

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.920 of 2012

Arising Out of PS.Case No. -127 Year- 2009 Thana -null District-
EASTCHAMPARAN(MOTIHARI)

=====

Deepak Patel S/O Bachcha Patel R/O Village - Sundarpur Barahi Tola, P.S.
Kesariva, District - East Champaran

.... Appellant

Versus

The State Of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Nachiketa Jha

For the Respondent/s : Mr. Bipin Kumar

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

Date: 12-04-2017

This appeal is directed against the judgment dated 7.9.2012 and order dated 12.9.2012 passed by Sri Sahajanand Sharma, Adhoc Additional District & Sessions Judge, East Champaran at Motihari in Sessions Trial No.44 of 2011 [State (through the informant Usha Devi)- Vrs.- Deepak Patel] arising out of Keshariya P.S.Case No.127 of 2009 dated 6.8.2009, by which he has convicted the sole appellant under Section 376 (2)(f)/511 of the I.P.C. and sentenced him to undergo R.I. for 10 years for committing offence under Section 376 (2)(f)/511 of the I.P.C. and Rs.20,000/- as fine further in case of default of payment of fine, S.I. for three months.

2. The prosecution case in short is that Usha Devi (P.W.8) filed a written report in Keshariya Police Station on 6.8.2009 stating *inter alia* that on the same day at about 4.00 P.M., her daughter,



Chhoti Kumari aged about 2 ½ years was playing in front of her house and then her '*Rishtedar*' Deepak Patel aged about 20 years took her in lap and went to '*Maisthan*' where he raped with her. This incident was seen by the wife of Jinish Patel, who then came and informed her. She further stated that then she began to go towards that place and saw that he (accused) is coming, taking her daughter in his lap. She snatched her from him and brought her home. Her daughter was in semi-conscious condition and the blood was oozing out from her private part. When she asked about the same to the accused, upon which he started abusing.

3. On the basis of the aforesaid written report, Keshariya P.S. Case No.127 of 2009 was instituted against the appellant under Section 376 (2) of the I.P.C. and the police after investigation submitted charge-sheet under the above Sections against the appellant.

4. Thereafter, cognizance of the offenses was taken up and the case was committed to the court of Sessions, which ultimately came to the file of Sri Sahajanand Sharma, Adhoc A.D.J. Ist, Mothari for trial and disposal.

5. The learned trial court by his judgment and order, as stated above, convicted the sole appellant under Section 376(2)(f)/511 of the I.P.C., and sentenced him to undergo R.I. for ten years and further fine of Rs.20,000/- and in default, S.I. for three months.

6. Being aggrieved by the aforesaid judgment and order, the



present appeal has been filed by the appellant.

7. The argument of the learned counsel for the petitioner is that there is no eye witness of the occurrence and though in the F.I.R. it is alleged that the mother of the victim Usha Devi (P.W.8) had come to know about the commission of rape from the wife of one Jinish Patel but she has not been examined in this case. So far other witnesses are concerned, none of them are eye witness of the occurrence. Further, it is argued that even the Doctor has stated in her evidence that such type of injury may be caused due to fall on hard and blunt substance and that type of injury may be caused by falling on '*Khunta*'.

8. It has also been submitted that the petitioner is the own uncle of the victim and is living in the same house and the act like commission of rape is not expected from him, rather he has been falsely implicated in this case due to enmity, which will appear from the evidence of Puja Kumari, who has clearly stated that though the accused (*Mudalaya*) are living in the same '*Aangan*' and she has one room whereas the accused persons have three rooms and they want two rooms, that clearly shows that due to the aforesaid fact the petitioner-appellant has been falsely implicated in this case and the learned court below without any eye witness of the occurrence, has convicted the appellant under Section 376(2)(f)/511 of the I.P.C., hence conviction of the appellant is bad in law.

