

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.379 of 2013

Against the judgment of conviction, dated 25.04.2013, and order of sentenced dated 26.04.2013 passed by Mr. Ram Pratap Asthana, Ad Hoc Additional Sessions Judge, I, Saharsa, in Sessions Trial No. 156 of 2012 arising out of Saurbazar P.S. Case No. 26 of 2012 (G.R. No. 207 of 2012)

1. Mantun Sah S/O Bahadur Sah R/O Arraha, P.S.- Sour Bazar, District- Saharsa
.... Appellant

Versus

1. The State Of Bihar
.... Respondent

Appearance :

For the Appellant : M/S Shiv Shankar Sharma and Arun Kumar Sinha, Advs.
For the Respondent : Mr. S.A. Ahmad, APP

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 14-12-2015

Heard the learned counsel for the appellant and the State.

2. The appellant has been convicted under Sections 376 and 452 of the Penal Code and sentenced to undergo rigorous imprisonment for four years for offence under Section 452 of the Penal Code and a fine of Rs.3,000/- and in case of default in payment of fine to serve further rigorous imprisonment for three months. The appellant has, further, been sentenced to undergo rigorous imprisonment for ten years for offence under Section 376 of the Penal Code with a fine of Rs.40,000/- and in case of non-payment of fine to serve, further, rigorous imprisonment for ten years.

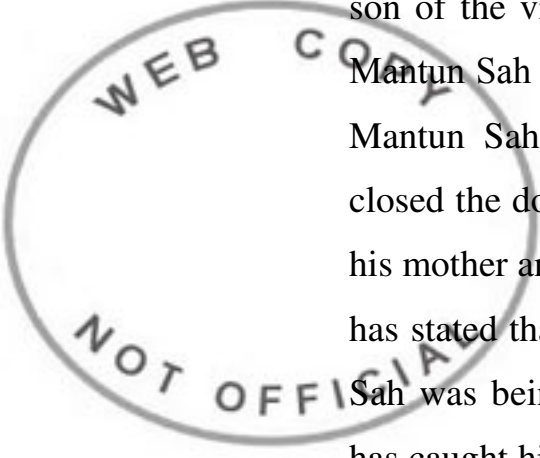
3. The prosecution case, as alleged in the first information report by the informant Tuna Devi that in the night of 02.02.2012 she came out of room to meet the call of nature, in the meantime, her neighbour, Muntan Sah, by scaling the wall entered into her court yard and concealed himself in the room of the informant beneath her cot. When she returned back, after meeting the call of nature and closed the door, laid on the bed, Mantun Sah came out from beneath the cot and got over the informant and when she tried to protest, then, he closed her mouth and raped her. Further, case is that the informant anyhow managed to release her mouth and made a hulla on which the neighbours

and several people collected. When Mantun Sah tried to escape, she caught hold of him and the villagers closed the door from the out side and kept it locked. The police was informed by mobile on which the police came and the informant made her statement. The, further, case is that earlier also Mantun Sah had raped the informant for which a case was filed. He has, again, committed rape and tried to flee away, but, due to timely intervention of the villagers, Mantun Sah could not flee away.

4. The fardbeyan of Tuna Devi was recorded by Assistant Sub Inspector of Police of Sourbazar Police Station at the house of the informant at village Arha at about 04.00 A.M. On the basis of the fardbeyan, first information report drawn and investigation proceeded.

5. The police on information that a man has entered into the house of Tuna Devi, reached there and the door closed from inside in which Tuna Devi and Mantun Sah (the appellant) got opened and took them out and, thereafter, Tuna Devi disclosed that Mantun Sah has committed rape on her and there the investigating officer recorded the statement of Tuna Devi and he proved the same with the signature of Tuna Devi, marked as Exhibit 2. On the fardbeyan, formal first information report drawn, marked as Exhibit 3. He, further, recorded the statement of the victim, during investigation, in which she supported the prosecution case. He also seized the cloth of Mantun Sah and also seized the saree and saya of Tuna Devi and sent Tuna Devi to hospital for medical examination. He inspected the place of occurrence, darwaza of the house, which Tuna Devi and the appellant was closed, recorded the statement of the witnesses, got the statement of the victim recorded under Section 164 of the Criminal Procedure Code and after investigation submitted the charge sheet.

