

Basudeo Mandal Vs. State of Bihar

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Court : Patna

Decided On : Aug-06-2013

Judge : Akhilesh Chandra

Appellant : Basudeo Mandal

Respondent : State of Bihar

Judgement :

1 IN THE HIGH COURT OF JUDICATURE AT PATNA Criminal Appeal (SJ) No.289 of 2010 (Against conviction and sentence awarded on 8th February 2010 by 1st Additional Sessions Judge, Fast Track Court, Jamui, in Session Trial No. 85/2008 arising out of Jhajha P.S. Case No. 106/2007, G.R. No. 1166/2007.)

===== Basudeo Mandal Son Of Late Maruyan Mandal Resident Of VillageTarakura, P.S.- Jhajha, District- Jamui. Appellant Versus The State of Bihar Respondent

===== Appearance :

For the Appellant/s : Mr. Prakash Mahto, Advocate For the Respondent/s : Mr. S.N. Prasad, Additional Public Prosecutor

===== CORAM:

HONOURABLE MR. JUSTICE AKHILESH CHANDRA ORAL JUDGMENT Date :

06. h August 2013 Heard learned counsel for the appellant and learned Additional Public Prosecutor for the State.

2. The solitary appellant has preferred this appeal against his conviction for the offence under section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 years with fine of Rs. 2000/- in default whereof to undergo further rigorous imprisonment for two months as awarded on 8th February 2010 by 1st Additional Sessions Judge, Fast Track Court, Jamui, in Session Trial No. 85/2008 arising out of Jhajha P.S. Case No. 106/2007, G.R. 2 No. 1166/2007.

3. The prosecution case as reveal from the Fardbeyan of the prosecutrix aged 12 years recorded on 1.30 p.m. on 31st August 2007 that three days before on 28th August 2007, the day of Rakshabandhan at about 12.00 p.m. she was there at the Well to take out water, the appellant who is resident of same locality got hold of her and took into his room, closed the doors from inside, lying her on bed, opened her undergarments and when she started crying pushed some cloths in her mouth and thereafter committed rape upon her, and subsequently appellant himself came out of the room and the prosecutrix followed her could be able to see wives of Thakuri Mandal and Budhan Mandal (P.Ws. 5 &

4) narrated the happenings and when mother of the prosecutrix met after cutting grass she intimated her and since her father had already gone to Deoghar, no case was earlier instituted, but only on his return from Deoghar the case was instituted. Investigating Officer investigated the case and submitted the charge-sheet etc. The appellant faced trial for the offences under section 376 of the Indian Penal Code, wherein prosecution examined altogether 11 witnesses besides producing following documentary evidence exhibited:

3. Exhibit - 1 - Formal F.I.R. Exhibit - 2 - Medical Board Report Exhibit - 2/1 to 2/3 - Three X-Ray Plats. Exhibit - 3 - Signature of Jagidish Mandal on Panchanama. Exhibit - 4 - Writing and Signature on Fardbeyan.

4. In defence two witnesses have been examined and following documents have been produced: Exhibit - A & A/1 - Injury report of Pobita Kumari.

5. On consideration of the materials available trial court convicted and sentenced the appellant in the manner aforesaid.

6. Learned counsel for the appellant contended that prosecution has not been able to substantiate the charge against the appellant who had falsely been implicated just to be deprived of his own land and house taking undue advantage of his age being more than 75 years and blind for long even doctor and investigating officer has not been examined that too purposely, since, there is no support from their version to the prosecutrix. Further reliance has been placed on two decisions of this court Sarafat Mian Vs. The 4 State of Bihar reported in 2007(2) PLJR 12 and Md. Raja Khan Vs. The State of Bihar reported in 2007(Supp.)PLJR 763 for remission of sentence if conviction is upheld.

7. On the other hand, learned Additional Public Prosecutor supported the case and submitted that statement of the prosecutrix itself is sufficient to hold conviction and sentence of the appellant.

