

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.575 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- MUZAFFARPUR

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1. Lakhinder Rai S/O Late Deo Narain Rai R/O Vill-Bardiha, P.S.-Patepur, Distt-
Vaishali

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sanjay Parasmani, Adv.

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

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

Date: 12-09-2017

This appeal is directed against the judgment dated 30.03.2011 and order of sentence dated 05.04.2011 passed by Sri Ram Daras, Additional Sessions Judge, Fast Track Court No. -3, Muzaffarpur, in Session Trial No. 56 of 2010, by which he has convicted the appellant under section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for ten years with a fine of Rs. 5,000 and in default of the payment of fine, further imprisonment of one year.

Brief facts necessary for adjudication of the present appeal are that the informant Asha Kumari (P.W. 2), filed her written information before the Brhampura police station stating that she was a student of class -IX and was living with her father, mother and



brother in the campus of M.I.T and her father was posted as peon in the said M.I.T and her mother was working as nurse in Kejriwal Hospital. She further alleged that whenever her mother and brother were not on home, her father used to molest her. It has also been alleged that five months ago, when her mother was on night duty in the hospital, her father – appellant, forcibly raped her and when her mother came back in the next morning, she narrated whole incident to her mother and on insistence of her mother, appellant apologized to her and the matter was kept secret as the prestige of family was involved. It has also been alleged that thereafter, the appellant started torturing both mother and daughter and continued to molest her.

On the basis of aforesaid written statement, Brahmpura P.S. Case No. 120 of 2009 was registered against the appellant under Section 376 of the Indian Penal Code and the police after investigation submitted charge –sheet against the appellant under Section 376 and 511 of the Indian Penal Code. Cognizance of the offence was taken and, thereafter, the case was committed to the court of sessions, which ultimately traveled to the file of learned Sri Ram Daras, Additional Sessions Judge, Fast Track Court No. -3, Muzaffarpur, for trial and disposal.

Charges were earlier framed under Section 376 and 511 of Indian Penal Code against the appellant, however, later on fresh



charge has been framed under Section 376 of the Indian Penal Code.

In this case altogether five witnesses have been examined from the side of the prosecution and they are: P.W. 1- Indu Devi (mother of the victim), P.W. 2- Asha Kumari (victim girl), P.W. 3- Raj Kishore Rai (maternal grand father of victim girl), P.W. 4- Manju Singh (Investigating Officer) and P.W. 5 – Dr. Suman Prasad (doctor who conducted examination on the victim girl).

Apart from the above, following documents have been admitted into evidence and marked as ; Ext. 1 – Signature P.W. 1 (Indu Devi) on written information, Ext. 2- Signature of victim Pooja Kumari on the written information, Ext. 3- Charge-sheet, Ext. 4 –Medical report of victim girl.

From the defence side also four witnesses have been examined and they are;- D.W. -1, Dilip Kumar, D.W. -2, Shivendra Rai, D.W. 3 – Ratan Kumar.

It appears from the suggestion given to the witnesses and his statement under Section 313 Cr.P.C, the defence of the appellant is of false implication and complete denial of the alleged occurrence and of innocence.

Learned Trial Court after conclusion of trial convicted the appellant under Section 376 and sentenced him as stated above.

Aggrieved by the said judgment, the appellant preferred the present appeal.



Learned counsel for the appellant has challenged the impugned judgment and has submitted that the judgment of Trial Court convicting the appellant under Section 376 of Indian Penal Code, suffers from serious infirmities, as in this case, there is delay of five months in lodging the F.I.R, and no satisfactory explanation for the delay has been offered by the prosecution side. It has also been submitted by learned counsel for the appellant that the appellant has falsely been implicated in this case at the instance of his own wife, as he did not had good terms with his wife as the appellant used to restrict her free movement with other persons, which was not acceptable to her and further a day before the registration of the F.I.R, there was a quarrel between the husband and wife, which has prompted her to instigate her daughter to file this present false case. It has also been submitted that as per the evidence of P.W. 1 –, in para 6 and 7, they used to live in a hut and on the alleged date of occurrence, P.W. 2 (victim girl) and her brother were present at home and were sleeping on the same cot and P.W. 2 has been raped by the appellant but surprisingly, the brother, who was present and sleeping on the same cot, was not examined, which casts a serious doubt on the prosecution story coupled with the fact that the medical report does not support the allegation of rape. It has also been submitted that the prosecution evidence that on the alleged date of occurrence, P.W. 1 (mother of the victim) was not present at home as she was on night



duty, appears to be quite doubtful as the evidence of D.W. 3, (the person, who used to maintain the attendance of nurses of Kejriwal Hospital) clearly shows that P.W. 1, was on leave from 14.04.2009 to 11.05.2009 and the learned Trial Court without considering all these vital facts has convicted the appellant under Section 376 of the Indian Penal Code, which is not sustainable in the eye of law.