9. On the other hand, it has been submitted on behalf of the



learned A.P.P. that in the present case, there is prosecution case that the appellant carried the girl to '*Maisthan*' and it has come in the evidence that he has committed rape with her. The informant has stated that on being informed, she had gone towards '*Maisthan*' and saw that the appellant was coming with the victim girl in his lap and the blood was oozing from her private parts, almost all the witnesses have supported the aforesaid evidence of P.W.8. Apart from that Pawan Kumar (P.W.2) has claimed himself to be eye witness of the occurrence and he has stated that he saw Deepak Patel committing rape of the victim girl and other women are also peeping the occurrence. He has further stated that after committing rape, the appellant cleaned the vagina of the victim girl and even the evidence of the Doctor shows that she had injury over her private parts and her age has been assessed to be 3 years by the Doctor (P.W.9). On the basis of above submission, it has been argued that conviction is just and proper and not required any interference.

10. On the basis of the aforesaid background, the prosecution evidence is being considered in this case.

11. In this case, following witnesses have been examined on behalf of the prosecution and they are Sanjay Patel (P.W.1), Pawan Kumar (P.W.2), Puja Kumari (P.W.3), Dr. Vinita (P.W.4), Nandakali Devi (P.W.5), Babali Kumari (P.W.6, Subodh Kumar (P.W.7), Usha Devi (P.W.8), Dr. Udai Shankar Pandey (P.W.9) and I.O. of the case



(P.W.10).

12. Apart from that following documents have been taken into evidence on behalf of the prosecution and they are Ext.1 Injury report, Ext.2, Signature of Usha Devi on Fardbeyan, Ext.3, report of the medical board regarding age determination.

13. P.W.8 is the informant, who is the mother of the victim girl and she has supported her case that the appellant has committed rape with the victim girl and she along with many persons rushed towards that place and saw Deepak Patel fleeing away from there and also found the victim on the '*Chabutra*' in unconscious condition. Her evidence also shows that Nandakali Devi, Sanjay Patel, Babali Kuamr, Pawan Kumar informed her about the appellant committing rape with the victim girl. She has also stated that the blood was oozing out from in between her thigh, on that she gave a written report before the Keshariya Police and her statement was also recorded. She has been cross examined and in her cross examination, she has admitted that the appellant is the '*Cousin Dewar*'. They were living in one '*Aangan*' and she had one room whereas the appellant has three rooms. She has further stated that earlier there was good relationship with the appellant. Her evidence in cross examination further shows that she had taken to the victim girl to the hospital and she was admitted in the hospital for three days. In her further cross examination she has denied the enmity with the appellant.



14. Puja Kumari (P.W. 3) is the sister of the victim and she has also stated in her evidence in chief that there was '*hulla*' at '*Maisthan*' and they went there and saw the appellant standing with his sister on his lap. On seeing the persons, the appellant left the victim girl on the '*Chabutra*' and fled away from there and at that time, she was unconscious and blood was oozing out from her undergarment and thereafter she was taken to the Hospital.

15. Nobody appeared for her cross examination, then she was discharged. But later on she was cross examined on record. She then stated that near the Temple 3-4 persons were there. In her cross examination, she has further stated that she saw her sister, blood was oozing out from in between her thigh and her uncle Deepk Patel was fleeing from there. In her cross examination, she has admitted that there was land dispute between the parties and they are living in one '*Aangan*' and she has one room whereas the appellant has three rooms and she wants that two rooms be given to them.

16. Considering the evidence of P.W.8 and P.W.3, who are mother and sister of the victim girl, it clearly appears that they are not eye witnesses but on '*hulla*', they went to the '*Maisthan*' and the appellant after leaving the victim on '*Chabutra*' fled away and at that time blood was oozing out from her private parts.

17. Dr. Vinita (P.W.4) is the Doctor, who had examined the girl and she has stated in her evidence that on 6.8.2009, she examined



Chhoti Kumari and further stated as –

- i. *On examination no external injury was found*
- ii. *lacerated wound extending from lower end of vagina towards anus of about ½” X ¼” X 1/8” size*

She has stated that the injury was caused by hard and blunt substance. She has further proved the injury report as Ext.1. In her cross examination, she has stated that internal injury mentioned above may be caused by fall on “*Khunta*”.

