

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.159 of 2015

Arising Out of PS. Case No. -101 Year- 2011 Thana -KATORIA District- BANKA

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DIPU YADAV SON OF DURO YADAV RESIDENT OF VILLAGE - THEBRI,
P.S. KATORIA, DISTRICT - BANKA

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Sanjay Kumar Jha, Adv.
Mr. Satyaveer, Adv.

For the Respondent/s : Mr. Syed Ashfaque Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 14-02-2017

Sole appellant Dipu Yadav has been found guilty for an offence punishable under Section 366/34 IPC, 376 IPC vide judgment of conviction dated 17.01.2015 and sentenced to undergo R.I. for five years as well as also slapped with fine of rupees ten thousand under Section 366/34 of the IPC, R.I. for eight years as well as fine of rupees ten thousand under Section 376 of the IPC with a further direction that in default of payment of fine, to undergo S.I. for six months additionally under both heads with a further direction to run the sentences concurrently and further, the period having been undergone during course of trial be set of in accordance with Section 428 of the Cr.P.C. vide order of sentence dated 21.01.2015 passed by Additional Sessions Judge, Illrd, Banka in Sessions Trial No.67/2012.

2. PW.5, Gurudeo Yadav who happens to be husband of the alleged victim Veena Devi (PW.2) had filed written report on 03.06.2011



alleging inter alia that his wife Veena Devi aged about thirty years had gone to meet nature's call in the night of 21.05.2011 and since thereafter, did not return. He made hectic search but being frustrated informed the police on 25.05.2011 whereupon Sanha was entered. Even thereafter, he continued with his effort and during course thereof, he was informed by the villagers as well as children of the village that his co-villager Dipu Yadav and Sahendra Yadav forcibly lifted his wife Veena Devi. Apart from this, it has also been disclosed that she is still traceless.

3. On the basis of the written report, Katoria P.S. Case No.101/2011 was registered under Section 366/34 of the IPC and during course of investigation, as is evident, appellant was apprehended, victim was traced out and so, concluding the same, charge sheet was submitted for an offence punishable under Section 376/34 of the IPC showing co-accused Sahendra Yadav to be absconder, whereupon cognizance was taken. On account of offences being sessions triable, the case was committed whereupon the trial commenced and concluded in a manner, subject matter of instant appeal.

4. Defence, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial as well as false implication on account of some sort of animosity prevailing amongst the parties. However, neither any DW nor any chit of paper has been adduced on their behalf.

5. In order to substantiate its case, prosecution had examined altogether nine PWs out of whom PW.1 is Shankar Kumar Yadav, PW.2 is Beena Devi, PW.3 is Kaili Devi, PW.4 is Indradev Yadav, PW.5 is Gurudev Yadav, PW.6 is Dr. Anita Arun, PW.7 is Ajeet Kumar, PW.8 is



Rajnanda Kumar, part Investigating Officer, PW.9 is Anil Kumar Thakur, Judicial Magistrate who had recorded 164 statement of the alleged victim. Side by side prosecution had also exhibited Ext.1 Series injury report/supplementary injury report, Ext.2 pathology report, Ext.3 petition filed by Investigating Officer for examination of the victim, Ext.4 signature of Officer-in-charge over formal FIR, Ext.5 formal FIR, Ext.6 endorsement over written report, Ext.7 statement of the victim under Section 164 Cr.P.C.

6. In a rape case, the statement of the victim happens to be of paramount consideration. Seldom corroboration is needed unless and until the conduct of the victim suggest otherwise. So far Indian continent is concerned, the prestige of the women happens to be of great importance and more particularly, women firstly try to cover up so that she should not face any kind of castigation in the society on that very score but, when the matter goes beyond her reach, then in that event, seeing no an alternative, steps forward to array perpetrator of the crime to be responsible for outrage her prestige. Therefore, statement of the victim is accepted without any if and but subject to some sort of variation being exposed and vary case to case.

7. Side by side, innocence of an accused is the legal presumption and that happens to be reason behind that an obligation is always upon the prosecution to substantiate its case even where the presumption happens to be against the accused. By virtue of an amendment Section 114A of the evidence Act introduced by amended Act No.43 of 1983 relating to offence of rape having been categorized under clause a,b,c,d,e,g of sub-section 2 of Section 376 of the IPC



whereunder presumption has been allowed to subsist in case the question of consent is involved it denied by the victim unless and until duly rebutted by the accused. Relating to sub-clause 1 of Section 376 of the IPC, the yardstick remains to be same, without influenced by the said amendment and so, with regard to facts and circumstances of the present case whereunder victim happens to be married, major as well as mother of two children, her conduct is to be seen in consonance with the allegation so attributed.

