

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 392 of 2013

Against the judgment of conviction dated 04.05.2013 and order of sentence dated 06.05.2013 passed by Sri Ram Vinod Prasad Singh, the learned Ad hoc 3rd Additional Sessions Judge, Madhubani in Sessions Trial No. 248 of 2012 arising out of Laukaha P.S. Case No. 85 of 2011, G.R. No. 1254 of 2011

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Md. Nazir, Son of Mr. Abdul Kayum, Resident of Village - Khilhi, P.S. - Laukaha, District - Madhubani

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Ajay Kumar Thakur, Advocate
M/S. Ravi Ranjan, Nilesh Kumar, Malay Kumar
Choudhary, Advocates

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

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

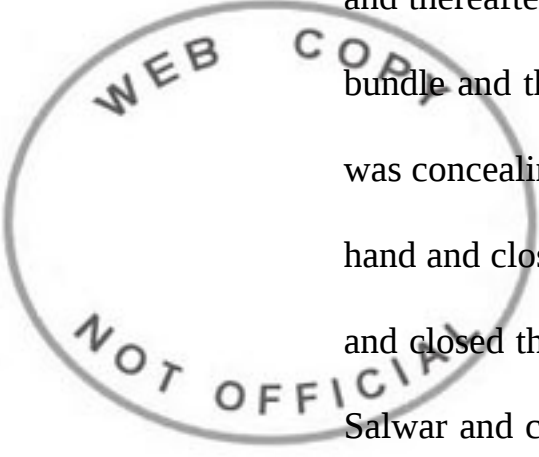
ORAL JUDGMENT

Date: 18-12-2015

Heard learned counsel for the appellant and the State.

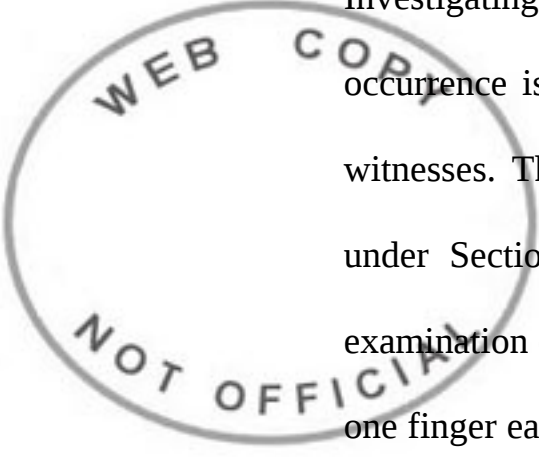
2. The appellant has been convicted under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo rigorous imprisonment for two months. He has further been convicted under Section 342 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year. However, it has been ordered that both the sentences will run concurrently.

3. The prosecution case, as alleged in the First Information Report by the informant Koresha Khatoon (P.W.8) aged about 15 years, is that on 12.11.2011 at about 4:00 P.M. she was going to her field and at that time daughter-in-law of his neighbour Islam Mian, namely,



Kusahawali, wife of Lal Mohammad called her for lifting paddy bundle and thereafter she went in courtyard and helped her in lifting the paddy bundle and thereafter Kusahawali left the Aangan and Md. Nazir, who was concealing himself in the courtyard from before, caught hold of her hand and closed her mouth and took her in a western room of the house and closed the door and window and threw her on a cot and untied her Salwar and committed rape forcibly. When she tried to raise hulla, her mouth was closed and she was confined for about two hours and committed rape twice. She anyhow raised hulla on which her mother Saburan Khatoon (not examined), Aunt Hasmul Khatoon (not examined) and Kusahawali came in the courtyard. In the meantime, Md. Nazir after opening door had fled away by scaling the wall and thereafter she disclosed about the said occurrence to her mother, aunt and Kusahawali. Thereafter her mother and father went to make complaint to the family member of Md. Nazir on which they stated for panchayati and in panchayati Md. Kayum, Md. Kari and Md. Mahfooz refused to accept the verdict and Md. Mahfooz fled away with Md. Nazir.

