

Dilip Machhuwa Vs. State of Bihar

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SooperKanoon Citation : sooperkanoon.com/522143

Court : Jharkhand

Decided On : Nov-13-2006

Reported in : [2007(1)JCR54(Jhr)]

Judge : Dilip Kumar Sinha, J.

Appellant : Dilip Machhuwa

Respondent : State of Bihar

Disposition : Appeal dismissed

Judgement :

Dilip Kumar Sinha, J.

1. The present appeal has been preferred by the sole appellant against the judgment of conviction under Section 376, IPC and order of sentence passed respectively on 18th and 19th November, 1997 whereby and whereunder the appellant was sentenced to undergo rigorous imprisonment for 10 years.

2. The prosecution story in brief is that the prosecutrix Mira Kumari delivered her statement before the Bundu Police at about 8.30 p.m. stating, inter alia, that she was aged about 10 years and on the same day while she was returning from the grocery shop of Akchhay Mahto after pur-purchasing Biscuit, she came across the appellant Dilip Machhua who after delivering a Chocklet asked her to accompany

him and took her away towards Manager Bandh on the northern bank of the pond and layed her down from back side. She further narrated that the appellant terrorized that in case of raising alarm she would be thrown in the pond after killing her. When she could not resist out of fear, the appellant lowered down her pantee and committed some bad work (rape) on her. During commission of offence he kissed her and after commission she was let off. She returned back to her home and narrated the occurrence to her mother, father and maternal grand-father. Disclosing the identity of the appellant she narrated that the appellant was the driver of the vehicle of the landlord of the house where she with her parents and maternal grand-father were living on rent. The police registered Bundu P.S. case No. 48 of 1996 under Section 376, IPC and after investigation submitted charge-sheet against the appellant under the said offence.

3. Mr. A.N. Deo, the learned Counsel appearing on behalf of the appellant submitted that the conviction as well as the sentence passed against the appellant is unsustainable only on the ground that the prosecution failed to prove the offence of rape against the appellant.

4. Advancing his argument Mr. Deo submitted that though the prosecution had examined altogether 9 witnesses but PW 1 prosecutrix is the only alleged to be the eye-witness and even if her evidence is accepted in its entirety, no offence under Section 376, IPC is made out. As a matter of fact, none of the ingredients for constituting an offence of rape has been established so as to attract the punishment against the appellant under Section 376, IPC. The explanation given in the definition of rape under Section 375, IPC, it is mentioned that penetration is sufficient to constitute the sexual intercourse and the necessary ingredient to the offence of rape is lacking in the instant case. It is nowhere alleged in the statement of the victim prosecutrix that the appellant had penetrated in her private part.

5. Advancing his argument Mr. Deo submitted that in the instant case medical examination report of the prosecutrix was proved Ext. 5 by a formal witness and not by the doctor who had examined her and in this manner the appellant has been prejudiced for being denied the opportunity to cross-examine the doctor who opined that attempt of rape was done on Mira Kumari.

6. Learned Counsel pointed out that the pantee of the prosecutrix seized by the Investigating Officer was never sent to chemical analyst for its examination nor the same was produced before the Court as material exhibit. The chemical examination report of the pantee of the prosecutrix could have been a corroborative piece of evidence for the prosecution but in absence of any chemical examination report of the pantee, adverse inference can be drawn against the prosecution. Similarly, the appellant was arrested from his home, soon after institution of the case, but he was never produced before any doctor for his medical examination and therefore, there is no corroborative evidence on the record to implicate the appellant for the alleged offence under Section 376, IPC. Concluding his argument Mr. Deo submitted that an important witness Akchhay Mahto from whose shop the prosecutrix was returning after purchasing Biscuit has not been examined in order to prove the date and time when Mira Kumari had visited his grocery shop and that Investigating Officer PW 9 has clearly stated that though there was material in the case diary in relation to the opinion of the doctor with respect to his observation that appellant attempted to commit rape on Mira Kumari but upon direction made by the Senior Police Officer (Supervising Authority) he submitted the charge-sheet under Section 376, IPC against the appellant after investigation.

7. I have gone through the judgment delivered by the learned 2nd Additional Judicial Commissioner, Khunti and find that when the prosecution failed to examine the lady doctor Karuna Barnwal in spite of long awaiting her presence in the witness-box, the Additional Public Prosecutor filed a petition on 24.9.1997 to prove the medical report of the lady doctor under Section 294 of the Code of Criminal Procedure to which the learned defence counsel Shri J.B. Ghosh extended his consent to take the medical report into evidence which was incorporated in the order-sheet dated 24.9.1997 and accordingly medical report of the victim was proved under Section 294(3). Cr PC and marked Ext. 5. The learned trial Judge recorded the extract of the opinion from the injury report (medical report) in the following manner:

No foreign hair on her cloth or private part. No mark of injury on her private part Swab taken from Posterior fourchette, was sent to Pathological test and as per

pathologist report received on 9.4.1996 occasional dead spermatozoa was seen.

