
(2014) 04 PAT CK 0089

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 442 of 2002

Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 10-04-2014

Acts Referred:

Citation : (2014) 2 BBCJ 557

Hon'ble Judges : Shri Dharnidhar Jha, J.

Bench : Single Bench

Advocate : None, for the Appellant in CR. APP (SJ) No. 442 of 2002; Sri. Bindhyachal Singh, Sri. Ram Binod Singh and Sri. Vipin Kumar Singh, Advocates, for the Informant in CR. APP (SJ) No. 442 of 2002; Sri. Bipin Kumar, A.P.P, for the State in CR. APP (SJ) No. 442 of 2002; Sri. Sunil Kumar Thakur, Advocate, for the Appellant in CR. APP (SJ) No. 538 of 2002; Sri. Bindhyachal Singh, Sri. Vipin Kumar Singh and Sri. Ram Binod Singh, Advocates, for the Informant in CR. APP (SJ) No. 538 of 2002; Sri. Sujeet Kumar Singh, A.P.P, for the State in CR. APP (SJ) No. 538 of 2002

Final Decision : Allowed

Judgement

Shri Dharnidhar Jha, J.(Oral)—The two appellants were tried by the learned 6th Additional Sessions Judge, Chapra in Sessions Trial No.478 of 1994 after being charged with committing offences under Section 366 IPC. Appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati was charged further with committing offence under Section 376 IPC. By judgment dated 11.07.2002 the appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati was acquitted of charge under section 376 I.P.C. but was held guilty of committing offences under Section 363 IPC with appellant Rajesh Rai and both the appellants were directed by two different orders of sentence dated 08.08.2002 and 16.09.2002 to suffer rigorous imprisonment for five years each as also to pay a fine of Rs.1,000/- each, else to suffer rigorous imprisonment for three months each. The appellants have preferred the two separate appeals to challenge the judgment of conviction and the order of sentence.

2. Petition of complaint bearing no.C.1494 of 1993 (Ext-2) was filed by the father of the victim (P.W.5) in the court of Chief Judicial Magistrate, Chapra on 16.11.1993. It appears that a copy of the petition of complaint was sent for investigation to the concerned police station under Section 156(3) of the Cr.P.C and on that basis the FIR of the case was drawn up whereafter the investigation was taken up.

3. It was alleged in the petition of complaint that the complainant/informant Satyadeo Bharti who had been serving in Indian Army, had retired from the services and had come back with Rs.48,000/- which was his retiral benefit and had kept the same in a briefcase. It was stated that appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati came to his house at around 10 P.M. and stating that her mother was seriously unwell, asked the victim (P.W.5) to accompany him up to his house and accordingly, the mother of the victim (P.W.4) permitted her to go with him. The victim did not return and subsequently it was found that the briefcase containing Rs.48,000/- along with certain ornaments was also missing.

4. The further prosecution case was that in spite of hectic search, the victim could not be found and the informant was told by many persons that the appellants had kidnapped the victim either for selling her or to pushing her in to prostitute or to have illicit intercourse with her.

5. The investigating officer was not examined but what appears from the evidence of witnesses is that the victim (P.W.5) was recovered from the company of appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati and she was produced before P.W.6 Dr. Jaishri Prasad, who was a medical officer in the Female Ward, Sadar Hospital, Chapra, on 09.12.1993 for her medical examination. P.W.6 found that the lady was aged about 18 years and was habituated to sexual intercourse because her hymen was found ruptured and that there was no evidence suggestive of sexual intercourse within 48 hours of the medical examination of P.W.5 by P.W.6. The investigating officer was not examined and, as such, it is very difficult to say as to what were the steps taken by him during the course of investigation but it sufficiently appears from the records that after close of the investigation, the two appellants were sent up for trial, which ended in their conviction.

6. Seven witnesses were examined by the prosecution in support of the charges, out of whom, P.W.7 (Om Prakash) was the witness of formal character who had proved the filing of the complaint petition and the contents thereof, as a result of which, the complaint petition was marked (Ext-5). P.W.1 Bindeshwari Giri had deposed on the fact that while he was sitting at a place for purchasing fishes, he found a lady with two persons going together and on inquiry being made from them it appeared that they were the two appellants and the victim (P.W.5), which fact was subsequently pointed out to him by the victim's father and other family members. P.W.2 Mangal Bharti was yet another witness, who stated that his brother, the informant Satyadeo Bharti came to him on 05.09.1993 to inform

that his briefcase containing Rs.48,000/- was missing and that his daughter was also missing from his house whereafter P.W.2 accompanied his brother in search of his daughter and subsequently came to know from persons, like, P.W.1 that the two accused persons and a lady had been seen going together. P.W.3 Shila Roy had also stated the same fact that she had seen the girl and two men going together but she did not make any enquiry from any one of them. P.W.4 Girija Devi was the mother of P.W.5 and was stating that appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati had come to her house in the night intervening 4th and 5th November, 1993 and had asked P.W.5, the victim to accompany him as the condition of his mother was very serious and accordingly she allowed his daughter to accompany him, but P.W.5 did not return and subsequently it was found out that the VIP briefcase along with Rs.48,000/- and some ornaments was missing from the house. P.W.5 Kiran Kumari was the victim of the offence and she also stated the same facts as were stated by P.W.4 and further stated that after she had come out of her house with appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati she saw appellant Rajesh Rai also standing at her Darwaja and both of them instructed her to accompany them and took her to village Anuni and kept her in an empty shop from where she went to Chapra and from Chapra she went to Varanasi and from Varanasi she went to village Anuni and in that village, she was made to sign on a blank paper and was informed that she was the wife of Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati and, thereafter, the lady was subjected to sexual intercourse forcibly.

