

**sIN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.451 of 2015**

Arising Out of PS.Case No. -405 Year- 2013 Thana -SAMASTIPUR MUFFASIL District-  
SAMASTIPUR

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1. Md. Aurangjeb @ Munnu son of Md. Shamshad, resident of village Bisanpur,  
P.S. Samastipur Mufasil, District Samastipur. .... Appellant/s

Versus

1. The State of Bihar .... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Nafisuzzoha, Advocate

For the Respondent/s : Mr. S.A. Ahmad, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**ORAL JUDGMENT**

**Date: 21-07-2017**

Appellant, Md. Aurangjeb @ Munnu has been found guilty for an offence punishable under Sections 376 IPC and sentenced to undergo RI for 10 years as well as fine of Rs. 25,000/- in default thereof, to undergo imprisonment of 3 months additionally by the Additional Sessions Judge-IV, Samastipur in Session Trial No. 02/2014 vide judgment of conviction dated 08.07.2015 and order of sentence dated 09.07.2014.

2. Victim (name withheld), PW-4 gave her Fard-e-beyan while she was admitted in emergency ward of Sadar Hospital, Samastipur on 01.04.2013 at about 3:00 AM, in presence of her brother Md. Javed and Bhabhi Azmati Khatoon (PWs-1 and 2) respectively alleging inter alia that she along with her brother and Bhabhi has come to visit Jitwarpur Mela over a vehicle driven by one Aurangjeb @ Munnu. They remained there. At about 12:00 Midnight, they came near the vehicle where all of a sudden Aurangjeb @ Munnu pulled her inside the vehicle and sped away towards river. Then



thereafter, she was taken to near 'Ikri' shrub where Aurangjeb @ Munnu began to undress her forcibly which was protested by her whereupon, she was assaulted with fists and slaps as well as shoes. Thereafter, she was ravished near about an hour. As a result of which her physical condition deteriorated. She suffered from sever pain. Blood began to ooze out from her private part. Thereafter, she was lifted inside the vehicle and then Aurangjeb @ Munnu returned back. At Chandni Chowk, he parked the vehicle and then informed her brother that he is coming along with her. Then he came to Mela where she was carried up to the place where her Bhabhi and Bhiya were present, where she divulged the occurrence. Aurangjeb @ Munnu threatened all of them and also tried to escape. However, his brother with the assistance of Md. Sitare and Md. Feroz, co-villagers chased, caught hold of Aurangjeb @ Munnu and then, brought him to the police who was present in the Mela. Police took all of them to hospital seeing her condition. She had further disclosed that at the time of taking her away by Aurangjeb @ Munnu he had pushed her Bhabhi.

3. After registration of Mufassil PS Case No. 405/2013, investigation commenced and concluded by way of submission of charge-sheet under Section 376 of the IPC whereupon the trial commenced and concluded before the learned lower court meeting with ultimate result by way of recording conviction and sentence against the appellant, hence this appeal.

4. Defence case as is evident from the mode of cross-



examination as well as statement recorded under Section 313 CrPC is that of complete denial of the occurrence. It has also been pleaded that father of alleged victim was inclined to get the victim married with appellant and for that he had approached but on account of refusal at the end of appellant, this false case has been instituted. To substantiated the same, DWs have also been examined.

5. In order to substantiate its case prosecution had examined altogether 8 PWs out of whom PW-1, Md. Javed, is the brother, PW-2, Azmati Khatoon, Bhabhi of the victim, PW-3, Md. Haleem, seizure list witness relating to seizure of Salwar, PW-4 is the victim herself, PW-5 is Md. Sohrab, another seizure list witness along with PW-3, PW-6, Md. Anwar is the seizure list witness relating to Scorpio vehicle, PW-7, Dr. Lalita Singh who had examined the victim and PW-8, Anil Kumar Singh, Investigating Officer.

