

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.420 of 2015

Arising Out of PS.Case No. -103 Year- 2012 Thana -SAUR BAZAR District- SAHARSA

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1. Suresh Sah S/o Rajo Sah
2. Umesh Sah S/o - Khusilal Sah Both residents of village - Hanuman Nagar, P.S. -
Sour Bazar, Dist - Saharsa.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

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Appearance :

For the Appellants : Mr. Chandramohan Jha, Advocate.

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

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 21-11-2017

Heard learned counsel for the appellants as well as
learned APP for the State.

2. Appellants Suresh Sah and Umesh Sah have been
found guilty for an offence punishable under Section 323 of the Indian
Penal Code and each one has been sentenced to undergo simple
imprisonment for six months, appellants Suresh Sah further been
found guilty for an offence punishable under Sections 376/511 of the
Indian Penal Code and sentenced to undergo simple imprisonment for
five years as well as to pay fine appertaining to Rs. 5000/- in default,
thereof, to undergo imprisonment of three months, additionally with a
further direction to run the sentences concurrently vide judgment of
conviction and sentence dated 02.07.2015 passed by the learned 2nd



Additional Sessions Judge, Saharsa in Sessions Trial No. 175 of 2012.

3. Prosecution case as is evident from the fardbeyan given by Nitu Kumari, P.W. 6 on 17.04.2012 at about 10:30 AM at PHC Sour Bazar in presence of her brother Mukesh Sah disclosing therein that on the same day at about 06:00 AM while she was sitting along with her mother Urmila Devi (victim), at that very moment her mother asks for water whereupon, she gone to hand pump during midst thereof, her neighbour Suresh Sah and Lallan Sah gone inside her house threw her mother on the ground and then attempted to commit rape over her whereupon, her mother raised alarm. She rushed from the hand pump and had seen the situation whereupon, she come outside and began to raise alarm but Bhulan Sah caught hold her. Anyhow, she succeeded in raising alarm attracting so many persons on the other hand, Chandan Sah, armed with rod, Uuresh Sah, armed with Lathi came also joined them and began to assault her mother with Lathi as well as rod. Bhulan Sah snatched away chain from her neck while Umesh Sah took away box. Villagers came and have seen the accused persons fleeing from her house along with box. Then thereafter, with the help of villagers her mother was taken to hospital where she is undergoing treatment.

4. After registration of Sour Bazar P.S. Case No. 103 of 2012, investigation commenced and after concluding the same charge



sheet was submitted against these two appellants keeping investigation pending against remaining and that happens to be basis for commencement of trial which ultimately concluded in the manner subject matter of instant appeal.

5. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 Cr.P.C. is that of complete denial. Furthermore, it has also been pleaded that both the parties are inter-related and on account of land dispute, they are on strained relationship, cases are pending amongst them since before and this case happens to be an additional link with false, frivolous allegation. Furthermore, one Kewala dated 24.06.1965 has been made an exhibit, Ext. A.

6. In order to substantiate its case, prosecution had examined altogether seven P.Ws. who are, P.W. 1 Mukesh Sah, P.W. 2 Urmila Devi, P.W. 3 Chhotelal Sah, P.W. 4 Vidyanand Sah, P.W. 5 Dr. Mithilesh Kr. Singh, P.W. 6 Nitu Kumari and P.W. 7 Upendra Nath Sharma side by side as also exhibited, Ext. 1 signature of P.W. 1 over fardbeyan, Ext. 1/1 signature of informant over fardbeyan, Ext. 1/2 fardbeyan, Ext. 2 injury report, Ext. 3 formal FIR, Ext. 4 chargesheet, supplementary injury report relating to injured Urmila Devi has been marked-X for identification. As stated above, no ocular evidence has been adduced on behalf of defence though, original



Kewala dated 24.06.1965 has been made an Ext. (A).

7. While assailing the judgment of conviction and sentence, it has been submitted on behalf of learned counsel for the appellants that the same happens to be perverse on account of non-appreciation of material facts available on the record since before. In order to substantiate such plea, it has been submitted that there happens to be grave error on account of non-performance of mandatory provision of law i.e. proper mode of recording of statement under Section 313 Cr.P.C. as, during course thereof, the learned lower court had not confronted any incriminating article relating to an attempt to commit rape and that being so, conviction and sentence recorded under Sections 376/511 of the Indian Penal Code would not survive. Apart from this, it has also been submitted that though P.W. 2, victim herself during her examination-in-chief had not spoken with regard to any activity at the hand of appellant Suresh Singh more particularly relating to his individual activity attracting any of the ingredients relating to Section 376/511 of the Indian Penal Code rather she had only deposed that their activity was to the extent of outraging her modesty. However, while she was being cross-examined her previous statement recorded under Section 161 of the Code of Criminal Procedure was confronted and on that very score, there happens to be material development in her evidence which



completely nullifies the prosecution version and further, is not at all found substantiated by the Doctor P.W. 5. Not only this, such kind of exaggeration is bound to discredit testimony of P.W. 2, the victim and that being so, did not allow the finding recorded by the learned lower court more particularly relating to Sections 376/511 of the Indian Penal Code.

