

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.499 of 2015

Arising Out of PS.Case No. -15 Year- 2011 Thana -PURNEA SADAR District- PURNIA

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ASHFAK ALAM, SON OF MD. MUTALIM, RESIDENT OF VILLAGE-
MIYAN BAZAR, CHIMNI BAZAR, P.S. SADAR, DISTRICT- PURNEA.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

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

For the State : Mr. S.A. Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

C.A.V. JUDGMENT

Date: 12-07-2017

As the learned counsel for the appellant failed to appear on account thereof, Mr. Arun Kumar Tripathi, learned advocate has been requested to assist the court as an Amicus Curiae.

2. Sole appellant Ashfak Alam who has been found guilty for an offence punishable under Sections 323 IPC, 376 IPC vide judgment of conviction dated 04.07.2015 and sentenced to undergo S.I. for one year as well as R.I. for seven years, fine appertaining to Rs.10,000/- in default thereof, to undergo R.I. for one year additionally respectively with a further direction to run the sentences concurrently, vide order of sentence dated 06.07.2015 passed by Additional Sessions Judge, IInd, Purnea in Sessions Trial No.841 of 2011/270 of 2014.

3. Victim (name withheld, PW.8) filed Complaint Petition No.4248 of 2010 on 08.12.2010 alleging inter alia that on 02.12.2010 at 04:30 PM while she was going to bring she-goat, all of a sudden accused, Ashfak Alam came from behind, gagged her mouth pushed her to the maize crop of Jhatu Mian where he committed rape. During course



thereof, she was also assaulted with fist and slap on account of protest having shown by her. Then, thereafter, the accused fled away. She came to her house and disclosed the event to her parents whereupon, her father informed the persons of his society. They intimated the father of the accused whereupon, it was resolved that matter will be sorted out in *Panchayati*. On 03.12.2010 *Panchayati* was convened wherein the accused also appeared wherein, he confessed his guilt and further undertook to marry. 05.12.2010 was date fixed for marriage on which date, accused absconded. In spite of search, his location could not be traced out. Then thereafter, the *Panches* have instructed to launch a case. On 06-12-2010 she had gone to P.S. where, police declined to register a case. Accordingly, compliant has been filed.

4. The learned Chief Judicial Magistrate transferred the aforesaid complaint to the local police for registration and investigation in accordance with Section 156(3) of the Cr.P.C whereupon Purnea Sadar P.S. Case No.15/2011 was registered. The Investigating Officer took up investigation and submitted charge sheet after concluding the same which happens to be basis of trial which culminated in conviction and sentence to the accused/appellant. Hence this appeal.

5. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is of complete denial of occurrence. However, neither any DW nor any chit of paper has been filed.

6. In order to substantiate its case, prosecution had examined altogether ten PWs out of whom PW.1 is Md. Hasib, PW.2 is Md.



Imteyaz Ali, PW.3 is Mustafa @ Mustaque Alam, PW.4 is Md. Rahim, PW.5 is Md. Karim, PW.6 is Bibi Aasiya Khatoon, PW.7 is Md. Mursalim, PW.8 is Marjeena Khatoon (victim), PW.9 is Surendra Prasad Singh (Investigating Officer) and PW.10 is Dr. Punam Prabha. Side by side also exhibited Ext.1-Signature of victim/informant over complaint petition, Ext.2-Formal First Information Report, Ext.3-Endorsement of SHO over copy of complaint and Ext.4-Medical Report.

7. At the present juncture, it looks relevant to mention here that complaint was filed on 08.12.2010 on which date, a prayer was made by the complainant for her medical examination which the learned lower court had allowed and PW.10, a Gynecologist posted at Sadar Hospital, Purnea examined the victim and found following injuries:-

“No external injury found anywhere on her body including her private part.

Hymen-Old ruptured. Hymen was found high vagina swab was taken and sent to pathological examination, spermatozoa not found. As, the victim left so, her age was not estimated.”