6. Side by side prosecution had also exhibited Ext-1, Signature of Md. Javed on Fard-e-beyan, Ext-2, Signature of Md. Javed on seizure list, Ext-3, Signature of Md. Javed on seizure list, Ext-1/A, Signature of Shabana Khatoon on Fard-e-beyan, Ext-2/A, Signature of Md. Sohrab on seizure list, Ext-3, Injury report, Ext-1/B Fard-e-beyan, Ext-1/C, Fard-e-beyan, Ext-4, FIR Ext-5, Seizure list, Ext-6, Seizure List, Ext-7, Seizure list.

7. In likewise manner, defence had examined 3 DWs out of whom DW-1 is Dr. Uday Kumar who had examined the accused/appellant, DW-2 is Md. Maqsood Alam, DW-3 is Md.



Shamshad, father of appellant. Medical report relating to appellant had also been exhibited as Ext-A.

8. The learned counsel for the appellant has submitted that because of the fact that PW-4 was not at all raped nor she was ever kidnapped for the aforesaid purpose from Jitwarpur Mela and that happens to be reason behind that on that very score, there happens to be inconsistency amongst the PWs. To substantiate the same, it has been submitted that while the victim had deposed that she was pulled by the appellant inside vehicle and at that very time her Bhabhi was pushed away by the appellant while the evidence of PWs-1 and 2, brother and Bhabhi of the victim deposed otherwise. They have deposed that the victim got inside vehicle. While PW-2, Azmati Khatoon was to board, the vehicle sped away. At that very time, it is evident that PW-1, Md. Javed had a talk over mobile. Had there been such kind of occurrence, at least, PW-1 would have dialed over the mobile of appellant directing him to return or, would have inquired why he had indulged in such kind of activity. Side by side, their natural conduct would have been to raise alarm to attract the people present in the Mela, the police was present there and further, having sufficient vehicle parked since before would not have spared the appellant to take away the vehicle and subsequently, an opportunity to rape her. Keeping silence is an abnormal activity and if considered in the facts and circumstances of the case, completely demolished the prosecution case which has purposely been introduced and for that,



there happens to be plausible explanation at the end of the appellant.

9. It has also been submitted that had victim taken away by the appellant and was raped, then in that circumstance, it was not at all expected that appellant would have returned with the victim to the Mela where her brother and Bhabhi were giving an opportunity of being apprehended apart from the fact that Md. Sitare and Md. Feroz, the co-villagers, who along with brother of victim got appellant apprehended have not been examined nor there happens to be any kind of explanation at the end of the prosecution over their non examination during trial.

10. Furthermore, it has also been submitted that appellant was apprehended at the Mela itself and had there been such kind of activity, the police would have recorded those things which would have gone against the appellant. In its continuity, it has also been submitted that clothe, under garments of the appellant allegedly containing stain were sent to FSL but, the report is awaiting whereupon it could not be conclusively held that the stain whatsoever found on the apparel, under garment of the appellant indicate to be that of semen, blood. Furthermore, it has also been submitted that Investigating Officer had visited the place of occurrence and from his objective finding, it is evident that no sign was there which could have corroborated the prosecution version with regard to any kind of occurrence having been committed there.

11. Coming to over-all situation of the prosecution case, it



has been submitted that save and except brother, Bhabhi and the victim, none is on material point. Had there been such kind of occurrence, then in that event, the parents as well as other family members, villagers would have certainly come forward to corroborate the same and so, it has been submitted that the evidence of Dr. (PW-7) is not going to save the prosecution case as it suffers from inherent illegality. So submitted that in the facts and circumstances of the case, it is apparent that the appellant has been victimized.

12. Controverting the submission made on behalf of the appellant, it has been submitted by the learned APP that on account of non examination of particular witness, the prosecution case would not fail. This deficiency could be perceived as an additional ground in case prosecution could not succeed in proving its case. On the other hand, it has to be seen that the evidence coming out from the mouth of a witness whoever been examined, the case is proved or not. So submitted that from the evidence having been adduced on behalf of prosecution, it is crystal clear that on the alleged date of occurrence, the victim was raped which is found corroborated with the evidence of PW-7, the doctor and so, the appellant has rightly been convicted and sentenced.

