

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.949 of 2007

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

- =====
1. Sri Narayan Yadav, son of Late Mohan Lal Yadav
 2. Sachchidanand Yadav
 3. Ghanshyam Yadav, both sons of Sri Hari Prasad Yadav
 4. Pasupati Yadav, son of Sri Narayan Yadav, all resident of village-Baniapatti (Kajha), P. S.-K. Nagar, District-Purnea.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 143 of 2008

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

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Bhola Yadav, son of Sri Sri Narayan Yadav, resident of village-Baniapatti (Khajha), P. S.-K. Hat, Post-Khajha, District-Purnea.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.949 of 2007)

For the Appellant/s : Mr. Vikramdeo Singh-Advocate

For the Respondent/s : Mr. Bipin Kumar-A.P.P.

(In CR. APP (SJ) No.143 of 2008)

For the Appellant/s : Mr. Vikramdeo Singh-Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 17-10-2017

Cr. Appeal (S.J.) No.949 of 2007 wherein Sri Narayan Yadav, Sachchidanand Yadav, Ghanshyam Yadav and Pasupati Yadav are the appellants and Cr. Appeal (S.J.) No.143 of 2008 wherein Bhola Yadav happens to be the appellant commonly originate against the judgment of conviction dated 06.09.2007 and order of sentence dated 07.09.2007 passed by the Additional Sessions



Judge, Fast Track Court No.1, Purnea in Sessions Trial No.05 of 2005/ 244 of 2006 convicting the appellant Bhola Yadav for an offence punishable under Section 376 of the I.P.C. and sentenced him to undergo R. I. for 10 years. Appellants, Sri Narayan Yadav, Sachchidanand Yadav, Ghanshyam Yadav, Hari Prasad Yadav (since deceased), Pasupati Yadav to undergo R. I. for five years under Section 313/ 511 of the I.P.C., on account thereof, have been heard conjointly and are being disposed of by a common judgment.

2. Before delving upon the merit of the case, certain features, as is visualizing from the L. C. Record, has to be taken note of. Victim (name withheld) filed Complaint Petition bearing No.904C.A./ 2003 before the learned lower Court arraying seven persons namely Sri Narayan Yadav, Hari Prasad Yadav, (since deceased), Sachidanand Yadav, Ghanshyam Yadav, Pashupati Yadav, Bhola Yadav, Madhusudan Yadav, which was sent to a local police for registration and investigation of the case as a result of which, Purnea K. Nagar P. S. Case No.137 of 2003 was registered. During course of investigation, presence of all the accused persons were procured, save and except appellant Madhusudan Yadav, whereupon trial was bifurcated and the original trial proceeded against remaining six persons, who have been found guilty under respective heads and accordingly, sentenced vide judgment of conviction dated 06.09.2007,



order of sentence dated 07.09.2007 passed by the Additional Sessions Judge, Fast Track Court No.1, Purnea in Sessions Trial No.05 of 2005/ 244 of 2006 and for that, Cr. Appeal (S.J.) No.949 of 2007 as well as Cr. Appeal (S.J.) No.143 of 2008 have been preferred. Subsequently thereof, appellant, Madhusudan Yadav has been apprehended and on account thereof, he was proceeded solely under above Supplementary Sessions Trial No.05 of 2005/ 149 of 2014 and has been convicted as a result of which, separate appeal has been filed on his behalf. Because of the fact that all the appeals relate with common Police Case Number, though have been proceeded independently, but in the aforesaid facts and circumstances of the case, have been taken together. However, are being decided separately, but on the same day.

3. PW-3 had filed complaint petition against seven accused persons namely Bhola Yadav, Sri Narayan Yadav, Pashupati Yadav, Hari Prasad Yadav, Ghanshyam Yadav, Madhusudan Yadav, Sachidanand Yadav alleging inter alia that on 16.03.2003 at about 12.00 noon while she was alone in her house, accused Bhola Yadav made house trespass, caught hold her, threw her on the bed and then, committed rape after gagging her mouth. On her protest as well as while she was to shout, he volunteered to marry. It has also been alleged that on the aforesaid pretext, he continued to commit rape