On the other hand, learned counsel for the State has submitted that there are sufficient materials available on record, showing that the appellant has committed rape on P.W. 2 –(prosecutrix). It has also been submitted that though in the medical report, no sign of rape has been found, however, this fact cannot be ignored that the victim girl was examined in this case after a lapse of more than five months as such if no sign of rape or injury was found, there is nothing abnormal in it. It has also been argued that it is now well settled that conviction under Section 376 Indian Penal Code can be based only on the sole testimony of prosecutrix even in absence of corroboration of medical evidence and in this case P.W. 2 (prosecutrix) has stated about commission of rape by appellant and in spite of her cross-examination, there is nothing to doubt about the genuineness of her evidence. It has further been argued that the victim girl is a student of IX th class and no girl would make such false allegation against her own father and would ruin her and her family's prestige. Further so far delay in lodging the F.I.R is concerned, the same has sufficiently



been explained as the appellant had apologized for the said incident and considering the prestige of family, the matter was kept secret, however, when appellant continued molesting her (P.W.2), they were left with no option but to report the matter to police. Hence, on the basis of the above submission, it has been argued by learned counsel for the State that the impugned judgment convicting the appellant under Section 376 of the Indian Penal Code is just and proper and the same does not require any interference.

In view of the submission of parties, this court finds it necessary to examine the evidences available on behalf of both sides.

P.W. 1, is the mother of P.W. 2 (victim girl) and she has stated in her evidence that she was working as a nurse in Kejriwal Hospital and on the date of occurrence i.e. on 22.04.2009, she was on night duty in the hospital and when she came back in the next morning, P.W. -2 informed her that father has committed rape on her. Her evidence further shows that when she asked the appellant about the incident, he accepted the same and apologized for the incident and, thereafter, the matter was resolved but since the appellant continued to molest P.W. -2, then they found no option but to report the matter to police. Further in her cross-examination in para -5, she has stated that she does not know the date of occurrence but again stated that rape was committed on 22.04.2009. Her cross-examination, in para -7 also shows that on the date of occurrence, her son and P.W. – 2 (victim



girl) was present at home and they both were sleeping on the same cot, when appellant committed rape on P.W. 2. Further in her re-cross examination, she has stated that on the date of alleged occurrence, she has prepared food for her family and had not gone on duty, after serving food to her family members.

P.W. 2, is the victim girl and she in her evidence has stated that on the alleged date of occurrence at 9.30 P.M., she was sleeping in her house and her mother had gone to her duty to Kejriwal Hospital, then her father – appellant, committed rape on her. Her evidence shows that the next morning when her mother came to house, she narrated whole incident. Her evidence also shows that on being asked by the mother, appellant accepted his guilt and apologized for the same and on promise of the appellant that he would not repeat such incident, , the matter was kept secret, considering the prestige of family in the society. Her evidence further shows that in spite of the promise made by the appellant, he continued to molest her and on protest by mother, he used to beat her and when left with no other option filed the present case against him.

P.W. 3 is the maternal grand father of the victim girl – P.W. 2 and he has supported the prosecution story with regard to commission of rape on P.W. 2, by the appellant and except that there is nothing important in his evidence.

P.W. 4 is the investigating officer of this case and she has stated



in her evidence that she had registered an F.I.R on the written application filed by P.W. 2 and recorded the statement of P.W. -2 and apprehended the appellant and got the victim girl medically examined.

P.W. 5. is Doctor Suman Prasad, who examined P.W. 2 and her evidence shows that Hymen of the girl was found intact and no foreign particles on her private part was found. Further no injury was found on the victim girl. Her evidence further shows that vaginal smear and slide was taken and sent for microscopical examination for presence of spermatozoa. Her evidence further shows that in pathological report, no spermatozoa was found. In her cross – examination, this witness has stated usually during sexual intercourse, hymen got ruptured.

On behalf of defence, oral evidence has been adduced and one Dilip Kumar, D.W. 1 has stated in his evidence that on 21.09.2009 a day before the registration of F.I.R, there was a quarrel between P.W. 1, and the appellant and P.W. 1 has threatened her that he would implicate the appellant in false case and, thereafter, he came to know that a case has been filed against the appellant.

