

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1019 of 2010

Arising Out of PS.Case No. 39 Year- 1997 Thana –Musari Gharari District- SAMASTIPUR

Ramesh Choudhary, son of Late Kinkar Choudhary, R/O Villagem + P.O.- Harpur
Alloth (Lagunia), PS. Musari Gharari, Distt-Samastipur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 1099 of 2010

Arising Out of PS.Case No. 39 Year- 1997 Thana –Musari Gharari District- SAMASTIPUR

Basmati Devi @ Dana Devi wife of Late Nathuni Mahto R/O Villagem + P.O.-
Harpur Alloth (Lagunia), PS. Musari Gharari, Distt-Samastipur.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

Appearance :

(In CR. APP (SJ) No. 1019 & 1099 of 2010)

For the Appellant/s : Mr. Devendra Kumar, Amicus Curiae

For the Respondent/s: Mr. Ajay Mishra & Mr. Bipin Kumar, APPs.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 12-08-2015

Cr. Appeal (SJ) No. 1019/2010 wherein Ramesh Choudhary is the appellant and Cr. Appeal (SJ) No. 1099/2010 wherein Basmati Devi @ Dana Devi is the appellant commonly originate against the judgment of conviction and sentence on account of which, there has been analogous hearing of both the appeals and are being disposed of by a common judgment.

2. Appellant, Ramesh Choudhary has been found guilty for an offence punishable under Section 376 IPC and sentenced



to undergo RI for eight years along with fine of Rs. 10,000/- in default thereof, to undergo imprisonment of a year additionally while appellant, Basmati Devi @ Dana Devi has been found guilty for an offence punishable under Sections 376/109 of the IPC and has been directed to undergo RI for seven years vide judgment of conviction dated 31.08.2010 and sentence dated 03.09.2010 passed by Additional Sessions Judge-FTC-1st, Samastipur in Sessions Trial No. 755/2004 which has been challenged separately as referred above by the respective appellants.

3. The prosecution case, in a nut shell, as is evident from written report (Ext-1) submitted by Kusheshwar Mahto (PW 6) filed on 02.05.1997 alleging inter alia that on 23.04.1997 at about 11:00 a.m. while his daughter Krishna Devi had gone to scrap grasses from his maize field lying east to his house and was to return, Most. Basmati Devi came and took away his daughter towards litchi orchard which belonged to Ramesh Choudhary where she gagged her mouth. Ramesh Choudhary, who was hidden there since before, came out and committed rape upon his daughter. The aforesaid occurrence has been reported to Jagdish Pathak, Mukhiya, who convinced him to convene a Panchayati, however, did not call the same, and on account thereof, instant prosecution has been filed.

4. The aforesaid written report led registration of



Musari Gharari PS Case No. 39/1997 under Sections 376/120B of the IPC wherein charge-sheet was also submitted after completing the investigation and accordingly, the case was committed, trial was taken up and ultimately, concluded in a manner, subject matter of instant appeal.

5. The defence case, as is evident from mode of cross-examination as well as from the statement recorded under Section 313 Cr.P.C., is of complete denial as well as of false implication.

6. In order to substantiate its case the prosecution had examined altogether 9 PWs out of whom, PW-1 Mahvir Sahani, PW-2, Upeshwar Mahto, PW-3, Rajendra Mahto, PW-4, Lalita Devi, PW-5, Dunia Devi, PW-6, Kusheshwar Mahto, PW-7, Ram Bharos Choudhary, PW-8, Laxmi Kant Rai and PW-9, Chandradeep Rajak. Side by side, had also exhibited Ext-1, written report. Neither any DW nor any kind of document has been exhibited on behalf of defence.

7. So far status of witnesses are concerned, PWs 1, 3, 7 and 8 have been declared hostile. PW-2, is uncle of victim, Krishna Devi, PW-4, PW-5 are step mothers of victim, PW-6 is the father of the victim as well as informant while PW-9 is Investigating Officer.