whenever got an opportunity. After sometime, she developed some sort of ailment and for that, she was taken to Purnea where she was examined by Dr. Smt. Poonam Raman, who after inspecting her, diagnosed to be pregnant and the same was confirmed by way of ultra-sound which disclosed her pregnancy to be about three and half months. Her parents interrogated her, whereupon she disclosed the whole event, whereupon, there was Panchayati wherein Bhola Yadav undertook to marry, but at the instance of his parents, he subsequently refused. Then thereafter, it has been alleged that on 27.07.2003, all the remaining accused except Bhola Yadav, came at her place and handed over one medicine instructing her to consume. On query, they disclosed that it is for abortion, whereupon she refused. Then thereafter, all the accused persons caught hold her and on an order of Hari Prasad Yadav, Ghanshyam Yadav, put two tablets in her mouth, Sri Narayan Yadav put water, but she did not engulf. After departure of the accused persons, she spat the tablets from her mouth. Then thereafter, it has also been stated that her brother Suman Yadav had gone to the place of Ghanshyam on 06.08.2003, whereupon he was caught hold up and assaulted and was confined in a room.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. In support thereof, have examined



two DWs viz. DW-1 Arjun Lal Yadav and DW-2 Sujeet Kumar Singh.

5. In order to substantiate its case, prosecution had examined altogether seven PWs, out of whom, PW-1 Dinesh Prasad Yadav, PW-2 Sumitra Devi, PW-3 victim herself, PW-4 Umesh Yadav, PW-5 Dr. Smt. Usha Rani Jaiswal, PW-6 Dr. Smt. Punam Raman and PW-7 Chitranjan Singh, the Investigating Officer as well as had also exhibited viz. Exhibit-1 signature of PW-1 over statement under Section 164 Cr.P.C., Exhibit-2 signature of victim over copy of complaint (written report), Exhibit-3 signature of victim, statement recorded under Section 164 Cr.P.C., Exhibit-4 birth certificate, Exhibit-5 medical report dated 13.09.2003, Exhibit-6 certificate granted by Dr. Punam Raman dated 17.07.2003, Exhibit-7 ultra-sound report, Exhibit-8 endorsement over written report, Exhibit-9 written report (complaint), Exhibit-10 supplementary chargesheet and Exhibit-11 chargesheet.

6. So far appellants of Cr. Appeal (S.J.) No.949 of 2007 are concerned, it has been stated by the PW-3, victim that they came and directed her to consume a tablet in order to facilitate abortion and on her denial, they caught hold her and then, Ghanshyam Yadav put the tablet inside her mouth while Sri Narayan Yadav poured water. The aforesaid event was witnessed by her sister Kumkum. Had there



been truthfulness in the assertion of the victim, then in that event, it was very much expected that appellants would have forced her to swallow the tablet instead of simply putting it inside her mouth along with water without caring whether she swallowed or not as, she had stated that after their departure, she spat. Furthermore, in the light of the controversy persisting amongst both the parties the aforesaid event appears to be improbable as, seeing them the victim or her sister might have raised alarm to desist them coupled with the fact that Kumkum has not been examined on behalf of prosecution nor there happens to be any kind of explanation at their end. That being so, the conviction and sentence recorded against them is found unsustainable in the eye of law. Consequent thereupon, is set aside. As such, Cr. Appeal (S.J.) No.949 of 2007 is allowed. Appellants, Sri Narayan Yadav, Sachchidanand Yadav, Ghanshyam Yadav and Pasupati Yadav are on bail, hence are discharged from its liability.

7. Now, coming to the status of Bhola Yadav appellant of Cr. Appeal (S.J.) No.143 of 2008, it has been submitted on behalf of appellant that Section 375 of the I.P.C. as it stood at the time of alleged date of occurrence speaks the validity of the consent of the victim above the age of 16 years and from the evidence available on the record, it is crystal clear that PW-3 was aged about 16-17 years as per ossification report allowing variance plus minus two years and



during consideration of case of present nature, the upper side is to be admitted and so, the victim happens to be in between 18-20 years, major one. Furthermore, it has also been submitted that from the evidence available on the record, it is crystal clear that she was a consenting party and that being so, the appellant could not be prosecuted nor could be found guilty for an offence punishable under Section 376 of the I.P.C. In worst case even assuming that there was contract in between the parties to marry and under such condition, they developed physical intimacy. In the aforesaid background, the appellant is to be prosecuted only for breach of promise or deceiving the victim and so, in worst Section 417 of the I.P.C. would be applicable. So, submitted that the finding of the lower Court to the extent of Section 375 I.P.C. is not at all conceivable.

