

In Re: Boura @ Drigpal

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Court : Madhya Pradesh

Decided On : Apr-28-2006

Reported in : 2006(4)MPLJ72

Judge : Rakesh Saxena, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313, 318, 329 and 341; Indian Penal Code (IPC) - Sections 376, 376(1) and 376(2)

Appeal No. : Misc. Cr. Case No. 283/2000

Appellant : In Re: Boura @ Drigpal

Advocate for Def. : Premnarayan Verma, Adv.

Advocate for Pet/Ap. : Arun Nema, Panel Lawyer

Judgement :

ORDER

Rakesh Saxena, J.

1. This case is a reference made by learned IInd Additional Sessions Judge, Chhatarpur in S.T. No. 49/04 under Section 318 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') wherein by order dated 24-12-99, he has passed the order of conviction of the accused Boura @ Drigpal for the offence under Section 376, IPC.

2. In this case, the accused is a deaf and dumb man, therefore, after conviction, the learned Additional Sessions Judge has made this reference for passing appropriate order. Section 318 of the Code reads as follows :

318. Procedure where accused does not understand proceedings.-- If the accused, though not of unsound mind, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

3. After committal of the case, the charge under Section 376, IPC was framed by the Trial Judge on 27-4-1994. At that time, the objection about the accused being deaf and dumb and incapable of understanding the proceedings was not taken. After framing the charge, the Court proceeded to record the prosecution evidence and by 13/14 of September, 1994, statements of 4 of the prosecution witnesses were recorded. From the order-sheet, it appears that on 25-11-1994, Counsel for the accused filed an application under Section 329 of the Code contending that the accused was deaf and dumb and was incapable to defend himself at the trial. On the direction of the Court, accused was examined by a team of doctors of District Hospital, Chhatarpur. Vide report dated 10-5-1995, it was opined that accused was deaf and dumb and his mental status was sub-normal. His fingers and toes were fused by birth. However, it was suggested that he be examined by the Specialist doctors of Neurology and ENT of the Medical College, Gwalior. He was examined by team of doctors of J.A. Hospital, Gwalior, comprising of Specialists of ENT, Neuro Surgery, Orthopaedics and Psychiatry. As per report received from J.A. Hospital, Gwalior, it was found that he had no audiometry response on audiometry and hearing assessment test. Psychiatry expert opined that on clinical examination, he was found suffering with mental retardation of IQ along with occasional episode of Psychiatric behaviour and congenital deafness and dumbness. Orthopaedician also found his fingers and toes suffering from syndactyly, i.e., fused together rendering them functionally incomplete. In view of the report of the various experts, the Trial Court held the accused to be a deaf and

dumb person. Though it was also opined that some mental deficiency was also present, but, it was not suggested that he was lunatic or a person of unsound mind.

4. The Counsel, who represented the accused at the trial, had initially not objected that the accused was incapable of understanding the proceedings of the Court. However, in view of the report, he contended that it was not possible for him to cross-examine the witnesses, but his objection was turned down and the trial proceeded and ultimately 12 witnesses were examined and cross-examined by the Counsel. Again, at the stage of recording of the statement of the accused under Section 313 of the Code, an objection was raised that since the accused was not able to understand even the signs and gestures, the recording of such statement was a futile exercise. From the Trial Court's observations, as made in the reference report, it appears that it had tried to make the accused understand the questions by speaking loudly and by making gestures but he shook his head on every question. Trial Court also sought assistance of a teacher of Deaf & Dumb School, but even then he could not be made to understand anything. Said trainer opined that since the accused was not trained in any such school of teaching by gestures, he could not understand and respond gestures. Trial Court further sought help of brother and parents of the accused, but they said that they do not talk to him by gestures. Ultimately, the statement under Section 313 of the Code could not be recorded.

5. I have carefully and minutely perused the various medical reports submitted by the Specialist doctors and the observations made by the Trial Court. On due consideration of the aforesaid material, I am of the opinion that the finding recorded by the Trial Court in regard to the accused's being a deaf and dumb person incapable of understanding the proceedings in the Court, is just and proper. Though there is some material on record to show that accused is a person of sub-normal mental status or some mental retardation, but, on that basis it cannot be held that he had no sufficient intelligence of knowing the criminal nature of the act committed by him. In the reference report, Trial Court has observed that on 1-2-99, in the presence of his Counsel when the accused was asked to go out, he went out and when Court asked some questions to his Counsel, he did not

react. It appeared that he understood as to if there had been a talk between the Judge and the advocate, he had no concern. However, he was not able to respond to questions put to him. In view of the above circumstances, I am of the firm opinion that accused is a deaf and dumb person who cannot be made to understand the proceedings of the Court and the Trial Court was right in making the reference to this Court under Section 318 of the Code while convicting him. In Re: Peethambaran : AIR1959 Ker165 the Division Bench of Kerala High Court observed :

(2) Having found that the accused was a sane deaf-mute who could not be made to understand the proceedings of the trial, the learned Judge rightly invoked the provision of Section 341, Criminal Procedure Code to make the reference after finding him guilty and convicting him of murder, without at the same time passing the sentence therefor. It is settled law that the provision of the said section could be invoked only when the accused is unable to follow the proceedings, see King Emperor v. Dada Mahadu 3 Bom LR , 371, Emperor v. Ganga AIR 1927 Lah 799 (1), Isso v. Emperor AIR 1943 Sind 237, The Crown v. Naru AIR 1950 EP 174 and In Re : Pondavi Jaddidu (1954) 2 Mad LJ (Andhra) 226.

