

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 776 of 2015

Against the judgment of conviction dated 29.10.2015 and order of sentence dated 29.10.2015 passed in Sessions Trial No. 113 of 2012 arising out of L.N.M.U. P.S. Case No. 262 of 2011 passed by Gyanendra Kumar Shrivastava, learned 2nd Additional Sessions Judge, Darbhanga

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Raghubir Das, Son of Ram Sewak Das, Resident of Mohalla - Alalganj, Aajam Nagar, P.S. - Lalit Narayan Mithila University, District - Darbhanga

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Girish Chandra Jha, Advocate
Mr. Govind Mohan Thakur, Advocate
For the Respondent : Mr. S.A. Ahmad, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

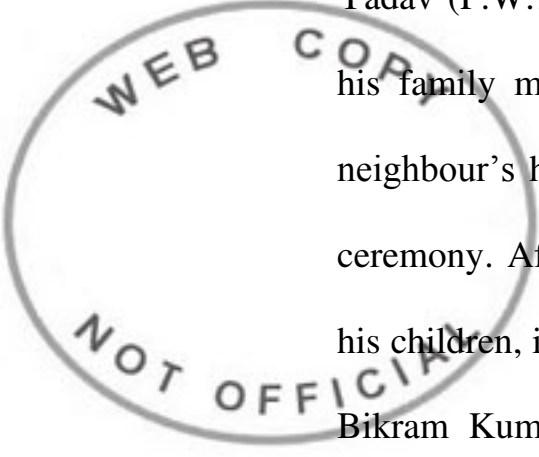
ORAL JUDGMENT

Date: 27-06-2016

Heard learned counsel for the appellant and learned Additional Public Prosecutor for the State.

2. The sole appellant has been convicted for the offence committed under Section 376/511 of the Indian Penal Code and sentenced to undergo additional rigorous imprisonment for six years with a fine of Rs.5,000/- and in default of payment of fine to undergo additional rigorous imprisonment for one year. He has further been convicted under Section 324 of the Indian Penal Code and sentenced to undergo simple imprisonment for one year with a fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment for one year. However, it has been ordered that both the sentences shall run concurrently.

3. The prosecution case, as alleged in the First Information



Report on the basis of the written report by the informant, Pawan Kumar Yadav (P.W.1) is that on 08.12.2011 at about 10:00 p.m. he along with his family members including the wife and children had gone to the neighbour's house of one Rajendra Yadav to take meal in the marriage ceremony. After taking meal, the informant washed his hand and asked his children, i.e. daughter Alka Kumari, aged about five years and his son Bikram Kumar, aged about eight years, to go to the home and just thereafter when they proceeded for some distance then Raghubir Das, aged 25 years (appellant) gave chocolate and ten rupees to his daughter Alka Kumari and lifted her in his lap and taken to agricultural field behind Brahmasthan near the house of Bishwanath Yadav and thrown her on the earth and committed rape due to which blood was oozing from her internal part as a result of which she sustained injuries. On her cry, Ramesh Yadav, Suresh Yadav and other co-villagers came there and on seeing them the appellant got up from the body of the victim and fled away. The further case is that the appellant took teeth bite on both cheeks of the victim due to which the victim sustained injuries and appellant also took away silver Bala and Payal.

The further case is that since it was late night he could not go to the Police Station. Hence, the occurrence took place on 08.12.2011, but the written report was submitted on 09.12.2011. The written report was submitted to the police on the basis of which First Information Report

was lodged on 09.12.2011 at 08:30 a.m. The distance between the place of occurrence and Police Station is about three kilometers towards west-north. After registration of the case, investigation proceeded and the Investigating Officer recorded the statement of the witnesses, inspected the place of occurrence, the victim was got medically examined. The Investigating Officer procured the medical report and submitted charge-sheet under Sections 376, 324 and 379 of the Indian Penal Code. Consequently, on the submission of the charge-sheet, cognizance was taken under the above mentioned Sections. Thereafter the charge was framed and after framing of charge, trial proceeded. During trial, seven witnesses were examined on behalf of the prosecution.

