

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.129 of 2013

Arising Out of PS.Case No. -53 Year- 2011 Thana -PRANPUR District- Katihar

Sanjay Choure, son of Late Sanjhla Choure, resident of village Ramanikol, P.S.
Pranpur, District Katihar

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance:

For the Appellant/s : Mr. Awdhesh Kumar Mishra
Mr. Anand Kumar Mishra
For the State Mr. S.N. Prasad, APP

CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
And
HONOURABLE MR. JUSTICE SANJAY KUMAR
CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)
Date: 16-02-2017

The sole appellant has been convicted by the learned Ad hoc Additional Sessions Judge-II, Katihar under section 376 (2) (f) IPC vide judgment of conviction dated 16.01.2013 and under order of sentence dated 19.01.2013 directed to undergo R.I. for life and to pay the fine of Rs. 10,000/- and in default of payment thereof to undergo further imprisonment of six months. He has also been held guilty under section 450 IPC and sentenced to undergo R.I. for 10 years and to pay a fine of Rs. 5000/- and in default of payment thereof to undergo further imprisonment for a period of 03 months. Both the sentences have been ordered to run concurrently.

2. The case of the prosecution, as set out in the Fardbeyan (Ext. 2) lodged by the prosecutrix (P.W.6) recorded on 10.04.2011 at 2.45 P.M. at Sadar Hospital, Katihar by Ram Ganesh Yadav, the S.I. of Katihar Town P.S., in brief, is that on 09.04.2011 at about 11 hours midnight when the mother of the prosecutrix was away from the house in connection with the threshing of wheat



and the prosecutrix was sleeping in her house with her younger sister, the appellant intruded into the house and after stripping her of the undergarment forcibly committed rape on her. She started weeping and raised a cry whereupon the appellant fled from the house. Within half an hour, the mother (P.W.5) of the prosecutrix arrived home to whom she narrated the entire incident. The mother went to the villagers and narrated the incident to them. The mother and her brother brought the prosecutrix to the Sadar Hospital, Katihar next morning where her Fardbeyan was recorded which gave rise to Pranpur P.S. Case No. 53 of 2011. The registration of the case ignited the investigation.

3. In course of investigation, the accused surrendered in court on 21.06.2011. The victim was medically examined by Dr. Jyoti Saha (P.W.4) who was posted at the said hospital as the Medical Officer. She submitted the medical report (Ext.1). Upon conclusion of investigation, the police submitted the charge-sheet on 21.07.2011 whereafter cognizance of the offence was taken and vide order dated 10.12.2011 the case was committed to the court of sessions which gave rise to S.T. No. 46 of 2012 subsequently. The case was transferred to the file of the learned trial Judge where charges were framed and explained/read over to the appellant to which he pleaded not guilty and claimed a trial. The defence of the accused is complete denial of the allegation and his false implication in the case at the instance of the Pradhan of the village.

4. In order to prove the charges, the prosecution examined 09 witnesses. The defence filed few documents Exts. A and B. Ext. B is the copy of the complaint whereas Ext. A is the order-sheet of the court on the said complaint. Upon conclusion of the evidence, his statement was recorded under section 313 Cr. P.C. wherein the appellant again denied all the allegations as false and concocted. He claimed his false implication owing to the dispute of the village



Pradhan Kurhiya Besara. Using the prosecutrix the Pradhan got the case manufactured/fabricated against him.

5. On perusal of the evidence on record it is seen that Ramanikol is a small hamlet located in one of the remotest districts of Bihar which is inhabited by the poor tribal people. The picture of the house in which the prosecutrix was living is painted through the evidence of P.Ws 5 & 6. It is a hut of which the walls are made of 'Thatthi'. There is no door. A Dhadhi (a temporary shield made of bamboos or Thatthi) is used as door of the hut. It is further seen that the father of the prosecutrix was not living with them. He was earning outside the State. The prosecutrix has four more sisters. The eldest one, according to the prosecution case, had accompanied the mother in connection with her earning as an agricultural labour. The prosecutrix is the second daughter who was inside the hut with her small sisters when the occurrence was committed.

6. Out of 09 prosecution witnesses, P.W. 1 Dular Murmu, P.W. 2 Tala Kuri Kishku and P.W.3 Marang Mai Hembram have been declared hostile. For this reason, the counsel for the appellant has not referred to their evidence. P.W.4, Dr. Jyoti Saha has come forward to depose in support of her medical report (Ext.1). As per her evidence on 10.04.2011 she was posted at Sadar Hospital, Katihar as a Medical Officer. She examined the prosecutrix on the same day at 9.30 P.M. who was admitted in the children's ward of the hospital and found the followings:-

“(i) About rape- No mark of injury on her body.

(ii) Examination of private Part- Injury present around her private part. Labia majora torn at upper and lower angle upper just above urethra. Labia majora torn, and lower just below parietal part. Hymen intact. Swab from the area injured near vaginal area taken and sent for pathological Examination. No spermatozoa found, according to Pathologist Dr. R. Suman. Hence I can say that I can not deny from the attempt of rape which can be



confirmed by other circumstantial evidence.”

