

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.286 of 2013

Against the judgment of conviction, dated 12.03.2013, and order of sentenced dated 13.03.2013 passed by Mr. Hanuman Prasad Tiwary, Ad Hoc Additional Sessions Judge, IV, Sitamarhi, in Sessions Trial No. 121 of 2011

1. Asgar Ansari @ Asgar Ali Son Of Md. Kamruddin Ansari R/O Village - Kapraul, P.S. - Riga, District - Sitamarhi Shashi Kant Rai Son Of Chet Narayan Rai
.... Appellant

Versus

1. The State Of Bihar
.... Respondent

Appearance :

For the Appellant : M/S Sachidanand Choudhary & Love Kush Kumar, Advs.
For the Respondent : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 01-02-2016

Heard the learned counsel for the appellant and the State.

2. The appellant has been convicted under Section 376 of the Penal Code and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.5,000/- and in case of non-payment of fine to under go further imprisonment for four months.

3. The prosecution case, as alleged in the fardbeyan that the informant, Ravina Khatoon, aged about 14 years, went to meet the call of nature on 19.05.2011 at 08.30 P.M. to the east of her house in a bamboo club along with her niece, Mosarrat Khatoon (P.W. 2), aged 9 years. As soon as, they reached in the bamboo club, then, Asgar Ansari, the appellant, aged 30 years, caught hold of her and did not permit her to flee away and, thereafter, pressed her mouth and thrown her on ground and tied her with clothes and forcibly raped her, though the victim protested, but, the appellant continued the rape. In the meantime, the victim, any how managed to remove the hand of appellant from her mouth and made a cry, then, he left her and flee away towards west and while going he threatened not to disclose about the occurrence else she will be killed. Thereafter, the victim-informant came to her house and

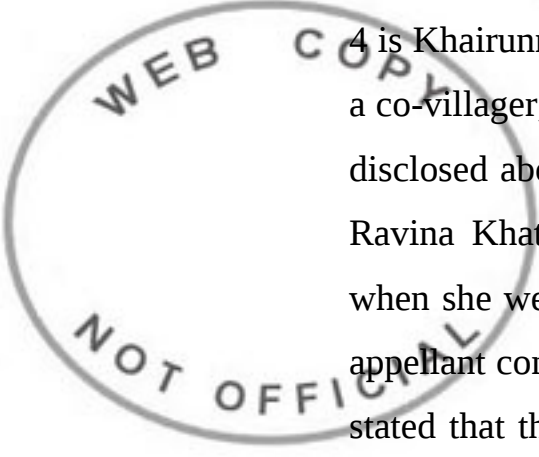
disclosed the fact to mother and, then, the inmates of the house also learnt, but, having regard to the fact that it was late night so the information was not given on that night. On the next day she came along with her father the Police Station and the written report was lodged.

4. On the written report of the victim-informant, the first information report lodged on 20.05.2011 at 04.00 P.M. After lodging the first information report, the investigation proceeded.

5. During the investigation, further, statement of the victim was recorded by the investigating officer, who also inspected the place of occurrence, the bamboo club, mentioned it's boundary, in the east there is banswari of Ganpat, in the west there is banswari of Sandeo Narayan Singh in the north of bamboo club land of Sahdeo Singh and in the south there is parti land of Shiv Dayal Singh. In addition there was also Jamun tree. The victim was sent to the medical officer for examination, thereafter, recorded the statements of the witnesses, procured the medical report and found the victim as minor, thereafter, completed the investigation, submitted the charge sheet.

6. After submission of the charge sheet the cognizance taken and the case committed to the Court of sessions and trial proceeded after framing of charge.

