

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.47 of 2015

Arising Out of PS.Case No. -219 Year- 2012 Thana -MEERGANJ District- GOPALGANJ

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LAKSHMAN CHAUHAN @ LAXMAN CHAUHAN SON OF LATE
JAGARNATH CHAUHAN, RESIDENT OF VILLAGE - BIGAHI BARISHAL,
TOLA DIGHAPAR, P.S. - MIRGANJ, DISTRICT - GOPALGANJ.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Ranjeet Kuamr Pandey, Adv.
Mr. Ojaswee Kumar, Adv.
Mr. Radhe Shyam Kumar, Adv.
For the Respondent/s : Mr. Z. Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 17-07-2017

Sole appellant Lakshman Chauhan @ Laxman Chauhan
having been found guilty for an offence punishable under Section 376 IPC
and sentenced to undergo R.I. for ten years as well as to pay fine
appertaining to Rs.20,000/- and in default thereof, to undergo R.I. for two
years by the First Additional Sessions Judge, Gopalganj in Sessions Trial
No.57/2013, has challenged the same under present appeal.

2. Father of victim, namely, Ashok Chauhan (PW.5) filed
written report on 19-10-2012 disclosing therein that he was engaged in
manual work at Barka Digha while Sangeeta Devi and daughter Rubi
Kumari aged about 6-7 years remained at his house. In usual manner, his
daughter Rubi Kumari took she-goat towards brick-kiln of Rameshwar
Singh lying eastern-southern direction from his house for grazing where,



his co-villager Lakshman Chauhan aged about 55 years has also gone with his she-goat. The aforesaid Lakshman Chauhan allured his daughter, took her in a sugarcane field and committed rape. Wife of Kamlu Chauhan and Baleshwar Chauhan (PW.3, PW.4) have gone towards brick-kiln of Rameshwar Singh for cutting thatch found his daughter senseless lying over which, they done few exercise and after regaining sense on query, Rubi has disclosed that Laxman Baba has raped her. Then thereafter, both two women accompanied his daughter to his house and disclosed the event. His nephew Om Prakash Chauhan came to his place and informed whereupon he rushed to his house and found his daughter in awkward position who, on query has disclosed event. Thereafter, he along with the victim, wife and co-villager Pramod Chauhan and others came to the P.S.

3. After registration of Mirganj P.S. Case No.219/2012, the police took up investigation and found the allegation duly substantiated, submitted charge sheet. The offence being exclusively triable by the court of Session allowed the trial before the court of Sessions which ultimately concluded with a verdict of guilt and sentence.

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 informant, father of alleged victim had borrowed substantial amount from the appellant which, appellant was insisting upon to re-pay but as informant was not inclined to repay getting an opportunity on account of injury having over person of his daughter, victim misused by him by way of institution of instant case only to digest the amount. However neither oral nor documentary evidence on that very score been adduced on behalf of



appellant.

5. In order to substantiate its case, prosecution had examined altogether ten PWs out of whom PW.1 is Sangeeta Devi, PW.2 is Daroga Chauhan, PW.3 is Jagdamba Devi, PW.4 is Chanda Devi, PW.5 is Ashok Chauhan, PW.6 is Rubi Kumari, PW.7 is Balister Chauhan, PW.8 is Pramod Chauhan, PW.9 is Dr. Manju Kumari and PW.10 is Devendra Prasad Yadav.

6. Side- by-side had also exhibited Ext.1- Series-Signature of respective witnesses over seizure list, Ext.2-Injury report, Ext.3-Formal First Information Report Ext.4 Series- Seizure List, Ext.5-FSL report. As stated above, neither oral nor documentary evidence has been adduced on behalf of defence.

7. The learned counsel for the appellant while challenging the judgment of conviction and sentence impugned has raised manifold argument. The first and foremost argument happens to be that prosecution has failed to substantiate the place of occurrence which goes to the route of the prosecution case. That being so, on account of deficiency persisting in the prosecution case on that very score would nullify not only the manner of occurrence rather demolish the prosecution case in its entirety as well as also cost dear to the prosecution over reliability of the witnesses. To substantiate such plea, it has been submitted that save and except the victim, PW.6 none is an eye witness to occurrence and so, they were not at all competent enough to affix in conformity to each other the place where offence of rape, allegedly was committed. That being so, even their status being corroborative in nature would not be in favour of the prosecution.



8. It has also been submitted that apart from exclusion of status of other witnesses, when the evidence of victim PW.6 is taken together with the evidence of PW.10, Investigating Officer, it is crystal clear that there happens to be vital inconsistency amongst them and so, not only makes the objective finding of the Investigating Officer redundant rather it also disingorates the authenticity of the evidence of the victim (PW.6).

