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Court : Patna

Decided On : Apr-29-2011

Judge : Dharnidhar Jha, J.

Acts : Indian Penal Code (IPC) - Sections 376, 511, 307, 326, 354; Arms Act - Section 27; Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Criminal Appeal (SJ) No.465 OF 2005.

Appellant : Sunil Kumar.

Respondent : State of Bihar.

Advocate for Def. : Shri Ajay Mishra, Adv.

Advocate for Pet/Ap. : Sarvshri Anjani Kumar; Sudhir Kumar Upadhyaya, Advs.

Judgement :

1. The present appeal questions the correctness of the judgment of conviction passed against the appellant by the learned 2nd Additional Sessions Judge, Hilsa on 12.7.2005 in S.T. No. 102 of 1991 by which the solitary appellant was found guilty of committing offences under sections 376/511 and 307 IPC and section 27 Arms Act while the appellant was acquitted of the charge under section 452 IPC. After hearing the appellant on sentence on 16.7.2005, the learned trial judge directed the appellant to suffer rigorous imprisonment for ten years under section 307 IPC and five years under sections 376/511 IPC. As regards the conviction of the appellant under section 27 Arms Act, the appellant was directed to suffer

rigorous imprisonment for one year only.

2. The prosecution case is contained in the Fardbeyan of P.W. 1 Damyanati Devi recorded on 28.8.1990 at 3 P.M. by S.I. Rajdeo Prasad at village Dariyapur. It was stated that the informant was residing at the house of her maternal grand mother Janki Devi since last ten years with a view to taking care of her. It was alleged that at about 12 A.M. someone entered inside the house in the night intervening 27th and 28th August, 1990 and attempted to catch hold of the informant, as a result of which she jumped out of the bed and started raising a halla. She was assaulted by slaps on her ear and face and was asked to keep silent. The lady stated that from the voice of the man as also in the light, which was emanating from a Dhibri (earthen lamp) burning there, she could identify the present appellant. The informant got out of the clutches of the appellant and ran into her Angan and started shouting that the appellant had come to commit theft inside the house. It is alleged that the appellant also came running inside the Angan and put the lady forcibly on the ground and attempted to sexually assault her. The lady continued fighting with the appellant and also continued raising halla. However, in that process, the appellant bit two three times at the scapular part of her body. It was stated that being attracted on the shouts of the lady, people started coming from the neighbourhood and in that process Smt. Urmila Devi (P.W.2) who was the daughter-in-law of the Mukhia Kesho Prasad came there along with her daughter Smt. Sumitra Devi (P.W.3) with a lantern to whom the informant stated about the acts of the appellant, who had, by that time, ran away from there.

3. The prosecution case further was that while the informant was narrating the incident to others, the appellant re- appeared with a pistol and abusively asked the informant (P.W. 1) as to why she was naming him and fired a shot at the informant but, incidentally, that hit P.W. 2 Urmila Devi who fell injured. At that particular moment, Kishori Pandey (P.W. 4) and others had assembled there and saw the occurrence. P.W. 2 Urmila Devi was taken to hospital for treatment.

4. The informant stated that she and her grand mother were widows and there was no male member in the house and, as such, none of them could go to police station for lodging the case, which was recorded after arrival of the Officer

Incharge of Nagarnausa police station.

5. It appears from the evidence of P.W. 7 ASI Rajdeo Prasad that he was entrusted with the task of investigating the case and in that course he inspected the place of occurrence. During that course, an empty .315 bore cartridge was produced before him by the informant of the case, which was seized by preparing the seizure memo (Ext. 2/2). He, thereafter, recorded the further statement of the informant P.W. 1 and the statement of other witnesses, also obtained the injury report of the injured including the informant and after closing the investigation, sent up the solitary accused for trial.

6. The defence of the accused was that the accused had committed no offence as was alleged by the informant and it was on account of the Mukhia, who was the father-in-law of P.W. 2 that a false case was foisted upon him in collusion with the doctor and the investigating officer.

7. In support of the charges, the prosecution examined seven witnesses out of whom, P.W. 4 Kishori Pandey was declared hostile. P.W. 5 Bhagwat Paswan was a witness of formal character, who exhibited the FIR of the case as Ext. 3. P.W. 6 Dr. Rajendra Choudhary had examined both P.Ws 1 and 2 and had issued injury certificates (Exts. 4 to 4/2). P.W. 1 Damyanti Devi, P.W. 2 Urmila Devi and P.W. 3 Sumitra Devi were witnesses to the occurrence and they supported the charges.

