

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1062 of 2013

Arising Out of PS.Case No. -85 Year- 2013 Thana -BARHARIA District- SIWAN

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Laddu Mian, Son of Late Amin Mian, resident of Village, Tethali, P.S. Barharia
District -Siwan

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Neeraj Kumar Sanidh (Amicus Curaie)

For the Respondent/s : Mr. A.K. Sinha (P.P)

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

and

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 16-06-2016

Heard learned counsel for the petitioner and learned counsel
appearing on behalf of the State.

Sole appellant Laddu Mian, who has been convicted under
Section 376(2)(f) of the Indian Penal Code vide Judgment dated
19.07.2013 and sentence to undergo Rigorous imprisonment for life as
well as also fined Rs. 10,000/- in default thereof to undergo Rigorous
imprisonment for six months vide order of sentence dated 22.07.2013,
passed by the Sessions Judge, Siwan in Session Trial No. 233 of 2013
has challenged the same under present appeal.

P.W. 1, Nizamuddin filed written report dated 11.04.2013,
disclosing therein that he, for the present was residing in village
Karbala on rent. On the same date (11.04.2013), at about 2.00 P.M.
his cousin brother in law (sala) Laddu Mian of village Tethali



Paschim Tola came at his house in his absence and took away Saral Khatoon, his daughter aged about 3 and ½ years. Saral Khatoon was suffering from fever for last 2-3 days. When he reached at his house, he could not found Saral Khatoon, over which he enquired from Asmina Khatoon daughter, who told that Laddu mama took away the Saral Khatoon. Then he along with his wife had gone to Tethali, where he found his daughter whose clothes were intense with blood and further internal part was also blood stained. Accordingly, he claimed that his daughter has been raped by Laddu Mian. Then, thereafter, he returned back with his daughter.

On the basis of the aforesaid written report Barharia P.S. Case No. 85 of 2013, was registered under Section 376 of the Indian Penal Code, whereupon, investigation commenced, appellant/accused was apprehended, witnesses were examined, the apparels belonging to the accused as well as alleged victim were sent to chemically examination (report has not been received), victim was medically examined and then after completing the same charge-sheet has been submitted. Consequent, thereupon, the offence being exclusively trialed by the Court of Sessions and ultimately taken up by the Court of Sessions and made with conviction and sentence as disclosed above, hence this appeal.

The defence case as is evident from mode of cross examination as well as statement of appellant/accused recorded under

Section 313 of the Cr.P.C. is that of innocence as well as false implication. The other event visualizing from statement of the accused/appellant is to be perceived at the later part of the Judgment. However, neither any material nor any document has been exhibited at the end of the appellant/accused.

During the course of trial prosecution has examined altogether six P.Ws out of whom P.W. 1, Nizamuddin P.W. 2 is Alimunnisha Khatoon (parents of alleged victim), P.W. 3 Asmina aged about 8 years, elder sister of the victim, P.W. 4, Doctor Priyanka who being one of the members of the medical board had exhibited the injury report, P.W. 5 Ram Pratap Singh, Investigation Officer and P.W. 6 Kintul Khatoon (Maternal Grand Mother of the alleged victim) side by side also exhibited exhibit 1 series, medical report as well as radiological report, respectively. Exhibit 2 endorsement over written report, exhibit 3 formal F.I.R., exhibit 4 series production cum seizure list, exhibit 5 carbon copy of requisition relating to medical examination of the victim. As stated above, nothing has been adduced on behalf of the appellant/convict.

From the nature of the evidence having been adduced by the prosecution, it is evident that none is an eye-witness to the occurrence. The victim, being aged about 3 and ½ years, on account of her age has also not been, and rightly not been examined. In the aforesaid background, the case rest upon the theme of circumstantial evidence

and for that, the basic principle happens to be the evidence so adduced be so clinching that it should rule out the possibility of theory of innocence of the accused.

As stated above, P.W. 1 and P.W. 2, parents of the alleged victim, they have clearly stated that Laddu Mian took away the victim in their absence. Whatever being known, that was by their another daughter Asmina khatoon, PW-3. So, the evidence of Asmina Khatoon, PW 3 is to be considered who has clearly stated that Laddu Mian took away victim Saral Khatoon, on the pretext of providing sweat and since thereafter, they were missing. That part of evidence is found further, corroborated by the evidence of PW-6, Maternal Grand Mother of the alleged victim, who had stated that on the alleged date i.e. 11.04.2013, Laddu Mian, had come to her place with the victim and threw her over Chachari (manufactured with the process of bamboo in a country side for facilitating sitting and sleeping). This part is found further corroborated by the admission of the accused/appellant during course of his statement under Section 313 of the Cr.P.C. wherein, he had admitted that he took away the victim on 11.04.2013 and further handed her over to PW-6. Therefore, this part of evidence apart from having consistency at the end of the prosecution evidence, is also found admitted during course of statement of the appellant/convict while examining under Section 313 of the Cr.P.C.



The other circumstance happens to be with regard to definite and proper appreciation of culpability of the accused relating to offence for which he has been convicted. Admittedly, the doctor, PW-4, had during course of her evidence has stated that there was swelling of Labia Mejora however, neither she had opined that it was an outcome of rape nor she had opined with regard to time relating to the aforesaid injury. That means to say that there happens to be complete lack of the material on the record relating to the time of injury and further, whether the aforesaid injuries were created while the victim was under the control of the appellant/convict. As stated above, none is an eye witness to the said occurrence so, it was incumbent upon the prosecution to have substantiated from this PW-4, that the injuries which has been found over the person of the victim was caused while the victim was under the control of the appellant/convict.

