

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.289 of 2013

Arising Out of PS.Case No. -2 Year- 2012 Thana -BHADAURA District- PATNA

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Sunil Paswan S/O Sri Jugal Paswan Resident of Village and Post - Dabhawan,
P.S.- Bhadaur, District- Patna.

..... Appellant/s

Versus

The State Of Bihar

..... Respondent/s

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Appearance :

For the Appellant/s : Mr. Neeraj Kumar Sanidh
Mr. Sanjay Kumar
Mr. Mrityunjay Kumar Jha
For the State Mr. S. N. Prasad

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

And

HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 18 -05-2017

Bereft of unnecessary details, the prosecution case as embodied in written report lodged on 16.01.2012 at 7.00 A.M. by Dinesh Prasad (P.W.1) being the father of the victim (P.W. 3) is that on the alleged date of occurrence they had taken meal together with the victim whereafter the informant went to sleep in one room of his house along with his wife (P.W.2) whereas the victim went to sleep in the adjoining room. At the dead of night, the appellant entered into the room of P.W.3 as the door of the room was unlocked, forcibly stuffed her mouth and lifted her in his arm and went to the adjacent place under a tree and forcibly committed rape on her. Her mouth was stuffed with a Gamcha (Scarf). Her garments were also torn. After the rape was committed the victim could remove the Gamcha from her mouth and raise an alarm which attracted the informant and his wife (P.W.2). An attempt was made to overpower the appellant



who was hiding in the nearby bush, but he managed to escape by scaling over the wall and jumping into the courtyard of the neighbour Sadhu Yadav. Lodging of the FIR ignited investigation by P.W.8, who on finding the accusations true laid the charge-sheet whereon cognizance was taken and the case was committed to the court of sessions which gave rise to S.T.No. 502 of 2012 on the file of the learned 2nd Addl. Sessions Judge, Barh, Patna wherein charges were framed and read over/explained to the appellant to which he pleaded not guilty and claimed to be tried. The defence is complete denial of his implication in the crime. A suggestion was given to all the witnesses by the defence that both the appellant and the victim were locked in love affairs and they wanted to marry each other.

2. In order to bring home the guilt, the prosecution examined 09 witnesses. P.W. 1 is the father of the victim and the informant of the case. P.W. 2 is the mother of the victim. P.W.3 is the victim herself. P.W. 4 Dr. Kiran has examined the victim on 16.01.2012 at 2.30 P.M. and furnished the medical report (Ext.3) based on the finding on radiological test provided by the Dr. Bikash Chand Choudhary (P.W. 5). The result of the medical examination of the victim made by P.W. 5 is Ext. 4. P.W. 6 Karu Yadav, P.W.7 Madan Paswan and P.W. 9 Ram Prit Paswan were produced as independent witnesses to support the circumstances attending the prosecution case. However, the prosecution did not rely on them and they were tendered. P.W. 8 is the I.O. of the case who not only recorded the FIR but also visited the place of occurrence and made seizure of certain incriminating articles from the place of occurrence as well as recorded the statements of the witnesses. The trial court, on critical analysis of the evidence of P.Ws 1,2 3 & 8, found the charges levelled against the appellant proved beyond shadow of reasonable doubts and accordingly convicted the appellant under section 376 IPC and ordered to undergo life imprisonment besides



directing to pay a sum of Rs. 50,000/- to the rape victim. The present appeal is directed against the said judgment of conviction dated 05.02.2013 and order of sentence dated 06.02.2013.

3. We have heard Mr. Neeraj Kumar Sanidh in support of the appeal and Mr. S. N. Prasad for the State.

4. On behalf of the appellant following submissions have been advanced:-

1. As per the testimony of P.W.4 read along with the report furnished by her (Ext.3) as well as the evidence of P.W. 5 read along with his report (Ext.4) indisputably the victim was aged between 17 to 18 years. If the ratio laid down on this aspect by the Supreme Court in the case of **Jaya Mala vs. Home Secretary, Government of Jammu & Kashmir & Ors. [(1982) 2 SCC 538]** is applied, the margin of error in age ascertained by such examination is two years on either side. The victim was definitely major.

2. It is a case where the victim had also accompanied the informant. Narration of the prosecution case by the victim could have been made by the prosecution. Instead of doing so a written report (Ext.1) prepared by the informant (P.W.1) was presented. The victim was not even produced for her statement u/s 164 Cr. P.C.

