

(2019) 04 JH CK 0032

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 99 Of 2016

Chanchal Kumar Mukherjee @ Chanchal Mukherejee @
Bhujawa

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 11-04-2019

Acts Referred:

Indian Penal Code, 1860 — Section 375, 376, 376(2)(f)
Code Of Criminal Procedure, 1973 — Section 313, 357A

Citation : (2019) 04 JH CK 0032

Hon'ble Judges : Aparesh Kumar Singh, J; Kailash Prasad Deo, J

Bench : Division Bench

Advocate : Suchitra Pandey, Ravi Prakash

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the appellant, Ms. Suchitra Pandey appointed by JHALSA to represent the appellant and learned counsel, Mr. Ravi Prakash, Additional Public Prosecutor representing the State.

2. Before us is the sole appellant, who has been facing rigorous imprisonment for 10 years on his conviction under Section 376(2)(f) of the Indian Penal Code rendered by learned 2nd Additional Sessions Judge, Fast Track Court, Bermo at Tenughat in Sessions Case No. 292 of 2011 by the impugned judgment dated 21st August, 2015 and order of sentence dated 31st August, 2015. Learned Court has also recommended that the victim/prosecutrix through her dependent be awarded compensation under Victim Compensation Scheme under Section 357-A of the Code of Criminal Procedure.

3. Informant is the grandfather of the victim (name withheld), Ismail Ansari, whose statement was recorded on 7th June 2011 at 14:40 hours at Surjudih Village near Nichetola by Subhash Singh, Officer-in-Charge, Kasmar P. S.

4. The gist of the allegation is as under:

Informant alleged that on 7th June, 2011 at 1:30 in the day when there was slight drizzle and breeze, towards the west of his house at about 50 meters from the house of Bipin Mukherjee and his agnates, their children were collecting mangoes and rose apple from beneath those trees and eating them as well. In the meantime, their neighbour, Chanchal Mukherjee, accused aged 35 years son of Kalyani Prasad Mukherjee of village-Surjudih, P.S. Kasmar lifted his granddaughter, the victim aged 4 years, in his lap and enticed her with an offer of mangoes and took her in the nearby orchard, besides the mango tree and committed rape upon her, as a result of which she was bleeding profusely and shouting. On her shouts and the shouts of other children, a number of persons of the locality assembled there when Chanchal Mukherjee ran towards his house. In the meantime, police personnel came to their house and informant's daughter Maimun Nisha and son Fakruddin took the victim for treatment to the hospital.

Informant further alleged that Bipin Mukherjee, Bhawani Mukherjee and Chanchal all have become emboldened these days.

5. On this Fardbeyan, First Information Report bearing Kasmar P. S. Case No. 30 of 2011 under Section 376 of the Indian Penal Code was registered at 17.00 hours against the sole accused, Chanchal Kumar Mukherjee.

6. In course of investigation, the case was found true and charge-sheet bearing no. 36 of 2011 under Section 376 Indian Penal Code was submitted against the sole accused. Cognizance was taken on 29.08.2011 by the learned Court. Since the case was triable by the court of Sessions, case was committed before the learned Additional Sessions Judge-I, Bermo at Tenughat. Charges were framed on 6th February, 2012 under Section 376 of the Indian Penal Code against the sole accused. He denied the charge on being explained to him in Hindi and pleaded not guilty and further claimed to be tried. Thus, trial commenced. Prosecution examined altogether 12 witnesses in support of their case and also adduced a number of documentary evidence upto Ext.-6 as under:

P.W.1, Ismile Ansari

P.W.2, Maimun Khan

P.W.3, Dilzan Ansari

P.W.4, Md. Rafique Ansari

P.W.5, Shakila Khatoon

P.W.6, Md. Fakruddin

P.W.7, Mehrul Hoda

P.W.8, Ashique Ansari

P.W.9, Shajadi Parvin

P.W.10, Amardeep Maharaj

P.W.11, Subhash Singh

P.W.12, Dr. Sneh Lal Sinha

Ext.1- Fardbeyan, proved by P.W.11 Ext.2-F.I.R, proved by P.W.11

Ext.3-Requisition of Medical Treatment, proved by P.W.11

Ext.4-Memo of Arrest, proved by P.W. 11

Ext.5-Charge-sheet, proved by P.W.11

Ext.6-Medical Report, proved by P.W.12.

