

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.413 of 2013

Arising Out of PS.Case No. -123 Year- 2010 Thana -ARWAL District- JEHANABAD

1. Badri Choudhary S/O Sri Ram Bilash Choudhary Resident Of Village Malhipatti,
P.S. Arwal, District Arwal.

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : M/S. Ajay Thakur, Ravi Ranjan &
Malay Kumar Choudhary

For the Respondent/s : Mr. Bipin Kumar, A.P.P.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 07-10-2015

This appeal is directed against the judgment of conviction and sentence dated 24.4.2013/30.04.2013 passed by the learned Ad-hoc Additional Sessions Judge III, Jehanabad in Sessions Trial No. 15 of 2011 by which the appellant has been convicted under section 376 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for ten years and also to pay a fine of Rs.10,000/- and in default of payment of fine to undergo further rigorous imprisonment for one year.

2. The prosecution case, as alleged in the F.I.R. by the informant Radha Kumari (P.W. 3) is that she had gone to meet the call of nature on 11.08.2010 at 9.00 P.M. from her house. While she was returning after meeting the call of nature, then appellant Badri Chaudhary caught hold of her and took her towards the bushes on the bank of river Sone. Further case is that when she made halla, he pressed her mouth and threatened to kill by knife and got her lay on the ground and thereafter un-tied her Salwar and got her naked and thereafter committed rape by having sexual intercourse. She wanted to make halla but the appellant pressed her mouth and continued the rape for about five



minutes. Further case is that after committing rape, the appellant fled away towards the bamboo clump to the south of the place of occurrence. Thereafter she came to her house and disclosed the fact to her mother then her mother got her bathed and washed her clothes and thereafter she along with her mother (P.W. 2) and elder sister Lakshmi Kumari (P.W. 1) came to the police station and gave a written application with a prayer to take needful legal action. On the Fardbeyan, F.I.R. was lodged and the police investigated the case.

3. During investigation, police inspected the place of occurrence, recorded statements of the witnesses. Place of occurrence is in village Malhipatti on the bank of river Sone. North of the P.O. is village Bakunama Tikha and in the south Sone river, east and west is part of Sone river. The victim was sent to Sadar Hospital for her medical examination. Her statement was recorded under section 164 Cr.P.C.

4. The police after investigation submitted charge-sheet, cognizance was taken and after submission of charge-sheet and taking of cognizance, the case was committed to the court of Session and after commitment trial proceeded after framing of charge for the offence punishable under section 376 of the Indian Penal Code against the sole appellant.

5. During trial eight witnesses were examined. P.W. 1 Laxmi Kumari, elder sister of the victim has supported the prosecution case but has stated that after the occurrence the victim came and disclosed about the occurrence and after the victim took bath, she along with her mother went to the police station where the case was lodged. Hence, she is not the eye witness and learnt about the occurrence from the victim.

6. P.W. 2 Barti Devi is the mother of the informant. She also stated that the victim came and reported about the occurrence in the house and has disclosed that as soon as the victim disclosed about the occurrence, she went to the police station to lodge the case.



7. P.W. 3 Radha Kumari is the informant as well as victim and has deposed that when she went to meet the call of nature and while she was returning to her home after meeting the call of nature, then appellant Badri Chaudhary caught hold of her by catching her Dupatta around her neck and he shut her mouth and dragged her to the bushes and thereafter threw her on the ground and committed rape. She has further stated that when her mother came there in search of her, then the appellant fled away and thereafter her mother covered her and took her to the house, got her bathed and then went to the police station where Darogaji recorded her statement and she signed which has been marked as Ext. 1. She has proved her signature on her statement under section 164 Cr. P.C., marked as Ext. 2 and in her cross examination she has stated that she protested and tried her best to get rid of the appellant and used her legs and hands to struggle to save herself from the appellant.

8. P.W. 4 is the Doctor who examined her and opined that no mark of struggle was present. Vaginal swab was taken for pathological examination and the doctor has found that there was no spermatozoa. He ascertained her age to be 15-16 years. However, he opined that possibility of rape cannot be ruled out and proved his report marked as Ext. 3. In his cross examination he stated that he did not find any sign of rape and he did not find any external injury on her body or on her private part and has opined that in course of forcible rape, some injury on the body by protest is possible and further opined that it may be possible that the victim was subjected to intercourse.

9. P.W. 5 is the I.O. who recorded the statement of witnesses, inspected the place of occurrence and sent the victim for medical examination and submitted charge-sheet.

