
(2019) 01 JH CK 0125

In the Jharkhand High Court

Case No : Criminal Appeal (DB) No. 197, 428 Of 2011, 655 Of 2013

Muktu Tanti @ Raju And Ors

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 09-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 212, 366A, 376, 376(2)(g)
Scheduled Caste And Scheduled Tribe (Prevention Of Atrocities) Act, 1989 — Section 3(x)
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 01 JH CK 0125

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

Bench : Division Bench

Advocate : Rashmi Kumari, R.P. Gupta, Arun Kumar Pandey

Final Decision : Allowed / Dismissed

Judgement

1. Heard, learned amicus curiae, learned counsel for the appellants and learned A.P.P. for State.
2. All these three appeals arise out of the common judgment dated 18.12.2008 and the order of sentence dated 20.12.2008 passed in Sessions Trial No. 284 of 2006 by the Ld. court of 1st Additional Sessions Judge, West Singhbhum at Chaibasa whereby these three accused persons/ appellants have been convicted for the charges under Sections 366A/34 and 376 (2) (g) of the Indian Penal Code whereas it has been held that the charges under Sections 212, 120B of the I.P.C. and Section 3 (x) of the S/C and S/T (Prevention of Attrocities Act) have not been proved against them.
3. The F.I.R. being Rail Chakradharpur P.S. Case No. 26 of 2006 was registered under Sections 366A/34, 376(2)(g), 212 of the IPC read with Section 3 (x) of the S/C and S/T (Prevention of Attrocities Act) against unknown on the basis of the fardbeyan of the victim girl (named 'X') at 13.30 Hours on 03.08.2006 before the Sub-Inspector Ashok Kumar of Chakradharpur P.S.

4. The girl 'X' inter-alia alleged that on 2nd August, 2006, she had come to Chakradharpur Bazar with two village girls whose name she did not know, for selling lemons in village Guigaon. After selling all the lemons in the evening she with other two girls and one Didi (girl) whose name she did not know came to the Chakradharpur Railway Station. One of the girls used to work in a hotel at the station. They had come to the station to catch the train back to their home but one of the girls whom she referred as 'didi' went back for work and three of them were left. They were lying near the ticket counter of the station. As the night set in two boys came, one of whom was wearing a white pant while other was wearing a black full pant. She has also described the colour of the shirt of these two boys as red and blue, one of whom was of wheatish complexion and young enough and they were speaking in Hindi. They picked her up in their lap and took her to the Eastern side of the platform where a large sized house was there. Thereafter, they took her in their lap to a place near the pond where she was slapped and on raising cries they muffled her voice, opened her pant and committed rape on her one after the other. Thereafter, they fled away. She could identify these two boys. Thereafter, she came to a temple near the railway station and fell down. She was completely wet when nearby people noticed her, she was given hot milk and made to sit near the fire place. She could not speak much on account of severe pain at that time and remained in the temple throughout the night. Thereafter, she was taken to the hospital. She has also stated that her statement made in Ho, Mundari language was explained in Hindi by a female constable Chandmuni Samad and thereafter, she recorded her thumb impression on the fardbeyan. Chandmuni Samad (P.W. 6) was one of the fardbeyan witnesses, apart from one Chariya Sulekha Khalkho (P.W. 4).

5. Upon investigation chargesheet was submitted against these three accused persons including one Ramesh Mukhi @ Ramjee @ Ram Singh. After cognizance, the case was committed to the court of sessions. Ramesh Mukhi absconded and his trial was separated. Charges were framed and read over to the accused persons to which they pleaded innocence.

6. Prosecution during the course of trial examined eleven witnesses while Awadesh Kumar, the A.S.I. and Investigating Officer of the case, was examined as a court witness no. 1. Learned trial court considered the evidence on record more specifically of the victim girl 'X' (P.W. 5) and the evidence of the doctor P.W. 8 and P.W. 9 as well, to come to a finding that these accused persons were responsible for taking the victim to the bush and for committing gang rape upon her. The accused Mukhto Tanti and Raju Tanti were identified in the T.I.P. and in the dock while accused Lado Mukhi was identified by her in the court. The learned trial court came to a finding that the prosecution has been able to prove the charges beyond shadow of all reasonable doubt.

