

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.509 of 1993

(Against the judgment of conviction, dated 27.09.1993, and the order of sentence, dated, 28.09.1993, passed, by Shri Rameshwar Prasad Verma, 5th Additional Sessions Judge, Bhagalpur, in Sessions Trial No.450 of 1988, arising out of Pirpaity (Ishipur) P.S. Case No. 210 of 1986, corresponding to G.R. Case No.1882 of 1986).

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1. Liluwa Nut, son of Yogendra Mandal, resident of village Firojpur, Police station Pirpaity, District Bhagalpur
 2. Maturia Paswan, son of Late Jageshwar Paswan, Resident of village Berma, Police station Pirpaity, District Bhagalpur

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : None

For the Respondent : Mr. Ajay Mishra, A.P.P.

Mr. Anshuman Singh, learned Counsel, *Amicus Curiae*

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**CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
AND
HONOURABLE MR. JUSTICE VIKASH JAIN**

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIKASH JAIN)

Date: 19-08-2015

The present appeal has been filed against the judgment of conviction, dated 27.09.1993, and order of sentence, dated 28.09.1993, passed by the 5th Additional Sessions Judge, Bhagalpur, in Sessions Trial No. 450 of 1988, whereby both the appellants have been convicted under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and they have further been sentenced to pay a fine of Rs.1,000/- each and, in default of payment of fine, to undergo rigorous imprisonment for one

year. It has further been directed that half of the fine amount, so realized, shall be paid to the victim lady and the other half shall go to the State.

2. According to the prosecution's case instituted, on 18.09.1986, at Ishipur Barahat Police Station, on the basis of a *fardbeyan* of the informant, being the victim lady, recorded at around 8.30 P.M., on 17.09.1986, she lived in her hutment at village Kharkatta within Ishipur Barahat (Pirpainty) Police Station. It was alleged by the informant that on 17.09.1986, at about 8.00 P.M., both the accused-appellants, namely, Maturiya Paswan and Lilua Nut, came at her door and enquired from her as to who was inside the house. She replied that none was in her house and she was alone. Subsequently, accused Maturiya Paswan asked her to sleep with him due to which she rebuked him for such behaviour and she stated that she was observing *Anant Brat*. It was further alleged that accused Lilua Nut took out a dagger and threatened her with dire consequences. Thereafter, accused Maturiya Paswan caught hold of the informant and took her inside the house and when she tried to rescue herself, accused Lilua Nut threatened to assault her with dagger. The accused, Maturiya Paswan, threw her to the ground and after removing her *saree* and *saya* (*petticoat*), he penetrated his penis into her vagina. It was further alleged that after discharge of his semen, accused



Maturiya Paswan left her. The *petticoat* of the informant was stained with semen. She further stated that thereafter, accused Lilua Nut entered into her hut and, in spite of the informant's protest, he committed rape on her. Thus, the accused persons, after committing rape upon her one by one, went out of the informant's room and proceeded towards the market. It was further alleged that after some time, her son, Bhagwan Tanti, came back to his house, to whom she narrated the entire incident and came to the Police Station with him for instituting the case.

3. The case was investigated by the police and *charge sheet* was submitted. At the trial, the appellants pleaded not guilty to the charge framed under Section 376 of the Indian Penal Code and claimed to be tried.

4. In order to prove the charge, the prosecution produced 07 (seven) witnesses, who were examined during the trial. PW-2 (Bhagwan Tanti) is the son of the informant and he was tendered by the prosecution. PW-3 (Ishwar Dayal Goswami) and PW-4 (Mohan Prasad Yadav) are the witnesses of the *fardbeyan* and the seizure list, who were declared hostile. PW-5 (Narain Tanti) is the husband of the informant. PW-6 is the informant herself; PW-7 (Dr. Kumkum Azad) is the doctor who has examined the informant and PW- 8 (K. C. Singh) is the Investigating Officer of this case. The evidence of

PW-1 has been expunged by the learned Court below.

5. Mr. Anshuman Singh, learned Amicus Curiae, submits that the appellants have wrongly been convicted as the prosecution cannot be said to have proved the charge against the appellants beyond reasonable doubt. There are material conflicts and contradictions in the versions of the alleged occurrence as narrated by the informant in her *fardbeyan* and her deposition respectively. For example, the informant, in her *fardbeyan*, had stated that she was raped by Maturiya Paswan followed by Lilua Nut, whereas in her subsequent deposition, she has stated that it was Lilua Nut, who had first committed rape on her. According to the informant's deposition, the total time consumed, in the commission of the offence, was one-and-a-half hours, which is inconsistent with the fact that the time of occurrence being allegedly 8 P.M., the *fardbeyan* was recorded only half-an-hour later at 8.30 P.M. Moreover, it has been stated in the *fardbeyan* that she was accompanied by her son, Bhagwan Tanti, to the Police Station after the occurrence, whereas she has stated, in her deposition, that she went alone to the Police Station, where her statement was recorded.