7. P.W. 5 is the mother of the victim whereas P.W. 6 is the prosecutrix herself. P.W. 7 Kanhu Hansda is the father of the victim who returned from Delhi and was narrated the incident. P.W. 8 Proorna Marandi is the Investigating Officer(I.O.) of the case. P.W. 9 Takai Murmu is a close relative (maternal aunt) of the prosecutrix who resides close to the house of the informant. She is the one who soon arrived at the place of occurrence on hearing the cry of the prosecutrix.

8. We have heard Mr. Awdhesh Kumar Mishra for the appellant and Mr. S. N. Prasad, APP for the State.

9. Learned counsel for the appellant has submitted that the prosecution suffers from diverse deficiencies. The evidence produced at the trial does not conclusively prove the guilt of the appellant/accused. It was not expected of the prosecutrix to identify the appellant or the culprits at the dead of night when there was no sufficient light. Undergarment of the prosecutrix was not sent for chemical analysis. The doctor did not firmly opine that it was a case of commission of rape. He also submitted that the hut having no door, the offence under section 450 IPC is not made out.

10. In contra, learned APP supported the impugned judgment. It is submitted that the victim, being a minor girl, would not normally tell a lie. The evidence of the rape victim is entitled to special consideration. She is not an accomplice. It would be unfair in the case like this to look for corroboration from the independent source(s). The discrepancies in evidence are minor in nature. If the entire evidence adduced at the trial are read conjunctively they prove beyond reasonable doubts the guilt of the appellant.



11. In the light of the submissions of the parties, we shall now examine the relevant evidence to find out whether the prosecution has been able to prove the charges beyond the periphery of reasonable doubts. Before we do so, it is noted that section 376(2) (f) is invoked in the case as the evidence on record particularly that of the father of the prosecutrix (P.W.7) demonstrates that the appellant is distantly related to him.

12. P.W. 6 being a minor girl was put few questions by the court to gauge/assess her understanding and thereafter she was permitted to be examined. In her evidence, she has supported the case as spelt out by her in the Fardbeyan. She stated that she was sleeping in her hut along with her 03 small sisters when the appellant forced himself into the hut and committed rape on her which caused bleeding from her private part. She started weeping and raised a cry whereafter the appellant left the hut. Within few minutes her mother came to the house to whom she narrated her nightmarish experience. In the morning she was taken to the hospital by her mother and her own Mama Mangal Hembrum (husband of P.W.9) where she was admitted to children's ward of the hospital. The police arrived there and recorded her Fardbeyan. She identified her signature (Ext.2) on the Fardbeyan. Thereafter she was sent for medical examination. In the cross-examination she has vividly described the hut she was living in during the relevant time. In the cross-examination she states that a Dhibri (lamp) was burning in the hut. We further find from her evidence that during the relevant time she was studying in a government school. P.W. 9 in her deposition has stated that at about midnight on the relevant date she heard the cry of the prosecutrix and went to her hut and enquired from her whereafter the prosecutrix narrated to her the entire manner in which the appellant had committed rape on her and fled away. The prosecutrix was found sleeping on Kaccha floor of the



hut. Soon the mother of the prosecutrix and others arrived. The following morning she was taken to the hospital. She stayed at the hut of the prosecutrix for sometime and when the mother and others arrived she returned home.

13. P.W.5 is the mother of the victim. According to the prosecution case, she along with her eldest daughter had gone to work (threshing of wheat). The prosecutrix was alone in the hut along with her other minor sisters. When she arrived at the house close to midnight she was narrated the incident which occurred with the prosecutrix. Her other daughter Sonamani Hansda also narrated the incident and named Sanjay Choure (appellant) as the culprit/tormentor. She could see the blood oozing out from her private part. The Ghaghra she was wearing had stains of blood. On hulla, the people around her arrived to whom she disclosed about the occurrence. At the advice of the people, she carried the prosecutrix the following morning to the hospital where she was medically examined and FIR was recorded. As noticed earlier, she too described the structure of her hut. Her statement was recorded by the police immediately after lodging of the case.

14. Having scanned the relevant evidence, it is pertinent to first emphasize the evidentiary value of the victim of sex offence. The Hon'ble Supreme Court on numerous occasions has considered the same. Several decades ago, in **Rameshwar vs. The State of Rajasthan (AIR 1952 SC 54)** the Apex Court opined as under:-

“The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge.”



15. Considering the above proposition of law, the Apex Court in **Dinesh vs. State of Rajasthan [(2006) (2) PLJR SC 2008]**, held that the victim of sex offence is entitled to great weight. A girl who is raped is not an accomplice. In such a case corroboration is not a sine qua non for conviction.

