

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.762 of 2013

Against the judgment of conviction dated 18.09.2013 and order of sentence dated 27.09.2013 passed by the Narsing Prasad, learned 2nd Additional Sessions Judge, Muzaffarpur, in Sessions Trial No. 369 of 2011 (arising out of Sakra P.S. Case No. 45 of 2010 G.R.No. 399 of 2010.

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Devendra Paswan Son of Yugeshwar Paswan, Resident of Village - Gous Basantpur, Police Station - Sakra, District - Muzaffarpur

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Ajay Kumar Verma, Advocate.
Mrs. Madhubala Verma, Advocate.
For the State : Mr. Z. Hoda, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 27-01-2016

Heard learned counsel for the appellant and learned counsel for the State.

2. This appeal arises out of judgment of conviction dated 18.09.2013 and order of sentence dated 27.09.2013 passed by the Narsing Prasad, learned 2nd Additional Sessions Judge, Muzaffarpur, in Sessions Trial No. 369 of 2011 (arising out of Sakra P.S. Case No. 45 of 2010 G.R.No. 399 of 2010, by which the appellant had been convicted for offence under Section 376 of Indian Penal Code and

sentenced to undergo rigorous imprisonment for ten years and fine of Rs. 50,000/- and in default of payment of fine further sentenced to undergo rigorous imprisonment for three years and if the fine will be paid by the convict the same will be paid to victim as a compensation.

3. The prosecution case as alleged in the written report on the basis of First Information Report was lodged by Md. Moti Mian alleging therein that his maternal grand daughter Hasina Khatoon aged about eight years had come to his house for study since last six months. On 06.02.2010 at 5.30 P.M. when he was returning to his house after performing Namaj then he saw a crowd standing at his house then he learnt from his daughter-in-law Ajmiri Khatoon, wife of Mustakim that Devendra Paswan, aged about 32 years of Village-Gous Basantpur lifted Hasina Khatoon while she had gone to collect wood for fuel and took her in Tori (mustard) field and committed rape upon her on which Hasina Khatoon started weeping and making cry on which Devendra Paswan after committed rape started fleeing away then co-villager Shamsha Khatoon, wife of Late Md. Bari (P.W.2), Md. Chand, (P.W.8) and others catch hold of Devendra Paswan while they were taking Devendra Paswan to the house, then Devendra Paswan manage to escape, but the co-villagers chased and catch hold of him. In the meantime, mother and brother of Devendra came to the house of the informant got Devendra free and took away.



On enquiry from Hasina Khatoon, she disclosed that while she was collecting wood and leaf for fuel then a boy came from her back and pressed her mouth and took her in his laps in the neighbouring Sarsoon (Mustard) field thereafter, untie her panty throw her on the ground and threatened to kill and rape her. Thereafter, she started crying due to pain and making hullah then the boy who was committed rape started fleeing away then the villagers catch hold of him and brought to the house of the informant and victim was brought to the hospital and case was lodged in the police station.

4. On the said written report of the informant F.I.R. lodged on 06.02.2010 at 7.45 P.M. After lodging the F.I.R., investigation proceeded. During investigation, I.O. inspected the P.O., recorded the statement of the witnesses Md. Chand, Shansha Khatoon and other. The P.O. is said to be near Baswari of Md. Mian in Tori (mustard) field of Sanjay Chaudhary and P.O. of Sarsoon (mustard) plant were found trampled and he has given description of the boundary of the P.O. The I.O. further got the victim medically examined. After completing the investigation submitted charge sheet. After submission of the charge sheet, cognizance taken and case was committed to the Court of Sessions.

5. During trial, after framing of charge ten witnesses were examined by the prosecution. P.W. 1 is Md. Vakil had deposed that he