10. P.W. 6 is Sheo Kailash Chaudhary. He has come to depose that appellant Badri Chaudhary, at the time of occurrence, was engaged in Hari Kirtan till 12 in the night. However, this witness has come to support the

case of the defence regarding alibi that the appellant was engaged in Hari Kirtan till 12 in the mid night. However, in his evidence there is no mention that from when Kirtan started and, hence, the alibi at the time of occurrence not well established when there is no time given when Hari Kirtan started whereas occurrence as alleged is of 8.00 P.M.

11. P.W. 7 is the doctor who has opined that the victim is 15-16 year of age on the basis of Xray of her elbow, wrist and pelvis.

12. P. W. 8 is the doctor who examined the vaginal swab of Radha Kumari and found that no spermatozoa was available.

13. The defence has also adduced five witnesses. D.W. 1 is Md. Musa, D.W. 2 is Satyendra Chaudhary, D.W. 3 is Surendra Chaudhary, D.W. 4 is Satya Narain Mochi and D.W. 5 is Rajendra Mochi. They are all defence witnesses and have come to depose that at the time of occurrence, the appellant was engaged in Hari Kirtan who was singing songs and has stated that Kirtan started since 7.00 P.M. in the night and the witnesses adduced on behalf of the defence are mainly on the point that at the time of occurrence, the appellant was engaged in Hari Kirtan.

14. The defence of the appellant, as per trend of cross examination and suggestion is that no occurrence as alleged took place and the victim was engaged in Hari Kirtan. One day prior to the occurrence, appellant had heard some murmuring and when he torches the light, then saw the victim talking with a boy and when he torches his light then the said boy fled away and this appellant asked the victim about the boy then the victim threatened to implicate him in a false case and for that reason the victim has implicated him in a false case and the witnesses have disclosed this fact.

15. The trial court after taking into consideration the entire evidence both prosecution and defence evidence convicted the appellant and sentenced him as mentioned above.

16. Learned counsel for the appellant has challenged the order of conviction and sentence recorded by the trial court. It has been submitted that the F.I.R. has been lodged on the written statement signed by the victim though in her statement she has stated that her Fardbeyan was recorded by the police on which she signed but the F.I.R. is not Fardbeyan but a written report signed by her and it has not been proved who has written the said written report, when was signed by her though her signature has been proved. It has been submitted that her evidence that Fardbeyan was recorded by the police is not substantiated as the F.I.R. is lodged not on the basis of Fardbeyan but on the basis of the written report. It has further been contended that P.W. 2, mother of the victim has stated in her evidence that at the police station her statement was recorded first and thereafter statement of the victim and her sister was recorded and she gave her thumb impression whereas the two daughters signed on the basis of this evidence in paragraph 13 of the deposition of P.W. 2 the mother of the victim it has been submitted that earlier version has been suppressed. It has further been contended that P.Ws. 1, 2 and 3 have specifically stated that they went to the police station in the night itself at about 1.00 P.M. after the occurrence and the F.I.R. or the written report was submitted but the F.I.R. has been drawn on 12.08.2010 and as per the F.I.R. time of receipt of the information is mentioned as 12.08.2010 at 7.30 A.M. and the F.I.R. recorded also mentioned as 12.08.2010 itself and, hence, it has been contended that there is some interpolation in the Fardbeyan regarding the time of occurrence. It has further been contended that though the victim in her statement under section 164 Cr.P.C. has stated that she protested the attempt of rape and she struggled with the appellant while she was being dragged and raped or she was being dragged to the bushes and even her evidence that she was thrown on the ground and rape was committed by force and not by consent. The doctor in his evidence has stated that he has not found any injury either on her person or on her private part and,

hence, prosecution case not acceptable. It has further been contended that the victim P.W. 3 in her statement has stated that they went to the police station in the night and thereafter after the Fardbeyan recorded and they signed apart from the thumb impression, the mother and the sister P.Ws. 1 and 2 returned back to their home leaving the victim at the police station. It is submitted that it is highly improbable that the mother and elder sister returned back to their house leaving the victim to the police station. It has further been contended that the doctor did not found any sign of rape nor found any external injury and, hence, the prosecution case is not liable to be relied upon and worthy of confidence to record a conviction and the appellant is entitled for acquittal.

17. Learned counsel for the State, however, contended that the witnesses have supported the prosecution case in material particulars and the victim herself disclosed about the occurrence just after the occurrence and the matter was reported to the police on which F.I.R. was lodged and the Doctor has opined that possibility of rape cannot be ruled out and there is nothing to disbelieve the evidence of the victim to record conviction.

