

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.23 of 2015

Arising Out of PS.Case No. -11 Year- 2012 Thana -BALIGAON District- VAISHALI(HAJIPUR)

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1. Tufani Paswan son of Late Sakkal Paswan resident of village - Bisunpur Kawa,
P.S. - Baligauw, District Vaishali.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Baban Roy, Amicus Curiae

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 15-09-2017

Yesterday, i.e. on 14th of September 2017 learned counsel for the appellant was present who was insisting upon granting of a long adjournment but the same was declined whereupon requested to argue the instant appeal. He took up the matter and then at his request, the hearing was adjourned.

2. Today, i.e. on 15th of September 2017, having the appeal been called out and keeping the file pending for half an hour awaiting presence of learned counsel for the appellant went in vain, whereupon, Sri Baban Roy, learned counsel, who is present in the court, has been requested to assist the Court as an Amicus Curiae.

3. Appellant, Tufani Paswan has been found guilty for an offence punishable under Section 376(f) of the IPC and sentenced to undergo RI for 10 years as well as to pay fine of Rs. 20,000/- in default thereof, to undergo SI for six months, additionally vide



judgment of conviction dated 19.11.2014 and order of sentence dated 21.11.2014 passed by Additional Sessions Judge-3rd, Vaishali at Hajipur in Sessions Trial No. 278/2012.

4. Mother of victim, Rangila Devi (PW 5) lodged FIR on 28.02.2012 at about 4.30 PM after coming to Baligaon PS along with the victim (name withheld) aged about 5 years alleging inter alia that on the same day she had gone to do menial work at Village-Bahauddinpur under Azhar Mian leaving behind her daughter, victim (name withheld) along with two other minors. Her cousin father-in-law, Aklu Paswan came to the field along with her daughter (victim) who was weeping at about 2:00 PM and disclosed that Tufani Paswan has committed rape on her on account of which, blood is oozing out from her vagina. Then thereafter, she had seen vagina of her daughter and found the blood still coming out. She had not worn pant. On query, she disclosed that while she was playing in front of her house, Tufani Baba came and gave a coin of Rs.1/- as well as provided Kurkuria (an edible item) and took her away inside his house where, put off her pant and then put her penis inside her vagina as a result of which, she felt severe pain, cried, whereupon he choked her mouth. As profuse bleeding started, he had wiped the same with his Gamchha and slipped from the room. She came out from the room weeping whereupon, Aklu Baba accompanied her to me. Then thereafter, she



had returned back to her house along with victim where Deepak Kumar, aged about 12 years disclosed that after hearing cry of the victim, he had gone to the house of Tufani Baba and saw the victim coming out from his house. He had also seen bleeding from her private part whereupon he rushed and informed Aklu Baba and others.

5. After registration of a case bearing Baligaon PS Case No. 11/2012, investigation proceeded, victim was medically examined, raid was conducted at the house of accused wherefrom articles were seized and for that, search-cum-seizure was prepared, presence of accused was procured, followed with submission of charge-sheet on the basis of which trial commenced and concluded in a manner subject matter of the instant appeal.

6. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has further been pleaded that there was talk in between the appellant as well as Rambabu and Rangila Devi (parents of the victim) relating to a land which did not finalize and on account thereof, the parents of the victim became aggrieved and in the aforesaid background, a month thereafter, in a pre-planned manner, the instant case has been filed. To substantiate the same DWs have also been examined.

7. In order to substantiate its case, prosecution had



examined altogether 15 PWs out of whom PW-1, Aklu Paswan, PW-2, Dipak Kumar, PW-3 Rita Devi, PW-4, Suman Kumari, PW-5, Rangila Devi, PW-6, Ganesh Paswan, PW-7, Lakhindra Paswan, PW-8, Phul Kumari, PW-9, Ramsagar Paswan, PW-10, Yogendra Paswan, PW-11, Sangita Devi, PW-12, Sheela Dev, PW-13, Dr. Vinita Kumari, PW-14, Ajay Kumar Singh and PW-15, Mangal Prasad. Side by side had also exhibited Ext-1, FIR, Ext-1/1, Signature of informant over the same, Ext-2 Series, medical report, X-ray report, report of the medical board, Ext-3, Seizure list, Ext-4 series, FSL report. As indicated above, defence had also examined 4 DWs, namely, DW-1, Bhola Paswan, DW-2- Babul Das, DW-3- Ram Chandra Paswan and DW-4- Bhutti Devi.

