

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.94 of 2015

Arising Out of PS. Case No. -52 Year- 2012 Thana -SURYAGARHA District- LAKHISARAI

=====

BIGAN BIND, SON OF LATE SATO BIND, RESIDENT OF VILLAGE-
ALINAGAR, P.S.- SURAJGARHA, DISTRICT- LAKHISARAI.

.... APPELLANT/S.

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S.

=====

Appearance:

For the Appellant/s : Mr. Manohar Prasad Singh, Adv.

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

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 13-02-2017

Sole appellant Began Bind has been found guilty for an offence punishable under Section 376 of the IPC vide judgment of conviction dated 15.12.2014 and sentenced to undergo R.I. for ten years as well as also fined rupees five thousand in default thereof, to undergo R.I. for six months additionally vide order of sentence dated 16.12.2014 with a further direction of set of the period having undergone during course of trial in terms of Section 428 of the Cr.P.C. by the Additional District Judge, Ist, Lakhisarai in connection with Sessions Trial No.578 of 2012.

2. Rita Devi (P.W.5) gave her fardbeyan on 22.03.2012 at about 08:00 P.M. at Sadar Hospital, Lakhisarai where her minor daughter Shivani Kumari was admitted divulging the fact that on the same day at about 12:00 noon she had gone to "Barki Pokhar" for washing her cloth. Her daughter Shivani followed her. She began to play along with other children near about. During course thereof, her co-villager Bigan Bind aged about 24 years came and gave coin of rupee one to her daughter and then thereafter, lifted her in his lap and proceeded towards



“Chamarhiya pokhar”. Her co-villager, wife of Bhuna Bind, subsequently was seen proceeding towards field for grass and during course thereof, she heard weeping of a child whereupon she proceeded near Chamarhiya pokhar where she found Began Bind engaged in doing something with the girl. The girl was weeping. Seeing her, Began Bind ran away. Then thereafter, wife of Bhuna bind gone near the child and found her to be Shivani who was lying on the ground and was weeping. Her pant was soaked with blood. Then thereafter she raised alarm attracting so many persons who lifted Shivani and took her to the place where she was. She found Shivani uneasy, her pant was soaked with blood. After removing pant, she found blood was coming out from her vagina. Thereafter, with the help of the villagers, she was taken to Suryagarha Hospital and from there, she was referred to Lakhisarai Hospital where she was undergoing treatment.

3. On the basis of the aforesaid fardbeyan Suryagarha P.S. Case No.52/2012 was registered, followed with an investigation and after completing the same, charge sheet was submitted. After taking of cognizance of an offence, the case was committed to the court of Session where, trial commenced and concluded in a manner, subject matter of instant appeal.

4. From the nature of cross-examination as well as from the statement recorded under Section 313 of the Cr.P.C. the defence as is found exposed is of complete denial as well as of false implication, on account of animosity prevailing amongst the families. However, neither any DW nor any sort of document has been exhibited on behalf of defence.

5. While assailing the judgment of conviction and sentence, it



has been stated by the learned counsel for the appellant that prosecution case suffers from basic infirmities and on account thereof, is fit to be rejected. To substantiate the same, it has been submitted that before registration of the FIR, police had already commenced investigation and on account thereof, the present FIR happens to be hit by Section 162 of the Cr.P.C. That being so, there happens to be no FIR in terms of Section 154 of the Cr.P.C. Accordingly, the whole prosecution case is found without frame whereupon is found completely disapprobative. It has further been submitted that two kinds of witnesses have been produced by the prosecution. PW.2, PW.3, PW.4 is not an eye witness to occurrence. Their status happens to be that of corroborative in nature and PW.5 is the informant whose evidence cannot be taken into consideration in the background of the infirmities as indicated above. PW.1 is the sole witness who came forward to say that she happens to be an eye witness to occurrence. However, when her evidence is minutely gone through, it is apparent that her evidence also did not satisfy its reliability and so, is fit to be discarded.

6. Then, it has been submitted that victim Shivani aged about 5-6 years was easily prone to tutoring and in the background of strain relationship persisting amongst both the families, there was every possibility that she might have been tutored. Therefore, the evidence of victim goes out of consideration. In the aforesaid backdrop when the evidence of PW.6 the doctor is being considered, it is apparent that it also happens to be a fruitless effort for the prosecution because of the fact that apart from absence of spermatozoa, the doctor had also opined that the injuries whichever is found over the person of PW.8, victim might be possible on account of mechanical violence (fall on pointed rock). So, the



cumulative effect happens to be that prosecution case is found completely ruined by its own conduct whereupon, appellant is entitled for acquittal.

7. The learned Additional Public Prosecutor while substantiating the finding recorded by the learned trial court has submitted that these points were raised before the learned lower court and the learned lower court had properly met therewith as well as reasonably explained the same in legal way. So, the finding recorded by the learned lower court did not attract interference.