3. The prosecution case as projected at the trial gets completely shaken by the medical examination of the victim made by P.W. 4 on the same day within hours wherein no sign of rape or mark of violence on the person of the victim was found. The written report does not disclose vital/material



part of the prosecution case which was narrated by the victim as well as the informant in their respective depositions. These omissions of material/relevant part of the prosecution case in the first prosecution version cuts severely on the significance or legal value attached to FIR.

4. The prosecution relied on seizure of the shawl (Ext.2) allegedly belonged to the appellant at or near the place of occurrence. If this was the incriminating circumstance, the prosecution ought to have put this incriminating circumstance to the appellant while his statement under section 313 Cr. P.C. was recorded. No such incriminating circumstance was put to the appellant providing him an opportunity to explain or deny. This part of the evidence therefore cannot be employed by the prosecution to prove the guilt of the appellant.

5. Counsel for the State, on the contrary, supported the prosecution case. He highlighted the significance and importance generally attached to the deposition of the rape victim.

6. We shall scan the relevant evidence in the light of the rival submissions of the parties. The appellant is the co-villager of the informant. The trial court found him 20 years of age at the time of recording his statement on 07.12.2012 under section 313 Cr. P.C. The informant (P.W.3) was examined on 16.01.2012 at 2:50 P.M. immediately after the incident was reported when on physical examination of her body and after obtaining the radiological/orthopedics tests conducted by P.W. 5 found her between the age of 17 to 18 years. Turning to the evidence of P.W.5, it is found that a medical board was constituted to ascertain



her age of which this P.W.5 was one of the members. Radiological/orthopedics tests were carried on the relevant part(s) of her body. On the basis of those findings, the victim was assessed between 17 to 18 years. The Medical Board, however, also found that a margin of two years in the finding of age would be permissible. In the face of aforesaid finding of the Medical Board, it may not be necessary, yet relying on Jaya Mala's case (supra) wherein the Hon'ble Apex Court in the matter of ascertainment of age held the court can take a judicial notice that margin of error in age ascertained by such examination is two years on either side the victim was also a young major girl. The result of granting such margin which goes in favour of the accused shall be taken into account as in a criminal trial the court proceeds on the assumption that the accused is innocent until the circumstance(s) proved at the trial prove otherwise. Thus both, the appellant as well as the victim were, young and enthusiastic persons by dint of their age. It can also be presumed that they were not very mature.

7. Turning to the written report (Ext.1) of the informant, it appears that he has narrated the entire incident as an eye-witness to major part of the allegation. When his evidence in court is contrasted with the statements made by him in the written report, it is found that several relevant and material facts were not disclosed by him in the FIR. If the court has to believe his evidence in court then the informant when reached near the place of occurrence found her daughter completely naked and she was queried by him for about half an hour whereafter they started looking for the appellant who was hiding in the nearby bush and was actually caught by him and he too was questioned by him for sometime whereafter he managed to escape but after leaving his shawl near the place of occurrence.

8. It has been argued on behalf of the defence that the presence of shawl



of the appellant at or near the place of occurrence may be an incriminating circumstance against the appellant but the prosecution is precluded from relying on the same as this incriminating circumstance was not put to the appellant u/s 313 of the Cr. P.C. providing him an opportunity to explain or deny. In the case of **Sharad Birdhichand vs. State of Maharashtra/AIR 1984 SC 1622**), the legal position on this aspect has been clarified when the Apex Court relying on various judgments on the point in para 142 observed as under:-

“142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz, circumstances Nos. 4,5,6,8,9,11,12,13,16 and 17. As these circumstances were not put to the appellant in his statement under section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of **Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468** this Court held that any circumstance in respect of which an accused was not examined under section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under section 342 or section 313 of the Criminal procedure Code, the same cannot be used against him.”

9. We have carefully examined the statements of the accused-appellant recorded under section 313 Cr. P.C. The recovery of the shawl (woolen cover) belonging to the appellant at or near the place of occurrence seized under Ext.2



as an incriminating circumstance appearing on record against the appellant was not put to him enabling the accused-appellant to deny and/or explain. In the circumstances discussed above, we shall exclude from our consideration Ext.2 as a circumstance incriminating the appellant in the crime. P.Ws. 6, 7 and 9, although tendered and permitted to be cross-examined but they have spoken about the strong rumour afloat in the village that the victim and the appellant were romantically involved since last two-three years and wanted to marry each other which was not being heeded to by the informant and his family members.