7. Common arguments have been made by the Amicus Curiae Mrs. Rashmi Kumar in Cr. Appeal (DB) No. 655 of 2013 and Cr. Appeal (DB) No. 428 of 2011 as both these persons were reportedly identified by the victim in the T.I. Parade

as also during the trial. On the other hand, Mr. R.P. Gupta, learned counsel for the appellant in Cr. Appeal (DB) No. 197 of 2011 has distinguished the case of this appellant on the ground that his implication is neither alleged in the F.I.R. nor proven during the course of trial. The victim-girl 'X' failed to identify this accused in the Test Identification Parade though she has identified the other two accused persons in the T.I.P. as also in the dock. His identification in the trial therefore is not to be treated with any legal sanctity to record his conviction on such serious offences under Sections 366A and 376 (2) (g) of the I.P.C.

Learned Amicus Curiae in the other two appeals has inter alia made the following submissions to assail the findings of conviction rendered by the trial court: It has been submitted that the victim girl-'X' alleged to be in the company of three girls of the same age and village, though, she could not name anyone of them. She alleges that she was picked up from the railway platform by these two appellants but there was no hue and cry raised by her even when she was being taken in a lonely secluded place where the offence was committed. The railway platform of a station like Chakradharpur is crowded with passengers and she is stated to be lying near the ticket counter. None of the other two girls have either come forward in support of the prosecution case neither have they raised any hue and cry when the victim girl was picked up in the lap by these two persons. It is surprising that despite serious allegations of the offences under Section 366A of the I.P.C. and of gang rape, none of the family member of the girl had come forward to support the prosecution case during trial. The story put forth by the girl while recording her statement in the fardbeyan is also inconsistent with her statement made during trial as she has tried to implicate the third accused person/appellant Lado Mukhi also for the crime. There has been no reference to the third person in the fardbeyan in the entire sequence of crime. Learned amicus curiae has also referred to the opinion of the medical experts P.W. 8 and P.W. 9 in particular and contended that they have not found incidence of commission of rape by more than one person. This expert evidence contradicts the testimony of the girl-'X' that she was gang raped. It has been further urged on behalf of the appellants that the manner in which she has narrated the story in the fardbeyan and also during trial creates an impression that she was tutored to implicate the appellants herein on false charges. There is no eye-witness to the occurrence, P.W.1, P.W. 2 and P.W.3 who first came across the girl after the incidence of rape in the temple, have also not categorically stated about any blood stains or mark of violence on the girl when she arrived and remained throughout the night in the temple. The girl (P.W. 5) in her deposition had contended that she was bleeding as a result of the gang rape committed upon her. Though the evidence of the medical experts relating to the injury on her private parts can't be doubted but the involvement of these appellants in the commission of acts of rape more specifically and for the offences under Section 366A do not stand established by the testimony of these prosecution witnesses. These appellants have remained in custody for more than 12 years by now. The learned trial court has imposed a disproportionate sentence of rigorous

imprisonment for life which is the maximum under section 376 (2)(g) of I.P.C. When the offences have not been proved beyond shadow of all reasonable doubt and there is no corroboration of gang rape by the medical experts and there is no cruelty depicted in the manner of commission of crime either, the sentence for life is excessive. Based on these arguments the conviction of the appellants have been challenged.

On behalf of the appellant Lado Mukhi, learned counsel representing him has forcefully argued that there is no truth in the allegations as against this appellant and neither are any evidence to convict him either for the offences under Section 366A or 376 (2) (g) of the I.P.C. Fardbeyan recorded on the statement of the victim girl-'X' is the first report of the occurrence of the crime where itself she had made no mention of the presence of this appellant. Even during the test identification parade this accused was also put on T.I.P., but she could not identify him though she identified the other co-accused persons/appellants herein. The identification of this appellant during trial after one and a half years renders it completely incredible. Even the description of the occurrence narrated by P.W. 5 'X' does not make any reference to the presence of this appellant on the scene. His conviction on unsubstantiated charges is therefore wholly unsustainable in law. This appellant has also remained in custody for 12 years and more.

