
(2015) 07 JH CK 0126

In the Jharkhand High Court

Case No : Cri. Appeal (DB) No. 412 of 2013

Gujua Manjhi and Others

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 01-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164A, 172, 173, 313, 53

Evidence Act, 1872 — Section 8

Penal Code, 1860 (IPC) — Section 34, 363, 366, 376(2)(g), 376(g)

Citation : (2015) 3 AJR 710 : (2015) CriLJ 4303

Hon'ble Judges : Virender Singh, C.J;P.P. Bhatt, J

Bench : Division Bench

Advocate : Mahesh Kumar Sinha, for the Appellant; Pankaj Kumar, APP,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

Virender Singh, C.J—The appeal on hand has been preferred by accused-appellant (i) Gujua Manjhi alias Gajju, Hansada, (ii) Guddu Manjhi alias Guddu Hansada and (iii) Anand Manjhi Hansada alias Anand Manjhi alias Hansda against the judgment of conviction dated 16.5.2013 and order of sentence dated 18.5.2013 passed by learned Additional Sessions Judge-II, F.T.C. Bokaro in S.T. No. 450 of 2010, whereby and where-under all the three appellants have been found guilty under Sections 366/34 and 376(2)(g) of the IPC and sentenced to undergo R.I. for ten years and to pay fine of Rs. 5000/- each and in default to pay fine, R.I. for six months for the offence under Section 366/34, IPC. They have been further sentenced to undergo R.I. for ten years and to pay fine of Rs. 5000/- each and in default to pay fine, R.I. for six months for the offence under Section 376(2)(g). Both the substantive sentences are ordered to run concurrently. The case of prosecution sans unnecessary details, as one finds from the written report of victim-P.W. 7, is that on 29.06.2010 at 8 p.m. in the night, while she was alone in her house and was sleeping having taken her meal, Gujua Manjhi (aged about 23 years), Guddu Manjhi (aged about 23 years) and Anand

Manjhi (aged about 23 years) and other two unknown persons entered into her house, caught hold of her and took her away towards Damodar river, where they committed rape on her one by one, resultantly she fainted. After regaining consciousness, she returned to her house at around four in the morning and slept over there. At around 9 a.m. she woke up and narrated her woes to her son, Dusrath Hembram and grandson, Prem Chand Soren. Thereafter, her son went to work as such she could not immediately inform about the incident to the police. In the evening, when her son and her grandson returned from work, she reported the matter to the police.

2. On the aforesaid allegations, formal FIR bearing 64 of 2010 under Section 363/376(g) of Indian Penal Code came to be registered in police station Harala against three accused-appellants and two unknown persons, investigation of which was undertaken by police Sub-Inspector Md. Kayum Ansari (P.W. 10) and the completion of investigation resulted into filing of challan against three accused persons, against whom charge for the offence under Sections 366/34 and 376(2)(g) of the Indian Penal Code was framed for which the appellants stand convicted and sentenced in terms of the impugned judgment/order.

3. The case of accused persons, as one finds from the statement recorded under section 313, Cr.P.C., is of denial simplicitor. During cross-examination, it has been suggested by the defence counsel to victim that the accused persons have been falsely implicated due to land dispute by her but she denied it. They have not chosen to adduce any evidence in their defence.

4. Learned counsel for the accused-appellant pointed out certain flaws in the case of the prosecution viz; there being inordinate delay in lodging of FIR, which is fatal for prosecution case, the testimony of so called victim remained uncorroborated by medical evidence; DNA profile of accused persons did not match with DNA of victim's vaginal swab; no spermatozoa was found in vaginal swab of victim; the important witness i.e. the son of victim has not been examined as such adverse inference can be drawn against prosecution; and the vital fact that no external or internal injury was found on the person of victim as such the accused-appellants may be extended the benefit of doubt to disturb the conviction as already slapped upon them.

5. Per contra learned A.P.P. submitted that there be sufficient evidence on record to prove the guilt of accused persons and added that external or internal injury on the private part of the person of victim is not sine qua non to prove the guilt of gang-rape. Non-examination of son is not fatal as it has come in evidence of one witness that the son of victim has already died. Admittedly delay in taking vaginal swab is the prime reason for non-finding of spermatozoa but the situation was beyond the control of victim. However, there be cogent, trustworthy and reliable evidence of victim regarding commission of gang rape on her. Thus, the appeal being devoid of merit is fit to be dismissed.

