

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.89 of 2015

Against the judgment of conviction, dated 16.01.2015, and order of sentence, dated 20.02.2015, passed by Mr. Ranjan Kumar, Additional District and Sessions Judge, II, Supaul, in Sessions Trial No. 266 of 2011 arising out of Pipra P.S. Case No. 113 of 2011

1. Jitendra Sardar @ Jitendra Kr. Sardar S/o Bhim Sardar Resident of Village Nirmali, Police Station Pipra, District Supaul Appellant

Versus

1. The State of Bihar Respondent

Appearance :

For the Appellant : M/S Ansul, Arun Kumar, Sanjay Kumar @ S.K., Archit Rajpal and Shreyanshu Kumar, Adv.

For the Respondent : Mr. Satya Narain Prasad, APP

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 26-02-2016

The sole appellant has been convicted under Section 376(e)(g) of the Penal Code and sentenced to undergo rigorous imprisonment for ten years and fine of Rs.10,000/- and in case of non-payment of fine to undergo imprisonment for one month. He has, further, been convicted under Section 380 of the Penal Code and sentenced to undergo rigorous imprisonment for seven years. However, it has been ordered that both the sentences shall run concurrently.

2. The prosecution case, as alleged in the first information report by the informant, Satya Narain Sah, son of late Nasib Lal Sah, that in between the night of 6-7 October, 2011 at about 11.00 P.M., one Bhogi Lal Sardar and Jitendra Sardar entered into the house broke opening the door and got over his newly wedded daughter-in-law, Ranjan Devi, with intention to commit rape, then, his daughter-in-law got up and made hulla. In the meantime, Bhogi Lal Sardar put sari in the mouth of the victim, Ranjan Devi, turned her neck by which she got unconscious and when the informant returned after visiting Mela at

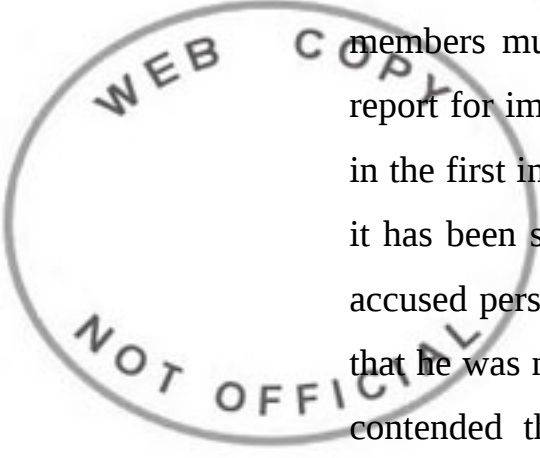
about 01.00A.M., then, saw the door of the house open and when he entered into the house, saw his daughter-in-law, Ranjan Devi, lying unconscious in half necked state and, then, he took her with the help of the villagers, to a private doctor for her treatment and when her daughter-in-law got consciousness, she disclosed that Jitendra Sardar and Bhogi Lal Sardar, both, committed rape upon her one after another and after committing rape took away cash worth Rs.10,000/- and gold and silver jewelleries from the house. The reason for delay in coming to the Police Station for lodging the case is due to the fact that there was matter of compromise going on at the instance of some village politics. The occurrence took place in between the night of 6-7 October, 2011, but, the fardbeyan was recorded on 07.10.2011 at 08.30 P.M. and on the basis of the fardbeyan, recorded by A.K. Jaiswal, Station House Officer, Pipra Police Station, an endorsement was made on the fardbeyan, itself, for registering a case. On the basis of the said fardbeyan formal first information report lodged bearing Pipra P.S. Case No. 113 of 2011, thereafter, the police proceeded for investigation. On 08.10.2011 at about 04.00 A.M. the police raided the house of Bhogi Lal Sardar and Jitendra Sardar and arrested Jitendra Sardar from his house and found accused, Bhogi Lal Sardar, absconding, thereafter, took the arrested accused, at 05.00 A.M., to the house of Satya Narain Sah. There he recorded, further, statement of the informant, also recorded the statement of Ranjan Devi and other family members. He inspected the place of occurrence, the house of the informant, Satya Narain Sah, which is a house of tat and phoos facing north where the occurrence took place. He has given the boundary and, then, took the accused Jitendra Sardar to the Police Station, recorded his statement and it is asserted that he accepted his guilt and disclosed to have committed rape along with Bhogi Lal Sardar and even looted money and jewelleries and when he demanded his share, then, Bhogi Lal Sardar assaulted him by torch. The

investigating officer got the victim examined by doctor and her statement was also recorded under Section 164 of the Criminal Procedure Code, thereafter, completed the investigation and submitted the charge sheet.

