

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.50 of 2015**

Arising Out of PS.Case No. -45 Year- 2011 Thana -BARHARA District- PURNIA

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Taleshwar Hasda @ Zoohalu Hasda, S/o Jethu Hansda, Resident of Village -
Dewari, P.S. - Barhara, District - Purnea.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Pramod Kumar Mallick-Advocate
Mr./s Anamika-Advocate

For the Respondent/s : Smt. Abha Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 01-08-2017

This appeal has been preferred against judgment of conviction dated 14.11.2014 and order of sentence dated 15.11.2014 passed by the 2nd Additional Sessions Judge, Purnea in Sessions Trial No.928 of 2011 whereby and whereunder appellant, Taleshwar Hasda @ Juhlu Hasda has been found guilty for an offence punishable under Section 376 of the I.P.C. and sentenced to undergo rigorous imprisonment for 10 Years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo rigorous imprisonment for one year.

2. Name withheld, victim (PW-7) filed written report on 19.05.2011 alleging inter alia that her husband happens to be at Punjab. On 18.05.2011 at about 5.00 p.m., she had gone to her maize



field in order to scrap grass and during course thereof, her co-villager Taleshwar Hasda @ Juhlu Hasda came, threw sickle from her hand, pushed her, gagged her mouth with her Sari and then, began to commit rape. She tried her best to come out of his grip as well as she also attempted to raise an alarm, but could not succeed. After commission of rape, he flew. She, anyhow came to her house. During midst of way, she felt dizziness, she vomited. She happens to be pregnant of six months and on account thereof, she suffered great pain on account of rape. After reaching at house, she narrated the event to her Gotni, Sabita Devi and others whereupon the other family members including villagers assembled, who after coming to know about the occurrence apprehended the accused, who was produced along with the written report.

3. The aforesaid written report lent registration of Barhara P. S. Case No.45 of 2011, whereupon investigation was taken up which concluded by way of submission of police report paving way for trial which met with ultimate result, the subject matter of instant appeal.

4. The appellant during course of trial had pleaded complete denial of the occurrence as well as false implication on account of caste rivalry in between Paswan as well as Scheduled Tribe. However, neither any document nor any witness has been examined on his behalf.



5. Nine witnesses have been examined on behalf of prosecution, who are PW-1 Kailash Paswan, PW-2 Shrawan Kumar Paswan, PW-3 Ashok Paswan, PW-4 Sabita Devi, PW-5 Pappu Paswan, PW-6 Domi Paswan, PW-7 (victim), PW-8 Dr. Punam Prabha and PW-9 Shambhu Narayan Pandey, the I.O. Side by side, had also exhibited Exhibit-1 signature of PW-1 over written report, Exhibit-2 signature of PW-1 over production-cum-arrest memo, Exhibit-3 injury report relating to victim, Exhibit-4 endorsement over written report, Exhibit-5 production-cum-arrest memo, Exhibit-6 requisition having issued by the I.O. of the examination of the victim.

6. Learned counsel for the appellant while challenging the finding recorded by the learned lower Court has submitted that same is not legally permissible on account thereof, is fit to be set aside. In order to substantiate the same, it has been submitted that there happens to be no legal evidence adduced on behalf of prosecution, which could be relied upon contrary to it, the prosecution case is suffering from improbability, inconsistency and so, would not have been accepted. The first and foremost argument on that very score is that at an initial stage, the prosecution had divulged that while victim was cutting grass from her field wherein maize crop was standing, she was ravished, but during course of evidence, the prosecution knowingly and intentionally withheld the same as the I.O. (PW-9) had not found a field belonging to the informant having



grown up maize plant. Once P.O. is not properly substantiated then in such circumstance, considering the evidence of PW-8, doctor, who had not found any sign of rape over the victim and ultimately, proved the defence version that on account of caste rivalry, he has fallen victim thereof.

