

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.697 of 2015

Arising Out of PS. Case No. -205 Year- 2011 Thana -BARSOI District- KATIHAR

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1. MD. AFTAB ALAM @ AFTAB AALAM, SON OF LATE AHMAD
 2. MD. MANNU @ MANNU AALAM, SON OF LATE AHMAD
 3. JAGARNATH PASWAN @ JAGNATH PASWAN, SON OF MARAIYA PASWAN
- ALL ARE RESIDENT OF VILLAGE - RAGHUNATHPUR, POLICE STATION - BARSOI, DISTRICT - KATIHAR.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Raghvendra Kumar Singh, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 28-07-2017

Heard learned counsel for the appellants as well as learned Additional Public Prosecutor.

2. Appellants, Md. Aftab alam @ Aftab Aalam, Md. Mannu @ Mannu Aalam, Jagarnath Paswan @ Jagnath Paswan have been found guilty for an offence punishable under Section 363 IPC and each has been directed to undergo R.I. for three years, to pay fine appertaining to Rs.2000/- and in default thereof to undergo imprisonment of three months, additionally, under Section 366 IPC, and sentenced to undergo R.I. for five years, to pay fine appertaining to Rs.3000/- and in default thereof to undergo imprisonment of four months additionally, under Section 354 of the IPC and sentenced to undergo R.I. for a year as well as to pay fine appertaining to Rs.500/- and in default thereof, to undergo imprisonment of one month with a further direction to run the sentences concurrently, with a further direction to set off the period already undergone during trial



under Section 428 Cr.P.C. relating to appellant Md. Mannu and Jagarnath Paswan additionally, by the Additional Sessions Judge, IVth, Katihar in Sessions Trial No.684 of 2012 by a judgment of conviction dated 31.07.2015 and order of sentence dated 03.08.2015.

3. Bahadur Mahto, PW.4 filed written report on 09-10-2011 alleging inter alia that his daughter (name withheld, PW.5) aged about 12 years along with daughter of Sajan Paswan (name withheld, PW.6) aged about 15 years have gone to see the immersion procession of goddess Durga at about 08:00 PM on 07.10.2011. At that very time his son aged about 8-10 years was playing along with other children near Dura Asthan, rushed and informed him as well as his wife that Md. Mannu, Md. Aftab and Jagarnath Paswan are carrying away both the victims towards railway crossing. Getting such information, he along with Sajjan Paswan rushed in search of both the girls but, they could not locate. On the following morning again they made hectic search but failed. Then it has been disclosed that during course of search they came to know that his enemy Buddhu Rai, Doma Sah, Ganga Mahto, Chandan Mahto, Bhola Sah, Mukesh Mandal, Soniya Devi, Maina Musmat hatched a conspiracy whereunder those accused enticed away both the girls. It has also been disclosed that his neighbour Ajay Mahto had seen both the victims along with accused persons at Raiganj (West Bengal).

4. On the basis of the aforesaid written report Barsoi P.S. Case No.205/2011 was registered under Section 366A, 364, 34, 120B of the IPC followed with an investigation during course of which both the



victims were recovered, they were medically examined, they were examined under Section 164 Cr.P.C., and after completing other paraphernalia, the Investigating Officer submitted charge sheet whereupon, after taking of cognizance the case came up before the court of Sessions where trial commenced and concluded in a manner, subject matter of instant appeal.

5. The defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial. Furthermore, it has also been pleaded that both the victims were major and so, as they joined company of appellants voluntarily without any coercion, duress, allurement, threat therefore, they would not be liable for prosecution.

6. In order to substantiate its case prosecution had examined altogether ten PWs out of whom PW.1 is Dr. Vijay Laxmi Kudra, PW.2 is Sita Devi (mother of PW.5), PW.3 is Sajjan Paswan (father of PW.6), PW.4 is Bahadur Mahto (father of PW.5), PW.5 one of the victim, PW.6 is another victim, PW.7 Mirtunjay Kumar, Investigating Officer, PW.8 Munna Kumar Mahto, brother of PW.5, PW.9 Santosh Kumar Paswan, cousin, PW.10 Sanjay Priya, who had recorded statement under Section 164 Cr.P.C.