13. Before coming to ocular evidence, first of all, the finding of the doctor, PW-7 is to be considered who had recorded as follows:-

“P/V. Lacerated wound of ¼” diameter in size on the labia minor extending up to hymen in right side. There is



partial rupture of hymen. Blood clot present on the wound. No active bleeding found in the private part. No stain of semen found on her private parts. Blood stained clothe preserved and handed over to constable for needful. Vaginal swab taken for microscopic exam. Vagina admits 1 finger and difficulty. No foreign hair found on the private parts. Age of injury within 24 hours.”

14. Furthermore, from the aforesaid report it is evident that the Medical Board had opined the age of the victim in between 13-14 years. Therefore, the status of the victim, PW-4 being a minor, could not be ruled out.

15. Coming to the oral evidence, first of all, the evidence of victim, PW-4 is to be taken up. She had deposed that the occurrence is of about 1 year and 4 months ago. Her brother, Md. Javed had hired a Scorpio vehicle to visit Mela from Aurangjeb @ Munnu who came at 9:00 PM along with the Scorpio vehicle. She along with her Bhaiya and Bhabhi boarded and visited the Mela. They remained there. Then, in order to return back, she came near the vehicle where, Aurangjeb @ Munnu pulled her. At that very time, her Bhabhi was in process to board. Then thereafter, she was taken to the bank of a river where she was dragged near about ‘Ikri’, shrubs where she was assaulted with fists and slaps as well as shoe. Thereafter, he forcibly undressed her and then committed rape as a result of which, blood oozed out. Blood spot stained over her Salwar. Thereafter, she was taken in the vehicle and during midst of way, she was threatened that in case of disclosure, she will be eliminated. After coming to Mela, he accompanied her to



her Bhaiya and Bhabhi where, she disclosed the whole event. Aurangjeb @ Munnu began to flee but was apprehended by her brother with the help of Sitare and Feroz and then was handed over to Mela Police. Police took them to PS and then thereafter, to hospital where she was treated. In Hospital, her Fard-e-beyan was recorded whereupon she put her signature. She identified the accused in the dock. During cross-examination at para-3, she had divulged that Aurangjeb @ Munnu was not on visiting term. She had seen him for the first time on the date of occurrence itself and then thereafter, in the court. In para-4, she had stated that during course of visit to Mela, she had not met with her co-villager. Aurangjeb @ Munnu was not moving in Mela along with them. After an hour, they returned back near the vehicle where more than 100 vehicles were parked since before. In para-5, she had stated that at that very time none other than her Bhabhi and Bhaiya were present near the vehicle. In para-6, she had stated that she was taken about 1 kilometer. She was brought after an hour. She had not sustained hurt over her body. She had raised alarm but none came. In para-7, she had further stated that her Bhaiya and Bhabhi had searched her in Mela. In para-9, there happens to be suggestion with regard to denial of the occurrence as well as institution of the false case on account of refusal by the appellant to accept offer having made at their end for marriage.

16. PW-1 is the brother. He had deposed that in the night of 31.08.2013, he along with his wife came to Chandni Chowk to visit



Mela and for that purpose hired a vehicle. At about 12:00 Midnight, they were to return back and for that, they came near the vehicle. At that very time, he attend a call. His sister boarded the vehicle followed by his wife who was about to board during midst thereof, Aurangjeb sped away the vehicle. He became nervous whereupon, Sitare and Feroz inquired. He had divulged the event. Subsequently thereof, he received a call at the end of Aurangjeb who directed him to remain stale as, he is returning along with his sister. After about an hour, he returned back along with his sister. His sister came near his wife slowly and then, began to weep. She further disclosed that Aurangjeb has raped her. When he tried to apprehend him, he ran away but with the assistance of Sitare and Feroz, was apprehended. Police arrived there and then, they were taken to the police station wherefrom, seeing the condition of his sister, she was referred to hospital where her Fard-e-beyan was recorded and then exhibited the signature over her Fard-e-beyan. Also proved seizure list relating to Salwar seized by the police. Scorpio was also seized and for that another seizure list was prepared. He had identified the accused in the dock. During cross-examination, he had completely disowned that there was love affair in between Aurangjeb and his sister. In para-5, he had stated that he is known to Aurangjeb since before as he was being hired since before. He had not gone to the place of Aurangjeb but mobile number is there and through mobile negotiation was being finalized. In para-7, he had stated that none of his co-villagers met during course