Now coming to the oral evidence on this very score to identify whether that remains conclusive to draw an inference against the appellant/convict that he was the author of the aforesaid injuries, the most relevant evidence on this score happens to be that of PW-6, Kintul Khatoon, at whose place the appellant/accused is said to have thrown the victim. In her examination in chief at para 1, she had stated that when Laddu thrown away the victim, then she went to see her she found blood on her apparels. She took out her apparel, washed and further substituted it with the apparels of her grand daughter. On the



same date, about 4.00 P.M., P.W. 1 and P.W. 2 came, identified the girl and took her with themselves. During the course of cross examination at para 8, she had stated that at that very time, she was insider her house. So many villagers were present outside near the victim. The villagers called and further requested her to see as to what has happened. In para 11, she has further stated that her mother took away the cloth which she had washed. She had not received back the apparels which the victim was worn. Therefore, from the evidence of this PW, it is evident that there was no blood stain over the cloth, which she has provided to the victim. She has further stated that the clothes which the victim was wearing was taken out and washed away. When the aforesaid event is taken together with the evidence of PW-1, who had stated in his examination in chief at para 2, that when he along with his wife has gone to his sasural, he had seen his daughter, Saral lying over the Chachari. Her pant and frock had blood stain. In para 3, he had further stated that his mother in law washed the cloth of his daughter and further provided the cloth of her grand daughter. He had further stated that his mother in law had disclosed that the Laddu Mian hade threw her. Then she again said that they reached at her sasural, mother in law had already given bath to the victim and washed her clothes. In para 4, he had further stated that he also took away the victim along with her clothes at Police Station, where he had produced the clothes.



PW-2, mother of victim has stated that when she reached along with her husband at her naihar, she had seen that her mother had already given bath to Saral, her clothes were washed and she was wearing cloth of her niece. She further disclosed that her mother had stated that Laddu Mian threw her. In para 3m, she has stated that she has seen her daughter. The pajama, which, she was wearing at that very time, was also blood stained. She had taken the victim to Police Station along with the clothes which the police had seized. In para 8 of her cross examination, she had stated that private part of the her daughter was torn and blood was oozing out. She has further stated that she had not taken away those clothes, which were washed away by her mother. Those clothes are lying with her at her house. The clothes which were given by her mother were only produced before the police.

PW-3 is not relevant on that very score.

PW-5 is the Investigating Officer, in para 4, he has stated that after recording statement of informant, Nizamuddin and his wife, Alimunisha (PW-1 and PW -2 respectively), he has seized the clothes of victim having been produced by his father and for that he had prepared production cum seizure list (exhibit-4). From perusal of exhibit -4, it is evident that it does not contain the description relating to presence of blood over the pajama. That means to say that the evidence of PW-2, that there was blood stain over the pajama which

the victim was wearing is found totally negated by this exhibit-4.

At the present stage, the evident of PW-5 is also found relevant, who has stated that the appellant/accused was apprehended as per para 7 of his deposition and further, from the order-sheet dated, 12.04.2013, it is evident that appellant/accused was produced personally, on 12.04.2013, neither any prayer was made on behalf of the Investigating Officer to have examination of accused to verify whether he had indulged in committing rape and further, neither seized nor prayed for examination of the apparels having been worn by the accused. After expiry of three days that means to say that on 15.04.2013, a prayer was made by the Investigating Officer that the apparels of the victim in terms of exhibit -4 as well as apparels of accused should be examined by FSL Laboratory and the same was allowed. Further, till conclusion of the trial neither the Investigation Officer cared to procure the same nor the prosecuting agency made sincere efforts to procure the same.

Thus after proper analyzing of the prosecution witnesses as well as perceiving the statement of the accused under Section 313 of the Cr.P.C., it is evident that following circumstances are emerging there from:-

- (a) Appellant/accused had taken away the victim Saral Khatoon on the alleged date of occurrence.

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- (b) Saral Khatoon was thrown away by the appellant/convict at her Mamhar, at the place of PW-6.
- (c) As per evidence of PW-4, there happens to be some sort of injury over labia mehora of the victim but the following link are found missing:-
- (a) The doctor had not opined the exact time relating to causing of the injuries that means to say the age of the injury which could have encircled the appellant/convict in order that during his custody, the victim has sustained injuries.
- (b) There happens to be inconsistency over presence of blood stain over the clothes having been worn by the victim.
- (c) The clothes which, were washed by PW-6 was never handed to the Investigating Officer
- (d) Absence of FSL report.
- (e) Non examination of accused in terms of Section 53 of the Cr. P.C. on the date of his production and so, the aforesaid deficiency certainly found adverse to the interest of the

prosecution because of the fact that the
aforesaid deficiency is found sufficient to be
linked and further would not allow the
prosecution to infer the only one hypothesis
brushing aside innocence of the accused.

That being so, the Judgment of conviction and sentence dated
22.07.2013, recorded by learned lower Court in Sessions Trial No.
233 of 2013, is set aside, the appeal is allowed.

The appellant is under custody; hence he is directed to be
released if not convicted in any other case.

(Gopal Prasad, J)

(Aditya Kumar Trivedi, J)

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