

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 767 of 2015

Against the judgment of conviction dated 06.10.2015 and order of sentence dated 08.10.2015 passed in Sessions Trial No. 373 of 2010 arising out of Hajipur Sadar P.S. Case No. 217 of 2010 by Sri Beni Madav Pandey, the learned Additional Sessions Judge-III, Vaishali at Hajipur

Sanjay Sah, S/o Shri Chaturbhuj Sah, Resident of Village - Manua, P.S. Sadar Hajipur, Dist Vaishali at Hajipur

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : Mr. Yashraj Bardhan, Advocate

For the Respondent : Mr. Binod Bihari Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 06-05-2016

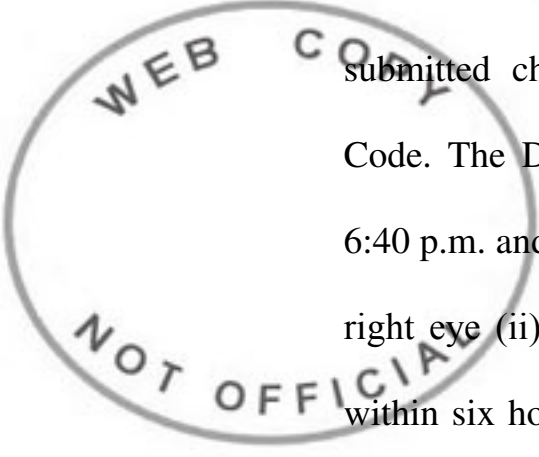
Heard learned counsel for the appellant and the State.

2. The appellant has been convicted under Section 376(2)(g) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.5,000/- and in default of payment of fine to undergo additional imprisonment of two months.

3. The prosecution case, as alleged in the First Information Report by the informant, Soni Kumari, aged about 14 years, is that on 25.06.2010 at about 12:00 noon she went to attend the call of nature in the Hata of orchard of Raj Kishore Thakur situated at Ismilepur and in the meantime, Sanjay Sah (the appellant) came there along with a boy to whom she did not identify. On seeing them coming towards her she stood up in the said Hata, in the meantime both reached near her and caught her. When she made a cry then both pressed her mouth and eyes

with their hands and thereafter threw her on the ground and committed rape with her by untying her Salwar and Panty. The blood started oozing out from her private part and she became unconscious. When she got consciousness she saw that Sanjay Sah and his associate have left away leaving her. Thereafter she wore her clothes and proceeded towards her house and informed about the occurrence to her mother Santi Devi (P.W.5) and her Bhabhi Kanchan Devi (P.W.6). They saw her clothes besmeared with blood and brought her to the Sadar Hospital, Hajipur where she made the statement with regard to the rape.

4. On the basis of the fardbeyan, First Information Report was lodged and investigation proceeded. However, during investigation, the Investigating Officer (P.W.11) recorded the further statement of the informant and the mother of the informant, Santi Devi, as also the other witnesses, inspected the place of occurrence as per the disclosure by the witnesses. The place of occurrence has been stated to be at Ismilepur in between the way of land of Bhubneshwar Shukla and Lal Babu Bhagat and to the west of the place of occurrence there is orchard of mango and banana of Bhubneshwar Shukla and to the east of the place of occurrence there is orchard of banana of Lal Babu Bhagat. He further stated that the place of occurrence is the lonely place. He has further stated that beside the place of occurrence there is tree of Pepal and Toddy and to the north of the place of occurrence there is banana orchard of Shatrudhan Sharma and to the south there is a land of Bhubneshwar Shukla and Lal Babu



Bhagat. He recorded the statement of the victim before the Magistrate under Section 164 of the Cr.P.C., procured the injury report and submitted charge-sheet under Section 376(2)(g) of the Indian Penal Code. The Doctor (P.W.10) examined the informant on 25.06.2010 at 6:40 p.m. and found these injuries; (i) linear abrasion about 2" just below right eye (ii) swelling $\frac{1}{2}$ "x $\frac{1}{4}$ " just below right eye. The age of injury within six hours. Nature of injury is simple. Weapon used is hard blunt substance. She also found perennial tear $\frac{1}{4}$ " present, bleeding positive. Hymen not intact. She has proved the injury report which has been marked as Ext. 3. The Doctor in paragraph 13 of her deposition mentioned that epithelial cells within spermatozoa can be seen as per the lab. no. 13461, dated 25.06.2010. According to her finding recent sexual activity upon her is proved. In cross-examination, she has stated that hymen not intact means rupturing of hymen. The victim was examined before the Judicial Magistrate under Section 164 of the Cr.P.C. and on completion of investigation, charge-sheet was submitted. After submission of the charge-sheet, cognizance was taken, case was committed to the Court of Sessions and after commitment charges were framed under Section 376(2)(g) of the Indian Penal Code and trial proceeded. During trial, 11 witnesses were examined.

