

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1310 of 2011

Against the judgment of conviction and order of sentence dated 16.12.2011 and 17.12.2011` passed by Shri Himanshu Shekhar Pandey, learned Additional Sessions Judge, Sheikhpura, in Sessions Trial No. 567 of 2010/T.R.No. 2 of 2011.

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Nagendra Singh @ Bumba @ Bambam Singh @ Babam Singh @ Bagoran Singh,
Son of Sri Chandra Shekhar Singh, resident of Village- Mehush, Police Station-
Mehush, District- Sheikhpura.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Bipin Kumar, Advocate.
Mr. Ram Vinay Pd.Singh @ Sanjay, Advocate.
Mr. Arun Kumar, Advocate.
For the State : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 18-09-2015

Heard learned for the appellant and learned counsel for the
State.

2. This appeal arises out of the judgment of conviction and order of sentence dated 16.12.2011 and 17.12.2011` passed by Shri Himanshu Shekhar Pandey, learned Additional Sessions Judge, Sheikhpura, in Sessions Trial No. 567 of 2010/T.R.No. 2 of 2011 by which the appellant had been convicted for offence under Section 376 of Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs.5,000/- and in default of payment of fine further sentenced to undergo rigorous imprisonment for one year. Further the appellant had been convicted for offence under Section 323 of Indian Penal Code and sentenced to

undergo rigorous imprisonment for one year. Further, the appellant had been convicted for offence under Sections 3 (xii) of S.C./S.T. (Prevention of Atrocities) Act and sentenced to undergo rigorous imprisonment for three years and payment of fine of Rs. 2,000/- and in default of payment of fine further sentenced to undergo rigorous imprisonment for six months. The fine imposed on the convict, if realised, was directed to be paid to the prosecutrix. All the sentences shall run concurrently. Further the period of detention already undergone by convict in this case during court of investigation and trial be set off against the aforesaid sentence of imprisonment imposed on him.

3. The prosecution case as alleged in the First Information Report by the informant Rinku Kumari aged 8-9 years and alleging therein that she was living along with her Nani at Village- Mehus Musahri. On 26.01.2007, during the occasion of immersion of goddess Sarswati a T.V. programme was going on at Community Dalan at Village-Mehus Musahri in which she had gone to watch T.V. and while watching T.V. she got slept there. Further case is that in the night while she was in sleeping state, the appellant, Bambam Singh lifted her in his lap then victim woke up and took her to Khanda she start weeping then Bambam Singh gave a slap by which her Besra (nose-pin) of nose fell down and even the accused threatened to kill



and thereafter he thrown her in Khanda and put his hand on her mouth and untie her panty and raped her, she cried out of pain then the accused slapped on her mouth. After the occurrence she came to the house of Nani, though, she at the outset did not divulge the fact to her Nani, but when pain started in her private part then she disclosed to her Nani about the occurrence that Bamba Singh @ Bambam Singh took her from Government Musahri Dalan by lifting her and took her to Khanda and raped her causing blood oozing out from her private part and her panty was besmeared with blood. Then her Nani along with other co-villagers came to police station and make her statement. Fardbeyan was recorded on 27.01.2007 at 9.30 A.M. by S.I. Luxmi Paswan and he made endorsement lodging F.I.R. bearing Mehus P.S. Case No. 1 of 2007 dated 27.01.2007 for offence under Sections 376 and 323 of Indian Penal Code and Section 3(i)(xii) of S.C./S.T. Act. Investigation proceeded. During investigation, further statement of the victim recorded. Fardbeyan which has been marked as Exhibit-2, seizure list of the said panty besmeared with blood was prepared which has been marked as Exhibit-3.

4. During investigation, statement of victim was recorded and statement of witnesses also recorded. The two P.O. was inspected. The first P.O. is Community Hall and second P.O. is the Khanda that well define boundary. The statement of the victim was recorded

under Section 164 Cr.P.C. and she was sent to hospital for medical examination. She was medically examined by the lady doctor at Munger. The injury report has been marked as Exhibit-4 on the requisition filed by the I.O. and police after investigation submitted charge sheet. Cognizance was taken and case was committed to the Court of Sessions.