8. After going through the evidence of witnesses, it is



apparent from the evidence of PW-4, one of the step mothers, that the victim is already dead. She had stated that victim had sustained injuries during course of commission of rape, as a result of which, she died. However, it has not been disclosed by the prosecution that she died in same sequence or after a reasonable gap. At the present moment, the evidence of PW-9, Investigating Officer is to be taken note of whereunder he had stated that he could not record statement of victim as she was dumb and was talking through sign and signal. He had also disclosed that the victim was not put on medical examination.

9. In the background of aforesaid deficiencies, that means to say, the victim has not been examined, she was not medically examined, the case of the prosecution is not found supported by an independent witness, one has to see whether the evidence of relatives are acceptable. In order to appreciate the finding recorded by the learned lower court, it looks prudent to appreciate that disclosure made by PW-9, that victim was a dumb, has not been stated by any of the PWs in his examination-in-chief, nor any of the witnesses was cross-examined on that very score. However, it is the prosecution who has to prove its case and on account thereof, it has to be seen whether the prosecution has succeeded in its exercise.

10. PW-2 had stated that on hue and cry, when he reached



at the place of occurrence, he found Ramesh Choudhary as well as Basmati Devi fleeing therefrom. His niece, Krishna Devi was present and on query disclosed that Basmati Devi took her to the maize field where Basmati called Ramesh who committed rape upon her. Attention has been drawn with regard to his previous statement under para-4 but from the evidence of PW-9, it is apparent that the defence had not cross-examined this PW on this very score. That being so, it could not be said that the materials with regard to which attention has been drawn under para-4 of his deposition happens to be existing. From para-6, it is evident that when he reached at the place of occurrence, 2-4 co-villagers were present. He had further stated that his house lies from the place of occurrence at a distance of 200 yards. In para-8, he had stated that he reached there alone. When he reached at the place of occurrence, his niece was narrating the incident. He further stated that he is unable to disclose the names of aforesaid 2-4 persons. He had further stated that he is unable to say whether the victim was taken to hospital or whether statement of victim was recorded. In para-9, he had stated that statement of Kusheshwar was recorded on the date of occurrence itself. He had admitted presence of land of Kusheshwar as well as Ramesh adjacent to each other.

11. PW-4, Lalita Devi had deposed that about 7 years 9 months ago at about 11:00 a.m., Basmati took away Krishna who had



gone to scrap grasses. Basmati took Krishna to maize field where she gagged her mouth and Ramesh committed rape. Ramesh was present in his orchard since before the occurrence. On hue and cry raised by Krishna Devi, she had gone to place of occurrence. Accused persons fled away. Krishna Devi had narrated the incident. She had further stated that on account of injury sustained by Krishna, during course of rape, she died. During cross-examination again at para-6, her attention has been drawn but from the evidence of PW-9, it is apparent that accused had failed to get the same. In para-6, she had stated that she happens to be step mother of victim, Krishna. She had further stated that her own mother is dead. In para-8, she had stated that she had got no land. She had domestic animals and for that grass was being collected to feed the animals. Krishna had gone to scrap the grass at about 11:00 am. She returned back at 1:00 p.m. At that very time, she along with Duniya Devi was present. Her husband was not present at the house. He came at 5:00 p.m. In para-9, she had stated that after coming to the house, Krishna began to weep out of pain. She talked with her. At that very time, neighbours had arrived. Clothe was stained with blood. In para-12, she had stated that Basmati happens to be a kept of Ramesh Choudhary.

