

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.347 of 2014

Against the judgment of conviction, dated 17.05.2015, and order of sentenced dated 23.05.2015, passed by Mr. Vinod Kumar, 1st Additional Sessions Judge-cum-Special Judge (SC/ST), Bhagalpur, in Sessions Trial No. 1222 of 2012/T.R. No. 69 of 2012 arising out of Shiv Narayanpur (Kahalgaon) P.S. Case No. 159 of 2012

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Kailash Mandal @ Kalso Mandal, son of Bindeshwari Mandal @ Bindo Mandal, resident of village Kurmi Chak (Parsuramchak) P.S. Antichak, district Bhagalpur
.... Appellant

Versus

The State of Bihar

.... Respondent

With

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Criminal Appeal (SJ) No. 289 of 2014

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1. Shailendra Mandal @ Sadu Mandal son of Late Makki Mandal Resident of village Parsuram Chak (Kurmichak), Police Station Shiv Narayanpur (Antichak), District Bhagalpur
.... Appellant

Versus

1. The State of Bihar

.... Respondent

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Appearance :

(In CR. Appeal (SJ) No. 347 of 2014)

For the Appellant : Mr. Manish Kumar no. 2, Adv.

For the Respondent : Mr. Binod Bihari Singh, APP

(In CR. Appeal (SJ) No. 289 of 2014)

For the Appellant : M/S Dr. Manoj Kumar & Sweety Sinha, Advs.

For the Respondent : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 19-01-2016

Heard the learned counsel for the appellants and the State.

2. both the appeals have been heard together and disposed off by this common judgment as both arise out of same judgment and order, dated 7th May, 2015, passed by Mr. Binod Kumar, 1st Additional Sessions Judge-cum-Special Judge (SC/ST Act) in Sessions Trial No. 1222 of 2012/T.R. No. 69 of 2012 arising out of Shiv Narayanpur (Kahalgaon) P.S. Case No. 159 of 2012, by which the appellant, Kailash Mandal @ Kalso Mandal, has been convicted under Sections 376 of the Penal Code and 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- under Section 376 of the Penal Code and, further, sentenced to undergo rigorous imprisonment for five years under Section 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and to pay a fine of Rs.5,000/- and in default of

payment of fine undergo simple imprisonment for six months. The appellant, Shailendra Mandal @ Sadu Mandal, has been convicted under Section 376/34 of the Penal Code and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- and has, further, been sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,000/- for offence under Section 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and in default of payment of fine to undergo rigorous imprisonment for six months. However, it has been ordered that both the sentences shall run concurrently.

3. The prosecution case, as alleged in the first information report by the informant, Sangeeta Tuddu, that on 26.05.2012 in the evening at 07.00 P.M., Shailendra Mandal called her at Basa to take milk, thereafter, she went to take milk at his Basa where Kailash Mandal @ Kalso Mandal was also there. Further, case is that as soon as she reached at Basa, then, Shailendra Mandal gave signal to Kailash Mandal to take her, on which Kailash Mandal at the point of pistol terrorized her and took her 2 Kms east on Bishanpur Bahiayar orchard near a Khanta and committed rape on the person of the victim, Sangeeta Tuddu, and after committing rape he threatened her not to disclose about occurrence and at about 08.00 P.M., after committing rape, Kailash Mandal took her to Basa of Shailendra Mandal and from there she was taken to her house. On reaching her house, she disclosed the fact to her father, mother and brother, then, her father and brother caught the appellants, Shailendra Mandal and Kailash Mandal, and took them to Antichak Police Station. The, further, case of the victim-informant that she reported the matter and the same was recorded and read over to her and she gave her signature on it. Further, case is that the father and brother of the victim-informant caught hold of accused persons, enquired about the matter on the next date of the occurrence, i.e., on 27.05.2012, and the victim-informant has given her statement.

4. On the fardbeyan of the victim, the first information report lodged, investigation proceeded. The investigating officer recorded the statement of the victim-informant, witnesses, inspected the place of occurrence, victim was medically examined and, thereafter, charge sheet

was submitted under Sections 376 as well as 376/34 of the Penal Code and 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. After submission of the charge sheet the cognizance was taken, case committed to the Court of sessions.

5. During the trial nine witnesses were examined by the prosecution. P.W. 1 is Dilip Yadav, who has deposed that he does not know anything about the occurrence. P.W. 2 is Radha Yadav. He also deposed that he also does not know anything about the occurrence. P.W. 3 is Binod Kumar Tuddu, the brother of the victim though he supported the prosecution case, but, not the eye witness. P.W. 4 is Rajesh Kumar Tuddu. He is also the brother of the victim and supported the prosecution case about the rape and has stated that he learnt about the occurrence on the disclosure of the fact of the victim, Sangeeta Tuddu. P.W. 5 is Sanjhila Tuddu, father of the victim. He has also supported the prosecution case and has also deposed that he learnt about the occurrence from Sangeeta Tuddu when she returned back at about 01.00 A.M. in the night and she disclosed about the rape. P.W. 6 is Anita Baski, the mother of the victim. P.W. 7 is Sangeeta Tuddu, the victim, who supported the prosecution case in the first information report. She has supported the prosecution case about the rape committed upon her by the appellant, Kailash Mandal, that when she went to the Basa of Shailendra Mandal and from there she was taken by force by Kailash Mandal on the point of pistol and she was raped. P.W. 8 is Dr. Pushp Sudha, who examined the victim. P.W. 9 is the investigating officer, Nirmal Kumar.

