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Rabi Kumar and Anr Vs. The State of Jharkhand

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Court : Jharkhand

Decided On : Sep-03-2015

Appellant : Rabi Kumar and Anr

Respondent : The State of Jharkhand

Judgement :

1 Cr.Appeal (DB) No.88 of 2015 ------- [Against the judgment of conviction and order of sen- tence dated 21st January, 2015, and 22nd January, 2015, respectively, passed by Sri Girish Chandra Sinha, learned 1st Additional Sessions Judge, Seraikella, in Sessions Trial No.173 of 2011] ---- 1. Rabi Kumar, son of late Shravan Kumar, resident of Village -Urmal, P.O. & P.S. Chauka, District -Seraikella-Kharsawan.

2. Duryodhan Gope @ Manjhla Gope, son of Sohan Gope, resident of Karandih, PO&PS- Ichagarh, District -Seraikella-Kharsawan ..... Appellants -Versus- The State of Jharkhand ..... . Respondent ------ For the Appellant : M/s Kaushik Sarkhel, Advocate P.A.S. Pati, Advocate, Tarun Kumar Mahto, Advocate For the State : Mr. Pankaj Kumar, APP ------ PRESENT HONBLE MR. JUSTICE VIRENDER SINGH, CHIEF JUSTICE HON'BLE MR. JUSTICE P.P. BHATT ------ Dated, the 03rd September, 2015 Per Virender Singh, C.J.

(Oral):

1. Since the instant appeal has arisen from the conviction suffered by both the appellants namely Rabi Kumar and Duryodhan Gope @ Manjhla Gope (hereinafter referred to as the accused) for the offence punishable under Section 376(2)(g) IPC, priority has been given to it over and above other appeals although filed in the year 2015 only and admitted on 4th March, 2015. Otherwise also, such type of cases have to be put on fast track for their disposal.

2. The sentence awarded to both the accused is ten years rigorous imprison- ment and a fine of Rs.5,000/- each, in default thereof, to undergo further rigorous imprisonment for six months.

3. As stated at the Bar, both the accused are in custody for the last four years.

4. The prosecutrix (name not being disclosed) and the accused persons hail from the same village (Shantinagar, Gamhariya). The prosecutrix is widow and lost her husband about 13 years before the occurrence. The present case was regis- 2 tered on the information supplied by her to one Gopal (not cited as witness), who reduced the same into writing, and thereafter, it was given to the concerned police of Police Station, Adityapur. It bears the thumb impression of the complainant-prosecutrix.

5. The date of occurrence as one finds from the initial report lodged with the police is of the night intervening 20/21.07.2011 at about 12 a.m.(Wee Hours). The first information report was lodged with the police on the following date i.e. 21.07.2011 at 14:40 (2:40 p.m.). The prosecutrix was examined by the doctor (P.W.-Mita Singh) on 22.7.2011 at 1:40 p.m.

6. The age of the prosecutrix is 40 years. She alleges that on 21/21.07.2011 at about 12:30 a.m., when she was sleeping in her house, she woke up all of a sud- den on hearing some sound. As the electric bulb was on, she could see both the accused in that light. She further alleges that both the accused persons entered in her room and then accused -Rabi Kumar caught hold her and grounded her on the floor and put his hand on her mouth and accused Duryodhan Gope @ Manjhla Gope did bad act with her. (In vernacular, she stated- Dushkarm Kiya). She further alleges that after that, the accused-Rabi Kumar also did the same act (in vernacu-

lar, she stated- Dono bari-bari se mere sath jabran Bhaybhit Kar sambhog kiya or jate waqt bola ki kisi ko bataogi to jaan se maar denge). She further alleges that she immediately disclosed about the occurrence to the persons staying nearby. This is all what we find in her initial statement, which is the basis of recording the first information report as P.S. Case No.168 of 2011 dated 21.07.2011 under Section 376(2)(g)/34 of the Indian Penal Code.

