

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.368 of 2011

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Sanjay Mahto @ Dakua Late Lal Babu Mahto R/o,Vill.-Chotahi,P.S.-Riga,Dist.-
Sitamarhi

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Thakur
Mr. Ashhar Mustafa.

For the Respondent/s : Mr. A.K. Sinha, A.P.P.

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CORAM: HONOURABLE JUSTICE SMT. ANJANA PRAKASH

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA PRAKASH)

Date: 20-05-2016

Heard learned counsel for the Appellant and learned
counsel appearing on behalf of the Additional Public Prosecutor.

2. The Appellant has been convicted under Sections
376 and 302 I.P.C. and sentenced to undergo ten years Rigorous
Imprisonment for the offence under section 376 I.P.C. and further
sentenced to undergo Rigorous Imprisonment for life for the
offence under section 302 I.P.C. by a Judgment dated
26/28.03.2011 passed by the Sessions Judge, Sitamarhi in
connection with Sessions Trial No. 265 of 2009 arising out of
Riga P.S. Case No. 38 of 2009.

3. The case of the Informant Andila Kumari, the
deceased herself gave *fardbeyan* before the Officer-In-Charge



Mehsaul O.P. on 19.02.2009 at 15:30 hours at Jiyalal Kalawati Memorial Hospital, Durma, District – Sitamarhi is that on 14.02.2009 when she was at her home at about 3.30 pm. her agnate Murari and the present Appellant Sanjay came inside her house and felling her down both of them committed rape upon her. When she said that she would tell her mother about it, they caught hold of her and poured Kerosene and lit her with the matchstick, on account of which she was burnt. Her mother knew about this occurrence as also her younger brother had seen the same. She was taken for treatment by Anirudh Rai, Birendra Rai, Janak Rai and Surendra Rai on a Bolero Car to Sitamarhi where she was being treated. They did not give any information to the Police because of fear nor did the family members inform the Police. Her mother had told the Chaukidar but the Chaukidar did not take any steps nor did he inform the Police Station.

4. After having gone through the evidence of witnesses, we find that the consistent evidence of the witnesses is that a fear psychosis prevailed in the village, on account of which the witnesses did not dare to speak against the powerful accused and steps had been taken to hush up the matter, but it was only when the press intervened that steps were taken to record the *fardbeyan*. Saying so, we discuss the evidence of the witnesses.



5. P.W. 1 Tetari Devi is the mother of the deceased, who stated that the deceased her daughter 15 years of age and her son Nitish Kumar (P.W. 3) were at home when the Appellant and Muari Rai carried her daughter to a Mill of his uncle Birendra Rai (the person whose name in the *fardbeyan* as one of the persons who had taken the deceased to the Hospital). In the Mill, the two boys raped her. When she threatened that she would disclose this fact to her mother and both the children came home they also followed her and then poured Kerosene oil and lit her with a matchstick. When she saw the smoke coming out of the house, she came home and she was informed about the occurrence. She went and informed the Chaukidar but he took no steps. Thereafter, Birendra Rai, uncle of one of the accused, Anirudh Rai, Janak Rai and Surendra Rai brought a Bolero Car and snatched her daughter from her lap and pushed her out from it and took her to a private Nursing Home where her daughter was kept in confinement. The Police reached Jiyalal Kalawati Memorial Hospital on the information of her brother and took the *fardbeyan* of her daughter in their presence. The Doctor was also present there. She, thereafter, stated that the daughter died during treatment.

In cross-examination, she was asked to explain as to

where she was working. She stated that her house was of one room amongst other houses. She also described the Mill where the deceased had been raped and it was lying vacant. She asserted that she had given the same statement before the Police earlier.

Her attention was drawn to the earlier statement about the manner in which the accused had chased the children home as also that Birendra Rai, Anirudh Rai, Janak Rai and Surendra Rai had snatched the deceased from her lap and thrown her out from the Bolero Car. She denied that in fact the girl had herself committed suicide when she was scolded by the mother and therefore, they want to hush up the matter and it was when the Star News reporter had created a *hulla* then her husband had instituted a case at Mehsaul O.P.

