

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.74 of 2015

Arising Out of PS.Case No. -308 Year- 2012 Thana -PURNEA SADAR District- PURNIA

Against the judgment of conviction dated 20.01.2015 and order of sentence dated 23.01.2015 passed in Sessions Trial No. 212 of 2013, Trial No. 109 of 2014, CIS No. 0001445 of 2013 arising out of Sadar (Dagarua) P.S. Case No. 308 of 2012, by Sri Sachidanand Singh, 2nd Additional Sessions Judge, Purnea.

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Md. Jahid Alam, Son of Md. Abbas, Resident of Village - Amana, P.S. - Dagarua,
District - Purnia. Appellant

Versus

The State of Bihar. Respondent

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Appearance :

For the Appellant/s : Mr. Radha Mohan Singh, Advocate
Mr. Ramesh Kumar Singh, Advocate
Mr. Dilip Kumar, Advocate
For the Respondent/s : Mrs. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 12-04-2016

The sole appellant has been convicted under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs. 50,000/- and in case of non-payment of fine to undergo further sentence of simple imprisonment for two years. It has further been ordered that if the amount of fine is paid then out of the said amount of Rs.50,000/-, Rs. 30,000/- shall be paid to the victim.

2. The prosecution case, as alleged, by the informant Banty Kumari, the victim that while she was alone in her house in the night on 29.07.2012 at about 10 P.M. she went out of the house to meet the call of nature (to urinate) in front of her house, she met Jahid



Alam and he disclosed her to immediately go to her aunt Anita Devi because she is serious. On the said statement of Jahid, she replied that she will go after taking permission of her father but Jahid did not permit her to go for permission of her father and he got seated her on the motorcycle, he took and kept her about three and half hours with him. The further case is that Jahid had kept her and during this period of three and half hours, he raped her. The further case is that after some time, he brought her back on his motorcycle to her house where she started weeping then Jahid first proceeded to some distance but returned back within two minutes on her cry and when the people standing nearby tried to catch hold of him but Jahid fled away leaving his motorcycle and thereafter the people of the village brought the motorcycle of Jahid in the courtyard of the informant.

3. The fardbeyan of Banty Kumari was recorded by Aslam Sher Ansari, the Sub Inspector of Police and the Station House Officer, Dagarua Police Station on 30.07.2012 at about 8.15 P.M. at the residence of Santosh Kushwaha, the Member of Legislative Assembly, Santosh Kushwaha. On the fardbeyan an endorsement was made to lodge a case under Section 376 of the Indian Penal Code and Sub Inspector of Police, Md. Aftab Alam will investigate the case. On the fardbeyan, a further endorsement to lodge Sadar (Dagarua) P.S. Case No. 308 of 2012 dated 30.07.2012 under Section 376 of the



Indian Penal Code and consequently First Information Report lodged and investigation proceeded. The fardbeyan was forwarded to the Station House Officer, Sadar Police Station for institution of case under Section 376 of the Indian Penal Code and thereafter, the endorsement was made by the Station House Officer of Sadar Police Station who further endorse to lodge case under Section 376 of the Indian Penal Code and handing over the investigation to Aftab Alam and consequently after lodging the First Information Report, the investigation proceeded. During the investigation, the Investigating Officer recorded the further statement of the victim and reached the place of occurrence from where she was kidnapped and left after occurrence as disclosed by the victim, inspected the place of occurrence and thereafter got the victim examined by the Medical Doctor at Sadar Hospital, Purnea. The place where she was taken and the place where she was left, which is a Pakki road adjoining the Nikhrail Bazar and adjoining it a betel shop of Sahib Alam and adjoining a shop of breakfast. He also raided the house of the accused and arrested him on 31.07.2012 and brought him to the Police Station. He recorded the statement of accused since the Investigating Officer was transferred to the Training Centre so he handed over the investigation to the Officer-in-charge of the Police Station. Subsequently, the investigation proceeded by another Investigating

Officer and on conclusion of the investigation charge-sheet submitted, cognizance was taken, case was committed to the Court of Session. Thereafter, the charge was framed and during trial nine witnesses were examined on behalf of the prosecution.

