

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.461 of 2014**

Arising Out of PS.Case No. -43 Year- 2007 Thana -DHURAIYA District- BANKA

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1. Bhola Yadav S/o Upendra Yadav Resident of Village Pachrukhi, P.S. Dhoraiya,  
District Banka.

.... .... Appellant/s

Versus

1. The State of Bihar

.... .... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Vibhakar Kumar, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP.

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**CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA**

**C.A.V. JUDGMENT**

**Date: 17 -10-2017**

This appeal is directed against the judgment dated 10.07.2014 and order of sentence dated 16.07.2014, passed by Sri Sanjay Kumar Singh, Adhoc Additional Sessions Judge, -Ist, Banka, in Session Trial No. 58 of 2008, by which he has convicted the appellant under section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for ten years with a fine of Rs. 10,000 and in default of the payment of fine, further R.I. for six months.

2. Brief facts necessary for adjudication of the present appeal are that the informant –Phool Kumari gave her written statement in Dhoraiya police station alleging *inter alia* that on 29.04.2007 at 4. P.M. when she was returning from the house of her maternal aunt situated at village – Pachrukhi, along with brother- Kundan and



maternal grand mother Gauri Devi then appellant Bhola Yadav meet them in between and maternal grand mother of informant asked the Bhola Yadav as to where he was going, on which he replied that he was going in search of his cow. Thereafter, the maternal grand mother of the informant returned to her house and informant and her brother proceeded towards their house situated at village – Raghunikita and when they reached near the primary school, Appellant – Bhola Yadav stopped them and asked for something from the informant and told her brother to go away from there. Thereafter, appellant committed rape on her near the hand – pump by threatening her to kill. Thereafter, both informant and her brother reached their house weeping and a panchayati was held in this regard but the appellant denied the allegations and did not comply the order of panchayat.

3. On the basis of above written statement filed by the informant in the Court of CJM, Banka, the case was sent for registration of F.I.R and, thereafter, Dhoraiya P.S. Case No. 43 of 2007 was registered against the appellant under Section 323 and 379 of the Indian Penal Code.

4. Police after investigation submitted charge-sheet against the appellant under Section 341, 323 and 376 of the Indian Penal Code.

5. Cognizance of the offence was taken by the CJM, Banka and case record was sent to different courts for trial, however, the same



ultimately traveled to the file of Sri Sanjay Kumar Singh, learned Adhoc Additional Sessions Judge, -Ist, Banka, for trial and disposal.

6. Charges were framed under Section 376 of Indian Penal Code against the appellant.

7. In this case altogether Seven witnesses have been examined from the side of the prosecution and they are: P.W. 1- Mahendra Yadav, P.W. 2- Pramila Devi, P.W. 3- Gauri Devi, P.W. 4- Kundan Kumar, P.W. 5- Phool Kumari (informant /victim girl), P.W. 6- Dr. Kaushalya, who conducted medical examination on the victim girl, P.W. 7- Geeta Devi (Mother of the victim girl).

8. Apart from the above, following documents have been admitted into evidence and marked as ; Ext. 1 – Medical examination of Victim girl – Phool Kumari.

9. From the defence side also one witness has been examined, who is D.W. 1 – Dinesh Singh and following documents have been admitted; Ext. A – Panchnama, Ext. A/1 – Signature of Ashok Kumar and Ext. A/2 – Signature of Upendra Yadav on Panchnamae.

10. It appears from the suggestion given to the witnesses and his statement under Section 313 Cr.P.C, the defence of the appellant is of false implication and complete denial of allegations leveled against him.



11. Learned Trial Court after conclusion of trial convicted the appellant under Section 376 and sentenced him as stated above.

12. Aggrieved by the said judgment, the appellant preferred the present appeal.

13. Learned counsel for the appellant has assailed the judgment and conviction of the appellant on the ground that there are serious infirmities in the prosecution story as it has come in the evidence of girl that at the place of occurrence, there were many houses beside the road and she had also raised *hulla* but surprisingly none came to save her and further she was accompanied by her brother as admitted by the girl but it is difficult to believe that P.W. 4 brother, did not make any effort to ask anyone to save his sister or he himself did not make any effort to raise any *hulla*. It has also been submitted that there is considerable delay in lodging the F.I.R, for which no plausible explanation has been offered. It has also been submitted that no such occurrence has taken place rather her family members were interested in getting the girl married with the appellant and earlier a talk has also been had, but when the appellant refused, they got a panchayati held at the house of the father of the appellant, in which father of the appellant was fined Rs. 15,000/- but when he refused to pay the said amount, they have lodged the present false and concocted case, which will appear from evidence of D.W. 1 as well as Ext. A. and P.W. 9 has



also admitted about the story of panchyati and also admitted that she had gone in panchayati. Falsity of the prosecution case will also appear from the fact that on medical examination of the girl, no sign of rape has been found. It has further been submitted that in this case, there is no independent witness, whereas it has been alleged that the occurrence took place in the evening behind the school, which was beside the road and on the other side of the road, there were many houses, which itself casts a serious doubt about the prosecution story. Further in this case, Investigation Officer has not been examined, which has caused serious prejudice to the appellant. It has also been submitted that father of the victim girl did not come forward to depose in this case, though he was present in the panchayati. On the basis of the above, it has been submitted that the learned trial court without considering all these vital facts has convicted the appellant under Section 376 of Indian Penal Code, which is bad in law and no sustainable.

