

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.7 of 2015

Arising Out of PS.Case No. -267 Year- 2009 Thana -RAMNAGAR District-
WESTCHAMPARAN(BETTIAH)

=====

Makku Dom, Son of Birendra Dom, resident of Village-Sabuni Pokhara, P.S.-Ram Nagar, District-West Champaran

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Milind Kumar Mishra-Advocate

For the Respondent/s : Mr. Bipin Kumar-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 30-11-2017

Appellant, Makku Dom has been found guilty for an offence punishable under Section 366A of the I.P.C. and sentenced to undergo R.I. for four years as well as fined of Rs.3,000/-, in default thereof, to undergo R.I. for one month, under Section 376 (2)(g) of the I.P.C. and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.5,000/-, in default thereof, to undergo R.I. for two months vide judgment of conviction dated 14.10.2014 and order of sentence dated 16.10.2014 passed by the 3rd Additional Sessions Judge, Bagaha, West Champaran in Sessions Trial No.463 of 2011.

2. PW-4 Mina Devi filed written report on 01.11.2009 alleging inter alia that in her absence, Makku Dom, Birendra Dom, Firoz Dom, Muria Devi and Nazma Devi kidnapped



her daughter Bindiya Kumari aged about 15 years in the night of 29.10.2009. They have also taken away Rs.20,000/- in cash, ornaments made of gold as well as silver. When she returned back, knew about the incidence from the neighbours, whereupon written report has been filed.

3. On the basis of the aforesaid written report, Ram Nagar P. S. Case No.267 of 2009 was registered followed with an investigation and during midst thereof, as appellant was apprehended, so chargesheet was submitted under Section 366A of the I.P.C. keeping the investigation pending against others, whereupon cognizance was taken and trial had proceeded. During midst thereof, it is also evident from the record that victim was traced out, her statement under Section 164 of the Cr.P.C. was recorded and that happens to be reason behind framing of charge against the appellant under Section 366A of the I.P.C. as well as under Section 376 (2)(g) of the I.P.C.

4. Defence case, as is evident from mode of cross-examination as well as statement under Section 313 of the Cr.P.C. is that of complete denial. However, neither oral nor documentary evidence has been adduced in defence.

5. Prosecution had examined altogether eight PWs viz. PW-1 Mst. Beldari Devi, PW-2 Subhawati Devi, PW-3 the



victim, PW-4 Mina Devi, the informant, PW-5 Babita Devi, sister, PW-6 Daulat Devi, sister, PW-7 Nawal Kishore Singh, the main I.O. and PW-8 Bhagwan Pandey, the part I.O. as well as had also exhibited the documents viz. Exhibit-1, formal F.I.R., Exhibit-2, chargesheet, Exhibit-3, report of the PW-8, called for during course of trial with regard to medical examination, if any, of the victim. As stated above, appellant/ victim had not entered into in evidence.

6. Learned counsel for the appellant while challenging the judgment of conviction and sentence impugned has submitted that the finding recorded by the learned lower Court is not at all based upon sound legal principle as well as cogent reasoning and that being so, is fit to be set aside. In order to substantiate such plea, it has been submitted that victim was not at all recovered during course of filing of first chargesheet keeping the investigation pending against the others. During course of which, victim had herself put her presence. Then in that event, supplementary chargesheet should have been submitted as the event taken up by PW-8 was on account of pendency of further investigation. That being so, on account of non-submission of supplementary chargesheet, the evidence of victim could not be relied upon and so, the whole prosecution case, which is based upon the disclosure made by the victim stood non-permissible in the eye of law. It has also been submitted that though the learned



lower Court had inquired (Exhibit-3) with regard to medical examination, but the fact remains that victim was not examined by the doctor and so, apart from absence of closet recording over rape, status of victim being minor or major also remained unexposed. Both the parties are illiterate, members of the downtrodden group of the society and so, at least status of the victim would have properly exposed whether she was minor or major, though in the written report, her age has been shown as 15 years, but from the conduct of the victim, discredited the aforesaid disclosure. That being so, the interest of accused/ appellant is found highly prejudiced. Side by side, prosecution case could be brushed aside on account of own lapses.