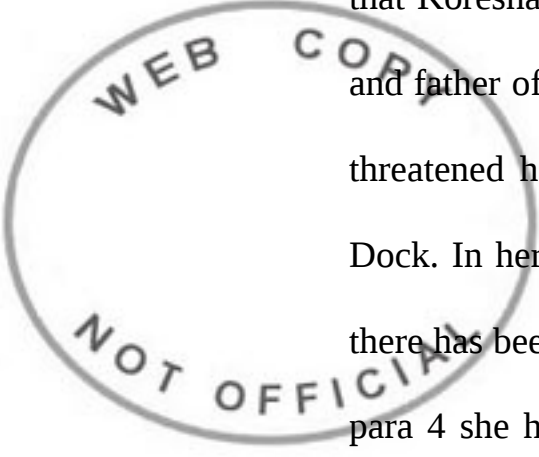
4. On the written report of the informant Koresha Khatoon, the First Information Report was lodged on 13.11.2011 at 6:30 A.M. and investigation proceeded. During investigation Salwar of the informant was present and production-cum-seizure list was prepared,



thereafter further statement of the informant was recorded. The Investigating Officer inspected the place of occurrence. The place of occurrence is the house of Md. Islam, recorded the statements of the witnesses. The informant was medically examined and her statement under Section 164 Cr.P.C. was recorded. The Doctors on medical examination of the victim found hymen ruptured old one, vagina admits one finger easily. The vaginal swab taken for medical examination. The Medical Board found the age of the informant to be 18 years and the Medical Board stated that no medical evidence of rape was found. The police after investigation submitted charge-sheet for the offence under Sections 376 and 402 of the Indian Penal Code. After submission of the charge-sheet, cognizance was taken, case committed to the Court of Session and after commitment charge was framed under Sections 376 and 342 of the Indian Penal Code and trial proceeded. During trial, 12 witnesses were examined by the prosecution.

5. P.W. 1 is Abdul Rajak, who has been tendered by the prosecution and in his cross-examination he has clearly stated that he knows nothing regarding the said occurrence.

6. P.W.2 is Amira Khatoon (Kusahawali) who has stated that she called Koresha Khatoon to lift the bag of paddy, who came and lifted the bag. Thereafter, she went out side of the courtyard and proceeded to mill and when she returned she saw that the appellant and



Koresha were doing wrong act (rape was being committed). She found that Koresha was being raped. Thereafter she raised alarm and mother and father of Koresha came there and thereafter the accused Md. Nazir threatened her. The witness has identified the accused present in the Dock. In her cross-examination she has stated that after 4 to 5 houses there has been the house of Koresha Khatoon-the victim of this case. In para 4 she has stated that at the mill of paddy crusher machine there were 10 to 15 persons and mill was operative. In the aforesaid para she has stated that she proceeded towards the mill at 4:00 P.M. and returned after half an hour. In para 5 of her cross-examination she has stated that the door of the house was closed and she was alone in her courtyard and when she opened door she found that Nazir was committing rape with Koresha. When she entered in her room, Nazir jumped to flee away. She tried to catch hold of him but he fled away. After fleeing of Nazir the mother of Koresha and father came and she has further stated that Koresha was brought by her parents to her house. In para 6 of her cross-examination, she has stated that there are three rooms in her courtyard. She has stated in para 7 that she has given statement before the police and she has further disclosed the name of mill owner as Farmood. She has two sons, aged about 5 and 3 years. She has further disclosed the boundary of her house and lastly she has denied that she has wrongly deposed and flatly denied that Nazir was

working at Delhi and engaged in private job.

7. P.W.3 Md. Mazid has deposed that while he was coming from the house of his Samdhi Nathuni of the same village Khilhi and reached near the house of Kusahawali, wife of Lal Mohammad then he heard cry of a women and when he entered in the courtyard, he saw that Nazir was fleeing away from the courtyard and when he wanted to catch hold of him he jumped the wall and fled away. Thereafter the informant and the witness entered in a room and found that Koresha was almost naked, who narrated the witness that Nazir has committed rape with her. In the meantime, the mother and father of Koresha came and brought Koresha to their home. In his cross-examination, this witness has stated that house of Koresha is situated in same muhalla where she lives. In para-5 of his cross-examination this witness has stated that he heard the cry of Koresha Khatoon from his door and in aforesaid para he stated that when he entered in the house of Kusahawali he saw fleeing of the accused Nazir and stated that he remained in courtyard for ten minutes and in courtyard there was no gate and room was opened. Koresha was naked. In para 7 of his cross-examination this witness has stated that he has given statement after two days of the occurrence in the courtyard of Kusahawali and lastly this witness has denied the suggestion that no occurrence as alleged and deposed by her has taken place.

