

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.154 of 2015**

Arising Out of PS.Case No. -90 Year- 2005 Thana -GORAUL District- VAISHALI(HAJIPUR)

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Nagina Paswan, S/o Late Ram Jatan Paswan, R/o village - Baksama, P.S. Garaul
(Kathara O.P.), District – Vaishali.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mrs. Rina Sinha-Advocate

Miss N. K. Lata-Advocate

For the Respondent/s : Mr. Sujeet Kumar Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 22-12-2017

Appellant Nagina Paswan has been found guilty for an offence punishable under Section 376/511 of the I.P.C. and sentenced to undergo R.I. for seven years with a direction to set off against the period having already undergone during course of trial in terms of Section 428 of the Cr.P.C. vide judgment of conviction dated 12.02.2015 and order of sentence dated 19.02.2015 passed by the 3rd Additional Sessions Judge, Vaishali at Hajipur in Sessions Trial No.424 of 2006.

2. PW-4 Ritlal Paswan filed written report on 13.05.2005 disclosing therein that his handicapped daughter Rekha Kumari aged about 13 years while had gone to meet nature's call on 26.04.2005 at about 7.00 p.m. in a banana orchard, his co-villager Nagina Paswan caught hold her and was untying her paint with an



intention to commit rape. On an alarm raised by Rekha Kumari, Dinesh Paswan and Dev Sharan Paswan came seeing whom, Nagina Paswan escaped there from. Then thereafter, they both getting paint worn by Rekha Kumari brought up and intimated with regard to the occurrence. He, at that very moment proceeded to register a case, but villagers intervened, who suggested that accused be punished socially. However, Nagina Paswan is still absconding on account thereof, Panchayati could not be convened. Thereafter, the villagers have allowed him to launch a case, whereupon written report has been filed.

3. After registering Garaul P. S. Case No.90 of 2005, investigation commenced and after concluding the same, chargesheet was filed on the basis of which, trial commenced and 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. Furthermore, it has also been pleaded that accused as well as informant were employed at Kolkata in same Jute Mill and on account of exchange of money amongst them, they have developed strained relationship, whereupon instant case has been filed maliciously. However, neither ocular nor documentary evidence has been adduced on his behalf.

5. In order to substantiate its case, prosecution had



examined altogether nine PWs viz. PW-1 Jaglal Paswan, PW-2 Dinesh Paswan, PW-3 Rekha Kumari, PW-4 Ritlal Paswan, PW-5 Dev Sharan Paswan, PW-6 Jai Narayan Paswan, PW-7 Musafir Paswan, PW-8 Ram Krishna Singh and PW-9 Shiv Kumar as well as had also exhibited the documents viz. Exhibit-1, signature of informant over the written report, Exhibit-1/1, endorsement over the written report, Exhibit-1/2, registration order, Exhibit-2, formal F.I.R., Exhibit-3, case diary and Exhibit-4, chargesheet. As stated above, defence had not examined any DW nor exhibited any kind of document.

6. From the material available on the record, it is crystal clear that for an occurrence dated 26.04.2005, case has been instituted on 13.05.2005. Explanation has been offered in the written report itself and even at the end of PW-4 Ritlal Paswan (informant), during course of his evidence. It is further evident that informant as well as accused were employed in a same Jute Factory at Kolkata. Though, it has been suggested that they used to send money to their houses through each other and during course thereof, money has been digested by the informant. On demand, this case has been registered, but no positive, concrete evidence has been adduced at the end of the appellant to substantiate the same. Even presence of appellant in witness box on that very score was expected, which never materialized.



7. Now, coming to the quality of the evidence, it is apparent that PW-8 is the part I.O., who conducted earlier part of the investigation, inspected the place of occurrence, recorded statement of the witnesses and then thereafter, on account of his transfer handed over charge, whereupon PW-9 took up the rest formality by way of filing chargesheet. On account of lapse of such a long time, PW-8 during course of inspection could not be able to collect any sign with regard to commission of the occurrence at the place of occurrence.