4. The witnesses examined on behalf of prosecution are P.W.1, Nirmal Kumar Bhagat has deposed that he does not know about the occurrence and his statement was not recorded by the Police and this witness declared hostile.

5. P.W.2, Ramesh Chauhan has deposed that he does not know anything and he also declared hostile by the prosecution.

6. P.W.3, Ranju Devi, the mother of the victim has deposed that she had gone along with her Gotani Anita Devi to the Primary Health Centre, Dagarua and after returning at home in the night, she learnt that her daughter is not at the house. Thereafter, she started searching of her daughter. She has stated that Jahid Alam came to leave her daughter by the motorcycle at home then her daughter started weeping and said Jahid Alam has raped her and when the inmates of the village tried to catch hold of him then Jahid Alam fled away leaving his motorcycle and thereafter went to the Dagarua Police Station, but Dagarua Police Station did not record his First Information Report and then she went to the house of Santosh Kushwaha, the Member of Legislative Assembly of the concerned

Constituency. Thereafter, her case was also lodged and after recording the statement of the informant, the Police read over the contents of the fardbeyan and she got signed on it after finding it true. She has further stated that the motorcycle was also seized, seizure list prepared and proved the signature on the seizure list, which has been marked as Ext. 1.

7. P.W.4, Devnath Sharma, Sub Inspector of Police, Laheriasarai, who submitted the charge-sheet in this case under Section 376 of the Indian Penal Code and proved his handwriting and signature on the charge-sheet.

8. P.W.5, Dr. Banita who examined the victim and has deposed the mark of identification which is as follows:-

“M.I.- A Til on the right side of nose. A Til on the left end of the left eye brow.

Built-Average

Breast-Developed but not fully

Pubic Hair- sparse

Auxiliary hair- Sparse

Mantualitis Arry -Regular

L.M.P.-18th April 2012

Menarche- Two Years back

9. However, it has been reported that no external injury

has been found on her body but it is reported fresh tear in hymen. High vaginal swab was sent for pathological examination when in the light spermatozoa was not found and radiologically, the victim was aged about 16 to 17 years. It has further been opined that possibility of rape could not be ruled out.

10. P.W.6, Manoj Mistri has deposed that he heard hullah from the house of Banty Kumari and he rushed there then he saw Banty Kumari was weeping and the motorcycle of Jahid has fallen. He asked Banty then she disclosed that in the same night at about 10 P.M. when she come out to meet the call of nature, in the meantime, Jahid reached there on motorcycle called Banty and said that her aunt is serious so that you went to see your aunt. Banty disclosed that she will take permission from her father then Jahid Alam said that there is no time sit immediate and got seated on the motorcycle and proceeded towards the forest and where she was being taken and then she was threatened that if she making a noise then she will be killed.

11. P.W.7, Banty Kumari, the victim has supported the prosecution case that at about 10 P.M. she was at her house and her aunt was admitted in the hospital and thereafter, Jahid asked her about her aunt Anita Devi and when she denied and asked from her father Jahid disclosed that she has not disclosed from her father forcibly



proceeded on the motorcycle. She has further stated that he has forcibly committed rape. However, she disclosed that she could not know the place where she was raped as it was dark. However, she stated that after committing rape, Jahid Alam brought her and left her near her house and he was turning his motorcycle. She started weeping on which the labourers came there but Jahid tried to flee away leaving his motorcycle then the co-villagers kept his motorcycle in their hands.

12. P.W.8, Aftab Alam, Sub Inspector of Police, who is the Investigating Officer has deposed that after lodging the First Information Report, he reached the place of occurrence and however, he has stated that during investigation, the victim produced the clothes and the production cum seizure list prepared and sent the clothes for testing in the Forensic Science Laboratory and the report of the Forensic Science Laboratory was received.

13. P.W.9, Brahmdeo Prasad Yadav, Advocate Clerk has formally proved the formal First Information Report. The defence of the accused persons is that the appellant has falsely been implicated due to political reason as Jahid used to work against Kushwaha Jee in election and the appellant has falsely been implicated at the instance of Santosh Kumar.