8. The defence examined a solitary witness Rajvanshi Singh and produced a certificate granted by Assistant Electrical Engineer, Supply Sub Division, Hilsa on the fact that there was no electric supply on the date of occurrence in the village. The purpose of examining D.W. 1 was to bring the contents of Ext. An on record, which was further to point out that there, was no means of identification.

9. It was contended by Shri Anjani Kumar, learned counsel for the appellant that Fardbeyan was recorded after fifteen hours of the occurrence and the informant did not make any attempt either to lodge the information herself or get it lodged through anyone else. As may appear from the evidence of P.Ws 2 and 3, who had, as per the claim of P.W. 1, arrived after hearing the shouts of P.W. 1 at the house of the lady informant, they were examined after about seventeen days of the

incident and that the delayed examination of P.Ws 1 and 2 by the police was fatal to the prosecution case. There is consistent evidence of all witnesses that many persons other than P.Ws 1 and 2 had also arrived but no one had come to support the charges. It was contended that it could not be a case under section 376 read with 511 IPC and the intention was not to attempt the killing of P.W. 2, who was hit accidentally and as such, it could be a case under section 326 IPC.

10. As against the above, Shri Ajay Mishra, learned APP submitted that the story contained in the fardbeyan was corroborated not only by P.W. 1 herself but, it was further corroborated by P.Ws 2 and 3, the evidence of whom was also supported by the seizure of the empty cartridge and by evidence of the doctor recording the finding of relevant injuries. It was a clear case of section 376/511 and 307 IPC.

11. Consistency appears the hallmark of the evidence of P.W. 1. From her evidence, which is a very long record running into 41 pages, what I have gathered is that the lady was married at an early age of 11-12 years, was widowed quite earlier in her life and was spending the life of a widow as a dependent upon her grand mother. On the day of her deposition, she was aged 35 years as appears recorded by the learned trial judge in the heading of deposition of P.W. 1. The age of the present appellant, which was recorded by the learned trial judge in his statement under section 313 Cr. P.C. was 20 years. This age of prime youth could be maddening for a young man, who was finding almost a young lady leading isolated and secluded life in a house where there was no male member to take care of them and to act as a shield of safety. Out of the two ladies, one was old and the other on the maturity of her youth. This is the background in which the evidence has been appreciated by me.

12. It has been stated by P.W. 1 that while she was sleeping inside her house, in fact inside its passage after bolting the door from inside, the appellant descended from the roof top through the stair of the house and came to her while she was sleeping on a chowki and started catching hold of her. As soon as he caught hold of the lady, she sprang up and stood up and ran inside the Angan and started shouting that she was being caught by a man. The man started slapping her and asked her to keep silent. The man was identified in the light of the dhibri which

was burning there as also in the electric light as the present appellant. When she had ran into her Angan, the appellant chased her up to that place and putting her down on the ground there attempted to commit raped upon her. She resisted the attempt and also continued raising halla. During that course, the appellant bit on the posterior part of her left arm but still the lady continued raising halla and also continued her valiant attempt to save herself, as a result of which she could not be raped.

13. On account of the resistance set up by the lady, the appellant gave up and fled away from there, whereafter the lady opened the entry doors to follow the appellant when she found that P.Ws 2 and 3 had already reached up to the entry of the house with a lantern who were narrated the story as to how the appellant had acted with P.W. 1.

14. P.W. 1 stated that just when she was narrating the incident to P.Ws 2 and 3, the appellant re-appeared with a pistol and asked as to why she was naming him, upon which P.W. 1 stated that because she had identified him as the person who had done the act. At this point, the appellant fired a shot targeting the informant but she was not hit and instead the missile hit Urmila (P.W.2), who was standing just by the side of P.W. 1, who fell down and was picked up by her father-in-law to be taken to the hospital.