8. Learned Amicus Curiae, while challenging the finding recorded by the learned lower court, has submitted that false implication is duly exposed on account of inconsistency prevailing in the prosecution case. To substantiate the same, it has been submitted that doctor (PW-13) had examined the victim on the following day but, she had not found any injury over person of victim including over private part, externally or internally. That being so, the story of rape propounded by the prosecution appears to be gutted down as well as it also suggests probability of the defence case for which, four DWs have been examined that on account of breakage of negotiation



relating to sale of land, the prosecution party became aggrieved whereupon, instant case has been filed.

9. It has also been submitted that none is an eyewitness to occurrence. Deepak Kumar who happens to be PW-2, a lad aged about 12 years, while was returning from his school claimed to have heard cry of the victim whereupon had gone to the place of appellant where he saw the victim coming out from his house having profuse bleeding from her private part but improbability is visualizing from his evidence as it was the month of February and there was no occasion for him to visit his place leaving the school. Therefore, his evidence happens to be unreliable. Discarding his testimony, the evidence of other PWs are liable to be rejected in similar way as apart from being not an eyewitness to the occurrence, they came to know from PW-2, Deepak Kumar. It has also been submitted that none of the witnesses, save and except, informant, Rangila Devi (PW 5) had deposed that they left their house on account thereof, their presence remained at their respective places. Had there been some sort of activity at the end of appellant, Tufani Paswan, then in that event, certainly, they would have deposed that they have seen Tufani Paswan alluring the victim and taking her away inside his house. That being so, considering the nature of the evidence having adduced on behalf of prosecution, it is apparent that they have conspired to teach a lesson to



the appellant whereunder projected a minor who, on account of her tender age, could not be in a position to perceive meaning of *Ganda Kam* (sin). Furthermore, the manner whereunder the victim had deposed before the court clearly suggests that she has been tutored to depose like so, otherwise her tender age would not have allowed the same and in its entirety coupled with the evidence of the doctor, no case of rape is made out whereupon, conviction and sentence recorded by the learned lower court is fit to be set aside.

10. On the other hand, learned APP while supporting the finding recorded by the learned lower court has submitted that true it is, that none of the witnesses had claimed to have seen the appellant alluring the victim, taking her away to his house where such kind of disgusting activity was taken up but, the circumstances are there which conclusively proves the activity of the appellant. Place of occurrence was visited by the Investigating Officer (PW 14) on the same day and from a room belonging to the appellant, bed-sheet, Gamchha and Dhoti was found whereupon blood was there. Over bed-sheet, there was spot which, during course of FSL examination had been detected to be semen. The blood having been found belong to one group. Neither the appellant nor the DWs out of whom DW-1 is full brother of appellant, DW-2 is cousin brother of appellant and DW-4 is daughter-in-law of appellant had explained. Even during their



evidences, all the DWs have not spoken to the effect that they have not seen the victim in company of appellant nor inside the room rather, they deposed on other aspect i.e. with regard to breakage of negotiation for sale of the land. In the aforesaid background and further scrutinizing evidence of the prosecution witnesses in its entirety, it is apparent that the prosecution has succeeded in substantiating its case whereupon, the judgment of conviction and sentence happens to be fit to be affirmed.

11. After going through the evidence available on record, apart from examination of official witnesses who are PW-13, the doctor, PW-14, the Investigating Officer and PW-15 who had exhibited the FSL report, the evidence is found of three categories. The first one happens to be the victim herself. The second belongs to the evidence of Deepak Kumar PW-12, Aklu Paswan, PW-1 and remaining are of third category. Before coming to the ocular evidence, first of all, evidence of PW-13, is to be considered.

