

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.866 of 2012

Against the judgment of conviction, dated 13.08.2012, and order of sentence dated 24.08.2012, passed by Shri Abhimanyu Lal Srivastav, Additional District and Sessions Judge, VI, East Champaran at Motihari, Sessions Trial No. 600 of 2009 arising out of Pakridayal P.S. Case No. 12 of 2009 G.R. Case No. 135 of 2009

1. Arman Mian S/O Sahebjan Mian @ Mohan Mian Resident Of Village-Harnathpur, P.S.- Pakaridayal, District- East Champaran At Motihari

.... Appellant

Versus

1. The State Of Bihar

.... Respondent

Appearance :

For the Appellant : M/S Rajeev Roy, Sunil Prasad Singh, Rajendra Prasad Sah and Makardhawaj Upadhya, Advs.

For the Respondent : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 03-09-2015

Heard the learned counsel for the petitioner and the State.

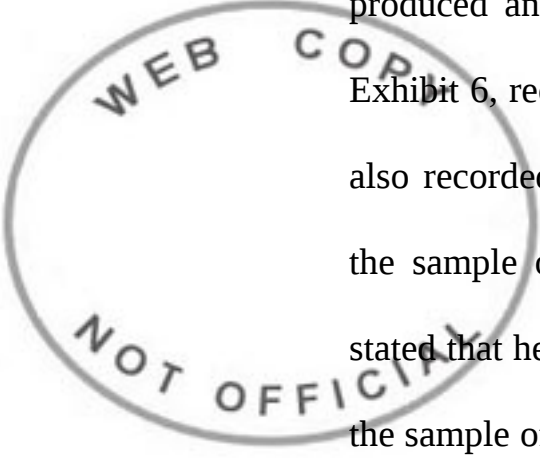
2. The appellant has been convicted under Section 376 of the Penal Code and sentenced to undergo rigorous imprisonment for a term of ten years and a fine of Rs.5000/- and in default of payment of fine has been ordered to undergo further sentence for a term of six months. The said conviction and sentence has been recorded in Sessions Trial No. 600 of 2009 arising out of Pakridayal P.S. Case No. 12 of 2009 G.R. Case No. 135 of 2009 for offence under Sections 342, 323 and 376/34 of the Penal Code.

3. The prosecution case, as alleged in the first information report registered on the fardbeyan of the informant, Ram Eqbal Mahto giving his statement before the Officer-in-Charge of Pakridayal Police Station at village Harnathpur, East Champaran at Motihari, at 04.15 P.M. alleging therein that on 18.02.2009 at about 11.00 A.M. one

Priyanka Kumari, the Sali of his son, Bhikhari Mahto, who used to live in his house since last one year, she had been at the bank of Machhua river which is in the south of the village in Sareh for washing clothes along with one Rani Kumari, the daughter of Bhikhari Mahto, who is neighbour. The informant also had been at the south of village at Sareh for harvesting his mustard crop, he saw Priyanka Kumari and Rani Kumari coming along with the clothes at about 01.30 to 02.00 P.M. Further, case that the informant saw Priyanka Kumari, victim, and she is walking with limping. The, further, case is that the informant also saw Arman Mian coming to the west after crossing the river, hence, the informant anticipated that for some reason Arman Mian may have assaulted Priyanka Kumari and is fleeing away. The informant enquired from Priyanka Kumari for the reason of her weeping, but, she could not explain well. However, enquiry from Rani Kumari it was learnt that Arman Mian, son of Mohan Mian called Priyanka Kumari for uplifting the bundle of harvested mustard and took her across river and, thereafter, take him on his lap and took her on siswani and assaulted. In the meantime, the wife of the informant also came from nearby field, who was harvesting mustard, and enquired from Priyanka Kumari, then, Priyanka Kumari disclosed that she was washing genthra in the river, on it's bank, Arman Mian, son of Mohan Mian, came to her and took her across the river on the pretext of uplifting the uprooted mustard bundle or harvested bundle. She, further, disclosed that after going for

some distance when she could not see any bundle of harvested bundle, then, she was returning back, but, Arman Mian pressed her mouth, took her in siswani and forcibly tried to unclothe her panty. When Priyanka Kumari protested, then, he gave her a slap and asked her to keep quite and by force take out the panty from her legs and, thereafter, raped her by sexual intercourse, then, the victim made a cry out of pain and after some time of the rape Arman Mian flee away. The blood was oozing out from the private part and then the wife of the informant helped her in taking to the house and the informant chased Arman Mian and caught him at and about his house. In the meantime, the elder brother of Arman Mian came to his rescue and he fled away. The, further, case is that Arman Mian was rescued by Ahsan, the brother of Arman Mian and in the meantime several people of the village collected to whom the informant disclosed about the occurrence and then the informant informed the Mukhiya, who informed the police on mobile and gave his statement before the police and also presented the blood stained cloth of Priyanka Kumari.