18. Taking into consideration the submission made by the parties, I proceed to consider the evidence of the witnesses in the light of submissions made by the parties. The prosecution case as alleged in the F.I.R. which has been lodged on the basis of a written report by the victim Radha Kumari (P.W. 3) in which it has been mentioned that she is making this statement today with specific mention of the date on 11.08.2010 that on the date of occurrence at 9.00 P.M. she had gone to meet the call of nature and while she was returning, she was apprehended by the appellant and took her to the bushes and on halla he pressed her mouth and threatened to kill by knife and lay her on the ground and thereafter un-tied her Salwar and then got her naked and thereafter committed sexual intercourse and while she tried to make halla, he pressed her mouth and committed rape for about five minutes and thereafter he went towards



bamboo clump to the south of the place of occurrence. However, the description of the P.O. though found in the evidence of the I.O. that it is on the bank of river Sone, however, P.W. 2 in her evidence has stated that in between the P.O. and her house there are 6-7 houses but none of the persons of those 6-7 houses came to depose and they are not witnesses, though I.O. has stated that he recorded the statement of the victim. However, the F.I.R. has been lodged on the basis of the said statement of the victim. On a plain reading of the written report on the basis of which F.I.R. has been lodged, it has been specifically mentioned that after the occurrence she came to her house and disclosed the fact to her mother and thereafter her mother got her bathed and then she along with her mother and elder sister Lakshmi Kumari came and gave a written report at the police station and is giving written application and, hence, it is on account of that the F.I.R. has been lodged on the basis of the written report given by the informant Radha Kumari. The statement of this witness recorded under section 164 Cr.P.C. has been proved and marked as Ext. 2. In her statement under section 164 Cr.P.C. she has further stated that while she was returning after meeting the call of nature, the appellant apprehended her and put her Dupatta around her neck and was dragged and thrown on the ground and whenever she tried to raise hulla, he used to press her mouth and thereafter he committed rape and after five minutes he heard the sound of her mother and then he fled away after leaving her. She has further stated that her mother had come out in search of her as there was delay in her return. However, she has developed a story that on the sound of her mother, he left her. However, there is no such story of intervention of mother of the petitioner at the P.O. in the F.I.R. However, this victim P.W. 3, the informant, in her evidence in Court has stated that the appellant put Dupatta around her neck, pressed her mouth and took her towards the bushes and thereafter un-tied her Salwar and committed sexual intercourse. He has further stated that her mother came in search of her, then he left her and thereafter her mother covered her and took her

to the house and thereafter got her bathed and thereafter she proceeded along with her mother and sister to the police station and at the police station she filed the case. Further she has stated that after reaching the police station, she gave her statement and Darogaji recorded it and has proved her signature Ext. 1. However, though in her evidence in Court she has stated that it was recorded by Daroghaji and in the Fardbeyan she signed and has proved Ext. 1. However, on perusal of Ext. 1 it is apparent that it is not a Fardbeyan rather it is a written report and the said written report has been signed by her and marked as Ext. 1. This written report itself does mention that after the occurrence she came along with her mother and sister and gave a written application to the police station and, hence, as per the prosecution story on which she put her signature and marked as Ext. 1 that she is being given a written application and this rules out the evidence that she signed Ext. 1 which was written by the police officer is Fardbeyan. However, she has developed the prosecution story to the extent that her mother came in search of her and then seeing her mother the accused fled away and further developed the prosecution story that when her mother came to the P.O. the appellant fled away. However, this witness P.W. 3 in her examination-in-chief has stated that when her mother came, then the accused fled away and then her mother covered her and brought her to the house. However, in cross examination in paragraph 20 and 21 she has stated that while she was coming from the P.O. to her house slowly then she met her moth in the way and, hence, her evidence in cross examination that when her mother came to the P.O. then the accused fled away is not supported rather P.W. 2, mother in her evidence has stated that when the girl returned to her house, then she disclosed her about the fact and, hence, the evidence of the prosecution that when her mother came to the P.O. then the accused fled away and then her mother covered her and took her to the house stands belied by her evidence itself in cross examination that she met her mother in the way and further evidence of P.W. 2, mother that the victim came to her

house and then disclosed the fact. Hence, it is apparent from the evidence of P. Ws. 1 and 2 that they are not eye witness of the occurrence though an attempt has been made to make P.W. 2 an eye witness but the same has been falsified.