6. The defence of the accused persons is that the victim has love affairs with the appellant, Kailash Mandal, and she also used to write love letters (Exhibit "A" series) and since the victim fell in love with Kailash Mandal and when Kailash Mandal refused to get marry so the false case has been lodged. The, further, case of the defence is that Sanghila Tuddu has taken milk worth rupees ten thousand which was in arrear of Shailendra Mandal and with regard to that money there was dispute between the two so a false case has been filed due to enmity regarding the arrears of the milk supplied by Shailendra Mandal to Sanjhila Tuddu. The defence witnesses examined in the case are D.W. 1, Shankar Prasad

Mandal, to the effect that there was arrear of rupees ten thousand for the milk supplied by Shailendra Mandal to Sanjhila Tuddu and the false case has been filed to avoid payment of said arrears. D.W. 2, Subhash Chandra Singh, has also deposed to the effect regarding the arrear of Shailendra Mandal lying with Sanjhila Tuddu as arrear of milk for supply of the milk and for which there was dispute between them. D.W. 3 is Ram Baran Mandal. P.W. 4 is Amarjit Kumar, who has come to prove the love affairs written by Sangeeta Tuddu addressed to Kailash Mandal. The love letters have been proved and marked as Exhibits "A" series. D.W. 5 is Kamal Kishore Mandal and agriculturist and labourer and has come to depose that he was Chowkidar or Rakhwala of the orchard at Bishanpur-Rampur and on the date of occurrence nothing had happened to the eastern Khanta of the said orchard.

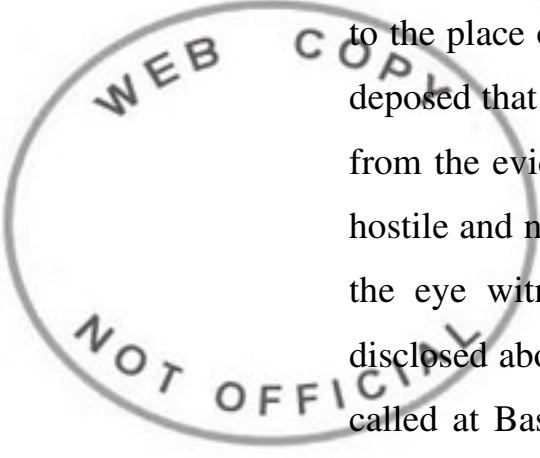
7. The trial Court taking into consideration the evidence of the witnesses, convicted the appellants as mentioned above in view of the statement of the victim itself.

8. The learned counsel for the appellants has challenged the order of conviction and sentence, recorded by the trial Court. It has been submitted that except the evidence of the victim there is no evidence regarding rape. It has, further, been contended that the evidence of the doctor does not support the prosecution case about the rape. It has, further, been contended that the age of the victim has been assessed by the doctor as 14 to 16 years though the victim was in love with the appellant, Kailash Mandal, and the case of the victim that she wanted to marry with the appellant and since the appellant did not marry so a false case has been instituted and, further, there is no evidence corroborating the statement of the victim. The learned counsel for the appellants has also submitted that the prosecution story, itself, is not believable in view of the fact that though in the first information report it has been mentioned that the victim was taken at the point of pistol, however, in the evidence it has been deposed that the victim was carried to a distance of about 2 Kms by dragging her and, further, the evidence of the victim that she was raped and the blood oozed out, but, the doctor has not found any injury on the person of the victim nor there is any evidence of dragging nor evidence that she was

raped causing injury in the private part.

9. The learned counsel for the State, however, contended that the victim has supported the prosecution case about the rape and once the victim has supported the factum of rape, it shall be presumed that there is no consent and, further, even if the evidence of the doctor is not supporting the prosecution case about rape, but, there is nothing in the evidence to disbelieve rape or the rape has been ruled out. However, the accused persons themselves have taken the plea of consent and love affairs, hence, the rape has been admitted and even the victim has supported the prosecution case about the rape, then, merely because that evidence of doctor not corroborating, is no ground to reject her evidence supporting the factum of rape. It has, further, been contended that there is evidence that the victim has intimacy and she has love affairs with the appellant, Kailash Mandal, the love letters suggest that the victim was eager for the appellant and even if it is accepted that the sexual offence between the parties is by consent, but, having regard to the fact that the age of the victim has been assessed as 14 to 16 years, the consent becomes irrelevant as the victim has not attained the age of 16 years, hence, the order and conviction of sentence required to be sustainable.