6. The prosecution, in order to bring home the charges framed against the

accused persons, has examined altogether 10 witnesses in this case. Apart from oral evidence prosecution has proved and exhibited signature of Prem Chandra Soren on written statement (Ext-1), signature of Dasharath Hambram on written statement (Ext-1/1), Radiological report (Ext-2) Pathological Report (Ext-2/1), medical report (Ext-3) and DNA Test report.(Ext-4).

i. P.W. 1 - Ram Kumar Manjhi; the brother of victim has deposed hearsay evidence about occurrence.

ii. P.W. 2 - Prem Chandra Soren has deposed that victim had complained on 30-06-2010 in the morning that Gujua Manjhi, Guddu Manjhi, Anand Manjhi and other unknown two persons took her away towards Damodar river and committed rape on her. He has proved his signature as well as signature of Dasharath Manjhi on written report dated 30-06-2010 as Exhibits-1 and 1/1.

iii. P.W. 3 - Dr. Manas Kumar Mallick has stated that he had assessed the age of victim on the basis of radiological impression as more than 18 years and has proved its report as Exhibit 2. He has further stated that he had also examined the vaginal swab and found no sperm, E.P. cell-plenty and pus cells-occasional. He has also proved pathology report in his pen and signature as Exhibit 2/1.

iv. P.W. 4 - Sukhdeo Manjhi has stated that he was not present at his house on 29-06-10. When he returned, he came to know about occurrence of rape thereafter he visited hospital, where the medical treatment of victim was going on.

v. P.W. 5 - Poke Manjhiyan has turned hostile and denied his testimony recorded in case diary by I.O. during cross-examination conducted by learned A.P.P.

vi. P.W. 6 - Karamchanda Manjhi, has stated that the son of victim namely Dashrath (now deceased) had informed him about the fact that rape was committed on his mother.

vii. P.W. 7 - victim/prosecutrix.

viii. P.W. 8 - Dr. Paramjit Kaur, is medical officer, who had examined victim on 01-07-10, has stated that victim was brought before her by A.S.I. Kayum Ansari (I.O.). According to her, she found that there was no foreign body, hair or stain on her dress. No spermatozoa was found in the pathological report of vaginal swab. No external injury or internal injury was found on the private part. According to her, it was difficult to say whether forceful sexual assault was done on victim or not. She has proved medical report as Exhibit-3.

ix. P.W. 9 - Phuleshwar Rai is part investigating officer, has stated that he had collected medical reports of victim from medical expert and submitted the charge-sheet against three accused-appellants.

x. P.W. 10 - Md. Kayum Ansari is first investigating officer, has proved both the place of occurrences with its topography. He is the I.O., who had sent vaginal swab of victim as well as blood samples of accused-appellants to FSL for

matching of DNA profile. He has also proved requisition sent by him to medical officer for the medical examination of accused-appellants as Ext-5.

7. Before initiation of the re-appreciation of the evidence of key witness (victim), it would be necessary to discuss the fate of medical evidence brought on record in this case.

8. From the admission of medical officer on oath it is apparent that victim was brought before doctor on 30-06-10 at 8.30 p.m. but doctor had examined her on next day i.e. 01-07-2010 meaning thereby victim was medically examined after about 12 hours even after her production with police requisition before doctor, which itself diminishes the possibility of the presence of any positive sign of rape particularly when victim is rustic, schedule-tribe illiterate old woman.

9. The delay caused by medical officer in examination of victim cannot be justified in any way particularly when the Hon'ble Supreme Court in State of Karnataka Vs. Manjanna, AIR 2000 SC 2231 : (2000) CriLJ 3471 : (2000) 6 JT 529 : (2000) 4 SCALE 461 : (2000) 6 SCC 188 : (2000) AIRSCW 2347 : (2000) 4 Supreme 4 recognized that the rape victim's need for medical examination constituted a "medico-legal emergency" and it is the right of the victim of rape to approach medical services first before legally registering a complaint in police station. Thus, the doctor or hospital is now required to examine victim of rape promptly even if she reports to hospital directly, and voluntarily without a police requisition. Second; it was the right of the victim of rape to approach medical services first before legally registering a complaint in a police station. The hospital was obliged to examine her right away; they could always subsequently initiate a police complaint on the request of the victim. As a result of this landmark judgment, the doctor or hospital is now required to examine a victim of rape if she reports to the hospital directly, and voluntarily, without a police requisition. The judgment recognizes the three ways by which a hospital may receive a victim of rape: voluntary reporting by the victim; reporting on requisition by the police, and reporting on requisition by the Court. Unfortunately this information has not been disseminated to all doctors, and the majority of them still insist on a police requisition before examining a rape victim.