7. The investigation of the present case has been conducted by P.W-Vanshid- har Prasad Shrivastava, who visited the place of occurrence, recorded the state- ment of Balram Satpati, Arun Pradhan, Kashi Nath Das, Navin Das, Ranjit Prad- han, Yogendra Mahto, Gopal and Manto Das. Navin Das, happens to be the Prad- han of the village, is also distantly related to the prosecutrix. According to the villagers, he is 'Damaad' of the prosecutrix. 3 8. The prosecutrix, when medically examined by the doctor, P.W.-Mita Singh, she noticed no external or internal injury on her person. The x-ray was conducted with regard to wrist joint, elbow joint, knee joint and pelvis joint, which indicates no injury. It appears that all these x-rays were conducted as the case set up by the prosecutrix was that some force was used against her. So far as vaginal examination is concerned, histopathological report reveals that no spermatozoa was noticed either alive or dead. With regard to Epithelial cells, pus cells, RBC and Bactria, it is NIL. Dr. Mita Singh further opined in her report that there was no history of recent past sexual intercourse with the pros- ecutrix. The medical report has been exhibited as Ext.-1 during the trial.

9. After completion of the investigation, challan was filed against both the accused for facing trial of the offence of Section 376(2)(g) IPC, accordingly, charged also for the said offence and now stand convicted and sentenced as sated above.

10. The prosecution in order to prove the charge, has examined as many as ten witnesses, but we do not feel the necessity of entering into the details of the witnesses, as most of the witnesses have been declared hostile, whereas some of them are the witnesses of hear-say evidence.

11. Primarily, the case of the prosecution is hinging upon the evidence of the prosecutrix only. Since it has come in the evidence that immediately after the

occurrence, the matter was disclosed to Navin Das, the Pradhan of the village, evidence of Navin Das also requires to be appreciated along with the evidence of the prosecutrix. We are also conscious of the fact that the prosecutrix does not whisper a word in her initial statement, which has been made the basis of registration of the case with the police that she had disclosed about the occurrence to Navin Das- the Pradhan of the village.

12. Mr. Kaushik Sarkhel, learned counsel appearing for both the accused, has not joined any issue vis--vis the identity of the accused and rightly so, as 4 both the accused hail from the village of the prosecutrix only, therefore, she knew them earlier. The main attack launched by the learned counsel is on the evidence of the prosecutrix and states that if the same is read in its right per- spective, it is suffering from certain inherent defects and when seen with the evidence of Navin Das -the pradhan of the village, it becomes more untrustwor- thy so as to hold the conviction of both the accused.

13. Learned counsel submitted that when the prosecutrix stepped into the witness box, she categorically stated that immediately after the occurrence, she disclosed about the occurrence to the ladies residing nearby and assembled there and it is, thereafter, P.W.4-Navin Das- the pradhan of the village, was called, who took the prosecutrix along to his house, where he summoned both the accused also and from there, the prosecutrix and both the accused were taken to the police station and then to the hospital, where all of three persons were medically examined. Learned counsel submitted that when one reads the evidence of P.W.-Navin Das, he gives altogether different version. He stated that after the occurrence, when the matter was reported to him, he went to the house of the accused persons, who were not found available there, and subse- quently, the police arrested them when they were patrolling in the village. Learned counsel submitted that the present case is registered on 21.07.2011 i.e. the next day of the occurrence and that as per the prosecutrix, the accused were with the police on 21.07.2011 itself when she was also available with the police and by that time the case was also registered, still the prosecutrix and the accused were not taken to the doctor for their medical examination and they were taken on the following date i.e. 22.07.2011. From this, the learned counsel wanted to develop that the story as

projected by the prosecutrix in the court, with regard to the occurrence, and immediately what had happened after the occurrence, is not a true account of occurrence, thus as to when the case was lodged with the police becomes highly doubtful. 5 14. Learned counsel submitted that another fact, which demolishes the case of the prosecutrix is the medical evidence, as all the x-ray examinations of the prosecutrix were conducted by the concerned doctor to ascertain whether she had received any external injury on any part of her body, but the x-ray reports available on trial court record falsify the story of the prosecutrix as put forth by her in her initial complaint lodged with the police or even her statement in the end.

15. Learned counsel submitted that not only that, the case of the prosecutrix turns out to be very weak on account of the aforesaid lapses, even the internal medical examination of the prosecutrix is also indicative of the fact that nothing, as alleged, has happened, as the histopathological examination of the pros- ecutrix rules out the possibility of any intercourse with her, there being no pres- ence of spermatozoa either alive or dead. As per P.W.,Doctor- Mita Singh, it is not a case of sexual intercourse in recent past and that fact further demolishes the case of the prosecutrix.