10. Having outlined the background in which the incident occurred, we shall evaluate the three relevant witnesses, namely, PWs 1,2 and 3 (victim) who have spoken about the occurrence and the involvement of the appellant. As noticed above, the victim was accompanying her father when the written report was lodged by P.W. 1 alleging that while the victim was sleeping alone in a separate room, the appellant intruded into the room at the dead of night, shut her mouth by stuffing a gamcha(scarf) into it, lifted her and took to the close by/nearby tree which is very adjacent to the courtyard where she was dumped. Her clothes were torn and put aside and rape was committed on her. After the commission of rape, the victim managed to take out the scarf stuffed into her mouth and raised an alarm for few minutes whereafter the appellant fled away from the place of occurrence by scaling over the wall of the courtyard of Sadhu Yadav which was seen by his wife (P.W.2). From his cross-examination, it is explicit that he had reached the place of occurrence only after the rape was committed on the victim and an alarm was raised by the victim. P.W. 2 is the wife of P.W.1 (mother of the victim). In her examination-in-chief, she has stated that only after hearing the alarm of her daughter, she and her husband awoke and thereafter they went to the victim near the tree. She could see the appellant



hiding in the nearby bush. The victim narrated to them the horrific incident and in the meanwhile the appellant took to his heels by scaling over the wall of the neighbour. Her evidence apparently runs contrary to the evidence of P.W. 1 in many ways. P.W. 1, in his examination-in-chief, has projected himself as an eye-witness to the entire sequence of events/storyline. He has also stated about the questioning of the victim for several minutes and thereafter catching hold of the appellant and again questioning him for few minutes when he managed to escape. What was the physical condition of the appellant was disclosed by him which has not been stated by P.W. 2. In para 3 of her cross examination, P.W. 2 has admitted that on hearing the alarm she along with P.W. 1 awoke and rushed to the victim who was standing and after 4-5 minutes of their stay there they took the victim inside the room and remained there till morning when they all went to the police station where her husband presented the written report.

11. Turning to the evidence of P.W. 3(victim) it is seen that in her examination-in-chief she has narrated the incident as spelt out by her father. On seeing her completely naked, her mother (P.W.2) started weeping. She was queried by them when she disclosed the entire incident befallen on her. They took her inside the room. Few minutes thereafter the appellant, who was hiding in the nearby bush, fled away by scaling over the wall of the neighbour. Her mother had noticed the appellant scaling over the wall. She has presented her torn clothes she was wearing at the time of the occurrence. On such presentation, the same was admitted in evidence as material Ext.1. She, however, admitted that she knew the appellant from before. What has further come in the evidence of the victim (P.W.3) is that the appellant, being a co-villager, had lived in Mumbai for some years and had returned back to the village. What strikes us is non-mentioning of some relevant facts by her which have been spoken by her father. These are



material facts considering the nature of the crime. Non-disclosure thereof in the written report shakes the credibility of the FIR. If any credence is to be given to the evidence of P.W. 3(victim), then as per her statements at para 8 stiff resistance was offered by her for about one or two minutes before the appellant could stuff her mouth by a Gamcha (scarf) inside the room and she was lifted by the appellant in his arms and taken to the nearby tree where she was dumped on the ground, her clothes were torn and removed and rape was committed. In para 11 she has admitted that she knew Sunil Paswan since her childhood and that he was the resident of the same village. A suggestion was put to her by the defence that they were well acquainted from before which, however, she denied. In para 12 she has stated that the victim and the appellant belong to two different castes. She has also denied the suggestion that the appellant had offered to marry her which was spurned/rejected by her father and that in order to put undue pressure on the appellant the case was lodged. Surprisingly, no one from the village or neighbourhood has been produced to support any part of the allegation. As noted above, the independent witnesses P.Ws. 6,7 and 9, although produced, but the prosecution got them tendered. The Court can reasonably presume that had they been permitted to be examined they could have narrated the case going adverse to the prosecution case.

