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IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.28 of 2014

Against the judgment of conviction dated 29.06.2013 and order of sentence dated 06.07.2013 passed by Sri Shiv Dhyan Singh, learned Ad-hoc Additional District & Sessions Judge-III, Samastipur, in Sessions Trial No. 88 of 2011 (arising out of Khanpur P.S. Case No. 116 of 2010)

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Rajiv Kumar Rai, Son Late Ram Ballabh Rai Resident of Village- Amrauti, P.S- Khanpur, District- Samastipur.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Sujit Kumar Singh, Advocate.

For the State : Smt. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 02-02-2016.

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

2. This appeal arises out of judgment of conviction dated 29.06.2013 and order of sentence dated 06.07.2013 passed by Sri Shiv Dhyan Singh, learned Ad-hoc Additional District & Sessions Judge-III, Samastipur, in Sessions Trial No. 88 of 2011 (arising out of Khanpur P.S. Case No. 116 of 2010) by which the appellant had been convicted for offence under Section 366(A) of Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years and fine of Rs. 10,000/- and on non payment of fine further sentenced to

undergo rigorous imprisonment for two years. Further the appellant had been convicted for offence under Sections 376(2) F/G of Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and payment of fine of Rs. 10,000/- and for non-payment of fine further sentenced to undergo rigorous imprisonment for two years. Further all the sentences were ordered to run concurrently.

3. The prosecution case as alleged in the First Information Report by the informant Anupam Kumari aged about eight years that on 13.08.2010 at about 3.00 P.M., the informant along with her mother Pinki Devi (P.W.8) went to Rewara Chowk and was returning with medicine with her mother towards her house at Amrauti,P.S. Khanpur, they reached near Hasopur Chowk towards Gudarghat then co-villager Rajib Kumar Rai her cousin uncle along with two unknown associates came there and apprehended the informant and her mother. Rajib Rai asked the mother of the informant to hand over Anupam Kumari, to take her to home on which the mother of the informant told that she herself was going to her home with her then why she will allow him to take the victim. In the meantime Rajib Kumar pushed the mother of the informant by which she got unconscious then all the three accused persons caught the victim and sat on bicycle, the said bicycle was driven by Rajib Kumar and lifted the victim and both the unknown boys were going behind them. After taking her some distance towards east on the ground in Khoparwa

Gachhi situated in the road of southern side and after throwing her on the ground, Rajib Kumar committed rape upon her, then the second boy whose height is long with fair complexion again committed rape upon her. It is further alleged that the third boy who is short height and dark colour also committed rape upon her. Further case is that victim was tried to make cry, but they used to threat and keep her silence. Further case is that the victim was feeling pain in her private part and blood oozing out from her private part which caused her cloths besmeared with blood. After sometime she wanted to proceed towards her house then her mother along with others in search of victim came towards her then she disclosed about the occurrence to her mother. Thereafter her mother and other persons brought her to Sadar Hospital, Samastipur for treatment and her treatment was going there. Fardbeyan was recorded at about 10.45 P.M. at Sadar Hospital, Samastipur and same was recorded by S.I. Rajesh Kumar Manjhi, S.H.O. Khanpur (I.O.) P.W. 12. F.I.R. was drawn at about 11.50 P.M. on 13.08.2010 and the victim Anupam Kumari signed on the Fardbeyan and Fardbeyan has been marked as Exhibit-2/2. The I.O. prepared seizure list of clothes of Anupam Kumari i.e. one red colour fork, one red colour Gaghra and one black colour panty which has got stain of blood and had been marked as Exhibit-1/2. Thereafter, the I.O. inspected the P.O., recorded the statement of witnesses. He found that there is two P.O. The first P.O. is main road from north to

south from where the victim was taken away by Rajib Kumar and two unknown persons by a bicycle and second P.O. is the place of occurrence where rape was committed. The second P.O. is said to be Khoparwa Gachhi Bandh 500 yards north-west beneath the Bandh where it is stated that rape was committed. The I.O. recorded the statement of witnesses. After completing the investigation, submitted charge sheet on which cognizance taken and case was committed to the Court of Sessions. After commitment, charges were framed under Sections 366(A), and 376(2) F/G of Indian Penal Code and trial proceeded.

