

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.568 of 2014

Arising Out of PS.Case No. -17 Year- 2013 Thana -FALKA District- KATIHAR

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Bichhu Mandal @ Vijay Mandal, Son of Late Jagu Mandal of Dira Chandpur, P.S.-
Falka (Pothia), District – Katihar.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance:

For the Appellant/s : Mr. Arun Kumar Tripathi, Amicus Curiae.

For the Respondent/s : Mrs. Abha Singh, APP.

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**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date: 15-09-2017

Heard learned Amicus Curiae for the appellant as well
as learned APP for the State.

2. This appeal has been preferred against the Judgment
and Order of conviction dated 21.01.2014 and order of sentence dated
27.01.2014 passed by the Additional District and Sessions Judge-I,
Katihar in Sessions Trial No. 167 of 2013 arising out of Falka P.S.
Case No. 17 of 2013, whereby the learned trial court convicted the
appellant Bichhu Mandal @ Vijay Mandal for the offence punishable
under Section 376 of the Indian Penal Code and sentenced him to



undergo R.I. for 10 years for the offence punishable under Section 376 of the Indian Penal Code.

3. The factual matrix of the case is that Falka P.S. Case No. 17 of 2013 was instituted under Section 376 of the Indian Penal Code against the accused Bichhu Mandal @ Vijay Mandal on the basis of the written report of Mahesh Mandal, Son of Late Laxman Mandal, Resident of village Morsand Chandpur, P.S.-Kurshella, District-Katihar dated 20.01.2013 with the allegation in succinct that on 19.01.2013 at around 5 PM accused Bichhu Mandal @ Vijay Mandal enticed away his daughter Mausam Kumari aged 3 years and took her at his house. In the meantime his mother, namely, Basiya Devi who was sitting on her door responding alarm made by Mausam Kumari arrived at the house of Bichhu Mandal and found him committing rape against Mausam Kumari. Then her mother made alarm, responding the said alarm, they and villagers rushed there and caught hold Bichhu Mandal and produced him before the police on 20.01.2013.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the accused Bichhu Mandal @ Vijay Mandal under Section 376 of the Indian Penal Code.

5. On receiving the chargesheet and the case diary and



perusing the same, the learned Magistrate took cognizance of the offence against the accused Bichhu Mandal @ Vijay Mandal and committed the case to the court of sessions and on transfer finally the case came in *seisin* of the Additional District and Sessions Judge-I, Katihar for trial.

6. Charge against the accused Bichhu Mandal @ Vijay Mandal was framed under Section 376 of the Indian Penal Code. Charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has been able to examine altogether eleven prosecution witnesses namely, Dr. Abhilasha Kumari as PW-1, Ramrup Sah as PW-2, Kanchan Devi as PW-3, Prakash Mandal as PW-4, Mantu Mandal as PW-5, Hira Lal Mandal as PW-6, Basiya Devi as PW-7, Informant Mahesh Mandal as PW-8, I.O. Md. Imtiyaz Khan as PW-9, Ajay Kumar Mandal as PW-10 and Paltu Mandal as PW-11. Out of the aforesaid witnesses, PW-10 and PW-11 happen to be the formal witnesses.

8. The statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be innocent. The accused has not adduced either any ocular or



documentary evidence in support of his case.

9. After hearing the parties and perusing the record, the learned trial court passed the impugned Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, the convict Bichhu Mandal @ Vijay Mandal has preferred this Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned Amicus Curiae for the appellant that none of the witnesses examined by the prosecution happens to be the eye witness of the occurrence. The doctor has also not found any spermatozoa in the vaginal swab of the victim, hence, no offence under Section 376 of the Indian Penal Code is made out. Learned lower court has wrongly convicted the appellant for the occurrence of committing rape which has not been actually committed by him, without correctly appreciating the evidence on record.