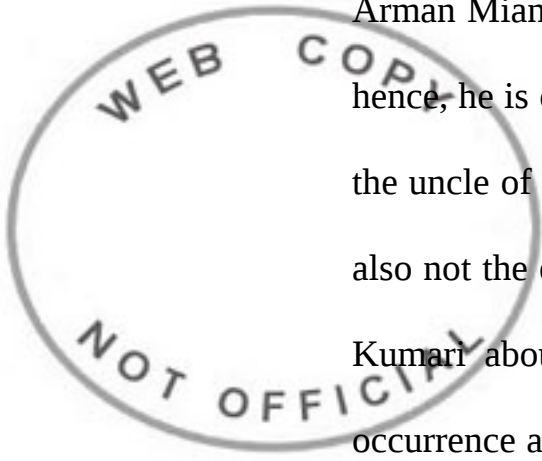
4. On the fardbeyan of the informant (not examined) the first information report was duly signed by a witness, Sukhal Mahto, P.W. 2 and on the fardbeyan of the informant the first information report lodged on 18.02.2009, itself, at 19.00 P.M. After recording the fardbeyan the endorsement was made on the fardbeyan to register Pakridayal P.S. Case No. 12 of 2009 and the investigating officer started investigation. The investigating officer is P.W. 9. During



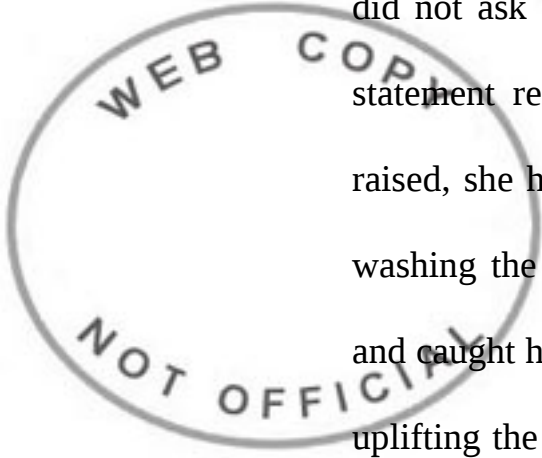
investigation, a panty of red colour containing blood stain and the sign of semen and one another cloth of white colour bearing the blood was produced and for which a seizure list was prepared and marked as Exhibit 6, recorded the statement of the victim, Priyanka Kumari. He also recorded the statement of the other witnesses. He also procure the sample of blood and semen of the appellant. He has, further, stated that he sent the blood stained clothes, produced before him, and the sample of the blood and semen of accused-appellant, Arman Mian, for chemical examination to the Forensic Science Laboratory. Attention of the witnesses has also been drawn regarding the statement made by the witnesses before him under Section 161 of the Criminal Procedure Code supporting the case. Attention of the witnesses has been drawn that the witnesses, Kavita Devi, Sumitra Devi, Rani Kumari, have supported the case of the prosecution and after completion of the investigation investigating officer submitted the charge sheet, and on the basis of the said charge sheet cognizance taken, case committed to the Court of sessions and after commitment the charges were framed against two accused persons, Arman Mian, the appellant and Ahsan Mian for offences under Sections 323 and 341/34 of the Penal Code, charge was also framed against Arman Mian for offence under Section 376 of the Penal Code.

