

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.223 of 2009

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(AGAINST THE JUDGMENT OF CONVICTION, DATED 15.11.2008, AND ORDER OF SENTENCE, DATED 18.11.2008, PASSED BY SHRI RAVI PRAKASH DHAR DUBEY, ADDITIONAL SESSIONS JUDGE, F.T.C.-IV, BEGUSARAI, IN SESSIONS TRIAL NO. 464 OF 2007, ARISING OUT OF BEGUSARAI MUFFASIL (SINGHAUL) POLICE STATION CASE NO. 103 OF 2007, CORRESPONDING TO G.R.NO.854 OF 2007).

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Mukesh Paswan, son of late Sita Ram Paswan, resident of Village-Bahrampur, Police Station-Bachhawara, District-Begusarai.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : None

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

Mrs. Soni Shrivastava, Advocate, as Amicus Curiae

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

and

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 21-04-2015

This appeal reminds us of the cardinal principle of criminal justice system that a person, accused of an offence, howsoever heinous the offence may be, shall be presumed to be innocent until proved guilty.

2. As we would show, the principle of law indicated above, has not been adhered to, while convicting the accused-appellant, Mukesh Paswan, under Sections 376 and 307 of the Indian Penal Code, under the judgment, dated 15.11.2008, passed, in Sessions Trial No. 464 of 2007, by Shri

Ravi Prakash Dhar Dubey, learned Additional Sessions Judge, F.T.C. IV, Begusarai, and in consequence of his conviction, under Section 376 of the Indian Penal Code, he stands sentenced, under the order, dated 18.11.2008, to undergo imprisonment for life and also to so suffer, for his conviction under Section 307 of the Indian Penal Code, imprisonment for life, both the sentences having been directed to run concurrently.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described thus, :

(i) On 27.03.2007, at late hours of the night, when the informant (PW 6), Sunita Devi, was sleeping in her house, with her seven children including the alleged victim **RK**, aged about 1-1/2 years, the accused entered into the informant's house by opening the gate of her house and took away **RK** towards an agricultural field. On noticing the accused taking away **RK** from the house, her mother, i.e., the informant, raised *hulla* and many of her neighbours and co-villagers arrived. The informant reported the occurrence to her neighbours and co-villagers and, along with them, went looking for her said daughter and, eventually, found her in the wheat field of one Ram Balak Singh with the accused. **RK** had suffered injuries on her vagina, which stood ruptured and was bleeding.

(ii) While the accused was caught by his co-villagers and kept detained at the house of their Village

Chowkidar (PW 11), the informant (PW 6), with the help of some of her other co-villagers, carried her daughter, **RK**, who was in unconscious state, to Sadar Hospital, Begusarai.

(iii) On being informed about the occurrence by the village Chowkidar (PW 11), the police arrived at the hospital and recorded the statement of **RK's** mother (PW 6), on 28.08.2007, at 09.15 AM, as her *farbayan* and, treating the same as First Information Report, Muffasil (Singhaul) Police Station Case No. 103 of 2007 was registered, under Sections 376/307 of the Indian Penal Code, against the accused.

(iv) During investigation, the Investigating Officer (PW 13) visited the informant's village, took into custody the accused, seized the underwear, which the accused was wearing, and sent the same to Forensic Science Laboratory for chemical examination. A medical board was constituted, which examined **RK** and found that she had been subjected to *rape*.

(v) On completion of investigation, a *charge-sheet* was laid, under Sections 376 and 307 of the Indian Penal Code, against accused Mukesh Paswan. Thereafter, on receiving the Forensic Science Laboratory's report regarding the said underwear, which showed that semen, with stains of blood, had been found on the said underwear, the police submitted a supplementary case diary annexing therewith the copy of the Forensic Science Laboratory's said report.

4. At the trial, when charges, under Sections 376 and 307 of the Indian Penal Code, were framed against the accused, he pleaded not guilty thereto.