7. Furthermore, it has also been submitted that none of the witnesses had come forward to say that they were in surrounding of the P.O. land where they have seen the victim disorderly condition, fleeing of accused rather they all have said that they got information with regard to commission of the occurrence through PW-7, victim. Once the evidence of victim became untrustworthy, then in that circumstance, the status of PW-1 to PW-6 as hearsay witness evaporates.

8. It has further been submitted that this happens to be reason behind over non-compliance of mandatory provision so prescribed under Section 53(A) of the Cr.P.C. whereunder an accused of rape is to be medically examined and having violation at the end of the prosecution in proper compliance of the aforesaid provision is bound to dent upon prospect of the prosecution and the cumulative effect thereof, did not justify the judgment impugned.

9. It has also been submitted that as per version of the victim (PW-7), her pregnancy of six months and further, she had disclosed that she indulged in an exercise in getting out of grip of



appellant during course of rape and so, there should have been some sort of internal injury even relating to status of foetus which, as per evidence of PW-8 was completely ruled out. That being so, it probablizes the defence version, whereupon at least, appellant should be allowed to avail the benefit of doubt.

10. The learned Additional Public Prosecutor while contradicting the argument having made on behalf of appellant has submitted that application of Section 53(A) of the Cr.P.C. is not at all mandatory. Its purpose happens to be to trace out whether accused was capable of rape (may be on account of physical or mental deformity), some objective finding by the doctor in case, accused is apprehended soon after the occurrence in order to trace out additional evidence disclosing connectivity of the accused with the commission of the crime. Once accused was apprehended much after the occurrence and as during course of trial it has not been pleaded at the end of the accused, who happens to be aged about 22 years that he was suffering from erectile function on account thereof, non-examination of accused by a medical practitioner in accordance with Section 53(A) of the Cr.P.C. is not at all found adverse to the interest of the prosecution. It has also been submitted that P.O. was visited by the I.O. The victim had deposed that while she was scrapping grass in her field, she was raped and so, it was incumbent upon the accused/appellant to have drawn her attention towards previous statement



having made by way of lodging of written report and in likewise manner, I.O. (PW-9) would have been cross-examined on that very score. Having failed, would not give any sort of privilege to the appellant to raise the issue. Lastly, it has been submitted that for the purpose of commission of rape, ejaculation is not a sine qua non rather slight penetration is sufficient which, from the evidence of victim is found duly substantiated. Therefore, the judgment impugned is fit to be confirmed.

11. It is basic principle of law that admissibility of evidence of witnesses will be only adaptable, if he tested and manner prescribed therefor is by way of cross-examination and so, provision of cross-examination has been made only to have an opportunity to the adversary to test truthfulness, veracity of the evidence of a witness as well as to show his interestedness, hostility, professional etc. and for that, the relevant provisions of the Evidence Act permit unhindered power, even questioning over personal character. So far, criminal trial is concerned, the evidence whatever been adduced during course of trial happens to be substantial evidence and not the evidence collected at an earlier occasion including the first information report. In terms of Section 162 of the Cr.P.C. as well as Section 145 of the Evidence Act, it happens to be the subject of contradiction, corroboration and for that, one has to take proper exercise be it a prosecution or a defence. Apart from this, it has also



been settled at rest that if a party wants to impress upon the Court to identify a witness to be liar or his evidence happens to be unworthy of credence then in such circumstance, the witness has to be cross-examined on all aspect so that witness would have an opportunity to explain the same, in case, the adversary fails to cross-examine the witness on a particular point, then in that event, those evidences would be accepted without any hitch and hindrance. That happens to the spirit of relevant judicial pronouncement having on that very score laid down by the Hon'ble Apex Court in ***Gian Chand & Ors. vs. State of Haryana reported in 2013(4) P.L.J.R. 7 (SC)***, wherein it has been held:-

“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as



being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in [Section 138](#) of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by [Section 146](#) of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.” (Emphasis supplied) (See also: [Ravinder Kumar Sharma v. State of Assam & Ors.](#), AIR 1999 SC 3571; [Ghasita Sahu v. State of Madhya Pradesh](#), AIR 2008 SC 1425; and [Rohtash Kumar v. State of Haryana](#), JT 2013 (8) SC 181)



12. The defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/contraband articles. Thus, no grievance could be raised by the appellants in this regard."