6. P.W. 2 Beerlal Rai is the father of the deceased, who stated that he and her wife were both in the fields when his daughter aged about 15-16 years and son Nitish Kumar aged about 11-12 were at home. It was then that both the accused persons, the Appellant and Murari Rai caught hold of his daughter and took her to a nearby Mill and committed rape upon her. His son Nitish Kumar (P.W. 3) saw the occurrence and created a *hulla* but he was assaulted by the accused. His daughter threatened that she would disclose to her parents so the accused chased her to her



home and then sprinkled Kerosene and lit her on fire. His son Nitish Kumar (P.W. 3) poured water on her. Then the family members of accused namely Birendra Rai, Anirudh Rai, Janak Rai and Surendra Rai who happened to be the uncle of accused Murari Rai came with a Bolero Car. When he was going to the Police Station he went to the house of Chaukidar. In the meanwhile, the aforesaid accused persons threatened his wife and took his daughter to Sitamarhi to a Doctors' place. For next 3-4 days, he looked for the child and it was in this course that he found her at Sitamarhi Clinic where the aforesaid four persons were present along with the deceased. When he started creating a *hulla*, the Police came and recorded the statement of the deceased. Later the deceased died. He stated that even now when he was coming to depose, the relatives of accused namely Janak Rai, Surendra Rai, Anirudh Rai and Birendra Rai had threatened him. Further, he stated that he kept his own Lawyer, but could not give any written report before the Police Officer in this regard. He explained as to where his house was situated and denied that he had dispute with the accused persons. He added that no one said anything against the accused. He denied about pendency of any case earlier and stated that his wife had not instituted Riga Police Case No. 73 of 1993.



He had informed the Mukhiya but said he could do nothing because he belonged to the lower caste and therefore was weak. The Chaukidar had also been informed and it was on his bidding that he had gone to the Police Station. However, the Police did not take any action and when his brother-in-law came to the Hospital, the Police and the rest of the authorities came to the Hospital after complaints to the higher authorities. He asserted that when he reached the Hospital, his daughter was talking properly even though her entire body, except her hands and legs, were burnt. He stated that the other persons who were working in the fields along with him belong to the group of the powerful and therefore were not supporting him in any manner.

His attention was drawn to the earlier statement that he did not state about his son pouring water on the deceased or that the deceased was removed to the Hospital on the Bolero Jeep by Anirudh Rai, Janak Rai, Surendra Rai and Birendra Rai. He also denied that he had not told the Police that he looked for the child for next 3-4 days and that when he reached the Hospital he had seen the aforesaid four persons also there. It was suggested to him that his daughter, in fact, had been burnt while cooking and a false case of rape had been instituted.

We, thus, find that two different suggestions have

been given to the father and mother of the deceased.

7. P.W. 3 Nitish Kumar is the brother of the deceased, who stated that on the date of occurrence at about 3.30 pm. both the accused persons including the Appellant committed rape upon his sister and thereafter, came to the house following her and when she stated that she would tell her mother about the occurrence, both the accused persons poured Kerosene and lit a matchstick on her. Thereafter, Birendra Rai, Anirudh Rai, Janak Rai and Surendra Rai came and took the deceased to the Doctor on the Bolero Jeep where she died later. His parents were not allowed to go for treatment and they were forbidden to inform anyone. He stated that his sister was not talking terms with the two accused. He explained as to how the deceased had been lifted by the two accused and taken to the Mill and also he was assaulted by them. His sister died a month later at the Hospital. It was suggested to him that, in fact, her sister had died while cooking.