5. In support of its case, prosecution examined altogether 13 (thirteen) witnesses.

6. The accused was, on closing of the prosecution's case, examined under Section 313 (1) (b) of the Code of Criminal Procedure, 1973, wherein the accused denied that he had committed the offences, which were alleged to have been committed by him, the case of the defence being that of denial. Defence also adduced evidence by examining one witness.

7. Having, however, found the accused guilty of the offences, which he stood charged with, learned trial Court convicted him accordingly and passed sentences against him as mentioned above.

8. Aggrieved by his conviction and the sentences, which have been passed against him, the accused, as a convicted person, has preferred this appeal.

9. We have heard Mrs. Soni Shrivastava, learned Counsel, appearing as *Amicus Curiae*, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

10. While considering the present appeal, it may be noted that according to PW 10, a *gynecologist*, who was

serving at the relevant point of time at Sadar Hospital, Begusarai, and who had, as a member of medical board, examined, on 28.03.2007, at 08:00 AM, **RK**, it was found as follows:

"Age of the victim – about 1 ½ years. Patient (victim) was in low condition. Pulse was 120 P.M., B.P.- 16 ms cystolic, condition was serious.

On local examination I found that whole of posterior vaginal valve ws torn extending upwards to anal region with bleeding plus contaminated with fecal matters.

Patient (victim) was referred to higher institution for anorectal surgery after taking vaginal swab and reousication.

Pathological examination was done by Dr. N. K. Chaudhary and no spermatozoa was found as per Pathologist report.

Dental opinion and Radiological opinion was seeked for age determination of the victim. On the basis of which the age of victim was assessed between 1 ½ years to 2 years.

After vaginal examination ample evidence of rape was found."

11. In her cross-examination, PW 10 has clarified that she did not find any semen on the person of **RK**. It is in her evidence that if a child is thrown on a rough surface and subjected to rape, there may be injury on her back. It is also in the evidence of PW 10 (doctor) that the vaginal swab of

the victim did not reveal presence of *spermatozoa*, the child having been found to be aged about 1 ½ years old.

12. In his cross-examination, PW 9, another member of the medical board, has clarified that if there is no ejaculation, *spermatozoa* may not be found or if a person, who commits rape, stood vasectomised, then, also *spermatozoa* may not be found and, further, due to physical inability of a man, *spermatozoa* may not be found in his semen.

13. Bearing in mind the medical evidence on record, when we turn to the evidence of the informant (PW 6), we notice that according to her evidence, at around middle of the night, when she (PW 6) was sleeping in her house with her seven children, accused Mukesh Paswan entered into her house after cutting the rope of her door and fled away after snatching **RK**, aged about 1½ years, from her and, on *hulla* being raised by her, people assembled and, in course of search, accused Mukesh Paswan was found in one Ram Balak Singh's wheat field, where accused Mukesh Paswan had committed rape upon her child, **RK**.

14. It is in the evidence of PW 6 that her co-villagers caught hold of accused Mukesh Paswan at the said wheat field and handed him over to Chowkidar, Gauri Paswan (PW 11), and, then, PW 6 took **RK** to Sadar Hospital, Begusarai, for treatment. It is also in the evidence of PW 6 that on the following day, in the morning, Sub Inspector of Police

recorded her statement as her *fardbayan*.

15. What is noticeable, in the evidence of the informant (PW 6), is that she has deposed, at one stage, that she was sleeping, at the relevant point of time, with two children, when the accused forcibly snatched away **RK**, while at another stage, she has deposed that she was sleeping with all her seven children in one room and she herself was sleeping in the middle of her children.

16. Apart from the above inconsistency with which suffers the evidence of PW 6, it is also important to bear in mind that it is the evidence of the informant (PW 6) that there is a main gate to the house of the informant and also a door in the room, where the informant was sleeping.

17. While, however, PW 6, as already noticed, deposed that she was sleeping in the room, the place of occurrence, which was shown to the Investigating Officer (PW 13), was a *veranda* of the house, where the informant had claimed to had been sleeping with **RK**, when **RK** was allegedly taken away by the accused-appellant.