7. During the trial, after framing the charge, eight witnesses were examined. P.W. 1 is Sampat Singh, who is a tender witness. P.W. 2, Mosarrat Khatoon, is the niece of the victim-informant, who followed the victim to the place of occurrence to meet the call of nature and was at the place of occurrence where the occurrence took place and has supported the prosecution case relating to the rape after the appellant having caught hold the victim and thrown her on the ground and raped her. P.W. 3 is Shamsuddin Ansari, the father of the victim and his evidence is to the effect that after the occurrence, the victim came and



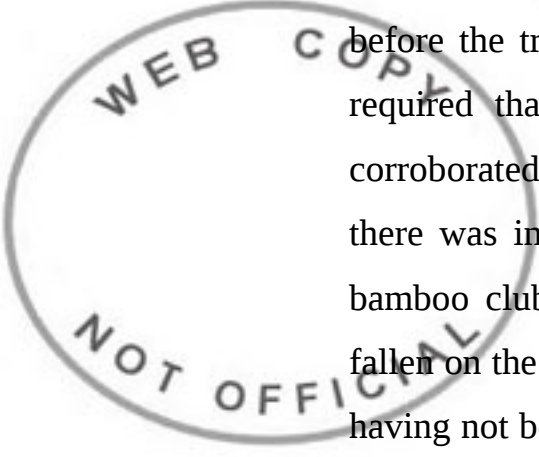
disclose about the occurrence and, thereafter, he went along with the victim to the Police Station where the victim singed the fardbeyan. P.W. 4 is Khairunnisa, the mother of the victim. P.W. 5 is Md. Hadis Ansari, a co-villager, who has come to depose that the victim came weeping and disclosed about the rape by Asgar Ansari. P.W. 6 is the victim herself, Ravina Khatoon, who supported the prosecution case about the rape, when she went to meet the call of nature in the bamboo club where the appellant committed rape upon her. She has, further, stated that she also stated that the appellant given a bite on the cheek of the victim and an abrasion by his nail on her neck. P.W. 7 is Bhudeo Chandra Nayak, the investigating officer of the case, who conducted the investigation and submitted the charge sheet and has deposed that the distance between the house of the victim and the bamboo club is 500 yards. P.W. 8 is the doctor, who examined the victim on 20th May, 2011, at 05.55 P.M. and has not found trauma or injury on any part of the body, hymen old ruptured, vagina admits one finger loose, vaginal swab taken and sent to pathologist and the vaginal swab report shows that spermatozoa nil, pregnancy test negative and has assessed her aged around 15 years and has opined that it is very-very difficult to say that rape has occurred or not and in his cross-examination he has mentioned that no injury found on the body of the victim.

8. The case of the defence, as appear from the trend of cross-examination, the suggestion of two defence witnesses, D.W. 1, Abdul Gaffar Ansari, and D.W. 2, Md. Jabir Ansari, are that both, the victim and the appellant, used to work in a bangles shop and Ravina Khatoon used to prepare nug on the bangles and about one year one month prior to the occurrence, there was some quarrel between them with regard to money and, further, there was some Panchayati between them in connection with the fact that Asgar Ansari has brought some mangoes and Ravina Khatoon has taken those mangoes and in this connection

there was Panchayati and Ravina Khatoon was found at fault for the same by Panchayati and was fined and, since, Ravina Khatoon was unable to pay the amount so instituted false case regarding the forcible rape.

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

10. The learned counsel for the appellant has challenged the order of conviction and sentenced, recorded by the trial Court, on the ground that there are variant discrepancy in the evidence of the victim and her niece. It is stated that in the first information report it has been stated that the appellant took the victim catching hold of her mouth and as soon as they entered the bamboo club whereas in her evidence before the Court she has stated that when she said in the bamboo club, then, the appellant caught hold of the victim and dragged her to the place of occurrence. It has, further, been contended that P.W. 2 remained there at the time of occurrence, but, she did not rush to her house making hulla to inform the inmates of the house and so her conduct is doubtful, as such, her evidence does not inspire confidence and appears to be abnormal and not worthy of reliance. It has, further, been contended that the victim and the witness in their evidences have stated that the victim protested and even alleged that appellant bite her cheek and given an abrasion by nail on his neck, but, the doctor has not found any injury on the person of the victim. It has, further, been contended that as per the evidence of the victim-informant that she was caught hold in the bamboo club while she was sitting and, thereafter, the appellant dragged her to the nearby place, where rape has been committed, but, the investigating officer has not found any mark of dragging in the bamboo club. It has, further, been contended that the clothes, which the victim was wearing at the time of occurrence, some material has fallen out, such as semen, but, the said clothes not presented to the daroga and consequently said clothe was