8. It has also been pleaded that there happens to be inordinate delay in lodging of the case without any explanation. That being so, the prosecution case would not be entertainable.

9. It has further been submitted that as per consistent version, it is evident that victim had begotten a female child. Had there been D.N.A. Test, the actual offence would have been exposed whether appellant happens to be her biological father and in that event, there would have been positive evidence over rape. So, in its entirety, the prosecution suffers from inherent lacuna, whereupon



judgment impugned is fit to be set aside.

10. On the other hand, learned Additional Public Prosecutor opposed the submission and submitted that it is not a case whereunder physical intimacy was under the banner of promise and so, prosecution would not be permissible in terms of Section 417 of the I.P.C. That being so, the judgment of conviction and sentence recorded against the appellant Bhola Yadav is fit to be confirmed.

11. Before entering into merit of the case, first of all, the legal propriety is to be seen. Before present amendment relating to Section 375 I.P.C., 16 years and upward was found to be competent enough to accord consent. That being so, any girl/ female above the age of 16 years was quite competent to give consent. Now, one has to see from the evidence whether there was any consent at the time of first incidence of copulation or the same was under the clutch of rape, which was subsequently transformed under promise to marry in order to ward off the curse of prosecution. None other than the victim herself happens to be on this very score, while the other evidences are corroborative in nature. At the present stage suggestion having been given to the victim at the end of the appellant is also to be perceived. More particularly under Para-20 of PW-3, whereunder there happens to be suggestion that she happens to be a characterless lady having physical relationship with so many persons as a result of which, she



became pregnant and now, she is putting finger against the appellant to be responsible therefor. That means to say, apart from examination of doctor (PW-5) as well as PW-6, there happens to be no controversy that victim conceived and further, from her examination-in-chief at Para-7, which had not been challenged at the end of the appellant, she had begotten a daughter. In written report, there happens to be specific disclosure that on 16.03.2003, while she (victim) was alone inside her house, appellant Bhola Yadav came, caught hold her, forcibly lie her down and then, committed rape. During course thereof, she resisted, she was about to raise alarm, she began to scream as her chastity has been criminally violated on account thereof, an offer came at the end of the appellant consoling her that he will marry and under such banner, he pounced upon her whenever he found the victim alone and lastly, on account thereof, she became pregnant. During course of evidence, PW-3 had reiterated stating that on the alleged date and time of occurrence, while she was alone, Bhola Yadav intruded inside her house, gagged her mouth, forced her to lie down and then, committed rape after untying her Salwar. She was to raise alarm, whereupon her mouth was gagged by the accused putting towel inside her mouth and then thereafter, she had narrated that as she began to scream over her helplessness, he offered to marry. Furthermore, she had stated that whenever accused got an opportunity



of her being alone, he always indulged in such kind of activity against her will, though always advanced her plea that he will marry her and lastly, when she became pregnant, he refused to marry and for that, Panchayati was convened and being frustrated on that very score, case has been instituted. From the trend of cross-examination, it is evident that appellant had completely denied. It is not the case of the appellant that being major, they have consented to marry and under such eventuality, they developed physical relationship. Even on Court question while victim was being cross-examined under Para-15, she had stated that after commission of the rape as well as coming to know about her pregnancy, her parents were inclined to get her married with Bhola Yadav. So far first incidence whereunder she was criminally assaulted, she has been cross-examined at Para-12, wherein she had stated that as soon as Bhola Yadav came inside her house, he caught hold her. She had resisted, but had not be able to push as he had thrown her over the Chauki. Even thereafter, she had tried her best to come out of his clutch, but could not succeed. She had further stated that as her mouth was gagged, therefore, she was not in a position to call for rescue. She had further stated that Bhola Yadav torn her Salwar as could not untied her string of the Salwar and then, committed rape. So far subsequent event are concerned, in Para-14 of her evidence, she had detailed the same.