8. Furthermore, it has also been submitted that with regard to Section 323 of the Indian Penal Code it is evident that prosecution utterly failed to substantiate the same in the background of the fact that when the evidence of P.W. 1, son is taken during cross-examination, he had not stood the test as an eye witness to the occurrence rather, he had stated that when he reached at the place of occurrence as, he was at the house of his neighbour, his mother was unconscious. He talked with his mother after 15 days. In likewise manner P.W. 3 Chhotelal Sah also not been able to corroborate the prosecution version in the background of the fact that in his examination-in-chief alone he has stated that when he reached he found the victim unconscious. Furthermore, his interestedness is found duly accepted as he had contributed for treatment of P.W. 3, injured. P.W. 4 has not supported the case of the prosecution and so, he was declared hostile. P.W. 6 is the informant. Admittedly, at the stage of her cross-examination, the parties had entered into



compromise and to substantiate the same, compromise petition along with permission petition were filed before the learned lower court and in the aforesaid background, she had stated that Suresh Sah, Chandan Sah, Lallan Sah, Bhulan Sah and Umesh Sah have assaulted her mother. When she intervened, she was also assaulted. P.W. 7 is the Investigating Officer who has not found blood at the place of occurrence. In the aforesaid background, it has been submitted that when those evidences is taken together with the evidence of P.W. 2, injured, it is apparent that manner of occurrence as suggested by the prosecution is found completely changed and that being so, the finding recorded by the Doctor P.W. 5 with regard to presence of injury over the person of P.W. 2, injured is not going to give any additional support. So, in the facts and circumstances of the case coupled with the evidence of P.W. 2 as well as P.W. 6, the informant the case of the prosecution is found completely smashed and that being so, instant appeal is fit to be allowed.

9. It has also been submitted that husband of the P.W. 2 has not been examined nor there happens to be any kind of explanation though, from the evidence of P.W. 2 it is apparent that his presence was there. In likewise manner, it has also been submitted that other independent witnesses whose arrival at the place of occurrence has been disclosed right from fardbeyan of P.W. 6, have



not been examined. In the background of strained relationship persisting since before, the evidence of interested hostile, inimical witnesses should not be accepted. So, the judgment of conviction and sentence recorded by the learned lower court appears to be fit for its annulment.

10. On the other hand, learned APP opposed the submission and submitted that from the judgment impugned it is evident that the learned lower court had meticulously examined the material available on the record and then, thereafter, inferred that prosecution has substantiated its case punishable under Section 323 of the Indian Penal Code as well as Sections 376/511 of the Indian Penal Code and on that very score, the finding appears to be fit for confirmation. That being so, instant appeal is fit to be dismissed.

11. P.W. 5 Dr. Mithilesh Kr. Singh while examining P.W. 2 Urmila Devi had found following injuries over her person:

- (I) bleeding from upper jaw,
- (II) abrasion on occipital parietal scalp – 2.5x5 cm.,
- (III) swelling on right upper front of leg and
- (IV) patient was complaining neckache.

Patient was referred to Sadar Hospital and as per report therefrom, there happens to be fracture of right leg, as well as upper left incisor broken, and so, opined



injury no. 1 and 3 to be grievous.

12. During cross-examination, it is evident that this witness has not been demolished save and except that these injuries no. 1 and 3 could be manufactured. That being so, presence of two grievous injuries on account of having a teeth broken down and in likewise manner, sustaining of fracture of leg is found duly substantiated.

13. In the aforesaid background, now the culpability of the appellants have to be seen and for that first of all evidence of P.W. 6, informant is to be seen. In her examination-in-chief she had deposed that while her mother was sitting at her Darwaja, Suresh Sah, Chandan Sah, Lalaln Sah, Bhulan Sah and Umesh Sah assaulted. When she intervened, she was also assaulted. During cross-examination she has disclosed that she has compromised the case. Her mother has also compromised the case. They both put their signature over the compromise petition as well as permission petition. In para-5 of her cross-examination she had stated that when she had gone to fetch water from hand pump, during the intervening period, her mother was assaulted. She had not seen who were the assailant. She was assaulted by fists and slaps. She was not treated. There happens to be land dispute amongst both the parties.

14. P.W. 2, the victim was examined before the aforesaid



event of compromise though, from the order sheet dated 07.05.2013 it is evident that she had objected the theme of compromise.