12. Having noticed and highlighted the incoherent parts of the prosecution case, we advert to the evidence of the doctor (P.W.4) who examined the victim the same day at about 2.50 P.M. On physical examination of her body, the doctor found her a well-grown girl aged about 17 to 18 years. She did not find any injury or mark of violence on her body and even on her private parts. The victim had the menstrual cycle/period some 12-13 days back. Vaginal swab was taken for pathological examination and on the basis of the pathological report she has



opined that the same did not show the presence of spermatozoa either dead or alive. In her cross-examination, she has candidly stated that on the basis of the examination(s) made by her of the victim she could not find any shred of mark of violence on her private parts or any sign of commission of rape. We have noted from the evidence of P.W.3 that she had offered resistance before being subjected to rape and further that she was made complete nude when the appellant satiated his sexual appetite by ravishing her. Modi in his text titled 'Modi's Medical Jurisprudence and Toxicology' (twenty-third Edition) dealing with such circumstance observed as under (at page 926):-

“Medical experts opine that it is very difficult for any person to single-handedly rape a grown-up and experienced woman without meeting the stiffest possible resistance from her. If a girl had struggled and put up resistance at the time when she was raped, she would have received some injuries on her buttocks, hips, back, elbow and thigh. Medical evidence is valuable for proving the presence or absence of marks of struggle. The presence of marks of struggle on the body and clothes, and marks of injury on the person, particularly the private part, should be evidence supporting the allegation of rape. When rape is denied, one looks for corroborative evidence of rape in medical evidence showing injury to the private parts of the victim, injury to the other parts of her body which may have been caused in resistance, seminal strains on her clothes or the clothes of the accused or on the places where the offence is alleged to have been committed.”

13. The medical report (Ext.3) and the testimony of the doctor (P.W.4) provide to court the circumstance which corroborates the prosecution case but we find that they categorically disprove the commission of rape on the victim or



even subjecting her to physical violence. Although, the evidence of the rape victim is of intrinsic value but if the court entertains/casts doubt on the veracity or probability on the narration of the prosecution case it is always prudent for the court to look for some corroboration. For this purpose, we have minutely examined the injury report (Ext.3) and the entire deposition of the doctor P.W.4). If the victim had offered resistance, both at the time of her being lifted from inside the room and at the time of commission of rape when she was made naked, some sign of violence or struggle on her body, in all likelihood, should be there. We are mindful of the fact already delineated above that both of them were young persons having fascination for each other. They were bubbling with the aspirations of youthfulness. The defence of the appellant is also that both of them were having love affairs and wanted to marry each other, but the parents of the victim were not agreeable. In order to put pressure and distract/discourage the appellant, he was framed falsely in the case. Surprisingly, the doctor found no such mark of violence on her body as well as on her private parts. The injury report completely negates the possibility of the victim subjected to rape.

14. In the light of the discussions of the relevant evidence(s) manifesting from the record, we entertain/cast serious doubt on the prosecution case as disclosed in the written report lodged by the father of the victim. Whatever happened on the date of occurrence may be a consensual one which was obliquely painted/portrayed as a case of rape by her father. Why the informant withheld the victim from lodging the Fardbayan and instead a written report depicting himself as an eye witness to the entire occurrence was filed? Why the statement of the victim was not recorded u/s 164 Cr. P.C. which normally is done in such case? Why no witness from the adjoining houses was presented to support at



least the fact that an alarm was raised by the victim for about one to two minutes and that the tussle between P.W. 1 and the appellant was seen which continued for sometime outside the house when the appellant managed to escape. At least three independent witnesses to depose on the circumstance corroborating the prosecution case were chosen and produced by the prosecution but they all were tendered. The Court can reasonably presume that had they been examined, the narration of the case by them would have completely discredited the prosecution case. These are the questions surrounding the prosecution case which have not been satisfactorily answered/explained by the prosecution.

15. For the forgoing reasons, the Court is unable to accept the prosecution case duly proved at the trial. The appeal is allowed. The judgment of conviction and order of sentence dated 5th and 6th February, 2013, respectively, passed in S.T.No. 502 of 2012 against the appellant are set aside and appeal is allowed. The appellant Sunil Paswan shall be set at liberty forthwith, if not wanted in any other case.

(Kishore Kumar Mandal, J)

I agree (Sanjay Kumar, J)

HR/-

AFR/NAFR	NAFR
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