14. The Trial Court after taking into consideration the



facts of the case convicted and sentenced the appellant that the victim while out of the house at about 10 P.M. then she was taken motorcycle on the pretext of seeing the aunt of the victim who was seriously ill and further the Doctor has found the injury and further taking into consideration that the clothes, the Salwar Ext.-C sent to the Forensic Science Laboratory and the Salwar Ext.-A found the semen of human. Further taking into consideration the contradictions in the evidence and the evidence recorded during the trial held that the situation is not as such under correctness of the local Advocate to help the situation is not a search to disbelieve the prosecution story so convicted the appellant and sentenced as mentioned above.

15. Learned counsel for the appellant, however, challenged the order of conviction and sentence recorded by the Trial Court on the ground that the First Information Report lodged on the fardbeyan of Bailo Devi at the house of Kushwaha Jee, local M.L.A. and hence is tainted with political motive. It has further been contended that none has seen the appellant either going or coming with victim at the place from where victim was taken or kidnapped and left over and none has even seen the accused fleeing away from the place after dropping the victim. It has further been contended that the statement of the victim has not been recorded under Section 164 of the Cr.P.C. It has further been contended that the Doctor did not



find any external injury on the person of victim and further it is submitted that it is not possible to rape by one person and even in the peculiar facts and circumstances of the case that there was no injury found either external or internal on the person of the victim and there would have been a resistance, there must have some injury either internal or external. It has further been contended that the accused was arrested within 48 hours but the accused has not been medically examined for confirmation of the rape by the appellant and has placed reliance upon a decision reported in **2011(7) SCC 130 (Krishan Kumar Malik v. State of Haryana)** as well as an unreported decision in Special Leave Petition (Crl.) No. 5844 of 2014 whereas an unreported decision of this Court passed in Cr. Appeal No. 1156 of 2008 (Ram Sevak Rai V. The State of Bihar) disposed of on 29.09.2011 having a contention that the non-compliance of Section 53A of the Cr.P.C.

16. The learned counsel for the State, however, submits that the witnesses have supported the prosecution case that the victim was taken on motorcycle and was raped at a lonely place and thereafter, she was dropped and the victim disclosed about the occurrence and further the rape of the victim is corroborated by the medical evidence as the fresh tear of the hymen was found by the Doctor and further evidence of the Doctor that the rape is not ruled



out and further the human semen found on the Salwar of the victim and hence, there are fresh corroboration of the evidence. The corroboration of the allegation of rape and non examination of the appellant after his arrest after two days of the occurrence to the prosecution case having respective submission and question for consideration whereas the prosecution has been able to record a conviction and sentence. However, prosecution case as alleged that victim came out of the house in the night at 10 P.M. She was taken by the appellant on the pretext that the aunt of the victim admitted in the hospital as she is seriously ill and the victim has supported the prosecution case that she was taken to a lonely place in the darkness of the night and where she was raped. The criticism by the learned counsel for the appellant that the allegation of rape was made and the manner in which it is alleged that the victim was taken on a motorcycle and it is not possible that a person driving the vehicle will drive away the victim will kidnapping by force on motorcycle and further one person cannot rape the victim alone as it is a case of one person raping the victim and when the victim resisted then there must have been some injury on his person either external or internal. However, the argument advanced on basis of prosecution that victim was brave enough to resist her tooth nail but nature of resistance varies from man to man. There may be a person who is victim of rape



and on mere threat she may succumb to the threat and make no resistance. However, there may be a person bold enough even to risk his life and putting the life of the accused at peril that he resist to such but that resistance depends from man to man and for this reason the prosecution case cannot be rejected. However, it is true that no injury was found on the person of the victim but as per the evidence of the Doctor, the Doctor has found fresh tear of the hymen and further just after return the victim started weeping and thereafter, she disclosed about the occurrence to her mother as the evidence of P.W.3 has stated that Jahid returned on the motorcycle to leave her daughter and then her daughter started weeping and disclosed about the rape and hence, the evidence is a corroborative piece of evidence under Section 6 of the Evidence Act was hit by the specific act and further the mother immediately took the victim to the Police Station and where it is alleged that the Police refused to lodge the First Information Report and then the victim was taken to the local M.L.A. and then at the intervention of the local M.L.A. the First Information Report was lodged on the next date.