8. Now coming to oral evidence, first of all evidence of victim is taken up.

9. PW.8 had deposed that she happens to be informant. On the alleged date and time of occurrence she had gone to the field of Jhatu Mian for bringing shegoat. Accused Ashfak Alam came from behind, pressed her mouth, took her to the field of Jhatu Mian where he



committed rape. Thereafter, he fled away to his house. She came out from the field of Jhatu Mian and was weeping whereupon Banu, Saidul, Aliya Khatoon, Mehnaz came. Rahim and Imteyaz also came who took her to her house where she disclosed the event to her parents. Her father informed the villagers over which, Panchayati was convened after two days. In Panchayati, Ashfak had confessed his guilt and also undertook to marry. Over this, 05.12.2010 was date fixed of marriage. During midst thereof, accused fled away whereupon, Panches have directed her to launch a case. When she gone to police station, the Darogaji refused to register a case whereupon complaint was filed. (Ext. her signature). Paragraph 4, 2, 10 is basically relating to event happened at Purnea court wherein she had disclosed that her brother Ismile, her mother and Rahim accompanied her. Her father had not come. In para-11 she had further stated that Rahim had disclosed regarding the occurrence to the lawyer on the basis thereof, complaint was drafted. As instructed by Rahim, she put her signature. Lawyer had not inquired from her. In para-13 she deposed that she had gone to hospital along with her brother. In para-14 she had stated that she along with accused have common house. Accused is one and half years older than her. In para-17 she had stated that her parents were inclined to marry her with Ashfak. Rahim was also interested. Rahim is her maternal brother. When Ashfak and his father did not oblige by way of acceding to marry then Rahim, her mother and brother got this case instituted. In para-22 she had stated that Panchayati was held at the house of accused. Document was prepared which is along with her (never filed). In para-13 she had deposed that this false case has



been instituted by her parents only to facilitate her marriage with the accused. In para-33 she had further stated that she will withdraw the case in case accused accede to marry with her.

10. PW.6 is the mother of victim. She had said that on the alleged date and time of occurrence she was at her house. Her daughter had gone carrying she-goat for grazing. She returned back and disclosed that Ashfak Alam dragged her to the field of Jhatu Mian and committed rape. Then, she disclosed to villagers whereupon panchayati was convened. After two days panchayati was held wherein accused became ready to marry but, he disappeared. As a result of which instant case has been registered. During cross-examination she had admitted that her husband as well as father of accused is full brother. House of accused lies adjacent to her house. In para-13 she had disclosed that first of all she informed her brother, nephew, regarding the occurrence. In para-17 she had stated that her daughter (victim) is older than the accused.

11. PW.3 is father of victim. He deposed that on the alleged date and time of occurrence he was at his house. At that very time his daughter had gone to bring she-goat near the field of Jhatu Mian. She came weeping. On query she narrated that Ashfak has raped her whereupon he informed the villagers. Panchayati was convened on the following day wherein accused Ashfak undertook to marry. Thereafter, Ashfak disappeared. He took his daughter to P.S. where case was not registered as a result of which, case was filed before the court. In para-3 he had stated that accused is his co-villager and so has been identified. Again said that after occurrence he knew the accused. Again said that



accused was not known to him since before the occurrence. In para-8 he had stated that his daughter had narrated the occurrence to his lawyer. He had not disclosed. At that very time he came out from the chamber. In para-11 he said that he had accompanied his daughter to hospital.

12. PW.4 is Rahim, maternal brother of the victim. He had deposed that on the alleged date and time of occurrence while he was going to his field, he heard sound of weeping coming from the field of Jhatu Mian. He had gone there and found victim weeping. On query, she disclosed that Ashfak Alam had committed rape after pressing her mouth. Thereafter, he took her to house where he had informed her parents regarding the occurrence. On the following day, Panchayati was convened. He was also one of the participants. Ashfak also came. He confessed his guilt whereupon, Panches have directed him to marry with the victim which he consented. Date was fixed but, during midst thereof, he disappeared. Then thereafter case has been registered. During cross-examination at para-4, he had admitted inter se relationship with the victim. In para-10 he had further stated that father of victim as well as father of accused Ashfak are own brother.

13. PW.1, Md, Hasid had deposed that a panchayati was convened on account of rape committed by the accused over victim. He was also one of the panches. Victim had narrated in the panchayati that Ashfak had committed rape on her while she had gone to graze the she-goat. Ashfak also confessed and became ready to marry with victim on 05.12.2010 but, he declined later on. During cross-examination at para-6 he had stated that document relating to panchayati was prepared but he



had not put his signature. In para-7 he had further stated that father of victim was interested getting her marriage with accused. When accused refused then this case has been registered.

