

(2022) 09 PAT CK 0075
In the Patna High Court
Case No : Criminal Appeal (DB) No. 172 Of 2019

Bhutto Mallik

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 19-09-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 313

Indian Penal Code, 1860 — Section 120B, 341, 342, 376D, 379, 506, 509

Citation : (2022) 09 PAT CK 0075

Hon'ble Judges : Chakradhari Sharan Singh, J;Khatim Reza, J

Bench : Division Bench

Advocate : Arun, Kanika, Shashi Bala Verma

Final Decision : Allowed

Judgement

1. Heard Mr. Arun, learned counsel appearing on behalf of the appellant and Ms. Shashi Bala Verma, learned Additional Public Prosecutor appearing on behalf of the State.

2. This appeal has been preferred by the appellant assailing the impugned judgment of conviction dated 05.12.2018 and order of sentence dated 18.12.2018, passed by learned Additional Sessions Judge-I, Supaul, in Sessions Trial No. 227 of 2016, arising out of Mahila P.S. Case No. 66 of 2016, whereby the appellant has been convicted and sentenced as under:

Conviction under Section

Sentence

Imprisonment

Fine (Rs.)

In default of fine

376D of the Indian Penal Code

20 years R.I.

25,000/-

3 month imprisonment

341 of the Indian Penal Code

No separate sentence was awarded

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3. Considering the facts and circumstances emerging from the accusation made in the fard-beyan, which is the basis for registration of First Information Report; statements of the informant, whose name has been concealed in the present judgment (referred to as 'X') (PW-5), recorded under Section 161 and 164 of the Code of Criminal Procedure, 1973 ('Cr.P.C.' in short) and the depositions of the witnesses at the trial, we deem it apt to set out, at the outset, in detail, the prosecution's case as disclosed in the fard-beyan.

4. The time of occurrence, as disclosed in the First Information Report, is 2:30 am on 12.07.2016.

5. The informant has alleged in her fard-beyan, recorded on 14.07.2016 at 3:00 pm by a lady police officer, that the maternal uncle of the husband of the informant (Mamiya Sasur) viz. Harilal Yadav @ Harbariya Yadav @ Hari Yadav, had visited her matrimonial home two days ago with Anil Yadav, Bhutto Mallik (the appellant) and Pahadi Mallik. She disclosed their parentage with their respective addresses, in her fard-beyan. On 12.07.2016 at 2:30 am, when the informant was sleeping in the veranda of her house, someone awoke her, whereafter she noticed that co-accused Anil Yadav and the appellant were there, carrying guns/pistols (chhota bandook). Co-accused Anil Yadav, thereafter, tied informant's hands and wrapped her mouth with a bed-sheet (Chaadar). Before the informant's mouth was alleged to have been wrapped with the bed-sheet, she had been appealing the miscreants to take away whatever material they wanted to take from the house but leave her. They, however, disclosed her that they would not be committing theft, rather they would be raping her. When the informant attempted to scream for help, they pointed their guns towards her. Thereafter, co-accused Anil Yadav raped her. After she was ravished by Anil Yadav, the appellant also ravished her. Thereafter, they untied her hands and mouth. In the meanwhile, Harilal Yadav, Pahadi Mallik also came there. Harilal Yadav is evidently the brother of mother-in-law of the informant. Harilal Yadav is said to have inquired from the persons, who had raped the informant, using foul language as to whether they had committed sexual assault on the appellant with full force or not. In response, the appellant and Anil Yadav, according to the prosecution's case, told the said Harilal Yadav that she had been so badly sexually assaulted by them that she would never ever, in her life, quarrel with his

(Harilal's) sister, who happened to be the mother-in-law of the informant. While leaving the place, all the four persons named in the First Information Report, threatened her of life, would she disclose the occurrence to anyone. Harilal Yadav is said to have told her that should the informant quarrel with her sister in future, he would get the informant raped by eight persons. After all the miscreants had left the place of occurrence, the informant noticed that her mother-in-law was lying with her hands and legs tied with rope. The informant untied her mother-in-law's hands and legs. After the occurrence, the local residents assembled there. She, however, did not disclose anything about the occurrence to anyone. Next day, when the police officer from Laukaha out-post came to visit the village, out of nervousness and the threat issued by the miscreants, she did not give her statement to the Police Officer. On 13.07.2016, a police officer from Laukaha out-post had come to the village in connection with a theft, which had taken place in her village. She disclosed the occurrence to the said police officer, who recorded her fard-beyan, based on which the First Information Report being Mahila P.S. Case No. 66 of 2016 came to be registered.