8. PW-5, PW-6 and PW-7 have not supported the case of the prosecution and on account thereof, they were declared hostile. Now, coming to evidence of remaining witnesses that means to say, PW-1, PW-2, PW-3 and PW-4, it is apparent that PW-4 is the informant, who himself was not an eye witness to occurrence. Whatever been stated by the victim (PW-3) as well as PW-2 along with PW-5 (hostile) on that very basis, he had filed written report. PW-1 is his brother. His presence as an eye witness to occurrence has not been perceived. Though, he claimed, but his son Dinesh Paswan also claimed to arrive at the P.O. along with Dev Sharan Paswan (PW-5) hearing alarm of victim (PW-3) have not shown presence of PW-1. Furthermore, PW-1 in his cross-examination at Para-6 had stated that he, during course of his statement before police, had stated that he came to know about the occurrence from the victim. That being so, his status as an eye witness goes away.



9. Before coming to evidence of PW-2, first of all evidence of victim (PW-3) is to be taken note of. PW-3 had deposed that while she was going to meet nature's call on the alleged date and time of occurrence, accused Nagina Paswan caught hold her, undressed her and tried to commit rape, whereupon she raised alarm. His brother Dinesh Paswan and uncle came, whereupon, he fled away. His brother carried her to her house, identified the accused. During cross-examination, it is evident that she was not at all tested on the factum of occurrence. That being so, it remained unshaken.

10. PW-2 had reiterated the same version by way of deposing that while he was returning from his field, heard alarm of Rakha, whereupon he along with Dev Sharan Paswan rushed and had seen accused attempting to commit rape upon Rekha. Seeing them, accused fled away. At that very time, Rekha was naked. They lifted her, dressed her and then, took her to her house. In Para-3, there happens to be contradiction, but that has got no relevancy in the background of the fact that during cross-examination of PW-8, his attention was not drawn towards the same. So far occurrence is concerned, it is evident from Para-8 of his deposition that at the time of occurrence, sun-set had already effected. On hearing alarm when he came near the banana orchard, at that very moment, accused was fleeing. He had already covered a distance of 200 yards. He had tried to apprehend Nagina Paswan. He had talked with Rekha. Rekha



Kumari disclosed name of Nagina Paswan.

11. For commission of the occurrence, four stages have been recognized viz. A) intention, B) preparation, C) attempt, D) commission of the occurrence. Certain offences have been identified whereunder preparation itself is found punishable in the eye of law. Thus, with regard to remaining, an attempt is found punishable with an aid of Section 511 I.P.C. With regard to applicability of Section 511 of the I.P.C. is concerned, that is only attracted when there happens to be an attempt by means of positive action. Because of the fact that it happens to be an obligation on the part of the prosecution to substantiate its case beyond all reasonable doubt and that being so, the prosecution was under obligation whereunder some sort of activity would have been exposed at the end of the accused which could have suggested that the aforesaid activity was with intention to commit rape. From the evidence of the victim, it is evident that save and except deposing in vague term that accused had attempted to commit rape, no activity has been shown at the end of the prosecution in getting the offence committed. Consequent thereupon, the conviction and sentence recorded under Section 376/ 511 of the I.P.C. is not at all found justified. That being so, same is set aside. However, from the evidence of victim (PW-3) as well as PW-2, it is evident that victim was undressed at the end of the appellant and that being so, such kind of activity suggest outraging modesty of the victim (PW-3) and that



being so, appellant is found guilty for an offence punishable under Section 354 of the I.P.C. and is accordingly, held so. So far sentence is concerned, is accordingly reduced and is directed to undergo R.I. for one and half years as well as also to pay fine appertaining to Rs.15,000/-. In case of deposit of the fine amount, half of the amount will be paid to the victim and in default thereof, to undergo R.I. for nine months, additionally. Appellant is on bail, hence his bail bond is hereby cancelled with a direction to surrender before the learned lower Court within fortnight to serve out remaining part of sentence. In case, presence of appellant is not found, then in that circumstance, the learned lower Court will be at liberty to proceed against the appellant in accordance with law. The period already undergone will be set off in accordance with Section 428 of the Cr.P.C. In terms thereof, this appeal is partly allowed.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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