17. The criticism of the evidence that the false case has been instituted at the instance of the local M.L.A., Santosh Kushwaha. The criticism has been made that First Information Report lodged was not at the Police Station but at the residence of local M.L.A. and



rational the false implication and the case has been made out as per the suggestion that the First Information Report lodged at the instance of Santosh Kushwaha, the M.L.A. as the appellant who was working against the M.L.A. in his election and a submission has been made that the appellant was a member of the RJD and the local M.L.A. was also a member of the RJD. However, the only suggestion gives which she answered that she does not know whether Jahid had worked against Kushwaha Jee in election. However, there is no specific averment regarding any dispute with the appellant and the local M.L.A., Kushwaha Jee, except the Kushwaha Jee, M.L.A. of B.J.P. and the appellant is member of the RJD and so there may be a dispute between them does not stand to reason. There is no specific averment or even suggestion what was the dispute between the local M.L.A. Kushwaha Jee and this appellant. There is neither any evidence nor even any suggestion regarding the nature of the dispute if any, which caused the false implication. The further criticism by the learned counsel for the appellant that P.W.6, Manoj Mistri stated in his evidence that he was the first person who reached the place of occurrence when he heard Jahid kidnapped Banty from the house of Banty Kumari and in his deposition in para 5 of the prosecution case. However, he stated that when Banty cried then he reached for the first time and has stated that Banty was making hullah at her house and she



was making hullah in the eastern portion of the house. Further, he stated that when he reached there. He has further stated that Banty disclosed about the occurrence and at that time Banty was weeping and he found the motorcycle of Jahid fallen there. However, the victim, P.W.7 in her evidence has stated that when Jahid flee away after leaving her then it was her mother, uncle and grand-mother came first to see her. However, the evidence of P.W.7 that she heard hullah from the house and she was the first person. However, Banty had stated that when the appellant fleeing away it was for the first time her mother has also stated that Banty was disclosing about the occurrence of the rape by the appellant. Hence, taking into consideration these facts that the victim was taken motorcycle and they returned the appellant and then the mother came and she disclosed the fact to the mother and other persons and thereafter, she was taken to the Police Station and when the refusal made by the Police to lodge First Information Report then she was taken to the local M.L.A. and at the intervention of the local M.L.A., the First Information Report was lodged by the prosecution. This matter command experience that the Police normally refused to get the First Information Report reported and in such situation the evidence of the informant that the Police refused to lodge then victim approached the local M.L.A. and on his intervention First Information Report lodged. There is nothing to



dispel the evidence or to suggest that the First Information Report lodged at the intervention of M.L.A. suffered from any infirmity. However, the statement of the victim was not recorded under Section 164 of the Cr.P.C. however, the criticism that statement of victim has not been recorded under Section 164 of the Cr.P.C. before a Magistrate. The appellant was arrested after 48 hours but he was not examined by the doctor. It is submitted that the DNA of the accused is mandatory in this case and placed reliance on a decision reported in 2011 (7) SCC 130. However, the fact of the case reported in 2011 (7) SCC 131 that the victim alleged to have been taken away by six accused persons and the First Information Report lodged against unknown without naming the person. However, subsequently, the victim named one of them. However, subsequently, at the latter stage of the institution, the victim names some of them on the pretext that the accused were there during the rape were calling the names and she identified him. However, admittedly the accused persons were not named in the First Information Report lodged by her and instead accused was described as Gittia (short stretcher) beard even though she was wipe his name but no explanation offered by her in this regard. The fact further shows that though the allegation is that the victim was raped by seven persons one by one and another a person also and though it is alleged that she was raped by eight persons but