8. In order to substantiate its case, prosecution had examined altogether eight PWs out of whom PW.1 is Reshma Devi, PW.2 is Bechan Bind, PW.3 is Asharafi Bind, PW.4 is Prakash Bind, PW.5 is Reeta Devi, PW.6 is Dr. Roopa, PW.7 is Subodh Kumar, PW.8 is Shivani. Side by side had also exhibited the injury report Ext.1 Series, Seizure List Ext.2 Series, Fardbeyan Ext.3, inculpatory extra judicial confessional statement of appellant Ext.4, endorsement over fardbeyan Ext.5 and FSL report Ext.6 Series.

9. Three kinds of evidence have been adduced on behalf of prosecution. The first one is relating to the victim as well as an eye witness, PW.1. Then happens to be the corroborative evidence by way of PW.2, PW.3, PW.4 and PW.5. The third one medical evidence of PW.6 along with FSL report. The remaining witness happens to be the Investigating Officer.

10. It is settled principle of law that unless and until witness is being cross-examined, having an opportunity to explain as held in ***Gian Chand & Others vs. State of Haryana*** reported in ***2013 (4) PLJR 7 (SC)***, that point cannot be taken into consideration. Neither from the evidence of PW.5, Rita Kumari nor from the evidence of PW.7 Subodh Kumar



Investigating Officer, it is manifest that they were cross-examined on the score of registration of the case. That means to say, at least PW.7 could not have an opportunity to explain whether FIR was recorded before commencement of the investigation or after commencement of the investigation and further, what was the reason for such compulsion. In terms of Section 157 of the Cr.P.C. same sort of preliminary inquiry is found permissible at the end of the police official which has also been identified by the Constitution Bench decision relating to ***Lalita Kumari vs. Govt. of U.P.*** reported in ***(2014) 2 SCC 1***. Apart from having extraordinary power entrusted to police in terms of Section 41 of the Cr.P.C. enabling apprehension of an accused whenever there happens to be commission of cognizable offence. For better appreciation, the same is quoted below:

“41. When police may arrest without warrant

- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—
- (a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
 - (b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or
 - (c) who has been proclaimed as an offender either under this Code or by order of the State Government; or
 - (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
 - (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
 - (f) who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or
 - (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any



act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 365; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of person specified in section 109 or section 110.”

11. Now coming to the evidence of PW.7, it is apparent that the officer-in-charge had already received information regarding commission of cognizable offence and on account thereof, he was directed to proceed towards place of occurrence. After arrival at the place of occurrence he was acknowledged with the fact that victim was taken to hospital simultaneously, appellant was produced by the villagers on account of having been apprehended at their end on chase, after commission of the occurrence and so, prima facie there was material available before the police to justify his apprehension. Moreover, in terms of Section 57 of the Cr.P.C. he was quite competent to have control over the accused who was to be transmitted within 24 hours excluding the period of journey for judicial remand in terms of Section 167 of the Cr.P.C.

12. Furthermore, it is also evident from the evidence of PW.7 that fardbeyan of PW.5, Rita Devi was recorded but, there happens to be slackness on the part of the defence while cross-examining this PW.7 who could have at least been cross-examined on the score whether the other eventualities found exposed before recording of the fardbeyan or



after recording of the fardbeyan. As, defence had failed to explicit aforesaid vital clue from the mouth of the PW.7 and on account thereof, there happens to be lacking of conclusive, cogent material on the record, in the aforesaid background it looks difficult to accede with the submission having at the end of the appellant that fardbeyan was recorded after commencement of the investigation.

13. Now explaining the situation which, in case would have been properly tackled at the end of the appellant certainly would have a bearing upon the fate of this appeal, the second event is to be seen. PW.6, doctor who was one of the member of the team who had examined the victim PW.8, had found following injuries over her person:-

- i. Bleeding on vagina.
- ii. Vulval extona present.
- iii. Hymen was ruptured recent and admit one finger.
- iv. Vaginal tear was present.
- v. Clothing was found blood stain.
- vi. Multiple abrasion present on the back.

14. Furthermore, the doctor had opined that she was subjected to sexual assault. During cross-examination she had admitted that the injuries was possible on fall over pointed stone. At the present moment again defence had over sighted regarding the injuries having found over back of the victim. Nothing has been suggested therefor and if both the injuries are taken together, it speaks a lot with regard to the condition which the victim, PW.8 had faced.

15. In order to appreciate the version of the defence that the injuries having over the person of victim might be on account of fall over pointed stone, the evidence of PW.8, the victim is to be taken note of.



