

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.512 of 2002

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1. Dhina Ram @ Dina Ram son of Late Bikarma Chamar,
 2. Tufani Nonia son of Late Kalu Nonia, both residents of village Akhalaspur, PS.
 Bhabhua, Distt-Kaimur at Bhabhua.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Baxi S.R.P. Sinha, Sr. Adv.
 Mr. Ravi Shankar Sahay, Adv.
 Mr. Aditya Nath Jha, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 11-02-2015

Appellants, Dhina Ram @ Dina Ram and Tufani Nonia

have preferred instant appeal against the judgment of conviction and sentence dated 02.08.2002 passed by Sri Rama Nand Sharma, Addl. Sessions Judge (FTC No.2), Kaimur at Bhabhua in Sessions Trial No.53/254 of 1989/2002 convicting both the appellants under Section 376 IPC and directed each of them to undergo RI for seven years, under Section 457 IPC and directed each of them to undergo RI for three years, Tufani Nonia independently, under Section 323 IPC and sentenced to undergo RI for six months with a further direction to run the sentences concurrently.

2. Kashmira Devi (PW-3) lodged First Information Report on 30.04.1987 at 5:00 p.m. at Bhabhua PS alleging *inter alia* that in the preceding night while she along with her children was



sleeping in her house, got awoken after hearing sound of rattling and had seen two persons. She flashed torch and inquired therefrom as to why they had come. Over which, Dhina Ram scolded and threw her on the ground, lifted her Sari and Saya and indulged in sexual activity, when she raised alarm, however was prevented by gagging her mouth. Tufani Nonia caught hold her leg. Dhina Ram succeeded in raping her. Then thereafter, he got down followed by Tufani Nonia who also committed rape. Getting scared, she raised alarm whereupon, Tufani gave iron rod blow over his left elbow. On account of hue and cry raised by her, her daughter Savitri Kumari awoke who had seen the occurrence. Neighbours also arrived whereupon they both escaped therefrom.

3. After registration of Bhabhua P.S. Case No. 84/87, investigation commenced and concluding the same, charge-sheet was submitted whereupon trial commenced and concluded in a manner, the subject matter of the instant appeal.

4. Defence, case as is evident from the mode of cross-examination as well as statement recorded under Section 313 Cr.P.C, is that of complete denial as well as of false implication. There is specific plea that the so alleged victim happens to be concubine of Ram Awadh Ram with whom she had developed strained relationship. As the appellants/accuser persons have taken side of Ram Awadh

Ram, on account thereof, they have been falsely implicated.

5. In order to substantiate its case prosecution had examined altogether six PWs out of whom PW-1, Komal Ram, PW-2, Sudarshan Nonia, PW-3, Kashmira Devi, PW-4, Achaibar Nath, PW-5, Savitri Kumari and PW-6, Dr. V. Laxmi as well as had also exhibited Ext-1, FIR and Ext-2 report submitted by PW-6, Dr. V. Laxmi.

6. In order to assail the judgment of conviction and sentenced rendered by learned trial court, it has been submitted on behalf of appellants that learned trial court in spite of perceiving grave flaws in the prosecution case, recorded the conviction and sentence in a mechanical manner. In order to substantiate his plea, learned counsel for appellants further argued that Investigating Officer has not been examined and on account thereof, the objective finding regarding place of occurrence has not come up before the court which, in the facts and circumstances of the case, found to be material one as much as caused prejudice to the appellants as been deprived of to bring material development in the evidence of PW-5 legally on record.

7. It has further been submitted that from the evidence it is apparent that there is inconsistency amongst medical as well as ocular evidence. As per medical evidence incidence of rape is completely rebuked. Therefore, in the background of admission at the end of PW-

3 as well as PW-5 that appellants happen to be sympathizers of Ram Awadh Ram once paramour of PW-3 and now brabble, fallen victim of abasement.

8. It has further been submitted that from the evidence of PWs-3 as well as 5, it is apparent that the main door of the room wherein they were sleeping, was neither opened nor broken and on account thereof, presence of these two appellants inside the room is indicative of the fact that the victim PW-3 was a consenting party. Unfortunately, during course of their consensual activity, PW-5, Savitry Kumari, daughter of PW-3 awoke, then and then only, to have some sort of explanation so that she would not be hated by PW-5, alleged victim got this case filed.