10. Having regard to the respective submissions, I proceed to consider the evidence of the witness in the light of the submission made by the parties. The prosecution case is that the victim was called at the Basa of Shailendra Mandal and when she reached there, then, Shailendra Mandal gave the signal and it is alleged that Kailash Mandal took the victim at the point of pistol by terrorizing her and, thereafter, it is alleged that she was taken at the distance of 2 Kms at the east of Khanta or orchard and she was raped by Kailash Mandal. Further, after having raped, she was returned back and left at Basa of Shailendra Mandal and from there she came to her house and disclosed the fact to her father, mother and brother, thereafter, the father and brother took the victim to Antichak Police Station, where fardbeyan of the victim was recorded on 27.05.2012. P.Ws. 1, 3, 4, 5 and 6 are brothers, father and mother of the victim and have supported the prosecution case that victim, in the night of the occurrence, disclosed about the occurrence. However, P.W. 7 is victim herself and has supported the



prosecution case that she was taken at the point of pistol to a distance of 2 Kms where she was raped. However, criticism of the offence by the learned counsel for the appellants, regarding the statement of the victim, is that she deposed that she was dragged from the Basa of Shailendra Mandal to the place of occurrence in the orchard where she was raped and she has deposed that she was dragged and blood oozed out from her knees. Hence, from the evidence of the witness, it is apparent that P.Ws. 1 and 2 turned hostile and not supported the prosecution case. P.Ws. 3, 4, 5 and 6 are not the eye witnesses to the occurrence, have only stated that the victim disclosed about the fact. However, the evidence of the victim that she was called at Basa of Shailendra Mandal and from there she was dragged by Kailash Mandal at the point of pistol, as per her first examination-in-chief, but, in her cross-examination she has stated that she has been dragged by force causing injury, hence, evidence of this witness, on this point, itself, is contrary to her statement in examination-in-chief as well as in fardbeyan and she has, further, stated that she was raped, which caused the blood oozing out from her private part. However, the doctor in his evidence does not indicate any injury as it has been mentioned that there is no sign of violence presence in and around vagina or valve or internal part of the body. The report of the doctor is Exhibit 2. Hence, taking into consideration the evidence of the witnesses as well as the medical report, there is contradiction in the evidence of this witness that while she has deposed that she was dragged causing injuries in her knees, leg and, further, she was raped, causing blood oozing out from her private part. However, the doctor has not found any injury though the victim was examined on 27.05.2012 at 04.00 P.M. whereas the occurrence alleged in the previous night, between the night of 26th and 27th May, 2012. However, the case of the prosecution is that the victim was taken and raped and the defence has proved the love letters, which are Exhibits 'A' series, and defence set up was that there was love affairs between Kailash Mandal and Sangeeta Tuddu.

11. The learned counsel for the appellants, however, pointed out the language of the love letters to indicate that the victim was in serious love and the consent of the victim has been set up showing that there was

love affairs as per suggestion that the victim was in love affairs and wanted to marry and since marriage not solemnized so the false case has been lodged. A second defence has been set up that there were arrears of amount for supply of milk and since the money was not paid so false case filed to get rid of the arrears. However, the defence set up regarding the institution of the false case that there was arrears of Rs.10,000/-, itself, appears to be absurd. It is unexpected that the appellant continues to give milk to the tune of Rs.10,000/- even if the amount has not been paid. Further, the defence set up about the consent and the love affairs in view of the fact that love letters, on the record, has not been seriously challenged, hence, there may be the element of consent.

12. Having regard to the facts and circumstances of the case that the age of the victim is in between 14 to 16 years, the consent becomes irrelevant as the consent is unacceptable defence when the victim is 16 years old.

13. However, the learned counsel for the appellants submits that the version regarding the age as 14 to 16 years, as assessed by the doctor on the basis of radiological report, has variation of plus-minus two years and prayed that report, itself, is that the age is within 14 to 16 years and if the age is taken to be 16 years, the appellant is entitled for benefit of doubt regarding consent.

14. However, so far the allegation regarding Shailendra Mandal is concerned, the only allegation is that he gave signal to Kailash Mandal and then Kailash Mandal took the victim by force. If no role has been attributed to Shailendra Mandal, except that he gave signal when the victim reached at his Basa, hence, there is no circumstantial evidence against Shailendra Mandal for his implication. However, having regard to the fact that the evidence of the victim that she was raped causing oozing out blood from her private part and she was taken by dragging causing injury in her person, but, the doctor has not found any injury nor there is any corroborating evidence and, further, the fact that there is love affairs and love letters and, further, in view of the fact that the element of consent and the age of the victim being 14 to 16 years though 14 to 16 years age is concerned, if the age under 16 years, the appellant would not be entitled of

the victim being a consenting party, however, if the age is to be taken 16 years, the appellant shall be entitled to benefit of his defence as a consenting party, hence, having regard to the facts and circumstances of the case the appellant, Kailash Mandal, is entitled to benefit of doubt and I give them benefit of doubt.

13. I find and hold that the prosecution has not been able to prove the charge, the order of conviction and sentence recorded by the trial Court is hereby **set aside** and the appeal is **allowed**.

12. Since the appellant, Kailash Mandal @ Kalso Mandal, is in jail, he is directed to be released forthwith, if not wanted in any other case. The appellant, Shailendra Mandal @ Sadu Mandal, is already on bail.

(Gopal Prasad, J)

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