18. So far as the evidence of PW 6 that she raised *hulla* saying that the accused was taking away her child is concerned, the same is not supported by PW 1, PW 2, PW 3 and PW 4 inasmuch as PW 1, PW 3 and PW 4 have deposed that the informant (PW 6) told them, when they arrived at her house, that her child was taken away by dog or jackal; but,

according to what PW 2 has deposed, the informant told them that *someone* had taken away her daughter.

19. It is also worth pointing out that PW 1 has deposed, in his evidence, that they continued to search the child for an hour and though he claims to have found the victim in the wheat field, there is absolutely nothing in his evidence to show that the accused-appellant was also present in the field.

20. Coupled with the above, the evidence of PW 2 is that, upon being informed by the informant that *someone* had taken away her daughter, they searched for the missing child of the informant and found her in the wheat field of Ram Balak Singh. There is absolutely nothing in the evidence of PW 2 either to show that the accused-appellant was also found with the said child of the informant.

21. Closely in tune with the evidence of PW 1, PW 3 has deposed that they went looking for the child of the informant and found, in the course of search, the said child lying in the wheat field of Ram Balak Singh. PW 3 also did not depose that the accused-appellant was found along with the said child.

22. No different is the evidence of PW 4, in this regard, inasmuch as this witness, too, has deposed that while he was asleep at his house, he heard the informant raising *hulla* saying that *jackal* or *dog* had taken away her daughter and, then, they searched for the informant's daughter and

found her in the wheat field of Ram Balak Singh; but even PW 4 has not claimed that the accused-appellant was found with the said child.

23. Two important aspects, discernible from the evidence of PW 1, PW 2, PW 3 and PW 4, are that according to them, the informant told them, when they arrived at her house, on her raising *hulla*, that *dog* or *jackal* had taken her child away meaning thereby that the informant did not know, at the time when **RK** had disappeared, that it was the accused-appellant, who had taken away her child. The second aspect of these witnesses' evidence is that though the said child was found in the wheat field of one Ram Balak Singh, the accused-appellant was not found with the said child.

24. What is, now, imperative to note is that though PW 2, PW 3 and PW 4 were declared *hostile* and cross-examined by the prosecution, their previous statements, which were said to have been made by them to the police during investigation and recorded as their statements under Section 161 of the Code of Criminal Procedure, were not proved by the prosecution. There is, therefore, nothing in the cross-examination of PW 2, PW 3 and PW 4 by the prosecution to show that the evidence of these witnesses is unbelievable or unworthy of trust.

25. There is yet another clearly noticeable aspect of the case, which makes the case of the prosecution



doubtful in nature. We notice that PW 1 has deposed that the accused was kept confined in the house of the informant and it was from there that the police took the appellant into their custody next morning. However, PW 1, at another place, has deposed that the police arrested the accused from the house of their Village Chowkidar (i.e., PW 11). The evidence of PW 5, in this regard, is that the accused-appellant was kept surrounded by 10-20 villagers at the appellant's house and, then, was handed over to the Chowkidar, at his house, meaning thereby that it was from the house of the said Chowkidar that the police had taken the accused-appellant into their custody.

26. With regard to the above, PW 6 has deposed that the appellant was found at the place of occurrence and from there, he was apprehended and handed over to PW 11 (i.e., the Chowkidar). However, the evidence of PW 11 is that police arrested the appellant from his house, i.e., the Chowkidar, where the villagers had kept him confined. It is also to be borne in mind that PW 11 was on duty at Singhaul O.P., where he received the information with regard to the occurrence and, then, he went to his house along with the police and it was there that the appellant was kept confined by the villagers meaning thereby that the appellant had not been handed over to the custody of Chowkidar (PW 11).

27. Contradicting the above evidence, given by the prosecution witnesses, PW 12 has deposed that a crowd

had assembled near the house of Sahdeo Paswan, where the appellant was caught and handed over to Chowkidar (PW 11). The evidence of the Investigating Officer (PW 13), in this regard, is that the appellant was arrested from near the house of the accused, where the villagers had confined him.