9. It has further been submitted that, this happens to be the reason behind non appearance of any kind of injury either over body of the victim or at the private part of the victim. Forceful entry as well as indulgence in sexual intercourse without consent of PW-3, the victim, since she being a major married woman, was not an easy task. Therefore, cumulative effect in the aforesaid background suggests that it was not a case of rape rather it was a consensual act. Being the victim major one does not attract any sort of punishment. So submitted that the judgment impugned is fit to be set aside.

10. It has also been suggested that at an earlier stage, the

allegation was attributed against Tufani to assault by rod over person of informant, while during course of evidence, Dhina has been alleged. In spite of apparent contradiction, the learned trial court convicted and sentenced Tufani for an offence punishable under Section- 323 IPC.

11. On the other hand, learned APP opposed and submitted that whenever there happens to be denial on the part of the victim being a consensual party, then in that event, it should be presumed to be the act of rape and being so, the judgment impugned is fit to be confirmed.

12. It is apparent that PWs 1 and 2 were tendered while PW-4 happens to be formal. PW-6 is the doctor who had examined the victim. So far material aspect is concerned, only PWs-3 and 5, that means to say, mother and daughter are the witness over occurrence.

13. Coming to medical evidence, PW-6, the doctor while examining PW-3 did not find any kind of injury over the person of victim PW-3 as well as also opined adverse to the prosecution suggesting no sign of rape.

14. So far ocular evidence is concerned, PW-3 is the victim herself. During course of evidence, she had stated that on the relevant date and time of occurrence, she was sleeping along with her children. After hearing rattling sound, she awoke. Flashed torch and saw Dhina

and Tufani entering inside her room. She protested over which, Dhina threw her on the ground and then, gagged her mouth with a piece of cloth. Tufani caught hold her leg and Dhina committed rape. Then thereafter, Tufani committed rape. Dhina assaulted with iron rod. She had stated that she perceived severe pain during course of rape. She further stated that they had threatened her of dire consequences, on account thereof, some delay caused. During cross-examination, she had stated at para-3 that her Naiher was at village-Simari. She also stated that her husband had remarried and deserted her for the last seven years. She lives in her house along with her children. She had further disclosed that her house happens to be thatched one. However, there is wall up to some extent. There happens to be wooden door. In para-4, she had stated that after locking the door from inside, she had slept. Wall was not broken. She was sleeping on a cot having bed thereupon. She had not instituted case against her husband. She had further stated that accused persons are in collusion with her husband and always remained at his side. She had further stated that she along with her daughter were sleeping inside the room. Accused persons did not misbehave with her daughter. While accused persons were committing rape upon her, her daughter was sleeping. She had further stated that they were sleeping on the ground. Again she stated that when the accused persons began to catch hold her, her daughter



awoke and began to raise alarm over which accused persons threatened her. Her daughter had not gone outside the room. In para-5 (wrongly mentioned), she stated that door was locked from inside. Accused persons had entered inside her room after breaking the doors. Her doors became opened. She tried to raise alarm but accused persons succeeded in gagging her mouth. Again at para-9 had stated that Awadh Ram is her husband. She has got cordial relation with him. However, he is not residing with her. She has been deserted by him. In para-10 of her evidence (wrongly mentioned), there happens to be contradiction with regard to further statement. In para-11 (wrongly mentioned) there happens to be observation of the court regarding demeanour of the witnesses.

15. PW-5 is Savitri Kumari who, on the date of her examination on 24.01.1997 shown her age to be 22 years. The occurrence is of the year 1987 and on account thereof, on the alleged date of occurrence, probably she happened to be aged about 12 years. She had deposed that on the alleged date and time of occurrence, she along with her mother and two younger brothers were sleeping in a room. After hearing sound of her mother, she awoke and saw in torch light Dhina as well as Tufani. Both of them committed bad work with her mother after gagging her mouth. Tufani had caught hold of her hands. Dhina Ram assaulted her mother with an iron rod. During



cross-examination at para-5, she had stated that house of her mother is fenced by mud wall. The door is made of bamboo. In para-6, she had stated that they had slept after closing the door. The door was not broken. The rope (Chhan) through which the door was affixed was also not broken. There was no sign of hole in the wall. Then she had disclosed that when her mother came at the village, Khalaspur, she was aged about 11-12 years. Her mother began to live with Ram Awadh at village-Khalaspur. Now, her mother is not residing with Ram Awadh. She is unable to say the exact time during which her mother stayed with Ram Awadh. She had further disclosed that accused persons are camp-men of her father. In para-8, she had stated that house of Tufani lies adjacent to her house. He has got family. Accused persons have not caught hold of her with an intention to commit rape. On having been threatened by the accused persons, she kept mum. She did not come out from the room. She further stated that it was a dark night. Police had seized the torch.

