

Bishnudayal

Vs

State of Bihar

Criminal Appeal No. 11 of 1975

(R. S. Sarkaria, R. S. Pathak JJ)

01.08.1980

JUDGMENT

SARKARIA, J. –

1. This appeal is directed against a judgment, dated August 8, 1974, of the High Court of Patna. The material facts are as follows :

2. Saraswati, one of the daughters of Jagarnath (PW 4) is married to Debnandan of village Bahera, Police Station Silao, District Patna. Ganga Prasad, who was accused 1 in the trial Court, is the elder brother of Debnandan, and Kameshwar accused 2 is his nephew. Bhatani Devi, who was accused 4 in the trial Court, is the sister of Debnandan and Ganga Prasad. Bishnudayal, who was accused 3 and is now the appellant before us, is the husband of Bhatani Devi. Bishnudayal is a resident of village Lawapur, Police Station Mahnar, District Muzaffarpur. Bishnudayal and Bhatani Devi have no issue. Jagarnath's younger daughter, Sumitra (PW 9) is unmarried.

3. On May 19, 1967, there was a puja in the house of Jagarnath (PW 4). He had invited a good many persons, including the accused, Ganga Prasad and Kameshwar Prasad. Bishnudayal and his wife, Bhatani Devi, were also invited at the puja. Saraswati Devi, the elder daughter of Jagarnath could not go and be present there on account of her illness. On May 20, 1969, after the puja when the guests were preparing to depart for their respective villages, a request was made on their behalf that Sumitra (PW 9) should be sent to village Bahera to look after her ailing sister, Saraswati, as the latter had to be taken to Patna for treatment. Taken in by this misrepresentation and the assurance held out by Ganga Prasad, the acquitted accused, that the younger daughter Sumitra would be sent back within a week, Jagarnath allowed Sumitra to go with the accused persons to village Bahera. Thereafter, he received a letter from the accused stating that Saraswati Devi, who was suffering from mental ailment had considerably improved on account of the care taken by Sumitra. The complainant Jagarnath awaited the return of Sumitra for more than a week, but she was not sent back. Worried, he wrote two letters to Ganga Prasad accused, requesting him to send the girl back. He received no reply. Jagarnath thereupon went to village Bahera, but did not find his daughter there. There, he learnt from two persons who were among those who had attended the puja at his house, that his daughter, Sumitra had been 'married' to Bishnudayal appellant. When Jagarnath protested, they said that they had done so and he was at liberty to take whatever action he liked. Thereafter, Jagarnath on June 10, 1967, lodged a report at Police Station, Sahebganj at 4.30 p.m., alleging that the four named accused had kidnapped his daughter, to Sedna or forced her daughter to have illicit intercourse with Bishnudayal. The Station House Officer, Parasnath Mishra (PW 15) went to the house of Jagarnath, informant and seized some letters. On June 24, 1967, the investigating police officer, in the presence of PW 16 and PW 17, recovered the girl, Sumitra from

the house of the appellant.

4. The Additional Sessions Judge convicted Ganga Prasad under Sections 366 and 376/109. Penal Code and sentenced him to four years' rigorous imprisonment on each count. He convicted Bishnudayal appellant under Sections 376 ad 366, Penal Code, and sentenced him to five years' rigorous imprisonment under Section 366 of the Code. Kameshwar Prasad accused was also convicted under Sections 366, 376/109 and 366-A of the Code and sentenced to four years' rigorous imprisonment. Bhatani Devi accused 4, was acquitted.

5. A learned single Judge of the High Court accepted the appeal of Ganga Prasad and Kameshwar Prasad and acquitted them. He, however, maintained the conviction and sentence of Bishnudayal under Section 376, but set aside his conviction under Section 366, Penal Code. Hence, this appeal by Bishnudayal.

6. The prosecution case hinged around these questions. Whether the prosecutrix (PW 9) was subjected to sexual intercourse against her will or consent ? What was her age at the time of occurrence ? If the preceding questions are found in favour of the prosecution, whether it was the appellant who had raped her ? The principle witness of the prosecution in regard to these facts in issue, is Sumitra Devi (PW 9), herself. She testified that she was forcibly raped repeatedly by Bishnudayal appellant for several nights in a house at village Lawapur. It is further an undisputed fact that she was recovered by the police from the house of Bishnudayal. Her testimony with regard to the factum of rape was corroborated by the medical testimony rendered by Dr. Asha Prasad (PW 24). The doctor testified that there was a para-urethral tear on the vagina of Sumitra Devi and her hymen was also found ruptured. On the basis of these facts, the doctor opined that Sumitra Devi (PW 9) had been subjected to forcible sexual intercourse.

7. As before the High Court, here also it was contended that the girl, Sumitra, had been willingly given by her father in marriage to the appellant and she had sexual intercourse with the appellant with her consent. The prosecution case however, was that at the time of the intercourse she was hardly 13 or 14 years old. If that be true, the question of consent was immaterial is the offence would tall within clause 'Fifthly' of the definition of 'rape' given in Section 375 of the Penal Code.

8. The evidence with regard to the age of the girl was given by the prosecutrix (PW 9), and her father : Jagarnath (PW 4) and Dr. Asha Prasad (PW 14). PW 9 and PW 4 both stated that Sumitra (PW 9) was 13-14 years of age at the time of occurrence. Dr. Asha Prasad opined that the girl was only 13 or 14 years of age on July 6, 1967 when the witness examined her. The doctor based this opinion on physical facts namely, that the examine (PW 9) had 28 teeth, 14 in each jaw, smooth public hair and axillary hair, which means the hair, according to the opinion of the doctor, had just started appearing at the age of 14.

9. The courts below have, on the basis of this testimony, come to the firm conclusion that, at the time of occurrence, Sumitra was about 14 years of age only. We do not find any good reason to disagree with that finding.

10. In regard to the appellant being the perpetrator of the rape, Sumitra's evidence has been found to be trustworthy by the courts below. Her evidence in regard to this fact stood corroborated by the other evidence on the record. Thus, the appellant was rightly convicted under Section 376, Penal Code.

11. As regards the sentence, counsel for the appellant stated that even after the occurrence, the prosecutrix has been living in the house of the appellant and has given birth to children from the liaison. Counsel, however wanted time to verify this information. We therefore, reserved orders in this case and adjourned announcement of the judgment. In spite of the ample time granted, neither the appellant nor anybody else has produced any material or evidence in regard to these post-occurrence developments which, if established, could be taken into account in fixing the quantum of punishment.

12. For the foregoing reasons, we dismiss Bishnudayal's appeal and maintain his conviction and sentence under Section 376, Penal Code.

13. The appellant shall surrender his bail bond and be taken into custody to serve out the sentence awarded to him.

</html