

(2014) 02 PAT CK 0025

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 772 of 2013

Sita Devi

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 18-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 120(B), 34, 366(A), 376

Citation : (2014) 02 PAT CK 0025

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : Manoj Kumar, Mr. Dharmendra Jha, Mr. Vinay Kumar Mishra, in C.R. app SJ No. 772 of 2013, Mr. Md. Imtiyaz Ahmad, Mr. Malay Kumar Choudhary, Mr. Ajay Kumar Thakur, in C.R. app SJ No. 749 of 2013, Mr. Ajay Kumar Verma and Mrs. Madhubala Verma, in C.R. app SJ No. 753 of 2013, for the Appellant; S.N. Prasad, Assistant Public Prosecutor in C.R. APP (SJ) No. 772 of 2013, Mr. Ajay Kumar Mishra, Assistant Public Prosecutor in C.R. APP (SJ) No. 749 of 2013 and Mr. S.A. Ahmad, Assistant Public Prosecutor in C.R. APP (SJ) No. 753 of 2013, for the Respondent

Final Decision : Allowed

Judgement

Aditya Kumar Trivedi, J.—Criminal Appeal (SJ) No. 772 of 2013 wherein Sita Devi happens to be the appellant, Criminal Appeal (SJ) No. 749 of 2013 wherein Santosh Gami happens to be the appellant and Criminal Appeal (SJ) No. 753 of 2013 wherein Santosh Pandey happens to be appellant commonly originate against the judgment of conviction dated 30.10.2013 sentence dated 02.11.2013 rendered by the First Additional Sessions Judge, Darbhanga in Sessions Trial No. 261 of 2012/866 of 2012 convicting appellant Sita Devi for an offence punishable u/s 366(A)/120(B) read with 366(A) IPC and directed her to undergo R.I. for 7 years as well as fined Rs. 2000/- in default thereof to undergo R.I. for a year additionally. However, no separate sentence has been passed for an offence punishable u/s 366(A)/120(B) of the IPC. Santosh Gami and Santosh Pandey has

been held guilty for an offence punishable u/s 366(A)/120(B) of the IPC and each of them has been directed to undergo R.I. for 5 years as well as fined Rs. 2000/- in default thereof to undergo R.I. for one year additionally, u/s 376 of the IPC whereunder each of them has been directed to undergo R.I. for 10 years as well as fined Rs. 5000/- in default thereof to undergo R.I. for two years with a further direction to run the sentences concurrently, on account thereof have been heard analogously and are being disposed of by a common judgment. Kiran Kumari (PW-9) had made fardbeyan on 20.01.2012 at about 10:00 P.M. at DMCH, Laheriasarai disclosing therein that she happens to be a student of Class-VIII of State Middle School, Ladha. On 18.01.2012 at about 10:00 A.M. she had gone to her school from her village-Birne. On the same day at about 11:30 A.M., Sita Devi, wife of Late Sadanand Yadav of village-Bhapura, P.S.-Jale, District-Darbhanga as well as Anila Devi, wife of Umesh Mahto of village-Harpur, P.S.-Mabbi who happens to be her neighbour and on account thereof, is her sister and with whom there was talk relating to procurement of sewing machine since about a month ago, came at her school and pretended herself before the headmaster, Hirdaya Narayan to be her guardian and disclosed that as she (informant) has to receive sewing machine from Block and for that she has to go. She had further disclosed that they have taken consent of her mother. Thereafter, Sita and Anila accompanied her outside school and then Anila directed her to go along with Madam on tempo where she will provide machine and then thereafter she would return. Thereafter, Sita Devi took her to Mohammadpur Station where they have boarded in a train and came to Darbhanga Station. Sita Devi had contacted one person over mobile at Darbhanga Platform itself and disclosed "come hurriedly as has brought "Mal"" Thereafter, one person came whom Sita Devi called Santosh who took her along with Sita Devi in a room belonging to Pawan. They sat in the room of Pawan Kumar where another person, namely, Santosh brought chicken and rice. Sita Devi and both Santosh took meal, drank wine and then Sita untied her string of her "Salwar" over which she raised alarm attracting so many persons as well as police official who took them to G.R.P.S. After making query, they were detained and then on 19.01.2012, first of all both Santosh were let off and then 07:30 A.M. she along with Sita was released. Subsequently, Pawan was also released. Thereafter, Sita Devi again got her seated along with her in a bogie while she had directed the others to sit in another bogie of a train. At Mohammadpur Station, they all got down. She insisted that she should be sent to her village over which Sita Devi assaulted her and then took her to Darbhanga on tempo where they have gone to the clinic of Dr. Sajiya Noor located at Beta Chowk and then after gossiping with a nurse, she hired a room where both the Santosh along with she were forced to go. Sita Devi had administered seven tablets. Both the Santosh began to handle her badly which was protested by her. Sita Devi again assaulted. Both the Santosh committed rape whole night. In the morning of 20.01.2012 both Santosh gone. Thereafter, Sita Devi began to search rickshaw along with her but she could not find and on account thereof, they got in a tempo and proceeded towards bus stand. During midst thereof, she had directed the tempo driver to stop tempo near Bajrangbali Mandir where Sita Devi