12. PW-13 who happens to be one of the members of the medical board including others, namely, Dr. Pushpa Lata Mishra, had examined the victim on 29.02.2012 and found the following:-

- (a) On general examination, she was found conscious. There was no external injury on her body.
- (b) For pelvic examination, she was examined under general anaesthesia in O.T. of Sadar Hospital, Hajipur. Her



secondary sexual characters are not developed. There is not injury on her external genitalia. Posterior fourchette is intact, No injury on labia majora or minora. Hymen is intact. There is redness at the inner side vaginal introits. Vaginal swab is taken and sent to Pathologist, Sadar Hospital, Hajipur. For age estimation, she was sent to the Radiologist. Report of Pathologist received. No spermatozoa was seen; Report of Radiologist received and her age has been estimated in between 3 to 5 years and then it has been concluded (1) her age is about five years, (2) Clinically and pathologically there is no evidence of sexual assault.

13. Now in its continuity the evidence of the victim, PW-4 is taken together. The court had tested her and found competent enough to give evidence. She had deposed that the occurrence is about one year ago. She was playing at her Darwaza. Tufani Baba caught hold her and took her to his house. He paid Rs. 1. He pressed her mouth and then said that if she would disclose the event to anybody then she will be murdered. Then thereafter, he undressed her. As soon as, he put his penis, she began to cry. He had committed sin with her. There was profuse bleeding from her private part. Deepak came and accompanied her to Aklu Baba who carried her to her mother. She was admitted in the hospital. Had identified the accused. During cross-examination at para-3, she had deposed that Ram Babu Paswan



happens to be her father. She had talked with him on the date of occurrence. At para -4, she had stated that she was playing along with her brother Shivam, Sister Sonali Kumari, Neha, her neighbour. Deepak was also present there. In para-5, she had deposed that others had not joined while Tufani was carrying her to his room. Tufani had caught hold of her and then, took her. At that very time, she had worn frock (red colour) and pant (black colour). In para-6, she had stated that her father took her to the hospital. On court question, she had stated that she had also gone to the police station. Her statement was also taken by the police while she was admitted at the hospital. She had further stated that none had seen the occurrence. In para-8, she had stated that there was blood over her pant. In para-9, there happens to be suggestion that no occurrence was committed with her. On the tutoring of her mother, this case has been filed.

14. PW-2, Deepak Kumar who was also tested by the Court on account of his tender age. In his examination-in-chief, he had stated that while he was returning from his school, he saw his sister (victim) weeping at the house of Tufani Paswan. He had gone there. He had seen blood oozing out and then disclosed the locations before the court which the court had noted down. Then thereafter, he took the victim to his house where his mother had seen her private part after removing the pant and on account thereof, she was taken to



the place where her parents were engaged in menial work. He had further stated that Tufani had committed sin with her. Identified the appellant. During cross-examination, he had deposed that he had to come to the court along with Ram Babu (father of victim). During course of returning from his school, he was alone. There are 4-5 houses near his house. At that very time, he had not met with any inmates of the aforesaid houses. He had further stated that police had taken his statement. Then at para-8, he had stated that he is not knowing the persons who have got their house in the boundary of Tufani Paswan. In para-9, he had stated that husband of Rangeela Devi had not instructed him. House of Rangeela Devi as well as that of himself is not common but adjacent to each other. Family members of all the houses conjointly had gone and during course thereof, he had disclosed. In para-10, he denied the suggestion that at the instance of his father Aklu, he has falsely deposed.

15. Other kind of evidence, i.e. PWs- 3, 5, 7, 8, 11 and 12 have deposed that after having the victim carried by the PW-2, Deepak Kumar, they had seen the physical condition of the victim, weeping, oozing out of blood from her private part and on query, disclosure made by the victim with regard to activity having at the end of Tufani Paswan.