5. After the charges were framed, nine witnesses were examined by the prosecution. However, the informant and his wife not examined. The nine witnesses are P.W. 1, Bhairo Mahto, the son

of the informant, however, he is not the eye witness and has only come to say that he saw his father chasing Arman Mian till the door of Arman Mian and, thereafter, he went and heard about the occurrence, hence, he is only a hear-say witness and not an eye witness. P.W. 2 is the uncle of P.W. 1 and full brother of the informant. However, he is also not the eye witness though he stated that he learnt from Priyanka Kumari about the occurrence, hence, is not an eye witness to the occurrence and he has learnt from Priyanka Kumari about occurrence. P.W. 3 is the victim herself. Her evidence is in three parts. In first part the question was asked about his ability to be an eye witness and the Presiding Officer of the Court observed that as per the question answered by her she appear fit to depose. In her deposition, she has stated that she had gone to the river to wash the clothes along with Rani Kumari. She has further stated that one boy came, but, she does not know his name and he asked to left the bundle of harvested mustard. When she followed her Rani Kumari was also ready to follow her, but, the boy forbid Rani Kumari to follow and then she went alone along with him. He took the victim, P.W. 3, near the trees of sesame and thrown her on the bundle of mustard. She got injury by the tree of sesame and she became unconscious and then she thereafter did not know what happened, hence, she has not supported the prosecution case about rape on her person in her examination-in-chief. At this stage, the learned Additional Public Prosecution sought permission to cross examine drawing attention of the witnesses that



what where the statement made by her before the police. The permission was granted. In her statement P.W. 3 stated that the police did not ask any question and she has neither been enquired nor her statement recorded by the police. Again, in answer to a question raised, she has stated that she had stated before the police that while washing the clothes Arman Mian, son of Mohan Mian, came to her and caught hold of her and took her for some distance in the pretext of uplifting the bundle of mustard and when she did not see any bundle, then, she was returning, then, Arman Mian closed her mouth and took her in siswani and threw her on the ground and tried to unclothe the panty and when she protested then he assaulted and asked to keep quite and by force untied the clothe, i.e., the panty, out of the leg and raped her. It has, further, been stated that out of pain she made a cry, then, Arman Mian pressed her mouth. The blood oozed out from the private part and went to Hospital where she was treated. She has, further, been deposed in answer to query by prosecution case that blood had not oozed out and she has not gone to Hospital. Again, a question was asked that after that what happened when she comes unconscious, the answer was that she does not know. Again in answer to a question for how long she remained unconscious or she gain consciousness, the answer was that she remained unconscious for two days. Further, in answer to a question where she gain consciousness, she has stated that she took the capsule in the house of Rani Kumari then she got consciousness. She has, further, stated in paragraph 4 of



her deposition that she did not disclose any one anything. She has, further, stated the person who has thrown her on the ground she can not identify even after seeing him. Again, a question has been asked “whether she identified the person who is in dock” she gives the answer “no”, i.e., in negative.

6. Again, a question had been asked that whether it is a fact Arman Mian has done something wrong with her, which she is concealing. The answer has been given in negative. P.W. 4 is Kavita Devi, the full sister of Priyanka Kumari, and she has come to stated that Priyanka Kumari had been with Rani Kumari to wash her clothes at the bank of Kachua River, but, no occurrence happened with her occurred. She had been to wash the cloth at 11.00 A.M. and returned at about 01.30 to 02.00 P.M. and both did not disclose her anything neither any injury on her person nor the blood had been seen there. This witness has been declared hostile and attention has been drawn with regard to her statement and had denied the statement about the occurrence.

7. P.W. 5 is Rani Kumari. She has stated that Priyanka Kumari is her mausi and she had not gone with Priyanka Kumari. However, she also refused to identify the accused.

8. P.W. 6 is Sumitra Devi, the wife of Sukhram. She has also not supported the prosecution case and has been declared hostile by the prosecution.

9. P.W. 7 is Anand Kumar Jha, Advocate Clerk, who has

formally proved the first information report and is a formal witness.

10. P.W. 8 is the Doctor who has examined Priyanka Kumari. He found on public examination second degree of perennial tear implies that hymen torn, hence, he felt no need to write about hyman tear and this type of injury with bleeding and has opined that the injury is due to hard and blunt substance and this type of injury may be caused by rape and he proved his report, Exhibit 3, and has also proved the radiological report, marked as Exhibit 4. P.W. 9 is the investigating officer.

11. On oral and documentary evidence of the witnesses the trial Court convicted and sentenced the appellant, Arman Mian, as stated above. However, Ahsan Mian was acquitted of the charge under Sections 323 and 341/34 of the Penal Code.

12. The documentary evidence is Exhibit 1, formal first information report, Exhibit 2, fardbeyan, Exhibit 3, medical examination report, Exhibit 4 radiological report, Exhibit 5, signatures of witnesses, Exhibit 6, seizure list and Exhibits C/1 and C/2 are Forensic Science Laboratory reports.