7. Furthermore, it has also been submitted that none is an eye witness to occurrence. Not only this, the conduct of the prosecution witnesses also happen to be uncreditworthy as according to version of the victim, while she was lifted, her family members were present including her mother inside her house while mother had disclosed that none was present. The aforesaid controversy has got relevance in the background of the fact that so called occurrence happens to be dated 29.10.2009, while the case has been registered on 01.11.2009. Apart from this, there happens to be deficiency on the part of the prosecution in order to conclusively prove that victim was kidnapped, in the background of the fact that I.O. (PW-7) had not



stated that he had gone to the house of informant in order to trace out the victim, who was found missing in the background of the fact that there happens to be consistent prosecution version that victim on her own, returned back without having disclosure, on which date, she came back and after spending how many days at her place, she was produced before the I.O., what was the reason for non-examination by the Medical Board. Aforesaid activities had purposely been played by the prosecution to keep at by the status of victim to be major as well as consenting party, as one of her sister was already married in the village itself. It also explicit that whole event visualized after victim was duly influenced by the informant.

8. Apart from this, it has also been submitted that informant had not disclosed by whom, she came to know that in her absence Makku Dom, Birendra Dom, Firoz Dom, Muria Devi and Nazma Devi had kidnapped. That means to say, it happens to be based upon own illusion. In likewise manner, it has also been submitted that victim had made effort of the informant frustrated when she had stated in her examination-in-chief alone that she was kidnapped by Makku Dom, Birendra Dom, Firoz Dom showing absence of Muria Devi as well as Nazma Devi.

9. In likewise manner, it has also been submitted that the whole scenario is found duly contoured at the end of victim



herself, when in Para-6 of her deposition, she had stated that accused persons were going ahead while she was following them. Furthermore, she had also admitted that while she was staying with accused at a place having presence of others, she had not disclosed to them regarding her being kidnapped, raped. In the aforesaid facts and circumstances of the case, no offence under Section 366A of the I.P.C. as well as under Section 376 (2)(g) of the I.P.C. is made out. Consequent thereupon, the appeal is fit to be allowed.

10. On the other hand, learned Additional Public Prosecutor controverted the submission and submitted that true it is that victim is the sole witness, who had substantiated the prosecution case and during course thereof, her evidence appears to be reliable, trustworthy, creditworthy, whereupon is fit to be accepted. Furthermore, she was gang raped, whereupon conviction and sentence having inflicted against the appellant under Section 376 (2)(g) of the I.P.C. is found maintainable.

11. From the L.C. Record, it is manifest that PW-1 has been declared hostile while PW-2 was tendered. The aforesaid activity of the prosecution is deprecated as there happens to be no provision under the Evidence Act. PW-3 is the victim. PW-4 is the mother while PW-5 and 6 happens to be sisters of the victim, out of whom, PW-6 had not supported the case of the prosecution and for



that, she was not declared hostile. PW-7 is the main I.O. while PW-8 is the part I.O., who took investigation after submission of first chargesheet. It is also evident that PW-4 and PW-5 are not an eye witness to occurrence. In the aforesaid background, the evidence of PW-3, the victim is to be taken first.

12. During course of her evidence, her age has been shown as 18 years. She had stated that on the alleged date and time of occurrence, she was at her house. When she came out to meet nature's call, Makku Dom, Birendra Dom and Firoz Dom gagged her mouth and took her to Siswa where she was kept for ten days. All of them committed rape on her. When Makku Dom, Birendra Dom, Firoz Dom were apprehended by the police then, she slipped and came to her mother. After coming to her house, she disclosed the whole incident to her mother. She identified the accused Makku Dom in dock. She had further stated that her statement under Section 164 of the Cr.P.C. was recorded. During course of cross-examination, she had stated at Para-2 that it was evening time. She had identified Makku Dom. In Para-3, she had shown presence of her neighbours in her vicinity as well as presence of house of Makku Dom intervened by ten houses. She had further stated that they were not on visiting term. At Para-4, she had stated that she came out from her house and had proceeded towards eastern direction covering 5-6 steps then the



occurrence took place. At that very time, the other family members were sleeping inside the house. In Para-5, she had stated that it was dark night. She came out after opening door. Her bhabhi, mother, brother and sisters were present at her house. She had further stated that Siswa Domkhana lies in Uttar Pradesh. She had further stated that she had tried to raise alarm, but her mouth was gagged during whole episode. They covered the distance on the same day. They arrived in the mid-day. During midst thereof, people were moving. In Para-6, she had stated that she had followed the accused persons. She had further stated that she had not met with anybody at Siswa village. She had not told to anybody. She stayed there for four days, family was residing at that very place. She had not complained the family members. There was no hurt over her body during course of rape. Her cloth has got torned during aforesaid event. New cloth was provided by the accused. She had not handed over cloth to the police. At Para-7, she had stated that she arrived at her house at 5-6 p.m. She had not met with anybody during course thereof. She returned back over bus. So many passengers were present in the bus. She was unconscious, therefore, she was not at all conversant how the accused persons carried her to Siswa. Again, she disclosed that she was lifted Siswa. In Para-8, she had stated that she was medically examined after a month and then, she denied the suggestion that Makku Dom had not



kidnapped her. She had further denied the suggestion that this false case has been instituted against the accused at the instance of her family members. She had further denied the suggestion that Makku Dom had not raped her.

