

(2016) 01 PAT CK 0066

In the Patna High Court

Case No : Criminal Appeal (SJ) Nos. 178 and 188 of 2014

Tuntun Mahto and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 06-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 34, Section 376

Citation : (2016) 01 PAT CK 0066

Hon'ble Judges : Gopal Prasad, J.

Bench : Single Bench

Advocate : Tej Narayan Singh, Satyendra Prasad Singh and Pushpa Kumari, Advocates, for the Appellant; Sujit Kumar Singh and Bipin Kumar, A.P.Ps., for the Respondent

Final Decision : Disposed Off

Judgement

Gopal Prasad, J.—1. Heard learned counsel for the appellants and the State.

2. These two appeals have been heard together and being disposed of by this common judgment as both the appeals arise out of against the same judgment of conviction and order of sentence dated 03.02.2014 and 05.02.2014, respectively, passed by the learned Additional Sessions Judge, Sheikhpura in Sessions Trial No. 825 of 2012, by which both the appellants have been convicted under Sections 376/34 of the Indian Penal Code and the appellant Tuntun Mahto @ Tutun Mahto has been sentenced to undergo rigorous imprisonment for seven years and the appellant Chandrika Mahto has been sentenced to undergo rigorous imprisonment for five years and they have also been directed to pay a fine of Rs. 5000/- each and in default of payment of fine to undergo rigorous imprisonment for six months each.

3. The prosecution case, as alleged in the fardbeyan of the informant Ramkali Kumari, aged about 15 years, daughter of Rajo Mahto, is that on 18.03.2011 at about 9:30 P.M. she proceeded from her house with a Lota to attend the call of

nature. She took water in the Lota from the hand pipe installed in front of her house to the east to attend the call of nature. In the mean time, the appellant Chandrika Mahto came, closed her mouth, lifted her in his lap and then took her about half kilometer south of the village in the Bahiyar. The further case of the prosecution is that the appellant Tuntun Mahto @ Tutun Mahto was present there since before she had been taken by the appellant Chandrika Mahto, who threw the victim in the field of co-villager Upendra Dardhi. The appellant Chandrika Mahto closed her mouth with clothes and the appellant Tuntun Mahto @ Tutun Mahto raised her skirt, took out undergarments from her body and raped her. Since the informant did not return after attending the call of nature and there was delay so her parents proceeded to search her along with co-villagers, namely, Ganesh Mahto and Manik Mahto. They reached at the informant victim and then she disclosed about the occurrence and then she returned to her home with them. The further case is that with regard to the occurrence she and her father informed to the co-villagers and thereafter they went to the house of the accused and informed about the occurrence to their parents. However, the inmate of the house of the accused persons got infuriated, but the appellants were found absconding from their house. The fardbeyan of Ramkali Kumari recorded at 07:00 A.M. on 19.03.2011 by S.I. Deep Narayan Paswan, Station House Officer, Korma Police Station near the house of the informant before her father Rajo Mahto at village Bhadauli. On the fardbeyan the First Information Report was drawn on 19.03.2011 at 09:00 A.M. The distance between the place of occurrence and police station is 10 kilometers from village Bhadauli. After recording the fardbeyan, the fardbeyan was sent for registering the First Information Report and the Investigating Officer, the Station House Officer, Korma Mr. Deep Narayan Paswan (P.W.7) proceeded with investigation. He recorded the further statement of the informant and thereafter recorded the statement of her father, aunt Atbariya Devi and sent the informant for medical examination. After the medical examination she was handed over to her parents. The Investigating Officer inspected the place of occurrence. There are two places of occurrence; the first place of occurrence is 50 yards of the house of the informant which is parti land having toddy tree, from where the informant was kidnapped closing her mouth and the second place of occurrence is about half kilometer south of the first place of occurrence where the informant is alleged to have been raped. The police thereafter collected the medical report, recorded the statement of the witnesses and submitted charge-sheet. After submission of the charge-sheet, cognizance was taken, case committed to the Court of Sessions and after commitment the charge was framed and the trial proceeded.

4. During trial, altogether 7 witnesses were examined by the prosecution.

5. P.W.1 is Dr. Nilima Rukhaiyar who examined the informant and found no external injury on the private part, but found two abrasions over the back in the midline and another abrasion below the fist, but found no sign of rape.

6. P.W.2 is Manik Mahto who has been declared hostile as he has not supported

the prosecution case.

