
(2019) 02 JH CK 0031

In the Jharkhand High Court

Case No : Criminal (Jail) Appeal (DB) No. 1288 Of 2008, 16 Of 2009

Haradhan Marandi And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 21-02-2019

Acts Referred:

Indian Penal Code, 1860 — Section 376, 376(2)(g)
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 02 JH CK 0031

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

Bench : Division Bench

Advocate : Rajni Kant Ojha, Azeemuddin

Judgement

1. Heard learned Amicus Curiae Mr. Rajni Kant Ojha and the learned
2. Appellants in both appeals are aggrieved by the judgment of conviction dated 17.09.2008 passed in Sessions Case No. 102/2006 by the court of learned 5th Additional Sessions Judge (F.T.C.), Dumka, whereby they have been convicted for the offence committed and punishable under section 376(2)(g) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years each with a fine of Rs. 1,000/- each, in default whereof, to suffer imprisonment for three months each, by the impugned order of sentence dated 18.09.2008. The third accused Kalishal Marandi has been acquitted of the charge.
3. Case of the prosecution is based on the fardbeyan of the prosecutrix 'X' (name withheld) recorded on 30.12.2005 at 20.00 hrs. by the S.I. Shamshad Ansari, Officer-in-Charge, Jama P.S. As per her fardbeyan, she was 18 years of age on 30.12.2005. At around 20.00 hrs. in the night, she made her statement before the Sub Inspector, Officer-in-Charge, Jama P.S. She states that she was in love with the accused Haradhan Marandi of village Tepura Dudhani since one year. She had gone to the place of her uncle at Lakad Diwani and met the accused Haradhan Marandi on Tuesday at Barapalasi Hatia. She rode as a pillion with the accused Haradhan Marandi on a bicycle at around 4.00 for coming back to her

house. The accused Haradhan Marandi kept her in the night on Tuesday in a Bari, adjacent to his house and committed rape upon her. On Wednesday, two more friends of Haradhan Marandi came. During the day, Haradhan took her to Jama to the house of his relative and both his friends returned. In the night, Haradhan Marandi committed rape on her. On Thursday, while she was coming back on the bicycle of Haradhan Marandi along with him to the house, his two friends met her on a pool (Bridge) just before the village Tepra Dudhani and all the three took her to a vacant field at around 10.00 am in the east of Khairbani village and committed rape upon her one after the other in a ditch in the vacant field. Thereafter, all the three left her and fled away. She was left with no strength and remained lying in Gadha (ditch) for the whole night. In the morning, villagers of Khairbani village saw her and brought her to the village. His cousin Mistri Tudu, son of Guguram Tudu, on their information, came and took her to her house at Bando. On information, police arrived at her house and took her for treatment to the hospital where she was undergoing treatment. She stated that Haradhan Marandi (accused) along with two of his friends committed rape upon her and she could identify them, though she did not know their names. She complained of severe pain in her stomach and calf. On her fardbeyan, her cousin Mistri Tudu inscribed his signature and she also put her right thumb impression after it was read over to her and she understood it. On these allegations contained in her fardbeyan, Jama P.S. Case No. 141/2005 was registered on 30.12.2005 under section 376(2)(g) of the Indian Penal Code against the accused Haradhan Marandi and two other unknown persons.

4. After conclusion of the investigation, charge sheet was submitted on 20.02.2006 bearing no. 18/2006 under section 376(2)(g) of the Indian Penal Code against three accused persons namely, Haradhan Marandi, Benapes Kujur @ Tudu and Kalishal Marandi. Cognizance was taken on 06.03.2006 and since the offence was triable by the court of sessions, the case was committed to the court of sessions on 26.05.2006. Charges were framed against all the accused persons on 17.06.2006 section 376 of the Indian Penal Code, which was later on amended to the section 376(2)(g) of the Indian Penal Code. Initially, when the charge was framed under section 376 of the Indian Penal Code on 17.06.2006, it was also read over and explained to the accused persons in Hindi, to which they pleaded not guilty and claimed to be tried.

5. During course of trial, prosecution examined twelve witnesses namely as under:

PW-1: Prosecutrix 'X'

PW-2: Sukhdeo Puhjar

PW-3: Mistri Tudu

PW-4: Talakudi Tudu

PW-5: Nandi Pujhar

PW-6: Augustin Tudu

PW-7: Dr. Pushplata Tuddu

PW-8: Basanti Tudu

PW-9: Bimlesh Kumar Sahay, Judicial Magistrate before whom test identification parade was conducted.