8. P.W. 4 Binod Rai is the *Mama* of the deceased, who stated that on the date of occurrences, he was in the village. When he heard a *hulla*, he saw the deceased in an injured condition. The deceased was saying that the two accused including the Appellant had taken her to the Mill and committed

rape upon her and when she stated about the occurrence to her mother, both of them followed and burnt her. Then the uncle of accused Murari Rai, Birendra Rai and 2-3 persons came and took her to Sitamarhi for treatment. He along with the parents of the deceased also came to Sitamarhi where she died later.

In cross-examination, he stated that he had seen the aforesaid persons, who had brought the deceased to the Hospital present there.

His attention was drawn to the earlier statement that he had not stated that the deceased had disclosed that she was raped there by two accused and burnt when she threatened, she would inform her mother.

9. P.W. 5 Dr. Bibha Kumari Jha was the Civil Assistant Surgeon at Sadar Hospital, Sitamarhi and examined the injured on 21.02.2009 and found the following :

M.I. could not be taken due to extensive burn. She was conscious unable to talk and unable to open her mouth. Height- 4' 10", Weight – 40 kg. teeth could not be counted. Burn on face, chest Axilla, left hand and right thigh. Secondary sexual character auxiliary hair not seen due to dressing covering the area. Breast covered with dressing. Public hair

present. Private part – Vagina admits one finger easily. Cervix healthy, uterus size not assessed. Vaginal swab taken and sent for microscopic examination. On report from radiologist x-ray elbow shows both epicondyles of humerus olecranon of ulna and head of radius fused. X-ray wrist shows – Distal ends of ulna and radius fused, X-ray pelvis shows both iliac crest appeared but not fused. Vaginal swab report – No spermatozoa present, Epithelial cells a few, others- Nil. On the basis of above mentioned finds, the radiological age of Andila Kumari is in between 16 to 18 years and it is difficult to say whether rape has occurred or not.

She proves the Medical Report as Exhibit-1.

In cross-examination, she stated that inability to talk and upon her mouth was due to extensive burn injury. However it may be by vocal cord.

10. P.W. 6 Udai Shanker Priyadarshi conducted the Postmortem of the deceased on 07.03.2009 and found the following Antemortem injuries on her person :

External Finding :

Dressed wound over both upper limb, chest and

back, right side of buttock, old burn and infected wound over face. Burn over neck, right side of thigh. All are old burn injuries and infected. Total burn area about 60%.

Internal Finding :

On opening of skull – cranium intact, brain matter pale. On opening of neck – NAD. On opening of thorax – Both lungs intact and pale. Heart intact and chambers partially filled with dark blood. On opening of abdominal cavity – All abdominal viscera intact and pale. Stomach contained gastric juice only. Urinary bladder empty. Uterus normal in size.

Time elapsed since death and P.M. held within 24 hours. In my opinion the cause of death was due to shock, fluid loss, hypoproteinemia, taxnia and septicemia leading to cardio respiratory failure as a result of above noted infected old burn injuries due to flame of fire.

He proves the Postmortem Report as Exhibit-2.

In cross-examination, he stated that there was a possibility of survival in case of burn injury of 60% as also that a

person may lose consciousness after 12 hours or even before that if one sustained 60% burn injury.

11. P.W. 9 Anil Kumar Singh was a Medical Officer of Jiyalal Kalawati Memorial Hospital, Sitamarhi, who stated that on 19.02.2009 a girl patient had been brought with burn injuries. She had sustained 70% burn injuries but she was speaking. He proves Injury Report as Exhibit-7 as also that on the said date when the Bindeshwari Singh (P.W. 8) Officer-In-Charge Mehsaul O.P. had recorded the *fardbeyan* of the deceased, who subsequently died on 07.03.2009. He proves the Inquest Report as Exhibit-8.

This witness has been put under extensive cross-examination as to the entries in the Patient Register and the condition of the patient in the circumstances of burn.

