

(2003) 06 PAT CK 0004

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 57 of 2002

Mohammad Arif

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 25-06-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 376

Citation : (2003) 3 PLJR 799

Hon'ble Judges : B.N.P. Singh, J

Bench : Single Bench

Advocate : R.A. Hussaini and M.Z. Quamar, for the Appellant; B.P. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

B.N.P. Singh, J.—The Appellant suffered conviction u/s 376 of the Indian Penal Code for which he was sentenced to suffer rigorous imprisonment for a period of ten years and was also sentenced to pay fine of Rs. 2000/- on accusation that in the dead of night at 11.00 P.M. on 6th November, 1993 the Appellant having gained his access in the inner apartment of house of Sanjeeda Khatoon (P.W. 3) having gagged committed sexual assault on her. The fardbeyan of the prosecutrix was recorded at 5.00 P.M. on 7th November, 1993, pursuant to which first information report was drawn up and investigation followed. As usual, in course of investigation, the Police Officer visited place of occurrence, recorded statement of witnesses, got the prosecutrix examined by the doctor and on conclusion of investigation laid chargesheet before the court.

2. In eventual trial that followed, the State examined altogether 8 witnesses and those examined by the State include one formal witness who brought on the record, first information report, the doctor, the prosecutrix, her family members and host of other witnesses.

3. The defence of the Appellant both before the court below and this Court was

plea of innocence and false implication due to land dispute with the family of the prosecutrix. However, the Appellant had not chosen to examine any defence witness on his behalf, and the trial court on consideration of evidences placed on the record, recorded finding of guilt and sentenced the Appellant in the manner stated above.

4. The finding recorded by the court below is sought to be assailed by the learned Counsel for the Appellant on premises that though prosecutrix was also clinically examined by the doctor, there has been no finding about commission of sexual assault on her. Contentions are raised that though host of witnesses were examined at trial, majority of them had turned volte face to the State and as such had betrayed the prosecution. Yet it would appear from Annexure-3 which is statement of prosecutrix recorded u/s 164 Code of Criminal Procedure before Magistrate that during her examination before the Magistrate she had disowned all allegations attributed to the Appellant about commission of sexual assault on her and as such had retracted from her statement which she rendered earlier before police about commission of sexual assault by the Appellant. Submission made at bar was that though the prosecution has a case that after Appellant grappled with the husband of the prosecutrix, his shawl came in custody of her husband but neither there has been seizure of the said wearing apparel of the Appellant nor there has been evidence of Investigating Officer to suggest seizure of said incriminating object during investigation. In this connection, statement of witnesses was also highlighted at bar to impeach their credibility.

5. The facts of the case are tell a tale. The prosecutrix while reiterating her earliest version stated her woes about commission of sexual assault by the Appellant at the dead of night after having gained access in the inner apartment of her house. The alarm raised by her attracted her husband and other family members who had occasion to see the Appellant making good his escape from her house, i feel that without burdening judgment with reproduction of evidence of witnesses, it would suffice to say that Md. Mursheed Alam, husband of the prosecutrix (P.W. 1), Md. Yasin, father-in-law of the prosecutrix (P.W. 4) with sustained consistency had stated about witnessing the Appellant making good his escape from their house, for which the prosecutrix told them about Appellant, who had committed sexual assault on her. True it is that Mushtaque (P.W. 2) who happened to be full brother of husband of the prosecutrix had turned volte face to the State at trial and had also acknowledged land dispute between the parties, be that as it may, this witness had not lent assurance to the prosecution allegation and his attention has been drawn by the State to impeach his credibility. Likewise, though Roshan Ara (P.W. 5) and Ishrat Bano (P.W. 6) too were hostile to the State but they were not witnesses on factum of sexual assault on prosecutrix even before the police and hence even though they were hostile to the State, that did not bear much significance. Now coming to the finding recorded by the doctor, though one may notice that the doctor had ruled out possibility of commission of sexual assault on the prosecutrix within 24 hours. This fact cannot be lost sight of that the occurrence took place at about 11.00

P.M. on 6th November, 1993 and it was not before 3.00 P.M. on 8th November, 1993 that the prosecutrix was clinically examined by the doctor and it was not unlikely that the doctor did not find evidence of commission of sexual assault on the prosecutrix, as after lapses of considerable time, after commission of assault, the possibility of evidence of commission of sexual assault having vanished, cannot be ruled out. So far animosity between parties are concerned, except acknowledgement made by witnesses who were hostile to the State, neither there is evidence on part of the defence nor that is testified by any evidible document. Though some witnesses were stating at trial about the night of incident being darkened night, possibility of identification of the Appellant cannot be said to be remote in view of he being not a stranger to the family members of the prosecutrix.

6. Some disturbing features in prosecution case, too require to be taken into notice thereof. In her earliest version, Manjeeda Khatoon, the prosecutrix, identified Appellant as elder brother of her husband but such relationship was eventually dropped at trial. I do not find that this fact is of such mitigating nature which can militate against accusation attributed to the Appellant. True it is, as it would appear from Ext. A that the prosecutrix had disowned all allegations attributed to the Appellant, in her examination u/s 164 Code of Criminal Procedure, she stated in her evidence in no uncertain term that said statement was made by her under duress. The moot question which would now arise as to whether she took recourse to public authority in case she was coerced to make statement under duress, but for that fact alone I am of the view that the entire evidence of the prosecutrix cannot be washed off, as utility of contradicting statement of a witness with early version was only to impeach credibility of a witness but that did not necessarily show that the statement made before the Magistrate was true, and narration made by the prosecutrix at trial which was rendered before the police, was untrue.

7. Learned Counsel for the Appellant would urge that the Appellant has remained in custody for about three years and hence considering this mitigating circumstances, sentence of the Appellant may be reduced in case his argument did not find favour for exoneration of charges. Though statute empowers the court for reduction of sentence for less than seven years, there must be evidence of mitigating nature warranting such reduction in sentence.

8. Prosecution was launched against the Appellant a decade back and he has remained in custody for about three years and in view of these mitigating circumstances, while upholding finding of conviction of the Appellant recorded by the court below, sentence is reduced to seven years. The finding of the court below about sentence of fine is however set aside and with these modifications, the appeal is dismissed.