

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.125 of 2015**

Arising Out of PS.Case No. -163 Year- 2006 Thana -SAHEBPUR KAMAL District- BEGUSARAI

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Kamdeo Jha, Son of Late Abhiram Jha, resident of Village - Sanha Purbari Tola,
Police Station - Sahebpur Kamal, District - Begusarai.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ashwani Kumar Sinha-Advocate
Mr. Dinkar Kumar-Advocate

For the Respondent/s : Mr. Z. Hoda-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 04-10-2017

Challenged in this appeal is judgment of conviction dated 31.01.2015 and order of sentence dated 06.02.2015 passed by the 4th Additional Sessions Judge, Begusarai in Sessions Trial No.19 of 2008, convicting the appellant, Kamdeo Jha for an offence punishable under Section 376 of the I.P.C. and sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.10,000/-, in default thereof, to undergo S.I. for two months additionally.

2. Name withheld (PW-3) gave her fard-bayan on 25.12.2006 at about 4.00 p.m. at Bajrang Chowk alleging inter alia that she had come to her Nani's place about 10 days ago along with her mother. During her stay, she developed headache. Even after taking some medicine, she did not get relief. Then, her maternal



grandmother had said that there happens to be one Baba, who by his occultism gets the ailment cured, whereupon she along with her maternal grandmother has come to the place of Kamdeo Jha, who directing her maternal grandmother to sit outside, took her inside hut. When she gone inside the hut, he closed the door and then, directed her to stand straight. Then thereafter, he began to press her both legs with both his hands and then, proceeded in ascending manner. When his hands came over waist, he suddenly opened string of her salwar as a result of which, she became naked, she tried to cover her body. During course thereof, she was forced to lie down, Kamdeo Jha gagged her mouth with one hand and then, pounced upon her and raped. After releasing, she came outside and disclosed the event to her maternal grandmother, who began to raise alarm attracting passers by as well as persons having their presence in surrounding. As soon as people began to assemble, Kamdeo Jha slipped there from.

3. On the basis of the aforesaid fard-bayan, Sahebpurkamal P. S. Case No.163 of 2006 was registered under Section 376 I.P.C. followed with an investigation and then, concluding the same, chargesheet was submitted facilitating the trial which concluded in a manner, subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the



Cr.P.C. is that of complete denial. It has also been suggested that prosecution party became puppet at the hands of local Mukhiya Ashok Kumar at whose instance this false case has been filed. However, neither any ocular nor documentary evidence has been adduced on his behalf.

5. In order to substantiate its case, prosecution had examined altogether five PWs, out of whom, PW-1 Md. Khurshid, PW-2 Bhuliya Khatoon, mother of the victim, PW-3, victim, PW-4 Khairon Khatoon, maternal grandmother of the victim and PW-5 Durgesh Ram. Side by side, had also exhibited viz. Exhibit-1 fard-bayan, Exhibit-2 formal F.I.R., Exhibit-3 endorsement over the fard-bayan.

6. The learned counsel for the appellant while assailing the judgment of conviction and sentence has submitted that the finding recorded by the learned lower Court is not at all substantiated by the material available on the record. In order to buttress such plea, it has been submitted that doctor has not been examined and that being so, the physical condition of the victim has not come up. It has further been submitted that evidence of doctor was very much crucial in the facts and circumstances of the case as, at an initial stage the victim had alleged that she was raped while during course of evidence, she had shifted there from and alleged that she



was subjected to sodomy. Furthermore, it has also been submitted that PW-5, the I.O. during course of inspection of the P.O. had not found anything, which could have substantiated the allegation made by the victim.

7. Now, coming to evidence of remaining witnesses, it has been submitted that PW-1 did not claim to be an eye witness to occurrence rather he had stated that from newspaper he came to know regarding the occurrence. PW-2, mother of the victim though claimed identification of the appellant, but from her evidence, it is crystal clear that she would not have identified as, she had not visited nor had seen the appellant since before. Furthermore, her evidence speaks with regard to introduction of new facts, which never been corroborated by the alleged victim as well as her maternal grandmother that Jabbir, brother of victim also accompanied them. The source, in the aforesaid background, became doubtful so, she cannot be even a hearsay witness. So far evidence of PW-4, maternal grandmother is concerned, during course of her evidence, she had not claimed identification of the appellant in dock and so, in totality of the event the case of the prosecution is found completely demolished. That being so, the finding recorded by the learned lower Court is not at all found supported by the testimony of witnesses whereupon is fit to be set aside.