5. P.W.1 Arjun Sah has deposed that when he was going for doing work he saw the appellant and Bhart fleeing away towards Haroli Bhudi Mai Chouk and in the evening he learnt that they raped the

daughter of Birendra Bhagat hence, the evidence of this witness is hit by hearsay.

6. P.W.2 Ranjan Kumar Malakar deposed that he learnt about the occurrence from his wife that the appellant and his associate committed rape upon the informant while she went to attend the call of nature and that she returned crying and her clothes were besmeared with blood and said to have been raped by the appellant and his associate. Hence, his evidence is hit by hearsay.

7. P.W.3 Rajesh Kumar deposed that while he was going to attend the call of nature in the afternoon he saw the appellant and Bharat coming from the orchard of Bhubneshwar Thakur. When he returned his house he heard that rape was committed upon the informant.

8. P.W.4 Birendra Bhagat has deposed that when he was in the Mela then his wife came and disclosed that the appellant along with Bharat Thakur committed rape upon his daughter, the informant.

9. P.W.5 Shati Devi, the mother of the informant, disclosed that her daughter Soni Kumari went to attend the call of nature and when she returned home, she disclosed that the two persons have committed rape upon her and her clothes were besmeared with blood.

10. P.W.6 Kanchan Devi, Bhabhi of the victim, deposed that when the victim returned to her house after attending the call of nature she disclosed about the rape on her and also disclosed the name of the accused-appellant.

11. P.W.7 Renu Devi, neighbour, having sweet shop near the house of the informant deposed that the informant disclosed about the rape by the appellant and she saw Salwar and Panty besmeared with blood.

12. P.W.8 Soni Kumari, the victim herself, has supported the prosecution case as alleged in the fardbeyan as well as recorded her statement before the Magistrate under Section 164 of the Cr.P.C.

13. P.W.9 Rashmi Prasad, Judicial Magistrate-1st Class, Hajipur recorded the statement of the victim under Section 164 of the Cr.P.C. P.W.10 Dr. Meena Verma, who examined the victim. P.W.11 Rajeshwar Kumar Singh, the Investigating Officer of the case. P.W.12 Anil Tiwari has formally proved Exts.3/1 and 3/2.

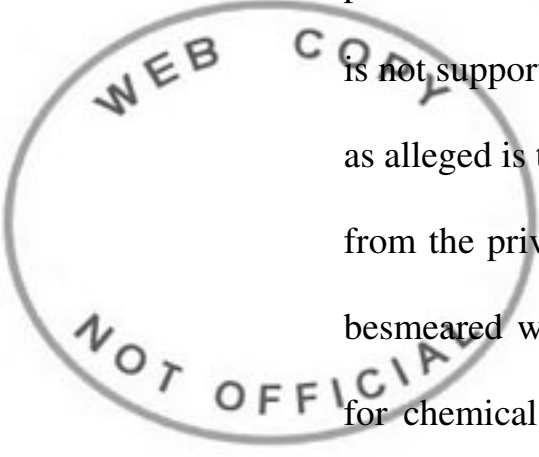
14. The defence has also adduced three witnesses as D.W.1 Urmila Devi, mother of the accused, D.W.2 Chanda Devi, wife of the appellant and D.W.3 Deolal Rai.

15. The case of the defence is that as per the suggestion made by the informant-victim and other witnesses is that on the date of occurrence the informant along with her mother were present in their shop in the Mela and the said shop is near about 5-6 lagga of Budhi Mai Mandir and the appellant had come along with his mother and wife and during sale and purchase of garland and other Pjua article there was quarrel between the mother of the informant and the mother of the appellant and there was some verbal altercation. The mother of the

informant abused the mother of the appellant and the appellant protested the abuse and also the mother of the appellant abused the mother of the informant on which she threatened the appellant to lodge a false case against him and the quarrel was with regard to the sale and purchase of the flowers and garlands and other articles used for Puja in which a demand of Rs.60/- was made instead of Rs.40/-. The further case of the defence is that the informant assaulted the wife of the appellant and 2-3 days of the occurrence the appellant learnt that a case has been filed against him.