Before appreciating her evidence, certain fit fall persisting on that very score is also to be seen. During course of investigation, as is evident from the evidence of PW.7 the Investigating Officer she was examined under Section 161 of the Cr.P.C. but on account of her pitiable condition. She was unable to detail the occurrence. However, after her recovery, she was produced before the Magistrate for her statement under Section 164 Cr.P.C. which during course of trial, has not been legally brought up on record nor been cared at the end of the prosecution nay attention of her was drawn by the appellant. For want of the same, the Magistrate could not be examined and on account thereof, the statement under Section 164 Cr.P.C. could not found an exhibit of the record. Be that as it may, statement under Section 164 Cr.P.C. is not at all a substantiate piece of evidence and its utility is found confined for the purpose of corroboration or contradiction. Furthermore, the attention of the victim was not at all drawn towards the same. So, none exhibit of the statement recorded under Section 164 Cr.P.C. would not cause any kind of dent in the prosecution case. In likewise manner the learned lower court would not have referred the statement under Section 164 Cr.P.C. under para-23 of the judgment.

16. Now coming to the evidence of PW.8 she had simply deposed to the event that her pant was opened by Bigan who committed sinful act with her. Further, she identified the appellant in dock. Coming to the cross-examination, it is evident that neither she was suggested that she was tutored at the end of her parents nor she was tested over her mental equilibrium, although the court had found her to be capable of giving evidence. Apart from this, it is evident that she was not at all cross-examined on crucial aspect rather she was cross-examined at the end of



the appellant regarding inter se relationship as well as over the fact that his father had quarrelled with Bigan. She had also stated that Bigan had committed sinful act with her in a ditch near a well. At that very time her mother was washing her cloth at Barki Pokhar. She further stated that she had not gone to Barki Pokhar along with her mother.

17. PW.1 is Reshma Devi, whose presence has also been perceived since initial prosecution version to be the only person who had seen the occurrence. In her examination-in-chief she had stated that on the alleged date and time of occurrence, she was going to bring grass from her field and during course thereof, she heard sound of weeping of a girl over which she rushed towards *pokhra* and saw Bigan was sitting with a child and was committing rape. When she further proceeded, Bigha slipped therefrom. After going near to child, she found her undressed, blood was oozing from her vagina. Then thereafter she raised alarm, brought the victim near her parents. Victim was present in court at the time of her evidence whom she identified. Furthermore, it has also been stated at her end that villagers chased Bigna, apprehended him and handed over to the police. She also identified the accused in dock. During cross-examination, it is evident from para-4 that at that very time she was going alone. She had further stated that none else than she had seen the occurrence. In para-5 she had further stated that when she had gone to pokhar, found accused fleeing therefrom. At para-12 she had stated that she had seen the accused fleeing from pokhar at the other end, found the victim weeping.

18. Though from her evidence the learned counsel for the appellant tried to justify his submission that this PW.1 happens to be inconsistent and so, her evidence should not be relied upon, is found only



for an argument sake. When the evidence in its totality is to be seen, the first part of her deposition has not been tested. She had, at the first instance had shown her credential to have seen the accused sitting near victim committing rape and then stating that when she proceeded further towards them, accused fled therefrom. So, she had rightly stated on cross-examination that she had seen accused fleeing therefrom. Furthermore, apart from rustic villager, she happens to be illiterate female and on account thereof her evidence is to be seen in the aforesaid background. In ***Subal Ghorai and Others vs. State of West Bengal*** reported in **(2013) 4 SCC 607**, it has been held:

“27. PW 1 Promila’s evidence has come under heavy criticism. It is true that she stated in her evidence that her complaint was read over to her but it was not intelligible to her. It was intelligible to the elder brother of her husband PW 5 Ananta who told her that it was correctly recorded by the police. It is argued that therefore the FIR is not, in fact, lodged by PW 1 Promila but is the creation of PW 5 Ananta and others. It is not possible to accept this submission. We find PW 1 Promila to be a natural and trustworthy witness. She appears to be a courageous lady who has, even after witnessing three gruesome murders, promptly lodged the FIR. She frankly stated that she is illiterate. In our opinion, PW 1 Pramila being a rustic and illiterate woman, some allowance must be made for the minor discrepancies in her evidence. Her case that she found it difficult to understand what was being read over to her and, to find out whether her statement was correctly recorded, she took the help of PW 5 Ananta, the brother of her husband has a ring of truth. We find nothing wrong in this exercise. It is also true that she stated that she did not know the fathers’ names of some of the accused and she did not know the addresses of the accused but the FIR contains those details. This again does not make PW 1 Promila an untrustworthy witness. In fact, because of this frank admission, she comes across as a very honest witness. It must be remembered that several persons were involved in this gruesome attack. In a case of this type and magnitude, it would be difficult for any person, more so for a rustic woman like PW 1 Promila, to give all particulars about the accused as required by the investigating officer. It is clear from her statement that she knew the first names of all the



accused. She gave the first name of the accused. There is, therefore, no manipulation of names. The trial court has rightly observed that she appears to have collected the addresses and fathers' names of some of the accused while her statement was being recorded. It is pertinent to note that she has correctly identified most of the accused in the court. We find it difficult to accept the submission of the counsel for the appellant-accused that PW 1 Promila's evidence must be discarded on this count. In our opinion, the evidence of PW 1 Promila inspires confidence and reliance can be placed on it. There are no major discrepancies in her evidence. She has stood the test of cross-examination very well."

