

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.771 of 2013

Against the judgment and order of conviction dated 12.11.2013 and 18.11.2013 passed by Sri Bajrangi Sharan, the learned Additional Sessions Judge-I-cum-Special Judge (POCSO) Act, Katihar, in Sessions Trial No. 485 of 2012.

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Bantan @ Batna Mandal S/O Kartik Mandal Resident Of Village- Barhat, P.S.- Azam Nagar, District- Katihar

.... Appellant

Versus

The State Of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Bhola Prasad, Advocate.
Mr. Satya Prakash, Advocate.
For the State : Mr. S. N. Prasad, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 14-12-2015

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

2. This appeal arises out of judgment and order of conviction dated 12.11.2013 and 18.11.2013 passed by Sri Bajrangi Sharan, the learned Additional Sessions Judge-I-cum-Special Judge (POCSO) Act, Katihar, in Sessions Trial No. 485 of 2012 by which the appellant had been convicted for offence under Section 376/511 of Indian Penal Code and sentenced to undergo imprisonment for five years.

3. The prosecution case as alleged in the First Information Report by the informant Reena Devi that on 04.05.2012 at 10.00 A.M. her three years daughter Rupali Kumari was taken away by Bantan @

Batna Mandal and committed rape upon her. On cry of the victim, Tapesb Mandal (not examined), Subol Mandal (not examined), Bimla Devi(not examined) and Pawan mandal (not examined) ran and entered into the house of Batna Mandal and saw rape having been committed and appellant was caught red handed. Further case of the prosecution is that blood oozing out from urinal track of the victim then victim was caught hold and tied in rope, the police was informed and police reached at the place of occurrence and arrested Batna Mandal.

4. On the written report of Reena Devi, F.I.R. was drawn and after lodging the F.I.R. investigation proceeded. During trial, police inspected the P.O. recorded statement of Tapesb Mandal, Subol Mandal. The victim was examined medically. The statement of accused was recorded and after completing investigation, charge sheet submitted. the Doctor, P.W. 7 who examined the victim found hymen intact, but surrounding area is red, there was some tissues torn, swab is blood stained and according to pathological report no spermatozoa was found . However she has been opined that this is a case of attempt to rape.

5. P.W. 1 Tapesb Mandal is hearsay witness and has stated that while Reena Devi making out search of her daughter Rupali Kumari then he learnt that rape committed in the house of Batna Mandal and saw that blood oozing out from private part of Rupali

Kumari and they caught Batna Mandal then police informed and police came and arrested Batna Mandal. It is further submitted that victim was treated by the doctor. P.W. 2 is Mantu Mandal has also supported that Reena Devi disclosed about rape. P.W. 3 is Mona Devi has stated that she did not saw the rape but heard about rape committed by Batna Mandal. P.W. 4 Subhash Mandal has stated that he heard the sound of weeping of Rupali from the house of Batna Mandal and Batna Mandal was caught by Reena Devi and saw that Batna committed rape upon Rupali and blood oozing out. Thereafter, a case was lodged and victim was examined by the Doctor. P.W. 5 is Reena Devi had supported the prosecution case and has stated that she make out search of her daughter for sending her to Anganbari, in the meantime, she learnt that Batna had taken away and thereafter, on hearing the sound of weeping, she went to the house of Batna then saw blood oozing out from private part of the victim then saw the victim weeping on the cot and Batna was also on the same cot and on her hullah Mantu, Bimla and others came at the place of occurrence and they caught hold of Batna. Thereafter, the matter was reported. P.W. 6 is I.O. has inspected the P.O. and recorded statement of witnesses, the victim got examined medically and arrested the appellant. P.W. 7 is Dr. Jyoti Sharan, though, she found hymen intact, but surrounded area is red. P.W. 8 is Rupali Kumari, the victim herself had stated that Batna Mandal took her to his house and untie

her pant, close her mouth and slept with her.