16. From the evidence of both the witnesses, it is apparent that some sort of immoral activity is found perceived at the end of PW-3 which, PW-5 had exposed. It is also apparent from their evidence that PW-3 was residing along with Ram Awadh at an earlier occasion but subsequently, she was deserted. It is also apparent from the evidence that both the appellants are sympathizers of Ram Awadh.

However, from the evidence of PW-3 as well as PW-5, it is evident that they have not been cross-examined on the factum of rape nor been suggested on that very score. It is also apparent from the statement of both the appellants recorded under Section 313 Cr.P.C. that they simply made bold statement without any further disclosure.

17. In the case of *Gangabhavani v. Rayapati Venkat Reddy* as reported in *2013(4) PLJR (SC) 345*, the Hon'ble Apex Court has held as follows:-

17. This Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, AIR 2013 SC 1204 examined the effect of non-cross examination of witness on a particular fact/circumstance and held as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the

scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.” (Emphasis supplied)

(See also: Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181; and Gian Chand & Ors. v. State of Haryana, JT 2013 (10) SC 515).

18. Thus, it becomes crystal clear that the defence cannot rely on nor can the court base its finding on a particular fact or issue on which the witness has not made any statement in his examination-in-chief and the defence has not cross examined him on the said aspect of the matter.

18. So far evidence of prosecutrix is concerned, that has got pivotal role in deciding the issue. In case of *Mukesh v. State of*

Chhattisgarh reported in **2014 Cri.L.J. 4900**, the Hon'ble Apex Court had occasion to consider including that of immoral character of the victim as well as over conduct of accused during course of statement under Section 313 Cr.P.C. and held as follows:-

15. Further, as has been repeatedly held by this Court in a catena of cases, the sole testimony of the witness is sufficient to establish the commission of rape even in the absence of corroborative evidence. Reliance has been placed on the decision of this Court in the case of Mohd. Iqbal v. State of Jharkhand[1], which states as under :-

“17. There is no prohibition in law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses.

18. In Narender Kumar v. State (NCT of Delhi) this Court has observed that even if a woman is of easy virtues or used to sexual intercourse, it cannot be a licence for any person to commit rape and it further held: (SCC p. 180, paras 30-31)

“30. ... conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the Court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its

totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.

31. The Court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtues/unchaste woman that itself cannot be a determinative factor and the Court is required to adjudicate whether the accused committed rape on the prosecutrix on the occasion complained of.”

19. In the statements of the appellant-accused under Section 313 CrPC, only a bald statement had been made by both the appellant-accused that they were innocent. No explanation had been furnished by either of them as to why the prosecutrix had deposed against them and involved them in such a heinous crime.”

19. Non examination of Investigating Officer is not found prejudicial to the interest of appellants in the background of the fact that the door made of wood would also include that of bamboo as well as there happens to be specific case that presence of accused was already inside the room since before awakening of PW-5, Savitri Kumari. Furthermore, there happens to be consistency in the evidence of PW-5, however, the contradiction having been found in the evidence of PW-3, para-10 (wrongly mentioned) also did not

adversely affect the prospect of prosecution version because of the fact that the same happens to be with regard to further statement and not of First Information Report wherein the victim had categorically stated the activity of both the appellants during commission of rape as well as reiterated during course of evidence. However, is found kindled so far incidence of assault is concerned.

20. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court to the extent of house trespass and rape is concurred. The appeal is dismissed to that extend. However, the conviction and sentence relating to Section 323 IPC against Tufani is concerned, the same is deciduous.

21. Appellants are on bail. Their bail bonds are cancelled with a direction to surrender before the learned trial court to serve out the remaining sentences, failing which the learned trial court will take proper steps in accordance with law.

(Aditya Kumar Trivedi, J)

Patna High Court
February 11th 2015
Perwez/AFR

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