

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.567 of 2002

Against the judgment of conviction passed on 19.09.2002 in Sessions Trial No.278/1993 (245/2002) by the learned additional District & Sessions Judge, -II (F.T.C.), Chapra.

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Jai Prakash Mishra @ Buchiya, son of Bhukhlal Mishra, resident of village Bedwalia, P.S. Derni, District-Chhapra.

... .. Accused-Appellant/s

Versus

State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Amit Shrivastava, Advocate
Mr. N. K. Nirala, Advocate

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

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date : 14-10-2017

Challenging his conviction under Section 376/511 of the Indian Penal Code (for short, the Code) and sentencing him to undergo five years rigorous imprisonment in Sessions Trial No.278 of 1993 by the Additional District & Sessions Judge- Fast Track Court, Chapra, vide judgment and order dated 19th September, 2002, this appeal has been filed by the appellant.

It is the case of the prosecution that on 30th May, 1992 at about 12 A.M. the informant P.W.3 (hereinafter referred to as the prosecutrix) had left her house and had gone to the western side of her house near an orchard to attend to the call of nature when the



appellant accused is said to have followed her and thereafter caught hold of her hand and when she refused to go with him, he said to have gagged her mouth, thrown her on the ground and committed the offence in question. It is said that when she raised an alarm, hearing the same, her mother P.W.1 Tetri Devi, her father, P.W.2 Jassu Mahto and her uncle P.W.5 Chhedi Mahto and P.W.4 Ramlal Mahto also relative came to the spot and the appellant ran away.

The incident is said to have taken place on 30th May, 1992 in the day time at about 12 in the noon and the FIR was lodged on the next day on 31.05.1992 in the morning. The reason for the delay in filing of the FIR is given by contending that efforts were being made for settlement of the dispute through the Panchayat. The appellant was prosecuted and having been convicted for the aforesaid offence, this appeal.

During the trial in question, the prosecution examined P.W.1 Tetri Devi, mother of the prosecutrix, P.W.2 Jassu Mahto, father of the prosecutrix, P.W.3 the prosecutrix herself, P.W.5 Chhedi Mahto, P.W.4 Ramlal Mahto, relatives of prosecutrix, who came to spot hearing alarm, P.W.6 Ravindra Mishra is a formal witness, who has proved the FIR and other documents, and finally, the Investigating Officer as P.W.7 was also examined.



Sri Amit Shrivastava, learned counsel for the appellant, took me to the statements of the witnesses, the FIR and the *ferbeyan*, Exts. 1, 2 and 3, the statement of the prosecutrix and pointed out material discrepancies to say that it is a case of consent and thereafter retraction. That apart, he argues that in fact, it is a case of false implication of the appellant and the incident itself has not taken place. He further pointed out that in her statement, P.W.3 and in his evidence, P.W.2, father of the prosecutrix, admit about the prosecutrix being treated in the hospital by the doctor and her admission in the hospital for four days, but surprisingly, neither the medical evidence or the doctor who had treated the prosecutrix have been examined in the case. Accordingly, Sri Amit Shrivastava argues that it is a case where the prosecution has not proved its case beyond reasonable doubt and the benefit has to be extended to the appellant.

Per contra, Sri Shri Binod Bihari Singh, learned A.P.P. representing the State, took me to the statement of the prosecutrix recorded as P.W.3 and argues that the statement of the prosecutrix is reliable, there is no reason why she would falsely implicate the appellant and, therefore, the conviction should be upheld.

I have heard learned counsel for the parties at length and perused the record. On a perusal of the record, it is seen that the



FIR in question is lodged by the prosecutrix herself. The FIR is available on record as Ext.-1 and normally the statement made in the FIR is assumed to be correct until and unless proved otherwise as it is most earliest information given with regard to the commission of offence and is believed to give the correct picture as to how the occurrence happened and when the FIR is lodged by the complainant prosecutrix herself, the averments and the statements made in the FIR become important. If the FIR lodged by the prosecutrix is taken note of, she speaks about her leaving the house at 12 in the noon for attending to the call of nature, the appellant following her in the orchard trying to hold her hand and, thereafter, putting her on the ground, climbing on her body, then trying to remove his own cloth, at which point of time, she makes an alarm and P.W.s 1, 2, 4 and 5 coming to the place of the incidence and the appellant ran away.