PW-10: Samshad Ansari, Investigating Officer of the case and Officer-in-Charge of Jama P.S

PW-11: Deep Nath Roy

PW-12: Binod Lal.

Out of these twelve prosecution witnesses, PWs-4, 5 and 8 were declared hostile on the request of the prosecution. PW-4 Talakudi Tudu is the grandmother of the prosecutrix. PW-6 Augustin Tudu has been tendered by the prosecution for cross-examination.

The prosecutrix (PW-1) 'X', in her deposition during trial stated that while she was returning from Hatia at 4.00 pm, she was raped at Tepra Dudhani first by Haradhan and then by Benapes and thereafter by the third accused Kalishal. The place where they raped her was a forest. She further stated that Haradhan had raped her and thereafter all three had raped her near Tepra River which is closed to Khaikuti village. She further states that she fell unconscious after the rape. Thereafter, her uncle and chowkidar brought the police and she was taken to her home and thereafter to the hospital by the police. She narrated these facts to her grandmother Talakudi Tudu and uncle Mistri Tudu. Her mother had died earlier. She has narrated the incidence to the Officer-in-Charge in her fardbeyan in the presence of her Uncle Mistri Tudu. She identified all three accused persons in the dock during trial.

In her cross-examination, she states that she had gone alone to Hatia on that day. She had not met anyone else in the way, though other persons were coming and going towards that direction. She had also not met anyone in the way. The place where she was raped for the first time is not far from the village Tepra Dudhani. It was night when she was raped. She could not know the time as she did have watch. She had protested at the time of rape. However, she had not received injury in her back. There was no stone at the place where she was raped, it was a field. She further states that it was forest and not field. Since she had fallen unconscious, she could not say on which day did the police come. Police had come in the evening at around 6-7 pm. In her further statement at para-15 of her cross-examination, she says that she had been raped by Haradhan, where-after she fell unconscious and then regained consciousness and again fell unconscious. She was able to regain consciousness time and again. She further states that after other two boys raped her, she fell unconscious. She knew Haradhan from before. She has admitted that she had been in love with

Haradhan from before, but there was no talk of marriage. She has denied false implication of Haradhan on his refusal to marry her.

PW-2 Sukhdeo Puhjar is chowkidar. He is hearsay witness. He came to know of the incidence from the villagers that the prosecutrix was lying unconscious and when he went there, he saw her lying unconscious in the field. Thereafter, he went to the police station and informed the Officer-in-Charge who came on a Jeep and took the victim to the hospital.

PW-3 Mistri Tudu is the fardbeyan witness who has proved the Ext.3 without objection. PW-4 Talakudi Tudu, grandmother of the prosecutrix, was declared hostile on the request of the prosecution. PW-5 Nandi Pujhar also turned hostile. PW-6 Augustin Tudu was tendered by the prosecution for cross-examination.

PW-7: Dr. Pushplata Tuddu is the first Medical Officer who has proved the Medical Report of the victim as Ext.1 without objection. Victim was examined at 9.00 pm on 30.12.2005 and again re-examined on 31.12.2005 in daylight which confirmed the findings as under:

Height-4'10" Weight- 82 lb

Feet: Upper - 14

Lower - 14

Auxiliary hair - present, brownish black Pubic hair - scanty, thick black Breast - developing On examination - no mark of injury over her body externally.

On internal examination - no mark of injury found over her private parts. Blood clots in vagina.

Hymen - old ruptured vagina admits 1 finger easily, vaginal swab was taken and sent to pathology for microscopic examination for presence of spermatozoa. Pathological report shows spermatozoa not found dead or alive. Pathological report given by members of medical board. Members Dr. R.P. Verma, Dr. A.K. Jha and Dr. A.K. Singh, all medical officer of Sadar Hospital, Dumka.

Investigation done of the following:

X-Ray of both wrist joint X-Ray of both knees joint.

X-Ray hip bone was advised. X-Ray plate was shown to Dr. S.N. Jha (Sadar Hospital, Dumka, Orthopedic Surgeon) who gave his opinion on 31.12.05 as follows:

X-Ray both knee joints - plate shows upper epiphysis of both tibia and fibula united. X-Ray both wrist joint plate shows lower epiphysis of both radius and ulna united. X-Ray of hip joints bone plate shows union of wrist of both ilium bones in advanced stage.