8. In order to appreciate it properly, it looks desirable to began with the evidence of PW.5, informant. He had stated that on the alleged date and time of occurrence he was at Kolkatta. He received information from his house that Dipu Yadav and Sahendra Yadav kidnapped his wife. The aforesaid information was conveyed by his brother and Bhabhi. He came to his village and began to search out his wife but failed. Then thereafter he had gone to P.S. and filed written report. After twenty days, his wife returned back after released by the accused persons. She further disclosed that Dipu Yadav had confined her in a room, was regularly assaulting as well as subjected her to rape daily. He was further threatening that in case she will narrate the event to anybody then, in that event, she will be murdered. His wife had disclosed the aforesaid theme to Kaili Devi and other villagers. Identified the accused in dock. In paragraph 3 of his cross-examination he had stated that Dipu had got no entrance at his place. In para-4 he had stated that on the following day of the occurrence he had instituted the case. In para-5 he had not reiterated the factum of Sanha though was cross-examined on that very score. In para-6 he had stated that his wife had made statement against the



accused. He had not made any statement against accused. Thus, from his evidence, it is crystal clear that occurrence did not take place in his presence, and in likewise manner, he was already informed by his family members that victim was kidnapped by Sahindra and Dipu. Then what was occasion left for him to lodge Sanha instead of FIR against the culprits and further, what was reason whereunder he failed to substantiate the same during course of his evidence, though the PW.7, Investigating Officer had deposed on that score. It is worthwhile to consider the approach of the prosecution whereunder Sanha has not been made an exhibit of the record. It has got relevancy in the background that PW.5 himself stated that case was filed on following day of occurrence, which is found totally in consistent with actual affair.

9. Now coming to the other witnesses, PW.3 is to be taken at first instance. The inter se relationship is no more under controversy being Bhabhi of the informant. She had stated that on the alleged date and time of occurrence, she along with victim had gone to meet natures call. While they were returning, Dipu Yadav caught hold victim's neck from behind, Sahendra Yadav caught hold her hand, thrust cloth inside her mouth and then, took her away over motorcycle. She rushed to her house and disclosed the event and then gone in search of victim along with her family members but till then, the accused persons succeeded in taking her away. After twenty days, Veena Devi returned back. Veena disclosed that she was confined in a room and was subjected to torture. She further stated that accused persons committed other misdeeds with victim. During cross-examination she had stated that she had raised alarm. Raj Kumar, Rajendra and other family members were present



there. It was 07:00 PM. They remained at their house whole night. On the following day they have gone to search. In paragraph-6 there happens to be contradiction and is found duly substantiated from the evidence of PW.7, para-16. In para-8 she had further stated that Veena Devi was not in love with Dipu Yadav. They were not on visiting term. She had not seen Veena Devi in company of Dipu Yadav. Being family member and further, having in company of victim at the time of alleged occurrence her conduct is to be perceived and for that, apart from major contradiction posing threat over her status to be an eye witness to occurrence, she had not stated that any of the accused was armed with deadly weapon and in likewise manner, whether they seen motorcycle parked since before. She happens to be further silent whether any resistance was made at her end as well as at the end of the victim. Moreover, it happens to be month of May and keeping themselves inside house whole night when a co-villager had dared to put his hand over prestige of the family by kidnapping the female folk is a circumstance of grave concern more particularly in the background of the fact that neither PW.5 in the written report had said anything that at the time of filing of Sanha this PW.3 had already spoken with regard to activity of the appellant and in likewise manner, there is silence at the end of PW.3 to have disclosed the event to PW.5, informant after his arrival.