during the evidence she stated some times eight and some times 7 and further the medical evidence shows that her living M.I. and libia minor were healthy and had no mark of injury. Hymen was not red hot as tender and did not bleed and the vagina admits two finger and taken to this consideration these facts and: circumstances as well as the fact the identification of the appellant was under challenge and it was found that from the beginning prosecution was doubtful of the trustworthiness of the prosecutrix herself and in that circumstance it has been observed that Section 53 of the Criminal Procedure Code under the facts and circumstances, it becomes necessary to the prosecution to go into DNA test in such type of cases facilitating the prosecution to prove its case against the accused. Having regard to the facts and circumstances of the case reported in 2011 (7) SCC 130 when the prosecution is doubtful regarding the accused and in that circumstance, the DNA test of the accused held to be required to prove the identification and hence, this ruling cannot have the universal application that DNA is mandatory in each and every case of rape and if the DNA test is not done under Section 53A then the case shall be ended in acquittal. However, under the facts and circumstances, it is not in dispute that the identification of the appellant, the victim at the very outset has named this appellant has identified the motorcycle of the said accused was left over and the



accused fleeing away and the victim disclosed the name of the appellant at the very outset. Moreover, under the facts of the case at hand that the appellant arrested after 48 hours of the occurrence i.e. after two days of the occurrence and hence, under the facts of non examination under Section 53A is not fatal if the evidence of the victim or the prosecutrix is reliable and trustworthy and further there is corroboration by medical and other evidence. Having regard to the fact and in the light itself the victim then returned along with the accused by motorcycle and started weeping and immediately the mother and the other witnesses collected. Hence, he disclosed the name of the appellant with allegation of rape and hence, this also must be admissible in evidence is a corroborative piece of evidence under Section 6 of the Evidence Act and further this Section coupled with the Doctor that he found a fresh tear of hymen and sign of semen on the Salwar and further the Salwar of the victim found with the human semen is an additional link. However, the criticism that the DNA test of the appellant has not been done for confirmation that the semen belongs to the appellant. It is true that the DNA test has not been conducted but taking into consideration the nature of the evidence that the victim supported the prosecution case just after the occurrence when she returned back she disclosed the name of the appellant and reported the occurrence of rape and further on medical examination

the doctor found hymen fresh tear of hymen the Jarbon and the opinion of the Doctor that the rape cannot be ruled out does not wipe out the rape.

18. Learned counsel for the appellant, however, relied upon the decision reported by this Court passed in Criminal Miscellaneous No. 1156 of 2008. However, the fact of the case is also that the appellant caught the victim and committed rape and there was allegation that the victim was bleeding from her private part. However, the Doctor who examined the victim found that there was no mark of violence external or internal or any part of the victim no mark of the violence on the private part, the hymen was found intact no external injury and hence, it was opined that there is no mark of violence and under these facts and circumstances of the case coupled with the circumstance of non-compliance of Section 53A considered as one additional circumstance to record acquittal. The other decision relied in Special Leave Petition in Criminal Miscellaneous No. 5848 of 2015 in which a direction was issued by the High Court to direct the accused appellant to give his blood for test as well as his voice sample for analyzing and subject himself for medical examination under Section 53A read with Section 178 (3) of Cr.P.C. and the said order of the High Court was challenged in the Supreme Court and the Supreme Court refused has no bearing in the case.

19. However, taking into consideration the facts and the circumstances of the case, the evidence of the prosecutrix found to be reliable and trustworthy and this followed by the corroboration of the medical evidence and the criticism drawn regarding the false implication has not been find reason for any enmity nor probalised even regarding the false implication or the fact that the First Information Report lodged at the house of the local M.L.A. at his intervention and hence, taking into consideration, the entire facts and circumstances, I find that the prosecution has been able to prove its case as there is nothing in the evidence of the victim to discredit rather her evidence found reliable and trustworthy and there is necessary corroboration as the Doctor opined that rape cannot be ruled out followed by finding the hymen fresh rupture and further the Salwar bear the sign of semen of human which was found on her cloth (Salwar) and hence, I find and hold that the prosecution has been able to prove its case beyond all reasonable doubts and the identification any merit to interfere with the order of sentence that against the charge framed against the appellant and, accordingly, this appeal is dismissed.

(Gopal Prasad, J)

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