8. P.W.4 Md. Jalil has stated that at 4:00 P.M. when he reached near the house of Kusahawali then saw that noise was coming from the courtyard and when he entered in the courtyard he found that the accused Md. Nazir was fleeing from courtyard and the informant was weeping in room and she was in naked position. On query the informant told him that Md. Nazir had forcibly committed rape with her.

9. P.W.5 Md. Yashin has been tendered.

10. P.W.6 is Md. Mustaque, who is brother of the informant, Koresha Khatoon has stated that when he returned home after purchasing vegetables he found that the informant was not present. He started searching the informant with his mother. Thereafter, he heard noise from the house of Kusahawali who is wife of Lal Mohammad and when he entered in the courtyard he found that the appellant, after committing rape with his sister, was coming from the house. He tried to catch hold of him but he fled away. At that time the informant was naked and on enquiry the informant told him that the appellant has committed rape with her twice.

11. P.W.7 Md. Farmood has stated that on hearing noise in the courtyard of Kusahawali he reached there and saw that the mother of the informant was providing cloth to her and there he came to know that the appellant has committed rape with the informant.

12. P.W.8 Koresha Khatoon is the informant-victim herself and she supported the prosecution case stating that while she was going to bath for bringing grass then Kusahawali called her and requested her to lift bag. She went in the courtyard and lifted the bag and Kusahawali went from there. When she was returning from the courtyard in the meantime the appellant, who concealed himself in the room of Kusahawali, came there and shut her mouth and caught hold of her and pushed her on Palang. He pulled the cord of Salwar and started committing rape with her. In her cross-examination she has stated that the appellant had threatened her to kill.

13. P.Ws. 9, 10 and 11 are the Medical Officers who conducted the examination of the informant and they assessed her age as 18 years, but they found no medical evidence of rape.

14. P.W.12 is the Investigating Officer of this case who conducted the investigation and submitted charge-sheet. The informant was examined and her statement recorded under Section 164 of the Cr.P.C. The medical evidence has been proved marked as Exts.2, 2/1 as well as 2/2. The documentary evidences were proved. Ext.1 is the signature of Md. Mustaque on the fardbeyan, Ext.1/1 is signature of Farmood on seizure list, Ext.3 is the endorsement of Officer-in-Charge of Laukaha Police Station on the written application of the informant and Ext.4 is the formal First Information Report, Ext.5 is the seizure

list.

15. The defence of the accused person as appeared from the trend of cross-examination and suggestion is that the accused person has falsely been implicated in this case and no occurrence, as alleged, has occurred as no rape has been committed and appellant has falsely been implicated due to enmity and the false case was instituted to extract the money.

16. The trial Court taking into consideration the evidence of the witnesses, convicted the appellant and sentenced as mentioned above.

17. Learned counsel for the appellant has challenged the judgment of conviction and order of sentence recorded by the trial Court. It has been contended that the evidence of the informant suffers from various infirmities and there is inherent contradiction in the evidence of the prosecutrix. It has further been contended that though the informant stated in her fardbeyan as well as in evidence that the appellant had closed the door and window and when she cried the witnesses came whereas evidence of P.W.2 Kusahawali is to the effect that when she returned after husking the paddy from the rice mill, she saw some wrong work being done by the appellant and the informant and when she entered into the house and opened the door of the room, she saw that Md. Nazir was committing rape on the person of the

victim (informant). It has further been contended that there is no chemical examination of the clothes of the informant.