13. On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence has submitted that PW-7 Basiya Devi who



happens to be the grandmother of the victim is the eye witness of the occurrence. She has witnessed the accused committing rape against the minor girl aged about 3 years and has consistently supported the prosecution case. The doctor has also found sign of sexual contact on the medical examination of the victim. Hence, the offence of committing rape under Section 376 of the Indian Penal Code stands established against the appellant and learned lower court correctly appreciating the facts and evidence available on record has rightly passed the impugned judgment and order of conviction and sentence which is liable to be sustained and this appeal has no substance in it and is liable to be dismissed.

14. From perusal of the record, it appears that there are seven material witnesses of the case. Out of the aforesaid witnesses barring PW-7 Basiya Devi who has seen the occurrence of committing rape against the victim by the accused, all the witnesses had arrived at the place of occurrence on alarm made by PW-7 witnessing the occurrence and caught hold the accused at the place of occurrence. As PW-7 Basiya Devi in her examination-in-chief has stated that on the date and time of occurrence, the accused Bichhu Mandal was playing with her grand-daughter Mausam Kumari on the road located in front of her house and in the said course, he took away her daughter to his house which is located adjacent to the road



at a distance of 10 steps from her house. Mausam Kuamri started screaming then responding the same, she rushed at the house of Bichhu Manal @ Vijay Mandal and witnessed him committing rape against Mausam Kumari on his bed and Mausam Kumari screaming. On halla made by her, her family members and villagers rushed there. Bichhu Mandal started escaping but he was apprehended by the villagers. On information to the Police Station, police arrived there and took Bichhu Mandal to Police Station. She was subjected to cross-examination, but nothing convincing and cogent has been elicited by the defence in her cross-examination having potential to rule out the presence of the said witness at the place of occurrence at the time of occurrence and witnessing the occurrence by her. Thus, from perusal of the aforesaid testimony of PW-7, it appears that she has fully supported the prosecution case. It is settled principle of law that it is the quality of the evidence and not quantity of the evidence is material. Conviction can be made even on the basis of testimony of solitary eye witness if it happens to be consistent, trustworthy and reliable.

15. The victim appears to be a minor girl aged about three years. From perusal of the record, it appears that the victim was presented before the court in the lap of her mother. She was tested by the court and it was found that she was unable to understand the



question and was not able to give reply to the question put to her by the court. Hence, her evidence was not recorded by the Court.

16. From perusal of the testimony of PW-3 Kanchan Devi who happens to be the mother of the victim and PW-8 Mahesh Mandal (informant) who happens to be the father of the victim, it appears that they have made an abortive bid to support the prosecution case claiming themselves to be the eye witnesses of the occurrence. But from perusal of the testimony of PW-7 Basiya Devi, it appears that they are not the eye witnesses of the occurrence of committing rape against the victim by the accused. As in Para-1 of her examination-in-chief, PW-7 has stated that witnessing the occurrence she made halla and responding halla, her family members and villagers rushed there and in Para-5 of her cross-examination, she has stated that responding halla, she had arrived at the house of Bichhu Mandal first and her son and daughter-in-law followed her. The aforesaid testimony of PW-7 also indicates that PW-3 and PW-8 had arrived at the place of occurrence together after arrival of PW-7. PW-3 Kanchan Devi has stated in Para-1 of her examination-in-chief that when she arrived at the house of the accused by that time he had committed rape against her daughter. The aforesaid testimony of PW-7 and PW-3 indicates that the aforesaid two witnesses, namely, Kanchan Devi (PW-3) and informant Mahesh Mandal (PW-8) had



not witnessed the occurrence of committing rape against the victim by the accused rather testimony of the aforesaid witnesses indicates that they had seen the accused in course of escaping.

