

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.469 of 2014

Arising Out of PS.Case No. -21 Year- 2012 Thana -MAHILA P.S. District- BANKA

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1. Sitaram Raut S/o Late Harish Raut, Resident of village- Devda, P.S.- Banka,
District- Banka

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sunil Prasad, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

Date: -10-2017

This appeal is directed against the judgment dated 17.07.2014 and order of sentence dated 19.07.2014, passed by Sri Akhilanand Dubey, Adhoc Additional Sessions Judge, -IV, Banka, in Session Trial No. 110/13, by which he has convicted the appellant under section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for ten years with a fine of Rs. 2,000 and in default of the payment of fine, further R.I. for two months.

2. Brief facts necessary for adjudication of the present appeal are that the informant – Bindu Devi in her written statement filed before the Banka, police had stated that she was the step mother of victim girl –Fudo Kumari, who was a mentally challenged girl and the appellant often used to secretly come with her in house and used to



make physical relationship by pressing her mouth. It has also been alleged that her nephew Nikku Jha and one Beauty Kumari had seen the appellant making physical relationship with the victim girl in a room of temple and were caught and on being asked, appellant denied that he has done anything wrong with the victim girl and the boy fetus, which was in the womb of victim girl was not his. Thereafter, they asked the victim girl, who impliedly pointed out the finger at the appellant. It has further been stated that after that a panchayati was held and the informant was asked to put her signature on a blank paper but she preferred to report the matter to the police.

3. On the basis of aforesaid written statement, Banka Mahila P.S. Case No. 21/12 was registered against the appellant under Section 376 of the Indian Penal Code and the police after investigation submitted charge –sheet against the appellant under Section 376 of the Indian Penal Code. Cognizance of the offence was taken and, thereafter, the case was committed to the court of sessions, which ultimately traveled to the file of Sri Akhilanand Dubey, learned Adhoc Additional Sessions Judge, -IV, Banka, for trial and disposal.

4. Charges were framed under Section 376 of Indian Penal Code against the appellant.

5. In this case, altogether, seven witnesses have been examined from the side of the prosecution and they are: P.W. 1- Bindu Devi



(informant and step mother of the victim), P.W. 2- Fudo Kumari (victim girl), P.W. 3- Dr. Indu Bala Prasad, who conducted medical examination on the victim girl, P.W. 4- Laxmi Devi, P.W. 5 – Nikku Jha, P.W. 6, Chandana Kumari (Investigating Officer) and P.W. 7- N.K. Priyadarshi, (Judicial Magistrate, Banka). Apart from the above, following documents have been admitted into evidence and marked as ; Ext. 1 – requisition for medical examination of Fudo Kumari, Ext. 2- supplementary requisition for medical examination of Fudo Kumari, Ext. 3- written statement of informant, Ext. 4 –formal F.I.R and Ext. 5- statement of Fudo Kumari, recorded under Section 164 of Cr.P.C.

6. From the defence side no evidence either oral or documentary has been adduced and it appears from the suggestion given to the witnesses and his statement under Section 313 Cr.P.C, the defence of the appellant is of false implication at the instance of informant and complete denial of the occurrence.

7. Learned Trial Court after conclusion of trial convicted the appellant under Section 376 Indian Penal Code and sentenced him as stated above.

8. Aggrieved by the said judgment, the appellant preferred the present appeal.

9. Submission of learned counsel for the appellant is that P.W. -2,



who is the victim girl Phudo Kumari is mentally not sound and the trial court has also not found this witness competent to depose, giving a finding that she is not a competent witness under Section 118 of the Indian Evidence Act. Further submission is that from perusal of entire evidence, it will appear that there is no eye-witness of the occurrence and though informant P.W. -1, has lodged a case against the appellant but it appears that she is not the eye witness of the occurrence and she had deposed on the basis of hear say evidence of Beauty Kumari and Nikku Jha, however, the Beauty Kumari has not been examined in this case as she died during the pendency of the case and P.W. 5 – Nikku Jha has not supported the prosecution case as he has stated that he has not informed the police about the appellant entering inside the “*Kothari*” (room) and making physical relationship with the victim girl. It has also been submitted that so far other witnesses are concerned, they are not the eye-witness of the occurrence. Further submission is that so far statement of girl under Section 164 Cr.P.C. is concerned; it appears that the same has been recorded by the Judicial Magistrate on the basis of what he has gathered from the gesture and sign of the victim girl though he is not an expert to understand the sign language. It has also been argued that medical report does not support the prosecution case of commission of rape recently on victim – Phudo Kumari rather it suggests that the victim



was carrying a pregnancy of 6 ½ months at the time of medical examination and these facts clearly shows that once she was found pregnant, appellant has been made scapegoat by the informant as it cannot be believed that P.W 1 was not knowing about the pregnancy of the victim girl at the time of lodging F.I.R, though she was carrying pregnancy of six and half months. On the basis of above, learned counsel for the appellant has submitted that the judgment of the Trial Court convicting the appellant under Section 376 suffers from serious infirmities and is not sustainable in the eyes of law.

10. Learned counsel for the State ,on the other hand, has submitted that statement of victim girl under Section 164 Cr.P.C., which has been recorded by Judicial Magistrate, supports the allegation of commission of rape by the appellant though it was shown on the basis of gestures and sign but the court is quite competent to record such finding. However, he has also conceded the fact that during the course of recording the evidence of P.W. -2, (victim girl), learned Trial Court has given a finding that this witness is not competent to answer questions and she could not been cross-examined. It has also been contended by learned counsel for the State that there are other evidences also available on record to prove the guilt of the appellant, as such, there is no infirmity in the impugned judgment, convicting



the appellant under Section 376 of the Indian Penal Code.