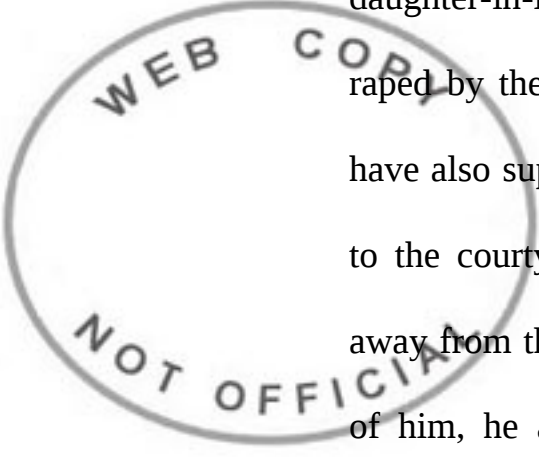
18. Learned counsel for the appellant further submits that the case of the prosecution is that the informant was forcibly raped but the fact remains that she was taken in the room and kept in the room for two hours as per the statement of the informant herself and it is stated that she remained in room but she did not make any cry and her evidence is contradicted with evidence of P.W.2 who stated that when she returned after husking the paddy and opened the door, then she found both lying on the cot and thereafter the appellant tried to flee away and hence, he contended that there is element of consent and, therefore, the prosecution has not been able to prove the charges beyond reasonable doubt.

19. Learned counsel for the State, however, opposed the contentions made by the learned counsel for the appellant and submitted that P.W.2 has specifically stated that when she came, she saw that both of them i.e. the appellant and the informant were doing wrong act. It has further been contended that the informant herself stated that she was forcefully taken and raped and on hulla the witnesses collected and saw the informant in naked state and disclosed about the rape and hence, witnesses have stated that on hulla when they reached the courtyard of Kusahawali, they saw the appellant fleeing

away and though an attempt was made to catch hold of him, but he managed to flee away. Therefore, there are evidence regarding the rape and the evidence of the doctor is only corroborative evidence and even if the evidence of the Doctor has not supported the rape, there are sufficient evidence to hold the appellant guilty and moreover the informant herself specifically stated that she was forcefully raped.

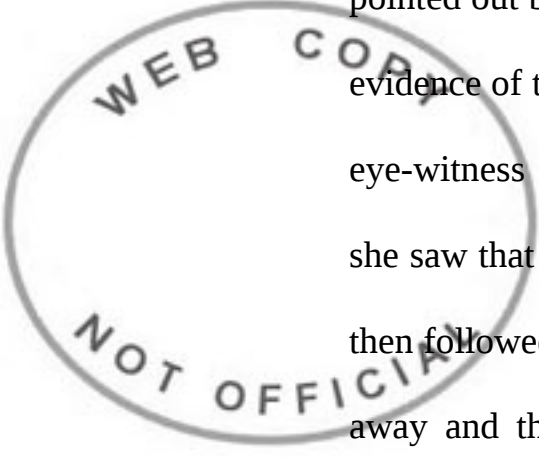
20. Having regard to the respective submissions of the parties, the question for consideration is whether the prosecution has been able to prove the charges against the accused beyond reasonable doubt.

21. However, going into the said question, the prosecution case in the First Information Report itself shows that Kusahawali, the daughter-in-law of Islam Mian asked the informant to help her for lifting the paddy bag while she was going to her field. Then the informant came to the courtyard of Kusahawali for lifting the paddy bag of Kusahawali, the daughter-in-law of Islam Mian. After lifting the paddy bag on head of Kusahawali, the daughter-in-law of Islam Mian went to rice mill for husking the paddy and while she was returning after husking paddy then she saw the rape having been committed by the appellant on the person of the informant. The informant, who happens to be the victim herself has also supported the prosecution case that she was caught hold by the appellant and her mouth was closed, she was taken in the room and then she was raped twice and then he



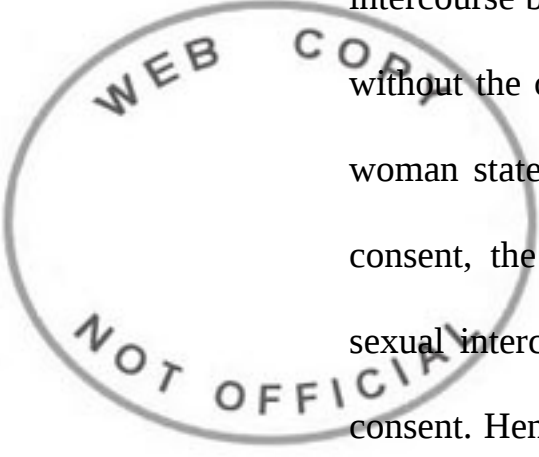
managed to escape and then her mother, aunt and Kusahawali the daughter-in-law of Islam Mian came, who all saw the informant being raped by the appellant. On hulla P.Ws. 3, 4, 6 and 7 came and they have also supported the prosecution case that on hulla when they went to the courtyard of Kusahawali, then they saw the appellant fleeing away from the courtyard and when an attempt was made to catch hold of him, he anyhow managed to flee away by scaling the wall and thereafter they saw the informant in naked state and the informant disclosed about commission of rape by the appellant and hence, the evidence of these witnesses P.Ws. 3, 4, 6 and 7 corroborated the statement of the informant regarding the rape.

