

Anuj Singh Vs. State of Bihar

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Court : Patna

Decided On : May-28-2007

Judge : Indu Prabha Singh, J.

Appellant : Anuj Singh

Respondent : State of Bihar

Disposition : Appeal allowed

Judgement :

Indu Prabha Singh, J.

1. This appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (in short the Code) is directed against the judgment dated 25-11-1992 passed by Shri H. B. P. Sinha, 4th Additional Sessions Judge, Nawadah in S. T. No. 1/ 92/3/92 convicting the appellant under Section 376/109 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for six years.

2. The prosecution case, in short, is that on 12-5-1991 while the informant Manti Devi (P. W. 8) had gone to Dhanma Bandh to graze her cattle, at about noon the appellant Anuj Singh came there along with others and charged her that her cow had grazed his Brinjal crops on the previous day. On her denial the appellant caught hold of her hand and brought her near the Brinjal field. He also took her to a hut where he threw her on the ground. One of the accused, namely, Jagdeo

Tanti caught hold of her legs while the other accused, namely, Ishwari Singh committed rape on her. On Hulla P. Ws. 3 and 4 came there and the accused fled away. P. W. 8 narrated the incident to her mother. The Fardbeyan of P. W. 8 was recorded. The police after investigation submitted charge sheet. The cognizance of the offence was taken and the case was committed to the Court of Session where the appellant was convicted in the manner indicated above. The other two accused, namely, Jagdeo Tanti and Ishwari Singh were acquitted of the charge under Section 376 of the Indian Penal Code since the prosecution failed to prove this charge against them beyond all reasonable doubts. So far as the present appellant is concerned, the learned Court below convicted him under Section 376/109 of the Indian Penal Code since it found that he had abetted the commission of the offence of rape.

3. The appellant has totally denied the alleged occurrence and has contended that the factum of rape does not find support from the evidence of the prosecution witnesses. The doctor (PW 2) who examined the prosecutrix did not find any sign of rape on her. No injury was found on any part of the body of P. W. 8. Also no spermatozoa was found in her private parts though she was examined on the same day on which the alleged rape is said to have taken place. It has been submitted that she being 22 years old she would have certainly resisted any attempt to rape and in the process must have sustained certain injuries on her person. P. W. 2 did not find any mark of injury on her person. The trial Court has convicted the appellant only on the charge of abetment and there was no allegation against him that he also committed rape on the prosecutrix. On these grounds it has been submitted that the judgment of conviction of the learned Court below be set aside and the appellant be acquitted.

4. The parties have been heard at length with respect to various submissions made by them. So far as the appellant is concerned my attention has been drawn to the evidence of P. W. 8 who has clearly stated that it was accused Tatma (Tanti) who had caught hold of her legs and accused Jagdeo Singh committed rape on her. From her evidence it is clear that she has not alleged rape against the present appellant. She has also stated that she does not identify the accused Jagdeo Singh. She has further stated that she did not know the name of this

appellant even when she identified him as one of the accused of the case.

5. It may be mentioned here that all the three accused persons of this case including the present appellant were charged under Section 376 of the Indian Penal Code. No charge under Section 109 of the Indian Penal Code was framed against any of them including the present appellant. It has been submitted that since the other two accused who are alleged to have committed the offence under Section 376 of the Indian Penal Code have since been acquitted of the charge under Section 109 of the Indian Penal Code against the present appellant cannot be sustained in accordance with law.

6. Paragraph 16 of the judgment of the learned Court below runs as follows:

16. Regard being had to the discussions above, it is clear that the prosecution has failed to prove charge against accused Jagdeo Tanti and Ishwari Singh beyond all reasonable doubts. Therefore, both these two accused persons namely Ishwari Singh and Jagdeo Tanti are held not guilty of the charge framed against them and are acquitted and set at liberty. They are further discharged from the liabilities of their respective bail bonds. So far accused, Anuj Singh is concerned, there is clear and reliable evidence that he abetted the offence of rape on the prosecutrix by aiding and facilitating the same, by some one. So he is, liable Under Section 109, of the I.P.C. for the abetment of offence under Section 376 of the Indian Penal Code. It is settled principle of law that the accused charged for, the substantive offence can also be convicted for the abetment thereof. Accused Anuj Singh is charged under Section 376 of the Indian Penal Code and not for its abetment. So he can also be convicted under Section 109 of the Indian Penal Code for the abetment of offence under Section 376 of the Indian Penal Code. As the prosecution has fully proved the offence under Section 376/109 of the Indian Penal Code against him, therefore, he is convicted for the same.