6. Reliance has also been placed on the decisions of the Hon'ble Supreme Court in the cases of **Rajoo & Others Vs. State of M.P. (AIR 2009 SC 858), Suresh N.**

Bhusare and Others Vs. State of Maharashtra, reported in **(1999) 1 SCC 220**, as well as **Tameezuddin @ Tammu Vs. State (NCT of Delhi)**, reported in **(2009) 15 SCC 566**, in support of the submissions made on behalf of the appellants.

7. Mr. Ajay Mishra, learned Additional Public Prosecutor, on the other hand, submits that the judgment of the learned trial Court does not suffer from any infirmity and the appellants have rightly been convicted for the offences charged. It is also submitted that the prosecution witnesses have supported the prosecution's case and there is consistency in their versions by which the prosecution has succeeded in proving the charges against the appellants. It is further submitted that some inconsistency in the informant's version with regard to which of the accused persons committed rape first and which of them subsequently, is not of much significance as the offence was committed by the accused persons. He relies on the decisions of the Hon'ble Supreme Court in the cases of **Utpal Das and Anr. Vs. State of West Bengal**, reported in **2010 (3) PLJR 112 (SC)** and **Vijay @ Chinee Vs. State of Madhya Pradesh**, reported in **2010 (4) PLJR 1 (SC)**.

8. We have heard the parties at length and carefully considered the materials on record and find that there are significant inconsistencies and discrepancies in the



deposition on the informant herself with reference to the *fardebayan*. To begin with, there is inconsistency in the two versions given by the informant with regard to the sequence in which she was subjected to rape by the two accused persons. It is highly improbable that a victim of rape would make a conflicting statement on such a crucial fact regardless of passage of time. Coupled with this, there is also the fact that in her *fardebayan*, she stated that it was Maturiya Paswan, who threw her to the ground before committing rape, but in her deposition, she has stated that both the appellants pushed her to the ground. Her deposition is completely silent with regard to her averments in the earlier version in the *fardebayan* to the effect that her husband and son had gone to the market for making purchases. Yet, again, there is deviation from her earlier version, where she stated that she was accompanied by her son to the Police Station, whereas she subsequently stated, in her evidence, that she went to the Police Station alone.

9. Bhagwan Tanti (PW-2) is the son of the informant, but he has been tendered. The two witnesses to the First Information Report and seizure list, namely, Ishwar Dayal Goswami (PW-3) and Mohan Prasad Yadav (PW-4), have not supported the prosecution's case stating that neither the *fardebayan* was recorded in their presence nor the *petticoat* of



the informant was seized in their presence. Both these witnesses were declared hostile and in their cross-examination by the prosecution, they asserted their denial that the informant's *petticoat* was seized in their presence. Narayan Tanti (PW-5), the husband of the informant, is merely a *hearsay* witness and he has himself admitted, in cross-examination, that he only heard from his son that the appellants had committed the offence, which did not occur in front of him. He has, however, stated that upon returning home from Chowk, he saw the appellants running away from his house.

10. Dr. Kumkum Azad (PW-7) was the doctor, who examined the informant and has proved the injury report marked as Exhibit 2. According to her evidence, no internal or external injury was found on the body of the informant. In her deposition, she has stated that according to the pathological report of vaginal swab, no *spermatozoa* was found present. In her opinion, an occurrence of rape would result in laceration or scratches. The medical evidence does not, therefore, support the prosecution's case. It would stand to reason that if the informant had been thrown to the ground by Maturiya Paswan, she would have sustained, at least, some injury or mark on her back, which, however, was found absent in course of her medical examination. In other words, the accusation, made in

this regard, does not find corroboration from the medical evidence of PW-7.