received telephone from the village- Gous Basantpur and it was disclosed that rape had been committed with Hasina Khatoon then he went village to Gous Basantpur. He saw there were people gathered at the house of the informant and on enquiry it was learnt that Devendra Paswan committed rape upon Hasina Khatoon. P.W. 2 is Shamsa Khatoon deposed that when she went to throw garbage she heard sound of weeping from Tori (mustard) field she asked who is weeping then Hasina Khatoon came out from Tori (mustard) field and catch hold of her. On enquiry she disclosed that Devendra Paswan had committed rape upon her. She caught Devendra Paswan and asked about the occurrence and asked him to follow her to the village. In the meantime, mother, sister and brother of Devendra Paswan came there and got him released. Thereafter, a case was lodged. In cross-examination she had stated that Devendra Paswan caught and tied in the house of the informant for about ten minutes thereafter, he was released by his brother and mother. P.W. 3 is Sakina khatoon, wife of informant Moti Mian stated that she had been to her naihar, when she returned back from naihar, she saw that people had tied Devendra Paswan in her house then parents of Devendra Paswan came and got him released. Hasina Khatoon disclosed about the entire occurrence. P.W. 4 is Moti Mian, the informant had deposed that while he was returning after performing Namaj he saw there was hullah at his

darwaja. When he enquired from his maternal grand daughter, she disclosed that Devendra Paswan had caught hold of her and took her in Tori(mustard) field and committed raped upon her. The boy was caught hold at his darwaja and when there was hullah the boy was fleeing away. P.W. 5 is Dr. Bipin Kumar who examined the victim and he has found on local examination of vagina shows bruise and swelling is and around vulva tender touch and admits tip of little finger. No spermatozoa were found. He found the age of victim girl was in between eight to ten years and had opined that sexual assault with her cannot be ruled out. However, in his cross-examination he has stated that victim was not examined by lady doctor and has stated that injury he found is not possible by fallen on khunti. P.W. 6 is Hasina Khatoon the victim had deposed that while she had gone to collect wood for cooking food then accused person came, but she did not know the name of the accused, the accused gagged her mouth and took her in the Tori (mustard) field and throw her on the ground and committed rape upon her. On identification, on query by trial court the accused disclosed his name as Awadhesh Paswan. She had further stated that the accused person threatened her not to disclose anyone about the occurrence and flee away. In the meantime, Shamsha Khatoon came to throw garbage, on seeing her she started weeping then she enquired from her and she disclosed about the occurrence.



She has stated that two boys were playing there who were said to be Md. Chand and Md. Nawab. She disclosed about the occurrence to them then all of them catch hold of the accused person and took him in the village. The villagers tied his hands and legs, in the meantime, mother and sister of the accused came there and got him released. P.W. 8 is Md. Chand had stated that he was playing 'Gulli danda' and in the meantime 'Gulli' went in the Tori (mustard) field then he saw that one boy was hurriedly came from there tied his pant. Thereafter, the girl came out from the field weeping then he enquired from the girl. On enquiry, the girl disclosed that the boy had threatened her not to disclose anyone, else she will be killed. Thereafter, they catch hold the boy and took him in the house of the informant. However, the boy anyhow managed to escape. P.W. 9 is Md. Nawab had also stated that he was playing 'Gulli danda' and when 'Gulli' went in the Tori (mustard) field and making search of 'Gulli' in Tori (mustard) field then saw a boy came out from the Tori (mustard) field hurriedly and saw the boy tying his pant. In the meantime, a girl also came out and she was weeping. In the meantime, Shamsha Khatoon came there to throw garbage and when she asked the girl, she disclosed about the occurrence that the boy had forcibly took her in the Tori field and committed rape upon her. Then he catch hold of the appellant and took him in the village. Thereafter, mother, father and brother of the



accused persons came there and they manage to get release the accused (appellant). He identified the boy as Devendra Paswan. However, P.W.1 had stated that he learnt about the occurrence then he came to the house of the informant and found there was a crowd. On enquiry the people disclosed about the rape committed by Devendra Paswan upon the victim. P.W. 2 is Shamsha Khatoon however stated that she went to throw the garbage then she saw Hasina Khatoon weeping in the Tori field and on enquiry she disclosed that Devendra Paswan had committed rape upon her. P.Ws. 3 and 4 are maternal grand mother and maternal grand father of the victim. However, P.W. 3 disclosed that at the time of occurrence she had been in naihar. After returning from naihar she saw Devendra Paswan tied in her house. P.W. 4 was also not in his house and when he returned he saw people gathered in his house and they disclosed that Devendra Paswan had committed rape upon Hasina Khatoon.