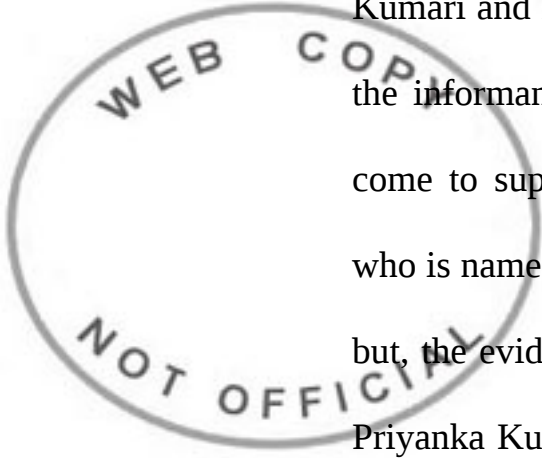
13. The learned counsel for the appellant, however, submitted that virtually it is a case of no evidence. There is no witness to the occurrence. The victim herself has not supported the prosecution case in her examination-in-chief though after declaring her hostile she was permitted to be cross examined by the prosecution and in her evidence though has stated that she stated before the police

about the occurrence of rape, but, in further cross examination, itself, she has refused to identify the appellant and has, further, stated in answer to a question neither the blood was oozed out nor she was admitted to any Hospital and, further, has stated that she has not been identified by accused, hence, the identification of the accused is doubtful. The other witnesses, P.Ws. 4, 5 and 6 have turned hostile and P.Ws. 1 and 2 though have come to support the prosecution case, but, they are not eye witnesses and only hear-say witnesses as disclosed by the victim and they are not reliable. It has, further, been contended that from the evidence of the Forensic Science Laboratory also the clear cut indication is not there.

14. The learned counsel for the State submits that it is true that the victim has been declared hostile, but, from the evidence of the witnesses while declaring her hostile her attention has been drawn to the statement made before the police supporting the prosecution case and this indicates the involvement of the appellant though she has not identified the appellant in Court and refused to identify. However, it can be from the material about the implication of the appellant.

15. Having regard to the respective submissions, the question for consideration whether the prosecution has been able to prove the charge of rape against the appellant is beyond reasonable doubt. However, it is apparent that the prosecution case, as per the first information report on the basis of the fardbeyan recorded by the police officer the statement of the informant, Ram Eqbal Mahto, who has not

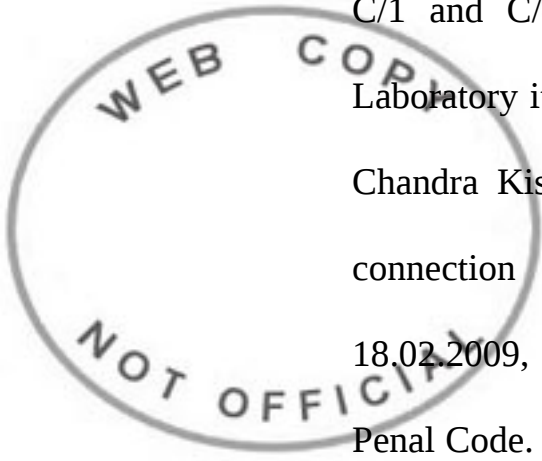
been examined in the case though in the fardbeyan it has been stated that wife of Ram Eqbal Mahto came and enquired from Priyanka Kumari and Priyanka Kumari disclosed, but, unfortunately the wife of the informant has also not been examined as a witness and has not come to support the prosecution case. However, one Sukal Mahto who is named as a witness in fardbeyan has come to depose as P.W. 2, but, the evidence of P.W. 2 is hit by hear-say as he stated that it was Priyanka Kumari who disclosed about the rape. P.W. 1 is the son of the informant, however, has not been named as a witness in the fardbeyan and he has also not claimed to be eye witness, but, only learnt about the occurrence though has stated that while his father was chasing the appellant till his door and Ahsan Mian gave a garasa blow, but, injury has not been proved about this fact. More over, the trial Court has acquitted Ahsan Mian of the charge under Sections 323 and 341/34 of the Penal Code. P.Ws. 4, 5 and 6 have been declared hostile have not supported the prosecution case that the victim was follows by Rani Kumari, P.W. 5 and P.W. 5 has also been declared hostile having not supported the prosecution case. P.W. 4 is the sister of the victim in whose sasural the victim was residing at the time of occurrence and she has also not supported the prosecution case. Hence, the only evidence left is the evidence of Priyanka Kumari, but, in her evidence though it has been stated that she was taken in siswani and was thrown on the bundle of mustard and she became unconscious after receiving injury. However, her statement that she has stated before the police