of Mela visit. Aurangjeb had not accompanied them, rather he was sitting inside the vehicle. In para-8, he had stated that he had not raised alarm when appellant drove the vehicle along with his sister. 10-12 vehicles were parked near about. In para-9, he had stated that his sister was accompanied by Aurangjeb who was apprehended at that very spot itself. In para-10, he had stated that he had not visited the alleged place of occurrence. In para-11, similar kind of suggestion is there.

17. PW-2 is the Bhabhi of the victim, PW-4 and wife of PW-1. During examination-in-chief, she had reiterated the prosecution version. During cross-examination, at para-4, she had stated that Aurangjeb was not on visiting term. In para-5, she had stated that Aurangjeb was not along with them in Mela. She had further stated that first of all, the victim had boarded the vehicle. At that very time, her husband was talking over mobile. In para-6, she had stated that she had not raised alarm over taking away her Nanad by Aurangjeb. Her Nanad had raised alarm or not, she could not hear. About an hour, Aurangjeb returned back along with vehicle. During midst thereof, they had not informed the police. When her Nanad returned, Aurangjeb was along with her Nanad. Aurangjeb and her Nanad had gone to the police station.

18. PW-3 is seizure list witness relating to search and seizure of the apparel, hair, seized from the possession of appellant. PW-5 is the witness who happens to be over seizure list relating to



seizure of Salwar. PW-6 is the seizure list witness relating to seizure of Scorpio vehicle from Mela.

19. PW-8 is the Investigating Officer who had deposed that on the alleged date and time of occurrence he was officer Incharge of Samastipur Mufassil PS. Fard-e-beyan of Victim having been recorded by R. N. Yadav was produced before him on the basis of which Mufassil PS Case No. 405/2013 was registered (Ext-endorsement, Formal FIR) and then took up investigation. During course of which recorded further statement of the victim, recorded statement of Md. Javed, Sitare and Feroz, accused was arrested and then he was forwarded to hospital for examination, seized apparel of the accused under seizure list (exhibited). Also seized Salwar of the victim produced by the doctor, PW-7, Lalita Singh, exhibited the seizure list, visited the place of occurrence which happens to be a mango orchard belonging to late Jang Bahadur Ray and identified it as north, road by the side of Bandh, South, mango orchard, East-passenger shed at the distance of 50 Yard, West-Mango orchard. Seized scorpio vehicle, recorded statement under Section 164 CrPC, sent the apparel for FSL examination after taking permission from learned CJM and then, concluding the investigation, submitted charge-sheet. During cross-examination at para-8, he had stated that after 11 hours of registration of the case, he had visited the place of occurrence. He had not found broken bangle. He had not found any other sign relating to commission of occurrence. He had visited the



place of Mela. Accused has got no criminal antecedents. Till submission of charge-sheet, he had not received FSL report.

20. DWs-2 and 3 have come up in support of plea of defence that the offer having at the end of father of victim for marriage of victim with Aurangjeb was turned down. DW-2 in para-4 had stated that for the last two years, he is on visiting term with Aurangjeb. DW-3 is the father of the appellant. In para-3 had stated that this occurrence happens to be 1 ½ months after the negotiation was offered. The occurrence was committed at about 11 PM. So from the evidence of DW-3, father it is evident that he had admitted some sort of occurrence having been committed at about 11 PM in the night.

21. DW-1, one of the members of the Medical Board who had examined the appellant on police requisition and found the following:-

1. Bruise 4" x 1" on the right side of neck.
2. Bruise 7" x 2" on the right side of upper chest and the aforesaid injuries were caused within 24 hours.

