

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.56 of 2012**

Arising out of P.S. Case No. -54 Year- 1988 Thana -Bidupur District- VAISHALI (HAJIPUR)

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1. **Rajesh @ Nanki Choudhary @ Rajesh Choudhary**, S/O Late Binda Choudhary Resident Of Village- Khilwat, P.S.- Bidupur, District- Vaishali.

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mrs. Bela Singh-Advocate

Mr. Rajeev Ranjan-Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**ORAL JUDGMENT****Date: 14-08-2015**

Sole appellant, Rajesh @ Nanki Choudhary @ Rajesh

Choudhary, who has been found guilty for an offence punishable under Section 376 of the I.P.C. and sentenced to undergo R.I. for 10 years passed by the Additional Sessions Judge-II, Vaishali at Hajipur in Sessions Trial No.86 of 1993/ 341 of 2009 has challenged the aforesaid finding under present appeal.

2. Lalmuni Devi (PW-3) had lodged first information report on 15.03.1988 at about 2.45 a.m. before the O/c Bidupur P.S. alleging inter alia that on 14.03.1988 at about 4.00 p.m. while she was at her *Bathan*, her daughter Krishna Kumari aged about 7 years had gone towards North in order to meet nature's call she also proceeded subsequently. At that very moment, she heard cry of her daughter Krishna Kumari, whereupon she rushed and came to '*betel Baraitha*' (*betel garden*) of Rajesh where she found Rajesh indulged in



committing rape upon Krishna Kumari. Seeing this, she also began to raise alarm whereupon Rajballabh Singh (PW-1) reached and then thereafter, they apprehended Rajesh. Bleeding was coming out from private part of her daughter. They carried them to their *Bathan*, Rajesh was also manhandled. Then, Chaukidar was informed. During course of journey to P.S., Deosagar Choudhary, Balram Choudhary and Brij Kishore intervened, resisted and then, assaulted by means of fists and slaps and then thereafter, they succeeded in snatching Rajesh from their custody. They have also threatened to face dire consequence in case the matter is reported to the police. Thereafter, they approached the local *Mukhiya*, who came at his house at late night, who directed them to proceed to P.S. and accordingly, they came to police station.

3. On the basis of the aforesaid first information report, Bidupur P.S. Case no.54 of 1988 was registered under Sections 376, 341, 323 of the I.P.C. followed with investigation as well as submission of chargesheet whereupon cognizance was taken and being the offences exclusively triable by the Court of Sessions, accordingly, the case was committed. After conclusion of trial, appellant including others were convicted and sentenced under different heads against which appellant has challenged the judgment impugned.

4. Defence case, as is evident from mode of cross-examination as well as from the statement recorded under Section 313

of the Cr.P.C. is that of complete denial of the occurrence as well as of false implication. It has also been pleaded that on account of land dispute for which a criminal case was in between the parties since before, instant case has been filed. However, neither any DW nor any kind of document has been filed on behalf of appellant.

5. In order to substantiate its case, prosecution had examined altogether six PWs, out of whom, PW-1 Rajballabh Prasad Singh, uncle of victim, PW-2 Sheo Kumar Singh, father of victim, PW-3 Lalmuni Devi, informant as well as mother of the victim, PW-4 Krishna Kumari, victim herself, PW-5 Dr. Prakriti Gupta, who had examined the victim and PW-6 Amresh Prasad Mishra, an advocate clerk from whom prosecution had exhibited certain documents for want of examination of the I.O. Prosecution had also exhibited the documents as Exhibit-1 signature of F.I.R. contesting witness, Exhibit-2 injury report, Exhibit-3 fard-bayan. As stated above, neither any DW nor any kind of document has been brought up on record on behalf of the appellant/ convict.

6. In a case of rape, the evidence of victim is of paramount consideration and on account thereof, first of all, the evidence of PW-4 has to be looked into. During course of her examination-in-chief, she had detailed how she was grabbed by the accused, dragged inside '*Paan Baraitha*' (*betel garden*), which is found duly fenced while she was returning after meeting of nature's



call and then, she was undressed as well as the accused himself undressed and then, began to commit rape out of severe pain, she raised an alarm whereupon her mother came. Accused tried to flee, however, was cordoned. Her mother also raised cry whereupon her father and uncle arrived, apprehended the accused, took them to 'Bathan'. Chaukidar was informed while they were in a way to Police Station, brothers of accused namely Brij Kishore, Deosagar and Bajrangi Choudhary intercepted them, assaulted them and then, succeeded in rescuing Rajesh. Thereafter, they have gone to Mukhiya, who came late in night. He directed to approach police in the night itself whereupon they have gone to police station. During course of cross-examination, apart from others, at Para-4, the appellant had cross-examined this witness over the manner of occurrence whereupon she had detailed that she was child at the time of occurrence, therefore, she is not remembering minute to minute detail, but there was bleeding. There was no full penetration, but was and it remained at the edifice of the vagina. She was lifted by her mother to the Bathan. Defence had not controverted the presence of injury rather some sort of suggestion was there that while she was plucking the leaves of caster, Rajesh came, scolded and on account thereof, she fell down sustaining injuries over her private part.