assaulted her over which she raised alarm attracting so-many persons including police where from she was taken to University P.S. and from there, she has been taken to DMCH for treatment.

2. On the basis thereof, Laheriasarai P.S. Case No. 27 of 2012 was registered u/s 366(A), 376/34 of the IPC and investigation was taken up and after concluding the same, charge sheet was submitted. Consequent thereupon, the appellants/accused have faced trial in a manner, the subject matter of instant appeal.

3. The defence case as is evident from mode of cross-examination as well as statement recorded u/s 313 of the Cr.P.C. is of complete denial of occurrence. However, neither any DW nor any exhibit has been made on behalf of the appellant.

4. While assailing the judgment of conviction and sentence, it has been submitted on behalf of appellant Santosh Purbey as well as Santosh Gami that in spite of having been perceived by the learned trial court that the victim, PW-9 had not identified these two appellants to be her rapist as well as having no cogent connecting material to pinpoint complicity of these two appellants during commission of rape upon the victim, or having accompanied the victim, even then the learned trial court convicted these two appellant simply on the ground that other circumstances are visualizing. However, no circumstances have been incorporated by the learned lower court which could at least justify recording of conviction and sentence. Therefore, conviction and sentence so recorded by the learned lower court against them is found based upon cryptic approach without having supported with cogent, reliable trustworthy evidence.

5. The learned counsel representing appellant Sita Devi has submitted that appellant Sita Devi cannot be convicted for an offence punishable u/s under Section 366(A) or 366(A)/120(B) of the IPC because of the fact that for the purpose of applicability of Section 120(B) of the IPC, the prosecution is under obligation to prove pre-meeting of mind to the extent of constricting the event for commission of the occurrence. There happens to be no positive, concrete evidence on record having been adduced on behalf of prosecution. More so, the evidence of the prosecutrix is not fit for reliance in the background of presence of dubious character. Apart from this, it has further been submitted that although the so alleged victim Kiran Kumari happens to be major one aged about more than 18 years and it further found supported with the estimation of age by the doctor in between 15-16 years on the basis of radiological report which has got permissible variance of two years either side and further joining with appellant at second moment up to clinic of Dr. Sajiya Noor from Mohammadpur on auto rickshaw without raising alarm as well as keeping silence at the clinic of Dr. Sajiya Noor, not raising any protest while going into room and even after commission of rape, as disclosed keeping silence during whole affair is indicative of the fact that she happens to be a consenting party and that happens to be reason behind that she had exonerated both the Santosh during course of evidence and decline to identity them being her rapist. On account thereof,

appellant cannot be held responsible in a way as held by the learned trial court. Therefore, the verdict of guilt as well as imposing sentence by the learned lower court is based upon fabulous materials.

6. While supporting the finding recorded by the learned lower court, it has been submitted by the learned Additional Public Prosecutor that the same is based upon cogent and reliable material. It has also been submitted that the situation which the victim had faced during intervening period was such horrific that she became stunned and that happens to be reason behind whereunder she was unable to raise alarm.