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

17. Learned counsel for the appellant has challenged the judgment of conviction and order of sentence recorded by the trial Court on the ground that the occurrence took place at a distance of 10-12 laggas from the house of the informant and it has come in evidence that the Mela place is about 15-20 laggas from the place of occurrence where huge member of people had collected. It has been contended that the occurrence took place in the orchard which is an open place at 12:00 noon and hence, the possibility of the witnesses around the place of occurrence cannot be ruled out as the case of the prosecution is that at the place of occurrence a Mela was being held and further the witnesses in their evidences have stated that they were passing through the place of occurrence and saw the accused persons fleeing away but did not notice



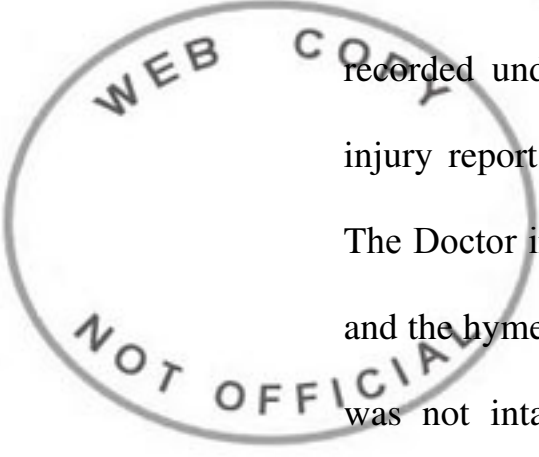
the presence of the informant which casts a serious doubt on the prosecution case. It has further been contended that the prosecution case is not supported by the medical evidence and further the prosecution case as alleged is that the victim was raped due to which blood was oozing out from the private part by which Salwar and Panty of the informant were besmeared with blood but neither the said clothes were seized nor sent for chemical examination and the Investigating Officer has stated that those articles were not produced and hence, one of the most valuable circumstances arising out of rape has not been proved. It has also been contended that the appellant surrendered but his examination under Section 53(a) of the Cr.P.C. has not been conducted. This casts a serious doubt about the investigation apart from the defence taken that the appellant has falsely been implicated for the quarrel between the family of the appellant and the informant and hence, it is asserted that rule of prudence requires necessary corroboration if there is a circumstance showing that there is material to corroborate the prosecution case.

18. Learned counsel for the State, however, contended that the informant is 14-17 years old, supported the case of rape and just after the occurrence she came and reported the matter to her parents. The First Information Report has been lodged within six hours of the occurrence and the fardbeyan was recorded in the hospital where she was admitted after the occurrence on the same day and hence, there is no delay in lodging the First Information Report and the Doctor, who examined the

informant, has found the sign of sexual assault and hence, rape has been corroborated by the medical evidence and, therefore, contended that in a case of rape on the sole testimony of the informant if it is found trustworthy and worthy of confidence then a conviction can be recorded on the said sole testimony of the informant.

19. Hence, taking into consideration the respective submissions, the question arises for consideration whether the prosecution has been able to prove the charges against the appellant beyond all reasonable doubts.

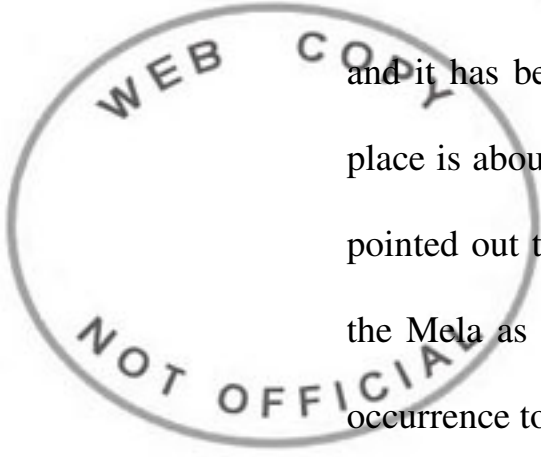
20. However, the prosecution case as alleged in the fardbeyan by the informant is that when she went to attend the call of nature at 12 noon then two persons came out of which she identified the appellant who closed her mouth and committed rape upon her one after another by which she got unconscious and when she regained consciousness she found that the two accused fled away and then came to her house weeping and disclosed about the occurrence to her mother and other family members and thereafter she was taken to the hospital where she was treated, the Police came and where her fardbeyan was recorded, on the basis of which First Information Report was lodged. However, the victim in her evidence has supported the prosecution case and has named the appellant who is said to have committed rape upon her due to which blood was oozing out from her private part, as a result of which her Salwar and Panty became stained with blood and thereafter she returned

