

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.566 of 2012

Arising Out of PS.Case No. -1 Year- 2010 Thana -null District- SASARAM (ROHTAS)

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Kanhaiya Kumar @ Kanhaiya Soni, son of Sri Bhagwan Seth, resident of Vill-
Mirjapur Bhadokhara, P.S.-Tilauthu, Distt-Rohtas

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Praveen Kumar, Advocate (amicus curiae)

For the Respondent/s : Mr. Syed Ashfaque Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
CAV JUDGMENT

Date: 25-04-2017

This appeal is directed against the judgment dated 23.5.2012 and order dated 25.5.2012 passed by Sri Sajal Mandilwar, 1st Additional Sessions Judge, Rohtas at Sasaram, in Sessions Trial No. 127 of 2010, arising out of G.R.No. 01 of 2010, Rohtas P.S.Case No. 01 of 2010, by which the sole appellant has been convicted under Section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for ten years and a fine of Rs.20,000/-, in default of payment of fine, appellant was further sentenced to undergo imprisonment for two years.

2. The prosecution case, in short, is that a written report was filed by Ainul Haque (P.W.6) before the Officer-in-Charge of Rohtas Police Station stating, inter alia, therein that on 2.1.2010 at about 3 P.M. his daughter was playing outside the house and after some time she was not there and later on his wife started searching her and then she heard the weeping of her daughter from the Baithaka of



Mohan Soni, situated in front of door of the informant and thereafter she went there and knocked the door and when the door was not opened she along with others tried to open the door but it was not opened as the door was closed from inside and thereafter she along with others went inside the room through narrow way and found the appellant committing rape on her daughter and also saw her daughter naked and the appellant after opening his pant was trying to penetrate his penis into the private part of her daughter. Thereafter the informant and others caught hold the appellant and pulled him out and separated him from her daughter. It is also prosecution case that the appellant was brought outside the room and thereafter he was taken to police station.

3. On the basis of aforesaid written report Rohtas P.S.Case No. 01 of 2010 was instituted against the sole appellant under Section 376 IPC and after investigation police submitted charge-sheet against the sole appellant under the above section, accordingly, cognizance was taken up. Thereafter the case was committed to the court of sessions for trial and disposal, which ultimately came to the file of Sri Sajal Mandilwar, 1st Additional Sessions Judge, Rohtas.

4. During trial, charge has been framed against the appellant under Section 376 IPC and after trial the appellant was convicted under Section 376 IPC and sentenced as stated above.

5. Being aggrieved by the aforesaid judgment and order,



the present appeal has been filed on behalf of the appellant.

6. Learned counsel for the appellant has submitted that appellant has falsely been implicated as except father and mother of the so-called victim none has come forward to support the prosecution case though a large number of witnesses have been examined and they have been declared hostile by the prosecution. It is also submitted that there is vital contradiction in the evidences of P.W.5 and P.W.6, who are father and mother of the victim and apart from that the evidence of Doctor clearly rules out the case under Section 376 IPC as he has clearly stated in his cross examination that no case is made out under Section 376 IPC. Hence, the conviction of the appellant is not maintainable.

7. On the other hand, learned APP has submitted that it is a case under Section 376(2)(f) of the IPC as offence of rape has been committed upon a three and a half years minor girl of the informant (P.W.6), and P.Ws. 5 and 6 both have supported the prosecution case, which is also corroborated by the evidence of Doctor (P.W.8). In the facts and circumstances of the case, it is argued that the conviction and sentence of the appellant are quite sustainable, which does not require any interference by this Court.

8. In this case, altogether 8 witnesses have been examined and they are Altaf Hussain (P.W.1), Khalil Hazam (P.W.2), Mannan Khan (P.W.3), Gulam Mustafa (P.W.4), Ajmeri Bibi, wife of informant (P.W.5), Ainul Haque, informant (P.W.6), Ayodhi Paswan,



Investigating Officer (P.W.7) and Dr.Bhagwan Singh (P.W.8), out of which P.Ws. 1 to 4 have been declared hostile by the prosecution and attention has been drawn towards their statements before the police. So far P.W.5 is concerned, she happens to be mother of the victim and P.W.6 happens to be father of the victim. P.W.7 is the Investigating Officer and P.W.8 is the Doctor, who was one of the members of Medical Board, had examined the victim.