12. PW-5, Duniya Devi is step mother of victim who had stated that on the alleged date and time of occurrence, she was at her



house. Basmati accompanied Krishna from her house and then facilitated the offence of rape at the end of Ramesh Choudhary by gagging her mouth. Later on, she had gone. Krishna had disclosed the commission of rape. She had disclosed the event to her husband who had also gone. At para-4, during course of cross-examination, attention has been drawn towards previous statement and in likewise manner there happens to be failure at the end of appellants. At para-5, she had stated that she happens to be eldest *Souten* (step mother of victim). At para-6, she had stated that when Basmati took away Krishna from her house, at that very time, she along with Lalita Devi and her husband were present at the house. They did not forbid Krishna. She had further stated that she met with Krishna at about 11:30 to 12 Noon while she was unconscious. When she arrived, she found Rajendra Mahto and Upendra Mahto. She carried Krishna. She regained sense after two days.

13. PW-6 is the informant, Kusheshwar Mahto who had stated that on the alleged date and time of occurrence, he was at his house. He heard alarm and went to maize field. He had seen his daughter, Krishna who disclosed that Basmati had taken her to maize field where she gagged her mouth and then Ramesh committed rape upon her. After taking the victim to his house, he along with 2-4 persons had gone to the place of Mukhiya. As the Mukhiya adopted



dilly- dallying tactics, then he had filed written report before O/C. During cross-examination at para-5, he had stated that police had not recorded statement of his daughter nor she was medically examined. He had further disclosed that Krishna was aged about 12-13 years at the time of commission of rape. She was not married. He is unaware regarding presence of blood over her clothe. Police did not seize any clothe. In para-7, he had stated that he heard alarm over which so many persons had gone there. He had named Bilat Paswan, Ganesh Master Rajendra Mahto and others. When he reached at the place of occurrence, he saw Krishna coming out from the maize field weeping. Armpit was there in the maize field. At that very time, Krishna was in semi conscious condition. She was weeping in sitting condition. She remained there for ten minutes. People present over there advised to inform Mukhiya and accordingly, he informed.

14. PW-9 is the Investigating Officer. As stated above, regarding his objective finding relating to victim as well as fault having at his end, on account of non-examination of the victim as well as non examination of the victim by the doctors as she was not produced by PW-9, he after having been entrusted with the investigation, had visited the place of occurrence which happens to be a maize field of Satya Narayan Kamat where he found some of the maize crop fallen down and some were in broken condition. From his

cross-examination, it is evident that defence had not cross-examined this PW over objective finding relating to place of occurrence.

15. By having minute analysis of the evidence having been available on the record, it is apparent that two kinds of evidences are there. The villagers have disowned while the family members by way of hearsay evidence have supported the prosecution case. It is also apparent that place of occurrence is found proved by way of objective finding of the Investigating Officer though, there happens to be slackness on the part of the Investigating Officer which is found sufficient to ruin the fate of the prosecution by not examining the victim, even though by having assistance of interpreter in case victim happens to be dumb as well as by getting the victim examined by the doctor.

16. Now coming to the evidence of the family members, it is evident that some sort of inconsistencies are persisting as according to Lalita Devi as well as Kusheshwar, Upeshwar Mahto, they had gone to place of occurrence after hearing alarm and then came to know regarding activity of Basmati Devi who facilitated the act of rape at the end of Ramesh Choudhary while from the evidence of PW-5, Duniya Devi, it is apparent that Basmati Devi @ Dana Devi took her from her house. Furthermore, save and except PW-2, none had claimed to have seen the appellant, Ramesh and Basmati fleeing from

the place of occurrence. Apart from this, on account of non-examination of the victim, Krishna Devi, the status of PWs-2, 4, 5 and 6 as hearsay witnesses cannot be recognized legally. The finding of the learned lower court that statement of Krishna Devi happens to be admissible in terms of Section 32 of the Evidence Act is nothing but a fallacious approach.

17. That being so, these two appeals are fit to be allowed and are accordingly, allowed setting aside the judgment of conviction and sentence rendered by the learned lower court.

18. Appellant, Ramesh Choudhary is under custody, hence, he is directed to be released forthwith if not wanted in any other case, while Basmati Devi @ Dana Devi is on bail, she is discharged from the liability of bail bond.

(Aditya Kumar Trivedi, J)

Patna High Court
August 12th 2015
Perwez/AFR

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