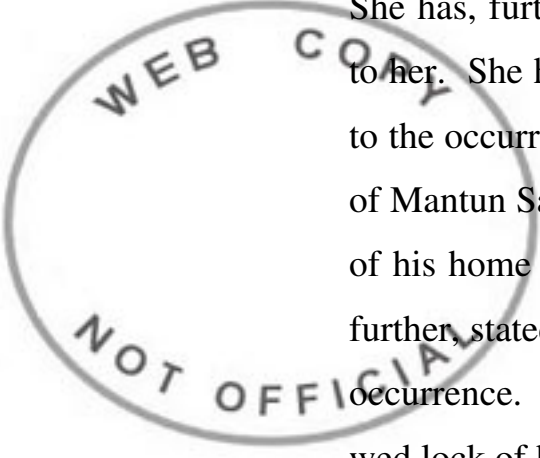
6. The victim was examined by a medical board, having duly been constituted and the victim was examined by Dr. Poonam on 02.02.2012 at 04.30 P.M., she found pain in private part, blood was oozing out and found rape has been committed by force within 3-4 days and has proved her report, marked as Exhibit 4. However, in her cross-examination she stated that she did not find the exact time of rape though



P.Ws. 1 and 2 have not supported the prosecution case and declared hostile. However, they have supported prosecution case to the effect that the police caught Mantun Sah in the room of Tuna Devi. P.W. 3 is the son of the victim and has stated that he was sleeping with his mother, Mantun Sah entered into the house, it was 9 o'clock and on hulla he saw Mantun Sah in the house and, thereafter, his grand-father came and closed the door and, thereafter, police came and caught Mantun Sah and his mother and took them to the Police Station. P.W. 4 is Samoli Sah and has stated that when he reached to the place of occurrence, saw Mantun Sah was being hold by the police and Tuna Devi disclosed that police has caught him from her house and Mantun Sah has raped her. P.W. 5 is Sudhakar Paswan. He is a member of Home Guard and has stated that he went to the house of Tuna Devi of village Arraha, at the same time Chhota Babu came and they got the door opened and Mantun Sah was taken out and Tuna Devi disclosed that Mantun Sah has committed rape upon her and both were taken to the Police Station. P.W. 6 also supported the case that Mantun Sah entered into the house and when the police came, Mantun Sah and Tuna Devi were taken out of the room and Tuna Devi stated that she was raped by Mantun Sah. P.W. 7 is Shambhu Sharma and P.W. 8 is Paplu Yadav also supported the prosecution case about the rape and on mobile message of Chhota Babu, they reached Arraha village where a person was kept closed in a room, there was cry of the villagers and the door was closed from outside and, thereafter, the said door was opened and Mantun Sah was taken out from the room of Tuna Devi and Tuna Devi disclosed about the rape. P.W. 9 is the investigating officer.

7. Hence, taking into consideration the evidence of the witnesses and documentary evidence, the trial Court convicted the appellant and sentenced, as mentioned above.

8. The learned counsel for the appellant has challenged the order of conviction and sentence, recorded by the trial Court. The learned counsel for the appellant, however, submitted that the victim was a consenting party and has taken the plea of consent. It has been



submitted that the victim herself has stated that she has got two children prior to the occurrence and after the occurrence one more child has born, who is about two years old, whereas the occurrence is of one year back. She has, further, stated that after the occurrence no child has been born to her. She has, further, stated that the child, which has been, born prior to the occurrence is the child of Mantun Sah and she claims the property of Mantun Sah. However, it is stated that the husband has driven her out of his home from the time she has contact with the appellant. She has, further, stated that she has no contact with the accused, except the day of occurrence. She has, further, stated that both the children are from the wed lock of her husband. In her further cross-examination she has stated that she want to marry with the accused since her husband has driven out her, now she is nowhere and on the basis of these evidences it is submitted to presume that the appellant and the victim are the consenting party. However, it has, further, been contended that the prosecution has not been able to prove the charge. It has, further, been contended that the prosecution case, as alleged that the appellant scaled the wall and entered into the house does not appear to be cogent and reliable and this, itself, indicates the element of consent and while they were indulging in sexual intercourse there might have been reason that the villagers and other family members have seen and made hulla and closed the room and when police came, then, the victim took the plea of rape making allegation of rape upon her to save herself.

9. The learned counsel for the State has contended that there is specific allegation of rape and the prosecution case itself that on hulla of the victim the villagers came closed the room from outside and as on hulla the accused-appellant was trying to flee, but, the victim caught him and made hulla and, thereafter, the police, informed, came and found both closed in a room and police took them out and the victim herself stated in her evidence that she has been raped by the appellant. It has, further, been contended that as per Section 114A of the Evidence Act when the victim herself has denied the consent then it shall be presumed that there was no consent and it is incumbent on the appellant to prove

the consent as defence of the accused.

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

11. However, the prosecution case that while the informant was sleeping in the room, came out from the room in the night to meet the call of nature, the appellant, after scaling the wall came in the courtyard and entered into the room and concealed him beneath the cot of the victim, thereafter, when the victim came, after meeting the call of nature and closed the door, laid on bed, then, the appellant came out and closed her mouth and raped her. The further case is that the victim made hulla and then the appellant tried to flee away and the victim caught hold of him and then the villagers and he other persons came and closed the door, intimated the police on which the place came. There is evidence of the investigating officer, P.W. 9 that when he came, he found both, Mantun Sah and the victim, being closed in the room and the darwaza was closed from outside. It can well be presumed that the appellant might have tried to flee away after the hulla of the victim and, thereafter when the villagers came they have closed the door from the outside as the case of prosecution is that the victim herself caught hold of the appellant and made hulla and both were closed from the outside and Mantun Sah and the victim were in the room.

