

ITEM NO.103

COURT NO.7

SECTION IIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO(s). 252 OF 2004

AHTESHAM ALI

Appellant (s)

VERSUS

STATE OF BIHAR (NOW JHARKHAND)

Respondent(s)

(With office report)

Date: 05/10/2010

This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE HARJIT SINGH BEDI
HON'BLE MR. JUSTICE CHANDRAMAULI KR. PRASAD

For Appellant(s)

Mr. Piyush K. Roy, Adv.
Mr. G. Ramakrishna Prasad, Adv.

For Respondent(s)

Mr. Gopal Prasad, Adv.

UPON hearing counsel the Court made the following
O R D E R

The orders of the courts below are set aside.

The appeal is allowed in terms of the signed
order.

(KALYANI GUPTA)
SR. P.A.

(RENU DIWAN)
COURT MASTER

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[SIGNED ORDER IS PLACED ON THE FILE.]

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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

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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

x

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 abdomina

1

pain in her stomach on which she approached P.W. 1 - Dhano

Devi, a mid wife, who examined her and told her that she

the

was pregnant. She also made an attempt to abort

pregnancy. It was at this stage that the prosecutrix,

the

having no option, told the entire story about

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

een

the abortion attempted by the midwife had not b

successful.

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It also appears that the appellant and his

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father were advised by the villagers that the appellant

this

should get married with the prosecutrix and when

the

offer was refused there was a scuffle between

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

lady

Khatoon, the mother of the victim, P.W. 7 - the

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 Cou

rts

further held that the prosecutrix had also been given a CRL.A. 252 of 2004

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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

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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.

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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.