9. P.W.6 is the informant in this case and he has supported the prosecution case about commission of rape by the appellant to his minor girl apart from some minor discrepancy in his evidence in chief. He has further stated that he has filed a written report to the Darogaji and he has proved the signature on the written report as Ext.1. Further he has stated that he had given the undergarments of the girl to the Darogaji which have been sent for medical examination. He has further proved the signature on the seizure list and the signatures of seizure list witnesses as Exts.1/1, 1/2 and 1/3 respectively. This witness has also been cross examined and in his cross examination he has stated in paragraph-9 that he went inside the room alone and he has further stated that there were two doors in the room. His evidence further discloses that in Janani Kita, Mohan Soni along with family members were residing but there was no door inside the room. His evidence also discloses that he had not seen any of the family members of Mohan Soni present at that time. In his cross examination in paragraph-2 he further stated that he went



inside the room and saw the appellant committing rape and there was no cloth on the body of the victim and there was no cloth on the body of the appellant except shirt and thereafter he had brought him outside the room and at that time he was provided clothes and at the same time the victim was taken out of the room. In his cross examination, there is nothing to doubt about his credibility.

10. P.W.5 is the mother of the victim and wife of the informant and her evidence in chief shows that she heard sound of weeping of her daughter coming from the Baithaka of Mohan Soni, she reached at his door and knocked the door but the door was not opened, then she raised alarm and villagers and her husband came and got the door opened. It further discloses that they entered inside the room and she saw appellant committing rape upon her daughter. Her evidence further shows that her husband took out her daughter from the room and went to the police station. However, in her cross examination she has stated in paragraph-3 that when she knocked the door, she found the crying stopped. Her cross examination further shows that in that house family members of Mohan Soni, including son, daughter-in-law and also granddaughter reside there. There are some discrepancies in her cross examination in paragraph-4 that she went to Baithaka of Mohan Soni but she has stated that she has not gone to the Baithaka of Mohan Soni and stated that her daughter was inside the room and from the darwaja, she heard sound of weeping of her daughter. Again in paragraph-5 this witness has stated that



appellant opened the door and thereafter they went inside and her daughter came crying from the room. This witness has further stated that her daughter was wearing frock, underwear and pajama and the boy was wearing pant and sweater.

11. Apart from the aforesaid ocular evidence other witnesses have been declared hostile by the prosecution, as they have not supported the prosecution case, though their attention has been drawn towards the statements made before the police.

12. P.W.8 is the Doctor in this case and he has stated that on 3.1.2010 at 2.20 P.M. a Medical Team was constituted consisting of Dr. Jai Shri Chandra, Dr. Bhagwan Singh (himself) and Dr. K.K.P. Srivastava to examine Afsana Praveen, daughter of Ainul Haque and she was brought and identified by S.I. Ayodhi Paswan of Rohtas Police Station. His evidence shows that there is no injury abnormal stain or foreign particles seen on any part of her body except inflamed area on private part. He has also stated that hair is inflamed area with tenderness in lower part of vulva, hymen intact and it was difficult to introduce tip of little finger in vagina and vaginal swab taken and sent for microscopic examination to Pathologist Dr. Pandey B.K.Sahai Sadar Hospital, Sasaram. He has stated that on the basis of medical examination possibility of attempt to rape cannot be ruled out and according to opinion of Medical Board, she was about three years of age. His evidence also shows that no spermatozoa either alive or dead was found. This witness has also been cross examined and in his cross



examination he has categorically stated in paragraph-6 that on the basis of clinical examination and pathological test of the victim there is no possibility of rape. However, he has further stated in his cross examination that inflammation on her private part may be caused by pressure of any type on it. However, since hymen was intact and tip of little finger cannot be introduced into vagina, so there is no possibility of rape. He, however, has stated that there is possibility of attempt of rape.

13. P.W.7 is the Investigating Officer of the case and he has taken over the investigation of the case and also recorded re-statement of informant, P.W.6 and he has proved carbon copy of production-cum-seizure list which was prepared in the same process as Ext.1/4. Thereafter he has recorded the evidence of different witnesses. His evidence further shows that he has sent the undergarments to the Forensic Science Laboratory after obtaining order of Chief Judicial Magistrate and after the medical report he has submitted charge-sheet in this case and his attention has been drawn towards the statements made by the witnesses before him then he stated that they had supported the occurrence.

14. Considering the discussions made above, it appears that in the present case prosecutrix has not been examined as she was aged about three years at the time of occurrence and it cannot be expected from a girl of three years to explain the occurrence as per the prosecution version. It further appears that except P.Ws. 5 and 6 all



other witnesses have been declared hostile as they have not supported the prosecution case. So far P.W.6 is concerned, there is nothing on record to discard his evidence both in chief and cross examination. However, it appears from perusal of the record that though in the FIR he has stated about the penetration by the appellant inside the private part of the victim but in his examination in chief he has stated about attempt of commission of rape only. It further appears from his cross examination that when he entered inside the room he saw the appellant lying over the body of victim and his evidence further shows that both were in naked condition. His evidence also discloses that at the time of occurrence there was no cloth and undergarments on the body of victim and when they were taken out of room, they were provided with clothes. His evidence shows that he is the only an eye-witness of the occurrence. P.W.5, who is mother of the victim, has also supported the prosecution version in her evidence in chief. However, from her cross examination it appears that she is not an eye-witness but she has stated that when she went inside the room, they both were in naked condition and then both the victim and appellant came out and at that time they were provided clothes. From all these, it can be concluded that appellant carried the victim girl aged about 3 years in the room, removed the undergarments of victim girl and also became naked. He further tried to ventilate the girl and caught red-handed.