18. Similarly, Dr. Udai Shankar Pandey (P.W.9) is the Doctor, who was member of the Medical Board, who assessed the age of the victim girl and he has proved the medical board report and stated that she was found to be aged about three years on the day of occurrence.

19. Apart from the above, other witnesses have also been examined on behalf of the prosecution. P.W.1, Sanjay Patel has stated that on ‘*hulla*’ in front of his house, he went there and saw the victim girl in the lap of accused and blood was coming out from her private part. The sister and mother of the victim was asking to hand over the girl but he was not ready and the victim girl was forcibly snatched from him. His evidence also shows that she was taken to the hospital. His evidence shows that he has not seen commission of rape. He has further stated that the victim girl was not competent to disclose anything .

20. Pawan Kumar (P.W.2) claims himself to be eye witness and he saw committing rape upon the victim girl and other ladies were also peeping inside. His evidence shows that after the occurrence her



vegina was washed out by the appellant and he took her in his lap but by that time, the mother of the victim girl arrived and she snatched the victim girl from him and she was taken to the hospital. This witness has been cross examined mainly to show that he lives at Patna. However, in his cross examination at para 3, he has stated that he remained in the hospital for three days.

21. Evidence of Nandkali Devi (P.W.5) shows that on *hulla* she rushed from there and she saw Chhoti Kumari in the lap of the appellant. She was bearing under garment, which was having blood and the sister of Chhoti Kumari snatched her from Deepak Patel and thereafter Deepak Patel fled away.

22. P.W. 6 is Babli Kumari and her statement shows that on *hulla* coming towards '*Maisthan*', she saw Deepak Patel having victim on her lap and the blood was coming out from in between her thigh and when she took the victim girl, Deepak Patel fled away from there. Thereafter, she was taken to the Hospital. She has also stated that her sister was bleeding and she was unconscious and she was in hospital for three days.

23. Subodh Kumar (P.W.7) has also stated that on '*hulla*' he went there and saw the victim girl in the lap of Deepak Patel and the blood was oozing out from her private part and she was taken by her mother and taken to the Hospital. This witness has also been cross examined but the cross examination is with a view to show that the appellant



Deepak Patel and Narad Patel the husband of the informant are cousin and they are living in the same Aangan.

24. P.W.10 is the I.O. of the case. He has stated in his evidence that he had received one written report regarding commission of rape to the victim from P.W.8 Usha Devi and thereafter her re-statement was recorded and the girl was sent to the Sadar Hospital, Motihari for examination. He also inspected the place of occurrence. His evidence further shows that he had arrested the appellant, who had confessed his guilt. He further stated that he did not get the statement of the accused girl recorded under Section 164 Cr.P.C. He has further stated that the house of the appellant and the victim is same.

25. The injury report (Ext.1) clearly goes to show that there was injury over private part of the victim girl and the medical board report i.e. Ext.3 indicates that she was aged about 3-5 years at the time of occurrence.

26. No specific stand has been taken by the appellant and even neither any witness has been adduced nor any document has been produced during the trial. Nothing in this regard, transpires from his statement under Section 313 Cr.P.C. From the cross examination, it appears that the defence of the appellant is that he has been falsely implicated in this case due to land dispute and no such occurrence has taken place and he is innocent.

27. Considering the discussions as made above, it appears that



there is consistent evidence available on the record to show that the appellant has taken the victim girl and on '*hulla*' other witnesses had gone there and saw that the victim girl was in the lap of the appellant and the blood was oozing out from her private part.

28. Here, there are some discrepancies in the testimonies of P.Ws. Some of the P.Ws. have stated that the victim girl was snatched from the lap of the appellant as he was not ready to hand over her, however, some have stated that he left the victim girl and fled away. These appear to be the minor discrepancies, which are bound to occur as most of the witnesses are rustic people and they are illiterate. The aforesaid contradictions are not so vital. One thing is well clear that the victim girl was in the lap of the appellant at the time when the *hulla* was raised and the blood was coming from her private part. In this case, the victim is aged about 2-3 years and as such it can not be expected from a girl of 2-3 years would disclose about commission of rape upon her. Further the Doctor has clearly stated about the injury on the person of victim girl.