In this statement recorded as FIR, the prosecutrix nowhere says that the appellant forcibly removed her cloths, put his private part in her private part and committed the offence in question. This part of the story is developed by her and made in Court for the first time after more than 3 ½ years when her statement was recorded in the Court on 09.09.1998. That being so, the story of the prosecutrix being put to rape and the story of penetration into the



private part becomes doubtful. That apart, the prosecutrix in her cross-examination admits that she was wearing a frock and pant and does not say anything as to how and in what circumstances or manner, the pant was removed. That apart, she admits in her cross-examination in para 6 that blood had come from her private part, semen was available on her cloth and she was taken to the hospital for treatment where she was admitted and continued in treatment for four days. This statement of the prosecutrix with regard to her treatment in the hospital is corroborated from the statement of her father, P.W.2 who in his evidence speaks about his daughter being treated in the hospital by one Dr. Dilip Babu. He also says that treatment was in the Government hospital and the papers were available with him. Surprisingly, neither the doctor who treated the prosecutrix, nor the medical documents are available on record. It is a case where merely on the basis of oral testimony of the prosecutrix which is also found to be contradictory in nature, without there being any medical evidence or other materials, like the cloth of the prosecutrix, the cloth of the appellant, which have not been seized, and any other forensic, scientific or medical examination, the conviction is ordered. These are vital lacunae in the case of the prosecution which creates serious doubt with regard



to allegations made and, therefore, it is a case where the case of the prosecution has not been proved beyond reasonable doubt.

That apart, there is another serious lacunae in the trial conducted by the Court below which vitiates the entire trial. While recording the statement of the accused under Section 313 of the Code of Criminal Procedure, the only questions put to him are (1) whether he has heard the evidence of the prosecution; (2) what has he to say with regard to the evidence given against him? and (3) is he not guilty to the offence said to have been committed by him?

The Hon'ble Supreme Court in the case of **Sukhjit Singh v State of Punjab** [(2014) 10 SCC 270], after relying upon earlier judgments of the Hon'ble Supreme Court in the case of **Ranvir Yadav v. State of Bihar** [(2009) 6 SCC 595]; **Tara Singh v State** [AIR 1951 SC 441]; **Hate Singh Bhagat Singh v. State of Madhya Bharat** [AIR 1953 SC 468] and **Ajay Singh v. State of Maharashtra** [(2007) 12 SCC 341] has laid down the principle that the requirement of Section 313 of the Code of the Criminal Procedure is to draw the attention of the accused to the specific points, materials and evidences available against him, put to these to him and seek explanation for the same.

In the case of **Ajay Singh** (supra), the Hon'ble Supreme Court in paragraph 14, the principles to be followed for complying



with the provisions of Section 313 Cr. P.C., have laid down in the following manner.

“14.The word "generally" in Sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.”

After considering the aforesaid, in the case of **Sukhjit Singh** (supra), the Hon’ble Supreme Court says that in case, the requisites questions are not put to the accused and if there is non compliance of the statutory requirement of Section 313 Cr.P.C., prejudice is deemed to have been caused to the accused and this vitiates the entire trial and a conviction based on such a vitiated trial is unsustainable.



If the aforesaid principle is also applied to the present case and if the statement of the appellant recorded under Section 313 Cr. P.C. is taken note of, I have no doubt that the entire trial stands vitiated. On this count also, that being the position of law, it is a fit case where the appeal should be allowed and the appellant acquitted.

Accordingly, the appeal is allowed. The appellant is acquitted of all the charges. His bail bond be discharged and set free.

(Rajendra Menon, CJ)

Sunil/-

AFR/NAFR	NAFR
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