7. It has further been submitted that the evidence of victim of a rape has got primacy and unless and until its authenticity is found at stake, it needs no corroboration. From the evidence of victim on record along with connecting evidence so adduced by the prosecution, it is crystal clear that the victim was subjected to rape wherein appellant Sita Devi played active role.

8. From lower court record, it is evident that altogether eleven PWs have been examined supported with the exhibit of statement of u/s 164, signature of informant thereupon, signature of informant over fardbeyan, medical report, fardbeyan, endorsement thereupon.

9. Now coming to the status of the witnesses. PW-1 is Santosh Das, one of the compounder of Dr. Sajiya Noor who had not supported the case of the prosecution even to the extent of presence of appellant Sita Devi with victim and on account thereof, he was declared hostile.

10. PW-2 is Hirdaya Narayan Jha, the Principal of Middle School, Ladha where Kiran Kumari, the victim was the student. He had stated that on 18.12.2012 Kiran Kumari came along with a lady and asked for permission to leave. On query, she had stated that her Bhabhi has come. She has to go to Darbhanga for obtaining sewing machine. He had directed to go to class teacher for that purpose and then thereafter she left the school after taking permission from class teacher. He had further disclosed the name of other lady as Anila Bhabhi how she was introduced by the Kiran. Then thereafter he came across the news through the newspaper. During cross-examination nothing substantial has been found but it is evident from his evidence that he had not identified any of the accused during examination-in-chief although in para-3 his deposition, he had stated that he could identify Anila Devi.

11. PW-3 is Nausad Alam, class teacher of Kiran. He had stated that on the alleged date at about 11:30 AM Kiran Kumari came near him along with a lady. Kiran Kumari was calling him Anila Bhabhi and asked for permission to accompany her Bhabhi to go for getting sewing machine and accordingly, he permitted. Although from his cross-examination, nothing more is found however like PW-2 he had not identified any of the accused in dock during his examination-in-chief.

12. PW-4 is the cousin brother of victim, Kiran Kumari who had disowned to have acknowledgement with regard to occurrence and on account thereof, was declare hostile. Even then the prosecution could not be able to explicit from his mouth any substantive evidence.

13. PW-5 is Ram Pukar Mahto, a police constable having been employed at University P.S. at the relevant time. He had stated that on 20-01-2012 he along with S.I. Ranjan Kumar was on day patrolling. When they reached near Mahavir Mandir in front of polytechnic college at about 12:30 PM, they saw crowd around a female and a girl who were taken to P.S. and from there, the girl was sent to DMCH. He had identified the lady who happens to be Sita Devi. During course of cross-examination, it is evident that defence could not be able to demolish his evidence with regard to interception of accused/appellant Sita with a girl, Kiran Kumari (PW-9), victim, bringing to University P.S. and then carrying to DMCH.

14. PW-6 is Abhishek Kumar, Judicial Magistrate, who had, during course of investigation, had recorded statement victim PW-9, Kiran Kumari u/s 164 of the Cr.P.C. as per direction of the Chief Judicial Magistrate and accordingly exhibited the same.

15. PW-7 is the doctor who had examined the victim on 22-01-2012 at 02:00 P.M. and apart from giving ornamental opinion, he had not found any external or internal injury as well as could not found spermatozoa dead or alive. Apart from opining adverse to the prosecution negativating recent sexual intercourse, age of victim was estimated in between 15 to 16 years. Again during course of cross-examination, he had reiterated his finding whatever he had opined during course of examination-in-chief.

16. PW-8 is Ranjan Kumar who on 20.01.2012 was posted as ASI at University P.S. On that day while he along with constable Ram Pukar Singh was on day patrolling, he received information regarding presence of crowd near polytechnic chowk whereupon they have gone there and found one lady scolding a girl at the verandah of Bajrangbali Mandir, whereupon he called the police jeep and took them away to Police Station. The girl was not in full consciousness. He had identified the lady. Girl was sent to DMCH for treatment. During cross-examination he had narrated that he had met with Investigating Officer of the case during course of investigation. Then there happens to be contradiction to the effect that he had not earlier stated before the Investigating Officer that the lady was scolding the girl. He had further stated in para-5 that S.D. entry was made but he is not remembering for the present that number. He had further stated in para-6 that he was not knowing Sita Devi since before her arrest.