7. P.W.3 is Rajo Mahto the father of the informant has supported the prosecution case. He has deposed that his daughter went to attend the call of nature on the Bathan then she was lifted by the appellant Chandrika Mahto and raped by the appellant Tuntun Mahto @ Tutun Mahto. He claimed to have seen the accused fleeing away from the place of occurrence and his evidence is to the effect that his daughter disclosed about the rape. He has also deposed that the Salwar has torn and there was mark and has proved his signature. In his cross-examination he has further deposed that he made halla on which ten persons came there and then he went to the police station along with ten persons at 1:00 A.M. in the night. The case has been registered at the police and he put his thumb impression at the police station and her daughter has also signed at the police station. However, this witness has denied the suggestion that he has given a false statement. He has further stated that he had gone to police station which is about 1 to 1 1/2 kilometers.

8. P.W.4 is Urmila Devi the mother of the informant though she has deposed about the rape, but she has stated that when she reached at the place of occurrence then both the accused fled away. Thereafter she stated that she got her daughter lifted and took her to the house and then she took her to the police station and the Sadar Hospital where she was treated. The informant was got unconscious.

9. P.W.5 is Ramkali Kumari the informant and she has deposed that she has filed the case and the time of occurrence is at about 8:45 P.M. When she went to attend the call of nature in front of her house, then the appellant Chandrika Mahto closed her mouth, took her near the Alang (ridge) and the appellant Tuntun Mahto @ Tutun Mahto raped her whereas the appellant Chandrika Mahto only caught hold of her. She has further deposed that when she was lying unconscious, she was taken by her father lifting her and thereafter she was taken to the police station.

10. P.W.6 is Atwariya Devi. She has stated that when she went to the place of occurrence then she saw that there was no cloth on the body of the informant and the informant was unconscious and then she was taken to the house and the next day in the morning the police came and took her to the police station.

11. P.W.7 is the Investigating Officer, who conducted the investigation.

12. The defence of the accused persons is that the appellants have falsely been implicated in this case and the parents of the informant used to live in the shop of the appellant Tuntun Mahto @ Tutun Mahto and he used to give money and the appellant Tuntun Mahto @ Tutun Mahto has given money to the parents of the informant and with regard to the payment of the money the appellant Tuntun Mahto @ Tutun Mahto used to write account in a register and in the said register he has written the name of the father of the informant regarding his having taken the money from the appellants and further defence is that the father of the

informant had taken money in advance to the tune of Rs. 50,000/- and for non-payment and with an intention to get rid of this amount the false implication has been made. The defence has also adduced both oral and documentary evidences. The oral evidence adduced on behalf of the defence is the evidence of D.W.1 Pappu Mahto, the full-brother of the accused-appellant Tuntun Mahto @ Tutun Mahto, making out a case and they used to do the work of Kebari and had a Kebari shop at Pathankot and the parents of the informant also used to live in their shop and there was give and take relation between the appellants and the parents of the informant. The appellants used to give money in advance to the parent of the informant and the said amount had been extended to the tune of Rs. 50,000/- and so a false case has been lodged to get rid of that amount. The further case of the defence is that with regard to the giving of money, appellants used to record in register and has proved Ext. A, which is register in the writing of the appellant Tuntun Mahto @ Tutun Mahto showing the names of the parents. Name of the father of the informant recorded by the appellants in his register mentions the amount against his name which makes out a case about the money having been taken by the father of the informant.

13. The trial Court taking into consideration the evidence of both the sides convicted the appellants and sentenced as mentioned above.

14. Learned counsel for the appellants has challenged the judgment of conviction and order of sentence recorded by the trial Court. It has been contended that the medical evidence and the medical examination of the informant itself suggest that no rape was permeated on the person of the informant and hence, the medical evidence does not corroborate the prosecution case. It has further been contended that the appellants have falsely been implicated for the reason that the father of the informant was working in the Kebari Shop of the appellants at Pathankot and the appellants had given money worth Rs. 50,000/- to the father of the informant and to get rid of the debt of Rs. 50,000/- a false case has been instituted. It has further been contended that the register, which was maintained by the appellants, shows the name of the father of the informant mentioned in the writing of the appellants, which was being maintained in ordinary course of business and the relevant portion of the register has been proved as Ext. A and hence, it is contended that the case is of false implication.