4. During trial altogether 12 witnesses were examined by the prosecution. P.W. 1 Ghanshyam Kumar had deposed that at the time of occurrence he was coming from village- Bidhar and in the way there was Khoparwa Gachhi orchard and he saw three persons had fled away and in the way she made Anupam Kumari, the victim. On enquiry, Anupam Kumari disclosed that she was raped by Rajib Kumar and he saw blood oozing out from her private part. P.Ws. 2, 3, 4 and 5 are Hareram Mandal, Ram Janki Devi, Jaidarath Rai and Amirki Devi they had deposed to the effect that they did not know anything about the occurrence and had not made statement before the police and declared hostile as they had not supported the prosecution case. P.W. 6 is Santosh Rai, he disclosed that Anupam Kumari had been raped in Khoparwa Gachhi. P.W. is 7 Anupam Kumari the

victim herself had supported the prosecution case regarding rape on her person. P.W. 8 is mother of the victim-informant and had supported the prosecution case about the rape. P.W. 9 is Brambhdeo Rai, father of the Anupam Kumari, the victim. P.W. 10 is co-villager had deposed that while he was returning from his field he saw the daughter of Brambhdeo at Golgol Chowk and at that time there was hullah that Rajib Kumar had committed rape upon the victim and at the arrival of police, Rajib fled away. P.W. 11 is the doctor had deposed that no injury found on all over the body. No injury found over face or abdominal. No foreign hair was found on private part or thigh of the victim. The victim was aged about 9 to 10 years. However, it has been reported that on physical examination and vaginal swab examination, it cannot be decided that rape has been committed or not. He has further deposed that he found recent rupture of hymen, muscle deep lacerated injury of lateral wall of vagina (left side) extending up to perineum (second degree) perineal tear. Further opined that rupture of hymen lacerated injury in vagina may cause sexual assault on minor girl. P.O. 12 is I.O. had deposed that the date of occurrence was 13.08.2010, he got information on mobile that a minor girl had been raped. He recorded information and made Sanha Entry No. 262/10 dated 13.08.2010, then he proceeded to the place of occurrence and saw Anupam Kumari was taken in injured state. He prepared injury report and Fardbeyan recorded and got signature of

Anupam Kumari and prepared seizure list.

5. Defence has also adduced two witnesses as D.W. 1 Shambhu Rai and D.W. 2 is Gauri Shankar Rai. However, defence of the accused is false implication of the appellant. Further defence has taken that there was exchange of land in the year 1974 and there was dispute between the parties with regard to boundary of the land and the appellant and victim are descendents common ancestor.

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

7. Learned counsel for the appellant however challenged the order of conviction and sentence recorded by the trial court on the ground that doctor had opined exclusively that rape was not committed upon the victim. It has further been pointed out that the mother of the victim in her deposition had stated that victim was lying unconscious in the field. Thereafter, she was taking the victim to the hospital in unconscious state and she got consciousness after two days, after two days she could be able to speak and was not speaking since last two dates of the occurrence prior to lodging of the F.I.R. It has further been contended that there was land dispute between the parties and there is false implication of the appellant to take revenge against him. Hence it is contended that when the evidence of the mother of the victim herself stated that the victim remained unconscious for two days then charge sheet and F.I.R. itself lost its

significance.

8. Learned counsel for the State however contended that doctor had found injury on private part of the victim and it can well be inferred by the statement of the victim recorded before the police. There was no evidence that the victim was unconscious state and hence evidence of the victim and other witnesses, it can well be inferred that prosecution has been able to prove the case.

9. Having regard to the respective submissions, I proceed to consider the evidence of witnesses as to whether the prosecution has been able to prove the charges beyond reasonable doubt. The prosecution case as alleged in the First Information Report itself, that while the informant was going along with her, then Rajib Kumar along with his two associates met them and they asked the mother of the victim to allow the victim to proceed with them to reach at her house, the mother of the informant did not agree, then they pushed the mother of the victim and took the victim in second place of occurrence where she alleged to have been raped one by one including the appellant. The victim supported the prosecution case about rape and blood oozing out from her private part. The P.W. 12, I.O. has specifically stated that he got information on his mobile about rape then he recorded Sanha Entry No. 262/10 dated 13.08.2010 and proceeded to the P.O. and found that victim Anupam Kumari was injured state and her family members were taking her to Sadar