9. Further, it has also been submitted that evidence of victim would not be admissible in the eye of law in the background of the fact that Investigating Officer, during his cross-examination had categorically stated that he had not recorded statement of the victim during course of investigation so, the evidence of victim was for the first time during course of trial whereupon, as the prosecution failed to explain her absence during course of investigation, would be considered with suspicious eye and creates doubt over its authenticity, reliability, admissibility.

10. It has also been submitted that admittedly, from the evidence of the doctor, it is evident that victim was 6-7 years of age and on account thereof, being a resident of country side certainly, will have lower I.Q. that too being an illiterate coming from lower strata of the society apart from minor vulnerable to tutoring and so, before her examination, the learned lower court should have tested whether she was carrying normal understanding or not as well as should have also considered whether she had an opportunity of tutoring. Such eventuality is found duly acknowledged under Section 118 of the Indian Evidence Act. The non-exercise at the end of the court appears to be fatal in the background of the fact that when she was tested by the defence counsel, she became blank and



that suggest that she was of below normal understanding and on that very score, was an incompetent witness in terms of Section 118 of the Indian Evidence Act. That being so, her evidence would not be, admissible, as well as legally entertainable.

11. Apart from this, it has also been submitted that after amendment of the Cr.P.C. whenever an accused relating to sexual offences are being apprehended, he is bound to be examined by the medical practitioner in order to search out the corroborative evidence which could be gathered by the doctor on his physical examination as laid down under Section 53A thereof. Admittedly, appellant was arrested on the same day and by such omission, the prosecution frustrated an opportunity for the appellant to prove his innocence as, has been pleaded his end with regard to false implication.

12. Furthermore, the learned counsel for the appellant also submitted that right from initial version of the prosecution, there happens to be presence of one Om Prakash nephew of informant (PW.5) who was the person gone to the place of informant for having him acknowledged with the incident. During course of evidence PW.5, informant himself admitted that Om Prakash had not disclosed regarding commission of an occurrence rather he had disclosed that victim had sustained hurt. The aforesaid Om Prakash, the reason best known to the prosecution, has not been examined nor any kind of explanation has been furnished for his non-examination. Had there been an occurrence of rape then, in that event, Om Prakash, being a family member would not have disclosed with regard to victim sustaining hurt rather would have disclosed definitely regarding the occurrence having



been committed over the victim by the appellant.

13. It has also submitted that in the background of aforesaid eventualities, infirmities, it is apparent that the suggestion whatever been given by the appellant by cross-examination the informant PW.5 as well as victim PW.6, happens to be more probable and so, the cumulative effect did not justify the finding recorded by the learned lower court whereupon, appeal is fit to be allowed.

14. The learned Additional Public Prosecutor while controverting the submission raised on behalf of appellant has submitted that victim happens to be categorical with regard to commission of rape over her by the appellant. Because of the fact that save and except victim none happens to be an eye witness to occurrence therefore, some sort of inconsistency has been found in the prosecution case regarding place of occurrence relating to other witnesses however, the defence could not be able to challenge nor intended to challenge the place of occurrence which lies adjacent to the brick-kiln of Rameshwar Singh. Furthermore, the act of rape is found duly substantiated by the medical evidence as deposed by PW.9 as well as from the FSL report coupled with the seizure of the apparels blood stain earth from the P.O. which also substantiate the same. So, the evidence of PW.6 victim, PW.9 doctor and PW.10 Investigating Officer along with documentary evidence duly substantiate the occurrence corroborated by other PWs. PW.3 Jagdamba Devi and PW.4 Chanda Devi, who lifted the victim from brick-kiln where she was lying in disorderly supported by parents PW.1 as well as PW.5 along with villagers, the remaining witnesses.



15. Furthermore, it has also been submitted that defence is free to suggest in a manner as it feels but, such suggestion is to be duly substantiated if, the defence intends to stick over the same for the purpose of controverting the prosecution version otherwise, the suggestion would be merely for defence sake. It has been suggested to the PW.5 that he was borrower and as there was insistence to repay the loan on account thereof, this case has been falsely instituted in the aforesaid background the defence would have shared the burden by way of substantiating the same wherein, failed so, the judgment of conviction and sentence recorded by the learned lower court is found fit for confirmation.

16. So far, incidence of rape is concerned that too under the Indian social paronam, it not only happens to be a physical assault rather it happens to be an assault over the whole personality of a woman shaking her identity and that happens to be reason behind that the evidence of victim is being considered above board. In normal course, evidence of victim is found sufficient to record conviction without any corroboration it inspires confidence when, shown a doubt is found then in that event corroboration is needed. Therefore, the evidence of the victim is to be tested at first glance in order to search out truthfulness at her end.

