

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 252 OF 2004

ATHESHAM ALI

.. APPELLANT

vs.

STATE OF BIHAR (PRESENTLY JHARKHAND)

.. RESPONDENT

O R D E R

1. This appeal is directed against the judgment of the High Court of Judicature at Patna dated 5th August, 2003, whereby the conviction and sentence imposed by the trial court on the appellant under Section 376 of the Indian Penal Code has been maintained.

2. The prosecution story is as under:

2.1 P.W. 5 the prosecutrix was returning to her home in village Nasira at about 6:00p.m., about 7 months before the lodging of the First Information Report when the appellant who was standing nearby caught hold of her, gagged her mouth, took her forcibly into his room and on the point of a dagger, committed rape on her. She was

also confined to the room for about three hours and when she came out at about 10:00p.m. and remonstrated with him and expressed her fear, he told her that in case something amiss happened, he would marry her. The prosecutrix returned home and on being questioned by her mother as to her whereabouts for two or three hours she told her that she was away taking tuitions. As per her case, the rape was repeated after 2-3 days at about 6:00p.m. and again a couple of days later at the same time, but over taken by fear on the threats held out to her the prosecutrix did not inform anybody as to what had transpired. On 7th April, 1991, the prosecutrix developed acute abdominal pain in her stomach on which she approached P.W. 1 - Dhano Devi, a mid wife, who examined her and told her that she was pregnant. She also made an attempt to abort the pregnancy. It was at this stage that the prosecutrix, having no option, told the entire story about the commission of rape by the appellant to her mother. A First Information Report was, accordingly, lodged on 9th April, 1991, for the offence punishable under Section 376 of IPC. The prosecutrix was also taken to P.W. 8 - Dr. M.N. Sinha, who aborted the pregnancy after noticing that the abortion attempted by the midwife had not been successful. It also appears that the appellant and his father were advised by the villagers that the appellant

should get married with the prosecutrix and when this offer was refused there was a scuffle between the villagers on the one side and the appellant and his father on the other.

2.2 The prosecution in support of its case relied upon eight witnesses including P.W. 1 - Dhano Devi, P.W. 5 - the first informant and the prosecutrix, P.W.4 - Mahmoon Khatoon, the mother of the victim, P.W. 7 - the lady doctor who had examined her on the allegations of rape and P.W. 8 - Dr. M.N. Sinha. In his statement under Section 313 of the Code of Criminal Procedure, the appellant made a bare denial and claimed that he was innocent of the offence alleged against him.

2.3 The trial court and the High Court have concurrently held that rape had been committed on the prosecutrix as she had been threatened with dire consequences in case she revealed the story to anybody and this fear justified the delay of seven months in the lodging of the FIR. The courts have also found that it is on account of fear that the prosecutrix had not revealed the factum of rape till the date she became apparently pregnant. The Courts further held that the prosecutrix had also been given a promise of marriage and for this reason as well the

appellant was guilty of the offence alleged against him.

3. We have heard the learned counsel for the parties. From a perusal of the evidence of the lady doctor - P.W. 7 it stands revealed that the prosecutrix who was examined by her on 23rd August, 1976, was between 15-18 years of age and for arriving at this conclusion the doctor had relied on the ossification test which was required as per law. We take it, therefore, that the defence was entitled to argue that she was 18 years of age on the date of the incident. Even assuming that the rape had been committed before seven months of the date of medical examination this would still make her about 17 years of age.

4. We have also gone through the evidence of the prosecutrix, her mother and P.W. 1 and the mid wife. It is apparent from a reading of this evidence that the house of the prosecutrix and that of appellant were adjacent to each other and they were well acquainted. We also find that the prosecutrix had been subjected to at least three different incidents of sexual intercourse. As per the defence it was by way of consent, but as per the prosecution it was rape on account of fear. We are, however, of the opinion that it would be difficult to believe that close neighbours would be so morally scared

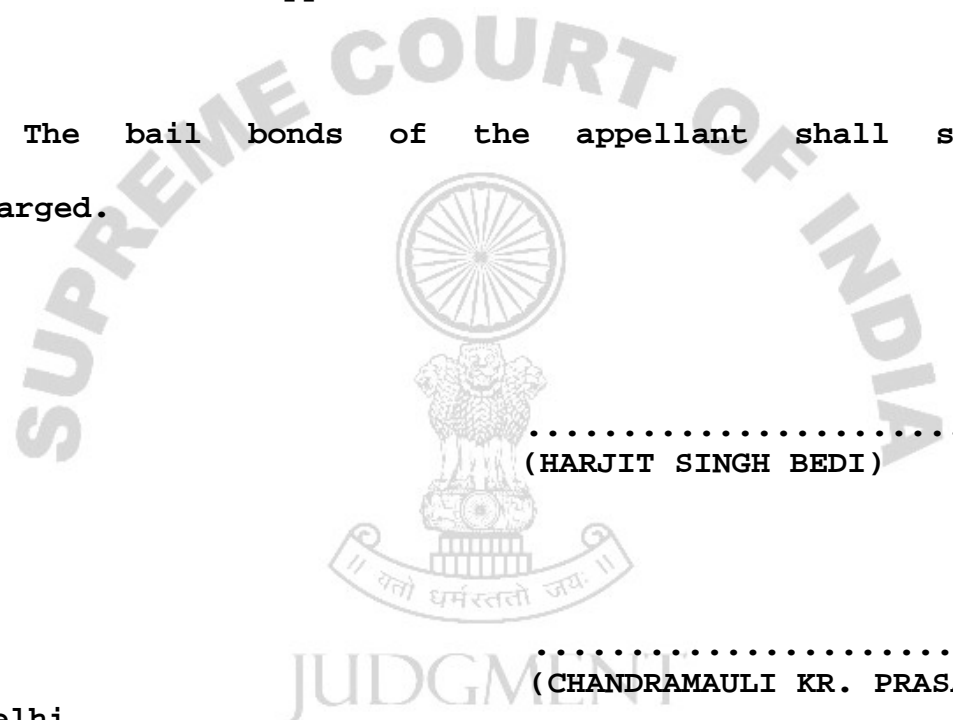
of each other that the story of rape would not come out for seven months. We also see from the record that soon after the first instance of rape an effort had been made to get the accused to agree to a marriage with the prosecutrix and during these discussions in which the co-villagers had also been associated the appellant's brother had been killed by the villagers. It is, therefore, very clear that the factum of the sexual intercourse was well known in the village long before the date on which the FIR had been filed. The fear that the prosecutrix claims was, therefore, non-existent.

5. We have also seen the medical evidence particularly that of Dr. M.N. Sinha. The doctor pointed out that she was about eight months pregnant on the date when he had examined her on 7th April, 1991 and as the attempt at abortion by the untrained midwife P.W. 1 had been unsuccessful he had carried out the medical termination of pregnancy(MTP). We are, therefore, of the opinion that the present case is clearly one of consent. It has been argued by the learned counsel for the State of Jharkhand (as at present) that the consent could not be inferred more particularly, as the prosecutrix was a victim of a broken promise. We have considered this argument as well. We find that the appellant had not given any promise of

marriage and the promise was that in case she became pregnant, he would look after her. This statement appears not only in the statement of P.W. 5 in Court but also in the FIR.

6. For the reasons recorded above, this appeal deserves to succeed. We, accordingly, set aside the orders of the Courts below. The appeal is allowed.

7. The bail bonds of the appellant shall stand discharged.



.....J.
(HARJIT SINGH BEDI)

.....J.
(CHANDRAMAULI KR. PRASAD)

New Delhi,
October 05, 2010.