6. The defence had also examined three witnesses as D.W.1 Ram Swaroop Ram, D.W. 2 Mohan Ram and D.W. 3 Ram Prakash Paswan. The defence had suggested that there were houses of two communities, one community is Harijan and other community is Muslim and there was adjoining about 200 houses of Muslim community and 50 houses of Harijan community. The Harijan community is poor and Muslim community always used to vex the



Paswan and taking advantage of the population of Muslim community they used to vex Paswan and threatened to lodge the case. Further case is that wife of the informant Moti Mian prior to the occurrence disclosed to Yogeshwar Paswan that Devendra Paswan will be died within three-four days for which a Panchayati was held and in the Panchayati fine Rs 5,000/- was imposed to the informant and same was paid for which Muslim community was dissatisfied with imposition of fine and they want to take revenge and for which a false case has been instituted by the informant.

7. The trial court taking into consideration the evidences convicted and sentenced the appellant but acquitted the other accused persons Kariman Paswan, Sakunti devi and Ranjan Paswan as there was no sufficient evidence against them.

8. Learned counsel for the appellant however challenged the order of conviction and sentence on the ground that the victim had not identified the appellant in her examination-in-chief itself. Furthermore, the victim stated that she did not identify the accused who committed rape upon her. However, the victim pointed out one of the accused but the accused to whom pointed out disclosed his name as Awadhesh Paswan whereas allegation of rape had been made against Devendra Paswan. It has further been contended that no T.I. Parade has been conducted. It is submitted that the prosecution case



in the First Information Report, it is alleged that the accused took her in Tori field and raped her. Thereafter, Hasina Khatoon weeping, Devendra Paswan fleeing away then Shamsha Khatoon and others catch hold of him. However, Shamsha Khatoon in her evidence had stated that when she went to throw garbage in the field, she found Hasina Khatoon weeping in the field and when she asked who is weeping then the girl came out and started weeping catch hold of her hand. When she asked why she was weeping then the girl disclosed the name of Devendra Paswan to commit rape upon her then she call Devendra Paswan. It has further submitted that P.O. has not been established. It has further been submitted that some one had stated the place of occurrence is Tori field and some one stated as Sarsoon field. It has further been submitted that the statement of victim under Section 164 Cr.P.C. had not been recorded.

9. Learned counsel for the State however submitted that evidence of P.Ws. 8 and 9 had specifically mentioned that when they were playing 'Gulli danda', the Gulli went in the Tori field, they went in the Tori field and found a boy came out from Tori field hurriedly tying his pant and the girl disclosed that the boy had been committed rape upon her. They catch hold of the boy. In the meantime, villagers came and tied the accused Devendra Paswan. Thereafter, other witnesses came there.

10. Taking into consideration the respective submissions, I proceed to consider the evidence in the light of the submissions made by the parties whether prosecution has been able to prove the charges beyond all reasonable doubt. However, four accused persons were facing trial as they were Devendra Paswan, Kariman Paswan, Sakunti Devi and Ranjan Paswan. However, allegation against Devendra Paswan is that he caught the victim and took her in the Tori field and committed rape upon her. The victim was weeping and crying out of pain and accused Devendra Paswan was trying to flee away. In the meantime, Shamsha Khatoon came there to throw the garbage. In the meantime P.Ws. 8 and 9 were playing there and when they went inside the Tori field to make search of 'Gulli' then they saw Devendra Paswan came out from the Tori field hurriedly tying his pant, then victim disclosed about rape. Thereafter, P.Ws. 8 and 9 catch hold of the accused and took him in the village and there other villager collected and tied the accused. P.W.4 Moti Mian, the informant stated in his evidence that when he returned after performing Namaj to his house he saw accused person having been tied in his house who committed rape upon the victim. Thereafter, mother and brother of the accused came and took the accused freed after untie the appellant. Further the victim in her evidence had stated that she did not know the name of accused, but identified the accused person in the dock that

this is the accused person who had taken her in the Tori field and committed raped upon her.

11. However, the trial court while recording the statement of victim asked the name of the accused person, the victim disclosed his name as Awadhesh Paswan and this evidence also relied upon by the learned counsel for the appellant to challenge the identification. However, the deposition of this witness had been recorded on 18.03.2013.

12. On going through the lower court records and order sheet dated 18.03.2013, it had been mentioned that out of four accused persons Devendra Paswan had been produced from jail. The Hazri filed on behalf of other, rest two have been represented through their lawyers so their petition under Section 317 of Cr.P.C. was allowed. From perusal of the record, it is apparent that appellant Devendra Paswan had been produced from jail and Hazri had been filed on behalf of accused Sakunti Devi and a petition under Section 317 of Cr.P.C. on behalf of rest two accused Kariman Paswan and Ranjan Paswan. However, there is no person named as accused. On perusal of this record, it is apparent only accused persons present were Devendra Paswan and Sakunti Devi.

