

Bablu Sah Vs. the State of Bihar

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Court : Patna

Decided On : Apr-02-2014

Judge : Aditya Kumar Trivedi

Appeal No. : Criminal Appeal (SJ) No. 1086 of 2011

Appellant : Bablu Sah

Respondent : The State of Bihar

Judgement :

1. This appeal has been filed by the sole appellant Bablu Sah against the judgment of conviction and sentence dated 09.08.2011 passed by the Additional Sessions Judge-II, Vaishali at Hajipur in Sessions Trial no.336 of 2009/109 of 2010 holding the appellant guilty for an offence punishable under Section 376 of the I.P.C. and sentenced to undergo rigorous imprisonment for ten years.

2. PW-3 Makhan Choudhary father of victim Mamta Kumari (PW-8) filed written report on 31.07.2008 disclosing therein that he resides over railway land after constructing house thereupon. A day before yesterday, he along with his wife and two minor sons had gone to his Sasural leaving victim Mamta Kumari along with three younger sisters for treatment of his wife, who disclosed on telephone that on 29.07.2008, his neighbour Babban Sah took her away to his house on the pretext of being called by his elder brother Bablu Sah. As soon as his daughter Mamta Kumari, aged about 13 years, had gone to the house of Bablu Sah, Bablu Sah

closed main door and dragged her to backward room where he committed rape upon her. He immediately rushed along with his wife and children and enquired from his daughter and after coming to know about the whole facts has launched the criminal prosecution.

3. On the basis of the aforesaid written report Hajipur Town P. S. Case No.404 of 2008 was registered under Section 376 of the I.P.C. whereupon investigation commenced followed with submission of charge sheet leading to trial meeting with ultimate result, the subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence. It has also been submitted that appellant is Egg seller and on account of payment of dues, some sort of disputes has arisen. Consequent thereupon, instant false case has been filed projecting the victim and for that the defence has also examined one DW Brij Kishore Sah.

5. Manifold arguments have been advanced on behalf of appellant while assailing the judgment of conviction and sentence rendered by the learned trial Court. It has been submitted that learned trial Court failed to perceive the improbabilities persisting in the prosecution case which could have erased the prosecution version from threshold. Further elaborating this point, it has been submitted that right from written report there happens to be specific disclosure that on 31.07.2008 Mamta Kumari had telephoned the informant who was at Senduari, his Sasural. From the evidence of PWs, it is evident that neither prosecution party nor their sasuralwala have telephone connection or mobile set. They have themselves disclosed the telephone call was made through telephone booth, but during course of investigation the aforesaid booth was not shown to the Investigating Officer nor the I.O. cared to examine the proprietor of telephone booth and in likewise manner, failed to cite them as a witness. It has further been submitted that informant happens to be an illiterate person and on account thereof, it was incumbent upon him to have disclosed the writer of the written report which he did not. It has further been submitted that there happens to be disclosure in the written report itself that Babban Sah had taken away Mamta Kumari under

deceitful manner, but Babban Sah had not been arrayed as an accused who, as per allegation, certainly was an abettor.

6. Now, coming to the factual aspect, it has been submitted that from the written report itself, it is evident that the victim along with her minor younger sisters were present while the informant along with his wife and two minor sons were away. Therefore, the two minor sisters of the victim should have been examined at least on the score that Babban Sah had taken away Mamta Kumari by deceitful means as well as the conduct of Mamta Kumari after having raped. In likewise manner, it has also been submitted that no neighbours have been examined or shown as charge sheet witness.

7. It has further been submitted that though in the written report, the age of the victim has been shown as 13 years, but from the evidence of the doctor (PW-10), her age has been estimated in between 15-17 years. Having variation of two years, the victim was major one and from her conduct, she was a consenting party having full access to coitus as is apparent from the medical report.

8. It has further been submitted that there happens to be delay of two days in launching FIR without any explanation. Delay in each and every case should not be found fatal to the prosecution case, but in the facts and circumstances of the present case, the same plays an important role.

9. It has also been submitted that objective finding of the I.O. relating to place of occurrence did not co-relate with the allegation. In likewise manner, in spite of having specific disclosure by the victim that "Salwar" was smeared with semen as well as blood neither been produced by the prosecution during course of investigation before the I.O. nor the I.O. ever tried to seize the same. It has further been submitted that the inconsistency prevailing amongst the evidence of the PWs is found sufficient to discredit the prosecution version and as such, the judgment of conviction and sentence is found non-sustainable in the eyes of law and is fit to be set aside.