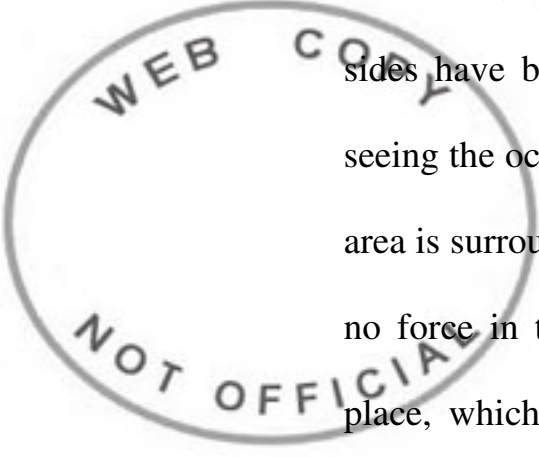


to her house from where she was taken to the hospital where she was treated and examined by the Doctor and thereafter her statement was recorded under Section 164 of the Cr.P.C. The Doctor submitted the injury report and opined that the recent sexual activity has been seen. The Doctor in his evidence found the perennial tear $\frac{1}{4}$ " present bleeding and the hymen not intact. In cross-examination she has stated that hymen was not intact means rupture of hymen and further she also found epithelial cells within spermatozoa seen and hence, sexual assault on the person of the informant was proved by the Doctor and hence, the oral evidence of the informant has been corroborated by the medical evidence. Apart from this, she disclosed that after the occurrence she returned to her house and disclosed about the occurrence to her mother and Bhabhi who have supported the prosecution case that the informant came after attending the call of nature and disclosed that while she went to attend the call of nature she was raped by the appellant and had named the appellant. The other witnesses Renu Devi, Kanchan Devi have also supported the prosecution case that informant disclosed about the occurrence and corroborated the statement of the informant. However, the age of the victim is 14 to 17 years. There is neither anything in her evidence to disbelieve her testimony nor any discrepancy has been pointed out to the evidence of the informant.

21. However, the criticism by the learned counsel for the appellant that the place where the informant went to attend the call of

nature is only about 10 laggas west to her house and further the place where the mela or where the shop of the victim was about 12-13 laggas and it has been asserted that the witnesses have deposed that the Mela place is about 12-15 laggas from the place of occurrence and it has been pointed out that the informant has stated that there was good crowd in the Mela as it was the day of Mela and hence, the criticism is that the occurrence took place at a crowded place, so there was opportunity of the occurrence being seen by several persons, but there is no eye witness to the occurrence. It is a matter of common experience that the occurrence of rape is done in secrecy. However, it is pertinent to mention here that the place of occurrence as per the evidence of the Investigating Officer is a Hata in between the land of Bhubneshwar Shukla and Lal Babu Bhagat. It has further been stated that to the west of the place of occurrence there is orchard of mango and banana of Bhubneshwar Shukla and to the east of the place of occurrence there is orchard of banana of Lal Babu Bhagat. He further stated that the place of occurrence is the lonely place. He has further stated that besides the place of occurrence there is tree of Pepal and Toddy and to the north of the place of occurrence there is banana orchard of Shatrudhan Sharma and to the south there is a land of Bhubneshwar Shukla and Lal Babu Bhagat and hence, from the description of the place of occurrence, it is apparent that the place of occurrence is a lonely place and is surrounded from the three sides by mango and banana orchards. Hence, it is apparent





that place of occurrence is not an open place to be visible from out side and hence, as per the description of the place of occurrence the three sides have been surrounded by the trees and hence, the possibility of seeing the occurrence and to hear the sound of cry are very remote as the area is surrounded by the mango and banana orchards. Therefore, there is no force in the submission that the occurrence took place in an other place, which was visible by the passerby. It is true that some of the witnesses saw the accused persons fleeing away after the occurrence.