These cases hold that though an accused is a deaf-mute, if he understood what was being alleged against him by the prosecution and its witnesses, Section 341 would have no place and that the Court concerned should deal with him in the ordinary way and dispose of the case. In the Sind case AIR 1943 Sind 237, Davis, C.J. and Weston, J., have elaborately considered the scope and amplitude of Section 341, Criminal Procedure Code.

6. I shall now proceed to examine the evidence adduced in the case to find whether the learned Trial Judge was right in finding the accused guilty of the offence under Section 376, IPC and convicting him of that offence. In brief, the prosecution case is that the prosecutrix who is a young girl of about 12 years of age, used to live with her parents in Village Patha within the jurisdiction of Police Station, Laudi of District Chhatarpur. On 7-1-94, at about 1.00 pm, when she had gone to graze her goats towards Bagiya of Shankar Lodhi alongwith another girl Ginia, the accused who is also resident of the same village, reached there. He

intimidated and asked Ginia to go away from that place. Thereafter, he caught hold of the prosecutrix and assaulted her and after taking out her underwear committed rape on her. Blood came out of her private part. Her underwear also got stained with it. Hearing her cries, Lakhan Kumhar and Brajbhan Ahirwar reached there, seeing them accused ran away towards his house. Girl went to her house weeping and narrated the occurrence to his father, viz., Hakkoo. On the same day, at about 5.00 o'clock in the evening, they went to Police Station, Laudi, where the prosecutrix lodged report, Ex. P-7.

7. Prosecutrix was sent for medical examination to District Hospital, Chhatarpur. Lady doctor, P.W.5, Dr. Usha Khare examined her and found that her hymen was ruptured in 6 o'clock position and was bleeding. She opined that the prosecutrix had been subjected to sexual intercourse. Slide of the vaginal swab and underwear of the prosecutrix were seized and sent for Forensic Examination. Accused was arrested on 8-1-94 and was sent for medical examination to PHC, Laudi. After preliminary examination, he was referred to District Hospital, Chhatarpur. P.W. 6 Dr. Khare examined him and found him fit and capable to perform sexual intercourse. As per FSL Report, Sagar, in the slide of vaginal swab of the prosecutrix and on her underwear human blood was found. After requisite investigation, the charge-sheet was filed before the Court of concerned Magistrate and the case was committed for trial.

8. Learned Trial Court framed the charge against the accused under Section 376, IPC and tried him. Though, due to accused being deaf and dumb, his statement under Section 313 of the Code could not be recorded, however, the defence witness D.W. 1 Babulal was examined. The defence of the accused was that he did not commit rape on the prosecutrix and that the prosecutrix had, in fact, fallen from a tree due to which she had suffered injury on her private part by some wooden stub.

9. During trial, prosecution examined 12 witnesses. On due consideration of statements of the witnesses adduced by the prosecution, learned Trial Judge found that the offence of commission of rape against accused was well brought home and that though he was deaf and dumb, but, he was perfectly sound and

was intelligent enough to understand the criminal character of the act committed by him. After careful examination of the evidence adduced by the prosecution, I am inclined to agree with the learned Additional Sessions Judge's conclusion that the accused has committed rape on the prosecutrix.

10. From the evidence of prosecutrix P.W. 11, it is established that she knew the accused Boura @ Drigpal from before. When she and another girl Ginia were grazing goats in the Bagia of Shankar, the accused had reached there and had made Ginia to go away. Thereafter, he had taken out her underwear and made her to sit in his lap. When she shouted, he assaulted her and committed rape on her and ran away from the spot. Prosecutrix went to her house and informed her mother about the occurrence. P.W. 9 Ginia corroborated the evidence of prosecutrix in saying that she had gone for grazing her goats with the prosecutrix and accused had caught the prosecutrix, she had shouted and ran away from the spot. She had gone to the house of the prosecutrix and had informed about the part of the incident she had seen to the father of the prosecutrix. Witness Ginia has deposed that accused had assaulted prosecutrix whereupon prosecutrix had fallen down, but she could not see thereafter as she had ran away from the spot. She also disclosed that accused is not capable of speaking. P.W. 10 Hakkoo, the father of the prosecutrix has deposed that his daughter, who presently is of about 14-15 years of age, had gone for grazing the goats alongwith Ginia. Ginia had come and informed that accused had assaulted the prosecutrix. When he went in the Bagia of Shankar, he found his daughter weeping and saw blood flowing on her leg. He deposed that Sukhia had told her that accused had committed Bura Kaam with him after removing her underwear. Her underwear was also blood stained. He had then taken the prosecutrix to Police Station from where the prosecutrix was sent for Medical Examination to Chhatarpur. This witness had deposed that the accused is hard of hearing and his speech is not clear.