4. P.W.1 Pawan Kumar Yadav is the informant of the case and father of the victim. He supported the prosecution case.

5. P.W. 2 Gita Devi is the mother of the victim and wife of the informant. She has also supported the prosecution case regarding rape and oozing out blood.

6. P.W.3 Ramesh Yadav is a co-villager. However, this witness has been declared hostile as he has not supported the prosecution case though named in the First Information Report as the person who reached the place of occurrence just after the occurrence.

7. P.W.4 Alka Kumari is the victim herself. Though she has supported the prosecution case that the appellant gave chocolate and ten

rupees and took her in his lap and further supported the prosecution case regarding the teeth bite on the person of the victim causing injury on her cheek but she has specifically stated that except teeth bite the appellant had done nothing and hence, she has not supported the prosecution case regarding rape or regarding the time of rape.

8. P.W.5 Suresh Yadav is also a co-villager. Though this witness is named in the First Information Report as the person who reached the place of occurrence just after the occurrence but this witness has also not supported the prosecution case regarding the rape and has also turned hostile.

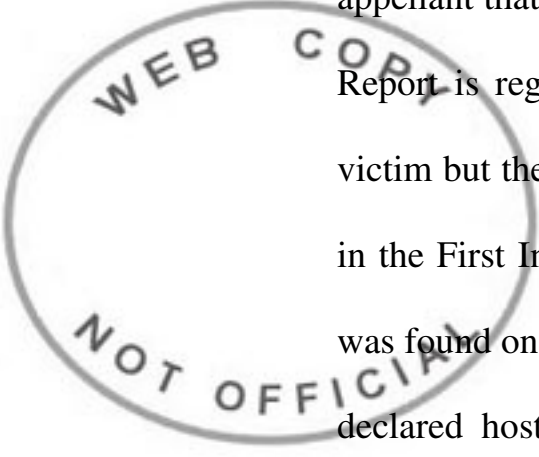
9. P.W.6 Dr. Bedanand Jah has examined the victim and found her age 5-6 years. However, he has opined that on the basis of physical and radiological findings there is no positive evidence to suggest commission of recent forceful sexual intercourse with the victim with emission of semen and has proved the medical report which has been marked as Ext.1 and hence, ruled out the possibility of rape on the person of the victim but found four separate teeth bite abrasion marks semi lunar in shape over right cheek in two lines with elliptical area in between them. The same teeth bite marks were seen over the left cheek also.

10. P.W.7 Subhadra Jha is the Investigating Officer of this case who conducted the investigation, recorded the statement of the witnesses and got the victim medically examined by the Doctor and finally

submitted charge-sheet. However, he has stated that he has not recorded the statement of the victim as she was not in a position to make statement.

11. However, trial Court after taking into consideration the evidence of the witnesses, convicted the appellant as mentioned above as the witnesses have deposed that the victim has identified the appellant in the Court and was found naked and the witnesses had seen the appellant lying on the body of the victim and immediately after their arrival the appellant started fleeing away arranging his clothes and the victim reported pain in her internal part and also there was sign of teeth bite and the witnesses deposed that they saw blood oozing out from the internal part and hence, held that the offence under Section 376 of the Indian Penal Code is established and convicted the appellant under Sections 376/511 and 324 of the Indian Penal Code.