16. Learned counsel submitted that another aspect which weakens the case of the prosecutrix further is that when she stepped into the witness box, she was very categoric in stating that on account of the rape committed upon her by both the accused, her clothes had smeared with blood and that some blood had also fallen on the ground, which fact is falsified, as it has nowhere come in the evidence of P.W., Doctor Mita Singh that she noticed any blood stain while internally examining the prosecutrix. The histopathological examination is also silent about it. Even otherwise, the investigating officer, P.W.Vanshidhar Prasad Shrivastava, when stepped into the witness box, also does not support the case of the prosecutrix as he was categoric in stating that when he visited the place of occurrence, he did not notice any blood on the ground. Learned coun- sel submitted that not only that, even the blood stained clothes have not been taken into possession by the investigating officer. Learned counsel submitted 6 that had the story of clothes having blood stained been true, the Investigating Officer would have seized the clothes as immediately after the occurrence the prosecutrix was

with the police along with P.W.Navin Das.

17. Learned counsel, while pointing out to the aforementioned infirmities in the case of the prosecution, has taken the Court through the evidence available on record and states that when the prosecutrix stepped into the witness box, she made a crude attempt to improve her case from the one originally set up by her for the reasons best known to her, although, the case of both the ac- cused, as one finds from the suggestion put to the witness to the prosecutrix or even to the P.W.4-Navin Das- the pradhan of the village, is that they were falsely implicated in this case on account of village rivalry, as the accused were against the pradhan who happens to be the relative of the prosecutrix. He sub- mitted that even if the defence put forth by the accused is not getting any sup- port, still that cannot be said to be a ground for believing the prosecution case if it is otherwise weak.

18. Learned counsel, thus prays for acquittal of both the accused, which prayer is vehemently opposed by Mr. Pankaj Kumar, learned Additional Public Prosecutor stating that the prosecutrix being a widow, has fallen prey, at the hands of both the accused when she was all alone in her house. He submitted that the prosecutrix is consistent on the vital aspect of the case throughout, ini- tially when she lodged the report with the police on 21.07.2011, and then in her statement recorded under Section 164 Cr. P.C and during trial also. Learned counsel submitted that no doubt certain discrepancies have been crept in her statement, but all those are not of that significance so as to dislodge her case in toto. He fairly submitted that there appears to be some weakness in the medical evidence also, but that too would not demolish the version of the prosecutrix. He, thus, prays for upholding of the conviction/ sentence of both the accused as already recorded by the learned trial court. 7 19. While dealing with the case of Section 376(2)(g) IPC, Hon'ble Supreme Court in case Rai Sandeep Alias Deepu Vs State (N.C.T. of Delhi), reported in (2012) 8 SCC21 while commenting upon the quality of sterling witness, ob- served in Para-22, as under :

22. In our considered opinion, the sterling witness should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its

face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecu- tion qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons in- volved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of of- fence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of ev- ery other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a sterling witness whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should re- main intact while all other attendant materials, namely, oral, docu- mentary and material objects should match the said version in ma- terial particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

20. It is also well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for 8 seeking corroboration. The evidence of the prosecutrix is more reliable than that of any injured witness. The testimony of the victim of sexual assault is vital, un- less there are compelling reasons, which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of the victim of sexual assault alone to convict the accused, where her testimony inspires

confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of the injured witness. Even minor contradiction of insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out, and otherwise, reliable for prosecution case.

21. We are examining the present case on the anvil of aforesaid principles. Let us scan the evidence of the prosecutrix to form an opinion, whether she is a sterling witness on whose evidence the conviction of both the accused for such a serious charge can be maintained or it is suffering from certain inherent infir- mities, which knock at the bottom of the case so as to dislodge the case of the prosecution in its totality. It is unfortunate that the prosecutrix has failed to pass the tests mentioned above. Her statement, when rescanned very minutely vis-- vis the grave charge of gang rape slapped upon both the accused, we are of the view that it is not free from doubt as she, for the reasons best known to her, made an attempt to improve upon her case when stepped into the witness box. When her evidence is appreciated along with the evidence of P.W.Navin Das, who happens to be her relative also and the pradhan of the village, it appears that the very case set up by the prosecutrix is not the true account of the occur- rence, rather there is tinge of very vital improvement made during the trial inas- much as the prosecutrix made an attempt to develop a story of her choice to make her case more weighty stating that her clothes got blood stained on ac- 9 count of bad act committed upon her by both the accused, which fact is totally washed away in the light of the evidence available on record. Not only that, the case set up by her is falsified by the medical evidence. Admittedly, immediately after the occurrence, she was with the police till she was examined by the P.W.- Doctor Mita Singh, therefore, there could not be any occasion for her to even wash her genitals. In this eventuality, the histopathological examination would have supported her version, whereas contrary to it, it indicates that no sperma- tozoa was found either alive or dead. P.W.Doctor Mita Singh, has also stated that there appears to be no history of recent past sexual intercourse with the prosecutrix. Even if we give some margin to the case of the prosecutrix, she be- ing a married lady, but the fact of the matter