11. Another witness P.W.2 Brajbhan has deposed that on hearing cries of prosecutrix, he had gone at the place of occurrence, seeing him, accused had run away. On asking by him, the prosecutrix had told him that Boura had mounted over her. In cross-examination, he admitted that he had strained relation with the father of the accused, but he has not deposed against the accused because of the

strained relation.

12. On examining the evidence of prosecutrix and Brajbhan in juxtaposition, it is seen that the prosecutrix has not said that at the time of occurrence Brajbhan had reached at the spot and she had informed him about the occurrence. In such circumstances, the evidence of Brajbhan seems to be inadmissible being hearsay. However, the evidence of prosecutrix seems reliable. Though there is some discrepancy in the statement of prosecutrix about the manner in which rape was committed, but that is not enough to discard her evidence totally. Statement of prosecutrix was recorded before the Court after about 4 years of the occurrence. Some minor discrepancies were just natural to occur. Learned Trial Court has critically and meticulously analysed her evidence and has found that merely by minor contradictions, the substance of her evidence cannot be discarded. Evidence of prosecutrix has been amply corroborated by the evidence of P.W. 9 Ginia and the evidence of her father P.W. 10 Hakkoo.

13. So far as the medical corroboration of the evidence of prosecutrix is concerned, P.W. 8 Dr. Usha Khare, who examined her, has categorically stated that she had examined her on 8-4-94 and had found her hymen ruptured in 6 o'clock position and there was bleeding from the injury. She deposed that duration of the injury was within 24 to 48 hours. She had seized the underwear of prosecutrix and sent it after sealing it to the police. As per report of FSL, Sagar, Ex. P-10, the underwear of the prosecutrix was found stained with human blood.

14. P.W.1 Dr. L.S. Chourasia of PHC, Laudi, who had examined the accused on 8-1-94, observed that there had been some deficiency in the body of the accused, his penis was somewhat undeveloped, but he was unable to give any opinion about his capability of performing sexual intercourse and he referred the accused to District Hospital, Chhatarpur. P.W.6 Dr. M.K. Khare, Assistant Surgeon of District Hospital, Chhatarpur, on examination found the voice of the accused to be abnormal and not clear. His IQ was also weak. He found smegma absent on his penis. His right testical was absent but his penis was fully developed. In his opinion, there was nothing to suggest that he was not capable of performing sexual intercourse. On cross-examination, he explained that though his

understanding was not good, but this did not mean that he had no understanding. The evidence of prosecutrix besides the evidence of Ginia and Hakkoo is amply corroborated from the medical evidence.

15. So far as the evidence of D.W. 1 Babulal is concerned, he deposed that accused was deaf and dumb by birth. He did not understand anything but he could do some work on gestures. He admitted that accused had assaulted the prosecutrix, but said that she had suffered injury by fall from the tree. He denied that the accused had committed sexual intercourse with the prosecutrix.

16. On due consideration of the evidence adduced by the prosecution as well as by defence, it is amply established that the accused had committed the offence of rape on the prosecutrix. The Trial Court has found the accused guilty after meticulous and critical analysis of the evidence adduced on record. Even on careful examination of the evidence and re-appreciation of the same, I am inclined to agree with the learned Additional Sessions Judge's conclusion that the accused had committed rape on the prosecutrix.

17. I have already noticed that to sustain a conviction against the person subject to physical infirmity as accused in this case is, the Court trying him should not only be satisfied that he is sane but also that he is sufficiently intelligent as to understand the criminal nature of the act committed by him. From the evidence of P.W.9 Ginia, P.W.10 Hakkoo, P.W.11 prosecutrix and D.W.1 Babulal, who have known the accused from the past, it is established that the accused was though deaf and dumb, but he possessed the ordinary intelligence to choose between right and wrong and understood the nature of the act which he was committing, when he committed the offence of rape. Accordingly, the finding of conviction recorded by the Trial Court is hereby confirmed.

18. While confirming the Lower Court's conviction of the accused for the offence under Section 376, IPC, this Court has to pass order with respect to the sentence against him. Section 376(1), IPC provides that '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 ... provided that the Court may, for adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term less than seven years.'

19. In view of the above legal position, the minimum sentence with which accused can be punished should not be less than seven years unless there are adequate and special reasons to impose a sentence less than imprisonment for seven years. From the evidence of the prosecution witnesses and the various medical examination reports of the accused, it is established that the accused is a deaf and dumb person. It is also on record that he is suffering from mental retardation to some extent and that his fingers and toes of both the hands and feet are syndactily fused rendering his hands functionally non-utilizable. The incident had occurred as long back as in the year 1994.

20. In my opinion, the aforesaid circumstances seem to be adequate and special reason to impose a sentence of imprisonment against the accused for a term of less than seven years. Accordingly, I sentence the accused Boura @ Drigpal to undergo simple imprisonment of two years. Accused, who is on bail, shall surrender before the Trial Court within two months to serve but the sentence. The period of custody of the accused during the trial shall be taken into computation of sentence.

21. The petition is disposed of.