15. On consideration of evidence of P.W. 1, mainly in a very long cross-examination, what I could find is that the witness withstood the test of cross examination. There is no fact which could be picked up so as to lessening the value of her evidence or could be treated as a material fact which was destroying the evidence of P.W.1 or was making her evidence ineffective. Even the manner of firing the shots gets corroborated as she has stated that P.W. 2 was standing by her side when the appellant fired the shot. This line in examination-in-chief was tested by cross- examination in paragraph 31 and subsequent paragraphs thereof. In paragraph 32, she has stated that when the shot was fired, P.W. 2 was standing very close to her on her left and P.W. 3 was as close to her on her right. She further stated in paragraph 33 that the appellant fired the shot while standing up and she could not notice as to whether he was aiming at her chest or at her head.

16. If one considers the evidence of Dr. Rajendra Choudhary, P.W. 6, in that connection, it may be found that P.W. 2 Urmila Devi was hit on the front side of her abdomen and it was a circular lacerated wound with charred margin. It was stated that both P.W. 1 and P.W. 2 pointed out that the solitary shot was fired from a distance of 2-3 cubits. But, one has always to appreciate the evidence of lady witnesses keeping in mind that they must have had a highly worked up mind which could not allow them to exactly state the distance in between them and the assailant. In addition to the above, it has always to be appreciated that it was night and the distance as has been narrated by P.Ws 1, 2 and 3 could not be an exact distance, it could be estimates as they have said that it was about 2 3 cubits. The shot was fired from a very close range is indicated by one feature of injury that the doctor found the injury bearing charred margin. The part of the story that the appellant had bit on the person of P.W. 1 gets corroboration from the evidence of P.W. 6 when he was stating that he found abrasions on the left shoulder region 2" x 1" and on the left shoulder region also measuring 2" x 1". The informant has stated that she was assaulted by the man who had intruded into her privacy so as to criminally assaulting her by fists and slaps. In the above connection, P.W. 1 has stated that she was assaulted on her face and ear. This part of the story also gets corroboration from P.W. 6 when he was recording the finding in his medical report that the lady P.W. 1 was bleeding from her left ear. The lady informant was forcibly put down on the ground so as to be raped and that is probabilized by the finding of an abrasion below the left knee of P.W. 1 measuring 2" x 1 1/2".

17. The initial part of the story which related to the intrusion of the appellant into the privacy of the lady while she was in her sleeps after securing herself by bolting the doors of her house, and the subsequent acts of the appellants of catching her and chasing her up to Angan while assaulting her or criminally assaulting her had never been seen by any one. The informant has not stated that even her grand mother had witnessed those acts. She could be the only witness to the occurrence and the court does not find any compelling reason as to why her evidence on that part of the occurrence could be disbelieved. She appeared a very competent witness. She was bearing injuries which were corresponding to the allegations and, above all, she was a lady who was not bearing any grudge against any one, least to talk of against the present appellant. Her evidence inspires confidence. I

have already noted that her cross-examination, which was quite lengthy and carried out on several dates and spread over 41 pages of recorded deposition, does not contain even an iota of material facts so as to rendering her an untruthful witness.

18. So far as evidence of P.Ws 2 and 3 are concerned, they are persons unrelated to and uninterested with the informant of the case. They are the neighbours and both of them, out of sheer anxiety and curiosity, arrived at the place of occurrence hearing the shouts seeking help of others on the unprecedented act of a berserk male. P.W. 2 has stated, as does P.W. 3, that while they were asleep, they heard the shouts of 'Chor, Chor' and woke up and came to her house with a lantern when they were pointed out as to how the appellant had intruded into the house of P.W. 1 to commit the case, I have already discussed. While P.W. 1 was relating the assault part of the occurrence to P.W. 2 and P.W. 3, the appellant appeared at that particular time with a pistol and asked the informant not to name him upon which he fired a shot which hit P.W. 2. Consistency is there again in the evidence of P.Ws. 2 and 3 as regards the act of appellant in firing a shot targeting the informant which ultimately hit P.W.2. I have already pointed out the injury which was recorded by P.W. 6 upon P.W. 2. P.W. 6 has stated that he referred P.W. 2 to PMCH for treatment as the injury was grievous in nature and, subsequently, on receipt of the treatment chart he appears issuing his opinion vide Ext. 4 regarding the grievous nature of injury and refers to the treatment which was given by Dr. Rajeshwar Thakur. The prosecution could not examine Dr. Rajeshwar Thakur but had produced the prescriptions in respect of the treatment of P.W. 2 Urmila Devi and it is indicated that the shot fired by the appellant had caused gross faecal peritonitis due to about 2.5 cm. perforation of middle of the small intestine which was thoroughly repaired and the perforation was closed. The injury report granted by P.W. 6 after examining P.W. 2, which has been marked as Ext. 4/1, indicates that after having pierced through the thickness of the body of P.W. 2, it had exited causing injury which was repaired by Dr. Rajeshwar Thakur. Injury could be highly dangerous on account of having passed through and through the body of P.W. 2. This is imminently indicated by the fact that both P.Ws 2 and 3 have stated in their evidence that P.W. 2 remained in the hospital for fifteen days when she could be saved. Thus, the contention of the learned counsel that it might not be a case