12. P.W. 8 Bindeshwari Singh is the Officer-In-Charge of Mehsaul O.P. stated that on 19.02.2009, he recorded the oral dying declaration of the deceased on which she gave her thumb impression, which is marked as Exhibit-5. He proves the carbon copy of requisition given to the Doctor for examination and report of the Injuries of victim as Exhibit-6. He informed the Riga Police Station about the occurrence at which Officer-in-Charge, Manu Prasad and Yogendra Prasad Rai (P.W. 7) came to

the Hospital where she was being treated. He handed over the *fardbeyan* to the Officer-in-Charge Riga Police Station because it was within his jurisdiction.

In cross-examination, he stated that he had not conducted any part of the investigation.

13. P.W. 7 Yogendra Prasad Ray was the Officer-in-Charge of Riga Police Station and assumed investigation of the case on 19.02.2009. He had proved the First Information Report as Exhibit-3 and examined the place of occurrence. He found the Flour Mill in which logs of wood were lying reportedly the place where the rape had been committed and nearby was the hutment of the Informant, which had a *jute* curtain in place of the door. He inspected the house of the Informant and did not find the accused persons in the house. He, thereafter, prepared the Inquest Report and procured the Postmortem Report and submitted the charge sheet.

In cross-examination, he stated that the parents and the uncle were present at the Jiyalal Kalawati Memorial Hospital and had not taken the exact measurements of the room of the Appellant.

His attention was drawn to the statement of Tetari Devi (P.W. 1) to some parts of P.W. 3 being an eye witness about



having stated earlier that P.W. 3 Nitish Kumar was an eye witness or that the relatives of accused Murari had forcibly taken the deceased to the Hospital on Bolero and pushed her out from the same. He also confirmed the fact that P.W. 2 father of the deceased had not stated that P.W. 3 was an eye witness or the exact manner of occurrence. P.W. 4 is the uncle of the deceased had also not stated the date of occurrence was in the village.

14. The counsel for the Appellant submits that the present case had been instituted after undue delay for which there is no explanation. Further submission is that the evidence of the Doctors suggests that the deceased could not have been in a position to speak and therefore the dying declaration is not authentic. Also, the Investigating Officer did not find any objective evidence in the house of the Informant where the deceased is said to have been burnt and the prosecution has materially changed its version by saying that the girl had been raped in the Mill. Further the injuries were not of the nature which were imminent to cause of death and therefore, no offence under section 302 I.P.C. is made out.

15. On the contrary, we find that the witnesses have given a very truthful and natural count of the manner of occurrence and also explained very well the reason for the late



reporting. We also find that the Informant and her family belonged to an economically and financially backward class, in which circumstances, the reports to the Chaukidar and Mukhiya/Police did not yield any result. We further find that P.W. 2, the father of the deceased had stated that even on the date that he was coming to depose in the present trial, the relatives of accused Murari had threatened him and no body used to dare to speak against them. The evidence of P.W. 3 (Nitish Kumar) who was younger brother of the deceased has also given a very credible evidence in regard to the manner of occurrence, which is supported by the three Doctors examined in the case.

16. We find from the evidence of P.W. 9 (Anil Kumar Singh) who was The Medical Officer posted at Jiyalal Kalawati Memorial Hospital, Sitamarhi that he has categorically stated that the deceased was in a position to speak at the time of her admission and therefore, was fully capable of giving her oral dying declaration. He also stated that the statement was recorded in his presence by P.W. 8.

17. As for the place of occurrence, no doubt, the Investigating Officer has not stated about finding any signs of burning in the room of the Informant but his failure to mention such a fact would not by itself disprove the manner of occurrence.

18. Also the later development of rape at the Mill is also of no consequence, since the first statement either by way of *fardbeyan* or dying declaration is not expected to be an encyclopedia. The extensive bruise were definitely enough and imminent to cause the death.

19. Hence, in view of the discussion above, finding no merit in the Appeal, the same is dismissed.

(Anjana Prakash, J)

(Rajendra Kumar Mishra, J)

Shailendra/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	26.05.2016
Transmission Date	26.05.2016