14. On the other hand, learned counsel for the State has submitted that there are consistent and reliable evidences of P.W. 5 victim girl and P.W. 4 brother of the victim girl available on record to show that the appellant had forcibly committed rape on the victim girl, which has been supported by other witnesses also. It has also been argued that it is well settled that conviction under Section 376 Indian Penal



Code can be based only on the sole testimony of prosecutrix even in absence of corroboration by medical evidence, therefore, there is no infirmity in the judgment of trial court and appellant has rightly been convicted under Section 376 of Indian Penal Code.

15. P.W. -5, Phool Kumari is the victim girl in this case and she has stated in her evidence that one and half year ago at 4 P.M., she was returning from the house of her maternal aunt along with her brother Kundan Kumar and when they reached near the school, Bhola Yadav beaten her brother and forced him to leave the place and appellant-Bhola Yadav took her behind the school and raped her. Thereafter, they reached their house and on the next day, She went to Banka,Court and after that she went to Dhankund Police Station. In her cross-examination, first she stated the she had gone to the house of her maternal aunt on Sunday and again she stated that she had gone to her maternal aunt house on Monday and came back on Sunday. Further she stated that she proceeded from the house of maternal aunt at 4.00 P.M. It has also been submitted that the school behind which the rape was committed to her, was situated in village Chalni and in front of school, there is road and there were several houses in the east and north side of the school and behind the school, there was open field and she had also cried but none has come to save her. She further stated that she did not disclose the occurrence to anyone there as she



was not known to any person of the said village. Further her evidence in cross-examination shows that she disclosed the whole occurrence at her house and the case was filed after six to seven days. Further she denied a suggestion put to her that there was talk of marriage between her and appellant.

16. P.W. 4 is brother of victim girl, Kundan Kumar and he has supported the case of prosecution and has stated that one and half years ago, he was returning from the house of his maternal grandmother along with his sister and maternal grandmother has also accompanied them for some distance but she returned back from village Degmara and when they reached near Chalani School, appellant Bhola Yadav started beating him by belt and committed rape on her sister. In his cross-examination, this witness has stated that *Daroga Ji* had come to his house but he did not enquire about the matter from him. Further this witness has stated that he knows appellant – Bhola Yadav, he is resident of village – Pachrukhi. His evidence further disclosed that the occurrence is of late evening and none was present there except he, his sister and appellant Bhola Yadav. His evidence also disclosed that he and his sister raised alarm but none came as the *basti* was far away from the school. It has also been submitted by him that his sister returned after about half an hour and, thereafter, they proceeded towards their home. Further this



witness denied a suggestion put to him that whatever he has deposed, he has deposed on the instruction of his father.

17. P.W. 1 – Mahendra Yadav, he has stated in his evidence that the victim girl is daughter of his '*Sarhu*' (brother-in-law) and a year ago Phool Kuamri (victim girl) told him that when she was returning to her house along with her brother and '*Nani*' (maternal grandmother) and '*Nani*' had returned back to her house after leaving them for some distance and when they reached near the chalni school, appellant caught her and beaten the boy and, thereafter, committed rape on the Phool Kumari (victim girl). In her cross-examination, this witness has admitted that he has not seen the occurrence rather the whole story was disclosed to him by the victim girl – Phulo Kumari. Further he denied a suggestion put to him that there was previous enmity between the parties.

18. P.W. 2, is the Pramila Devi and from her evidence as well as her cross-examination, it appears that she is not the eye witness of the occurrence rather she is only the hearsay witness.

P.W. 3 – Gauri Devi, is '*Nani*' of victim girl, Phulo Kumari, She has supported the prosecution story with regard to commission of rape on victim girl – Phula Kumari, and has stated in her evidence that the occurrence is of prior to one and half year and at 4 P.M. while she was accompanying with her grandson and granddaughter, where she saw



that Bhola Yadav was asking for his cow to some boy and after leaving the grandson and granddaughter for some distance, she returned back to her house. In her cross-examination, this witness has stated that she is not the eye witness of the occurrence.