8. Learned A.P.P. has countered the submission of the learned counsel for the appellants on number of counts. He submits that the girl-'X' was aged 7-8 years at the time of occurrence. She is a rustic girl who as per her own admission used to come to sell lemons from her village to Chakradharpur and return every evening by train. On that fateful evening also while she was waiting for the train at the Railway platform, these two unknown persons projecting themselves to be villagers of the same village took her in her lap and she gullibly believed them. She was carried to a lonely place near a pond where she was threatened and slapped. Thereafter the heinous offence of gang rape was committed by these appellants on a minor girl of such tender age. The constable who translated her statement in 'Ho' language for recording of the fardbeyan and was a witness to it along with the other fardbeyan witness, both have deposed during trial as P.W.6 and P.W.4 respectively. Even during trial, this witness has deposed in her language which was translated by a social worker with the permission of the Court and her testimony is consistent with the story put up during her First Information Report to the Police.

Learned counsel submits that there is no reason for a minor girl of such tender age to falsely implicate these appellants for such a serious crime. He has placed the Medical evidence adduced by P.W.8 and P.W.9 which shows very serious injuries on the private organ of the victim girl. The injuries themselves speak that repeated sexual assault by more than one person was committed upon her. The nature of injuries are such that even the Medical experts have not ruled out the commission of rape by more than one person though there is no firm opinion

on that. The appellants, Muktu Tanti @ Raju and Raju Tanti both were identified by the victim girl during Test Identification Parade amongst nine persons each and were also identified during trial by P.W.5. There is no reason to doubt the involvement of these two appellants in the crime. The T.I.P. has been duly proved by the Judicial Magistrate, 1st Class, P.W.11 during trial. He has categorically stated about the identification of these two appellants by the girl during T.I.P. These T.I.P. charts are proved as Exhibit-5 and Exhibit-5/A. The Investigating officer was examined by the Court as a Court witness. He has been successful in proving the place of occurrence as well. The place of occurrence is a lonely place near a pond as described by the girl P.W.5 as well. There is no reason to doubt the testimony of the prosecutrix even though she is a minor, aged about 7-8 years at the time of crime and 9-10 years at the time of trial.

The learned trial court has dealt with the material evidence on record with much care and caution and found the charges to be proved beyond shadow of all reasonable doubt. There is little scope for interference in such a considered finding. The appeals, therefore, deserve to be dismissed.

9. We have considered the submissions of learned amicus curiae, learned counsel for the appellant, Mr. Rajendra Gupta and learned A.P.P. in light of the material evidence on record as relied upon by them and also perused the impugned judgment. In a case of rape, the principles have become crystallized by now in view of the pronouncement by the Hon'ble Apex Court that the testimony of the victim/prosecutrix alone is sufficient to prove the charges, if it is consistent and trustworthy. Reliance is placed upon the judgment of Hon'ble Supreme Court in the case of State of Rajasthan vs. Om Prakash, reported in 2002 (5) SCC 745 specially in paras 13, 14 and 19 which reads as follows :-

"13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well settled proposition. In State of Punjab v. Gurmit Singh, referring to State of Maharashtra v. Chandraprakash Kewal Chand Jain this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr. Justice A.S. Anand (as His Lordship then was), speaking for the court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

14. In State of H.P. v. Gian Chand Justice Lahoti speaking for the Bench observed

that the Court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined.

19. Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been steep rise in the child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse. These factors point towards a different approach required to be adopted. The overturning of a well considered and well analyzed judgment of the trial court on the grounds like non- examination of other witnesses, when the case against the respondent otherwise stood established beyond any reasonable doubt was not called for. The minor contradiction of recovery of one or two underwear was wholly insignificant."

Considering the nature of the crime which cannot be expected to be committed in an open and crowded place there is little chance of any eye-witness to corroborate the testimony of the victim woman or girl. In the present case, the medical evidence on record proved by the Doctors, P.W.8 and P.W.9 show serious injuries in the private part of the girl-x which are as under:-

"On general examination.

Mark of identification - 1. black til on right eyebrow. II.

Black til on nose left side.

Height 49.5" Complexion dark weight 21 kg. Teeth upper jaw/lower jaw 7+6/6+6
13/2

Breast not developed.

Auxillary & pubic hairs absent.

4. M./history- Menarche not yet started.

5.Mental state. She is physically and mentally normal.

6.Mark of violence- No mark of violence on body.

7. Per vaginal examination

Valve swollen & tendered. Hymen lacerated. Perinial tears upto the anterior valve of the rectus. Redness plus. Bleeding and tenderness on touch. White and reddish dried up stained present on valva inner aspect of thigh, perineum and around the anus.