12. Keeping the aforesaid principle in the backdrop, now evidences is to be seen. It is needless to say that none of the witnesses have claimed to be an eye witness to occurrence, that means to say, the status of PW-1 to PW-6 happens to be that of hearsay and the source is the only one from the victim (PW-7). One additional theme happens to be that after being disclosed at the end of victim, the villagers got the appellant apprehended and produced him along with written report. It is also apparent that accused had not denied the same coupled with the fact that while cross-examining the witnesses, more particularly victim as well as I.O., had not questioned and in likewise manner, suggested virtually, appellant remained exanimate during course thereof.

13. So far PW-7, victim is concerned, she had stated that on the alleged date and time of occurrence, she was scrapping grass in her field. Taleshwar Hansda came from behind, caught hold her, threw sickle from her hand and then, committed rape. Thereafter, he ran away, she vomited. She felt dizziness. Anyhow, she reached at her



house and disclosed with regard to occurrence having with her to her Gotni Sabita Devi (PW-4) along with villagers whereupon accused Taleshwar Hasda was apprehended and produced before the police where she had also gone to launch a case. She had further stated that she was medically examined. During cross-examination at Para-4, she had detailed the topography of P.O. In Para-5, she had stated that at the time of scrapping of grass/ commission of crime, none was present in the surrounding. In Para-6, she had further stated that as she was pregnant of six months on account thereof, she could not resist properly. In Para-7, she had stated that when accused began to commit rape, she became unconscious. After regaining sense, she came to her house. As she developed pain, she took medicine. At the time of statement before the police, her Gotni Sabita Devi and Nandosi Kailash Paswan (PW-1) were present. Her further statement was recorded by the police at her house. She had shown the place of occurrence to police. She had further explained that as son of her Bhainsur had taken away the sickle. So, it was not present at the place of occurrence during course of inspection. In Para-15, she had further stated that her medical test was done after two days of the occurrence.

14. PW-8 is the doctor, who had examined PW-7 on 20.05.2011 and found the following:-

- (i) *Body built-Thin built Height-4' 5", Breast-Developed, Pubic hair-auxiliary hair well grown.*



- (ii) *No external injury found any wherein her body including her private part.*
- (iii) *Hymen-old rupture found.*
- (iv) *High vaginal swab was taken and sent to pathologist sadar hospital, Purnea for microscopic examination for presence of spermatozoa.*
- (v) *She complaint-6 month ammenorhea. But as per abdominal examination size of uterus 16 to 18 weeks.*
- (vi) *Per vagina (P.B.) finding- Os (external OS) closed whitish discharge ++ report of high vaginal swab spermatozoa not found-ultra sound report. Live foetus of unstable presentation and 19 weeks one day maturity.*

According to doctor, no sign of rape was found at the time of her examination, but the aforesaid event could not be ruled out. During cross-examination, it is evident that she reiterated her finding that at the time of examination, she had not found sign of rape.

15. PW-9 is the I.O., who had stated that on 19.05.2011, written report was filed by the victim (PW-7), whereupon case was instituted and investigation was entrusted. It has also been stated that accused was produced and for that, production-cum-arrest memo was prepared by him (Exhibit-A). He recorded further statement of the informant, statement of other witnesses and then, proceeded to inspect place of occurrence. He reached at the village and visited/ inspected