17. PW-9 is the victim herself during her examination-in-chief, it is apparent that she had shifted from her earlier statement by way of stating that on 18-01-2012 at about 11:30 AM while she was at Middle School, Ladha, Sita Devi came at 11:30 AM and disclosed Nausad, teacher that in case Kiran Kumari does not proceed, she will not get sewing machine over which the teacher had directed to

take permission from headmaster. She had gone to headmaster and asked for permission whereupon principal had accorded. Then thereafter Sita Devi took her to Mohammadpur Station on tempo and from Mohammadpur to Darbhanga Station. At Darbhanga Station Sita Devi had telephoned one person and said "she has bring Mal, come". Thereupon, one boy came who took her to the room of Pawan where one more person came. Thereafter, Pawan brought chicken and rice and all of them ate but she could not. Thereafter, Sita Devi untied her string of Salwar. She raised alarm over which GRP police arrived. GRP police kept Sita Devi, Pawan and both Santosh along with her whole night and then on 19th GRP released one by one. Sita Devi accompanied her up to Mohammadpur Station in train while both Santosh followed them having their presence in last bogie. After getting down at Mohammadpur Station, she desired to go to her house over which Sita Devi slapped her. She further disclosed that she will carry her through motorcycle but she could not. Thereafter, Sita Devi along with both Santosh took her to the clinic of Dr. Sajiya Noor where Sita Devi took a room on rent and then locked her along with both boys. She raised alarm over which Sita and Abha came inside. Abha Devi said that they are engaged in similar activity so why she is raising protest. Thereafter, Sita Devi administered seven tablets whereupon she became senseless. Both Santosh committed rape whole night. In the morning of 21st Sita Devi accompanied her on rickshaw and then hired tempo. When she came near Bajrangbali Mandir tempo she said that she will go to P.S. over which Sita Devi slapped her. People assembled. Police came and took both of them to P.S. She was medically examined. She had given statement before the police and thereafter she had claimed identification of Sita Devi and Asha Devi but disowned to identify Santosh Purbey as well as Santosh Gami and on account thereof, she was declared hostile by the prosecution. During cross-examination again she had disowned to identify Santosh Purbey as well as Santosh Gami and further disclosed that the aforesaid two happens to be different persons than that of having present in court. Under para-10 and 11 her cross-examination relates with Abha Devi, since acquitted. From para-12 there happens cross-examination on behalf of Sita Devi wherein she had stated that the house of Sita Devi lies village-Muraitha while house of Anila Devi lies at Haripur. Two lagga away from her house. In para-13, she had stated that Anila Devi had disclosed regarding sewing machine. She had no talk with Sita Devi with regard to sewing machine. She had not met with Sita Devi before the school. From para-15, she had further stated that she had not raised alarm at the Mohammadpur Station or at Darbhanga Station even after hearing the conversation of Sita Devi with a boy. In para-17, she had stated that on the following morning after releasing from GRP Police Station, she had come to Mohammadpur Police Station along with Sita Devi even then she had not raised alarm. She had further stated in para-20 that during course of coming from Mohammadpur to Darbhanga on tempo she had not raised alarm. On 20th when she was proceeding towards Darbhanga from Laheriasarai, she raised alarm over which so many persons collected and during course thereof police come.

18. PW-10 Pankaj Kumar, the Investigating Officer. He had stated during examination-in-chief that he took further statement of informant, arrested Sita Devi, inspected the place of occurrence. Place of occurrence happens to be clinic of Dr. Sajiya Noor but did not found any incriminating material there from. Recorded statement of compounder Santosh Kumar Das (PW-1). He had also taken statement of Abha Devi, Nurse (since acquitted). The second place of occurrence happens to be railway quarter No. "C". He had also inspected the middle school lying at village-Ladha. He had recorded statement of the witnesses, got the victim examined u/s 164. After coming to know about apprehension of accused by the GRP police personnel, got them remanded in this case and identified both of them in court. During cross-examination he had fairly admitted that he had not taken statement of patient, attendant of the Nursing Home. He had not seized cloth of victim. He had not examined the doctor. He had not conducted T.I. parade. He had not inspected the Station Diary of University P.S. He had not taken statement of parents of victim Kiran Kumari.