15. Learned counsel for the State, however, contended that the defence of the accused is not acceptable at all as Ext. A the register has formally been proved by the brother of the appellants and he in his deposition has stated that whatever written in Ext. A by the appellant Tuntun Mahto @ Tutun Mahto, he had no knowledge and hence, the part of the register, which has been proved as Ext. A, has not been proved by a person having knowledge of the register and the appellant Tuntun Mahto @ Tutun Mahto who used to write the register has not come to depose that the same has been maintained in ordinary course of business and hence, formal proof of the register in the writing of the appellant Tuntun Mahto @ Tutun Mahto is not relevant. It has further been contended that

the evidence of the Doctor is very cryptic on the face of it. The Doctor has not given any detailed description of the examination of the private part of the victim and though he has deposed that there is no external injury on the private part, but has not described the other features whether the hymen was torn or not or there was other feature of rape and hence, his finding is not worth consideration. It has further been contended that though he has not given specific finding but he has mentioned the injury on the back and as per the evidence of the witnesses as she was thrown on ground and raped hence, it is submitted that the presence of injury on back is of relevance for due consideration. It has further been contended that the informant has supported the prosecution case and the witnesses have also supported the prosecution case regarding the recovery of the informant and fleeing away of the accused persons from the place of the occurrence to record a conviction.

16. However, taking into consideration the respective submissions, I proceed to consider the evidence in the light of the submissions made by the parties.

17. However, the prosecution case as alleged in the fardbeyan of the informant is that she proceeded to attend the call of nature at about 09:30 P.M. and she took water from the hand pipe in front of her house and proceeded at a distance of 50 yards under a toddy tree then she was at once kidnapped by the appellant Chandrika Mahto who closed her mouth, lifted her in his lap and took her at a distance of half kilometer in Bahiyar where the appellant Tuntun Mahto @ Tutun Mahto was there since before. She has further stated that she was raped by the appellant Tuntun Mahto @ Tutun Mahto, as a result of which she became unconscious and then her mother and father came in her search as there was delay in her returning to the house after attending the call of nature. The fardbeyan has been marked as Ext. 2. The fardbeyan itself mentions that it has been recorded on 19.03.2011 at 07:00 A.M. at her house before her father Rajo Mahto in front of the Officer-in-Charge of Korma Police Station. However, P.W.5 is the informant. She has stated that the police station is at a distance of two Kosh. She has further stated that she went to the police station in the night itself on a vehicle and then Daroga came to her house. In paragraph 8 she has stated that it has wrongly been written that she has given statement in front of her house before her father P.W.3 Rajo Mahto is the father of the informant and has stated that her daughter disclosed about the occurrence at the police station itself and the same was written at the police station and was read over on which she signed and this document has been marked as Ext. 2. P.W.3 is the father of the victim. He has also stated in his evidence at paragraph 5 that the case was registered at the police station and the signature was also made at the police station and his daughter also signed at the police station. However, P.W.4 Urmila Devi is the mother of the informant who has stated that her daughter went to attend the call of nature and thereafter she along with her husband went there and saw his daughter in unconscious state. She remained in hospital for whole day and regained consciousness in the evening and when she regained consciousness, then she disclosed about the occurrence. She has further stated

that the case was instituted in the same night of the occurrence and the informant was examined in the hospital. She has further stated that though case was lodged at Korma but the informant got conscious in the Hospital. However, her statement i.e. statement of P.W.4 is quite contrary to the evidence of P.Ws.3 and 5 that the statement was recorded after the occurrence. The informant went to the police station where she stated about the occurrence. However, P.W.7 is the Investigating Officer and the Officer-in-Charge, Korma who recorded the fardbeyan disclosed that on 19.03.2011 at 5:00 A.M. he got information. Thereafter on 19.03.2011, he reached at 7:00 A.M. He has further stated in his evidence that the statement of the informant was recorded in the village Bhadauli by him and he has proved the fardbeyan and proved his writing, fardbeyan and signature and he deposed that he read over hence, for the evidence of the prosecution witnesses itself it is apparent that there is variation in the statement of the evidences hence, there is contradiction in the evidence of the prosecution witnesses itself wherein P.Ws.3 and 5 who are the most material witnesses and who are nonelse than the informant as well as her father and they have deposed that the statement of the informant was recorded at the police station in the night itself when they went to the police station but the Station House Officer who has recorded the fardbeyan has deposed that he received information on 19.03.2011 at 5:00 A.M. and he reached the place of occurrence on 19.03.2011 at 7:00 A.M. and then recorded the fardbeyan at the house of the informant and hence, there is contradiction in the evidence of the Investigating Officer who recorded the fardbeyan and evidence of the informant about recording the fardbeyan with regard to the time and place of recording the fardbeyan.

18. However, the informant P.W.5 has supported the prosecution case in her evidence and though father P.W.3 has stated that when the informant did not return after attending the call of nature then he went to the place of occurrence and saw the accused persons fleeing away and the informant disclosed about the occurrence and then he went to the police station in the night itself at 1:00 A.M. and the case recorded at the police station whereas the mother of the informant P.W.4 has stated that she along with her husband went and saw her daughter in unconscious state and she brought the informant in the hospital and the informant got consciousness in the evening and when she got consciousness in the evening then she disclosed about the occurrence. She has further stated that the case was lodged in the night itself and hence, there is no contradiction in the evidence of the witnesses regarding the regaining of consciousness of the victim.