15. Defence has come with a story of false implication



due to some dispute but except suggestion given to the witness that appellant has falsely been implicated, there is nothing on the record and even in the statement under Section 313 Cr.P.C. the appellant has not stated any specific defence in this regard. Appellant is a person of other village and he was the relative-cum-villager of Mohan Soni, in whose Baithka the alleged occurrence was committed. Even as per suggestions given to the P.Ws. it has been suggested that there was dispute in between Mohan Soni and informant (P.W.6) due to tying of goat and hence appellant being a relative of Mohan Soni has falsely been implicated. This defence did not inspire confidence and does not appear to be believable at all. If there was enmity between Mohan Soni and family members of the informant, why the appellant being relative of another village will be implicated. Furthermore, defence has not adduced any evidence to prove the reliability of defence version.

16. Contention of the defence is that appellant has falsely been implicated in this case as there is contradiction in the statement of P.W.5, the mother of the victim, and the evidence of P.W.6, the informant, as such, the evidence of P.W.6 cannot be believable. His evidence further discloses that appellant was lying over the body of victim for five minutes and pressed her body and he got them separated. Further it has been submitted that the evidence of Doctor has ruled out any possibility of rape and according to Doctor at best it is a case of attempt to commit rape.



17. No doubt, as stated above, there is contradiction in the statement of P.W.5 and she does not appear to be an eye-witness to the actual occurrence. So far P.W.6 is concerned, there is categorical evidence that he saw the appellant lying over the body of victim and committing rape and he has also stated that appellant was lying over the body of victim for five minutes and he got them separated. There are some discrepancies in the statements of both P.W.5 and P.W.6 as regards occurrence, but they are not sufficient enough to brush aside the whole prosecution case. Evidence of P.W.6 shows that he caught hold the appellant and evidence of P.W.5 shows that she saw the victim and appellant just after the occurrence and thereafter both of them were taken to police station. Apart from that, the Doctor has ruled out the possibility of rape on the ground that it was not possible to enter even tip of little finger inside her private part and he has found only inflammation on her private part. However, Doctor has stated that possibility of attempt of rape cannot be ruled out.

18. No doubt, for constituting of offence of commission of rape it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen and partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape. However, in the present case, prosecutrix being a minor girl aged about three years has not come forward to depose in this case. However, P.W.6 has stated about the commission of rape and stated in



the FIR about the penetration but in his evidence in court he has not stated about penetration, rather his evidence discloses that both the appellant and victim were in naked condition at that time and appellant was lying over the body of victim and the evidence of Doctor only shows about inflammation on her private part.

19. In this case, appellant was convicted under Section 376 IPC. However, after coming into force the amendment of Section 376, **Section 376(2)(f)** was introduced by Criminal Law (Amendment) Act, 1983, which provides for **commission of rape on a woman when she is under twelve years of age**, the learned court below has not considered this aspect of the matter. However, considering the discussions made above, it appears that at best it is a case under Sections 376(2)(f)/511 IPC.

20. So far Section 376(2)(f) IPC is concerned, minimum sentence as provided therein is 10 years imprisonment but in the present case from the findings made above it appears to be a case under Section 376(2)(f)/511 IPC. Section 511 IPC reads as follows :

“S. 511.Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.”

21. In the present case, appellant was aged 21 years when



he was examined under Section 313 Cr.P.C. on 26.4.2012 and further it appears that last seven years he is facing trial and he is in custody for about seven years four months and prosecution has not brought on record any past criminal antecedent of the appellant.

22. Considering the discussions made above and also considering the young age of the appellant and the fact that he has remained in custody for about seven years four months, to my opinion, it would be reasonable and sufficient that conviction of the appellant be modified under Section 376(2)(f)/511 IPC and his sentence be modified to the period already undergone. However, sentence of fine shall remain intact and in default of payment of fine, he has to undergo further sentence of R.I. for six months.

23. Accordingly, with the modification in the order of conviction and sentence to the extent indicated above, this appeal is disposed of.

(Vinod Kumar Sinha, J)

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