neither sent to the Forensic Science Laboratory for chemical examination nor the same was given to the police for producing the same before the trial Court, hence, it is contended that the rule of prudence required that the evidence of the victim may be supported by the corroborated material, but, since, the case of the prosecution, itself, that there was injury on her person by the accused was dragged from the bamboo club to place where she was raped and there was something fallen on the clothes, hence, not finding the dragging mark or the clothes having not been sent for chemical examination and the injury having not been found casts serious doubt about the prosecution case. It has, further, been contended that the occurrence took place on 19th May, 2011, but, first information report lodged on the next day, i.e, 20th May, 2011, at about 04.00 P.M. and there is long delay in lodging the first information report and itself indicates that the first information report lodged deliberately after long delay and the element of false implication can not be ruled out.

11. The learned counsel for the State, however, submitted that the age of the victim is 14 years and she is a minor and if her evidence inspires confidence, then, no corroboration is required. It has, further, been contended that the victim, P.W. 6 and her niece, P.W. 2, have supported the prosecution case in the material particular and there is nothing in their evidences to disbelieve the testimony. Further, P.Ws. 3, 4 and 5 have supported the prosecution case that just after the occurrence the victim came in the house and disclosed the fact about rape. It has, further, been contended that the victim has explained the delay in lodging the first information report and has stated that since the occurrence took place in the night and the distance between house and the Police Station is 12 Kms, so they did not go to Police Station in the night and on the next day the matter was reported to the police, hence, the delay has properly been explained. It has, further, been contended

that with regard to the injury the witnesses have stated that a bite was given on cheek, but, blood had not oozed out. As per the evidence of P.Ws. 2, 3, 5 and 6, since, the place of occurrence was a bamboo club there can hardly be any possibility of dragging marks. However, so far the clothes are concerned, it is specifically stated that the clothes were not given as after the occurrence the victim went to the Police Station in a different dress, as she has changed the clothes after the occurrence and at the Police Station they had not brought the clothes which she worn at the time of occurrence.

12. Hence, taking into consideration, the respective submissions, the question for consideration whether the prosecution has been able to prove the charge and whether non-production of the clothes of the victim and not finding the dragging marks as injury, itself, shall be sufficient ground for acquittal of the accused.

13. However, it is well settled that in a case of rape, the evidence of victim is of primary nature, a conviction can be recorded on the sole testimony of the victim, if the evidence of the victim inspires confidence and if there are supporting materials. There is no rule of law required that the evidence of the witness requires to be supported by any corroboration, however, there is rule of prudence though requires corroboration, if there is any doubt on the testimony of the witness.

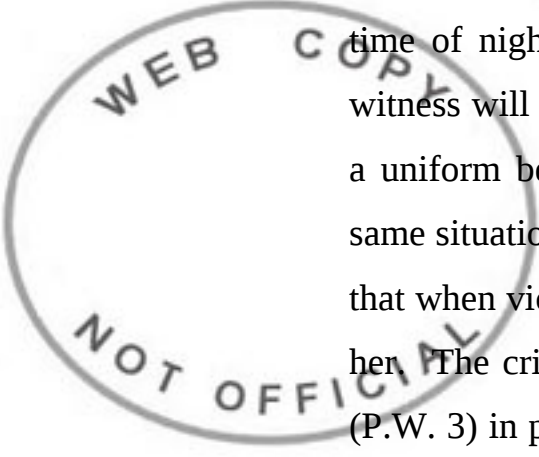
14. However, the fact of the present case that the victim, herself, is a girl aged 15 years, who is the victim of rape and the prosecution case that she went at about 08.30 P.M. on 19.05.2011 to meet the call of nature to the east of her house in a bamboo club along with her niece, Mosarat Khatoon, aged 9 years, and when she reached there, the appellant came, caught hold of the victim, closed her mouth and raped her after tying her hands.