3. After submission of the charge sheet, cognizance taken, case committed to the Court of sessions where the charge framed and trial proceeded. During the trial nine witnesses were examined by the prosecution. They are P.W. 1 Shubh Kala Devi, P.W. 2 Pawan Sah, the husband of the victim, P.W. 3 Satya Narain Sah, the informant, P.W. 4 Ranjan Devi, the victim herself, P.W. 5 Ram Munesh Ojha, who is the investigating officer, who submitted the charge sheet only after the investigation handed over to him by the earlier investigating officer, P.W. 6, Braj Kishore Singh, who conducted the investigation. P.W. 7 is Dr. Mahendra Choudhary, who examined the victim along with the medical board. P.W. 8 is Dr. Nutan Verma, the lady doctor, who was also member of the medical board to check-up the victim and P.W. 9 is Dr. Mihir Kumar Verma, who was conducted the microscopic examination regarding the vaginal swab, but, not found spermatozoa.

4. The trial Court taking into consideration the fact that there are multiple injuries on the person of the victim, specifically the impression of teeth over right cheek and other examination found it seems to be case of rape and, further, taking into consideration the evidence of the victim, having fully supported the prosecution case convicted the appellant, as mentioned above.

5. The learned counsel for the appellant, Mr. Ansul, has challenged the order of conviction and sentence, recorded by the trial Court on the ground that there is long delay in lodging the first information report. The occurrence took place in between the night of 6-7 October, 2011, at about 11.00 P.M. to 01.100 A.M. and at 01.00 P.M. the informant had entered the house and saw the victim in unconscious

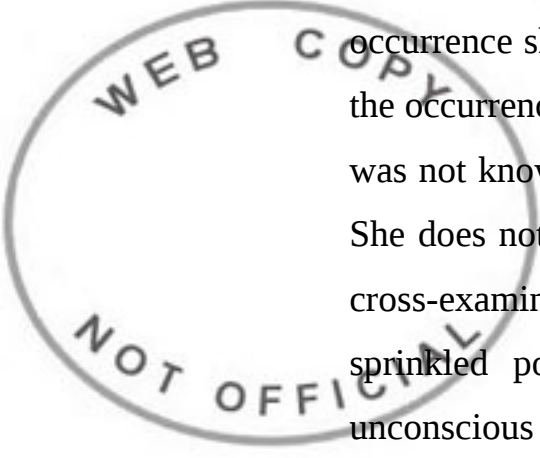


state, but, the first information report has been lodged on 07.10.2011 at 08.30 P.M. It has been submitted that during that period the family members must have due deliberation for lodging the first information report for implicating the appellant. It has, further, been contended that in the first information report as well as in the evidence of the witnesses it has been stated that it was the victim who disclosed the name of the accused persons, but, the victim, in her evidence, has specifically stated that he was not knowing the appellant from before. It has, further, been contended that the prosecution has not made out the case or even whisper in the first information report that the informant or his wife ever seen the accused persons fleeing away at the time of occurrence, however, they have developed the case at the stage of trial that they saw the accused persons fleeing away when the informant entered into the house at the night after coming from Mela, then, saw Jitendra Sardar and Bhogi Lal Sardar coming out from the house of his daughter-in-law and fleeing away on which they challenged the accused persons and it is submitted that this part of the evidence is a further development as there is no such case in the first information report nor even mentioned in the fardbeyan or even in further statement and there is no other evidence of identification by any of the witness and, further it has been pointed out that the conduct of the police in the case that after lodging the first information report and even without taking further statement of the accused, the conduct of the police is that it straightway went to the house of the accused and even prior to proceeding for further investigation brought the accused to the house of the informant, which apparently appears that the motive was to show the accused to the victim to get him identified for false implication. It has, further, been contended that the victim was pregnant for six months and two persons committed rape on her person and the possibility of abortion can not be ruled out, but, there is no such case. It has, further, been contended that the husband of the

victim was informed in the morning the informant himself came to know about the occurrence at about 01.00 P.M.

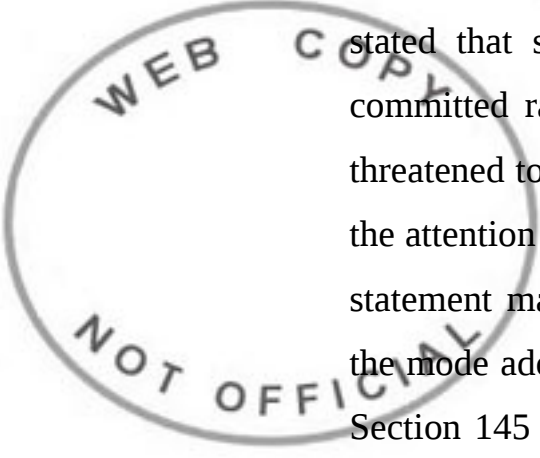
6. The learned counsel for the State, however, opposed the prayer and contended that the prosecution has well proved the case as the statement of the victim, itself, that she has disclosed the name of the accused persons and in her deposition each has allege specifically against the appellant and the medical examination fully corroborates and the doctor has found injuries and even the sign of bite on the cheek, itself, indicates the sexual relation and, further, the injuries and identification, in this regard, is a minor contradiction.