5. During trial six witnesses were examined by the prosecution as P.W. 1 Yogendra Prasad proved formal F.I.R, marked as Exhibit-1, P.W.2 Jitni Devi, the Nani of the victim, who attended the victim after the occurrence and took the victim to the police station and supported the prosecution case, P.W. 3 Rinku Kumari, informant (victim), P.W. 4 Luxmi Paswan, S.I. who had proved the Fardbeyan of the informant as Exhibit-2 and seizure list as Exhibit-3, P.W.5 Dr. Bina Kumari Singh proved the injury report as Exhibit-2 and P.W. 6 I.O. who investigated the case inspected the P.O. and got the statement of the victim recorded under Section 164 Cr.P.C. recorded. P.W. 5 is the doctor who had gave report and confirmed about the rape. P.W. 6 is Jai Ram Singh, the Officer-in-Charge of the police station and has stated that the case was registered by Luxmi Paswan, Officer-in-Charge of Mehus and he has submitted charge sheet and had been proved the Fardbeyan as Exhibit-2 and seizure list as Exhibit-3. Exhibit-4 is injury report. D.W. 1 was Advocate Clerk.



He has proved complaint petition in four pages having been typed by Janardan Singh. However, defence had also adduced some documentary evidence which has been marked as Exhibit-A is the copy of order sheet of Complaint Case No. 327 of 2005 by Aasho Devi Vrs. Bambam Singh, Exhibit-B is the Final Form submitted by the police in Mehus P.S. Case No. 114 of 2004, dated 06.05.2004 corresponding to S.C. No. 201 of 2006, Exhibit-C is report regarding Sanha No. 519 of 2005 dated 30.09.2005 which has been destroyed by the Memo No.332 of 23.06.2011 of District & Sessions Judge, Munger, Exhibit-D is the copy of First Information Report lodged by Chandra Shekhar Singh, father of the appellant and Exhibit-E is the Complaint petition bearing No. 327(C) of 2005 filed by one Aasho Devi, the Aunt of the informant.

6. Defence of the accused is that he was falsely been implicated in this case by tutoring the victim. Further defence of the accused that maternal uncle of the accused was done to death by one Tuntun Singh for which a murder case was instituted by the father of the appellant. The F.I.R. of the said murder case has been marked as Exhibit-D and it is stated that appellant and his father are witnesses of this case and said case was lodged against the appellant by one Aasho Devi, the Aunt of that informant i.e. the victim of the present case. But no case was registered as yet on the basis of this complaint.



Further, it is submitted that Aasho Devi was filed a case on direction of Tuntun Singh to lodge the case under Section 156 (3) Cr.P.C. In this case awaiting Final Form with a direction to send the copy of the complaint to the Officer-in-Charge of the police station. However, from the order sheet it shows that said case remained awaiting Final Form till 23.04. 2004. In the meantime the present case was filed in the year 2007. It is also submitted that the present case was filed at the instance of Tuntun Singh to pressurise the appellant that he may not depose in the murder case of his maternal uncle and it is submitted that appellant has falsely been implicated in this case having been tutored at the instance of Tuntun Singh.

7. The trial court taking into consideration both oral and documentary evidence convicted the appellant and sentenced as mentioned above holding that prosecution had succeeded to prove the case against the appellant beyond reasonable doubt.

8. Learned counsel for the appellant however challenged the order of conviction and sentence recorded by the trial court mainly on the ground that victim had been tutored and appellant had been falsely implicated in this case at the instance of Tuntun Singh to pressurise the appellant that he may not depose in the murder case. Further it is submitted that prosecution has been lodged at the instance of said Tuntun Singh and Tuntun Singh is an owner of brick klin and Aasho

Devi is captive and labourer of Tuntun Singh.

9. Learned counsel for the State however submits that victim had specifically stated in her evidence regarding rape and specifically mentioned the name of the appellant and the appellant lifted her and raped her and this evidence had also been corroborated by her Nani as well as medical report who had been examined the victim as she was found sign of rape upon the victim. Having regard the fact evidence of the victim having been corroborated by the medical evidence as well as evidence of Nani of the victim who disclosed about the occurrence before her.

10. However, in this context discrepancy has been pointed out regarding contradiction in the evidence of the witnesses, but this contradiction do not go to the root of the prosecution case to disbelieve the prosecution case and are fatal in the nature of occurrence. Further defence pointed out that appellant had falsely been implicated in this case for the reason that he was eye witness to the occurrence of the murder of his maternal uncle which has been proved as Exhibit-D and hence defence set up did not accept in view of evidence adduced by the prosecution.