15. P.W. 6 is the victim and she has supported the prosecution case that she went in the bamboo club to the east of her house and while

they were sitting, the appellant came, closed her mouth and dragged her to banswari and raped her. She has, further, stated that he bite her on the cheek and scratch by nail on her neck. She has, further, stated that it was very light with feeble mark. However, this fact has not been mentioned in the first information report though in her cross-examination, she has stated that the bite was on the left cheek and it was soft cut, only once and there was a light sign and the scratch was below the neck by nail and as stated that there was no marks injury, except on the cheek and neck. The doctor has also not found any injury on any part of the body. She has, further, stated that in her cross-examination when she come to the house along with Mosarrat Khatoon, P.W. 2, the niece, after the occurrence and has stated that after occurrence something has fallen out on her kachiya and sameez, but, she has not given the clothes to daroga.

16. P.W. 2, Mosarrat Khatoon, has also supported the prosecution case that she was along with the victim to meet the call of nature and Asgar Ansari took the victim by catching hold of her in bamboo club and raped her. She has also stated that no blood has oozed out by these injuries.

17. However, the criticism has been advanced by the learned counsel for the appellant that the conduct of this witness is as such that when the victim was caught hold by the appellant and was dragged and committed rape, but, this witness (P.W. 2) did not ran to her house and remained all along there during the rape, hence, her evidence is not required to be taken as believable or inspires confidence. However, the prosecution case from the out set that the victim went along with this witness, P.W. 2, to meet the call of nature and there occurrence took place and P.W. 2 is the witness to the occurrence. The criticism advanced by the learned counsel for the appellant that the evidence of P.W. 2 is not acceptable as her behaviour as she did not reach to her home at the time of occurrence. The evidence of investigating officer,



P.W. 7, is that the distance between the house of the victim and the place of occurrence, i.e., the bamboo club, is about 500 yards and it was the time of night at 08.30 P.M. However, there is no set of rule how a witness will behave in a certain situation. It can not be said that there is a uniform behaviour, different person may behave in different way in same situation. P.W. 3 is the father and his evidence is only to the effect that when victim returned, disclosed about the occurrence occurred upon her. The criticism has also been raised on the evidence of this witness (P.W. 3) in paragraph 5 that the informant has stated that the occurrence took place in the different dress whereas it has been stated that she had been at the place of occurrence in a different dress other than the school dress. The evidence of P.W. 3 in paragraph 5, it is apparent that the victim has gone to the Police Station after changing the school dress in which the occurrence has occurred and so the clothes was not given to daroga. P.W. 4 is the mother of the victim and her evidence is only to the effect that the victim disclosed about the occurrence after the occurrence when she came back to the house after the occurrence. However, this witness has stated that she found injury on her body and blood was oozing out and the injury was shown to the doctor. P.W. 5 though the uncle of the victim and his evidence is also to the effect that the victim came weeping along with her niece and disclosed about the rape by Asgar Ansari. This witness also stated that he found the injury by nail and bite on cheek, but, stated that blood was not oozed out, hence, going through the evidence of the witnesses, it is apparent that P.Ws. 6 and 2 have supported the prosecution case about the occurrence that the victim was caught by the appellant when the victim along with P.W. 2 has gone to the bamboo club for meeting the call of nature and where she was raped. P.W. 2 also claimed to be the eye witness to the occurrence. The, further, case that after the occurrence they, P.Ws. 6 and 2, came to the house and disclosed about the occurrence to her

father, mother and uncle, P.Ws. 3, 4 and 5, and supported the prosecution case that they learnt about the occurrence from P.Ws. 2 and 6. However, the criticism, pointed out, that there is delay in lodging the first information report as well as the doctor's evidence is not corroborative, the injury report not corroborating the prosecution story and the dragging marks not found by the investigating officer and the clothes on which it is alleged that the semen has fallen has not been given to daroga, hence, it has been contended that supported material likely to be reliable is not supporting by this corroborative evidence, however, P.Ws. 6 and 2 are the eye witnesses. P.W. 2 is the niece of the victim, aged 9 years, was the person, who was present, at the place of occurrence and has supported the prosecution case. There is nothing in the evidence to disbelieve the testimony, except the submission that the corroborating evidence is not supporting as the injury report of the doctor does not support the injury alleged to have been inflicted on the victim and, further, the fact that the doctor does not have confirmed the rape. However, so far the evidence of the doctor is concerned, the doctor in his evidence has not ruled out the rape though his evidence is that the hymen had old rupture and vagina admits one finger loose, vaginal swab taken and sent to pathologist and the vaginal swab report shows that spermatozoa nil, pregnancy test negative and it is very difficult to say that the rape has occurred or not, hence, the evidence of doctor does not eliminate the rape and his evidence is only to the effect that he is unable to say that whether the rape has occurred or not, hence, having regard to the fact that the evidence of the doctor does not rule out the rape. It can not be said that the evidence of the doctor is not corroborating or it is ruling out the rape and on these evidences the evidence of the doctor it is difficult to say whether rape has occurred or not. Hence, the evidence of eye witness and victim can not be rejected. It has, further, been contended that the doctor has not found spermatozoa