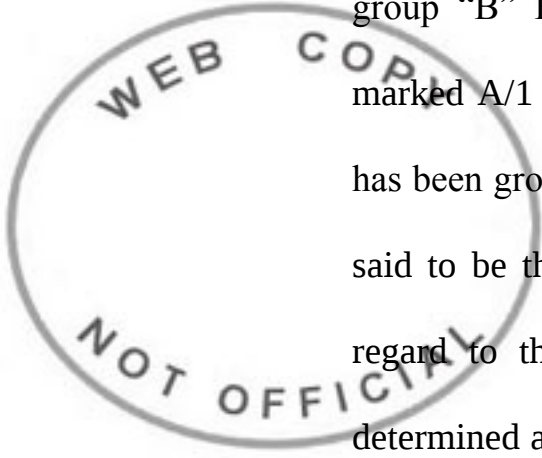
about occurrence, but, when specifically asked whether blood oozed out or whether she went to Hospital, she told that neither blood oozed out nor she went to Hospital and, further, her statement that she did not disclose to any one any fact and she can not identify the person, who had thrown her on the ground even on seeing and, further, her statement that she did not identify the person (accused) in dock, hence, there is no admissible evidence regarding the identification of the accused having committed the occurrence. P.W. 3 has not stated about the identification of appellant and evidence of P.Ws. 1 and 2 is hit by hear-say as they are not the eye witnesses to the occurrence and virtually there is no witness who has come to support about the prosecution case regarding the prosecution case of the appellant.

16. However, the most vital aspect of the case regarding the identification is the Forensic Science Laboratory report and the evidence of the investigating officer. The investigating officer, P.W. 9, in his evidence, has stated that he collected the clothes, panty and a white cloth presented to him for which seizure list was also prepared, which has been marked as Exhibit 6 and he has also stated that he collected the sample of the blood and semen of the victim, which is also matter to be indicate that the victim was raped by the appellant though she has also been examined by the Doctor, however, the document is on record, but, the same has not been proved or marked exhibit. Having regard to the fact that the investigating officer has stated that the sample of the semen and blood of the appellant had

been collected and was sent to Forensic Science Laboratory, reports Forensic Science Laboratory has been proved and marked as Exhibits C/1 and C/2. However, in the report of the Forensic Science Laboratory it has been mentioned that one person, special messenger, Chandra Kishore Singh, has deposited the sample in the office in connection with Pakridayal P.S. Case No. 12 of 2009, dated 18.02.2009, for offence under Sections 341, 323 and 376/34 of the Penal Code. The report, however, mentions that the parcel consists of one plastic dibba enclosed within cloth covered with duly sealed with impression of seal corresponding with the seal impression. It contains two paper packets marked 'A' and 'B' respectively. It has, further, been reported that the packet marked 'A' contains one panty and one cloth piece which were further marked '1' and '2' respectively in the laboratory. The panty marked A/1 bore reddish brown stain over a small area. It also bore grayish white stains which were stiff to feel and which produced characteristic bluish white fluorescence in ultra-violet light. The cloth piece marked A/2 bore reddish brown stains over large areas. It also bore grayish stains which were neither stiff to feel nor did they produce any characteristic bluish while fluorescence in ultra violet light. The serological report on origin and group of blood and semen would follow and the serological report has been marked as C/2, it mentions panty cuttings marked A/1, cloth cuttings marked A/2, reddish brown liquid marked B/1, grayish while liquid marked B/2. The result of serological analysis shows Exhibit marked



A/2 nature of stain blood species of result human and has been found the group "B". A/1 is also shown the semen species or origin human group "B" Exhibit marked A/2 blood human group "B". Exhibit marked A/1 nature of stain blood species of origin result human and has been grouped as "group B". However, Exhibit B/2 nature of stain said to be the semen species of origin result human, however, with regard to the grouping it has been mentioned that could not be determined and there is no mention in the serological report about B/1 regarding it's grouping. However, going through these reports, it is apparent that B/1 and B/2 are the specimen collected from the appellant, but, in serological report there is no mention about the grouping of blood in B/1 found and in serological regarding B/2 the group shows that could not be determined though the panty and clothes produced and sent to the Forensic Science Laboratory. It has been mentioned and marked as Exhibits A/1 and A/2 and report has been given regarding the blood and semen of A/1 and A/2 and the grouping of the blood human of A/1 and A/2, but, the grouping of B/1 has not at all been mentioned in the result of serological analysis whereas B/2 has been mentioned as could not be determined and from these serological reports it can not be specifically stated that the sample of the appellant of blood and semen tally with the panty and the clothes seized by police and again the mystery whether the semen on the cloth and the panty belonged to the appellant as remarks regarding B/2 is that the result of test for blood grouping is