7. However, taking into consideration the respective submissions, I proceed to consider the evidence of the witnesses in the light of the submissions made. However, the prosecution case as alleged in the first information report by the informant Satya Narain Sah that the victim Ranjan Devi was sleeping alone in the house and when in the mid night he came at about 01.00 P.M. in the night, then, he found the house opened and when he entered into the house saw his daughter-in-law, Ranjan Devi, in half necked state lying unconscious then she was taken to local doctor for treatment and even a treatment was made by the local doctor and when she came to consciousness she disclosed the name of Jitendra Sardar and Bhogi Lal Sardar having committed rape one by another. However, P.W. 4 is the victim and she has stated in her evidence that about 10.00-11.00 P.M., on the date of occurrence, in the night, she was at her house and the inmates of the house had gone to attend the shop at Dushehra Mela. She has, further, stated that someone banged upon the door and Bhogi Lal Sardar and Jitendra Sardar entered into the house and when she tried to make hulla they closed her mouth and turned her neck and they first attempted to commit rape and to kill, then, she got fearful and both committed rape one by another. She has, further, stated that they sprinkled some powder by which she got



unconscious and they broke opened the lock and committed theft of jewelleryes and cash. However, this witness has stated that at the time of occurrence she had a pregnancy of five months and after four months of the occurrence, she gave birth to a child. She has, further, stated that she was not knowing Jitendra Sardar from before. She had never seen him. She does not know what he used to do. She has, further, stated, in her cross-examination that at the time of entering into the house they has sprinkled powder on her face and on doing so she has become unconscious and she got conscious at about 01.30 A.M. in the night and she can not say what happened with her during unconsciousness. She has, further, stated that on the next day some people had come and they were discussing with her father-in-law and mother-in-law and after having consultation the case has been lodged as the people advised to her husband, father-in-law and mother-in-law. However, this witness, in her evidence, stated that she was not knowing Jitendra Sardar nor she was identifying him. Hence, prosecution case in the first information report that the victim herself on getting consciousness disclosed about the rape by Jitendra Sardar and Bhogi Lal Sardar caste a serious doubt on the prosecution case regarding the identification by this victim.

8. P.W. 3 is the informant and has stated that that on the date of occurrence at about 11.00-12.00 P.M. his daughter-in-law was at the house and he along with his wife and sons, Pawan Sah and Raman Sah were attending the shop and about 12.00 to 01.00 A.M., in the night, came to his house. He has, further, stated that when he reached in the court-yard, along with his wife, he saw Jitendra Sardar and Bhogi Lal Sardar coming out from the house of his daughter-in-law and fleeing away. He has, further, stated that he even challenged them to stay, but, they managed to flee away. He has, further, stated that light was burning in verandah and in the said light he identified the accused. He has, further, stated that his wife went inside and saw the daughter-in-law in

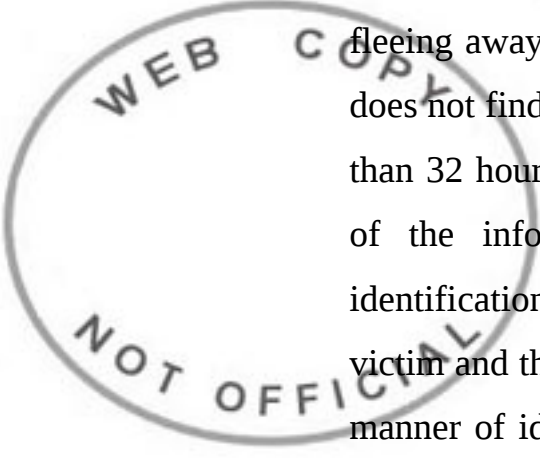


unconscious and half necked state and found sign of injuries on her person, then, taken the victim to the village doctor. He has, further, stated that she disclosed that Jitendra Sardar and Bhogi Lal Sardar committed rape on her one by another and then, turned her neck and threatened to kill. However, this witness is the informant. It is true that the attention of this witness has not been drawn with regard to his earlier statement made before the police to record a contradiction. However, the mode adopted by the defence has taken otherwise as provided under Section 145 of the Evidence Act to record contradiction. His attention has been drawn with regards to the statement made by him in the Court and has stated that he had stated before the police these facts what he deposed in the first information report regarding the fact that when he entered into the court-yard, saw the accused, Jitendra Sardar and Bhogi Lal Sardar, fleeing away from the house. However, statement made by this witness either in the first information report or in the statement before the police has not been drawn nor the investigating officer has been asked what this witness has stated before him (the investigating officer). The same repetition has been made and the investigating officer has stated that the informant has not stated whatever he stated before this Court in his deposition, but, it has not been brought on record that what the informant had stated before the police, hence, the procedure mentioned under Section 145 of the Criminal Procedure Code for recording contradiction has not been followed. However, the fardbeyan of the informant on record and the Court got the opportunity to see the fardbeyan. The statement by this witness recorded by the police under Section 154 of the Criminal Procedure Code, which has been proved and marked as Annexure 2. However, in the fardbeyan which is the earliest version recorded under Section 154 of the Criminal Procedure Code of this witness, there is no whisper that this witness had stated that when he entered into the house along with his wife, he saw the accused persons