6. The statement of the informant was recorded before the Judicial Magistrate 1st Class, Supaul, on 13.07.2016 under Section 164 of the Code of Criminal Procedure. The narrative in the statement, under Section 164 of the Code of Criminal Procedure, of the prosecution's case was apparently at variance with from the one disclosed in her fard-beyan. In her statement under Section 164 of the Code of Criminal Procedure, she stated that nearly two years ago, the informant and her mother-in-law had quarreled. On 10th (apparently 10.07.2016), the brother of her mother-in-law, namely, Harilal Yadav, had come with the miscreants for assaulting her. The appellant and Anil Yadav had physically assaulted her and attempted to kill her. Subsequently, they had fled away after having noticed flash of light of a tractor, which was passing through, near the house. She further narrated that Anil Yadav and this appellant had sexually assaulted her and they had beaten her up mercilessly.

7. The police, upon completion of investigation, submitted its charge-sheet for the offences punishable under Sections 342, 376-D, 379, 506, 509, 120 B of the Indian Penal Code. Based on the charge-sheet submitted by the police, cognizance was taken of the offences punishable under Sections 341, 376-D, 506, 120-B of the Indian Penal Code against all the four named accused persons including the appellant.

8. During the course of trial, altogether eight prosecution witnesses were examined, namely, Umesh Kumar Yadav @ Umesh Yadav (PW-1), Anandi Devi (PW-2), Durbal Yadav (PW-3), Satruhan Yadav (PW-4), 'X' (PW-5), Premlata Bhupa Shri (PW-6), the Investigating Officer, and Sulekha Devi (PW-7) and Dr. Ragini Bhushan (PW-8). The medical report prepared by PW-8, upon medical examination of 'X', was exhibited, at the trial, as exhibit-3/A and the statement of 'X' recorded under Section 164 of the Code of Criminal Procedure as exhibit-4/1. PW-7 came to be declared hostile at the instance of the prosecution.

After examination of the prosecution witnesses, the circumstances appearing from the evidence adduced at the trial against the persons put on trial, were explained to them in accordance with the provision under Section 313 of the Code of Criminal Procedure. The appellant reiterated his plea of innocence and denied the said circumstances against him.

9. Upon analysis and scrutiny of the evidence adduced at the trial, the trial court, noticing contradictions in the evidences of the witnesses, concluded that the prosecution failed to prove beyond all reasonable doubt, the charges against the co-accused, Harilal Yadav and Pahadi Mallik. The trial court has noticed, in its impugned judgment of conviction, that the depositions of the witnesses in respect of presence of said Harilal Yadav and Pahadi Mallik were inconsistent. Further, the statements of 'X' herself, recorded under Section 164 of the Code of Criminal Procedure before the Magistrate and that before the police under Section 161 of the Code of Criminal Procedure, were contradictory. The trial court has further noticed that there were material inconsistencies in the evidence of witnesses on various aspects, i.e., whether Harilal Yadav was present or not with the mother-in-law of the informant at the place of occurrence; whether Harilal Yadav and Pahadi Mallik had come with the two others, viz., Anil Yadav and this appellant together or not and whether the mother-in-law of 'X' was tied with rope or not.

10. The trial court also noticed that the prosecution did not examine the competent witness on all these points, particularly, the mother-in-law of the informant. The co-sister (gotni) of the informant, who was examined at the trial as P.W.-7 came to be declared hostile.

11. After having noticed the aforesaid contradictions and non-examination of the most competent witness, the trial court recorded that it was highly improbable that brother of mother-in-law of the informant would be a party to causing sexual assault on the wife of his nephew (bhagina). After having noticed these circumstances, the trial court acquitted Harilal Yadav and Pahadi Mallik of the charges framed against them. However, as regards the appellant and Anil Yadav, the trial court has concluded that the prosecution has been able to prove the charges under Sections 341 and 376-D of the Indian Penal Code beyond all reasonable doubts.

12. Mr. Arun, learned counsel appearing on behalf of the appellant, has argued that evidence of 'X' (PW-5) has been disbelieved by the trial court itself in the backdrop of material contradictions noticed in her depositions and statements at various stages. He has submitted that the narration of the prosecution's case, disclosed in the statement under Section 164 of the Code of Criminal Procedure, is entirely different from that disclosed in the fard-beyan, which is manifest. He has further submitted that the trial court has noticed material contradictions in the deposition of 'X' (PW-5) at the trial and her statement recorded by the police during the course of investigation. He has contended that there is absolutely no explanation as to why, the mother-in-law of the informant, who, according to the

informant, was present in the house at the time of occurrence, was not examined by the police during the course of investigation and her statement was not recorded. He submits that withholding of the best evidence, i.e., the mother-in-law of the informant, during the course of the trial, casts serious doubt on the prosecution's case and, on this ground alone, the appellant deserves to be given benefit of doubt. It has also been argued that PW-7 has not supported the case of the prosecution, as disclosed in the fard-beyan, and though she has been declared hostile at the instance of the prosecution, her evidence may not be completely discarded for the purpose of consideration as to whether the appellant deserves to be given benefit of doubt or not.