hospital, Samastipur. He disclosed about seriousness of the injury of the victim. Thereafter, P.W. 12 went to meet Anupam Kumari. Thereafter, the I.O. prepared injury report and recorded the Fardbeyan. Further the Fardbeyan bear the signature of the victim which is Exhibit-2/1. The I.O. had specifically had given description of both the P.O. as first place of occurrence and second place of occurrence. The first place of occurrence where the victim was kept and taken forcibly by the appellant and two associates. The second place of occurrence where the rape was committed. There is specific description of first place of occurrence is Khanpur to Khoparwa Gachhi passing through main road going through Hasopur to Gudarghat near the middle road of Dupolia from where the victim was kidnapping and the second place of occurrence has been described is place about 500 yards west-north of Yogia Moin which passes through Khoparwa Gachhi Bandh where the victim was raped.

10. However, the doctor P.W. 11 who had examined the victim on the date of occurrence has not mentioned about rape nor stated that the victim was in unconscious state or not in a position to speak. Further the doctor in general examination, no injury found over face or abdominal of the victim. No foreign hair was found on private part or thigh of the victim. The victim was aged about 9 to 10 years. However, it has been reported that on physical examination and vaginal swab examination, it cannot be decided that rape has been

committed or not, but the doctor found recent rupture of hymen, muscle deep lacerated injury of lateral wall of vagina (left side) extending up to perineum (second degree) perineal tear. Further opined that rupture of hymen lacerated injury in vagina may cause sexual assault on minor girl. However, it is strange that, though, the doctor found recent rupture of hymen and laceration in vagina but opined that on physical examination and vaginal swab examination it cannot be decided that rape has been committed or not. Hence the evidence of the doctor appears to be doubtful. Further, in his cross-examination he has deposed that the period of recent rupture has not been mentioned. Hence, from the evidence of the doctor, it is apparent that rape as alleged has not been ruled out as injury of lateral wall of vagina extending up to perineum as there is evidence of sexual assault. P.W. 7 is the victim had supported the prosecution case about rape on her person by the appellant.

11. However, criticism has been made by the learned counsel for the appellant that Pinki Devi the mother of the victim in her statement in paragraph 10 stated that the field in which her daughter unconscious was about 50 lagga from the road and she has not seen the field before the occurrence and after the occurrence she found her daughter was in unconscious state and she is unable to speak. Further the mother of the victim taken the victim to Sadar hospital, Samastipur, in unconscious state and she got conscious after

two days of the occurrence then she is in a position to talk. Since the evidence of P.W.8 the mother of the victim, it is apparent that the victim was unable to speak then how Fardbeyan was drawn on the basis of F.I.R. lodged does not inspire confidence and this F.I.R. is itself doubtful.

12. Having regard to the statement of the victim and as well as statement of the I.O. that after getting information on his mobile about rape he rushed to P.O. and in the way itself he saw Anupam Kumari was in injured state and her family members were taking her at Sadar hospital, Samastipur. Thereafter, he went to Sadar hospital, prepared injury report and recorded Fardbeyan and got signature of the victim. Hence, in that view of the fact, the evidence of the doctor as well as the victim herself, it is not proper to disbelieve their evidence on mere statement of the mother of the victim in paragraph 10.

13. However, the evidence of father of the victim is not material evidence as he reached the house after three days of the occurrence and he found the victim in hospital lying in bed where her treatment was going on.

14. However, defence set up by the accused person that there was land dispute between the parties, though, the father of the victim stated that there is no dispute of any boundary with regard to land. P.W. 1 Ghanshyam Kumar and P.W.6 Santosh Rai had also supported

the prosecution case.

15. Learned counsel for the appellant however contends that appellant and the victim are common ancestor. However, there is no material to suggest that both appellant and the victim are common ancestor, but mere suggestion that both are common ancestor itself is not sufficient to believe that the victim and the appellant are common ancestor. Further it is submitted that at the time of the occurrence the appellant was aged about 21 years old and he remained in jail custody since then. Hence, taking into consideration the age of the appellant at the time of occurrence, the sentence may be considered.

16. Regard being had to the fact, end of justice shall meet by sentencing the appellant to undergo rigorous imprisonment for eight years with fine of Rs. 10,000/- and in non-payment of fine further sentenced to undergo rigorous imprisonment two years as mentioned above in the judgment of the trial court.

17. **With this modification of sentence, this appeal is dismissed.**

m.p.
N.A.F.R

(Gopal Prasad, J)

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