7. The defence also examined the single witness, namely, Bisheshwar Pandey who had tendered in evidence (Ext-A) the complaint petition and a compromise petition in Trial No.152 of 1985.

8. After considering the evidence of both the prosecution and defence, the learned trial Judge acquitted the appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati under Sections 366 and 376 IPC but held him guilty of committing offence under Section 363 of the Penal Code, whereas, appellant Rajesh Rai was held guilty of committing the same offence under Section 363 IPC and both of them were directed to suffer rigorous imprisonment for five years as also to pay a fine of Rs.1,000/- each, else to suffer rigorous imprisonment for a further period of three months.

9. No one was appearing on behalf of appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati. Sri Sunil Kumar Thakur, Advocate appeared for appellant Rajesh Rai of the other appeal. Sri Sujeet Kumar Singh has appeared on behalf of the State and Sri Bindhyachal Singh, Advocate has appeared on behalf of the informant. It was contended by the learned counsel appearing on behalf of the appellant that the name of appellant Rajesh Rai was not appearing either in the first information report or in the statement under Section 164 Cr.P.C. of the victim recorded by a Magistrate and it appears that no role had been assigned to him. It was contended that at best it appears a case of elopement of a lady with other appellant Vijay Bharti @ Vijay Kumar Bharati @

Bigan Bharati by taking away the cash and ornaments from her house and that probability was arising out in her own evidence. The learned counsel appearing on behalf of the informant was vehemently supporting the judgment and was submitting that the victim of the offence has always to be treated at par with an injured witness and credence has to be accorded to her evidence. Submission was that appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati was the cousin of the victim and it was that aspect of the offence which was more damaging to the society. The other submission was that as may appear from the evidence of the victim of the offence, her father was murdered during the pendency of the trial and the court should also consider that subsequent event. Sri Sujit Kumar Singh, the learned Additional Public Prosecutor was also supporting the imposition of punishment by the learned trial Court.

10. It was rightly contended by the learned counsel appearing for the informant that the victim of an offence of the present nature could not be treated as an accomplice and no inference under Section 114(b) of the Evidence Act should be drawn. The victim of such an offence is at par with an injured witness and the court has to attach such importance to her. However, as regards the scales of appreciating the evidence of such a witness, the law does not provide for any other yardstick than the ordinary one of judging the evidence of such a witness on the scales of acceptability and probability. If the court finds that the victim of an offence inspired its confidence and was not appearing untrustworthy, then the court should very well act upon the evidence of such a witness in recording the conviction. But, while doing so the court has to keep in its mind that the victim of an offence is herself very much interested in the outcome of the litigation and the court has to judge her evidence as an interested witness as there could be every chance of the victim heightening the allegations so as to ensuring that the accused was convicted and sentenced.

11. In the present case, the witnesses other than P.W.5 were witnesses on facts which do not appear disputed much in view of the very evidence of P.W.5. It could not be said that she had not gone out of her parent's house and she had been in the company of the two appellants Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati and Rajesh Rai. It also does not appear much in dispute that she had left her parents house carrying a briefcase which was probably containing Rs.48,000/- in cash and was also probably containing some of the ornaments which were missing from the house of P.W.4, her mother. The only question, under the above factual background which remains to be judged, was as to whether it could really be an offence by virtue of the victim having been taken away or being enticed away from her lawful guardianship for any particular purpose which appears in Section 366 IPC. The learned trial Judge has held that the offence under Section 366 IPC was not constituted. This finding of the learned trial Judge that the offences under Section 366 or 376 IPC were not established on the strength of the evidence available to him, to me appears quite bald. The learned trial Judge has discussed the evidence of witnesses in paragraph-17 and onwards and has thereafter, without assigning any reason as

to how the two offences were not constituted on facts acquitted the accused persons of the charges. It is true that there is no appeal against the acquittal of the appellants for offences under Sections 366 and 376 IPC, but the very conviction of the two appellants under Section 363 IPC renders it necessary to reappraise the evidence of the prosecutrix so as to finding out whether that particular offence was also constituted on evidence or not.