6. The trial court taking into consideration the evidence of witnesses convicted the appellant for offence under Sections 376/511 of Indian Penal Code, but in view of evidence of P.W. 7 the doctor observation that this is a case of attempt of rape, doctor, though, found hymen intact and no spermatozoa was found and hence hold that prosecution has not been able to prove the charge for offence under Section 376 of Indian Penal Code. The trial court taking into consideration the fact had taken lenient view, holding that offence under Section 376 of Indian Penal Code is not made out rather offence under Section 376/511 of Indian Penal Code is made out in view of the fact that hymen of the victim was found intact, no spermatozoa was found.

7. Learned counsel for the appellant however contends that having regard to the evidence of the witnesses, the appellant had been convicted for offence under Section 376/511 of Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and so a lenient view may be taken taking into consideration the fact that appellant is in jail custody since 04.05.2012 for more than three years and six months but the total sentence of five years. It is further submitted that, though, the informant in the First Information Report had stated that the appellant took the victim and committed rape upon her and on cry of the victim Tapeshe Mandal, Subol Mandal, Bimla

Devi and Pawan Mandal rushed to the place of occurrence, but they are only hearsay witnesses and had not supported the rape.

8. Learned counsel for the State however opposed and it has been contended that taking into consideration the evidence of the doctor who opined that hymen of the victim was intact and no spermatozoa was found the trial court hold that it was case for offence under Section 376/511 of Indian Penal Code. However, taking into consideration the evidence of the doctor that, though, hymen intact, but surrounding area of private part of the victim had been shown reddish in colour and some tissues torn. Further blood oozing out from private part of the victim which itself indicate there must be contact of private part of the victim by the male organ and even touching of the private part of the victim with male organ itself amount to rape. It has further been contended that trial court taking the lenient view convicting the appellant for offence under Section 376/511 of Indian Penal code, but going into the evidence of the doctor itself it is clear that offence under Section 376 of Indian Penal Code is made out and hence it is contended that no lenient view required to be taken further when appellant had been convicted for offence under Section 376/511 of Indian Penal Code.

9. Having regard to the respective submissions, it is apparent that victim was taken away by the appellant in his house and there is oral evidence and eye witness that committed rape upon her. The



informant when searching her daughter, hearing the sound of weeping reached the house of the appellant and found the victim in injured state and blood oozing out from her private part. Thereafter, on hullah, Tapesb Mandal and others reached at the place of occurrence and informant disclosed about rape and blood oozing out from private part of the victim. The informant, Reena Devi, P.W. 5 supported the prosecution case that she make out search of her daughter Rupali Kumari and on hearing the sound of weeping of the child from the house of Batna Mandal then rushed to the house of Batna Mandal and saw blood oozing out from private part of the victim and Batna Mandal was on the same cot then on hullah Tapesb Mandal and others reached at the place of occurrence. However, evidence of P.W. 1 is hit by hearsay.

10. Be that as it may, the fact disclosed just after the occurrence and the informant rushed to the place of occurrence and saw blood oozing out from private part of the victim. However, the evidence of P.W. 5 relying under Sections 6, 7 and 8 of the Evidence Act that just after the occurrence disclosure of Reena Devi, the informant.

11. However, taking into consideration the fact, evidence of witnesses as well as evidence of the doctor that hymen of the victim was intact, but surrounded area was shown red and some tissues torn itself indicate for offence, though, conviction recorded under Section

376/511 of Indian Penal Code, but no appeal has been preferred by the State nor any effort was made even no notice has been issued for enhancement of sentence or conviction under Section 376 of Indian Penal code, hence it is not prudent at this stage to convict the appellant for offence under Section 376 of Indian Penal Code. However, there is cogent, reliable evidence that victim was taken by the appellant and the evidence of the doctor showing surrounding area of private part of the victim red, itself confer for offence under Section 376/511 of Indian Penal Code.

12. Regard being had to the fact and nature of allegation as well as age of the victim and appellant, I find and hold no further lenient view is required to be shown. Hence, I do not find any merit in this appeal to interfere with the order of conviction and sentence recorded by the trial court and hence the **appeal is dismissed**. Furthermore, the conviction and sentence recorded by the learned trial court is confirmed.

m.p.

(Gopal Prasad, J)

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