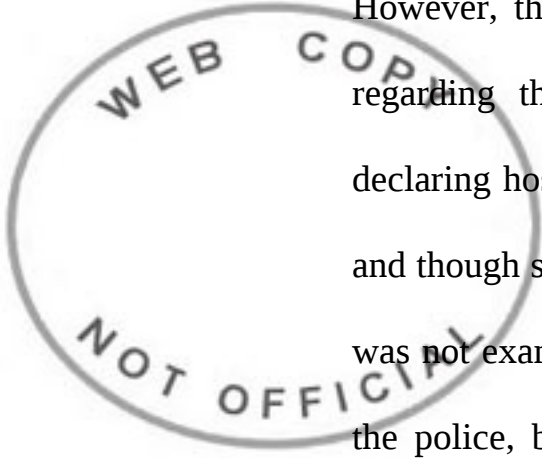
inconclusive. Hence, on the basis of these evidences, as discussed above, the identification by blood and semen sample not established.

Neither there is evidence that P.W. 3 has identified the appellant nor there is any other evidence regarding the implication of the appellant, except hear-say of P.Ws. 1 and 2 and so far the Forensic Science Laboratory's report about the stain of blood and semen on the panty and white cloth produced and the sample taken of the appellant does not match conclusively. Hence, identification of the appellant neither conclusive by the oral evidence nor by the serological report.

17. However, the trial Court has misdirected itself taking into consideration the statement of the victim under Section 161 of the Criminal Procedure Code recorded during the course of investigation by the investigating officer and, further giving a finding that her statement under Section 161 of the Criminal Procedure Code taken by the investigating officer has been corroborated by the investigating officer, P.W. 9, in his deposition in paragraph 11. However, it is well settled that the statement recorded under Section 161 of the Criminal Procedure Code can not be used as corroboration and only to be used for any purpose, except contradiction as per under Section 162 of the Criminal Procedure Code. However, the trial Court misdirected in taking the evidence recorded under Section 161 of the Criminal Procedure Code and the statement of the investigating officer, P.W. 9 that the victim has stated before him the treating as corroboration is against the provision of Section 162 of the Criminal Procedure Code.

The said evidence taken into consideration is not admissible in evidence and trial Court considered the inadmissible evidence.

However, though the victim has not supported the prosecution case regarding the rape in her examination-in-chief and though after declaring hostile she was confronted with her statement before police and though she has specifically stated that no blood oozed out and she was not examined, however, merely stating that she has stated before the police, but, P.W. 3, the victim, has specifically denied to have identified the appellant in Court as per her evidence in paragraph 4 where she has specifically stated that she can not identify the accused who has thrown her on the ground and even has refused to identify the appellant in dock. Hence, there is no cogent and reliable evidence about implication of the appellant more over statement of victim under Section 161 of the Criminal Procedure Code, the deposition of P.W. 9 and the evidence of P.W. 9, the investigating officer, that the victim has stated before him. The said statement can not be taken as corroboration of her statement made under Section 161 of the Criminal Procedure Code to the police or investigating officer. Neither the statement made by a witness under Section 161 of the Criminal Procedure Code can be treated as evidence nor the deposition of the investigating officer that victim had stated before him in admissible in evidence is admissible in evidence nor even be treated as corroboration as per Section 162 of the Criminal Procedure Code, statement made under Section 161 of the Criminal Procedure Code



can not be used for any purpose, except for contradiction to discredit a witness as per procedure prescribed under Section 145 of the Evidence Act. Hence, the conviction recorded on these evidences by trial Court is per specific evidence illegal and is not sustainable in law.

18. The order of conviction and sentence recorded by the trial Court is hereby set aside and appeal is allowed. I find and hold that the prosecution has not been able to prove the charges beyond reasonable doubt, hence, I acquit the appellant of the charges. Since the appellant is in jail, he is directed to be released forthwith, if not wanted in any other case. He is discharged from the liability of bail bond.

(Gopal Prasad, J)

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