7. After closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C, where he simply denied his involvement and pleaded innocence. No other statements were made by him in support of his innocence neither any evidence was adduced.

8. Learned Trial Court considered the evidence on record and the submission of the parties and convicted him for the charge under Section 376(2)(f) of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for 10 years as above. During pendency of this appeal, the Coordinate Bench of this Court has vide order dated 20th April, 2017 issued notice on the appellant on the question of enhancement of sentence awarded by the learned trial court.

9. On behalf of the appellant, learned counsel, Ms. Suchitra Pandey has inter alia made the following submissions:

It is submitted that when the evidence is read in entirety, look of the prosecution case gives a clear indication of false implication on sectional lines. There are vital discrepancies as to the description of place of occurrence by different prosecution witnesses. There is also vital discrepancy in the narration of manner of occurrence. The victim girl, who has been examined as P.W. 9 has completely failed to prove any overt act of sexual assault upon her during trial. She was about six years at the time of her deposition and though questions had been put by learned trial court to test her competency but her answers on the material allegations are completely superficial. P.W.5, victim's mother has exaggerated the manner of occurrence in her deposition. From perusal of the evidence on record, it further transpires that the victim was examined on the next day of the alleged assault i.e. on 8th June, 2011. The injury report proved by the Medical Officer, Dr. Sneh Lal Sinha (P.W.12), if read properly does not conclusively show penetration as required under Explanation-I to Section 375 (Unamended) to constitute the offence of rape. The evidence on record also suggest that the victim was treated at three different places altogether without any explanation for such treatment within a course of 24 hours. The victim's mother (P.W.5) and other prosecution witnesses like P.W.1 though have asserted that she was bleeding profusely but the medical evidence brought on record as Ext.-6 by P.W.-12 does not show any bleeding. As such, the case of prosecution is shaky and conviction for a serious offence of rape under Section 376 of the Indian Penal

Code (Unamended) should not be upheld since the ingredients of the offence have also not been duly established. Learned counsel for the appellant, Ms. Pandey has fervently pleaded that no case of enhancement of sentence against the accused is made out since there is no brutalization of the minor girl proved even if the allegations are assumingly found true on the basis of the prosecution evidence. None of the internal organs of the girl have been ruptured because of any such sexual assault. The victim has apparently fully recovered from the assault while the appellant was a young man of 35 years only, who has a chance to reform in his life if the sentence is not disproportionately enhanced.

10. Learned Additional Public Prosecutor has supported the findings rendered by learned Trial Court in extenso. Relying upon the evidence on record, he submits that the case of the prosecution is simple and fully proved by the evidence of the prosecution witnesses such as P.W.1, the grandfather of the victim and informant, P.W.5, Shakila Khatoon the mother of the victim, P.W.9, the victim herself and the injury report Ext.-6 proved by P.W.12., the Medical Officer, who examined the victim on the next day itself at around 9 am in the morning. He has in particular taken this Court to the injuries found on examination of the private part, which shows swelling of vulva present; tear of lower vaginal mucosa above forchette present and other parts of valiga looks inflamed. The victim was reacting on touching private part due to pain. As such, the minor girl of a tender age of 4 years was sexually assaulted and penetration within the meaning of Explanation-I of Section 375 (Unamended) had been made out to constitute the ingredients of the offence. Learned Trial Court has considered the evidence on record in proper perspective and rightly recorded the finding of conviction against him. As such, the impugned judgment does not deserve any interference in appeal. Moreover, the crime is heinous and if such accused persons are not adequately punished, a wrong message may go to the society. Learned Additional Public Prosecutor submits that it is a case of enhancement of sentence since the appellant has been let away with a considerably lesser sentence of 10 years only.

11 We have considered the submission of learned counsel representing the appellant, Ms. Pandey appointed by JHALSA and learned Additional Public Prosecutor, Mr. Ravi Prakash, gone through the materials on record, including the Fardbeyan, framing of charge, evidence of 12 witnesses, 6 prosecution exhibits, statement of the accused under Section 313 Cr.P.C and also perused the impugned judgment of conviction and order of sentence.