19. However, the defence has been set up by the accused persons that the accused persons have falsely been implicated in the case as the appellants had a Kebari shop at Pathankot in which the father of the informant used to work and had given Rs. 50,000/- to the father of the informant and he has filed a false case to get rid of payment of the said money. However, a register has been proved in which the name of the father of the informant was mentioned showing dues of Rs. 50,000/- and odd. However, there is no signature of the father of the

informant on the said register and there is nothing in the evidence regarding the receipt of the money nor is there any evidence or licence about having a Kebari shop at Pathankot nor is there any evidence that the said register was mentioned regularly in ordinary course of business rather the entry formally has been proved. In the register, also it is not specifically mentioned regarding the fact as to what has been mentioned though the register shows the due amount as Rs. 50,000/- and odd but in the evidence it has been stated by the appellants in the statement under Section 313 Cr.P.C. about Rs. 50,000/- dues. However, the register does not show day to day transaction of money, which was given on loan or whether it was given at one time though a defence has been set up but there is nothing to show that the father of the informant was working in the Kebari shop of the appellants or whether the appellants have a Kebari shop. Neither is there any license nor is there any paper regarding existence of the Kebari shop of the appellants and hence, the defence set up by the appellants has not been properly established nor has even probalibilized the prosecution case regarding the false implication of the appellants. The register has been proved, which does not mention about any Kebari shop of the appellants. However, it does not appear prudent that a Kebari shop keeper shall give such a huge money of Rs. 50,000/- to a labourer without having a written receipt and his signature and moreover the register has only formally been proved by the brother of the appellants that the writing in the said register is of the appellants. However, appellants have not come to depose as to in what manner and in what way they provided the money and have only formally proved without any suggestion even in the evidence of the father of the informant that they had given money or while working in a Kebari shop of the appellants hence, the defence set up has even not been proved or appears to be probable.

20. However, merely, because the defence of the accused has been disbelieved is no ground for conviction as the prosecution has to stand on its own leg to prove the charges beyond reasonable doubt. However, going into the question though the victim has supported the prosecution case that she was kidnapped by the accused-appellant Chandrika Mahto and was taken to a distance of half kilometer in laps whereas the second appellant Tuntun Mahto @ Tutun Mahto raped her. However, the informant has stated that she has become unconscious and the evidence of the father that the informant disclosed about the occurrence and he saw the accused persons fleeing away. The mother has said that the informant remained unconscious for whole night and she regained consciousness in the evening on the second day in the Hospital and then she disclosed about the occurrence. This itself again is a contradiction in the evidence of the witnesses. The medical evidence though has also not corroborated the rape, but there is no contradiction in the evidence of the informant and his father that matter was reported in the night itself whereas in the fardbeyan which according to the evidence of the Investigating Officer was recorded at 7:00 A.M. there is mere manipulation in the fardbeyan as there is over writing about time of occurrence or about the time of recording of the fardbeyan. However no cross-examination

has been made, neither it was pointed out to be explained by the Investigating Officer or by the Police Officer who recorded the fardbeyan regarding the over writing at the time of occurrence as it is apparent that it appears "01" has been made "07". However, since the evidence of the prosecution witnesses itself is in contradiction regarding the time of recording of the fardbeyan as the informant has not stated that the fardbeyan was recorded at about 1:00 P.M. whereas the fardbeyan and the evidence of the Investigating Officer is that the fardbeyan was recorded at the house of the informant when the police reached the house of the informant at about 07:00 A.M. and hence, having regard to the facts and circumstances of the case, the appellants are entitled to get the benefit of doubt. Hence, I find and hold that the prosecution has not been able to prove the charges beyond reasonable doubt and the judgment of conviction dated 03.02.2014 and order of sentence dated 05.02.2014 passed by Shri Satish Chandra Srivastava, learned Additional Sessions Judge, Sheikhpura in connection with Session Trial No. 825 of 2012 arising out of Korma P.S. Case No. 08 of 2011 are hereby set aside and both the appeals are allowed. Appellant, namely, Chandrika Matho of Cr. Appeal (SJ) No. 188 of 2014 is on bail. He is discharged from the liability of his bail bond. Let appellant, namely, Tuntun Mahto @ Tutun Mahto of Cr. Appeal (SJ) No. 178 of 2014 who is in custody, be released forthwith if not wanted in any other case.