14. PW.2 is Imteyaz who had stated that on the alleged date and time of occurrence when he had gone to the place of victim, he was informed regarding the occurrence. There was panchayati. He was also one of the participant. Ashfak and his father also participated. Ashfak had confessed and became ready to marry with the victim but he disappeared subsequently whereupon this case has been filed. In para-5 he had stated that after the occurrence father of victim was inclined to marry the victim with accused.

15. PW.5 is Md. Karim who deposed that on the alleged date at about 5:00 PM after his return from Purnea, mother of victim came to his place and accompanied him to her place where victim had disclosed that when she had gone to bring back her she-goat, Ashfak caught hold her, dragged her to the field of Jhatu where committed rape on her. There was panchayati on that very score wherein accused and his family members also participated. Accused had confessed his guilt and further offered to marry with the victim. Date was fixed but, he disappeared. In para-3 he had stated that as accused failed to marry with the victim so case has been registered. In para-4 he had disclosed that parents of victim had not disclosed anything. Victim had narrated the incident. In para-6, he had stated that victim happens to be her cousin (Phupheri) sister.

16. PW.7 had stated that on the alleged date and time of occurrence father of victim came to his place and disclosed that Ashfak



committed rape upon his daughter in a maize field. Panchayati was convened on the same day participated by the accused and the father, maternal uncle. Accused had confessed his guilt and then it was resolved that accused should marry. As accused disappeared, on account thereof, this case has been registered. During cross-examination at para-7 he had stated that Md. Raishiuddin, Amir Mandal, Anshur Mandal, Md. Shamim, Md. Kalam were the other panches. Document was prepared but he is unable to say whether it bears signature of victim as well as accused.

17. PW.9 is Investigating Officer who had deposed that after registration of the case, he was entrusted with the investigation. He had gone to place of occurrence detailed. Recorded statement of the witnesses, took further statement of the victim. Seen the place of occurrence which happens to be the field of Jhatu Mian. No sign of occurrence was found then had disclosed boundary. Received supervision note and then, submitted charge sheet. During cross-examination in para-6 he had stated that all the witnesses were hearsay before him. No document of panchayati was placed before him.

18. Because of the fact that it happens to be a case of rape on account thereof, the evidence of victim has got primacy. In case, the evidence of victim is found inspiring then in that event sole evidence of victim is sufficient will justify the conviction as well as sentence against the culprit otherwise. In the aforesaid background, when the evidence of victim PW.8 has been gone through, it is apparent that though in her examination-in-chief she had narrated the occurrence but in cross-



examination she had categorically stated that as her parents were inclined to facilitate her marriage with the accused, for that her parents got this case filed. This disclosure has got relevance which could be perceived from the conduct of the parents of the victim who, in spite of having admitted at her end as well as at the end of her mother, PW.6 to be her cousin brother and is residing in the same house having common courtyard even then, her father PW.3 openly declined to accept the same by way of deposing that accused was not known to him since before and in likewise manner disclosed that since after occurrence, he began to identify the accused. This aspect has got a bearing in the background of the fact that though the witnesses have introduced factum of panchayati preparation of document, having in possession of the victim, never been filed to substantiate the factum of panchayati.

19. Now coming to other corollary event, the victim had deposed that she was taken to court by her mother, full brother along with Rahim, her full brother had taken her to hospital, the occurrence was narrated by Rahim which has not been supported by PW.4 Rahim. Contrary to it father PW.3 had claimed that he had accompanied PW.8, victim, while discarding presence of PW.4 as well as Ismail, his son.

20. Now coming to the occurrence, save and except victim, others are hearsay. So far normal activity of her parents are concerned, at least some sort of disclosure was expected at the end of PW.6, mother with regard to physical appearance of her daughter along with the condition of the apparel having worn by her at that very moment which is found completely locking. Furthermore, as per evidence of PW.4 he



had brought the victim from the field of Jhatu Mian, and during said course had not shown presence of any other at that very place while from the evidence of PW.8, victim it is evident that she had shown presence of Banu, Saidul, Aaliya Khatoon, Mehnaz and then thereafter presence of Rahim and Imteyaz. Imteyaz, PW.2 had not supported the same. In likewise manner neither mother PW.6 nor father PW.3 had substantiated the same.

21. Inconsistencies in inconsonance with the disclosure made by the victim herself that for the purpose of marriage with accused Ashfak this case has been filed did not justify the finding of the learned lower court. Accordingly, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed. Appellant is on bail, hence discharged from its liability. First and last page of judgment be handed over to the learned amicus curiae for the needful.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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