13. However, it is strange to see that in the order recorded by the trial court, the accused, on enquiry disclosed his name as



Awadhesh Paswan. However, the accused person, brought from jail and produced in the court, was Devendra Paswan. The victim Hasina Khatoon, P.W. 6 in her evidence specifically stated that this is the person (Devendra Paswan) who gagged her mouth and took in Tori field and throw her on the ground and after untied her pant committed rape. She had further pointed out that this accused threatened her not to disclose anyone and fled away. In the meantime, Shamsha Khatoon came there to throw garbage and on seeing her, the victim started weeping and on asked, she disclosed about the occurrence. The victim had further stated that two boys were also playing there as they were P.W.8 Md. Chand and P.W.9 Md. Nawab and caught hold the accused person who standing there took him in the village. Hence from her evidence, it is apparent that only accused person in dock was Devendra Paswan who produced from jail. Further P.Ws. 8 and 9 have also deposed that they were playing 'Gulli danda' at the place of occurrence. In the meantime 'Gulli' entered into the Tori field, when they entered into Tori field to search 'Gulli', they saw accused person tying his pant and hurriedly came out from Tori field and a girl also weeping there. Thereafter, they catch hold of the boy and took him at the house of the informant where villagers tied his hands and legs. P.W. 9 had also deposed to the effect that they were playing 'Gulli danda' and when 'Gulli' went to Tori field they entered into Tori field



to search the 'Gulli' saw a boy came out hurriedly, tied his pant and on disclosure of the victim about rape, they caught him. In the meantime Shamsha Khatoon also reached there. However, the evidence of Shamsha Khatoon, it is apparent that when she went to throw garbage she saw the victim weeping and on enquiry, she disclosed about the occurrence. However, criticism has been made in evidence of Shamsha Khatoon, P.W. 2 that she had stated the victim disclosed the name of accused as Devendra Paswan. However, merely because disclosure the name of Devendra Paswan cannot be prudent when there is evidence that all the event of rape reaching of P.Ws 8 and 9 and P.W.2 are similar with the fleeing of appellant and catching hold of the appellant on the spot and falling identified and have known the name. From the evidence of the victim as well as evidence of P.W.s 8 and 9, it is apparent that on the disclosure about rape and accused person came out hurriedly from Tori (mustard) field tied his pant and was caught hold and taken to the village and tied by rope is true. P.Ws. 3 and 4 also reached there and saw accused person tied in rope. In the meantime, mother and brother of the appellant came and got him free by untied the rope itself indicate that accused person had properly been identified. However, in the fact and circumstance of the case, no T.I. Parade has been conducted as it is not at all required to identify the accused person, when the accused

person catch hold at the place of occurrence as per evidence of P.W.s 8 and 9 and their evidence to the extent has not been challenged in cross-examination.

14. However, criticism has been made by the learned counsel for the appellant that P.O. has not been properly established for the reason that some one has stated there was Tori (mustard) field and some one has stated it was sarsoon field. However, in the village Tori(mustard) field and saroon field are two varieties of same species and used invariably one for another and misnomer may not be sufficient to disbelieve the prosecution story. The I.O. has specifically stated he found Tori field (Mustard) was trampled itself indicate about the occurrence. The doctor in his evidence also found injury on private part of the victim. Further doctor opined that rape cannot be ruled out.

15. However, taking into consideration the defence of the accused that there is some dispute between Harijan community and Muslim community and Muslim community used to vex the Harijan community so a false case had been filed. However, defence set up on behalf of the accused does not inspire confidence for the reason such type of case has not been filed. Further it has been stated that there was some dispute between two communities for which Panchayat was conducted and fine was imposed and same was paid,

but no witness had come to say who were present in the said Panchayati and who was member of the Panchayat. The defence set up has only shake set of defence and it does not shake core of the prosecution case.

16. Hence, taking into consideration the entire evidence, I do not any merit to interfere with the judgment of conviction and order of sentence recorded by the trial court. **The appeal is dismissed.** Further, judgment of conviction and order of sentence recorded by the trial court against the appellant is confirmed.

m.p.
N.A.F.R.

(Gopal Prasad, J)

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