10. She had stated that on the alleged date and time of occurrence she along with Kaili Devi (PW.3) had gone to meet natures call. She had gone to the place in front of house where bush lies. During course of return, Dipu Yadav caught hold her neck and pulled towards bush where he had kept motorcycle. Sahendra Yadav was along with



him. Nothing was done by the accused in the way. After covering long distance, they locked her in a room. Then thereafter, Dipu Yadav assaulted her and then raped. Dipu Yadav kept her for 20 days and during course thereof, he used to commit rape on each day her condition deteriorated. Then thereafter, he took her to jungle near her Naihar and then released her. During course thereof, he had tied her hand, leg and thrust cloth in her mouth so that she could not raise alarm. Children came towards her and then untied her. At the time of departure, the accused threatened that in case of filing of case her husband will be murdered. Then thereafter, she returned back to her Naihar where she narrated her owe to her parents. Her husband was also in search of her. Her father informed her husband whereupon her husband accompanied her from her Naihar whom she had disclosed the event. Thereafter her husband took her to P.S. wherefrom Banka Hospital and then Bhagalpur Hospital. During cross-examination at para-7 she had stated that the place where she gone to meet natures call lies 20-25 hands away from her house. In para-10 she had stated that Kaili Devi had raised alarm. Then thereafter where Kaili Devi had gone, she is unable to say. She might have gone to her place. Accused had taken her away. In para-12 she had stated that accused persons took her away covering long distance after driving 3-4 hours. She had further stated that Dipu Yadav had caught hold her. She was sitting at front. She cross 3-4 villages but unable to disclose. In para-13 she had stated that she is unable to disclose name of the village where she was confined. In para-14 she had stated that she was confined in a room, having attached latrine. She had further stated that the door was fixed at western side. Window was at other side. In para-15 she had



stated that during course of captive only Dipu Yadav used to meet her. During rest time she used to stay alone. She had further stated that he used to leave after tying her. She further stated that her hands and legs were separately tied. In case she has to meet natures call, she used to go to latrine. In para-16 she had stated that she remained during aforesaid period in only cloth. Out of fear she did not raise alarm. Then thereafter there happens to be cross-examination on the point of bringing her to the jungle where she was left. After going through her evidence, it is evident that she was left at a jungle near her Maika and from there she had gone to her Maika. The aforesaid place was not shown to the Investigating Officer. Why she was left near Maika, instead of Sasural is a circumstance to be taken note of, though is found uncorroborated, as neither any family member at her Maika came forward to support the same, nor PW.5, informant (husband) had substantiated the same.

11. Apart from this, her conduct during alleged period of captive is also to be seen. She had clearly stated that only Dipu came to her, for certain period while for remaining period, she used to stay alone. She had further stated that she used to visit lavatory even having her hands and legs tied. Then in that event, why not she attempted to raise alarm through window, and in likewise manner, taken effort to open door to come out from the room. Though, she had stated that out of fear she had not adopted such recourse, but whether this explanation appears to be reliable in the event of such situation whereunder victim was left uncared at the end of appellant. In likewise manner, whether the story of tying of hands and legs is believable when she, on her own, deposed that she used to go to latrine to meet natures call. So, allowing herself in company



of appellant without any protest, speaks a lot over authenticity of the prosecutrix. Furthermore, from her evidence it is evident that she was caught hold by the Dipu alone controverting the evidence of PW.3 over apprehension by Sachinder also, and gagging of her mouth. She though did not speak over having the appellant armed, also failed to say any kind of resistance having at her end nor raising of alarm for rescue, although she was within vicinity of her house.

12. Furthermore, when the evidence of PW.2 is taken together with the evidence of PW.7 (Investigating Officer), para-3 it is evident that Investigating Officer had gone to her Maika wherefrom she was accompanied while the PW.2 stated that her father had informed her husband whereupon her husband came to her Mailka and then she was taken to P.S. by her husband and from there to Banka as well as Bhagalpur, which PW.5, informant also contradicted by stating that PW.2 herself came to him.

13. Now coming to the evidence of remaining witnesses PW.1 had simply stated that his mother Kaili Devi had stated that his aunt was kidnapped by Dipu Yadav and Sahendra Yadav after thrusting cloth in her mouth. At that very time his aunt had gone to meet natures call near a canal lying near his house. Then thereafter, they made hectic search but could not traced out. After 20 days his aunt returned back and disclosed that Dipu Yadav had committed rape on her. He used to keep her in a jungle. Whenever she tried to speak was beaten by him. During cross-examination he rightly said that he is not an eye witness to occurrence. So, from his evidence, it is apparent that victim had disclosed regarding her confinement at jungle instead of room. In likewise manner stated that



she on her own returned back.