7. While assailing the judgment of conviction and sentence it has been submitted on behalf of appellant that learned lower court had acted in mechanical manner during course of recording conviction and sentence against the appellants. To substantiate such plea, it has been



submitted that from the written report itself it is evident that neither any sort of coercion, threat or allurement was there nor there happens to be such event substantiated by any independent witness contrary to it, the written report speaks that both two victims were seen by the minor son of the informant in company of these appellants going towards Railway Station. Had there been the aforesaid activity against the wish of victim, then in that circumstance, at least it was expected from both the victims to have raised alarm, protested the activity. Absence of aforesaid activity is indicative of the fact that they were consenting party whereupon, no offence is made as, both victims happen to be major.

8. It has also been submitted that when the statement of both the victims recorded under Section 164 Cr.P.C. is gone through, it is apparent that they have not shown their status to be a victim and further, those statement are taken minutely, it is apparent that they both stated in parrot like statement whereupon, it could fairly be inferred that they were tutored at the hands of the prosecution party to implicate the appellants though, the aforesaid eventuality is found completely inconsistent with the initial version having at the end of PW.4.

9. It has also been submitted that true it is that during course of examination of PW.5 and PW.6 attention relating to aforesaid statement have not been drawn up but the fact remains that court could look into the matter as, it happens to be an outcome of judicial exercise as well as by examination of PW.10, the Magistrate both two statements have become an exhibit of the record. That being so, the inconsistency in between the



statement recorded under Section 164 Cr.P.C. in consonance with the initial prosecution version, the allegation of kidnapping is found completely vanished.

10. Furthermore, it has also been submitted that status of both the victims is detailed under the written report to be minor is also found incorrect in the background of medical evidence wherein one of the victim has been found aged about 18 years whereupon she happens to be major and so far another victim is concerned her age has been estimated in between 15 to 16 years allowing plus two years and so she was also major if not, at the verge of majority. In the aforesaid background, their activity should also been considered who joined hands with the appellants moved place to place without raising any kind of alarm and so, their conduct suggest that they both were consenting party and so, none of the offences whereunder appellants have been convicted and sentenced for are found duly substantiated.

11. It has also been submitted that now coming to status of the remaining witnesses, it is evident that PW.1, PW.2 and PW3 are not an eyewitness to occurrence. So, what they deposed happens to be on the theme of hearsay. PW.8 and PW.9 have come forward to say that they have seen the victims in company of appellants is not going to save the prosecution because of the fact that both the victims were major and what they acted, they acted under own volition being of proper understanding. So submitted that the judgment of conviction and sentence recorded by the learned lower court happens to be contrary to the spirit of law and so, is fit



to be set aside.

12. On the other hand the learned Additional Public Prosecutor controverted the submissions made on behalf of appellant and submitted that the finding recorded by the learned lower court did not require interference because of the fact that from the judgment impugned it is apparent that learned lower court had recorded the same after meticulous examination of the materials available on the record. So submitted that, this appeal is fit to be dismissed.

13. While appreciating the rival submission, the lower court record has been gone through, evidences have been taken to consideration, finding of the learned lower court has been looked into. It is apparent that three kinds of evidences are available on the record. The first kind is of those witnesses who have seen both the victims in company of appellants and those are PW.8 and PW.9. The second category of evidence happens to be of those who deposed on the basis of disclosure made by PW.8 and PW.9 as well as, the subsequent event whereunder, PW.5 and 6 were recovered and the third nature of evidence is from both the victims PW.5 and PW.6.

