was falsely implicated due to enmity.

10. PW-4, Vinod Prasad Yadav has deposed in his examination-in-chief that the occurrence took place in the year 2010 at 02:00 p.m. He was present in his house. He saw that the appellant was committing rape upon the victim girl near railway cabin. Blood was oozing out from her private part. Thereafter her uncle Ranjit brought her to hospital. Thereafter Dilip Mallik was arrested. This witness claims to identify accused Dilip Mallik in court.

10.1. During cross-examination, the said witness



stated that a women, who was grazing cows, firstly saw the incident. It is also stated by this witness in his cross-examination that when he reached at the place of incident, the accused was running away. He has denied the suggestion that no such occurrence took place and he has falsely deposed.

11. PW-5, Ranjit Rajbhar, the informant of the case, has deposed in his examination-in-chief that the incident took place on 23.06.2010 at 02:00 p.m. He was at railway platform, Kathagola. Someone informed him that his four year old niece has been raped. Dilip Mallik was caught by the villagers. It is further deposed that he caught Dilip Mallik and reached at railway platform. The people there got Dilip Mallik released. He brought his niece to Barari hospital and she was treated. The victim was referred to Sadar hospital from there. He and his sister-in-law, Matrano Devi brought the victim to Katihar hospital. The police recorded the statement of the victim in Sadar hospital. The police also recorded his *fardbeyan*. This witness claims to identify Dilip Mallik, the appellant.

11.1. The said witness has stated in his cross-examination that he reached at the place of occurrence 30 minutes after the occurrence and his niece was unconscious.



The victim regained her consciousness after two days. The blood stained clothes (frock and undergarment) were handed over to Daroga Ji. It is further stated by this witness in his cross-examination that his brother also works as porter at Barari railway station. This witness has denied the suggestion that he has not seen the occurrence and falsely implicated the accused.

12. PW-6 is the victim girl who has deposed in her examination-in-chief about the manner in which rape was committed. She claims to identify the accused.

12.1. The said witness has stated in her cross-examination that she had not stated before Daroga Ji that the accused committed wrong act after removing her pant. She has denied the suggestion that she has deposed falsely.

13. PW-7, Indradev Paswan is the Investigating Officer of the case who has deposed in his examination-in-chief that he took charge of investigation of the instant case on 24.05.2010. After taking charge of investigation, he recorded the statement of the informant. He inspected the place of incident. He recorded the statements of Kokila Devi, Subodh Yadav, Vinod Yadav, Firoj Yadav, Khusboo Kumari and Santosh Kumar. This witness has described the place where the



occurrence took place. He found blood at the place of incident. Blood was also found on the railway line. He recorded the statement of the victim girl on 25.06.2010 at 10 O'clock at Sadar Hospital, Katihar. He also recorded the statement of the mother of the victim. It is further deposed that he arrested the accused. He submitted charge-sheet against the accused being Charge-sheet No.105/2010, dated 30.06.2010.

13.1. The said witness has stated in his cross-examination that he did not seize the blood stained soil. He also did not seize the blood found on the railway line. He did not seize clothes of the victim or clothes of the accused. It is further stated by this witness in his cross-examination that the victim girl had not stated in her statement that the accused committed rape on her as she was innocent.

14. PW-8, Subodh Vyas has stated in his examination-in-chief that the occurrence took place on 23.06.2010 at about 02:00 p.m. This witness further states that there was a rumor that someone had come to remove the kidney. The police also came there. Blood was fallen near the *Akban* plant.

15. PW-9, Matrano Devi is the mother of the victim girl who has deposed in her examination-in-chief that the



occurrence took place 1.5 years ago at about 02:00 p.m. He had gone to hospital with her husband as her husband had pain in his leg. When she was returning from the hospital, she saw her daughter smeared with blood. She brought her daughter to Barari hospital. It is further deposed that Dilip Kumar physically abused her daughter. Her daughter was referred to Katihar for better treatment. Her daughter informed her as to how she was ravished. This witness claims to identify Dilip in the court.

16. We have re-appreciated the entire relevant evidence led by the prosecution before the Trial Court. We have also considered the submissions canvassed by learned counsel appearing for the parties. From the evidence led by the prosecution, it would emerge that, as per the case of prosecution, incident took place at about 02:00 p.m. on 23.06.2010. It is alleged that the appellant committed rape on the victim girl, aged about 4 years. The appellant was caught by the village people from the place of incident itself and during scuffle, the appellant also sustained injuries. It would further reveal that the informant, PW-5, who is uncle of the victim, reached at the place of incident on getting information and thereafter the victim was taken initially to Barari hospital



and after getting primary treatment, the victim was referred to Sadar Hospital, Katihar. In Sadar Hospital itself the informant gave his *fardbeyan* at 10:00 p.m.