10. An amendment in Cr.P.C. by which Section 164A has been inserted by Code of Criminal Procedure (Amendment) Act, 2005 (w.e.f. 23-06-2006) to meet out the aforementioned situation with an object that the medical examination of the rape victim should be carried out as early as possible without any delay with consent of victim preferably by a lady doctor.

11. Section 164A, Cr.P.C. is binding on the doctors, which runs inter-alia, Section 164A, Cr.P.C. Medical examination of the victim of rape.--

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted

by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of a such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her and prepare a report of his examination giving the following particulars, namely:-

(I) the name and address of the woman and of the person by whom she was brought;

(II) the age of the woman;

(III) the description of material taken from the person of the woman for DNA profiling;

(IV) marks of injury, if any, on the person of the woman;

(V) general mental condition of the woman; and

(IV) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigation officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation. - For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in Section 53.

12. Reasons for negative wet smear in alleged victims of sexual assault: this could be for several reasons but two are very common (1) Delay in taking the samples, due to late reporting (2) Washing of the genitals.

13. In the case on hand, delay in reporting and delay in taking sample both ruined the possibility of finding any positive scientific sign of rape.

14. It also appears from record that vaginal swab of victim from pathology lab was collected by I.O. on 06-07-10 (after 5 days since it was taken) as per paragraph 60 of case diary (which has been perused on strength of section 172, Cr.P.C.) and it was sent to F.S.L. with the blood samples of accused persons for matching the DNA profile of accused persons with male DNA profile, if detected, in vaginal swab while pathological report Ext-2/1 had already ruled out the presence of any sperm in the vaginal swab on 02-07-2010 hence a mindless and extremely futile exercise for matching of male DNA profile, if found, in vaginal swab with DNA profile of blood samples of accused persons was done by police when the result of pathological test of vaginal swab unveiling no sperm present in when tested on 02-07-2010. Ext-4 DNA profile report confirms our view as "human male DNA profile" could not be detected in vaginal swab of victim, hence no question would arise for its matching with DNA profile of blood samples of accused persons. Hence, we are of the view that absence of positive sign of rape in medical evidence in the facts and circumstances of the case would cause no effect on case of prosecution, if the evidence of victim of rape inspires our confidence.

15. Thus, the entire case rests upon the quality of the testimony of victim, who was allegedly abducted and raped in night hours. The rules laid down in following case laws are important as guiding principle to arrive at correct conclusion.

16. Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753 : (1983) CriLJ 1096 : (1983) 2 Crimes 232 : (1983) 1 SCALE 665 : (1983) 3 SCC 217 : (1983) 3 SCR 280 --

The Hon''ble Supreme Court in this case, felt that asking for corroboration in sex offences was like adding insult to injury of the victim. There was no reason to insist on corroboration because of the very nature of the offence, i.e. sex crimes, which makes it almost impossible to gather independent witnesses for corroboration. However, it was laid that in certain circumstances corroboration by medical evidence alone was required. These included cases where a woman of the age of majority is found in compromising position, who is likely to make accusations for self preservation and where the "probabilities-factor" is out of tune.

17. State of Maharashtra Vs. Chandraprakash Kewalchand Jain, AIR 1990 SC 658 : (1990) CriLJ 889 : (1990) 1 Crimes 724 : (1990) 1 JT 61 : (1990) 1 SCALE 33 : (1990) 1 SCC 550 : (1990) 1 SCR 115 .

It has been held by the Hon''ble Supreme Court that if totality of the circumstances appearing on the record of the case discloses that the prosecutrix doesn''t have a strong motive to falsely involve the person charged, the court should have no hesitation in accepting her evidence.

18. In State of Orissa Vs. Thakara Besra and Another, AIR 2002 SC 1963 : (2002) CriLJ 2642 : (2002) 2 Crimes 291 : (2002) 4 JT 235 : (2002) 3 SCALE 570 : (2002) 9 SCC 86 : (2002) 3 SCR 173 : (2002) AIRSCW 1906 : (2002) 3

Supreme 467 .