14. From the charge it is evident that same has been framed under Section 363, 366 and 354 of the IPC. When the evidence of PW.5 and PW.6 have been gone through, it is evident that they have explicitly stated that they both were raped by the accused persons during course of their captive. The learned lower court had perceived the aforesaid allegation in para-11 of judgment while dealing with evidence of the



respective victim. In spite of positive evidence at the end of both the victim that accused persons have committed rape, even then the learned lower court failed to exercise its power to amend the charge as provided under Section 216 of the Cr.P.C. That means to say, the learned lower court failed to exercise its power in its right perspective and allowed the prosecution to be gutted down. It is also evident that both the victims were examined by the doctor (PW.1) after so many days of alleged occurrence and so, on other aspect the report happens to be negative save and except finding that hymen found old ruptured and so, opined that both the victims were accustomed to sexual intercourse. That being so, there happens to be flagrant violation of mandate of law during course of trial by the learned lower court.

15. Even considering the option having on that score under guise of Section 221 Cr.P.C. found duly acknowledgeable under Section 464 Cr.P.C allowing such exercise to be legally tenable whenever there happen to be presence of ample material to justify the same, which the accused confronted with during course of trial, however there happens to be different kinds of procedure is to be taken up by the accused during course of trial along with presumption though rebuttable in terms of Section 114A of the Evidence Act, persuade for retrial having amendment of charge, as well as an opportunity to the accused to defend in terms of Section 313 Cr.P.C. Court is an institution accountable for doing justice. So far criminal trial is concerned, the court has to protect fundamental right of an accused simultaneously, the court has also to hear pity of a victim.



Court should not be deaf or dumb, rather it has got active role to play. It cannot permit itself to remain in isolation, allowing miscarriage on that very score. In *Pooja Pal v. Union of India reported in (2016) 3 SCC 135*, it has been held:

“**54.** It was propounded in *Zahira Habibulla case (2004) 4 SCC 158* that in a criminal case, the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community and are harmful to the society in general. That the concept of fair trial entails the triangulation of the interest of the accused, the victim, society and that the community acts through the State and the prosecuting agency was authoritatively stated. This Court observed that the interests of the society are not to be treated completely with disdain and as persona non grata. It was remarked as well that due administration of justice is always viewed as a continuous process, not confined to the determination of a particular case so much so that a court must cease to be a mute spectator and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community.

55. In *Zahira Habibulla case (2004) 4 SCC 158* while highlighting the courts’ overriding duty to maintain public confidence in the administration of justice, it was enunciated as well that they cannot turn a blind eye to vexatious and oppressive conduct, discernable in relation to the proceedings. That the principles of rule of law and due process are closely linked with human rights protection, guaranteeing a fair trial, primarily aimed at ascertaining the truth, was stated. It was held as well that the society at large and the victims or their family members and relatives have an inbuilt right to be dealt fairly in a criminal trial and the denial thereof is as much injustice to the accused as to the victim and the society.

56. Dwelling upon the uncompromising significance and the worth of witnesses in the perspective of a fair trial, the following revealing comments of Bentham were extracted in para 41: (*Zahira Habibulla case (2004) 4 SCC 158*, SCC pp. 187-88)

“41. ‘Witnesses’, as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears



of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed.”

(emphasis supplied)

57. It was underlined in *Zahira Habibulla case (2004) 4 SCC 158* that if ultimately the truth is to be arrived at, the eyes and ears of justice have to be protected so that the interest of justice do not get incapacitated in the sense of making the proceedings before the courts, mere mock trials. While elucidating that a court ought to exercise its powers under Section 311 of the Code and Section 165 of the Evidence Act judicially and with circumspection, it was held that such invocation ought to be only to subserve the cause of justice and the public interest by eliciting evidence in aid of a just decision and to uphold the truth. It was proclaimed that though justice is depicted to be



blindfolded, it is only a veil not to see who the party before it is, while pronouncing judgment on the cause brought before it by enforcing the law and administer justice and not to ignore or turn the attention away from the truth of the cause or the lis before it, in disregard of its duty to prevent miscarriage of justice. That any indifference, inaction or lethargy displayed in protecting the right of an ordinary citizen, more particularly when a grievance is expressed against the mighty administration, would erode the public faith in the judicial system was underlined. It was highlighted that the courts exist to do justice to the persons who are affected and therefore they cannot afford to get swayed by the abstract technicalities and close their eyes to the factors which need to be positively probed and noticed. The following statement in *Jennison v. Baker*(1972) 2 QB 52, was recalled: (QB p. 66)

“... ‘The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.’”