19. P.W. 6 is Doctor Kaushalya, who conducted medical examination on the victim girl – Phulo Kumari, and has proved medical examination report in her handwriting and signature and has stated in her evidence that no foreign body was found on the private part of the girl. Further the hymen was found torn. Further she has stated that vaginal swab was taken and the same was sent for microscopical examination for presence of spermatozoa. Further she opined that no definite opinion can be drawn with regard to recent sexual intercourse with the girl – Phulo Kumari and her age was ascertained as sixteen years. In her cross-examination she has stated that vaginal swab report was not produced before her.

20. P.W. 7 – Gita Devi is mother of victim girl - Phulo Kumari, and she has supported the prosecution story with regard to commission of rape on the girl and has stated in her evidence that about four and six months ago, her daughter – Phulo Kumari and her son Kundan Kumar had gone to village Pachrukhi to take her mother to her house and in the evening at 4 P.M. they were returning from village- Pachrukhi and when they reached near the Chalani school,



appellant – Bhola Yadav committed rape on her daughter and beaten her son and, thereafter, they returned to their home and informed about the occurrence to her and villagers. Next day, her *Gotiya* Saryug Yadav, Mahendra Yadav and others went to the village Pachrukhi for panchayati but father of Bhola Yadav did not accept the verdict of Panchayati. Further this witness had admitted that she was not the eye witness of the occurrence and she had gone to the police station and, thereafter, had gone to the hospital for the treatment of her daughter and son. Further she denied a question put to her that there was talk of marriage between the victim girl – Phulo Kumari and appellant Bhola Yadav and when the marriage was not solemnized, appellant has falsely been implicated in this case.

21. Considering the evidence as discussed above in the background of submissions advanced by learned counsel for the appellant as well as by learned counsel for the State, it appears that defence of the appellant is that there was a talk of marriage between the appellant and the prosecutrix, which failed and a panchayati was held in that connection, in which father of the appellant and father of the prosecutrix were present and it was decided in the panchayati that father of the appellant shall pay Rs. 15,000/- to the father of the prosecutrix as fine, but as father of the appellant failed to pay the said amount, case has been filed against the appellant. A panchnama was



also proved as Ext. A and L.T.I. of father of the prosecutrix as Ext. A/1 with objection. Prosecution denied such panchyati and further denied L.T.I. of father of prosecutrix in the said panchayati and further submission is that evidence of D.W. 1, in para -5 of cross-examination shows that there was no panch from the side of the prosecutrix and signatures of prosecutrix as well as her mother is not over that. On perusal of the said Panchnama, it is very much clear that there is L.T.I. claimed to have been of father of the prosecutrix and in evidence in chief D.W. 1 has also stated so but neither there is any cross-examination on that point nor the prosecution has challenged the genuineness of the L.T.I., said to be of father of the prosecutrix nor any suggestion was given that father of the prosecutrix was not present, nor prosecution has examined father of the prosecutrix as prosecution witness, undoubtedly, he is an important witness on the point of panchyati. On the other hand, P.W. 9, mother of the prosecutrix has also stated about the panchayati in para -2 of her cross-examination and in para -3, she has admitted that panchayati was held at the “*Darwaza*” of appellant Bhola Yadav and she has gone there but she has stated that no panchayati was held. Panchnama Ext. A, supports the defence version as stated above.

22. Apart from that, there is delay of seven days in lodging F.I.R and instead of approaching the police directly, complaint petition was



filed and that too after lapse of seven days. It is well settled that in rape cases delay of seven days is not of much consequence as prestige of family members of the prosecutrix happens to be involved. However, in the background of the discussion made above about the Panchnama Ext. A., the possibility of false implication cannot be ruled out. Evidence of prosecution also discloses that there are houses in front of school, where rape was committed and evidence also shows that the prosecutrix as well as her brother raised hulla but surprisingly none has come forward to save them. Further, brother, who was present there also did not make any effort call any other person. The aforesaid circumstance also creates a doubt about the veracity of the prosecution version as well as evidence of prosecutrix and her brother. All the above infirmities in the background of defence and Panchnama Ext. A shows that prosecution version is not free from reasonable doubt especially when father of the prosecutrix has not been examined and secondly, prosecutrix was examined by Doctor Kaushalya P.W. 6 and she has also deposed that no definite opinion can be given about possibility of rape. However, learned Trial Court has not considered the above aspects and relying on the evidence of prosecutrix P.W. 5 and other witnesses, has convicted the appellant without appreciating the above infirmities.

23. Considering the entire discussions made above, it appears that



the prosecution has failed to establish its case against the appellant Bhola Yadav beyond all reasonable doubts and thus the appellant certainly deserves the benefit of doubt.

24. Accordingly, this appeal is allowed and the judgment dated 10.07.2014 and order of sentence dated 16.07.2014, passed by Sri Sanjay Kumar Singh, Adhoc Additional Sessions Judge, -Ist, Banka, in Session Trial No. 58 of 2008, is hereby set aside.

25. As the appellant is in judicial custody, he is directed to be released forthwith, if not required in any other case.

**(Vinod Kumar Sinha, J)**

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