13. Ms. Shashi Bala Verma, learned Additional Public Prosecutor appearing on behalf of the State, has, on the other hand, submitted that the informant ('X') (PW-5) has been consistent in her statements obtained during the course of investigation as well as in her deposition at the trial that this appellant and co-convict, Anil Yadav, had sexually assaulted her. She contends that even if the medical evidence does not corroborate the prosecution's case of sexual assault as narrated in the fard-beyan and supported in the deposition at trial, the trial court's finding, based on the deposition of 'X' (PW-5), to the extent it related to sexual assault with her, cannot be said to be suffering from any legal infirmity. She has submitted that it is not expected, in such offences, that there would be an eye-witness to the occurrence and has contended conviction can be recorded by the trial court based on solitary evidence of a victim of sexual assault.

14. We have perused the impugned judgment and order of the trial court. We have carefully scrutinized the lower court's records for ascertaining as to whether the prosecution has been able to prove its case beyond all reasonable doubts against this appellant.

15. It is true that in a case of sexual assault, constituting offence, punishable under Sections 376/376-D and other similar offences, conviction can be recorded in appropriate cases on solitary evidence of the victim, if such evidence of the victim appears to be trustworthy and unblemished, though not corroborated by the medical evidence.

16. In order to consider the merits of the submissions advanced on behalf of the parties, as noted above, the Court is primarily required, in the facts and circumstances of the present case, to examine as to whether 'X' (PW-5) can be treated to be a truthful witness, based on whose evidence, the conviction for commission of the offence punishable under Section 376-D of the Indian Penal Code could be safely recorded or not.

17. We find force in the submission made on behalf of the appellant that the prosecution's versions, as disclosed by 'X' (PW-5) in the fard-beyan, in the statement recorded under Section 164 of the Code of Criminal Procedure, statement recorded by the police under Section 161 of the Code of Criminal Procedure and her deposition at the trial substantially differ. In the fard-beyan,

she has alleged that sexual assault was committed on gun point by this appellant and co-convict, Anil Yadav. There is no such fact mentioned in her statement recorded under Section 164 of the Code of Criminal Procedure (Exhibit-4/1). In the fard-beyan, there is no mention of physical assault made on her person other than the sexual assault. In her statement, under Section 164 of the Code of Criminal Procedure, she made allegations of physical assault also by the appellant and co-convict, Anil Yadav. In her deposition, at the trial, she has stated that Harilal Yadav had also attempted to commit rape on her, which was not her case, as disclosed in the fard-beyan.

18. In paragraph 3 of her evidence, she, initially, deposed that a gun was also recovered from her house; she, subsequently, however, denied her own statement of recovery of gun by police from her house.

19. Further, PW-7 had also said to have put her thumb impression on the fard-beyan of PW-5, which was reduced in writing by S.I, Premlata Bhup Shri (PW-6). PW-7 has been declared hostile, as she has not supported the prosecution's version, as disclosed by the informant (PW-5).

20. There is no explanation as to why statement of mother-in-law of the informant was not recorded by the police during the course of investigation and she was not produced at the trial in view of the admitted case of the prosecution that she was present at the place of occurrence.

21. In view of the circumstances, as explained hereinabove, in our considered opinion, the evidence of 'X' (PW- 5) cannot be said to be so reliable as to record finding of conviction on that basis alone.

22. The aforementioned conclusion, in the background of the fact that her deposition is not at all corroborated by the medical evidence, inasmuch as neither any sign of external injury nor of rape has been found by the doctor, casts a shadow of doubt on the credibility of evidence of 'X' (PW-5).

23. The medical report, which has been exhibited as exhibit-3/A, reads as under:
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"No fighting sign or sign of causing external and internal injury was found. Deep vaginal swab was taken and sent to Sadar Hospital, Supaul, for H.P.E."

24. The Investigating Officer, in her statement, has recorded that the petticoat of 'X' (PW-5) was seized and was sent to Forensic Sciences Laboratory for examination. The F.S.L report was, however, never received. The Investigating Officer has further recorded that she had not found any sign at the place of occurrence to indicate that rape was committed on 12.02.2016, as she had gone to the place of occurrence on 14.07.2016.

25. PW-1 is the brother, PW-2 is the mother, PW-3 is the husband, and PW-4 is father of 'X'. Their evidences are apparently based on the disclosure made to them by 'X' (PW-5).

26. In our considered opinion, considering contradictory and inconsistent evidence of the PW-5 and non-examination of the material witness (the mother-in-law of PW-5), without any explanation, casts serious doubt on the prosecution's case. The prosecution, thus, in our opinion, failed to prove its case beyond all reasonable doubts.

27. The appellant, in our considered opinion, deserves to be given benefit of doubt.

28. Accordingly, the appellant stands acquitted of the charge of offence punishable under Sections 376-D and 341 of the Indian Penal Code and the impugned judgment of conviction dated 05.12.2018 and order of sentence dated 18.12.2018, passed by learned Additional Sessions Judge-I, Supaul, in Sessions Trial No. 227 of 2016, arising out of Mahila P.S. Case No. 66 of 2016, are hereby set aside. The appeal is accordingly allowed.

29. The appellant is in jail. Let him be released forthwith, if he is not required in any other case.