11. In view of respective submissions, I proceed to consider the evidence of the witnesses and in the light of submission by the learned counsel for the appellant and State. The prosecution case as

alleged in the First Information Report that the victim was going to Community Dalan to see the T.V. program on the occasion of immersion of Goddess Saraswati and while she was watching T.V. she slept there then in the night appellant lifted her in his lap and was taken to Khanda and when she cried the appellant was assaulted by slap on her mouth and put his hand on her mouth and raped her by untie her panty which cause blood oozed out from her private part. and her panty besmeared with blood. Thereafter, she came to her Nani house, though, she did not disclose the fact to her Nani in the night but when severe pain was started in her private part she disclosed about the occurrence to her Nani in the morning. In her cross-examination she has stated that her Aunt Aasho Devi was labourer of Tuntun Singh, the owner of brick klin. However, in her cross-examination, she specifically stated that Bambam Singh lifted her when she was slept and other female child were flee away but none had chased him. However, she has further stated that Bambam Singh lifted her and took her some distance then she woke up and she made cry. However, criticism has been made in this part of evidence that she along with children was at Dalan and Bambam Singh lifted her and tried to take other place and none have protested. However, the prosecution cannot be rejected outright on this part of evidence and this is minor contradiction which did not go to the root of the

prosecution to disbelieve the prosecution story. She has further stated in her evidence that Bambam took her from Dalan after one hour and at that time all the witnesses were sleeping there. She returned in same cloth and she has not disclosed about the occurrence to her Nani in the night, but she disclosed the occurrence to her Nani in the morning and she stated the name of her Nani Jitni Devi. Further the victim had stated that she did not disclose about pain in the night, but she disclosed about pain the morning after attending call of nature. However, great emphasis has been given to this part of evidence to disbelieve the prosecution case.

12. P.W. 2 Jitni Devi had stated about rape and injury on the victim on her private part and has stated in her cross-examination the victim was taken to police station in the morning. Further she had stated that victim met her in the night and when she taken in lap then the victim disclosed about the occurrence and further P.W. 2 stated she did not see any injury on her body, though, she was naked.

13. P.W. 5 Dr. Bina Kumari Singh is doctor who examined the victim on 28.01.2007 and he had stated that she examined the victim on 28.01.2007 at about 5.45 P.M. and found following injuries :-

- (i) lacerated wound 1" long on right temporal bone;
- (ii) swelling and abrasion on both cheeks 2"x2"
- (iii) vague abrasion on the inner side of both thighs.

Vulva under developed perineal tear from Vagina back up to rectum 2" long. 1" depth x 1" width exposing perineal muscles. Inner side of thigh shows dried of liquid and blood Vagina Swab report stated that there is no spermatozoa either alive or dead. No foreign body WVC +Epith Cells 3+ RBC Nil.

The doctor P.W.5 has been opined that according to above findings rape on the said person can not be omitted, though, she had proved injury report in her writing and signature which has been marked as Exhibit-4. Further in her cross-examination she had stated that she gave report on 29.01.2007, though, she examined the victim on 28.01.2007. The assessment of age of injuries depends upon colour. She had not written colour of injury of blood and injury report had given on rough paper and she had not reported to the police. Though, criticism has been made on this part of evidence that she has written report on rough paper. Having regard to the fact, the victim was examined on 28.01.2007 and injury report was given on 29.01.2007 and with regard to above mentioned injury on the person of the victim is general phenomena, hence, I do not find to disbelieve the evidence of the doctor P.W. 5 regarding injury found by her. P.W. 5 doctor in her cross-examination had stated in paragraph 9 that rape cannot be rule out. From the report she had given such type of opinion. Further attention has been drawn to paragraph 7 and 10 she

has mentioned injury no. 1 and 2 and injury no. 1 and 2 can be possible of rape. However, injury no. 1 and 2 have not concerned with the rape and whatever concerned with the rape is of injury no. 3 opinion of the doctor is very pressing with written report as well as in her evidence in cross-examination that rape cannot be ruled out.

14. I.O. had also examined as P.W. 4 and he had taken further statement of the victim and inspected the P.O. Thereafter, the victim examined before Magistrate and her statement recorded under Section 164 Cr.P.C. and he also referred the victim before the lady doctor.

15. However, criticism has been made that, though, occurrence took place in Village- Mehus Musahri, the statement of the victim recorded by the Magistrate at Sheikhpura, but the victim was examined by the doctor at Munger about 65 kilometers away as distance between Sheikhpura and Munger. However, answer can well be found in the medical report Exhibit-4 that a request letter was sent by the I.O. for medical examination of the victim to the doctor and it was mentioned on the back of the report of the doctor itself that the victim was referred by the doctor of Sheikhpura with endorsement on medical report that there is no lady doctor in the Sheikhpura and hence the victim was referred for her medical examination to Munger hospital and hence proper explanation has been made for non-examination of the victim at Sheikhpura.