No definite opinion could be given whether victim was raped or not. As far as age

is concerned, according to secondary sex character, number of teeth and X-Ray report, age of victim is about 18 yrs.

Since the Medical Officer Rashmi Kamal who examined the victim had later on been appointed as IAS Officer, Dr. Pushplata Tuddu (PW-7) who had worked with Dr. Rashmi Kamal, identified her writings and signature and proved the medical report as Ext.-1.

PW-9 Bimlesh Kumar Sahay is the Judicial Magistrate before whom test identification parade was conducted on 18.01.2006. He in his deposition has proved the TIP chart as Ext.2. He has stated that the victim identified the suspect Benapes Kujur @ Tudu, appellant in Cr. Appeal (DB) No. 1288/2008. According to him, she told that this accused along with the accused Haradhan had committed rape upon her. However, the victim could not identify the other accused Kalishal Marandi during TIP.

PW-10 Samshad Ansari is the Investigating Officer of the case. He was posted as Officer-in-Charge of Jama P.S. on 30.12.2005. On information at around 5.00 pm in the evening during patrolling that a girl of the village Bando has been raped and her condition was serious, he reached the village Bando and finding her condition critical, took her to Sadar Hospital, Dumka with whom Mistri Tudu also accompanied. He took the statement of the victim in the hospital and the fardbeyan is in his handwriting and signature, which has been marked as Ext.3. Formal FIR was prepared by the Munshi Akhtar Ali bearing his signature, which has been marked as Ext.4. He took the re-statement of the victim and also statements of the witnesses Mistri Tudu, Talakudi Tudu, Basanti Tudu and Sukhdeo Pujhar and on return to the police station, registered the formal FIR. Again on 31.12.2005 he went to the hospital and found that the condition of the victim was still serious. From there, he proceeded to Khairbani village and took the statement of Nandi Pujhar and Deva Pujhar of Khairbani village. This witness has examined the place of occurrence and described it be at four places as under:

The first place of occurrence is at Khairbani village at about ½ km in the east north direction from Mayurakshi River. There is a river rivulet by its side. He was told that at this place, the victim was lying unconscious there and other villagers of Khairbani village took her to the village. In the east of this place of occurrence is Mayurakshi River and at a distance of ½ km in the west southern direction is Khairbani village; in the south at a distance of about 1 ½ km is Bando village. According to this witness, he took the confessional statement of the accused Haradhan Marandi after arresting him on 01.01.2006. He has further described the second place of occurrence as Joje Tola under Tepra Dudhani village at Bari of the accused Haradhan Marandi situated in the north where there is a Berry tree. This is the place where the accused was stated to have committed rape upon the victim. At 60-70 yard from this place is the house of the accused Haradhan Marandi. On the statement of the accused Haradhan Marandi, third place of occurrence was inspected which is described at village Tepra Dudhani Joje Tola; in the north near Basbari of one Rakhisas Tudu, under the Sagwan tree at that

place, victim had alleged rape by the accused. Thereafter, the accused Benapes Tudu was arrested and on the same day, third accused Kalishal Marandi was also arrested. On the statement of the accused Haradhan Marandi, fourth place of occurrence was inspected, which is at distance of ½ km in the north west of Khairbani village and at a distance of 1.00 km from Harrarwa village in the east of Mayurakshi River where there are Palash trees as well. Victim had stated that all these three accused persons had committed rape upon her one after the other at these places under Palash Tree. During inspection of that place, the Officer-in-Charge had found earrings of the victim which he seized and prepared the seizure list, which has been marked as Ext.5. In the east southern corner of this place of occurrence is Khairbani village and at a distance of 1.00 km in the west is Harrarwa village. According to this witness, after conclusion of the evidence and procurement of the medical report of the victim upon instruction of the senior official, charge sheet was filed. PW-11 Deep Nath Roy has proved the seizure list, which has been marked as Ext.6. PW-12 has proved his signature on the seizure list, which has been marked as Ex.6/1. All these exhibits were adduced without objection.

6. After the closure of the prosecution evidence, accused persons were examined under section 313 of the Cr. PC where they denied their involvement and pleaded themselves to be innocent. However, no defence witness or documentary evidence in support were adduced by the accused person.