17. PW-1 is an independent witness who resides near the place of incident. The said witness has specifically stated that at about 02:00 p.m. on the date of incident, he was at the door of his house and he heard the noise and thereafter he had seen that one boy was running from the place and thereafter the village people chased him and he was caught from the place of incident. Name of the said boy was Sunil Mallik. Similarly, PW-4 is also a witness residing near the place of incident and the said independent witness has also supported the version of the prosecution.

18. PW-3 is the sister of the victim, who is aged about 10 years and she has also supported the version of the prosecution. Similarly, PW-5, Ranjit Rajbhar, the informant, who is uncle of the victim, also reached to the place of incident immediately after he got the information that rape has been committed on his niece, aged about 4 years. The said witness specifically stated that the village people caught Dilip Mallik (present appellant) and thereafter the said witness took his niece to Barari Hospital for the purpose of treatment and



thereafter the victim was referred to Sadar Hospital, Katihar. PW-9 is Matrano Devi, who is mother of the victim girl. The said witness has also deposed that when she was returning from the hospital, she noticed that her daughter (victim) was smeared with blood. Therefore, she took her daughter to Barari Hospital from where she was referred to Sadar Hospital, Katihar.

19. At this stage, we would also like to examine the deposition given by the victim. At the time of deposition, her age was 5 years. In her examination-in-chief, she has specifically stated that rape was committed on her after removing her pant. She also stated by giving indication that blood oozed out from her private part and she went to the hospital. She has further identified the appellant-accused in the court room who had committed rape on her.

20. From the aforesaid deposition given by the victim, her relatives as well as independent witnesses, it can be said that the appellant was caught from the place of incident.

21. PW-7, the Investigating Officer has also deposed before the court that after registration of the FIR, he rushed to the place of incident and recorded the statement of witnesses. He found blood at the place of incident and



statement of the victim was recorded in Sadar Hospital, Katihar. The victim minor girl has pointed out that she is suffering from pain in her private part. However, it is true that the Investigating Officer has admitted during cross-examination that he did not seize the clothes of the victim or the appellant nor had he collected the sample of blood from the place of incident.

22. From the aforesaid deposition given by the victim girl, her relatives as well as independent witnesses, it would reveal that the appellant was caught from the place of incident by the village people immediately after the incident took place. The victim girl was taken to the hospital. The victim had identified the appellant in the court room as the person who had committed rape on her.

23. At this stage, we would also like to refer the deposition given by PW-2, Dr. Jyoti Sah who had examined the victim. The said witness has specifically stated that the injury was found on the private part of the victim. Hymen was torn. She specifically opined that injury to vagina may be due to sexual intercourse. Grievous injury to her private part has been made.

24. Thus, from the aforesaid evidence led by the



prosecution, it would reveal that the medical evidence also supports the version given by the victim as well as the prosecution witnesses. The deposition given by the prosecution witnesses is trustworthy and when the medical evidence supports/corroborates the version given by the prosecution witnesses, including the victim, we are of the view that the prosecution has proved the case against the appellant beyond reasonable doubt.

25. We have also gone through the reasoning recorded by the Trial Court while passing the judgment of conviction and order of sentence. We are of the view that the Trial Court has not committed any error while convicting the appellant for the offence punishable under Section 376 of the Indian Penal Code. Hence, so far as conviction recorded by the Trial Court, no interference is required.

26. However, at this stage, we would like to consider the alternate submission canvassed by learned counsel for the appellant. It is submitted that appellant is a poor person and he has to maintain his family. It is required to be observed that at the time of incident, the appellant was aged about 22 years. The Trial Court has imposed maximum punishment to the appellant, i.e., life imprisonment. The appellant is in



custody since June, 2010, i.e., since last more than 14 years and 3 months. It is pertinent to note that the present incident is of the year 2010. Prior to amendment of Section 376 of the Indian Penal Code in the year 2013, punishment for rape was provided 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 be 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 case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with 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)

27. Thus, looking to the facts and circumstances of the case, we are of the view that so far as the sentence imposed by the Trial Court is concerned, the same is required to be modified. Therefore, we are of the view that total period undergone by the appellant in custody till now is the sufficient punishment.

28. Accordingly, the appeal stands partly allowed. The impugned judgment of conviction dated 09.02.2012 and



order of sentence dated 13.02.2012, passed by learned Additional Sessions Judge, F.T.C.-III, Katihar in Sessions Trial No.380 of 2010, arising out of Barari P.S. Case No.82/2010, G.R. No.1362 of 2010 are hereby confirmed. The sentence awarded to the appellant is modified. The total period of custody undergone by the appellant till now shall be treated as sentence served.

28.1. Since appellant, namely, Dilip Mallik is in jail, he is directed to be released from jail custody forthwith, if his presence is not required in any other case.

(Vipul M. Pancholi, J.)

(Ramesh Chand Malviya, J.)

Sanjay/-

AFR/NAFR	NAFR
CAV DATE	NA
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