8. On the other hand, learned Additional Public Prosecutor though endorsed the view having been advanced at the end of the appellant, but submitted that so far event of molestation is concerned, victim happens to be consistent and during course of cross-examination since she stood firm. In the facts and circumstances of the case, though there happens to be inconsistency in the evidence of the PW-3, victim herself, whether she was raped or sodomized, but so far molestation is concerned, she had categorically stated and so, Section 354 of the I.P.C. is found very much applicable and for that, the conviction on that score needs modification.

9. Gone through the L.C. Record. From the L.C. Record, it is apparent that doctor has not been examined. It is also evident from the evidence of PW-3 (victim) that Salwar which contains blood stain as well as other kind of spot was taken away by the police, but PW-5, the I.O. had not substantiated the same. It is further evident from the evidence of PW-5, I.O. that during course of inspection of the P.O., he had not found anything objectionable which could have given additional assurance with regard to commission of the occurrence at the alleged P.O.

10. Now, coming to the evidence of the remaining witnesses, learned counsel for the appellant has rightly submitted that PW-1 came to know through newspaper after so many days of the



alleged occurrence, PW-2 mother of the victim came to know from the disclosure having been made by the victim, when she was taken to that place by her son Jabbir, which neither been corroborated by PW-3, victim herself nor by PW-4, Khairoon Khatoon, the maternal grandmother. Apart from this, age of Jabbir has not been disclosed nor the aforesaid Jabbir examined in this case. PW-4, Khairoon Khatoon had deposed that she along with victim had gone to the place of Kamdeo Jha, she sat outside while Kamdeo Jha took victim inside hut. After coming out from hut, her daughter's daughter disclosed that she has been raped, but failed to identify Kamdeo in the dock and so, substantial evidence relating to identification gone up.

11. Now, coming to the evidence of victim (PW-3). She remained intact so far other activity of the appellant is concerned. However, she shifted herself from initial version whereunder she had disclosed that she was raped by Kamdeo. During course of evidence, she had deposed that she was sodomized. No charge was amended on that very score. At the present moment, though to some extent, Section 386 of the Cr.P.C. does permit, but while exercising such power, it is apparent that basically these two offences require two different kind of defence which, if allowed, will cause prejudice to the appellant. So far other kind of allegations are concerned, there happens to be consistent evidence of the victim that she was molested



and on that very score, during course of cross-examination had detailed the activity having adopted by the appellant under Para-23, 36. However, in Para-29, she had disclosed with regard to tying of her hands and legs, whereupon there was injury over her hand and leg, but the PW-5, I.O. had not corroborated the same, as no sign was found over person of victim.

12. Falsus in uno falsus in omnibus is not at all applicable and on account thereof, part evidence of a witness, which is found unreliable is to be rejected. Simultaneously, the remaining part which inspires confidence, reliability, credibility is to be accepted. After all, the function of the Court is separate the grain from chaff that means to say, while appreciating the evidence of a witness, the Court is under obligation to separate the truthfulness from falsehood. Applying the aforesaid principle when the evidence of PW-3 has been gone through, it is apparent that on account of being novice, she could not perceive the actual event which she was confronted and on account thereof, there happens to be inconsistency, but so far molestation is concerned, she stood firm whereupon the conviction having recorded under Section 376 of the I.P.C. is modified to its lesser offence under Section 354 of the I.P.C. So far sentence is concerned, the occurrence is of the Year 2006, appellant remained under custody for a year whereupon reducing the sentence as already



undergone maintaining the sentence of fine in default thereof, to undergo S.I. for two months. Appellant is on bail, which is extended for eight weeks, during midst thereof, the amount of fine should be deposited failing which, the learned lower Court will be at liberty to proceed against the appellant in accordance with law. If fine amount is deposited, then in that event, half of the same should be handed over to the victim on proper identification within four weeks from the date of deposit and further, the learned lower Court will intimate the same.

13. With the aforesaid modification, instant appeal is partly allowed.

(Aditya Kumar Trivedi, J)

Vikash/-

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