7. Learned Trial Court upon consideration of the entire materials on record and submissions of learned counsel for the parties, was pleased to hold the accused Haradhan Marandi and Benapes Kujur @ Tudu guilty of the offence under section 376(2)(g) of the Indian Penal Code. However, since the victim had not identified the third accused Kalishal Marandi during TIP and for the first time, she identified him in the dock during trial, learned Trial Court was of the view that it would not be safe to record conviction on such weak evidence against the third accused Kalishal Marandi.

8. Heard Learned Amicus Curiae, Mr. Ranji Kant Ojha who has been appointed in Criminal (Jail) Appeal (DB) No. 16 of 2009. He has also argued the case of the appellant in the connected Criminal (Jail) Appeal (DB) No. 1288 of 2008 since learned Amicus Curiae Mrs. Niki Sinha in Cr. Appeal (DB) No. 1288/2008 has been appointed as Additional Public Prosecutor. We have also heard learned counsel for the State Mr. Azimuddin, Additional Public Prosecutor in both the appeals.

9. Learned Amicus Curiae has during course of his submission questioned the findings recorded by the learned Trial Court inter alia on the following grounds:

He submits that as per the admission of the victim, she was in love with the appellant Haradhan Marandi from before. She had voluntarily gone with Haradhan Marandi on that date riding on his bicycle. The Medical Officer Dr. Puspallata Tudu (P.W.7) has proved Ext.1, report of the examination of the victim,

which shows her to be about 18 years of age based upon radiological examination of fusion of her bones. At the same time, it has been stated that it was the case of old rupture of vagina which admits one finger easily. There was no mark of injury found on the private parts, though blood clot was found in the vagina. Pathological report did not show live or dead spermatozoa. Based on the examination of the victim, the Medical officer has opined that no definite opinion can be given, whether victim was raped or not. Therefore, the victim, a major aged about 18 years, in all likelihood, had consensual sexual relationship from before and absence of any injury despite allegation of gang rape on her body or private part, proved that allegation were concocted for some ulterior reasons. Perhaps, she could not get the assurance of marriage from appellant Haradhan Marandi. Her failure to identify the third accused Kalishal Marandi in Test Identification Parade and identifying him for the first time during trial also goes to show that her statements are not trustworthy. False accusation is therefore writ large in her testimony. As per her own admission she was already was in love with Haradhan Marandi from before and the medical report shows that she was habituated to sexual intercourse from before. Learned Trial Court committed a serious error of law in appreciation of evidence on record in recording conviction against these two appellants on such unreliable evidence. He submits that three prosecution witnesses including the grandmother of the prosecutrix, Talakudi Tudu (P.W.4) have turned hostile and the prosecution has tendered P.W.6 Augustin Tudu as well during trial. The incidence is alleged to be spread over four places of occurrence and for three days during which time there had been movement of the victim along with the accused / appellant Haradhan Marandi on bicycle, but she has never raised any hue and cry or tried to flee away from his custody. These are the unnatural conduct of the prosecutrix which makes her testimony all the more doubtful. Therefore, conviction of these appellants is not safe on the basis of unreliable testimony of sole prosecutrix and same deserves to be set aside.

10. Learned Additional Public Prosecutor has defended the impugned findings. He submits that prosecution evidence has not been shaken during course of trial and upon cross examination by the defence. The victim 'X' P.W.1 has truthfully accepted that she was in love with Haradhan Marandi from before and that she had accompanied him on a bicycle on return from hatia on Tuesday. However being in love, does not give any license to the accused to commit rape upon her if she did not consent for sexual intercourse. The medical report shows presence of blood clot in the vagina. As per the testimony of the prosecutrix, she was raped by three persons one after the other. Therefore, there was little scope for her resistance. Absence of injuries on the private parts could not alone belie her story. The prosecution witnesses including the 'chowkidar' have found her lying unconscious in a lonely place at the fourth place of occurrence in an open vacant field in the cold cruel night of 30.12.2005 for the reason that she was subjected to gang rape and did not have enough strength left to come back from the place of occurrence to her village. The victim's statement in case of such repeated

sexual assault by more than one person, cannot be disbelieved as she had no motive to implicate the accused persons. She has also denied this suggestion in her statement. Other prosecution witnesses have also supported the case of the prosecution who have brought her back to her home, where after she was taken for treatment at Sadar Hospital, Dumka where her condition remained serious for more than one day even as per the statement of the Investigating Officer, P.W.10. The Investigating Officer Shamshad Ansari has also seized earrings from the fourth place of occurrence which shows that the victim was subjected to forceful sexual assault at that place in the night by the accused persons. Learned Trial Court on the basis of these clinching material on record has rightly convicted the accused persons for the offence of gang rape under Section 376 (2)(g) of the I.P.C. The appeals are without merits and deserve to be dismissed.