16. PWs-6 and 10 have become hostile. PW-9 is one of



the seizure list witnesses, namely, Ram Sagar Paswa, though shown his presence over the seizure list, but stood under same category.

17. PW-14 is the Investigating Officer, who had deposed that after registration of case, he took up investigation. He recorded further statement of the informant, Aklu, statement of victim and then proceeded towards place of occurrence, inspected the same which happens to be the house of Tufani Paswan having eastern front and then identified the same with boundary. He had gone inside the room and there he found one Dhoti having blood stain, one Gamchha (red colour) having blood spot, blood over earthen floor, blood over bed-sheet and all were seized for which seizure list was prepared in presence of Ganesh Paswan (PW 6) and Ram Sagar Paswan (PW 9). Sent the aforesaid items to the FSL. Recorded statement of other witnesses. Arrested Tufani Paswan. Received medical report from Sadar Hospital, Hajipur and then after completing investigation submitted charge-sheet. During cross-examination, he had disclosed in para-7 that the victim was sent to Sadar Hospital, Hajipur on 29.02.2012. He had further stated that all the articles were seized from a room which was under the occupation of the accused. He had further stated that he had not inquired from the accused whether those items were belonging to him or not. He had further stated that the accused put his LTI over the search-cum-seizure list. In para-8, he had denied



the suggestion that the items which were seized from the room were not belonging to the accused. He had further deposed that the accused was not medically examined after his arrest. It has further been suggested that in presence of Ram Sagar Paswan and Ganesh Paswan (declared hostile), nothing was recovered nor seized. He had further stated in para-10 that after receiving medical report, he had incorporated the same with the finding that no evidence of rape was found.

18. From the FSL report (Ext-4 Series), it is evident that on all the articles, the blood was found was of the same Group 'A'. Furthermore, over the bed-sheet, apart from blood, semen was also found.

19. Now coming to the DWs, it is evident that DW-1 is own brother, DW-2 is cousin brother and DW-4 is the daughter-in-law of the appellant. Neither DW-1 nor DW-2, nay DW-3 had deposed that police had come, inspected the house of Tufani Paswan, arrested Tufani Paswan and during course thereof, inspection of the place of occurrence, room occupied by the appellant, had recovered the articles, were not at all recovered. They have simply deposed that there was negotiation relating to sale of the land at an earliest which did not materialize and on account thereof, prosecution party carried a grievance. So far DW-4, Bhutti Devi is concerned, she had deposed



that nothing was recovered from her house while visited by the police but during cross-examination at para-2, she had deposed that she along with her husband and children remained at Karnal. After commission of the occurrence, she had come to her Sasural and so, her arrival happens to be after the occurrence and in the aforesaid background, she was not a competent witness to depose on that very score, though, admitted presence of police at her place.

20. For attracting Section 376 IPC penetration to any extent is sufficient, neither the full penetration nor ejaculation is a condition precedent though found over the bed-sheet and it might be on account of ejaculation outside the vagina.

21. From the evidence of PW-13, it is evident that medical report had negatived the incident of rape but has found redness at the inner side of vaginal introits and that indicates some sort of external activity. If slight penetration is made, then in that event, hymen would not rupture, more particularly, in case of child where it happens to be deeply embedded.

22. Modi has observed that *“where the hymen, the posterior commissure and fourchette were intact, but there was congestion of the vaginal wall outside the hymen and there was redness underneath the labia majora, though no contusions”* even then, it may be held to be an instance of rape.



23. That being so, the finding rendered by the learned lower court is found to be based upon the evidence available on the record as well as having observed by the Modi in the text book “Medical Jurisprudence and Toxicology” and on account thereof, is affirmed.

24. Consequent thereupon, the appeal sans merit and is accordingly, dismissed.

25. Appellant is under custody wherein he will remain till saturation of the sentence.

26. The first and the last pages of the instant judgment be handed over to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

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