22. However, the criticism has been raised about the inherent contradiction in the evidence of P.W.2 as pointed out by the learned counsel for the appellant that the informant has stated that the door and window were closed. However, closing the door and bolting the door is a different connotation. It has not been stated that the door was closed by bolting it and hence, mere closing of the door without bolting it can well be inferred. The doctor though has opined that there is no sign of rape, however, to constitute an offence of rape the mere touching of male organ with female private part is sufficient and no full penetration is required. However, in the nature of evidence that Kusahawali and the informant having supported the rape and witness saw accused fleeing



away is sufficient to establish the charge. However, the contradiction pointed out by the learned counsel for the appellant cannot overrule the evidence of the witnesses. The evidence of P.W.2, who claims to be the eye-witness to the occurrence, shows that she specifically stated that she saw that the appellant and the informant were doing wrong act and then followed with the evidence of P.Ws.3, 4, 6 and 7 that accused fled away and then saw the informant in naked state and the informant herself disclosed that she was forcefully raped by the appellant and hence, these evidences cannot be over ruled or disbelieved in view of the infirmities pointed out by the learned counsel for the appellant or the evidence of the Doctors that they did not find the sign of rape. The oral evidences on the face of it are reliable, trustworthy and worthy of confidence and having been corroborated by the other witnesses and hence, it can well be inferred that the prosecution has been able to prove the charge.

23. However, a point has been raised that the informant was a consenting party. There is no defence taken by the accused during the trial that the informant was a consenting party. There is no whisper in the entire evidence, neither is there any suggestion nor even is there any statement under Section 313 of the Cr.P.C. that the appellant has ever whispered that the informant was a consenting party. Section 114A of the Evidence Act provides that in a prosecution for charge of



rape under Section 376 of the Indian Penal Code where sexual intercourse by the accused is proved and the question is whether it was without the consent of the women alleged to have been raped and the woman stated in her evidence before the Court that she did not give consent, the Court shall presume that she did not give consent for sexual intercourse and then burden is upon the accused to prove the consent. Hence, in view of the presumption under Section 114A of the Evidence Act since the appellant herself stated that she was forcefully raped, it cannot be inferred that she was a consenting party. Learned counsel for the appellant, however, tried best to impress that the informant went inside the room after lifting the paddy bag though she alleged that she was taken inside the room by catching hold of her and thereafter she was raped for two hours and as per the evidence of P.W.2, she returned after half an hour after husking the paddy and saw the informant being raped by the appellant in the room having been closed.

24. However, merely, because the informant did not protest or take the risk of her life to resist, it cannot be said that the informant was a consenting party. The argument was advanced that one male may not rape forcefully a woman if she resists. However, it depends upon man to man or woman to woman. A woman may be brave enough to risk her life to protest her utmost with the entire vigor but there may be

women who submit herself against a brutal force. There is evidence that the appellant was threatening to kill and in view of these facts under the facts and circumstances of the case, it cannot be held that the informant was a consenting party since she did not resist to her utmost hence, having regard to the facts and circumstances of the case, I find and hold that there are overwhelming evidence to support the prosecution case regarding the charges and hence, I do not find any merit to interfere with the judgment of conviction dated 04.05.2013 and order of sentence dated 06.05.2013 passed by Sri Ram Vinod Prasad Singh, the learned Ad hoc 3rd Additional Sessions Judge, Madhubani in Sessions Trial No. 248 of 2012 arising out of Laukaha P.S. Case No. 85 of 2011, G.R. No. 1254 of 2011 and the same are hereby confirmed. In the result, the appeal is dismissed.

(Gopal Prasad, J)

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