11. We have considered the submission of learned Amicus Curiae and learned Additional Public Prosecutor also in both appeals; we have also gone through the entire materials on record including the F.I.R; framing of the charge; evidence of twelve prosecution witnesses; six prosecution exhibits; statement of the accused persons recorded under Section 313 Cr.P.C and the impugned judgment of conviction and order of sentence.

12. We have considered the evidences in its entirety and have not found any reason to disbelieve the prosecution case based primarily on the testimony of the prosecutrix P.W.1 and also other supporting evidence of P.W.2 Sukhdeo Pujhar, P.W.9 Bimlesh Kumar Sahay, Judicial Magistrate, P.W.10 Shamshad Ansari, Investigating Officer of the case and P.W.7 Dr. Puspallata Tudu, Medical officer. In a case of rape which happens usually at a lonely place, it is least expected that there could be corroboration of the statement of the prosecutrix by any other eye witness. If the testimony of the prosecutrix is found to be reliable and trustworthy, there is no reason why conviction cannot be based upon sole testimony of the prosecutrix Victim 'X', [see *Lillu v. State of Haryana* reported in (2013) 14 SCC 643, para 10 and 11 thereof]. From the testimony of P.W.1 Victim 'X', we find that she has truthfully admitted of being in love with Haradhan Marandi from before. She also says that she had gone along with him riding on a bicycle on her return from haat on Tuesday on her journey back to home. However accused Haradhan Marandi instead of taking her back to her home, managed to keep her in the night near his own house and committed rape upon her for the first time. Thereafter, she was subjected to rape on the next night by the appellant Haradhan Marandi and other accused persons. Victim has further supported her initial statement made in the fardbeyan and in her deposition during trial where she states that she was subjected to rape by the appellants and the other persons one after the other at the vacant field which is half Kilometer to village Kherbani in the northwest near the Mayurakshi River under the Palash tree. The victim was recovered in the morning after the villagers saw her lying at this place in a stage of unconsciousness. It was the night of 29/30.12.2005 and obviously a very cold night. She did not have enough strength left after the repeated sexual assault by more than one person to come back to

her home. She had fallen unconscious, therefore, she remained at the same place throughout the night. It further transpires from the statement of P.W.1 read with the statement of P.W.10, Investigating Officer that her condition was so serious that she had to undergo treatment for two consecutive days in Sadar Hospital, Dumka where she was examined by Dr. Rashmi Kamal. The medical report proved as Ext. 1 also shows the presence of blood clot in the vagina. This, in itself, indicates that she had been subjected to forceful sexual intercourse. Since it was sexual assault by more than one person, the victim who was of a moderate built and height of 4 feet 10 inch weighing 42 pounds and about 18 years of age, could not have offered much resistance. Therefore, absence of external injuries in itself cannot discredit the oral testimony of the prosecutrix that she was subjected to sexual assault by more than one person. Prosecutrix had been able to identify accused Benapes Kujur @ Tudu during T.I.P, which has been brought on record and marked as Ext.2 and proved by P.W.9, Judicial Magistrate Bimlesh Kumar Sahay. However, since she could not identify the third accused Kalishal Marandi during T.I.P but had identified him only for the first time during trial in the dock, learned Trial Court had reason to hold that it was unsafe to convict the third accused Kalishal Marandi for the offence of gang rape.

13. When these material evidence on record are analyzed in the manner indicated above, we do not find any error of law or mis-appreciation of evidence on the part of the learned Trial Court in holding these appellants guilty of commission of offence punishable under Section 376(2)(g) of the Indian Penal Code. Both the appeals being devoid of merits, are accordingly dismissed.

Let lower court records be sent to the court concerned along with a copy of this judgment.

14. While parting, we record our appreciation for the valuable assistance rendered by the learned Amicus Curiae Mr. Rajni Kant Ojha during hearing of his case. His admissible legal remuneration should be borne by the Secretary, High Court Legal Services Committee. Let such payment be made within four weeks from the date of receipt of certified copy of the judgment along with an application.