is that she is a widow and that her medical examination should have given some indications of sexual intercourse, which fact is conspicuously missing in the case on hand, if one examines the medical evidence available on record.

22. What disturbs us in this case is that there is also no evidence available with regard to the medical examination of both the accused so as to say that they were physically fit to perform sexual intercourse. Although, we do find the medical slip available on the trial court record with regard to the medical exami- nation of both the accused, but the doctor, who medically examined the ac- cused for that purpose, has not stepped into the witness box. Not only that, his name does not figure in the list of witnesses. Undoubtedly, there appears to be a lapse on the part of the Investigating Officer in this regard as he should have taken the pain to show him in the list of witnesses. Equally, the Additional Public prosecutor has also been casual about it, otherwise, he could file an application before the trial court under Section 311 Cr. P.C for examining the doctor, being an important witness. Be that as it may, the fact of the matter is that the medical examination of the accused is not available on record. This aspect, in any case, would also be a ground to be taken in favour of the accused and no latitude can 10 be shown to the prosecution, where the accused are facing such a serious charge. We may state here that had the Investigating Officer bothered to go in for DNA test in this case of the prosecutrix as well as of the accused, as is now the requirement after incorporation of Sections 53-A and 164-A of the Code of Criminal Procedure with effect from 23.06.2006, it would have really facilitated the prosecution to prove its case to a great extent, if the accused were actually involved in the commission of offence.

23. What appears to the Court, while examining the entire prosecution case, is that the witnesses, who have been declared hostile, in this case, were the wit- nesses of corroboration. The weak evidence of the prosecutrix when not getting any corroboration from any source, makes it further weak so as to place re- liance on the same. As stated above, the evidence of Navin Das, the pradhan of the village, which is in the shape of hear-say evidence, is also not convincing, which would lend any support to the case of the prosecutrix as his name does not figure in the initial complaint lodged by the prosecutrix with the police, whereas he projects

himself to be there at place of occurrence with the pros- ecutrix as the villagers called him immediately after the occurrence. The wit- nesses, who were immediately informed of the occurrence, have been declared hostile. Even otherwise, the evidence of P.W.-Navin Das is at variance with the evidence of the prosecutrix, therefore, no credence can be attached to his evi- dence.

24. In the decision rendered in case of Krishan Kumar Malik Vs State of Haryana, reported in (2011) 7 SCC130 in respect of offence of gang rape un- der Section 376 (2)(g) IPC, in para-31, it has been held as under :

31. No doubt, it is true that to hold an accused guilty for commis- sion of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected here- 11 inabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

25. As a sequel to the aforesaid discussion, we find that the solitary version of the prosecutrix cannot be taken as a gospel truth in the absence of any other supporting evidence, rather the medical evidence, on the other hand, demol- ishes her case in totality. Viewed thus, there is no scope to sustain the convic- tion. In our considered view, the prosecution has miserably failed to establish the guilt of gang rape falling within the mischief of Section 376(2)(g) IPC against the present two accused. They deserve acquittal.

26. The appeal, on hand, thus, stands allowed and the judgment of conviction and order of sentence dated 21st January, 2015 and 22nd January, 2015, respec- tively, passed by learned 1st Additional Sessions Judge, Seraikella in Sessions Trial No.173 of 2011, are, hereby set aside.

27. Both the appellants, named above, are acquitted of the charges. They shall be set at liberty forthwith, if not required in any other case.

28. Registry is directed to intimate the jail authority of the outcome of the or- der without any delay. The Trial Court shall also be apprised accordingly. (Virender Singh, C.J.) (P.P. Bhatt, J.) High Court of Jharkhand, Ranchi, Dated the 03rd of September, 2015. Anu/SI/LAK NAFR

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