fleeing away from the house of his daughter-in-law nor it has been mentioned that they identified in the light of verandah and the light was burning in the house of his daughter-in-law, hence, this part of evidence apparently appears to be a development during the trial and this fact of evidence can not be believed.

9. P.W. 1 is the wife of the informant and she has stated that at the time of occurrence she was at her shop of her son in the Mela and she has stated that in the Mela she was along with her sons and husband and in the night at about 01.00 A.M., she along with her husband, P.W. 3, came, then, saw the house is open and the victim, daughter-in-law, lying unconscious and it was daughter-in-law, who disclosed the names of Jitendra Sardar and Bhogi Lal Sardar. However, this witness does not support the prosecution case or the evidence of her husband, the informant, that she identified the accused fleeing away at the time of occurrence from the house of her daughter-in-law has not been supported by this witness. Hence, the evidence of P.W. 3 regarding fact that when he entered into the court-yard along with her wife then saw Jitendra Saw and Bhogi Lal Sardar fleeing away from the house of their daughter-in-law. Though P.W. 3 claims that he was along with his wife, when, they entered into the house and the wife is P.W. 1. She does not support that she identified any one fleeing away when she came to the house rather her evidence is only to the effect that the victim disclosed the names of Jitendra Sardar and Bhogi Lal Sardar.

10. Further, the conduct of the investigating officer that even before proceeding for investigation, he proceeded to the house of the accused and caught hold of the accused from his house and brought him to the house of the informant, itself, indicates something hanky-panky. More over, the delay in lodging the first information report, itself, creates a doubt under the facts and circumstances about the prosecution case that the first information report has been lodged with due



deliberation, particularly, in view of the fact that if the evidence of P.W. 3 the informant is disbelieved to the effect that he saw accused persons fleeing away from the house of her daughter-in-law as pointed out, but, does not find mention in the fardbeyan recorded at the earliest after more than 32 hours of the occurrence, when the occurrence came to the light of the informant, hence, there are two evidences regarding the identification of the accused-appellant. One is the identification by the victim and the other is the identification by the informant. However, the manner of identification indicated by the informant does not find place in the fardbeyan and the evidence regarding the identification of the victim stand doubted in view of the evidence of the victim that she was not knowing Jitendra Sardar from before and her evidence that she has never seen him, hence, it becomes highly doubtful that how the name of the accused came in the first information report. However, with regard to the other evidence that there are evidence of rape and the injuries found on the person of the victim as stated by the doctors, P.Ws. 7, 8 and 9 though the injuries have been shown by lady doctor, Dr. Nutan Verma, and found other injuries on the person of the victim which indicate and point towards the commission of rape on her person. The argument that the evidence of rape is not suitable and is unacceptable that in case of rape of a pregnant lady having six months pregnancy the probability of abortion is bit large, however, it varies person to person, but, the issue is not relevant. The serious aspect of the matter is the identification of the appellant by prosecution.

11. However, having regard to identification of the accused that the prosecution case has developed story and the evidence led that the accused have been identified by the victim as well as by the informant, however, the evidence of the informant was that he saw the accused persons fleeing away in the night, itself, in the light of verandah as well as the house of the victim does not find support in the first information

report or in his subsequent statement, hence, it is apparently a development during the trial and is not acceptable as the evidence is not cogent, reliable and unimpeachable to be relied upon. So far the evidence of identification by the victim is concerned, in view of her evidence that she was not knowing the name of the accused from before and the prosecution has not been able to show that how the names of two accused were came when the victim was not knowing them and, further, the conduct of the investigating officer that after lodging the first information report he arrested the appellant and brought him to the house of the victim, itself, castes a serious doubt in the manner of the investigation, hence, under the facts and circumstances the appellant has made out a case for creating a doubt and I find and hold that prosecution has not been able to prove charge against the appellant beyond reasonable doubt. The trial Court did not go into the question of identification and development of prosecution case at trial.

12. Hence, the order of conviction and sentenced, recorded by the trial Court, is hereby **set aside** the appeal is **allowed**.

13. The appellant, who is in jail, is directed to be released forthwith, if not wanted in any other case.

(Gopal Prasad, J)

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