22. Learned counsel for the appellant submits that there is variation in the statement of the victim in the fardbeyan as well as in the statement under Section 164 of the Cr.P.C. as well as in her evidence during the trial. However, after going through the said three evidences it is apparent that though in the statement under Section 164 Cr.P.C. a word rape “Balatkar” has not been used but after going through the sum and substance of the allegation, it is apparent that she has specifically stated that she was caught hold by the accused persons and act was committed due to which blood was oozing out from her private part and her clothes i.e. Salwar and Panty had besmeared with the blood and hence, an irresistible conclusion can be drawn that the act alleged is apparently rape. However, the criticism is that each of the three versions is not in same language. However, it is not required that a witness who deposed three times regarding the same occurrence can mention the same words in the evidence. If a witness deposes the same language in all three

statements given at different times and places at different intervals, it can well be stated that it is a parrot like statement and the same may be viewed that the statements suffer from being tutored.

23. However, if the witnesses stated about the occurrence in different mode and manner, it is very natural because the language is used differently as it is not a tutored statement and hence, there is no merit in the submission that there is variation in the words used when it can be well inferred that all the three statements specifically stated about the occurrence and irresistible conclusion is drawn that whatever stated, points out the fact regarding rape.

24. The further criticism by the learned counsel for the appellant is that the victim has not been examined under Section 53(a) of the Cr.P.C.

25. However, having regard to the facts and circumstances of the case, the occurrence took place on 25.06.2010. The appellant surrendered in the Court after one week of the occurrence. However, the examination of the appellant after one week of the occurrence has got no significance under Section 53(a) of the Cr.P.C. as it has been incorporated that if the accused-appellant of a rape case is apprehended just after the occurrence then the examination of his person will afford evidence as to the commission of offence. However, the possibility of finding in such evidence after one week is very remote and the injury

during rape may vanish and hence, the same does not cause any prejudice the defence.

26. The next contention raised that the clothes of the victim were not seized by the police though it has been asserted by the prosecution that the clothes were shown to the police also, but the police did not take the clothes. The police officer stated that there is nothing mentioned in the case diary. However, any lapse on the part of the Police Officer to collect the clothes and send for examination cannot be ground for acquittal when the evidence of the victim found reliable and not suffers from any infirmity and is corroborated by other evidence.

27. However, taking into consideration the facts and circumstances of the case, coupled with the evidence of the informant it is proved that the rape was committed and there is nothing in her evidence as well as in the entire evidence to disbelieve as the victim is a rustic girl and of tender age and her evidence regarding the rape has been corroborated by the medical evidence and the Doctor P.W.10 has corroborated and found the sexual assault on the person of the informant and even the spermatozoa has also been found upon her and the perennial tear and the hymen also found not intact with blood oozing out and the informant was examined after six hours of the occurrence and there is no delay in lodging the First Information Report as the informant immediately admitted in the hospital and her statement was recorded by the Police in the hospital itself.

28. However, the defence set up that the appellant has falsely been implicated for the reason that there was a quarrel between the mother of the informant and the mother of the appellant for demand of Rs.60/- instead of Rs.40/- However, it does not stand to reason that for a dispute of Rs.20/- a false case of rape would be instituted in jeopardy to the own prestige of the victim and her family having consequence and the consequence to be faced in the society losing the prestige and consequence of losing the hope of getting a good marriage of the victim or putting the reputation of the female and family at peril. It is apparent from the Indian society that there is a grave consequence for the victim of rape and hence, the defence set up by the appellant of false implication due to the quarrel is not acceptable under the facts and circumstances of the case.

29. However, having regard to the fact that the allegation regarding the rape, having been supported by the informant is corroborated by the medical evidence as well as evidence of the witnesses that the victim immediately after the occurrence came weeping and disclosed about the occurrence itself is an evidence of corroboration which is followed with the medical evidence and hence, I find and hold that the prosecution has been able to prove the charges levelled against the appellant. I do not find any reason to interfere with the order of conviction and sentence as recorded by the trial Court and the appeal is dismissed.

30. Learned counsel for the appellant contended that taking into consideration the age of the appellant and the facts and circumstances of the case that the appellant is in jail since 01.07.2010 the sentence be reduced to the period undergone.

31. However, having regard to the facts and circumstances of the case, the minimum sentence provided under Section 376(2)(g) of the Indian Penal Code is ten years. The order of sentence is modified to eight years instead of ten years. The appeal is dismissed with modification in sentence.

(Gopal Prasad, J)

Kundan Sharma

AFR/NAFR	NAFR
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Uploading Date	18.05.2016
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