15. Be that as it may, from her examination-in-chief it is evident that on the alleged date and time of occurrence, while she was inside her house, Suresh and Lallan Sah came, they pulled away her Saari and then, in order to outrage her modesty threw her on the ground. When she raised alarm, Lallan Sah assaulted her as a result of which her tooth was broken down. Her daughter Nitu Kumari came on her alarm who was assaulted by Umesh Sah, Bhulan Sah and Chandan Sah. They also assaulted her. They assaulted with cane, Lathi and rod. On hue and cry, Mukesh Kumar Sah, her husband Nageshwar, Chhotelal and others came, who took her away to police station and then to hospital. She was referred to Sadar Hospital, Saharsa where she was treated. Identified the accused. During cross-examination at para-3 there happens to be disclosure relating to her family genealogy. In para-5 she had disclosed the boundary of her house North Lalu Mian, South land of Lallan, East house of Lallan and West land of Suresh Sah. She had further disclosed that her house stood over the land belonging to her maternal father-in-law. She does not know whether her maternal father-in-law had sold away aforesaid land in favour of Suresh Sah. At para-6 she has admitted that during course of her statement under Section 161 Cr.P.C. she had stated that



Suresh Sah indulged in inhumane treatment with her after removing her cloth, as a result of which there was profuse bleeding from her vagina. At para-7 she had stated that first of all Suresh Sah and Lallan Sah intruded inside her house and then, had assaulted. Suresh Sah and Lallan both inserted cane inside her vagina. As a result of which she became unconscious. At para-8 she had stated that when Suresh and Lallan came inside her house, none was present there. In para-9 she stated that Suresh Sah and Lallan inflicted injury over her head at that very time, none was present. She regained sense after 15 days. She had seen all the accused persons. In para-12 she had stated that as a result of injury over her head as well as also got her tooth broken. Her leg also fractured. The accused persons also assaulted over back. Suresh had assaulted over head with Lathi and further inserted cane inside her vagina. Lallan Sah had assaulted with stick as a result of which her tooth was broken down. There was copious blood over the ground. Broken tooth was handed over to police. The blood stained cloth, earth was seized by the police in presence of Chhotelal Sah and Birendra Yadav.

16. P.W. 1 is the son of victim P.W. 2 as well as brother of P.W. 6. His presence as an eye witness in the fardbeyan is lacking. During his examination-in-chief he had stated that on the alleged date and time of occurrence while he was sitting at the Darwaja of his



neighbour, Suresh Sah and Lallan came, intruded inside the house and demanded water from him. Suresh Sah choked mouth of his mother and then, attempted to commit rape over which he raised alarm. His hand was caught hold. His sister Nitu Kumari also raised alarm whereupon, Bhulan Sah pressed her mouth and snatched away chain. Umesh Sah and Chandan Sah assaulted his mother with Lathi and rod. On hue and cry Birendra Yadav and others came as a result of which the accused persons fled away. Then thereafter, they have taken his mother to police station and then to hospital. During cross-examination apart from having contradiction visualizing from para – 7 and 8, at para-12 he had stated that when he reached at his house, Nitu Kumari was present there. Accused were present there. None other were present. About half an hour then corrected as 10-15 minutes after his arrival, villagers came who were Md. Naim, Bindeshwari Yadav, Birendra Yadav and Pannalal. Even at that very time the accused were standing. They have not tried to apprehend them. In para-13 he had stated that when he reached at his house at that very time his mother was unconscious. Intermittently she regained sense she had not talked with his mother at his house because of the fact that she was unconscious. He talked with his mother 15-20 days after the occurrence. So far as counter case is concerned para-15, 16 is there.

17. P.W. 3 had not claimed to be an eye witness to the



occurrence rather he had simply said that Lallan, Umesh, Chandan and Bhulan Sah had assaulted the wife of Nago. When he reached at the place of occurrence, he found her unconscious. During course of cross-examination at para-6 he had reiterated the same. P.W. 4 had not supported the case of the prosecution on account thereof he was declared hostile. P.W. 7 is the investigating officer. During course of examination-in-chief he had stated that after registration of the case he was entrusted with the investigation. He had inspected the place of occurrence having boundary North open land then road, South courtyard of informant and then half constructed plinth, East house of Umesh Sah, West informant. He recorded statement of the witnesses. Procured the injury report. Accused was apprehended and then charge sheet was submitted. During cross-examination he had stated that he has not seen blood at the place of occurrence. At para- 17, 18 there happens to be contradiction relating to P.W. 1 as well as P.W. 2.

18. After analyzing the evidences available on the record as discussed above, it is apparent that so far charge under Section 376/511 of the Indian Penal Code is concerned, found completely non-substantiated from the evidences. Manner whereunder P.W. 2 had deposed not only contradicts the other P.Ws. rather put question mark over her own status. That being so, the finding recorded by the learned lower court to that extent is found contrary to the material and



is accordingly set aside. But, so far as factum of assault is concerned, apart from consistency amongst the evidence of P.Ws. the evidence of P.W. 5, doctor is found corroborative one. That being so, the conviction and sentence relating to Section 323 of the Indian Penal Code is found duly substantiated whereupon that extent judgment of conviction and sentence recorded by the lower court is affirmed.

19. Now coming to question of sentence it has been submitted on behalf of learned counsel for the appellants that taking into account the animosity amongst the parties, litigation, coming in between since before drawing of this case and further, from the evidence P.W. 6 it is evident that matter has been compromised and so, appellants be released giving benefit of Probation of Offenders Act, which the learned APP controverted.

20. Considering the evidence in its entirety, the sentence inflicted by the learned lower court is modified as period already undergone. Consequently thereof the instant appeal is partly allowed in terms as indicated above.

(Aditya Kumar Trivedi, J)

KKSINHA/-

AFR/NAFR	NAFR
CAV DATE	NA
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