(emphasized by me)

19. Same view also been reiterated in ***Sukhwinder Singh v. State of Punjab***, reported in **(2014) 12 SCC 490** at para-13, wherein it has been held:

"**13.** We have already noted the gist of PW 2 Labh Singh's evidence. He has given the details of articles given to the appellant and his family as dowry and stated that after marriage the attitude of the accused was hostile towards the deceased. Thereafter, he has described his visit to the appellant's house along with PW 3 Surjit Singh on 25-6-1991 when the deceased, who was in tears, told him about the dowry demand of the accused. The appellant was present there. PW 3 Surjit Singh, who had accompanied PW 2 Labh Singh, corroborates PW 2 Labh Singh on this aspect. They are rustic witnesses. Their evidence must be read bearing their simple background in mind. PW 2 Labh Singh had lost his daughter. Besides, they were deposing in 1994, almost three years after the incident. Hence, allowance must be made for minor discrepancies, if any, in their evidence. In any case, by and large, their evidence is consistent. The only discrepancy which is pointed out by the appellant's counsel is that while PW 2 Labh Singh stated that the deceased told them about the demand in the room, PW 3 Surjit Singh stated that she talked to them in the verandah. Evidence of witnesses cannot be rejected on such minor inconsistencies."

(emphasized by me)

Therefore, the evidence of PW.1 Resma inspire confidence as, in its totality substantiated her status to be an eye witness.

20. PW.2, PW.3 and PW.4, (who also happens to be father of



victim) have shown their status in impartial manner to be not an eye witness to occurrence and in likewise manner happens to be the status of PW.5, the informant. They have not tried to change their status and on account thereof, there happens to be no room of doubt in accepting their evidence.

21. PW.7 is the Investigating Officer, who during course of his evidence had stated that after apprehension of Bigan Bind, he was taken to hospital for his examination. He had also seized the frock, pant of the victim as well as underwear of the appellant and the same was sent for chemical examination. The report is available on the record and its relevancy will be discussed hereinafter. From his objective finding relating to place of occurrence, he had stated that during course of inspection he had found the bush duly pressed to some extent. He had further stated that he had not found blood stain at the place of occurrence. He had further admitted that he had not got the private part of the accused examined by the doctor. At the present moment Section 53A is to be taken note of and for better appreciation, the same is quoted below:

“53-A. Examination of person accused of rape by medical practitioner. –

- (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.



(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

- i. the name and address of the accused and of the person by whom he was brought,
- ii. the age of the accused,
- iii. marks of injury, if any, on the person of the accused,
- iv. the description of material taken from the person of the accused for DNA profiling, and".
- v. other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(2) (5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section."

22. From plain reading of Section 53A it is evident that it happens to be incumbent upon the I.O. to have medical examination of an accused but the said examination is to be with regard to procurement of the evidence that too based upon opinion of the Investigating Officer. Here in the present case, it is apparent that after apprehension of the accused, his underwear was found soaked with blood and the same was seized therefore, the non-examination of private part of the accused by a doctor, even having no cross-examination at the end of the appellant that why not he was examined and further the reason therefor, would not give any kind of benefit in favour of appellant.

23. The most important theme happens to be relating to presence of blood over frock, panty of the victim as well as underwear of the appellant of the same group 'O'. Apart from this, the panty of victim



(marked as para-1) has been found containing blood along with semen as is evident from F.S.L. report. The appellant failed to insist upon examination of an expert and on account thereof, appellant is precluded from raising any kind of objection with regard thereto. Though, during course of examination of victim PW.8, spermatozoa was not seen, will not adversely affect the prosecution version as the same does not happens to be condition precedent. Slight penetration is sufficient to constitute rape, which is found duly proved.

24. Consequent thereupon, giving minute observation of the facts and circumstances of the case, it is apparent that prosecution has succeeded in proving its case. Consequent thereupon, the finding recorded by the learned lower court is hereby affirmed. As a result of which, the appeal, being sans merit is dismissed.

25. Now coming to quantum of sentence, the girl aged about five years has been ravished by a man aged about 24 years only to satisfy his carnal desire whereupon, did not attract any sympathetic approach. As such, no interference is required over the sentence having been inflicted by the learned trial court. Appellant is under custody, hence is directed to remain till its saturation.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	21.02.2017
Transmission Date	21.02.2017