the place of occurrence as pointed out by the informant which happens to be the maize field belonging to the informant. He had identified the same, North-Sridhar Paswan, South-Vilash Paswan (Maize field), East-Tiju Manjhi (Maize field), West-Yaddu Bhagat (Maize field). He also recorded the statement of Sabita Devi, Pappu Paswan, Shrawan Kumar Paswan and Domi Paswan, returned back to the P.S. On the following day, he sent the victim for medical examination and for that, issued requisition (exhibited), recorded statement of accused Taleshwar Hansda, accused was remanded to judicial custody. Received medical report, received supervision note, then after completing investigation, submitted chargesheet. During cross-examination, he had stated that the house of witnesses are in the surrounding of the house of informant and they are related with the informant. In Para-13, he had further stated that as per F.I.R., occurrence had taken place on 18.05.2011 at 5.00 p.m. while information was given on 19.05.2011 at 9.00 a.m. He had not investigated over the delay. In Para-14, he had not mentioned the place where statements of witnesses were recorded. In Para-15, he had stated that he had not mentioned Khata number and Khesra number and area of the P.O. land. It belonged to the informant wherein maize crop was there. In Para-16, he had stated that he had not found scrapped grass at the P.O. In Para-17, he had stated that neither he had found such injury over the victim nor victim had shown injury to him



then had exhibited the requisition. In Para-19, he had stated that when victim came before him, her cloth was not torn. He had not seen stain over the cloth below the waist. At Para-20, he had admitted that informant had not stated before him that accused threw sickle from her hand.

16. Giving minute observation to the evidences of the witnesses, it is evident that victim (PW-7) was not at all cross-examined on the factum of rape as well as over delay in institution of the case, as defence was already known the fact that her husband was not present at that very moment. Presence of spermatozoa is not a condition precedent for constituting of an offence of rape in the background of presence of proviso of Section 375 of the I.P.C. whereunder slight penetration has been found sufficient to constitute an offence of rape. Apart from this, PW-7 was never cross-examined that there was ejaculation during course of commission of rape. Unless and until, there happens to be ejaculation, would not be found so, having absence thereof, is not going to benefit the appellant even considering evidence of PW-8, doctor over non-presence of spermatozoa. So far non-presence of injury over the body of victim is concerned, defence got the answer of victim, who under Para-6 stated as she was pregnant of six months on account thereof, she could not resist apart from presence of explanation of Section 375 I.P.C., which ought to have properly dismantled by the appellant wherein, he failed.



The pregnancy is found supported with the medical evidence.

17. Now, coming to argument having made on behalf of appellant that mandatory provision of Section 53(A) of the Cr.P.C., has not been followed and so, right of appellant is found prejudiced. First of all, it has to be seen in the background of non-cross-examination of PW-7, the victim that appellant was incapable to commit rape and in likewise manner, PW-9, the I.O., so there was no denial at his end that he was physically unfit.

18. Furthermore, application of aforesaid provision is in favour of prosecution and not in favour of accused. It is not mandatory one rather it happens to be optional and its application is only to enable the prosecution to get additional evidence, in case accused is examined soon after commission of rape, if apprehended otherwise as per “medical jurisprudence by Modi”, the connecting evidence would disappear as soon as accused urinates. That being so, the alternative argument has also got no leg to stand.

19. Considering the Indian social framework whereunder virginity of a woman is a priceless jewel and her identity is connected therewith, whereupon one has to dare to launch a case against her rapist at the cost of stigma as well as family prestige and so, delay is likely to occur which is to be usually condoned unless and until an adverse impact, in the facts and circumstances of an individual case is found. Apart from this, the evidence of victim stood on upper



pedestal than the evidence of normal witness. In likewise manner, if the evidence of victim is found inspiring one, would justify the conviction without any corroboration. Furthermore, it is evident from the cross-examination of victim (PW-7) that no case of consent has been advanced, rather it happens to be blatantly denial of occurrence, therefore, that part is found completely abandon at the end of appellant.

20. From the evidence, as discussed above, it is crystal clear that learned lower Court had rightly recorded the conviction and sentence against the appellant and that being so, instant appeal sans merit and is accordingly, dismissed. Appellant is on bail, hence his bail bond is cancelled directing him to surrender before the lower Court to serve out remaining part of sentence, failing which learned lower Court will proceed against him in accordance with law.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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