19. PW-11 is Satish Kumar who brought the Santosh Purbey as well as Santosh Gami from GRP, Darbhanga and being so, is formal in nature.

20. From the evidence on record, it is evident that although the victim PW-9 had narrated with regard to the incident committed at the night of 18.01.2012 as well as their detention by the GRP police and release on the morning of 19-01-2012, but the Investigating Officer reasons best known to him, did not care to see and verify from G.R.P., Darbhanga whether all of them were detained in the night of 18/19-01-2012 and were released on 19-01-2012. It is apparent from the record that the prosecution had not disclosed date of apprehension of Santosh Purbey as well as Santosh Gami by the GRP, Darbhanga from where PW-11 had carried them on 21-01-2012. It is also apparent from the evidence of Investigating Officer, PW-10 as well as Satish Kumar, PW-11 that they have identified the appellants Santosh Gami, Santosh Purbey but from the evidence of victim PW-9 it is evident that she declined to identify both of them being her rapist. Neither connecting material is available on record to justify their involvement nor there happens to be direct evidence.

21. Rampukar (PW-5) as well as PW-7, Ranjan Kumar had stated that they have proceeded with victim along with Sita Devi on 20-01-2012 to University P.S. from where she was taken to DMCH. From the fardbeyan Ext.-5, it is evident that it was recorded by the police official at DMCH on 20.01.2012 while from Ext.-2 the injury report as well as from the evidence of PW-7, Dr. V.P. Singh, it is apparent that victim was examined by him on 22-01-2012. The prosecution failed to produce any injury report with regard to victim having been examined by the doctor on 20-01-2012 or on 21.01.2012 and in absence thereof, the conduct of the prosecution is found much more suspicious.

22. While judging the status of Sita Devi, conduct of the victim is also to be taken into consideration. Since inception of the case, presence of Sita Devi was shown along with her co-villager Anila Devi whose presence subsequently been

wiped out and only Sita Devi remained. There happens to be own admission of victim (PW-9) that she was not knowing Sita Devi since before the occurrence and further, Sita Devi herself took initiative to have permission to leave school, though found contradicted by PW-2 the headmaster and PW-3, the teacher by disclosing the name of Anila Bhabhi, who came along with PW-9 for permission to leave school. Why Anila was given up is a matter best known to prosecution. Furthermore, having no acquaintance since before with Sita Devi. She accompanied with her till her apprehension along with Sita Devi on 20-01-2012 by the University police is a matter of surprise. During the intermediary period, as is apparent from her own admission that victim never raised alarm at least to save herself from the clutches of Sita Devi at any crucial stage even having full knowledge regarding illegal activity of Sita Devi. Not only this, on 19-01-2012 when she was released by GRP, Darbhanga, she had not objected Sita Devi to accompany her rather even having seen both the Santosh sitting in different bogie fallen in company of Sita Devi up to Mohammadpur Station where, even during course of slapping by Sita Devi, she had not raised hue and cry. At the other hand she silently followed them in a tempo upto Darbhanga without putting any sort of objection or crying for help. Permitting herself by victim in company of Sita Devi till her apprehension along with Sita Devi without any hindrance is suggestive of the fact that she happens to be consenting party.

23. Now, the only point remains whether victim was major. PW-6 the doctor had already opined her age in between 15 to 16 years and as per Medical Jurisprudence by Modi there happens to be flexibility of two years either side. It is settled principle of law that the age leaning in favour of accused should be accepted and on account thereof the age of victim is found 18 years. No other kind of evidence contradictory to the opinion of doctor is available on record on this score. There happens to be lapses on the part of Investigating Officer, PW-10, who though had gone to school, taken statement of PW-2 as well as PW-3, but failed to see the date of Birth of PW-9, victim to find out her status being less than 18 years of age. The cumulative effect of aforesaid lapses persisting in the prosecution case as well as conceiving the dubious uncorroborated evidence of PW-9 it looks in appropriate to concur with the finding of the learned trial court. Consequent thereupon, the judgment of conviction and sentence recorded by the learned trial court is set aside. All the three appeals are allowed. Appellants are under custody, hence are directed to be released forthwith, if not wanted in any other case.