12. However, this fact followed with the medical evidence and the victim was examined by the medical board and it has been stated that the doctor found the sign of forcible rape on the person of the victim and it has been found that the blood oozing out from the private part and there is evidence of violent rape, however, the only criticism of the evidence is that it has been stated that the rape has been committed within 3-4 days. However, the doctor in her cross-examination has stated that she can not say the exact time. However, having regard to the fact that the son of the victim was also sleeping with her and he has also supported the prosecution case that when his mother made hulla, then, he saw Mantun Sah inside the room. However, it is well established that

the victim and Mantun Sah were inside the room and there is allegation of rape and the doctor found sign of violent rape on the person of the victim, hence, on these evidences it can well be inferred that the appellant entered into the room, committed rape and the witnesses, P.Ws. 3, 4, 5, 6, 7 and 8 have supported the prosecution case, they went at the place of occurrence and saw the victim along with the appellant in a room and the police came and took them out of the room.

13. However, the defence set up by the accused person is that it is apparent from the trend of cross-examination and the suggestion given that no rape was committed upon the victim and the victim wanted to marry with the appellant and since family members of the appellant were not ready and she wanted to grab the property of the appellant so a false case has been filed. There is no plea taken during the trial regarding the argument advanced during the appeal that both were consenting party.

14. However, the criticism that the clothes of the appellant and the victim, with the sign of semen on the saya and saree of the victim, but, the same were not sent to any chemical laboratory to ascertain that whose semen is this. However, in the prosecution case, itself, a specific assertion has been made and the saya and saree were seized by the investigating officer and the allegation has been made that these saya and saree bore the semen of appellant while committing rape, fallen on it and the same semen belongs to appellant. However, the investigating agency though proved the seizure list, but, has not proved or not sent the clothes for chemical examination. However, great emphasis has been given by the learned counsel for the appellant that the semen has not been examined, but, this argument by the prosecution or infirmity during investigation by the investigating officer is not ground to disbelieve the prosecution case when there are sufficient evidence that the witnesses are stated that the sign of rape having been found and the witnesses stated that on hulla they went there and the victim and the appellant were taken out from the room before the police, when police came on information about the occurrence. The learned counsel for the appellant, however, contends that the appellant was though apprehended on the

spot, but, no examination of his private part conducted and has stated that this, itself, is a ground of disbelieving the prosecution case. However, having regard to the nature of the evidence that both have found in the room and the doctor has found the sign of violent rape, hence, mere non-examination of the victim in the light of the evidence and the circumstance the prosecution case can not be disbelieved on this count that the appellant has not been examined by the doctor.

15. However, a defence has been taken that the victim was a consenting party in view of the evidence that the children are of the appellant, however, apparently the appellant is not the husband of the victim and taking into consideration her evidence she has stated that she has been driven out of the house in view of the occurrence and she wants a help or she is not finding out any way and so she wants to marry with Mantun Sah, but, this fact, itself, can not make out any logic to say that the victim was a consenting party to the rape or she was a consenting party at the time of rape. Had she been a consenting party there was no reason that she would have made a hulla and allow the neighbours and family members to close them inside the room. She has specifically denied the consent and merely that subsequently the fact that she has driven by her husband from matrimonial home, compelled her to find out a person to live and she is not finding any other way, except to marry the appellant, is no ground or reason to hold that the victim was a consenting party.

16. The learned counsel for the appellant has relied upon a decision reported in **(2005) 1 S.C.C. 88 (Deelip Singh @ Dilip Kumar vs. State of Bihar)**. However, this is a case of different fact and different connotation. In the facts and circumstances of the case, the case of the prosecution is that the victim gave consent to the appellant to have sexual intercourse in view of the allurements by the appellant to assume to marry her, i.e., consent taken in that case with a promise to marry her. However, under the facts and circumstances of the case, there is no fact that the appellant consented to have sexual intercourse by any allurements rather it is a clear case that she has been raped without her

consent, hence, ratio decided in **(2005)1 S.C.C. 88 (supra)** is not applicable to the facts and circumstances of this case.

17. Hence, having regard to the facts that there is cogent, reliable and unimpeachable evidence that the victim and the appellant were found in a room and the case of the prosecution that the appellant entered into the room, raped her and then the victim anyhow managed to free her and made hulla on which the witnesses came and closed the room from outside and the victim herself caught the appellant resisting him from fleeing away and then the witnesses came, intimated the police and then the police came and took them out from the room and the doctor has also found the violent sign of rape on the victim.

18. Hence, I do not find any reason to disbelieve the prosecution story, neither there is any material to suggest that the victim was a consenting party. I do not find any merit to interfere with the order of conviction and sentence, recorded by the trial Court.

19. The appeal is **dismissed**.

(Gopal Prasad, J)

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