58. It was declared in *Zahira Habibulla case*(2004) 4 SCC 158 that the courts have to ensure that the accused persons are punished and that the might or the authority of the State is not used to shield themselves and their men and it should be ensured that they do not wield such powers, which under the Constitution has to be held only in trust for the public and society at large. That if any deficiency in investigation or prosecution is visible or can be perceived by lifting the veil covering such deficiency, the courts have to deal with the same with an iron hand appropriately within the framework of law, was underlined.

59. Referring to its earlier decision in *Karnel Singh v. State of M.P.* (1995) 5 SCC 518, it was reiterated that in a case of a defective investigation, the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Section 311 of the Code or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It recalled as well its observations in *Ram Bihari Yadav v. State of Bihar*(1998) 4 SCC 517 that the courts are installed for justice-oriented mission and thus, if a negligent investigation or omissions or lapses due to perfunctory investigation are not effectively rectified, the faith and confidence of the people would be shaken in the law-enforcing agency and also in the institution devised for administration of justice.

60. Though, as referred to hereinabove, trial was completed and the accused persons were acquitted, in the textual facts, this Court in *Zahira Habibulla case*(2004) 4 SCC 158 did direct retrial as prayed for, to avoid subversion of the justice delivery system and ordered the investigating agency or those supervising the investigation to act in terms of Section 173(8) of the Code as the



circumstances would so warrant.

61. The observations and the propositions, though made in the backdrop of a request for retrial, those pertaining to the essentiality of a fair and complete investigation and trial as well as the solemn duty of the courts to ensure the discernment of truth to administer even handed justice as institutions of trust of public faith and confidence, are in our estimate, of universal application and binding effect, transcending the factual settings of a case. An adverse deduction vis-à-vis the quality of investigation and a trial trivialising the cause of justice, is however the essential prerequisite, for such remedial intervention by way of further investigation, reinvestigation, additional evidence, retrial, etc. to be made objectively but assuredly for the furtherance of the salutary objectives of the justice dispensing system as *contemplated in law, it being of paramount pre-eminence.*

62. This Court in *Mohd. Hussain*(2012) 9 SCC 408 was also seized of a situation imploring for a retrial following the termination of the prosecution principally on account of delay, when juxtaposed to the demand for justice in cases involving grave crimes affecting the society at large. The offence involved was under Sections 302/307/120-B IPC and Sections 3 and 4 of the Explosive Substances Act, 1908 and had perpetrated an explosion in a passenger carrying bus. This Court amongst others recalled its observations in *Kartar Singh v. State of Punjab*(1994) 3 SCC 569 that while dispensing justice, the courts should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear ones and above all the collective interest of the community and the safety of the nation, so that the public may not lose faith in the system of judicial administration and indulge in private retribution. It, however, also took note of its ruling in *State of M.P. v. Bhooraji* (2001) 7 SCC 679 that (SCC p. 685, para 8) a de novo trial should be the last resort and that too only when such a course becomes desperately indispensable and should be limited to the extreme exigency to avert a failure of justice. It noted with approval the observation in *P. Ramachandra Rao*(2002) 4 SCC 578 that it is neither advisable nor feasible nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings and that the criminal courts are not obliged to terminate the trial or criminal proceedings merely on account of lapse of time. That such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings or to terminate the same and acquit or discharge the accused, was emphatically underlined. Reference too was made of the decision in *Zahira Habibulla H. Sheikh* (2004) 4 SCC 158.”



16. After giving anxious consideration to the aforesaid lapses having at the part of the learned lower court, it is evident that the trial is suffering from miscarriage of justice and on account thereof, the judgment of conviction and sentence impugned is being set aside. Appeal is allowed. Matter is remitted back to the learned lower court to proceed afresh after exercising the power in terms of Section 216 of the Cr.P.C., to hear the parties and will pass judgment in accordance with law.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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