12. Now, analyzing the evidence available on the record in consonance with the mode of cross-examination, it is apparent that appellants have not taken recourse of being a consenting party under the pretext of marriage, breach of promise of marriage rather there happens to be complete denial. Then in that event, when the evidence of victim has been taken together with the suggestion of the appellant, pregnancy has not been denied, which could be only on account of physical intimacy and for that, even considering that for subsequent events the offer was persisting, but so far first incidence is concerned, that was certainly a rape and on that very score, the cross-examination at the end of the appellant, particularly Para-12 could not be able to wash it away.

13. In ***Karthi @ Karthick vs. State Represented by Inspector of Police, Tamil Nadu reported in A.I.R. 2013 SC 2645***, it has been held:-

“14. The factual submission advanced at the hands of the learned counsel for the appellant was that the prosecutrix Poomari (PW1) was a consenting party to the sexual relationship which the accused-appellant Karthick had with her. That may be so at a subsequent stage, yet it is not possible for us to accept the instant submission advanced at the hands of the learned counsel for the appellant for his exculpation. The facts as they unfold from the



statement of the prosecutrix Poomari (PW1) are, that even before the first act of sexual intercourse, the accused-appellant Karthick used to tease her. He also used to tell her, that he wished to marry her. The fact that he had sexual intercourse with her, when the prosecutrix Poomari (PW1) was all alone in her house, is not disputed. The prosecutrix Poomari (PW1) has confirmed in her deposition, that at the time of the first sexual intercourse with her at her house, the accused-appellant Karthick had gagged her mouth with his right hand. He had promised to marry her, by placing his hand on her head, after having ravaged her. The subsequent acts of sexual intercourse, were actions of actively cheating her, by giving her the impression that he would marry her. The occurrence at the Murugan temple, is of significant importance. At the temple, for the first time the accused-appellant Karthick told the prosecutrix Poomari (PW1), that he would not marry her. The instant factual position has been confirmed by Chandran (PW9) and Ilangovan (PW10). Despite lengthy cross-examination, the accused-appellant has not been able to create any dent in the testimony of the prosecutrix Poomari (PW1). In the aforesaid view of the matter, we confirm the concurrent determination of the courts



below, that the accused-appellant Karthick committed deceit with the prosecutrix Poomari (PW1) by promising to marry her. On the strength of the said deception, in the first instance persuaded her not to disclose the occurrence to anyone, and thereafter, repeatedly had sexual intercourse with her. Therefore, in the facts and circumstances of this case, it is not possible for us to accept the contention advanced on behalf of the accused-appellant Karthick, that sexual intercourse by the accused-appellant Karthick with the prosecutrix Poomari was consensual. Obtaining consent by exercising deceit, cannot be legitimate defence to exculpate an accused.”

14. So far delay in institution of case is concerned, more particularly rape case, that has been elaborately dealt with by the Apex Court in ***State of Himachal Pradesh vs. Sanjay Kumar @ Sunny reported in 2017 CRI.L.J. 1443***, it has been held:-

“24. When the matter is examined in the aforesaid perspective, which in the opinion of this Court is the right perspective, reluctance on the part of the prosecutrix in not narrating the incident to anybody for a period of three years and not sharing the same event with her mother, is clearly understandable. We would like to extract the following passage from



the judgment of this Court in [Tulshidas Kanolkar v. State of Goa](#)[(2003) 8 SCC 590]:

“5. We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render the prosecution version brittle.”



25. In Karnel Singh v. State of Madhya Pradesh[(1995) 5 SCC 518], this Court observed that:

“7...The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false...”

26. Likewise, in State of Punjab v. Gurmit Singh & Ors.[(1996) 2 SCC 384], it was observed:

“8...The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR 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 her family. It is only after giving it a cool thought that a complaint of sexual offence



is generally lodged...”

15. Chastity of female, at least in Indian social arena happens to be her soul. That being so, one could not conceive, unless and until, there happens to be mitigating circumstance, that the victim will implicate other than her violator, at least for rape. Furthermore, being characterless is of no consequence to the violator, if the victim is not the consenting party.

16. That being so, finding recorded by the learned lower Court convicting and sentencing the appellant Bhola Yadav for an offence punishable under Section 376 of the I.P.C. is found justifiable. Consequent thereupon, appeal is dismissed. Appellant is on bail, hence his bail bond is cancelled directing him to surrender before the learned lower Court within four weeks, failing which the learned lower Court will be at liberty to proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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