14. PW.4 is Indradev Yadav who had stated that on the alleged date and time of occurrence, Kaili Devi came running and stated that Dipu Yadav and Sahendra Yadav kidnapped Veena Devi and took towards jungle. Both the lady had gone to meet nature's call. They searched Veena Devi but failed to trace. About 15-16 days after the occurrence, Veena Devi returned back and disclosed that Dipu Yadav had confined her in a room, where used to committed rape. During cross-examination there happens to be contradiction at para-9 and is found substantiated from PW.7 para-17 on material aspect.

15. PW.7 is the part Investigating Officer who had conducted major part of the investigation. After going through his evidence it is evident that learned lower court acted contrary to the settled principle of law by recording statement of victim whatever she might have given before the Investigating Officer under Section 161 Cr.P.C. without having any sort of attention having been drawn on behalf of prosecution by declaring her hostile. He visited the place of occurrence which lies hundred meter away from the house of victim wherefrom she was kidnapped. During course of cross-examination admitted that neither the place where victim was left by the accused nor the place where victim was confined for such long period was shown to him. Again without having been confronted to PW.2, victim the defence drew attention towards her previous statement under para-9. In para-11 he had stated that he traced out Veena Devi from her Maika on 17.06.2011. He had not stated that he ever cared to examine parents of victim. PW.8 is another Investigating Officer who had simply submitted charge sheet and on



account thereof his evidence is of no consequence. PW.9 is the Magistrate who had recorded statement of the victim. PW.2 during course of investigation under Section 164 of the Cr.P.C. which, as is evident from the statement of the PW.2 had not reiterated.

16. PW.6 is the doctor. Her finding relating to PW.2 is as follows:-

“Height 5’2”, weight 38 Kg.

Teeth upper jaw 14, lower jaw 15 tatoo mark over left hand written as Sakar Bachao.

Examination of breast-There is no sign of any injury or violence on any body part of body as well as chest.

Axiliary hairs-black and well developed.

Examination of private parts:-

Pubic hair thick and black in colour. There is no any foreign hair, semen discharge present over pubic area or area around it.

P.V. examination-hymen absent. Vagina admits two fingers tightly. Uterus is antverted and normal in size. Vaginal swab taken and sent for pathological examination JLNMCH, Bhagalpur, for X-ray pelvis and wrist joint for determination of age.”

Supplementary report – I received vaginal swab report and X-ray report with plate from JLNMCH, Bhagalpur on 11.11.2011 at 1.30 PM and found the following:

Vaginal swab report S. No. 80 memo no.169 dated 20.06.2011-spermatozoa not found. X-ray report-x-ray No.MMEK/30 memo no.300 dated 18.6.2011.

17. From her evidence, it is evident that she had not conclusively opined nor her report speaks regarding factum of rape.

18. After appreciating the evidence having adduced on behalf of prosecution, the following circumstances visualize:



- (a) Though PW.5, informant had stated that earlier Sanha was registered but the same has not been made an exhibit which has got relevancy in the background of the fact that occurrence is said to have seen by Kaili Devi. PW.3 who happens to be his Bhabhi and further, on the same day, PW.5 was informed regarding kidnapping of his wife Veena Devi by Dipu Yadav and Sahendra Yadav. In the aforesaid background there was no occasion for registration of the Sanha rather being cognizable offence, and further, there was proper identification of the accused, there should have been proper registration of the case.
- (b) Registration of the case on 03.06.2011 while the occurrence happens to be 21.05.2011 without any explanation and further, there happens to be complete absence in the evidence of PW.7, Investigating Officer that since after registration of the case, there was any effort at his end to trace out the victim.
- (c) There happens to be in consistency amongst PW.2 as well as PW.3 over manner of kidnapping as well as participating of the accused during course thereof.
- (d) There happens to be inconsistency amongst the evidence of PW.5, PW.2, PW.7 over approaching of PW.2.
- (e) There happens to be absence of material on account of non-examination of Maikawala of PW.2, on which date she came to her Naihar and in what condition.
- (f) When PW.7 Investigating Officer had gone to the Maika of PW.2 to contact her, why not P.O. was shown to him.
- (g) Even during the alleged time of captive, the conduct of PW.2, victim is not found above board.



19. The cumulative effect thereof, makes the prosecution version unreliable, whereupon the judgment of conviction and sentence would not survive. Consequent thereupon is set aside. Appeal is allowed. Appellant, being under custody is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	NAFR
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