D.W. 2 in his evidence has also stated that the relationship between the P.W. 2 and the appellant was not good and on 21.09.2009 a scuffle had taken place between them and P.W. 1 had threatened the appellant that she would put him behind the bars.

D.W. 3 was an employee of Kejriwal Hospital, who used to



look after the attendance of nurses and he has stated in his evidence that during the period from 14.04.2009 to 11.05.2009, P.W. 1 – Indu Devi was absent from the duty.

As discussed above, learned counsel for the appellant has assailed the judgment vehemently on the ground that in this case, there is delay of five months as the occurrence is of the month of April 2009, whereas the F.I.R. was lodged in the month of September 2009, for which no satisfactory explanation has been offered and on this score alone, the whole prosecution story appears to be absurd, improbable and not free from reasonable doubt.

No doubt, delay in lodging F.I.R, gives a chance of manipulation and false implication, which goes to create doubt about the veracity of prosecution story but in a case of sexual offence, it has been held by Hon'ble Apex in a catena of decisions that in the cases of sexual offence, delay in lodging the F.I.R, is not material, when the same is properly explained. Further the Hon'ble Supreme Court in the case of **State of Punjab v. Gurmit Singh and Others** reported in **[AIR 1996 SC 1393]** has held that “ **the courts cannot overlook the fact that in sexual offences delay in the lodging of the F.I.R. can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of the family. It is only after giving it a**



cool though that a complaint of sexual offence is generally lodged”.

In the present case also, the informant/prosecutrix is the daughter of the appellant and P.W. 2 – prosecutrix as well as P.W. 1, mother of the prosecutrix has stated in their evidence that as the prestige of their family was involved and the appellant had also assured that he would not repeat the said act in future, the case was not lodged earlier. However, when the appellant continued to behave in the same manner, the present case was lodged. As such, it appears that a plausible explanation has been given by the prosecution for not lodging the case soon after the occurrence, which requires a great courage and strength as the accused in this case is the own father of the prosecutrix but the evidence has come that due to persistent misbehave by the appellant to the prosecutrix, she left with no other option but to report the matter to police.

It has also been argued by learned counsel for the appellant that as the appellant used to oppose the free movement of P.W. 1, mother of the prosecutrix and one day prior to lodging of the F.I.R, appellant has assaulted P.W. 1, due to which P.W. 1 instigated her daughter P.W. 2 to file the present false case against the appellant with a view to teach him a lesson. However, as stated above, it is very rare that a minor girl goes to lodge a case of rape against her own father, which is one of the hardest steps to be taken by her and it requires the



courage and strength but when, she left with no other option, she was forced to lodge the case as the evidence has come that the appellant continued to molest her.

It has further been argued that medical report did not support the case of prosecution with regard to commission of rape on the prosecutrix as her evidence shows that blood started oozing out but medical report did not show any sign of rape and no injury was found. However, it is an admitted fact that the prosecutrix was medically examined in this case after lapse of more than five months and if no injury or any sign of rape was found, there is nothing abnormal in it and on that score, prosecution story of rape cannot be disbelieved. It is also pertinent to mention that evidence of P.W. 1 clearly shows that P.W. 2 – prosecutrix was aged about 15- 16 years at the time of alleged occurrence, as such, some exaggeration and improvement in her evidence cannot be ruled out.

Hon'ble Apex Court in the case of **Gurcharan Singh v. State of Haryana** reported in [**AIR 1972 SC 2661**] has held that “ **the absence of injury or mark of violence on the private parts or elsewhere on the person of prosecutrix is of no consequence when the prosecutrix is minor and that would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may well suggest, helpless surrender to the inevitable due to sheer timidity. In any**



event, her consent would not take the case out of the definition of rape”. Further Hon’ble Apex Court in the case of **Devinder Singh Vs. State of Himachal Pradesh** reported in [AIR 2003 SC 3365] the Hon’ble Apex Court while considering the case of similar nature, had come to conclusion that when no injury was found on the body of the prosecutrix, there was no presence of matting of pubic hair with discharge. No injury was found in the genital area, as the prosecutrix was used to sexual intercourse that no injury was found on her body only goes to show that she did not put up resistance.

The decisions cited above clearly shows that there is no force in the contention when there was any forcible sexual intercourse, it would have resulted in some injuries upon the prosecutrix’s person are not always *sine qua non* to prove a charge of rape.