It has been held by the Hon"ble Supreme Court that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

19. Recently in a case law reported in Deepak Vs. State of Haryana(2015) 3 AD 535 : (2015) CriLJ 2049 : (2015) 2 RCR(Criminal) 246 : (2015) 3 SCALE 414 : (2015) 4 SCC 762 : (2015) 4 SCJ 211 .

It has been held by the Hon"ble Supreme Court that the testimony of prosecutrix is vital and unless there are compelling reasons, which necessitate looking for corroboration of her statement or where there are compelling reasons for rejecting her testimony, there is no justification on part of court to reject her testimony.

20. P.W. 7 the victim, has stated on oath that the incident occurred about two years back. At around 9.00 p.m., when she was at her house, Gujua Manjhi, Guddu Manjhi & Anand Manjhi forcibly entered into her house and asked whereabouts of her son Dushrath Hembrum. On being replied that he was not in the house, they took her towards the jungle and committed rape on her resultantly she fainted there. She returned at her house at 4 a.m. and complained about the occurrence to her son. She went to police station with her son namely Dushrath Hembrum and Premchand Soren (P.W.-2), where case was registered, thereafter she was sent to hospital for medical treatment. She identified three accused persons, who were present in the Court. During cross-examination she has stated that she, while being taken away, had screamed but no one came. On the date of incident there was marriage in front of her house. She denied the suggestion given on behalf of defence during cross-examination to the effect that she has falsely implicated the accused-appellants due to land dispute.

21. It is well settled principle of law that a witness should be cross-examined on each and every point and failure to cross-examine him/her on a particular point would entail a presumption that party, not cross-examining the witness, had accepted the evidence. On scrutiny of evidence of victim we found that the evidence of victim, which communicates the fact that abduction followed by rape was committed on her by three accused appellants, has not been subjected to cross-examination. The suggestion without any evidence, given on behalf of defence to the effect that victim has falsely implicated the accused-appellants, does not appeal to reasoning. There was no reason for a woman at the age of 55 years, (grandmother of P.W.-2), to falsely implicate the accused-appellants at the cost of her own prestige and honour.

22. Here it is also important to note that the evidence of P.W. 2-Prem Chandra Soren, who has also deposed that "victim had complained to him that Gujua Manjhi, Guddu Manjhi, Anand Manjhi and other unknown two persons took her away towards Damodar river and committed rape on her" as per early statement of victim is indisputably & legally admissible as evidence of conduct because of illustration (j) to section 8 of the Indian Evidence Act, as such it has corroborated the evidence of victim. What else was expected from their rustic and illiterate family.

23. After scanning the evidence once again very minutely, especially evidence of the prosecutrix, who happens to be a widow (aged 55 years), there appears to be no tinge of exaggeration so as to falsely implicate the present three accused, who are from three different families but incidentally of the same age i.e. 23-24 years. Therefore, we do not find any reason for not believing her statement sufficient for the purposes of holding all the three accused guilty of the charge of Section 376(2)(g) of the Indian Penal Code, despite there being no corroboration to her statement, whereas all the attending circumstances of the prosecution case are proving the complicity of all the three accused who took undue advantage of absence of the son of prosecutrix, entered her house, lifted her to a particular place and then gang raped her. Such type of persons who committed beastly act, otherwise do not deserve any sympathy of the Court.

24. The net result is that the appeal on hand qua all the three accused, namely, (1) Gujua Manjhi alias Gajju Hansada, (2) Guddu Manjhi alias Guddu Hansada and (3) Anand Manjhi Hansada alias Anand Manjhi alias Hansda stands dismissed on all counts.

25. We have been informed that the accused are in custody for last about five years. They shall now serve the remainder of their sentence slapped upon them.

26. The Jail Superintendent of the concerned jail, where present three accused are lodged, shall be informed of the outcome of the instant appeal without any delay by the Registry of this Court. Registry is also directed to send a copy of judgment to Principal Secretary (Health), Department of Health & Family Welfare, Government of Jharkhand, Ranchi, for its circulation among doctors of the State of Jharkhand for their strict adherence on procedure incorporated under section 164A, Cr.P.C. in its letter & spirit, which is of binding nature as well as the directions issued by the Hon''ble Supreme Court in case law reported in State of Karnataka Vs. Manjanna, AIR 2000 SC 2231 : (2000) CriLJ 3471 : (2000) 6 JT 529 : (2000) 4 SCALE 461 : (2000) 6 SCC 188 : (2000) AIRSCW 2347 : (2000) 4 Supreme 4 , both discussed in paragraphs 10 to 12 of this judgment.