8. Clothes dried up white & reddish stained was produced before me. The piece of cloth sent to the Laboratory for analysis of semen and blood.

9. As the wound was bleeding on touch but wound margins on swollen, red, tendered and some dried up blood present. 10. The time of injury appeared to be within 12 to 72 hours. 11. Pathological examination. Vaginal swab shows sample no.1 Sample hazy. No spermatozoa either alive or dead found.

Pus Cell - nil in Epithelial cell -++

R.B.C. present in plenty in number. Bacteria nil.

Sample No.2 white & reddish dried up stained on cloth. No spermatozoa either alive or dead found. Pus cell nil. Epithelial cell nil. R.B.C. present in large number (blood present).

12. Radiological Examination. No.1 X-ray pelvic epiphysis of pelvic bone not appeared. X-ray elbow joint epiphysis around the elbow joint not united with their respective shaft. (3) X-ray wrist joint. There are seven carpal bones ossified.

13. Opinion. According to physical, pathological and radiological examination, the opinion is :-

(I) The age of the victim is 7 to 8 years.

(II) Forceful penetration of vagina has been tried.

(III) It is not possible for us to say whether intercourse has been conducted by one or more persons."

The girl was examined on 8.10 P.M. on 4th August, 2006, after institution of the F.I.R. on 3rd August, 2006 by a Medical Board comprising three Doctors, two of whom have deposed as P.W.8 and P.W.9. From a bare perusal of the nature of injury, it is not left to doubt that a serious sexual assault was committed on the girl, aged about 7-8 years. They have conducted pathological examination of the vaginal swab, but no spermatozoa was found dead or alive. However, the vaginal examination had revealed vulva swollen and tendered, hymen lacerated; Perineal tear up to anterior wall of the rectus, redness plus bleeding and tenderness on touch; white and reddish dried-up stain present on vulva, inner aspect of thigh, perineum and around the anus. Clothes were dried up with white and reddish stains when produced before the Medical Board. The wound was bleeding on touch, but wound margins were swollen, red, tender and some dried-up blood clot was also present. Time of injury was within 12 to 72 hours. The Doctors opined that forceful penetration of vagina had been tried, but it was not possible for them to say whether intercourse has been conducted by one or more

persons. However, the testimony of the P.W.5, the minor girl and the nature of injuries found on her do not leave us with any element of doubt that she was subjected to serious sexual assault. The manner in which the injuries were caused right from the vulva to the anterior wall of the rectus itself go to show the serious nature of the assault. The commission of forceful sexual assault multiple times by more than one person upon such a minor girl is conclusively proved by the prosecution. We find no reason to doubt the ocular testimony of the victim i.e. the prosecutrix though she was aged 8-9 years at the time of her deposition. [See *Rajkumar vs. State of Madhya Pradesh*, reported in (2014) 5 SCC 353, Paras 18 and 19].

Reliance is also placed upon the judgment of Hon'ble Supreme Court in the case of *Umesh Singh v. State of Bihar*, reported in (2013) 4 SCC 360 specially in Paras 22 and 23 which are quoted as under :-

"22. In so far as the medical evidence of the Doctor-PW8 read with the post mortem report upon which strong reliance is placed by the learned senior counsel for the appellant that death must have taken place prior to 30 to 36 hours as opined by the doctor that means it relates back to the early hours of 16.07.1996 but not at 3.30 p.m. as mentioned in the FIR. Once the time of death is drastically different from the one claimed by the prosecution its case is vitiated in law. In support of the above-said contention strong reliance placed upon the decisions of this Court on aforesaid cases are all misplaced as the same are contrary to the law laid down by this Court in *Abdul Sayeed v State of Madhya Pradesh*. The relevant paragraphs are extracted hereunder:

"33. In *State of Haryana v. Bhagirath* it was held as follows: (SCC p. 101, para 15) "15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."

34. Drawing on *Bhagirath* case, this Court has held that where the medical evidence is at variance with ocular evidence, "it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant' ".

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The

eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

"21. ... The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

36. In *Solanki Chimanbhai Ukabhai v. State of Gujarat* this Court observed: (SCC p. 180, para 13)

"13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

23. The learned State counsel has rightly urged that if the medical and ocular evidence is contrary then the ocular evidence must prevail. This aspect of the matter has been elaborately discussed and the principle is laid down by this Court in the aforesaid decision."