16. Hence, taking into consideration the evidence as discussed above, P.W. 3 is the victim who had supported the prosecution case that she was taken by the appellant in his lap and he has taken to Khanda and he was committed rape upon her. From the evidence of the doctor, prosecution case as alleged has been corroborated that rape cannot be ruled out. P.W. 2 Jitni Devi is Nani has also supported the prosecution case that victim disclosed about the occurrence and hence, taking into consideration of these evidences of P.Ws, 2, 3 and 5 commission of rape had been established and there is specific evidence of the doctor that rape on the person of the victim cannot be ruled out.

17. However, defence set up by the accused as well as submission of the learned counsel from the appellant that there are some contradictions in the evidence of witnesses. However, contradictions pointed out are minor and does not go to the root of the prosecution case to disbelieve the evidence of the victim or the prosecution case.

18. However, learned counsel for the appellant has relied upon decision reported in **1977 Cr.L.J. 4078 (Prahlad Singh V. State of Madhya Pradesh)**. “However, facts and circumstances of this case, though, rape of the victim had established. However, identification of the accused by the prosecutrix was found to be not



acceptable as the accused was not identified at the time of rape and accused was arrested on suspicion and in his identification parade the accused was identified by the prosecutrix, but the prosecutrix in her evidence that accused was kept in custody in the Quarter Guard where father of the victim had taken and Major Raizada was also present there. Thereafter, her father had taken again to the camp for re-identification of the accused and father had told her to move to the place of identification and to identify the accused and it was held that accused had been identified even prior to the Test Identificationj Parade before one Major Raizada, but no evidence was laid in that regard that even Major Raizada was not examined as a witness”.

19. However, here there is no question of any misdirection in identification as identification has not been misdirected rather it is specifically stated that victim was taken by the appellant to Khanda and committed rape and there is nothing in the evidence the victim was misdirected in her evidence. However, criticism has been made as per evidence of this victim in her cross-examination that she named her Nani as Jitni Devi as she disclosed the occurrence to her Nani in the night. However, there is no question arise that prosecution story cannot be disbelieved from the evidence of the doctor itself that rape has been established and appellant has been named and identified by the victim and it is not acceptable that real culprit has been left out

and the name of the appellant has falsely been implicated.

20. However, defence has been set up by the appellant that he has been falsely implicated in this case as an F.I.R. had been lodged by the father of the appellant against Tuntun Singh and it is stated that appellant and his father are eye witnesses of the murder of his grand father. However, F.I.R. of that case had been marked as Exhibit-D. In that case Chandra Shekhar Singh is the informant and he had lodged the case that his Sala Kare Lal Singh used to come to village being his relative and during this period he had closed friendship with Tuntun Singh and had also contact with his family and after some days there is rumour that Kara Lal Singh had illicit relation with the daughter of Tuntun Singh and it is alleged that Tuntun Singh took huge amount from Kare Lal Singh and he demanding to return money and in this fact it is alleged that on 05.05.2004 at about 10.30 P.M. 10 to 12 persons came and dragged Kare Lal Singh by force and even informant and others protested but they were threatened and thereafter, they took Kare Lal and it is alleged out of fear they did not followed, though, they informed the Mukhiya even reported the police station and they remained searching for whole night, but in the morning they learnt from the villagers that dead body of Kare Lal Singh in the orchard was found. However, ultimately, there was not eye witness to the occurrence and only evidence that Kare Lal Singh



was kidnapped and the case was made appears to be hinges on circumstantial evidence. However, this occurrence is of the year 2004 and occurrence at hand it is stated that one Aasha Devi was lodged a case of rape against Bambam Singh. It is asserted that it case was made on behalf of Tuntun Singh, but order sheet of that complaint marked as Exhibit-A shows that said complaint was sent for lodging of F.I.R. but order sheet till 2009 is still awaited to find out that go to show that there is inference that earlier an attempt was made by the appellant and Tuntun Singh was raped upon Aasha Devi, but nothing has been brought on record that whether Aasha Devi was raped or not.

21. Hence taking into consideration the entire evidence, there is evidence against the appellant for commission of rape and the rape of the victim has been proved the evidence is as such that rape cannot be ruled out. However, defence set up that appellant has falsely been implicated at the instance of Tuntun Singh, but there is nothing in the evidence on the face of the evidence that appellant has been falsely implicated in this case. However, false implication and the infirmities pointed out, does not go to the root to the prosecution story to disbelieve the prosecution case.

22. Regard being had to the fact, I do not find any merit in this case to interfere with the order of conviction and sentence recorded by the trial court for offence under Sections 376 and 323 of

Indian Penal Code as well as Section 3(xii) of S.C./S.T. (Prevention of Atrocities) Act.

23. The appeal accordingly, is dismissed.

(Gopal Prasad, J)

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