Further in this case, learned counsel for the appellant has also submitted that hymen of the prosecutrix was found intact in the medical examination and there was no sign of rape on the private part of the prosecutrix. However, rupture of hymen depends on many circumstances and it is not necessary ingredients of rape, as mere penetration is sufficient for offence of rape as such on this score, it cannot be said that rape has not been committed upon the prosecutrix, whereas, the evidence of prosecutrix in para -8 of her cross-examination shows that after the rape, she came to know about the meaning of rape.



It has further been argued on behalf of the appellant that in this case evidence of P.W. 1 shows that at the time of rape the victim girl and her brother was sleeping on the same cot and in spite of that the said brother has not been examined. In this context, on examination of the evidence of P.W. 3, maternal grandfather of the prosecutrix clearly shows that as the brother was quite young as such, he has not been involved in this case and further so far sleeping on same cot is concerned, evidence of P.W. 2 – prosecutrix, in para -5 shows that there were two cots in the room, in which the rape was committed and P.W. 1 is not the eye witness of the case as such, on the evidence of P.W. 2, prosecution story of rape cannot be doubted.

The appellant has further argued that appellant has been made accused in this case on account of previous grudge of P.W. 1 against the appellant as the appellant used to restrict her free movement and one day prior to lodging of the F.I.R., there was a quarrel between the P.W. 1 and the appellant, due to that P.W. 1 had also threatened the appellant that she would get him behind the bars and D.W. 1 and D.W. 2 has also stated so in their evidences and Investigating Officer has also stated in para -3 of her cross examination that appellant and P.W. 1 used to quarrel and earlier a bond was also executed for not making quarrel and as such due to the aforesaid grudge appellant has falsely been implicated in this case. It has also been argued that D.W. 3, who was an employee of Kejriwal Hospital proved the attendance



register to show that P.W. 1 was on leave from 14.04.2009 to 11.05.2009 and this fact clearly makes the prosecution story false and concocted about the commission of rape on 22.04.2009. Learned counsel for the appellant has also drawn the attention of this Court towards the evidence of P.W. 1, on record that on 22.04.2009, she prepared food and she had not gone to duty after preparing the food.

However, on perusal of evidence of P.W. 1, it appears that in her cross-examination she has stated that after serving food, she had not gone to duty, however, it has also been stated by her that it is not true that prior to five days from 22.04.2009 to ten days after, she has not gone out of her house and as such this evidence does not show that on 22.04.2009, she was present in the house. So far the evidence of D.W. 3 is concerned that P.W. 1 was on leave during the period from 14.04.2009 to 11.05.2009, D.W. 3 has himself admitted that there is no signature on the attendance register as to who has prepared the register. He has also stated that on the attendance register, there is no signature of P.W. 1- Indu Devi or any other signature and in such a situation, no reliance can be placed on the register produced by D.W. 3. There is positive evidence of P.W. 1 that she was on duty on 22.04.2009 and not present in the house.

It has also been argued that there is no independent witness of the case even circumstantial in nature so as to show that P.W. 2 has stated about commission of rape to anybody and further there are



several inconsistencies and contradictions in between the evidence and statement recorded before the police and the Investigating Officer has also admitted the said fact in her evidence in para -5.

However, as I have noticed above, P.W. -2, prosecutrix, at the time of alleged occurrence was aged about 15 to 16 years and in such a situation, if there is any inconsistency in her evidence or any contradiction from her previous statement and the same does not go to the root of the case in such a case. Those inconsistencies and contradictions do not make the prosecution story of commission of rape by the appellant upon the prosecutrix false and concocted. On the other hand, the evidence of P.W. 2 has been corroborated by the evidence of P.W. 1, who has stated that on the very next day in the morning, the prosecutrix had told her about commission of rape by her own father and the above evidence is admissible under Section 157 of the Indian Evidence Act.

Considering the entire discussions made above, the evidence of P.W. 2 about the commission of rape by appellant to her in the night appears to be convincing and corroborated by evidence of P.W. 1 under Section 157 of Indian Evidence Act. Apart from that P.W. 3, who is the maternal grand father of P.W. 2 has also supported the case of prosecution and has stated that he came to know about the incident from his daughter (P.W. 1). As such, this Court finds no illegality in the judgment dated 30.03.2011 and order of sentence dated



05.04.2011 passed by Sri Ram Daras, Additional Sessions Judge, Fast Track Court No. -3, Muzaffarpur, in Session Trial No. 56 of 2010, convicting the appellant under Section 376 of the Indian Penal Code.

Accordingly, this appeal is dismissed, impugned judgment and order is hereby upheld.

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	AFR
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