11. From perusal of the evidence of informant – P.W. 1, it appears that according to her, P.W. 5, Nikku Jha and Beauty Kumari had informed her on phone that they had seen the appellant committing rape on the victim girl and also stated that victim girl was carrying a pregnancy of 6 to 6 ½ months and a panchayati was also held for that purpose. Her evidence also shows that the report was written in the handwriting of P.W. 5 – Nikku Jha. However her evidence as well as her cross-examination, clearly shows that she is not the eye-witness of the occurrence, rather she appears to be hearsay witness. Her evidence in chief also shows that she has not narrated the prosecution story in so many words in her chief, rather she has stated that she got the report written by P.W. 5 – Nikku Jha.

12. P.W. 2 is the victim girl- Phudo Kumari and from perusal of her evidence, it appears that she is unable to express anything. Though trial court has recorded her evidence in part, on the basis of her gesture and sign, that this appellant tried to strangle and undress her. Thereafter, it is recorded by the Trial Court that in spite of best efforts she could not answer the queries of the court, as to what else was done by the appellant. The Trial Court has also recorded a finding that this witness is unable to depose further in the court and her cross-



examination is not possible, hence discharged her.

13. P.W. 5, Nikku Jha has not supported the case of prosecution and has not stated anything to show that he is the eye witness of the commission of rape on the victim girl by the appellant rather he has stated that he has not stated so before the police. His evidence further shows that he came to know about the same from Beauty Kumari and Beauty Kumari has not been examined in this case and the said Beauty Kumari had died during the pendency of the case.

14. P.W. 4, is one Laxmi Devi, She has also not supported the case of prosecution and has been declared hostile.

15. Apart from the above, there is evidence of Investigating Officer (P.W. 5) though he has stated about narration of Beauty Kumari and other witnesses with regard to commission of rape on the victim girl and also stated that victim girl by sign and gesture has stated about the same but it is well established that the evidence of I.O. as well as statement of girl under Section 164 Cr.P.C. can at best be used for the purpose of corroboration and that cannot be used as substantive piece of evidence.

16. Apart from him, Doctor (P.W. 3) has also been examined in this case and she has also stated in her evidence that no sign of recent rape was found on the victim girl and her hymen was found ruptured



from before and further the victim girl was carrying a pregnancy of 6 to 6 ½ half months. The evidence of doctor further shows that the victim girl was suffering from unsoundness of mind or brain , which is psychosis. Further stated that psychosis is vague term and it includes many other disorders and the victim girl was not in a position to express such type of act.

17. From the discussions of evidences, it appears that the learned Trial Court after assessing the sign and gestures of the victim girl, came to a conclusion that victim girl is not competent to depose in the court under Section 118 of the Indian Evidence Act and further there is absolutely no substantive evidence has been brought by the prosecution side to prove its case of commission of rape on the victim girl except her part evidence but she has been discharged without cross-examination , hence defence has not got an opportunity to taste as to whether those evidence is unimpeachable or not . On the other hand the doctor, who conducted examination of the victim girl, has also not found any sign of recent rape on the victim girl rather on medical examination, it was revealed that the victim girl was carrying a pregnancy of six and half months. Though it is as well settled principle of law that even if the medical report does not support the allegation of rape, conviction can be made only on the sole testimony of the prosecutrix but in the present as discussed above, the victim is a



mentally challenged girl and was not able to depose in the court and defence has also not got opportunity to cross-examine her to test the credibility of evidence of victim girl

18. It further appears that learned trial court has not tried to get the assistance of any family members or any expert in recording her evidence.

19. Further the witnesses, who have supported the case of prosecution with regard to commission of rape on the victim girl by the appellant are only hearsay evidence. Though her statement u/s 164 Cr. P. C. has been brought on record but that is of no value in the eye of law. Learned trial court in spite to come to finding but in absence of any credible substantive piece of evidence, she has not been expressed herself and discharged her without cross-examination and there is no other substantive piece of evidence available on record convicted the appellant.

20. No doubt, commission of rape on a mentally challenged is a very insensitive, inhuman and barbaric act of a polluted mind and that has to be dealt with keeping in mind the helplessness of the victim, who is often found unable to disclose the true facts but it has also to be kept in mind, while deciding the facts as in the present case that others may also not been allowed to take advantage of mental condition of the victim for false implication of any particular person.



21. This Court might have considered in remanding the case back to the trial court for recording the evidence of victim girl with the assistance of any expert, afresh for *de novo* trial, however occurrence is of the year of 2012 and appellant is in custody for five years. Moreover it seems, no useful purpose will be served after recording her evidence after five years of occurrence when she is mentally unsound and unable to express herself.

22. Considering the entire discussions made above, it appears that the prosecution has failed to prove its charge against the appellant under Section 376 of the Indian Penal Code.

23. Accordingly, this appeal is allowed and impugned Judgment and order of sentence passed by Sri Akhilanand Dubey, learned Adhoc Additional Sessions Judge, -IV, Banka, in Session Trial No. 110/13 is, hereby, set aside. As appellant is in custody, he is directed to be released forthwith, if not required in connection with any other case.

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	AFR
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