22. On external examination, the doctor had stated that no stain of blood and semen was present on private part. However, hair was present over shirt which was collected and handed over to the police. Some stains were present over clothe which was seized by the police as is evident from the evidence of PW-3 and 8. In para-3 of his cross-examination, he had stated that the stain which was found over



clothe might be of blood as well as of semen subject to examination. Furthermore, he had stated that after urinating, stains vanish. It has also been divulged at his end that if the rapist is not examined soon after the occurrence, then in that event, stain will not be located over his private part.

23. After analyzing evidence available on the record, it is apparent that the victim PW-4 was not at all cross-examined on the score whether she was wearing bangles at the relevant time so non presence of broken bangle at the P.O. goes out of consideration. In likewise manner, neither PW-4 nor PW-8 was cross-examined with regard to nature of land having at the P.O., whether it was hard, soft, ploughed, and in likewise manner, whether herbs were present in and around it. The victim was also not cross-examined whether during course of resistance, she had used her nails by way of scratching or given a bite upon her rapist. On the other hand, the appellant himself examined DWs and in the aforesaid background, whatever been deposed by the DWs would have an impact upon his fate. Injuries were found over the person of appellant caused within 24 hours which he failed to explained. When the evidence of the prosecution the witnesses is taken together with the evidence of father of the appellant, DW-3, it is apparent that he had admitted commission of occurrence though some variance over timing.

24. Another circumstance as is visualizing from the evidence of PW-4, victim is that she has not been cross-examined on



the theme of rape which happens to be the crux of allegation and for that only prosecution sailed. In likewise manner, PW-4, victim had not been cross-examined over her status being major one, and in likewise manner, PW-7, the doctor who opined victim to be in between 13-14 years has also not been challenged. So, it could be conclusively held that PW-4, victim happens to be minor.

25. The allegation that victim was taken away from Mela in presence of brother and Bhabhi who remained silent spectators as they too had stated that they have not raised alarm nor taken any kind of activity to chase, failed to inform the police present in Mela, commission of rape after taking the victim away from Mela, and then returning therefrom along with victim, informing the brother over mobile (not substantiated by call detail though not cross-examined), coming to Mela along with victim. Non examination of two co-villagers who joined hand with brother of victim in apprehending the accused/appellant suggest other different nature of incidence than as projected, but those observation washed away when the status of the victim is duly acknowledged being minor.

26. That being so, the victim is found minor one whereupon, being a consenting party will not change fate of the instant prosecution. As held by the Apex Court *in Dilip v. State of Madhya Pradesh* as reported in 2013 *AIR SCW 2538*, it has been held that there happens to be no relevancy of consent given by a minor. For better appreciation relevant paragraph is quoted below:-



12/13. In case, the prosecutrix was below 16 years of age at the relevant time, the issue of consent becomes totally irrelevant. Even the issue of consent is no more res integra even in a case where the prosecutrix was above 16 years of age.

In *State of H.P. v. Mange Ram*, AIR 2000 SC 2798, this Court, while dealing with the issue held:

"Submission of the body under the fear or terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances." (Emphasis added)

27. In *Gian Chand & others v. State of Haryana* reported in **2013(4) PLJR 7 (SC)** it has been held:-

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.*, AIR 2013 SC 1204 observing as under:

*"31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the*



*witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”*

28. That being so, no perversity is found in the finding recorded by the learned lower court and so, needs no interference. Furthermore, while appreciating the sentence having been inflicted by the learned lower court in the facts and circumstances of the case, as discussed hereinabove, the sentence of 10 years needs revisit whereupon the minimum sentence so prescribed under Section 376 IPC is inflicted against the appellant and so, sentence inflicted by the learned lower court is modified to the extent directing the appellant to undergo RI for 7 years. So far fine is concerned, the same is also confirmed with the default clause. Furthermore, period already undergone will be set off in terms of Section 428 of the CrPC.

29. With the aforesaid modification in sentence, the appeal is dismissed.

**(Aditya Kumar Trivedi, J)**

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