11. PW-8 (K. C. Singh), the Investigating Officer of this case, has stated that the informant came with her son, Bhagwan Tanti, to the Police Station and gave her *fardebayan*. This statement contradicts the informant's evidence, wherein she has stated that she went alone to the Police Station. The Investigating Officer has further given evidence that he seized the *petticoat* containing two or three semen like stains on it and prepared a seizure list. The two independent witnesses, PW-2 and PW-3, do not, however, corroborate this fact in their evidence, both stating that no such seizure was made in their presence. Significantly, such a crucial piece of evidence, as the *petticoat*, was not marked as Exhibit and was never produced by the prosecution in course of trial. Moreover, even though the *petticoat* is said to have been seized by the Investigating Officer, the same does not appear to have been sent, for its chemical examination, to the Forensic Science Laboratory. This aspect of the matter also renders the evidence of PW-8 doubtful, improbable and unbelievable. He has further stated that he reached the place of occurrence at 9.45 P.M., about which the evidence of the informant raises serious doubt, as according to her, the time of occurrence was 8.00 P.M. lasting for one-and-a-half hours, that is till 9.30 P.M., after which she

proceeded to the Police Station to record her *fardbeyan*.

12. There are also material contradictions in the evidence of the informant (PW-6), her son, Bhagwan Tanti (PW-2), and her husband (PW-5), which render the prosecution's case wholly unreliable, improbable and unbelievable.

13. As pointed out above, there are crucial contradictions in the two versions of the informant herself, who is, thus, incapable of being believed. Even if her evidence to the effect that she was alone in the house at the time of occurrence be taken at face value, the same directly militates against the evidence of her husband stating that the son, Bhagwan Tanti (PW-2), was at home at the time of occurrence and who said that he could not prevent the occurrence out of fear as the accused had a dagger in his hand. Had the son, Bhagwan Tanti, been at home at the time of occurrence as stated by him, it is hardly likely that he would not raise any alarm, while rape was being committed upon his mother for the duration of one-and-half hours. Similarly, the evidence of the informant's husband (PW-5) to the effect that he saw the accused persons running away from his house inspires little confidence. Moreover, PW-5 stated that he found his wife near the bush soon after the occurrence and it is contrary to ordinary conduct of a person that he would not accompany her

to the police station. His evidence, in his examination-in-chief, is that it was his wife, who told him about the offence committed by the appellants, whereas in his cross-examination, he has contradicted himself by stating that he learnt about the occurrence from his son. The informant, in her evidence, is completely silent on this aspect of the matter of having told her husband about the occurrence.

14. Apart from the informant's own version of the occurrence, clearly there is no eye-witness to the occurrence. It is also highly unlikely that the occurrence would have taken place for the duration of one and half hours, as alleged, when the husband and son of the informant are stated to have gone to Barhat market, which, according to the Investigating Officer's evidence, was only 100 yards away.

15. The effect of tendering of a witness for cross-examination was explained in the case of ***Sukhwant Singh vs. State of Punjab (AIR 1995 SC 1601)*** as amounting to giving up of the witness by the prosecution as it does not choose to examine him in chief. There is no procedure, whereby the prosecution is permitted to tender a witness for cross-examination only, without there being any examination-in-chief in relation to which, such a witness can be cross-examined. The effect of witnesses being tendered only for cross-examination amounts to the failure of the prosecution to

examine them at the trial. Their non-examination, in our opinion, seriously affects the creditability of the prosecution case and detracts materially from its reliability."

16. In **Rajoo** (supra), the Supreme Court has held as follows:-

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration".

17. In **Suresh N. Bhusare** (supra), the Supreme Court has held that *"where the evidence of the prosecutrix was found suffering from serious infirmities and inconsistencies with other material, and there being no injury on her person even though her version was that she was dragged and had received some scratches, no reliance can*

be placed upon her evidence."

18. Yet, again, in **Tameezuddin @ Tammu** (supra), it was held as follows:

"It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter".

19. Lastly, the Supreme Court, in **Narendra Kumar Vs. State (NCT of Delhi), (AIR 2012 SC 2281)**, has observed as under:

"Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. 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 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 case becomes liable to be rejected."

20. In the above view of the matter, this Court finds that none of the statements of the prosecution witnesses

can be safely relied upon for the purpose of sustaining the conviction of the appellants.

21. For the above reasons, this Court is of the view that the prosecution has failed to prove the charge levelled against the appellants beyond all reasonable doubt and, as such, the appellants ought not to have been convicted in the facts and circumstances of the case.

22. In the result, the appeal is allowed and the impugned judgment of the trial Court in Sessions Trial No.450 of 1988, arising out of Pirpainty (Ishipur) P.S. Case No. 210 of 1986, is set aside. Since the appellants are on bail, their bail bonds are hereby cancelled and their sureties shall stand accordingly discharged.

23. Let the Amicus Curiae be paid a fee of Rs.5,000/-.

24. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(Vikash Jain, J.)

I. A. Ansari, ACJ.: I agree.

(I. A. Ansari, ACJ.)

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