The unamended Section 375 I.P.C which defines rape, reads as under:

"Section 375. Rape- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First- Against her will.

Secondly- Without her consent.

Thirdly- With her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly- With or without her consent, when she is under sixteen years of age.

Explanation .- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

12. In order to constitute rape as per the unamended provisions penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Before us is the Fardbeyan of the informant, grandfather of the victim, who examined himself as P.W.1 and fully supported the first information story projected through him. In his testimony during trial, he has categorically stated that the accused, Chanchal Mukherjee appellant herein lifted his granddaughter (the victim) took her near a mango tree and when they heard cries of the child and were looking for her, she was found with lot of blood oozing out. This witness has further stated that his granddaughter was bleeding from a private parts and on being asked named the accused, Chanchal, who had committed wrongful acts with her after laying her down.

The gist of the allegations made in the Fardbeyan have been duly supported in his examination during trial. P.W. 2, Maimun Jaan is the victim's grandmother, who has also supported the material part of the allegation made in the Fardbeyan. She stated during trial that she had also disclosed to the police that the victim had informed her that Chanchal Mukherjee had picked her up from near the rose apple tree and brought her to such condition.

Thereafter she was taken for treatment to Jainamore Hospital and then to B.G.H. Hospital. The defence has not been able to discredit the testimony of this material witness, who has shown herself present soon after the incidence. P.W.3, Dilzan Ansari is the victim's uncle. He had also heard about the incidence upon brawl being raised in the afternoon of that date and has supported the case of the informant stating that the victim girl aged 4 years was bleeding from her private parts after the assault and she had named the accused, Chanchal Mukherjee as having committed the wrongful act upon her. Nothing has been elucidated from him during course of cross-examination by the defence. P.W.4, Md. Rafique Ansari is the cousin of Sultan Mian and is also the uncle of the

victim. His testimony is also in the same fashion as P.W.3. Defence has not discredited him on any material parts of his evidence. P.W.5 is the mother of the victim, namely, Shakila Khatoon, whose testimony is vital for coming to a conclusion whether the prosecution case as made out by the informant in his Fardbeyan duly stands corroborated in its substance and entirety. She in her examination-in-chief categorically states that on the eventful day there was light drizzle and breeze and children were plucking rose apple when the accused Chanchal Mukherjee lifted her four years old daughter and took her away and thereafter forcibly committed rape upon her. When the girl started shouting he fled away. The girl continued shouting and then lot of persons assembled there. She was bleeding profusely, police has also come by that time. Her statement was recorded by the police. The victim was taken to the hospital and the accused was apprehended. Her daughter was treated at Bokaro. She has identified the accused in the dock. In her cross-examination, she has reiterated the gist of her statement to the effect that she found the child near the pond after hearing her cries and by the time she reached her, the accused had ran away, but the victim was crying. Thereafter a number of persons had assembled. The accused was apprehended by the police and taken into custody. Defence has not been able to show that her testimony suffers from any such inconsistency, embellishment or improvements on which her evidence could be discarded. P.W. 6, is Md. Fakruddin Ansari, another uncle of the victim. His statement also proved the allegations made in the Fardbeyan, though he was not present at the place of occurrence at that time. P.W.7, Mehrul Hoda also belongs to the village Surjudih, who has reached the spot after hearing the brawl and seen the victim bleeding from her private parts. He has also named the accused as the perpetrator of the offence of rape. Defence has not been able to discredit the witness either. P.W.8 is Ashique Ansari also of the same village. His statements are also in the same fashion as that of P.W.7. Defence has not been able to draw any contradiction in his evidence during cross-examination. The evidence of the victim examined as P.W.9 is also of great significance though she was aged 6 years at the time of deposition and only 4 years at the time of occurrence. She has been found to be a competent witness by the learned Trial Court before her testimony has been recorded. In material parts, the allegations made in the Fardbeyan has been proved by her. She has stated that she was plucking rose apple under the rose apple tree. She has identified the accused, who belongs to her own village. He was the one, who lifted her and pressed her mouth whereafter she claims to have fallen unconscious. There is nothing in her testimony to disbelieve the prosecution case. P.W.10 is Amardeep Maharaj, a Sarpanch, who has been declared hostile on the request of the prosecution. P.W.11 is the Investigating Officer, who has proved Ext.-1, the Fardbeyan Ext.-2, formal F.I.R Ext.-3, medical requisition for treatment of the victim Ext.-4, the memo of arrest and also the charge-sheet submitted as Ext.-5. Now, we come to the medical evidence in the nature of Dr. Sneh Lal Sinha, P.W.12, who examined the victim on 8th June 2011 at Sadar Hospital, Chas at 9 am. She has found the following features on external physical examination of the victim and also found