17. From perusal of the testimony of PW-2 Ram Rup Sah, PW-4 Prakash mandal, PW-5 Mantu Mandal and PW-6 Hira Lal Mandal, it appears that they have also not witnessed the occurrence of committing rape against the victim by the accused as the aforesaid witnesses happen to be villagers of the victim and as per the account of PW-7 Basiya Devi, they arrived at the place of occurrence responding alarm made by her. PW-2 Ramrup Sah has himself stated in his examination-in-chief that he and villagers rushed to the place of occurrence responding halla made by PW-7 Basiya Devi. PW-5 Mantu Mandal has stated in Para-1 of his examination-in-chief that when he arrived at the house of Bichhu Mandal responding alarm, he witnessed the accused had committed rape against Mausam Kumari. Likewise, PW-6 Hira Lal Mandal has stated in his examination-in-chief that when he entered into the house of Bichhu Mandal, he found Bicchu Madal had committed rape against Mausam Kumari. Though PW-4 Prakash Mandal has stated in his examination-in-chief that when he arrived at the house of Bichhu Mandal along with the villagers, Bichhu Mandal was committing rape against Mausam Kumari, but in Para-2 of his cross-examination he has stated that



when he arrived at the place of occurrence, several persons had congregated there by that time and villagers had kept Bichhu Mandal apprehended.

18. PW-2 has stated in Para-1 of his examination-in-chief that semen was fallen. PW-3 has stated in Para-2 of her examination-in-chief that semen of the accused was fallen on the attire of her daughter and PW-8 in para-6 of his cross-examination has stated that the police seized the panty of the victim. From perusal of the testimony of I.O. Md. Imtiyaz Khan (PW-9), it appears that the I.O. has stated that the grandmother had produced panty of the victim Mausam Kumari which was seized by him and from perusal of the seizure list marked as Exhibit-4, it appears that semen stained panty of the victim was produced before the police and the same was seized by it at the place of occurrence at the time of occurrence.

19. Thus from perusal of the aforesaid evidence of the prosecution, it appears that PW-7, grand-mother of the victim has supported the occurrence of committing rape by the accused against the victim and other witnesses have supported the factum of apprehension of the accused at the place of occurrence in course of escaping and finding of the semen on the panty of the victim and production of the said panty of the victim to the police. Though the semen stained panty of the victim was not sent to FSL for its



chemical examination by the I.O., but it appears the latches and fault on the part of the I.O. and the aforesaid latches and fault on the part of the I.O., in my considered opinion, would not shatter the merit of the prosecution case.

20. From perusal of the medical report of the victim marked as Exhibit-1, it appears that the victim was examined by Dr. Abhilasha Kumari and the doctor has found redness and congestion on her private part and also abrasion on the perineum of the size of half inch and the doctor has opined the aforesaid injury on the perineum of the victim due to sexual contact. The said injury report has been proved by the said doctor examined in this case as PW-1. Thus, the aforesaid ocular testimony of the prosecution stands corroborated by the medical evidence as well. Though no spermatozoa was found in the vaginal swab of the victim, but the aforesaid aspect in my considered opinion has no potential to rule out the occurrence of rape against the victim.

21. Hon'ble Apex Court in the case of **State of U.P vs Babul Nath reported in (1994) 6 SCC 29** has been pleased to rule that to constitute the offence of rape, it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ in the labia majora or the vulva or pudenda with or



without any emission of semen and even an attempt of penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. Hon'ble Apex Court in the case of **Aman Kumar V. State of Haryana** reported in **AIR 2004 SC 1497** has been pleased to rule that, to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.

22. In view of the aforesaid facts and circumstances of the case, I find and hold that the prosecution has successfully established the offence of committing rape against the minor girl aged about three years by the appellant by taking away her at his house by adducing trustworthy, reliable, convincing and cogent ocular and documentary evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned lower court is not suffering from any infirmity and impropriety and it does not require any intervention of this appellate court and the same is



upheld. This appeal has no merit in it and is dismissed accordingly.

23. Let the Amicus Curiae be paid the prescribed fee by the Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J.)

Mishra/-

AFR/NAFR	A.F.R.
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