12. The learned trial Judge has started on the premise that the victim was below 18 years of age as appears recorded in paragraph-18 of the impugned judgment and I have no hesitation in noting that particular finding is against the evidence which was produced by the prosecution itself. The prosecution had produced two witnesses, one was P.W.5, the victim herself, who stated during her testimony in court as appears from paragraph-13 in the last line that the certificate issued to her for having passed the Intermediate Examination showed 31.01.1975 as her date of birth. Thus, this admitted fact that the prosecutrix was born on 31.01.1975 appears one vital factual data so as to assessing the age of the victim. The date of occurrence of the case is 04.11.1993 and after making the necessary arithmetics, what appears is that the victim was aged about 18 years, 9 months and 3 days on the date of occurrence. Thus, the finding of the learned trial Judge that she was below 18 years of age is not only against the weight of evidence on record, but also against the admitted fact which was a fact introduced by cross-examining the witness produced by the prosecution. The other evidence on the age of P.W.5 also came from one of the prosecution witnesses, i.e., P.W.6 Dr. (Smt.) Jaishri Prasad. She had medically examined P.W.5 on 09.12.1993 and after carrying out the radiological examination for the purposes of assessing the age of victim, she found that the lady was below 18 years of age. Thus, there were two conflicting evidences produced by the prosecution on the age of the victim P.W.5. I have already noted that the age recorded in the certificate of the victim issued to her on the occasion of passing out the Intermediate Examination was indicating that the lady was 18 years, 9 months and 3 days of age. In this regard one may refer to a series of decisions starting from the case of *Jaya Mala v. Home Secretary, Govt. of Jammu and Kashmir* and others reported in AIR 1982 SC 1297, which judgment has been followed by the subsequent judgments by all courts, and which held that three years has to be added to the assessed age while assessing the age of the victim. As per that judgment and view on assessment of the age, if three years are added then P.W.5 could be somewhere around 21 years of age. I am not much concerned as regards the age of the victim being 21 years or 18 years. What I want to point out is that the lady was definitely not less than 18 years of age; she might be above 18 years of age. Thus, the threshold which has been fixed by the provision of IPC for applying the law to the facts of such a case appears crossed.

13. Coming to the facts of the case P.W.5 the victim herself has stated that she went out of her house in the cover of darkness carrying the briefcase in the company of appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati and

when she had come out of her parents' house, she found that the other appellant Rajesh Rai was also standing there. The lady stated that she was subjugated on the point of pistol to accompany the accused persons to go from her parents' house to different places, like, Chapra to Anuni, Varanasi to Delhi and again back to Chapra. But during her cross-examination her attention was drawn to the above facts as appears from paragraph-15 of her deposition sheets. She was extensively cross-examined with reference to her previous statements made either before police or before the Magistrate under Section 164 Cr.P.C and what appears from her cross-examination is that the element of threat or element of coercion or even of subjugation was not only absent rather there was no element of blandishment given to her by any of the accused persons. She was moving from her father's house to Anuni and from there to Chapra where she was going to catch a train. She was traveling in the train after procuring valid traveling tickets. She was sitting in a boggy with passengers and she found the train ticket examiner in the boggy and also police personnel all around, but she never complained to any one and the simple explanation which was coming from P.W.5 was that she was completely over awed by the accused persons who had earlier brandished pistol to subjugate her. The inference which is naturally coming out from these admitted facts of traveling from one place to another and passing through such public places, like a bus stand or a railway station, or sitting in a bus or in a boggy of a train with other persons without even raising a protest or lodging a protest simply raises an inference that the lady was a willing person who was more than willing to travel with the accused persons from one place to another. The lady had stated that on one occasion some one had to enquire from the accused persons as to who they were, i.e., the lady and the two appellants who were traveling together, and appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati had pointed out that they were brother and sister but again the lady was not raising a protest that she was being kidnapped or she had been enticed or had been taken away. While residing in Delhi or another place, the lady had the occasion of raising protest or hue and cry but again she was not doing so. These are all the circumstances which points out to an inference that the lady was a willing party who was moving with the accused persons out of her volition. It is true that there is evidence of rape coming from the lady but under the circumstances which I have just noticed, the lady could not be said to be a protesting persons rather she was consenting in all acts whatever was complained of by her subsequently in Court.

14. The learned counsel appearing for the informant had submitted that the appellant Vijay Bharti @ Vijay Kumar Bharati @ Bigan Bharati and P.W.5 were cousin between themselves and the offence would be detrimental to the interest of the society. I personally hold the same view that such offence may not be an ideal signal to the society, but judges never judge by idealism; they judge facts and the facts are judged in the light of the provisions of law. The Penal Provisions have to be applied under the facts of the case and if the facts do not attract any particular provision, then the mere sentimental aspect of the offence could not

seek the judgment to be pronounced by a Judge. Crime situation does not partake of ideal situations. Offence and its definition itself suggest that ideal situations are completely ruled out of criminal law. On the very strength of the evidence of P.W.5 it does not appear to me a case either of taking away or of enticing away, it was a case of consensually going together by the victim and the appellants and the conviction of the appellants also for the offence under Section 366 IPC, in my considered view, was completely bad in law.

15. In the result, the appeal succeeds and the same is allowed. The two appellants of the two appeals are acquitted of the charge for which they had been found guilty of by setting aside the judgment of conviction and order of sentence. Both appellants are on bail. They shall stand discharged from the liabilities of their bail bonds.