17. So far this case is concerned, before going to do such exercise, the status of the victim is also to be duly acknowledged. Admittedly, victim happens to be aged about 6-7 years. From the deposition it is apparent that court had not taken due exercise to test her IQ and in likewise manner the order dated 07.08.2013, the date on which she was examined suggests so. Defence had tried to test her mental IQ and during



said course, she had crossed the first barrier by deposing that she happens to be student of Class-II. School lies at Barka Digha, she was examined by the police while at second step she failed to disclose how many days a month constitute, how many days a week constitute, she was unable to say what treatment denotes but again on other aspect, she faced cross-examination properly by saying that she had come along with her parents. Her school runs from 10 AM to 03:00 PM then thereafter she remains at her house. In the aforesaid background, the defence had taken a risk by not cross-examining the victim on the factum of occurrence. Whether aforesaid eventuality could be perceived as sufficient to identify the victim to be intellectually deficient one , after taking together the other parts of cross-examination whereunder she had categorically answered. That being so, she could not be found to be incompetent in terms of Section 118 of the Indian Evidence Act and that being so her evidence is found fit to be accepted.

18. In the aforesaid background, now the evidence of the victim PW.6 is taken up whereunder, she had categorically stated the activity of appellant how he acted before commission of the rape, committed rape, the post rape condition which never been contested challenged at the end of the appellant, and that being so, the factual aspect relating to occurrence as deposed by the victim, is found uncontroverted.

19. In **Gian Chand & others v. State of Haryana** reported in **2013(4) PLJR 7 (SC)** it has been held that when no cross-examination has been made to an witness on a particular point the same would be accepted to be admitted at the end of the appellant. For better appreciation, the relevant para is quoted below:-

“11. The effect of not cross-examining a witness on a



particular fact/circumstance has been dealt with and explained by this Court in ***Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204*** observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

(Emphasis supplied)

20. Therefore, the evidence of victim PW.6 remained intact whereupon does not need additional help by way of corroboration even though, there happens to be bunch of witnesses more particularly PW.3 and PW.4 who lifted the victim PW.6 from the brick-kiln of Rameshwar Singh to her house while was lying disorderly there, for which on query disclosed the narration of occurrence.

21. In this regard the evidence of doctor, PW.9 is also to be



considered who was one of the member of the board relating to estimation of age of the victim whereunder, victim was estimated to be aged about six years. She being a Gynecologist had examined the victim and found following injuries over her person:-

“There was second degree posterior perineal tear. There was also tear in post vaginal wall and let vaginal wall extending up to vault. The apex of tear could not be visualized and repaired by above mentioned doctors. Vagina admits two fingers (with 2nd degree perineal tear) MI- A small mole on chest just above angle of twice.

Investigation.

- (1) Vaginal swab for microscopic examination of spermatozoa. Report shows not spermatozoa.
 - (2) X-ray wrist A/P and lateral view of elbow joint for the age determination.
- and so opined to have intercourse.

22. Investigating Officer had visited the place of occurrence, found blood at the place of occurrence which was seized, in likewise manner blood stained Ganghia was also produced, seized, got examined by the FSL and further, its report happen to be pointing out not only presence of blood of another group rather semen also. Apart from this, blood of same group was also over the soil which was taken from the place of occurrence and this part, when is considered along with the evidence of victim, PW.6, duly interconnect.

23. In the aforesaid background, the non-examination of the



appellant by a medical officer is not at all found adverse to the prosecution in the background of the fact that appellant had not suggested even to the victim that he was physically incapable to indulge in sexual intercourse. Had there been, then in that circumstance, none examination of the appellant would have adversely affect upon the prospect of the prosecution case.

24. So far, deficiency in the evidence of PW.10 to the extent of proper identification of P.O. has got no relevancy in the background of own lapses of the appellant whereunder event of rape has not been questioned while cross-examining the victim as well as no cross-examination relating to place of occurrence as deposed by the victim as well as Investigating Officer have been confronted. Therefore, merely some sort of variance will have no adverse impact more particularly having been supported with ancillary evidence, i.e. presence of blood stain, seizure of blood stained earth.

25. In likewise manner, non-examination of Om Prakash and further the disclosure having made by PW.5, informant relating to an information given by Om Prakash happens to be a genuine conduct as, it was not expected to have such kind of disclosure before others which could have malign his family prestige as well as a stigma, a scar over future of a minor girl.

26. Considering the totality of the event as well as giving anxious consideration over the materials available on the record, it is apparent that prosecution has succeeded in proving its case beyond all reasonable doubt. Consequent thereupon, this appeal lacks merit and is accordingly dismissed.



27. So far sentence part is concerned, that needs no interference in the background of the fact that the lecherous activity of the appellant could not be condoned that too when a minor 6-7 years have been subjected for the aforesaid purpose. Appellant is under custody which he remain till saturation of sentence.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
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