

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.768 of 2006

Against the judgment of conviction dated 01.08.2006 and order of sentence dated 02.08.2006 passed in Sessions Trial No.366 of 2003 by the Additional District & Sessions Judge-cum- Fast Track Court No.2, Sheohar, Sitamarhi.

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Ram Ekbal Mahto, son of Bilas Mahto, resident of Village- Tikauli, P.S. Runni Saidpur, District-Sitamarhi.

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Pawan Kumar, Advocate
Mr. Sudhir Kumar Jha, Advocate

For the Respondent/s : Mr. Z. Hoda, APP.

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date : 09-09-2017

This appeal has been filed by the appellant Ram Ekbal Mahto challenging the judgment of conviction dated 01.08.2006 and order of sentence dated 02.08.2006 passed by the Additional District & Sessions Judge, Fast Tract Court No.2, Sheohar, Sitamhari, in Sessions Trial No.366 of 2003, by which he along with co-accused Kishori Mahto and Ganesh Mahto have been convicted and sentenced to undergo 10 years rigorous imprisonment for having committed an offence under Section 376/34 of the Indian Penal Code and fine of Rs.1500/- and on failure to



deposit the said fine, he has to undergo for a simple imprisonment for a further period of two months.

It is the case of the prosecution that the prosecutrix herself who is the informant had made statement that on 06.05.2002 at about 10 A.M. in the morning, the three accused persons, namely Kishori Mahto, Ganesh Mahto and Rak Ekbal Mahto had convinced her father-in-law Sukdhdeo Paswan that with the help of black magic, they would make the prosecutrix free from the ailment and on this instigation her father-in-law Sukdhdeo Paswan came along with three accused and took the prosecutrix to the place where the incident took place. It is further case of the prosecutrix that Kishori Mahto and Ganesh Mahto took her inside the room and the appellant Ram Ekbal Mahto and the father-in-law stood outside and the two accused Kishori Mahto and Ganesh Mahto committed the rape on the prosecutrix.

For the offence in question, the accused were put on trial and they have been convicted as indicated hereinabove.

As far as the present appellant Ram Ekbal Mahto is concerned, it is his case that he was not present inside the room when the offence was committed. He is only responsible so far as taking the prosecutrix to the place of incidence is concerned along with her father-in-law.

Learned counsel for the appellant invites my attention to the statement of the prosecutrix recorded as P.W.10 and the admission made by her which clearly shows that it is the co-accused Kishori Mahto and Ganesh Mahto who had committed rape. According to the



prosecutrix herself that the appellant Ram Ekbal Mahto along with her father-in-law Sukhdeo Paswan was standing outside the room. Learned counsel further argues that this appellant Ram Ekbal Mahto has undergone custody for the period from 08.05.2002 to 22.09.2006, i.e. for a period of more four years and, therefore, looking into the facts and circumstances of the case, now even if he is not acquitted, he should be released after convicting him and sentencing him for the period of sentence already undergone.

Learned counsel also invites my attention to the medical evidence available on record which clearly shows that there is no medical evidence to show that the appellant had committed the offence with the prosecutrix.

Even though learned counsel for the State argued that the appellant is convicted with the aid of Section 34 of the Indian Penal Code, he had accompanied the three accused and was instrumental in taking the prosecutrix to the place of incidence, but having heard learned counsel for the parties and on a perusal of the totality of the circumstances and the evidence that has come on record, it is clear that the prosecutrix was carried by the three accused persons and her father-in-law Sukhdeo Paswan and no overt act is attributed to the present appellant Ram Ekbal Mahto. The only evidence available against him is that he along with her father in law Sukhdeo Paswan was present outside the room when the offence was being committed. Added



thereto, the medical evidence does not indicate that he is responsible for the offence.

Taking note of the role assigned to the present appellant Ram Ekbal Mahto with regard to the offence in question it is clear that the prosecutrix, who has been examined as P.W.10, in her statement clearly exonerated him of all the allegations made and it is her statement that the appellant Ram Ekbal Mahto was watching outside with her father-in-law. The prosecutrix has only indicated that it is the accused Kishori Mahto and Genesh Mahto who had committed the offence on her after threatening her.

From the statement of her father-in-law, P.W.1, Sukhdeo Paswan it is clear that on the date of the incident when he had come to Kundal Bazar and was returning home, near the Katchari, he found all the three accused persons standing along with one Ram Ekbal Mahto and talking about black magic. He approached them and indicated to them the condition of his daughter-in-law and when it is said that they agreed to perform black magic and cure her. He then says that all the three accused accompanied him to his house and Kishori Mahto performed some black magic in his house for two hours and after two hours, they took the daughter-in-law along with him to perform further rituals in the place where the offence was committed. Even though he makes a general statement to say that all the three accused committed the offence of rape, but the prosecutrix makes specific statement to say that



the appellant Ram Ekbal Mahto was standing outside the room with her father-in-law.

That being so, it is clear that with regard to actual commission of the offence under Section 376 of the Indian Penal Code, no specific overtact is attributed to the appellant. The appellant Ram Ekbal Mahto has been convicted with the aid of Section 34 of the Indian Penal Code, i.e. an act done in furtherance of common intention. However, for attracting the provision of Section 34 of the IPC, two conditions indispensable and necessary are that the criminal act consisting of series of actions which have been done not by one person, but by more than one person and doing of every such individual act cumulatively resulting in the commission of criminal offence it was in furtherance to a common intention of such persons and for there being a common intention, there has to be meeting of mind and a concerted effort after such meeting to commit the offence together. This evidence of meeting of mind and concerted effort in furtherance to this is missing and therefore, in view of the law laid down by the Hon'ble Supreme Court in the case of **Suresh V. State of U.P. [AIR 2001 SC 1344]**; and **Girija Shankar V. State of U.P., [AIR 2004 SC 1808]**.

It is a case that where except for the fact that the appellant Ram Ekbal Mahto is present on the spot, there is no evidence of meeting of mind or common intention or planning of the offence together. The requirement of the law of sharing of a common intention is not present in the facts of the present case and, therefore, the ingredients necessary



for establishment of common intention being not available it is a case where the appellant cannot be convicted, his conviction has to be interfered with.

Accordingly, the appeal is allowed, the conviction of the appellant is set aside and he is acquitted of all the charges levelled against him. He is already on bail vide order dated 22.09.2006. Now, he is discharged from the liabilities of the bail bonds.

(Rajendra Menon, CJ)

Sunil/-

AFR/NAFR	NAFR
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