7. PW-5 is the doctor, who had examined the victim on 15.03.1988 at 3.05 p.m. and found the following injuries:-

i) Abrasion with swelling was found around the valve, 4 in number or varying sizes $\frac{1}{2}$ " x $\frac{1}{2}$ " to $\frac{1}{4}$ " x $\frac{1}{8}$ ".

ii) Hymen was intact, swab taken from vagina and sent for microscopic, pathological examination, spermatozoa was found absent.

The girl estimated to be aged about 7 years and further, it has been opined that the injury found over private part of the victim would have been by an attempt of sexual intercourse. During cross-examination, she had stated that no definite opinion could be given on the basis of the report whether victim was raped or not. She had further disclosed that the nature of the injury was simple. She had further acceded with the suggestion of the defence that aforesaid injuries may be caused coming in contact with hard and blunt substance during course of meeting of nature's call.

8. PW-3 is the informant, who had categorically stated that on the alleged date and time of occurrence, her daughter Krishna Kumari aged about 7 years had gone to meet nature's call. She also proceeded, during midst thereof, she heard cry of her daughter over which she rushed and came inside 'Paan Baraitha' (betel garden) and found her daughter as well as Rajesh undressed and Rajesh was indulged in committing rape over her. She raised alarm over which her husband, Dewar arrived. Rajesh was apprehended, she lifted the victim while Rajesh was taken too. As they were going to police

station, brothers of Rajesh intercepted them and then, succeeded in rescuing Rajesh as well as had also threatened, over which they have gone to Mukhiya, who had directed to contact police in the night itself and accordingly, they have come to police station where she recorded first information report. She along with victim was sent to medical examination. Rajesh was also apprehended by the police.

9. Defence had tried to bring the physical location in around the place of occurrence. So far occurrence is concerned, she had categorically stated under Para-3 of her cross-examination that when she reached at the '*Paan Baraitha*', at that very time, Rajesh was committing rape upon victim. '*Baraitha*' was fenced with thatched wall. He tried to flee, however, was apprehended. She had denied the suggestion that her daughter had fallen over '*Tkri*' sustaining injury over her private part.

10. PW-1 and PW-2 are the uncle as well as father of the victim and certainly, as per evidence of PW-4 as well as PW-3, their presence happen to be after arrival of PW-3 and that being so, they have corroborated the occurrence.

11. Learned counsel for the appellant stressed upon the evidence of PW-2, father of the victim whereunder at Para-6, he had admitted that Shiv Dulari Devi was his '*Bhabhi*' and Shiv Dulari instituted a case against Ran Nath Singh, Ramji Singh and Nagendra Choudhary. There happens to be complete absence at the end of the

defence to inter-connect the aforesaid person Ram Nath Singh, Ramji Singh and Nagendra Choudhary with his lineage.

12. It has also been submitted on behalf of appellant that doctor had not found rupture of hymen and on account thereof, it cannot be said that the injury found over private part of victim to be an outcome of rape. It has also been submitted that doctor was not conclusive in her opinion and accordingly, she did not opine it to be case of rape as well as the aforesaid injury found over private part of PW-4 was outcome of rape rather an attempt to rape. Referring Para-4 of PW-4, it has been submitted on behalf of learned counsel for the appellant that it could not be said positively that there was penetration, a sine qua non for attracting conviction and sentence under Section 376 of the I.P.C. Accordingly, the conviction recorded under Section 376 of the I.P.C. did not justify its prevalence.

13. learned Additional Public Prosecutor opposed the submission and submitted that learned lower Court had dealt with the issue in detail and that happens to be plausible, acceptable and on account thereof, the submission made on behalf of the appellant has got no legal force.

14. Rupture of hymen is not sine qua non for commission of rape and that has been held by the **Modi** in his Medical Jurisprudence and on account thereof, having hymen intact is not going to give any sort of relief to the appellant.

15. Now, coming to the other aspect, as is evident from PW-4 at Para-4, she had categorically stated that full penetration was not there that means to say, to some extent penetration was there and that being so, the offence of Section 376 of the I.P.C. is found fully proved. So far other aspect is concerned, the injury found over private part of PW-4 as indicated by the PW-5 is found in support thereof.

16. That being so, instant appeal is found meritless and is accordingly, dismissed.

17. At this stage, the learned counsel for the appellant asked for some sort of leniency over sentence. Appellant was indulged in committing rape over seven years old girl did not attract any kind of sympathy. Accordingly, sentence inflicted by the learned lower Court is maintained. Appellant is under custody, hence, he is directed to serve the remaining part of the sentences.

(Aditya Kumar Trivedi, J)

Patna High Court
Dated-14.08.2015
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