8. Out of 11 prosecution witnesses, P.W. 1 Umesh Singh and P.W. 11 Ranjit Kumar Pandit are formal witnesses respectively proved Exhibit - 1 & 4. P.W.2 is Dr. Syed Naushad Ahmad, one of the members of the medical board constituted to determine age of the prosecutrix proved Exhibit - 2 the report, and 2/1, 2/2, 2/3 the X-ray plats forming basis of record and arrived at the conclusion that prosecutrix was aged between 14 to 15 years.

9. P.W.3 Jagdish Mandal comes to say while he was at his own house heard some noise and came to know that some wrong has been committed by the appellant with the prosecutrix. He further says that earlier also the appellant had committed some wrong for which Panchayati etc. was organized. He proved Exhibit - 3 his signature on the panchnama. In cross examination he admits that appellant is 5 none else than his uncle in Gotia and for about 50 years he is a Saint. He is blind man and move with the help of Lathi. He has his own land and house, but, neither wife nor any children and further denied false implication of the appellant just to grab the land.

10. P.W. 4 namely Pramila Devi has come to say, on the relevant time when she arrived near Hanuman Temple she found the appellant coming out of his room followed by the prosecutrix and she could come to know from the prosecutrix that she was taken inside by the appellant where she was humiliated (beijjati) and

likewise earlier witnesses, she also says about earlier offence committed by the appellant and in cross examination she admits that appellant having land and house and blind of both the eyes takes aid of Lathi to move and denied false implication just to grab the land of the appellant.

11. P.W. 5 Dhaneshwari Devi aged about 40 years, reproduced the statement of P.W.4 with only addition that the appellant while coming out of his room climbed over the Guava tree and in cross examination she further admits the appellant having some land etc. and denied false implication. Further she says that appellant is blind since before she came to her Sasural.

12. P.W.6 Bhikho Mandal comes to say that at the relevant time he was in Bajrangbali temple and when came out found the prosecutrix weeping and on query reported about misdeeds committed by the appellant with her and he also found the appellant on Guava tree and earlier also appellant had committed similar wrong with the sister of Jagdish Mandal, wherein panchayati etc. was done. In cross examination, he admits that when he arrived near prosecutrix two ladies were there (must be P.Ws. 4 &

5) and further he admits appellant being blind and follower of kabirpanthi, whereas others of the village do not adopt the same and further denied false implication etc. This witness is the first witness who introduced the prosecutrix was weeping. Whereas earlier two witnesses P.Ws. 4 & 5 who were there since before did not say about such weeping.

13. P.W. 7 Kaleshwar Mandal, father of prosecutrix has come to say about his presence on Deoghar etc. on the relevant day only on coming back and giving information of the prosecutrix and case was instituted. Further stated about appellants earlier commission of similar crime and in cross examination admits the appellant being 7 unmarried blind having some landed property and denied false implication just to grab the landed property.

14. P.W. 8 Jeetlal Mandal like P.W.7 he too was at Deoghar and only on return came to know about the occurrence and further stated about earlier commission of similar offence by the appellant and in cross examination admits no case was

instituted for earlier offence, of course, in panchayati some fine was imposed. He also affirms the appellant being blind moving with aid of Lathi.

15. P.W. 9 Ganesh Mandal likewise P.Ws. 7 & 8 he was also at Deoghar at the relevant time and came to know about the occurrence on arrival and further states earlier commission of offence by the appellant. During cross examination he admits about status of the appellant and further asserts he was one of the Panch in Panchayat organized for earlier wrong.