7. Section 109 of the Indian Penal Code prescribes the punishment for the abetment if the act abetted is committed in consequence thereof and where no provision is made for its punishment. In the case of Joseph Kurian v. State of Kerala : 1995 CriLJ502 the Hon'ble Supreme Court has held that Section 109 is by itself an offence though punishable in context of other offences. The roles of the

perpetrator and abettor done are distinct.

8. From the facts of this case it would appear that the appellant Nos. 1 and 4 were found guilty of the offence punishable under Sections 272 and 328 of the Indian Penal Code and also under Sections 55(a) and 55(1) of the Kerala Abkari Act and they were convicted accordingly. On appeal the High Court confirmed the conviction and sentence of appellant No. 1 as imposed by the Court of Session. So far as appellant No. 4 was concerned the High Court set aside his conviction and sentence under Sections 272 and 328 of the Indian Penal Code and also under Sections 55(a) and 55(i) of the Kerala Abkari Act but convicted him under Section 109 of the Indian Penal Code for having abetted the commission of the aforesaid offences by the other appellants. In this decision the Hon'ble Supreme Court has held in para 13 as follows:

13. Section 109, Cr. P. C. is by itself an offence though punishable in the context of other offences. A-4 suffered a trial for substantive offences under the Indian Penal Code and Abkari Act. When his direct involvement in these crimes could not be established, it is difficult to uphold the view of the High Court that he could lopsidedly be taken to have answered the charge of abetment and convicted on that basis. There would, as is plain, be serious miscarriage of justice to the accused in causing great prejudice to his defence. The roles of the perpetrator and abettor of the crime are distinct, standing apart from each other.

9. This decision had come up for consideration again before the Hon'ble Supreme Court in the case of *Wakil Yadav and Anr. v. The State of Bihar* 2001 SCC (Cri) 1499 : 1998 (2) PLJR SC 167 : 1999 Cri LJ 5000. In this decision reliance was placed on the decision of Joseph Kurian (supra). It was further observed as follows:

Out of the two appellants before us, Guru Charan Yadav the main accused has since died. His appeal therefore abates and is disposed of as such. The other Wakil Yadav was originally charged along with 6 others for offence under Section 302/149, I. P. C. and for some lesser offences as part of the some constructive liability. The Court of Session convicted all the 7 accused for the offences charged. The High Court in appeal acquitted 5 persons, convicting Guru Charan Yadav

substantively for offence under Section 302, I. P. C, sentencing him to life imprisonment (whose appeal has abated) and convicting Wakil Yadav, appellant, for offence under Section 302 read with Section 109; I. P.C. It is undisputed that no charge was framed against the appellant with the aid of Section 109,I. P. C. This Court's view above stated is that Section 109,I. P. C. is a distinct offence (The Hon'ble Court was referring to its decision in the case of Joseph Kurian (supra).

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The appellant having faced trial for being a member of an unlawful assembly which achieved the common object of killing the deceased, could in no event be substitutedly convicted for offence under Section 302, I. P. C. with the aid of Section 109,I. P. C. There was obviously thus not only a legal flaw but also a great prejudice to the appellant in projecting his defence. He, on such error committed by the High Court, has rightly earned his acquittal.

10. From the discussions made above it becomes clear that the appellant would not have been convicted under Section 376/109 of the Indian Penal Code for the simple reason that no charge under Section 109 of the Indian Penal Code has been framed against him. On this ground alone he is entitled to be acquitted.

11. So far as the judgment of the learned Court below is concerned in paragraph 16 it has held that no case of rape could be proved against the accused Jagdeo Tanti and Inshwari Singh. No sign of rape was also found on P. W. 8. The provisions of Section 109 of the Indian Penal Code are clear on this point. They are only attracted if the act abetted is committed in consequence of the abetment as is clear from the language of this section. It runs as follows:

109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.- Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

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12. Thus the section itself shows that unless the act abetted is committed no offence under Section 109 of the Indian Penal Code is made out.

13. So far as the oral evidence is concerned P. W. 1 is a formal witness. PWs. 3 and 4 have been declared hostile. P. W. 5 is the brother of the prosecutrix who has said that he has learnt about the alleged occurrence from her (P. W. 8). P. W. 8, however, does not say that she told P. W. 5 about it. P. W. 7 is the father of the prosecutrix who has admitted in his cross examination that P. W. 8 is not mentally sound. Under these circumstances it would appear that even the oral evidence on this point is far from satisfactory.

14. From the detailed discussions made above it becomes clear to me that the judgment of conviction of the learned Court below cannot be sustained.

15. In the result, this appeal is allowed and the judgment of conviction of the learned Court below is set aside. The appellant is acquitted of the charge under which he has been convicted. He is directed to be set at liberty.

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