10. Counter meeting with the submission raised on behalf of appellant, it has been submitted on behalf of learned Additional Public Prosecutor that application of

general criteria during course of appreciation of evidence as well as with regard to delay in launching prosecution relating to rape cases is not permissible and on account thereof the rape cases should not be allowed to gyrate under such principle. In the background of social frame work of Indian continent wherein rape has been identified as stigma not against the victim rather whole family. So far this particular case is concerned, it has been submitted that the victim who was alone without having presence elders of the family at the time of occurrence and who faced such horrifying incidence as well as being illiterate coming from lower strata of society could not be considered possessing adequate presence of mind and that happens to be reason behind the delay in informing her parents though, just after arrival of her parents got this case filed. It has further been submitted that none of the witnesses, save and except, victim herself happens to be eye witness rather they have simply corroborated the incidence in hearsay manner. Moreover, the evidence of victim happens to be consistent so far factum of rape is concerned and any sort of infirmity having present on account of defective investigation is not going to demolish the case of the prosecution. In likewise manner the medical report also did not play an important role, because of the fact that the victim was examined after three days of occurrence. It has further been submitted that the points so raised on behalf of appellant was also before the learned lower Court which found properly answered. As such the judgment of conviction and sentence needs no interference.

11. In order to substantiate its case the prosecution had examined altogether ten (10) PWs, out of them PW-1 Shambhu Sharma, PW-2 Sunil Kumar, PW-3 Makhan Choudhary, the informant, PW-4 Baiju Sah, PW-5 Babu Lal Choudhary, PW-6 Murari Prasad, PW-7 Manju Devi, PW-8 Mamta Kumari, the victim, PW-9 Ramayodhya Ram, the I.O. and PW-10 Dr. Sunita Kumari as well as had also exhibited Exhibit-1 series signature, Exhibit-2 endorsement over written report, Exhibit-3 requisition for medical examination and Exhibit-4 medical report. DW-1 Brij Kishore Sah has been examined on behalf of defence.

12. PW-10 had examined the victim on 01.08.2008 and during course thereof, had not found external or internal injury over the person of victim. Hymen was old torn admitted one finger. For ascertainment of age, victim was referred to other

segment and the conclusion arrived thereupon, happens to be in between 15-17 years. She had further opined that evidence of recent sexual activity has not been found. That means to say the medical evidence virtually ruled out the story of the recent sexual intercourse. The date of occurrence so alleged happens to be 29.07.2008 while the victim was examined on 01.08.2008. However, from the conduct of the prosecution, it is evident that prosecution had not cared to get it explained with regard to the aforesaid factual aspect.

13. So far case of rape is concerned, the evidence of victim has been accepted as of paramount consideration by a catena of judicial pronouncement. It has succinctly been held that in case the evidence of prosecutrix inspires confidence then in that event there is no need to ask for corroboration. More recently in the case of Hem Raj Vs. State of Haryana reported in (2014) 2 SCC 395, it has been taken note of and explained in following way:

œ6. In a case involving charge of rape the evidence of the prosecutrix is most vital. If it is found credible, if it inspires total confidence, it can be relied upon even sans corroboration. The court may, however, if it is hesitant to place implicit reliance on it, look into other evidence to lend assurance to it short of corroboration required in the case of an accomplice. (See State of Maharashtra v. Chandraprakash Kewalchand Jain (1990) 1 SCC 550) Such weight is given to the prosecutrix's evidence because her evidence is on a par with the evidence of an injured witness which seldom fails to inspire confidence. Having placed the prosecutrix's evidence on such a high pedestal, it is the duty of the court to scrutinize it carefully, because in a given case on that lone evidence a man can be sentenced to life imprisonment. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection and only after its conscience is satisfied about its creditworthiness rely upon it.?

14. PW-8 is the victim herself. She had stated that the occurrence is about two years ago. It was 12.00 noon, at that very time, she was at her house. Babban Sah came and disclosed that Bhaiya is calling. Bablu Sah is his elder brother whereupon, she had gone to house of Bablu Sah. Bablu Sah took her in a room and closed the door and then committed rape upon her. She further identified the

accused in dock and disclosed that this accused had committed rape upon her. During cross-examination at paragraph-2, she had disclosed that she occasionally used to go to house of Bablu Sah. In paragraph-3, she had further disclosed that Babban Sah had disclosed that Bhaiya has called on account of urgent work. Since before that he had not called. In paragraph-4, she had disclosed that Bablu Sah is married having two child. His wife and parents used to reside in the house, but at the time of occurrence, none was present. In paragraph-5, she had disclosed that when Bablu Sah took her to room, she resisted, but Bablu Sah disclosed that she will be murdered in case she would raise alarm. She had tried her best to come out from his grip. She had scratched upon his face on account of which blood oozen out. At that very time, Babban Sah had slipped there from. In paragraph-6, she had disclosed that at the time of occurrence, she was wearing Frock and Salwar. Blood oozen out from her vagina and soaked with Salwar. In paragraph-7, she had disclosed that she had made statement before the police. She had not shown Salwar to police. In paragraph-8, she had disclosed that she sustained injury at the vagina. She was medically examined, she had shown injury. In paragraph-9, she had stated that after coming out from the house of Bablu Sah, she had raised alarm, but people did not gather. In paragraph-11, she has stated that she had narrated the incidence to her parents, however, had not disclosed to any of the mohalla people. She had denied the suggestion that no offence of rape was committed.