16. We shall examine the submissions made on behalf of the appellant. Firstly, it has been submitted that the medical report (Ext. 1) does not convincingly prove that the victim was sexually assaulted. Section 375 IPC defines rape. Explanation thereof clearly provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Much emphasis has been placed on the finding of the doctor on examination of the private part of the victim that the hymen was found intact. It has been held that the same does not rule out rape in case of a child. If there was no semen found/detected that would only indicate that there was no ejaculation. Reference in this regard be made to the case of **Aman Kumar v. State of Haryana (AIR 2004 SC 1497)** wherein it has been emphasized that penetration is the sine qua non for an offence of rape. In the celebrated book titled 'Medical Jurisprudence and Toxicology' authored by Dr. K.S. Narayana Reddy, the following has been observed with regard to rape on children:-

“In young children there are few or no signs of general violence, for the child usually has no idea of what is happening and also incapable of resisting. The hymen is deeply situated, and as the vagina is very small, it is impossible for the penetration of the adult organ to take place. Usually, the penis is placed either within the vulva or between the thighs. As such, the hymen is usually intact and there may be little redness and tenderness of the vulva.”



17. Coming to the means of identification, we find from the evidence of the prosecutrix herself that a Dhibri (lamp) was burning inside the hut. That apart, the appellant was known to her from before. The victim had called her Mama. The father (P.W. 7) has clarified the relationship between him and the appellant. The appellant was a distant brother-in-law of P.W. 7 (father of the victim). Considering the above, there was no difficulty for the victim to identify the appellant who must be on visiting term with the family and thus was known to victim from before.

18. On a consideration of the evidence of the prosecutrix read with the evidence of her mother (P.W.5) we have no manner of doubt that on the relevant date and time the victim was subjected to sexual assault at the hands of the appellant.

19. The counsel for the appellant, referring to the testimony of I.O. (P.W.10), has submitted that in course of investigation the undergarment including the Ghaghari was not seized, got scientifically analyzed and produced at the trial. These lapses on the part of the I.O. are fatal blows to the prosecution, particularly when the victim has deposed that owing to the sexual assault on her blood had oozed out from her private part and her undergarment had blood stain marks. Non production of the undergarment as also the FSL report on those garments would not shake the evidence of the prosecutrix which finds support from the evidence of her mother as well. We have carefully gone through the evidence of the prosecutrix, her mother (P.W.5) and the aunt (P.W.9). They have consistently deposed that the blood had come out from her private part and her undergarment had blood stain marks. Why a girl of tender age will make an allegation like this at the cost of her dignity, honour and respect? A victim of sex offence, particularly a child victim, had serious stakes when such allegation



is made. There is nothing on record to show that the victim or her family had an evil design to fulfil against the appellant. In the statement under section 313 Cr. P.C., the appellant while pleading his complete innocence stated that at the behest of the village Pradhan he has been falsely implicated in this case. In support of the same, the defence has filed Exts. A and B. We do not find from those documents that the family of the prosecutrix was in any way involved in litigation with the appellant or his close family members. A plea raised in this regard but could not be proved by convincing/credible evidence would also be considered an adverse circumstance to the case of the defence.

20. The conviction of the appellant under section 450 IPC has also been challenged. Referring to the description of the hut which had no permanent door but a makeshift 'Dhadhi' used as the door, it has strenuously been urged that section 450 IPC would not be attracted. House trespass is defined under section 442 IPC. It has a wide connotation. Anybody committing a criminal trespass by entering into any building, tent and vessel, used as a human dwelling, would constitute an offence. The evidence on record is conclusive that it was the hut having 'Thathi' walls on three sides and a 'Dhadhi' used as shield of the hut which was used by the family of the prosecutrix for their dwelling purpose. That is enough to brush aside the said contention of the appellant.

21. In the light of the discussions made above, we are of the considered view that the prosecution has been able to prove the charges against the appellant by reliable and convincing evidence to the exclusion of any reasonable doubt. We do not find any illegality in the conclusions of guilt recorded by the learned trial court against the appellant.

22. It has been submitted that the appellant was in his youthful days when the occurrence was committed. Referring to the evidence of P.W.9, it is submitted



that he is married having children. Our law being a blend of reformation and deterrence, the extreme punishment awarded on him under Section 376 (2)(f) is excessive. There is every likelihood of the appellant after suffering the sentence to reestablish himself in the society and contribute productively. On the other hand, it has been submitted on behalf of the prosecution that such offence was committed on a young growing child who was then only 8-9 years old. It must have a traumatic effect on her which will last for remainder part of her life. Having considered the submission of the parties, in our view, the ends of justice shall be served if the sentence passed against the appellant by the learned trial court is converted from R.I. for life to R.I. for 12 years, besides imposition of fine, as directed under the order of sentence passed by the learned trial court. In the event of realization of fine, the same shall be made over to the victim. His conviction and sentence under Section 450 I.P.C. is maintained.

23. With the aforesaid modification in sentence only, the appeal is dismissed.

(Kishore Kumar Mandal, J)

I agree

(Sanjay Kumar, J)

HR/-

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