19. Further case of the prosecution, as per evidence of P.Ws. 1, 2 and 3 is that they went to the police station in the night itself and they remained in the police station till 1.00 A.M. in the night and thereafter the victim remained in the police station for the whole night and mother and sister returned back to their house. However, P.W. 1 has stated in her evidence that she went to the police station where her statement was recorded by Darogaji which stands falsified in view of the written report on the basis of which F.I.R. was lodged when in the written report itself it is mentioned that she had given a written application in the police station and, hence, it cannot be said that she signed the document Ext. 1 which was the fardbeyan recorded by the police officer. However, the police officer who recorded the statements of the witnesses who made endorsement for investigation of the case by the I.O. has not been examined in this case and it has not come as to who has recorded or written the written report. However, the evidence of the witnesses has been recorded by the police officer and she signed has not been substantiated.

20. However, in the said facts and circumstances the submission made by the learned counsel for the appellant is that the earliest version have been suppressed, in view of the evidence of P.W. 3 that she gave her statement which was recorded by the police office on which she signed. The statement of P. W. 2, mother of the victim that at the police station she first gave her statement and thereafter the victim and her sister gave statement and the police got signature of both and she gave her thumb impression. However, though this part of the evidence is neither supported nor substantiated as document has been proved which bears the signature or thumb impression of the three witnesses having been recorded by the police and so the submission is that



earlier version has been suppressed. However, the F.I.R. shows the date of occurrence as 11.08.2010 there is some interpolation in column Ka regarding the day and date. There is specific mention about the information when received at the police station shows that on 11.08.2010 at 7.30 A.M. and the formal F.I.R. having been recorded on 12.08.2013. However, if this document is taken into consideration then it stands contradicted as per evidence of P.Ws. 1, 2 and 3 that their statement was recorded in the night itself and in the night itself the statements were recorded and the F.I.R. was drawn up. Hence, with regard to the time of recording of Fardbeyan is at variance with the documentary evidence of formal F.I.R. as well as the evidence of P.Ws. 1, 2 and 3.

21. So far as the manner of occurrence is concerned, there is development and contradiction as is apparent in the evidence of P.W. 3 and her statement recorded under section 164 Cr. P.C. and her statement in the written report signed by her. However, the variation is only to the effect that in the F.I.R. she says that after the occurrence she came to the house and disclosed about the occurrence to her mother, though in the statement under section 164 Cr.P.C. she stated that the accused fled away on the voice of her mother as her mother came out in search of her and her evidence in court is that seeing her mother the accused fled away and then she came along with her mother to the house and her mother and sister brought her to the police station.

22. Next part of the occurrence that she has specifically stated in her evidence that the appellant dragged her to the place of occurrence after she was apprehended by putting Dupata around her neck and was dragged to the P.O. It has further been stated that she had been thrown on the ground. She further stated in her evidence that there was protest on her part. Even she has claimed that her clothes were torn and she even then fight out by using force with her hands and legs. This part of the stand is also contradicted from the earlier version of the occurrence that she was taken at the point of dagger and was lay

down on the ground but in her evidence she has not deposed that she was silenced by the threat of a dagger. There is nothing in her evidence that any dagger was used rather her evidence is that she protested and even used her hands and legs but the doctor has not found any injury on her person.

23. The doctor in his evidence has specifically stated that there is no mark of struggle on the body or on her private part and has further stated in her cross examination that he did not find any sign of rape and he did not find any external injury on her body or on private part, though the doctor has opined that the possibility of rape cannot be ruled out.

24. Even fight out against rape and it was not a consent but having fight out rape, no injury was found does not corroborate and substantiate the case.

25. Having regard to the facts and circumstances of the case that though in her evidence recorded that her statement was recorded by the police on which she signed on the Fardbeyan. However, in the written report it is mentioned that she first gave a written report and further the fact that she has tried to develop the prosecution case that her mother was a witness to the occurrence and further fact that no injury found having recorded to the facts and circumstances of the case, the appellant is entitled to benefit of doubt.

26. However, though the defence set out by the appellant making out a case of alibi that he was engaged in Kirtan and further this fact of the defence that he saw the victim with some boys and when asked her she has falsely implicated him in the present case does not inspire confidence. Even the defence of the appellant there is no ground to accept the prosecution case and unless the prosecution stand and proved case beyond reasonable doubt.

27. However, having regard to the facts and circumstances of the case as discussed above, the prosecution has not been able to prove the charge and in the facts and circumstances of the case, the appellant is entitled to

the benefit of doubt. Hence, I give the benefit of doubt to the prosecution case and hold that the prosecution has not been able to prove the charge beyond reasonable doubt. Hence, the order of conviction and sentence recorded by the trial court is hereby set aside and the appeal is allowed. The appellant is in jail. He is ordered to be released from the custody forthwith if not required in any other case.

Amin/-

U			
---	--	--	--

(Gopal Prasad, J)