in vaginal test. However, the occurrence took place on 19.05.2011, the medical test has been conducted on 20.05.2011 it has come in evidence that the victim went to the Police Station on the next day after changing her clothes which she had worn at the time of occurrence and in such a circumstance the probability of finding the spermatozoa is very weak if the victim has already taken a bath and there are evidence that the victim went to the Police Station after changing the dress.

18. However, the next criticism the doctor did not find any injury on the person of the victim whereas there is oral evidence of bite on the cheek of the victim by the accused and the scratch on the neck, hence, the ocular evidence is not corroborated by the medical evidence. However, having regard to the fact that there is evidence that the accused bite on the cheek of the victim, but, it has also come in evidence that no blood was oozed out and the scratch on the neck has not caused any bleeding and, further, the doctor examined the victim after more than 20 hours, hence, not reporting the injury on the cheek or neck may not be of much consequence as it has come in evidence there may not to be such graver to be marked after 20 hours. The victim, P.W. 6, and P.Ws. 3 and 5 though have supported the prosecution case about the bite on cheek, but, they have also stated that no blood has oozed out. The doctor not ruled out the rape though he has stated that there is no injury on any part and has mentioned that there is old rupture of hymen and it is difficult to say whether rape has been committed or not, hence, the evidence of doctor not ruled out that rape has not been committed. However, the further criticism that there was no dragging mark, the place of occurrence is a bamboo club and the victim is 15 years old, having caught hold of and taken by the accused may not have created any dragging mark and the next criticism that the clothes not given to daroga and for which it is mentioned that the victim went to the police after changing her clothes as she went there on next day.

19. However, the discrepancy or the criticism, pointed out, that no injury found on the person of the victim, dragging mark not present at place of occurrence and clothes not presented to daroga is not as such to disbelieve the prosecution case in view of the evidence of the prosecutrix and supported by P.W. 2. In view of the evidence of the witness, P.W. 6, the victim, that she along with P.W. 2 went to meet the call of nature, where she was caught hold by Asgar Ansari, who closed her mouth, dragged and raped her and there is nothing in the cross-examination except that something has fallen on her panty and the clothes were not given to daroga and her evidence that there was bite on her cheek, but, it was very light and it is only one bite and there was very feeble mark.

20. The defence of the accused that the accused has falsely been implicated due to quarrel between the victim and the accused about one year and one month prior to the occurrence with regard to the bangles and, further, defence that there was occurrence of assault in regard to collecting mangoes and in which there was Panchayati in which the victim was found guilty and since the victim was unable to pay the amount so instituted a false case and, in this regard, two witnesses, D.Ws. 1 and 2 have been examined. However, the witnesses D.Ws. 1 and 2, in cross-examination, have stated that they have not disclosed this fact prior to their statements in Court and the police have not enquired. They stated that there is no Panchayati in the village and prior to the Panchayati they have not made in Panchayati and there were 50-60 Panches, hence, the evidence regarding the Panchayati does not inspire confidence nor the defence set up has been probablized. D.W. 1 stated that he can not say about the day, month or year of the Panchayati and the prosecution witnesses have denied suggestion about the defence set up. D.W. 2 has specifically stated that the victim never indulged in the work of making bangles, hence, defence set up by the accused has neither been established nor even probablized and there is nothing in the

evidence of the victim to disbelieve her testimony and her version has been supported and corroborated by P.W. 2, who have followed the victim to meet the call of nature.