15. Now, coming to remaining witnesses, PW-1 is the F.I.R. attesting witness as well as he happens to be hearsay in nature, because of the fact that he came to know regarding occurrence from Makhan Choudhary, the informant. PW-2 had stated that the occurrence is one and half years ago, it was 12.00 noon, Bablu Sah took away Mamta Kumari to his house and committed rape. During cross-examination, he had stated that he came to know regarding occurrence from the wife of Makhan Choudhary on the following day while he was going to chowk. At that time wife of Makhan Choudhary was standing at Darwaza, she called and then disclosed regarding the occurrence till then case was already instituted.

16. PW-3 Makhan Choudhary, informant who had stated that the occurrence is one and half years ago, it was Shrawan month. It was mid-day. He had gone to his

sasural. His daughter Mamta Kumari had called him and then disclosed that Bablu Sah had committed rape upon her. Then thereafter, he returned back to his house and enquired from his daughter who reiterated in presence of Shambhu Sharma (PW-1), Sunil Kumar (PW-2), Anil Kumar (not examined), Babu Lal Choudhary (PW-5) that Babban Sah took her away to his house where, after closing door Bablu Sah committed rape. At that very time, Mamta Kumari was aged about 13 years, thereafter he had gone to P.S. and filed written report. The aforesaid written report was scribed by Anil Kumar. In paragraph-2 of his cross-examination, he had stated that the house of Bablu Sah lies in front of his house. They are on visiting terms. Five or six houses live adjacent to the house of accused. In paragraph-4, he had further disclosed that he had got no telephone nor there happens to be telephone at his sasural, booth is at chowk. In paragraph-5, he had disclosed that his daughter had telephoned from telephone booth to a shop located at his sasural, but he is unaware with the identity of shop. In likewise manner, he had also stated that he did not know the proprietor of telephone booth. In paragraph-7, he had stated that his daughter had telephoned him on the following day of the occurrence. He is not remembering the date. In paragraph-8, he has stated that he had mentioned the fact in the written report as per disclosure made by his daughter, the victim. In paragraph-10, he has stated that he is unable to explain why not his daughter had made complaint. In paragraph-13, he had further disclosed that his daughter had disclosed that she had not divulged the incidence to neighbours then there happens to be denial of the suggestion. He had further admitted that Bablu Sah had a shop on S.D.O. road where he sells egg.

17. PW-4 had stated that he knew informed Makhan Choudhary who happens to be the informant of this case. He is unable to disclose the incidence, which was committed with the daughter of Makhan Choudhary namely Mamta Kumari, over which he was declared hostile.

18. PW-5 had stated that the occurrence is about one year and nine months ago, it was 12.00 noon. The occurrence was committed with the daughter of Makhan Choudhary namely Mamta Kumari. Mamta Kumari was at her house. Younger brother of Bablu Sah came to her to call over which Mamta Kumari gone to house of Bablu Sah. Bablu Sah closed the door then committed rape. In paragraph-2 of

his cross-examination, there happens to be contradiction with regard to his aforesaid statement. He had denied his status before the police as hearsay witness. The aforesaid event is found corroborated from the evidence of PW-9 the Investigating Officer in paragraph-6.

19. PW-6 had stated that he knew Makhan Choudhary, the informant. The occurrence is one year and nine months ago, it was 12.00 noon. Wife of Makhan Choudhary had disclosed that Bablu Sah took away her daughter to his house and then committed rape. In paragraph-3, he had stated that wife of Makhan Choudhary had narrated the incidence in the evening of same day at her Darwaza. In paragraph-4, he had further disclosed that his wife Meera Srivastava had already instituted a case against accused but had denied the suggestion that on account of animosity he had deposed.

20. PW-7 is Manju Devi, mother of victim, who had stated that occurrence is about two years ago, it was 12.00 noon. At that very time Mamta Kumari was at her house, Pawan came and disclosed to Mamta Kumari that his elder brother Bablu Sah is calling and on that pretext took away. Bablu Sah caught hold hand of Mamta Kumari, pulled inside his house and then committed rape. At that very time Mamta Kumari was aged about 13 years, she was informed by Mamta Kumari regarding occurrence. During cross-examination at paragraph-2, she had disclosed that parents, wife of Bablu Sah along with two children reside in the said house. In paragraph-3, she had stated that she had no talk regarding the occurrence with the parents of Bablu Sah. In paragraph-4, she has further disclosed that the victim had disclosed regarding occurrence at house, she had not raised alarm. She had not disclosed to anybody. In paragraph-5, she has stated that she had also accompanied her husband to Police Station along with five more persons. Written report was submitted by her husband, Darogaji also enquired from them. In paragraph-7, she has stated that Babloo used to stay at his house and sells egg. She had denied the suggestion of false implication. The background of demand of money by Bablu Sah from her husband in lieu of egg.