13. PW-4 is her mother/ informant. She had deposed that on the alleged date and time of occurrence, she was not at all present at her house. She had gone outside leaving her daughter (victim), who at that very time, was aged about 12-14 years. When she returned back, she began to search her daughter. After 8-9 days, her daughter came and then, disclosed that Makku Dom, Firoz Dom and Birendra Dom kidnapped her, who took her to Uttar Pradesh and then, committed rape. Makku Dom was apprehended by the police. In the aforesaid event, she got written application inscribed and then, was placed before police. Identified the accused. During cross-examination at Para-4, she had stated that she had informed her son, whereupon he came. She had narrated the incident, whereupon he had gone to Gorakhpur, but could not get any clue. He had also gone to the place at Siswa Domkhana 3-4 days after the occurrence. Her daughter had disclosed that accused persons had taken away Siswa and then, to Bilaspur wherefrom she slipped from Bilaspur at the distance of three miles from her village. She had further disclosed that she came on barefoot. How she came from Siswa to Bilaspur, she had



not disclosed. After return of her daughter, they all discussed how to launch a case and against whom. Then thereafter, she took her daughter to police station for institution of the case. Darogaji took thumb impression of her daughter over written application and then thereafter, she returned back along with her daughter 10-15 days, thereafter her daughter had gone to Court to make statement. Then had denied the suggestion that no such kind of occurrence had ever taken place rather she has been made escape-goat as there was persisting land dispute with the accused Makku Dom.

14. PW-5 is the sister of victim, who had deposed that on the alleged date and time of occurrence, she was kidnapped. On the following day, she came to know that Makku Dom had kidnapped the victim. At that very time, victim was aged about 14-15 years. 8-10 days thereafter, victim was traced out. She had disclosed that Makku Dom, Birendra Dom, Firoz Dom took her to Uttar Pradesh where they all committed rape. Identified the accused. During cross-examination, she had admitted that her Naihar and sasural lies in the same village. She had further stated that when victim returned back to her house, she was wearing same cloth, which was provided from her house. She had not seen any kind of spot over those cloth. She had not seen the cloth to be torned. She had not seen any kind of injury over her person. Then had disclosed regarding dispute relating to the land



amongst the resident. It has also been disclosed that land was allotted by the government.

15. PW-6 is another sister, who had stated that she heard rumour that her sister was taken away by Birendra Dom, Makku Dom, Firoz Dom. Her sister returned back after ten days. She had not disclosed anything to her.

16. PW-7 is the main Investigating Officer, who had stated that on 01.11.2009, he was posted as A.S.I. at Ram Nagar Thana P. S. after registration of the Ram Nagar P. S. Case No.267 of 2009. He was entrusted with the investigation (exhibited other documents). He recorded further statement of informant Mosmat Meena Devi. He had visited the place of occurrence, which happens to be Domkhana lying near Sabuni Pokhra Domtoli. Then had given boundary of the P.O., which happens to be house of Mosmat Meena Devi. He recorded statement of so many witnesses, who supported the case of the prosecution. Makku Dom was arrested on 10.11.2009 from his house. He obtained supervision note of Deputy S. P. and he had submitted chargesheet against the accused Makku Dom on account of being under custody keeping the investigation pending against others. He had further stated that the day during course of further investigation by him, victim was not recovered. During cross-examination at Para-2, he had stated that after submitting chargesheet,



gone on C.L. He had further stated that the statement of victim under Section 164 of the Cr.P.C. happens to be dated 08.01.2010, but the aforesaid statement was not recorded at his behest. In Para-3, he had stated that he had not got accused medically examined after his arrest.

17. PW-8 happens to be the subsequent Investigating Officer, whose evidence is not at all relevant in the present case as he had simply exhibited his report on an query made by the Court regarding medical examination of the victim.