12. Learned counsel for the appellant, however, challenged the judgment of conviction and order of sentence recorded by the trial Court on the ground that the prosecution case as alleged in the First Information Report is that the victim was taken away by the appellant in his lap after giving her chocolate and ten rupees and when the witnesses reached at the place of occurrence the appellant fled away and further case is that blood oozing out from the internal part of the victim, but neither the seizure list has been prepared with regard to the clothes nor the said clothes were produced before the Court nor has been sent to the Forensic



Science Laboratory. The further submission of the learned counsel for the appellant that the case of the informant as alleged in the First Information Report is regarding the blood oozing out from the internal part of the victim but the informant in his cross-examination in paragraph 14 as also in the First Information Report has specifically mentioned that no blood was found on the clothes of the victim. However, P.Ws.3 and 5 have been declared hostile as they have not supported the prosecution case and hence, any evidence regarding the blood oozing out from the internal part of the victim has not been supported by the medical evidence or even producing the clothes or sending the blood so there is no documentary evidence. However, P.W.2 is the wife of the informant and mother of the victim. Though she has supported the prosecution case regarding the blood oozing out, but her evidence is contradictory from the evidence of P.W.1, the informant, and further the victim who was examined as P.W.4 has deposed about teeth bite but the Doctor does not found corresponding evidence and hence, contended that there is no evidence at all with regard to rape on the person of the victim.

13. Learned counsel for the State, however, submits that there is evidence that the victim was taken away by the appellant after giving chocolate and ten rupees and further the victim has supported the prosecution case regarding the teeth bite on her cheek and P.Ws.1 and 2 have also supported the prosecution case regarding the rape and blood

oozing out and hence, the conviction under Sections 376/511 of the Indian Penal Code is fit to be sustained.

14. Having regard to the respective submissions of the parties and on the other hand that there is force in the statement made by the learned counsel for the State, it is true that there is evidence regarding teeth bite but this part of the occurrence is not supported by the Doctor P.W.6. However, in the evidence of the victim she did not allege anything except the teeth bite on the cheek as she has specifically stated in paragraphs 2 and 3 that the appellant after giving chocolate and ten rupees, lifted her and gagged her mouth and given a teeth bite by which blood started oozing out from the cheeks but thereafter he did nothing. Thereafter on the cry the witnesses reached there. Hence, it is apparent that the only allegation against the appellant is the teeth bite on the cheek by the appellant.

15. However, the prosecution case in the First Information Report by the informant is that the appellant committed rape upon his daughter. However, after going through the evidence of P.Ws.1 and 2, it is apparent that they are not the eye-witness to the occurrence though P.W.1 has stated in the First Information Report that the blood was oozing out from the internal part of the victim but the same was not found on her body but the evidence of victim regarding teeth bite stands corroborated by the Doctor's evidence. However, P.W.1 himself in his

cross-examination stated that he did not find any blood on the person of the victim and hence, the informant himself has given a go-by to the prosecution story about finding of blood on the person of the victim. P.W.2 though has supported the prosecution case regarding the rape but her evidence stood contradicted from the evidence of P.W.1. However, neither the blood was seized by the Investigating Officer nor the clothes were seized nor the seizure list prepared and hence, there is no corroboration with regard to the allegation of rape and blood coming out from internal part coupled with the fact that the victim herself not supported the prosecution case regarding rape or the blood oozing out or any act of commission of rape committed by the appellant and the Doctor has also opined that he did not find any injury on the internal part of the victim regarding the act of commission and omission with the internal part and hence, there is no evidence regarding attempt to commit rape. Hence, the oral evidence that the blood was oozing out from the internal part of the victim is contradictory to witnesses and not corroborated by the medical evidence not accepted as the evidence suffers from contradiction which is neither found to be reliable nor worthy of confidence to be relied upon. However, the witnesses have only supported the prosecution case regarding teeth bite and hence, the conviction recorded under Sections 376/511 of the Indian Penal Code on these evidences is not sustained but it can well be recorded under Section

324 of the Indian Penal Code. However, there is no material to suggest the time of occurrence or about the commission of rape on the person of the victim and the conviction recorded under Sections 376/511 of the Indian Penal Code is not sustainable and is hereby set aside. Hence, it is hereby ordered that the conviction recorded under Section 324 of the Indian Penal Code be sustained for a period already undergone by the appellant. Appellant is, accordingly, ordered to be released forthwith if not wanted in any other case and the appeal is allowed in part.

(Gopal Prasad, J)

Kundan Sharma

AFR/NAFR	NAFR
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