21. PW-9 is the Investigating Officer. He had stated that on 31.07.2008, Makhan Choudhary had come to P.S. and submitted written report on the basis of which

Town P. S. Case no.404 of 2008 was registered by the O/c and investigation was entrusted to him. During course of investigation, he had gone to place of occurrence, recorded further statement of informant. Place of occurrence happens to be the interior room of house of accused wherein one Chauki was there. The roof of room was covered with asbestos. There was one Darwaza, one small window. He had not found any sign at the place of occurrence. He recorded the statement of witnesses, got the victim examined and then after completing investigation submitted charge sheet. In paragraph-5 of his cross-examination, he had stated that he had not mentioned in the case diary regarding the fact that informant along with victim had come to P.S. There was no sufficient cause for non-examination of victim at the police station.

22. The accused during course of his statement recorded under Section 313 of the Cr.P.C. had simply denied the allegation. DW-1 was examined on behalf of appellant/ convict to suggest that the allegation whatsoever been alleged against him happens to be false. The instant case has been filed on account of dispute over payment of dues. During cross-examination, he had admitted that police had come to place of occurrence at that very time, accused was not apprehended.

23. After analyzing the evidence of PWs as referred above, it is evident that PW-8, the victim had not disclosed during her examination in-chief that at the time of occurrence her parents were away from house. She had not disclosed the fact that she had telephonically informed them and after their return they enquired elaborately and then written report was submitted. She confined herself to the main offence whereunder she was raped. During cross-examination at paragraph-5, the defence had cross-examined her on that very score whereunder, she had categorically stated the activity of the accused as well as the nature of resistance taken by her. She had even scratch face of accused during course of aforesaid event. Admittedly, even from the evidence of DW-1, it is evident that the appellant/ convict had made his escape and was not apprehended. Had there been then during course of examination the scar mark or the injury having over his face would have been exposed and this part of accused certainly is found admissible in light of Section 8 of the Evidence Act under the guise of *res gestae*. Regarding non-showing of Pajama soaked with blood to the police is of no consequence in

the background age of the victim as well as the society where from she represents. Moreover, on that very score, PW-3 as well as PW-7, the parents have not been cross-examined. In paragraph-11 of her cross-examination, she had categorically stated that she had divulged the fact to her parents which PW-3 and PW-7 also corroborated.

24. Admittedly, victim was examined after two years of occurrence and so certainly natural lapses of memory during course of evidence apart from being of tender age was not unusual. That being so, there happens to be no reason to discard or disbelieve the evidence of PW-8, the victim. Moreover, when she was not at all cross-examined on the factum of rape. In the aforesaid background the finding of doctor has got no relevance at all.

25. In Gangabhavani v. Rayapati Venkat Reddy and Ors. reported in 2013 CRI. L.J. 4618 the status of witness along with appreciation of evidence in the background of presence of contradiction has been taken into consideration and explained in following way:-

CONTRADICTIONS IN EVIDENCE:

9. In State of U.P. v. Naresh, (2011) 4 SCC 324, this Court after considering a large number of its earlier judgments held:

œIn all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecutions case, render the testimony of the witness liable to be discredited.?

A similar view has been re-iterated by this Court in *Tehsildar Singh and Anr. v. State of U.P.*, AIR 1959 SC 1012; *Pudhu Raja and Anr. v. State, Rep. by Inspector of Police*, JT 2012 (9) SC 252; and *Lal Bahadur v. State (NCT of Delhi)*, (2013) 4 SCC 557).

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence.

26. Non-cross-examination of witness on particular issue has also been considered in *Gangabhavani Case* (supra). ¶17. This Court in *Laxmibai (Dead) Thr. L.Rs. and Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. and Ors.*, AIR 2013 SC 1204 examined the effect of non-cross examination of witness on a particular fact/circumstance and held as under:

¶31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory

provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.? (Emphasis supplied)

[See also: Rohtash Kumar v. State of Haryana, JT 2013 (8) SC181; and Gian Chand and Ors. v. State of Haryana, JT 2013 (10) SC 515].

27. Thus, after having minute observation as well as giving analytical approach to the evidence of PW-8, it is evident that she succeeds in detailing her awe with regard to incidence of rape at the hands of appellant/ convict and on account thereof, the deficiency so found relating to medical examination, is not found adverse to prosecution case much less in the background of delay in examining the PW-8.

28. Hence, the instant appeal sans merit and is accordingly dismissed. Appellant who is in custody is directed to serve remaining part of sentences so inflicted by the learned trial Court.

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