28. It is, thus, clear that there is no consistent evidence as to where the accused-appellant was apprehended from, where accused-appellant was kept confined and by whom and where, the accused-appellant was handed over to the police (i.e., PW 13).

29. Though it has been pointed out by the learned *Amicus Curiae* that no *spermatozoa* had been found by the pathological examination and no semen was also found on the private parts of the victim, we are of the view that in the light of the evidence of PW 9 (i.e., doctor) that *spermatozoa* may not be found if there is no ejaculation and since no pathological test was performed immediately after **RK** was found, absence of semen does not prove that she had not been subjected to sexual assault.

30. What, however, cannot be ignored is the fact that no injury was found at the back of the victim. There is considerable force in the submission, made by learned *Amicus Curiae*, that if the child had been put on the ground in a wheat field and was subjected to sexual assault by a man, it is wholly impossible that no injury would have been found on back of the

said child.

31. So far as the report of the Forensic Science Laboratory is concerned, the Investigating Officer has proved the report, which shows that semen with stains of blood was found on the underwear of the accused, which the accused-appellant was wearing. There is, unfortunately, no examination conducted to find out as to whether the blood, which had been found on the said underwear, was of **RK** or not.

32. Thus, there is no proof of the fact that the blood stains, found on the said underwear, were of the said child.

33. Because of what has been indicated above, it becomes abundantly clear that the seizure of the said underwear and the report of the Forensic Science Laboratory connected therewith do not help the prosecution in proving the case against the accused-appellant. In absence of any examination of the blood, found on the said underwear, it is clear that there is no proof of the fact, we may reiterate, that the victim's blood was found on the underwear of the accused-appellant.

34. There is considerable merit in the submission, made by the learned *Amicus Curiae*, that no material evidence or incriminating circumstance appearing against the accused-appellant, in the light of the evidence adduced at the trial, was put to the accused-appellant, while he

was being examined under Section 313 of the Code of Criminal Procedure.

35. We might have been tempted to set aside the conviction of the accused-appellant and the sentences passed against him and, then, remand the case to the learned trial Court for examining the accused-appellant in accordance with the requirements of Section 313(1)(b) of the Code of Criminal Procedure, 1973, and, then, dispose of the case in accordance with law, we, however, refrain from doing so in order to avoid miscarriage of justice inasmuch as we do not find, in the facts and the attending circumstances of the present case, that any fruitful purpose would be served by remanding the case to the learned trial Court for the purpose of examining the accused-appellant under Section 313(1)(b) of the Code of Criminal Procedure, 1973, when we are clearly of the view that the evidence on record was grossly insufficient to hold the accused-appellant guilty of the offence of rape and/or of the offence of *attempt to commit murder*.

36. What crystallizes from the above discussion is that contrary to the assertion of the informant that her child was taken away by the accused-appellant, she had not disclosed, when her neighbours arrived at her house, on hearing the *hulla*, raised that her child had been taken away by the accused-appellant; rather, her claim was that her child was taken away by the *dog* or *jackal*. There is no credible and



convincing evidence that the accused-appellant was found at the place, where the said child was found lying. There is also no credible and clinching evidence on record to hold that the accused-appellant was found with the said child at the place, where the said child was recovered from. Further-more, the report of the Forensic Science Laboratory does not prove that it was the accused-appellant, who had subjected the said child to sexual assault. In short, there is no credible, convincing and clinching evidence fastening the accused-appellant with the offences, which he stands convicted of.

37. Because of what has been discussed and pointed out above, we are clearly of the view, and we do hold, that the prosecution failed to prove its case beyond reasonable doubt against the accused-appellant and the accused-appellant ought to have, therefore, been acquitted of the charges framed against him.

38. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentences passed against him by the judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offences, which he stands convicted of, and he is hereby acquitted of the same.

39. As the accused-appellant, Mukesh Paswan, is in jail custody, he is directed to be set at liberty forthwith unless he is required to be detained in connection with any

other case.

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

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

(I. A. Ansari, J)

(Nilu Agrawal, J)

A.F.R.
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