10. The next question now revolves around involvement of these three appellants. We have carefully analyzed the testimony of the prosecutrix (P.W.5) in conjunction with the prosecution story set up by her through the fardbeyan recorded on 3rd August, 2006. Though the girl is not fluent or well-versed with Hindi language, but on assistance with a translator both during recording of the fardbeyan and during trial she has been able to graphically narrate the manner in which she was picked up from the platform by these two persons on the fateful night and taken to a lonely place where the offence of rape was committed on her. She also has stated that no body came on hearing her cries and blood was

oozing out of her private parts. However, it is to be mentioned at this stage that it is for the first time during trial that the presence of the third appellant, namely, Lado Mukhi has been brought into picture. There is no reference of his presence in the fardbeyan recorded on the next day, after the incidence. She had failed to identify this appellant even during Test Identification Parade though she has identified the other two accused persons. Her identification of this appellant during trial, therefore, cannot be accorded much weight, that too for a serious charge under Sections 366A and 376(2)(g) of the I.P.C. No other prosecution witness has been able to prove the presence of this appellant in the crime or while she was lured away from the Railway Station to the place of occurrence. We are therefore, inclined to give him the benefit of doubt.

11. However, so far as the involvement of the other two appellants are concerned, the story put up by the prosecutrix right from the fardbeyan, their identification in the Test Identification Parade in presence of the Judicial Magistrate (P.W.11) and during trial is consistent and trustworthy. We do not find any reason to doubt her testimony on that count so far as the commission of offences under Sections 366A and 376(2)(g) of the I.P.C. by these two appellants i.e. Muktu Tanti @ Raju and Raju Tanti are concerned. It would be pertinent to state here that the testimony of other P.Ws. like P.W.1 to 3 and 7 who were present in the temple at that night do not discredit the consistent and trustworthy testimony of the prosecutrix who has suffered such a serious sexual assault at a tender age of 7-8 years. Rest of the witnesses were nor expected neither present at the place of crime to depose any further. They have deposed whatever they have seen when the girl came to the temple after the incidence in a state of shock and was trembling. As such, much weight cannot be attached to the argument advanced by these two appellants on lack of corroboration by any other witness to the testimony of P.W.5 prosecutrix regarding the offence committed by these two appellants. We find that the P.W.10, the Dy. S.P., Rail and P.W. 12, the court witness, A.S.I. and Investigating Officer have been able to substantiate the place of occurrence where the offence was committed. The material evidence on record had been duly put to these accused persons while recording the statement under Section 313 of the Cr.P.C. They cannot make out any ground that the evidence as against them were not put at the time of recording of their statement. In view of the detailed discussions made and the reasons recorded here-in-above, we uphold the findings of conviction for the charges under Sections 366A/34 and 376(2)(g) of the I.P.C. against the appellants, Muktu Tanti @ Raju and Raju Tanti. However, we are unable to sustain the conviction recorded as against the appellant, Lado Mukhi in Cr. A. (DB) No.197 of 2011 for the aforesaid reasons. He is acquitted of the charges.

However, we are of the opinion that the sentence of life imprisonment imposed upon the appellants, Muktu Tanti @ Raju and Raju Tanti appears to be rather excessive. We do not find any brutality of such nature showing the depravity of mind on the part of these two appellants in committing the crime. These two appellants have undergone a custody of more than twelve and a half years by

now. We are, therefore, inclined to modify the sentence of life imprisonment to the period already undergone.

12. Accordingly, the judgment of conviction dated 18.12.2008 and order of sentence dated 20.12.2008 passed by the learned 1st Additional Session Judge, West Singhbhum at Chaibasa in Sessions Trial No. 284 of 2006 is hereby set aside, so far the appellant, Lado Mukhi in Cr. Appeal (DB) No.197 of 2011 is concerned.

13. Cr. Appeal (DB) No. 197 of 2011 is allowed, Cr. A (DB) No.655 of 2013 and Cr. A (DB) No.428 of 2011 are dismissed with modification in sentence as above.

14. Consequently, Lado Mukhi is directed to be released forthwith, if not wanted in any other case.