16. P.W.10 Pobita Kumari is the prosecutrix herself states with only addition that the blind appellant is in relation as her uncle and she is not aware of his name and further states that only after coming out of the room she alarmed then P.Ws. 4 & 5 came there and she narrated about the occurrence to them and since her father was not available, 8 so on his arrival case was instituted. In cross examination she admits that north of Well her house situates from adjacent to some house of Dagori Mandal and there are 10 to 20 houses more at nearby place and while she was there at Well for fetching water he was gone and when her hand was got hold by the appellant she did not raise any alarm, of course, tried to come out of his clutches but he dragged her inside the room but no injury etc. was caused and when she arrived at the door she raise alarm but none came on, even inside she was crying but subsequently during commission of real crime she did not raise any hue and cry. In paragraph 7 she admits that when some cloth was pushed in her mouth and causes no injury and there was some bleeding from her private part and also blood stains on her garments. Again in para 8 she admits from the room appellant came out, she only followed him and in para 12 he admits about her medical examination etc. and also admits status of the appellant being complete blind having landed property and being issueless and his lands are adjacent to land of the prosecutrix. She denied false implication just to grab the landed property of the appellant.

17. It is evident that witnesses examined except the prosecutrix are nothing but hearsay and even P.Ws

4. & 5 who could be able to see the prosecutrix coming out of the room following the appellant said nothing about any weeping or crying by the prosecutrix, though,

P.W.6 has tried to insert the same and even prosecutrix P.W.10 in examination in chief tried to support P.W.6, but, failed during cross examination. However, this much is undisputed from the statements of the witnesses examined that appellant is totally blind and not in a position to move only with aid of stick. There is nothing in the evidence to explain the circumstances under which the appellant came to know about arrival of the prosecutrix at the Well, arrived there getting hold of her, taking inside the room without any resistance. Medical examination report of the victim produced on behalf of the prosecution is only as regard to her age indicating the same being 14 to 15 years, but, on other part though Doctors report is available with the record, but the prosecution did not produce the same as a piece of evidence by examining the doctor. Even the Investigating Officer has been withheld. From the trend of cross examination as well statement of the appellant under section 313 Cr.P.C. is nothing but totally denial of involvement with assertion of false implication just to grab his property and that apart the appellant has also 10 clearly stated about his incapability to do any sexual act which prima facie find support from his undisputed age 75 years at the time of his examination under section 313 Cr.P.C. on 20 th October 2009 that means around 73 years at the time of occurrence. His medical examination was also incumbent to establish the prosecution version.

18. The witnesses examined by the defence is D.W.1 Kashi Das stated about his false implication of the appellant just to grab his land since he flatly refused to transfer the same in favour of the prosecutrixs father and D.W.2 Jawahar Yadav formal witness proved Exhibit - A and A/1, medical report of the prosecutrix, though the doctor who examined and prepared the report has not been produced as either of the side. Normally the report cannot be looked into, only for the purpose the reason behind on examination of the doctor and producing report by prosecution, it is perused and indicated that there is absolutely nothing to substantiate the prosecution case including the additional fact that even hymen of prosecutrix was intact without any rupture etc.

19. Two or three days delay in institution of the case for such offence does not come in the way of prosecution. As has already been held by Apex Court in a case 11 of State of Uttar Pradesh Vs. Manoj Kumar Pandey reported in (2009) 1 S.C.C.

72 it is held as follows:..Apart from that normal rule regarding the duty of the prosecution to explain the delay in lodging FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of FIR does not per se apply to cases of rape . 20. But, to hold anyone guilty for the commission of such heinous crime. It is essential that at least statement of the prosecutrix/victim must be reliable one. Whereas in the instant case taking into consideration the appellant being totally blind man, resident of neighbouring room, the circumstances relating to his coming out taking the prosecutrix inside etc. remained unexplained. There appears something missing in the entire chain and when the prosecution especially the prosecutrix is not in a position to explain the circumstance in spite of her being capable to understand everything since as per medical report (Exhibit -

2) her age in between 14 to 15 years which may be stretched upto 16 to 17 years. The cardinal principle of law to accept the view indicating innocence of accused if on consideration of material two view are possible and the cloud casted on the 12 prosecution case if not removed or diluted conviction of the accused/appellant cannot sustain.

21. In the result, The appeal is allowed. The judgment of conviction and sentence passed against the appellant be set-aside. The appellant, who is in custody, be set at liberty forthwith, if not required to be detained in any other case. (Akhilesh Chandra, J) Rajeev/-

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