the following injuries on examination on her private part.

13. The victim was fully conscious and there was a slight brownish serum discharge. However, no active fresh bleeding was seen. The Injury report proved as Ext.-6 in her handwriting and signature is extracted hereinbelow

" Examination of private part: Swelling of vulva present, Tear of lower vaginal mucosa above forchette present. No active bleeding present. Other part of vagina looks inflamed and victim reacts on touching her private part due to pain. Her mother complaint that she did not pass urine after incidence. Vaginal swab taken gently. No foreign body found in and around private organ. Vitadin applied on vagina and abrasion on back. Antibiotic and vitamin ointment advised. Hot and cold compression of supra pubic region was advised. vaginal swab report-sperm-Nil.

Opinion: 1. In my opinion sexual assault has been done.

2. Her age is about 4-5 years.

This report is written by me and it bears my signature.

Entire medico legal report has been marked as Ext.-6"

In cross-examination, she has however denied that any seminal stains were noticed though swab (vaginal) was sent for microscopic examination. Brownish bleeding was noticed though no fresh bleeding was seen.

14. We have analyzed the prosecution evidence on record in entirety and also minutely. Upon careful analysis of the material evidence on record, we find that the prosecution has been able to substantiate the charge of rape as against the accused appellant herein. The allegations made by the informant, grandfather of the victim in the Fardbeyan has been proved in all its materials part during his examination as prosecution witness no. 1. More particularly, the evidence of P.W. 5, mother of the victim also substantiate the allegations made in the Fardbeyan in substance. The victim girl was picked up during the day time at 1:30 while she was playing along with other children picking up a rose apple and mangoes by the accused, Chanchal Mukherjee and taken towards his orchard where the heinous offence of rape was committed upon her. The girl raised lot of cries which attracted her mother and other nearby persons including the grandfather, who immediately rushed there and rescued her since the accused had fled away by that time on cries being raised by the victim. The victim while being taken for treatment was found to have suffered serious injuries on her private part. The injuries found on her external examination by the doctor, extracted hereinabove, clearly showed that swelling of valva was present; tear of lower vaginal mucosa above forchette present and other parts of vagina looked inflamed and the victim was reacting on touching of her private parts due to pain. The doctor (P.W. 12) opined that sexual assault had taken place. Evidently, the accused committed sufficient penetration in the private parts of minor girl of tender age of 4 years and the injuries found during her medical examination proved as Ext.-6 by

P.W.12 corroborate the charge of rape in terms of Section 375 Explanation-I of the Indian Penal Code as per the unamended provisions.

15. Taking the material evidence in entirety and upon careful scanning of the prosecution evidence, we are of the considered view that the learned trial court has not committed any error or illegality in recording conviction under Section 376(2) (f) I.P.C and sentencing the accused to rigorous imprisonment of 10 years. However, on consideration of the submission of learned counsel representing the appellant and learned A.P.P., we do not find sufficient grounds to enhance the sentence any further. The present appeal being devoid of merit, is accordingly dismissed.

16. Let Lower Court Record be sent down to the concerned court with a copy of the judgment.

17. Before parting, we record our appreciation to the able assistance rendered by learned counsel, Ms. Suchitra Pandey appointed by JHALSA to represent the appellant during hearing of this case. The Member Secretary, JHALSA would bear her admissible legal remuneration on production of the certified copy of the judgment along with an application within a period of four weeks therefrom.