18. From close scrutiny of the materials available on the record, it is evident that it happens to be badly conducted case. So many lapses is found visible on the record, but relevant witnesses have not been cross-examined relating thereto. More particularly, the I.O. had not cross-examined, why not there was proper compliance of Section 157 of the Cr.P.C. transmitting the F.I.R. to the Court of Chief Judicial Magistrate within 24 hours as from the format, it is evident that same was received at the office of the Chief Judicial Magistrate on 10.11.2009. In likewise manner, PW-7 has not been cross-examined whether he had visited the house of the informant to know about the arrival of the victim or not, as from the evidence of the victim (PW-3) as well as PW-4, her mother, it is apparent that after arrival of the victim, she remained at her house and then thereafter, she was taken to the police station where her statement was recorded.



10-15 days thereafter, her statement under Section 164 Cr.P.C. was recorded. Though statement under Section 164 Cr.P.C. is not an exhibit of the record nor the Magistrate has been examined, but the deposition is available on the record, relevant order sheets are there from which, it is evident that her statement was recorded on 08.01.2010, that means to say, before submission of chargesheet, victim was already present at her place.

19. The victim (PW-3) during course of her examination-in-chief had submitted that when Makku Dom, Birendra Dom, Firoz Dom were apprehended by the police, then thereafter, she rushed to the place of her mother. From the record, it is evident that save and except appellant Makku Dom, none has been apprehended. From the evidence of PW-7, I.O., it is evident that appellant Makku Dom was arrested on 10.11.2009 from his house. That means to say, either victim was somewhere else in company of somebody else or she was present at her house after arrest of Makku Dom. But unfortunately, defence had not cross-examined PW-3, PW-4 and PW-7 on that very score. Furthermore, it is evident that victim (PW-3) has not been medically examined. As she has not been examined by a doctor, on account thereof, neither estimated age has been ascertained nor any kind of injury over her person including that of private part. Be that as it may, it was incumbent upon the appellant to have at least



suggested or would have challenged the veracity of testimony of each of the PWs including PW-3 (victim) even by way of suggesting that she was major and she was a consenting party and she volunteered herself, more particularly in the background of disclosure having made under Para-6 of the evidence of PW-3 that she followed the accused persons, during course of going. Furthermore, she had not made any disclosure to the other family members, who were present over having been kidnapped or raped. That means to say, during said course, she was not at all captive. She was going without raising any hue and cry, without disclosing to others with regard to any mishappening having with her at the end of the appellant, but from the cross-examination, it is evident that neither PW-3 nor PW-4, her mother nay PW-5, her sister or PW-6, her another sister were cross-examined or suggested at the end of the appellant that victim was a major. Had there been such kind of evidence on record, then in that event, would have changed the scenario, but in the present situation where the victim happens to be found minor as consistently been disclosed by the prosecution witnesses including the victim herself having not been tested during cross-examination. Now, coming to the event of rape, certainly PW-4 and PW-5 are hearsay witnesses. PW-3, victim is the sole witness, who categorically stated that while she was at Siswa Domtoli, she was raped and virtually, there happens to be no



cross-examination at the end of the appellant to demolish. That being so, instead of absence of medical examination, it is not going to adversely affect the testimony of the victim wherefrom, it is evident that appellant Makku Dom, Birendra Dom, Firoz Dom committed rape for the ten continuous days even for a moment that victim was a consenting party has got no purposeful for the appellant as he failed to disintegrate the victim, not to be minor. From the evidence of victim, it is manifest that he was examined by the doctor a month thereafter, which is not on record and for that a report was called for by the lower Court from PW-8 (Exhibit-4). However, during course of cross-examination of PW-8, he was not at all cross-examined why not victim was medically examined. As held by the Apex Court in *Awadh Prasad Singh and another vs. the State of Bihar and others reported in 2013(4) P.L.J.R. 344*, if a witness has not been cross-examined on particular point, the same would not be taken adverse to him, rather same should be considered as an admission by conduct. That being so, the finding recorded by the learned lower Court under Section 376(2)(g) of the I.P.C. is affirmed along with sentence having inflicted thereof. So far sentence under Section 366A of the I.P.C. is concerned, it could not be as from Section 366A of the I.P.C., it is apparent that kidnapping should be with an intention or knowledge that the victim will be subjected to the sexual activity by somebody



else. Here in the present case, all the kidnappers are themselves the rapist and that being so, Section 366A of the I.P.C. would not attract. As such, conviction and sentence relating thereto is set aside.

20. With the aforesaid modification, instant appeal sans merit and is accordingly, dismissed. Appellant is on bail, hence his bail bond is hereby cancelled directing him to surrender before the learned lower Court to serve out the remaining part of sentence, failing which learned lower Court will be at liberty to proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	05.12.2017
Transmission Date	05.12.2017