8. For better appreciation it would be relevant to record the extract of the medical report of the prosecutrix Meera Kumari who was examined on 6.4.1996 at about 11.28 a.m. and the following was recorded:

Teeth 12/12

Auxiliary and pubic hair present (scanty).

Breast not developed.

No injury on her body or on her private part weight 46 lbs height 5'.

No foreign hair, no stain on her cloths or private part.

No mark of injury on her private part and that the swab was taken from her fourchette and was sent to the pathologist and it was reported by the report dated 9.4.1996 that occasional dead spermatozoa seen. The injury report was prepared by Dr. Mrs. K. Barnwal.

9. From the injury report it is evident that no injury was found on any part of the victim girl including on her private part and even her hymen was found intact.

10. Learned Counsel for the appellant submitted that neither the prosecutrix is specific that the appellant had penetrated in her private part nor it is evident from the medical/injury report that any penetration was made by the appellant and therefore. the conviction of the appellant is not sustainable.

The trial Judge on the basis of the materials stated above, observed:

Besides, the explanation given in Section 376 of the IPC says that penetration is sufficient to constitute rape but the code does not specify how much penetration and as such no matter, the little penetration constitutes offence punishable under Section 376 of the IPC. In the case of Abdul Majid reported in [1927] 28 Cr LJ page 241. it was held that it is not essential that the hymen should be ruptured, provided it is clearly proved that there was penetration even though partial.

On the basis of such observation the appellant was convicted under Section 376, IPC and was awarded substantial sentence of 10 years rigorous imprisonment.

11. In disagreement with the learned Sessions Judge 1 find that the prosecution failed to prove the penetration by the appellant in the private part of the prosecutrix. The prosecutrix herself, though a minor girl was not capable to understand the gravity of the situation under which she had undergone and an attempt was made to ravish her. Similarly the doctor who had examined the victim girl did not find any injury on the private part of the victim girl aged about 10 years and she was also of the opinion that attempt was made to commit rape and not that rape was committed on the minor girl on the basis of finding of occasional dead spermatozoa in the pathological report of the vaginal swab taken from the posterior fourchette of the victim girl. No injury was found on her labia minora. Had there been any penetration on the private part by an adult on a girl aged about 10 years, the natural colour of labia minora would have been found changed but since there is no such finding of the doctor about the change of the colour it goes in favour of the appellant.

12. Admittedly, the victim girl Mira Kumari is the sole eye-witness as well as the injured witness who has consistently proved the allegation against the appellant by corroborating her earlier version what she had narrated before the police at first point in time. She admitted some pain in her private part at the time of commission of offence and her behaviour is very natural that soon after the occurrence she went to her house and narrated the occurrence to her mother, father and maternal grand-lather as also their landlord Ram Bhajan Choudhary who took her to the police station. The occurrence took place on 5.4.1996 at about 6-7 p.m. and the case was instituted on the same day after about 1-1/2 hours at 20.30 hours with the Bundu Police on the statement of the prosecutrix. The other witnesses such as PW 2 Nishikant Sonar, PW 3 Kohni Devi, PW 4 Ram Narayan Pan-dey, PW 7 Deepak Sawarnkar, PW 8 Basant Kumar Sonar have consistently corroborated the statement of the prosecutrix Mira Kumari. The Investigating Officer PW 9 Shyamla Pandey though admitted that he had seized the pautee of the victim in presence of two independent witnesses to which a seizure list was prepared but the same was not sent for chemical examination. The incriminating material

collected in course of trial was put to the appellant during his statement recorded under Section 313, Cr PC but he expressed innocence.

13. From the facts and circumstances I find that the penetration by the appellant to the prosecutrix could not be proved so as to attract the punishment of rape under Section 376, IPC which is a condition precedent as defined under Section 375, IPC. But there is positive material on the record that an attempt was made by the appellant to commit rape on the prosecutrix Mira Kumari which he could not succeed on account of her minor age. However, the appearance of dead spermatozoa on the posterior part of her fourchette indicates that though the appellant was unsuccessful in his attempt of penetration but he ejaculated. The question of consent or no consent in a case of a minor girl aged about 10 years for the offence under Section 376, IPC does not arise.

14. In view of the above finding the conviction of the appellant under Section 376, IPC and sentence thereto of 10 years rigorous imprisonment awarded against him is unsustainable and hence it requires interference. However, in the facts and circumstances, I find that the appellant had attempted to commit rape on the prosecutrix Mira Kumari on the alleged date and time of occurrence and therefore, the case is proved under Section 376/511, IPC. The conviction of the appellant under Section 376, IPC is modified and he is convicted under Section 376/511, IPC. Accordingly, the sentence of 10 years rigorous imprisonment is modified to 5 years rigorous imprisonment to the appellant. With such modification in conviction and sentence against the appellant this appeal is dismissed.

15. The bail of the appellant stands vacated and he is directed to serve out the sentence as modified aforesaid. The Court below is to take effective steps in this regard.