29. It is the contention of defence that the Doctor has stated that such type of injury can be caused on the person of anyone when someone falls on "*Khunta*" and also on hard blunt substance. But it is not the case that she fell on '*Khunta*' rather there is consistent evidence of the prosecution witnesses that the victim girl was taken in his lap by the appellant and further there was bleeding coming from



her private part corroborated by medical evidence. All these clearly show that some mishpenning had taken place with the victim girl. The learned court below has convicted the appellant under Section 376(2)(f)/511 of I.P.C. Though Doctor has not stated about whether rape with victim girl was committed or not but an injury extending from lower end of vegina to anus shows that some attempt has been made with the victim girl, who is a minor aged about 2 ½ years.

30. Learned counsel for the appellant has also argued that as there is no eye witness of the occurrence and there is no clear finding of the Doctor with regard to either commission of rape or attempt to rape. As such, conviction of the appellant under Section 376 (2)(f)/511 of the I.P.C. is not sustainable in absence of any eye witness. As noticed above, it is the consistent evidence that victim was in the lap of the appellant at the relevant time and the blood was oozing out from her private part. All these indicate culpability of the appellant who has not explained it in any manner nor any evidence has been put forward by the defence to prove its version that victim sustained injury due to fall on '*Khunta*'.

31. Considering the entire discussion as made above, I find no infirmity in the conviction of the appellant under Section 376 (2)(f)/511 of the I.P.C. as such it is upheld.

32. So far as sentence of R.I. of ten years and fine of Rs.20,000/- is concerned, it has been submitted on behalf of the appellant that in this



case sentence under Section 376 (2)(f) of I.P.C. is minimum of ten years but in the present case he has been convicted under Section 376(2)(f)/511 of the I.P.C.

33. On plain reading of Section 511 of I.P.C., it will appear that the sentence as prescribed is half of the punishment with imprisonment for the offences but the learned court below has sentenced the appellant R.I. for ten years, which is not just and proper.

34. So far Section 376 (2) (f) of the I.P.C. under the 1983 (Amendment) is concerned, it prescribed as follows : -

“376. Punishment for rape. – (1) *Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:*

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) *** (f) *commits rape on a woman when she is under twelve years of age; or shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.*

Whereas Section 511 of IPC reads as follows :

511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—*Whoever attempts to commit an offence*



punishable by this Code with 1[imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with 2[imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.

35. Plain reading of Section 376 (2)(f)/511 of the I.P.C. prescribes punishment of imprisonment for half of the imprisonment as prescribed for the offences.

36. The Hon'ble Supreme Court has considered this aspect of the matter in the case of ***Mohd. Kalam – Vrs. State of Bihar***) reported in ***(2008) 7 SCC 257 at Para 5 and 6*** and has come to a conclusion in Para -9 that – ***“Therefore, the High Court as noted above has rightly held the appellant guilty. Coming to the question of sentence, according to us, 5 years’ custodial sentence with fine imposed by the trial court and maintained by the High Court would meet the ends of justice”.***

37. In the present case, the appellant has been sentenced to undergo R.I for ten years and a fine of Rs.20,000/- and in default of payment, further S.I. for three months.

38. From perusal of the record, it appears that the appellant has already been in custody for a period of more than seven years and seven months. As such considering nature of the allegation, facts and



circumstances of the case and also period of custody of the appellant, punishment of the imprisonment is modified to the extend period already undergone with fine imposed by trial court, which would meet the ends of justice.

39. Accordingly, the sentence is modified to the period already undergone and the amount of fine shall be payable to the victim.

40. With the aforesaid modification in sentence, this appeal is dismissed.

(Vinod Kumar Sinha, J)

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AFR/NAFR	N.A.F.R.
CAV DATE	11.04.2017
Uploading Date	
Transmission Date	