under section 307 IPC does not find favour with this Court and the same is rejected. The appellant was rightly convicted under section 307 IPC and properly sentenced. However, the sentence of imprisonment for ten years, which was inflicted upon the appellant, appears insufficient under the circumstances of the case and specially considering the nature of the injury which was inflicted by the appellant upon P.W. 2. But, the difficulty with this Court is that it cannot enhance it as the appellant has not been served any notice of enhancement of sentence. If injury is caused, the section itself indicates that the sentence could be anywhere around imprisonment for life. When the section talks of injury, it always connotes injury of such proportion as could be dangerous to life and in a given case; the life would have been saved only by competent and valiant medical effort. The present was an ideal case in which the court below ought to have inflicted a sentence of imprisonment for life.

19. The contention of the counsel that P.Ws 2 and 3 were making statements before the I.O. after seventeen days or more than that period of the occurrence gets explained by the discussion I have just made in the present judgment. The lady was struggling for her life and was being administered surgical treatment by a surgeon, who was carrying out surgery to salvage her from the dangers of surviving the damage which had been caused by the gun shot. Above all, the law does not say that the witness has to come to make statement. It requires a witness to make statement if he meets the investigating officer or if the investigating officer approaches him with such a request of giving his or her statement. The very medical report issued by P.W. 6 (Ext. 4/1) indicates that P.W. 2 was referred to PMCH for treatment. I.O. of the case, who was examined as P.W. 7, has no where stated in his evidence that he went to Patna, approached the lady and attempted to record her statement but she had either refused or was reluctant to make statement. Similar is the case with P.W. 3 Sumitra Devi. If the I.O. of the case was not going to record the statement of the witnesses and if there is no evidence that in spite of being approached by police, both the witnesses were not making their statements, then how they could be faulted for giving belated statement to the I.O. The explanation is circumstantial and it emerges from the facts and situations obtained in the case.

20. As regards the contention that persons who had assembled at the scene of occurrence were also not examined, the court does not find any merit in this contention also inasmuch as there is no evidence either of P.Ws 1, 2 or 3 that any of the persons, who had assembled, were told about the incident by any of them. They might have been attracted to the scene of occurrence and they might have come to the scene of incident also and as such their evidence could have been of the category of hear say. If that evidence was not produced by the prosecution, it was not going to have any adverse impact upon the proof of charge.

21. Lack of electricity in the village may be genuinely true though Ext. A appears quite inadmissible in absence of examination of the person granting it, and further due to the non-production of the relevant records. However, the Dhibri, an ancient and only dependable source of light was available there, and that does not appear denied by the defence. Dhibri was the source of light.

22. I have already noted that it was an offence under section 307 IPC. As regards the conviction of the appellant under section 27 of the Arms Act, that also appears properly recorded and again the sentence under that section appears deficient. So far as conviction of the appellant under section 376/511 IPC is concerned, this Court doubts that the appellant could have been convicted for that offence on account of the fact that evidence given by P.W. 1 does not indicate that the real attempt on raping her was made. The evidence is that the appellant put the lady down on the ground to commit rape upon her but, what further acts were committed by the appellant in order to turning his preparation into an attempt, does not appear from evidence. It appears to this Court that it was merely in the realm of preparation when the evidence indicated that the appellant was intruding into the house, was assaulting the lady and was putting her down on the ground and was struggling with her to violate her. No real evidence of attempt on the lady appears available on record of the case, as a result of which, the conviction of the appellant under section 376/511 IPC is set aside. It appears to the court that it merely could be an offence under section 354 IPC and the court directs him to suffer rigorous imprisonment for three years under section 354 IPC. Sentences to run concurrently.

23. With the above modification in conviction of the appellant and with the above alteration in the sentence which has just been passed by me, I find no merit in the appeal and the same is dismissed.

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