21. The criticism by the learned counsel for the appellant that the evidence of P.W. 2 is highly improbable and there is inherent infirmity creating doubt about the veracity of the witnesses and has placed reliance upon a decision reported in **(2014) 10 S.C.C., 254 (Munna Vrs. State of Madhya Pradesh)**. However, the matter concerned is the appreciation of evidence and the facts of the case reported in the above case is quite different and no appreciation of evidence is applicable as the facts and circumstances of each case are different. Here, in the case reported in **(2014) 10 SCC, 254** (supra) under the facts and circumstances of that case it was held that the statement was as the victim herself though alleged that two persons raped, but, during her evidence she supported the version against only one accused and there was admitted enmity of the husband of the prosecutrix with the appellant, hence, this peculiar facts and circumstances do not apply to the facts and circumstances of the present case. The learned counsel for the appellant also relied upon decision reported in **(2015) 9 SCC, 91 (State of Madhya Pradesh Vrs. Keshar Singh)**. The matter concerned with the appreciation of evidence, which is not applicable to the facts and circumstances of this case. Further, reliance has been placed on decision reported in **2005(3) P.L.J.R., 638 (Bhola Pandey Vrs. State of Bihar)**, it is a case under Section 302 of the Penal Code where the victim admitted the prior land dispute and the evidence not supported by the medical evidence and P.Ws. 4 and 5 who claimed to be the eye witnesses had not supported the rape and their evidence was only to the extent that the victim was misbehaved and the blouse of the victim was torn by the accused and the accused fled away. The reliance has been placed decision reported in **1991 (1) P.L.J.R., 321**

(Lakshman Nonia & Ors. Vrs. State of Bihar) is a case of murder has totally a different fact. However, reliance has been placed on (2002) 10 SCC, 743 (Sudarshan Sekhar Sahoo Vrs. State of Orissa) for the proposition that the evidence of the prosecution shall be cogent and convincing and if there is any supporting material likely to be available, then, rule of prudence required that evidence of the victim may be supported by such corroborative materials. However, it is well settled that in the Indian context the refusal to act on the testimony of the victim of sexual assault in absence of corroboration as a rule is adding insult to injury.

22. The Evidence Act nowhere says that the statement of the victim can not be accepted unless it is corroborated by material particular and in a rape case it is well settled that the conviction can be based solely on the evidence of victim provided such evidence inspires confidence in the mind of the Court. However, if the Court of fact finds or is hesitant to place implicit reliance on the evidence of the victim it may not look for evidence, which may lead assurance to her testimony. However, taking into consideration the evidence of the victim having supported the prosecution case and the evidence of P.W. 2 who was all along with the victim has also supported the prosecution case about the rape and there evidences have not suffered from any infirmity and they claim to be the eye witnesses and the defence set up has neither been established not having been probabilized to reject the testimony of this witness though the criticism that the evidence of P.W. 2 is highly improbable that it is not expected that when the appellant kidnapped the victim, P.W. 2 did not choose to rush to her house to inform the inmates of the house and remained there. However, the place of occurrence was about 500 yards from the house of the victim as apparent from the evidence of the investigating officer and it was night, it was difficult to say about the behaviour of any person that how he will behave in a

particular situation though P.W. 2 responded and has stated to have made hulla and for that reason that she did not rush to her house making hulla is no ground to disbelieve her testimony. The conduct of P.W. 2 can not be said to be improbable to disbelieve the prosecution case at this score.

23. Hence, having regard to the fact, I do not find any infirmities as the evidence of prosecutrix supported and corroborated by P.W.2 and, further, they stated the fact to P.Ws. 3, 4 and 5, hence, the evidences of P.Ws. 3, 4 and 5 corroborate the evidences of P.Ws. 2 and 6, I do not find any merit in this appeal as the prosecution has been able to prove the charge beyond all reasonable doubts and do not want to interfere with the order of conviction and sentence, recorded by the trial Court, is hereby **confirmed**.

24. This appeal is **dismissed**.

(Gopal Prasad, J)

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