

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.15 of 2015

Arising Out of PS.Case No. -null Year- null Thana -null District- JAMUI

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Naushad Ansari, son of Anwar Mian @ Anwar Hussain, resident of Village- Garhi Chowk, P.S.- Khaira, District- Jamui.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. S. P. Parasar-Advocate

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

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 18-08-2017

Sole appellant Naushad Ansari has been found guilty for an offence punishable under Section 376 of the I.P.C. and sentenced to undergo R.I. for seven years as well as to pay fine appertaining to Rs.2,000/- and in default thereof, to undergo S.I. for six months additionally with a further direction to set off in terms of Section 428 of the Cr.P.C. relating to the custodial period vide judgment of conviction dated 31.10.2014 and order of sentence dated 05.11.2014 passed by the Additional Sessions Judge-2nd, Jamui in Sessions Trial No.163 of 2013.

2. Name withheld, PW-10 gave her fard-bayan on 26.12.2012 at about 7.05 P.M. before Officer-in-Charge of Khaira Police Station alleging inter alia that on preceding evening i.e. on



25.12.2012 at about 7.00 P.M., Md. Naushad Ansari, son of Anwar Mian @ Anwar Hussain dialed over her mobile and talked with regard to their marriage. She had further disclosed that she along with Naushad Ansari were on talking term for the last 4-5 months. Naushad used to talk relating to their marriage. He used to loiter around her house in usual course. Again, Naushad dialed at 8.00 p.m. and then at 9.00 p.m., at that very moment, he directed her to come outside her house. Because of the fact that they both were on talking term on account thereof, she came out from her house at about 10.00 p.m. in order to see Naushad. During said course, when she reached near the house of Ashir Mian, she found Naushad, who instructed her to proceed towards Northern direction. First of all, she declined, but Naushad lifted her in his lap after closing her mouth and crossed about half a kilometer from her house near a Jackfruit tree where he forcefully indulged in physical relationship. Then thereafter, he took her to the place of Md. Kabir, his friend. Nephew of Kabir was present, who used to loiter along with Naushad near-about her house. One another friend of Naushad was also present whose sasural lies at village-Milni-Tand and name of his father-in-law happens to be Isho Mian. She stayed at about 10 minutes. When she said that now, she will not return to her house, because of the fact that her family member would not allow her, over this Naushad had disclosed that put



belief over his conduct. For the present, you should go to her house, he will marry her. Putting belief upon the word of Naushad, she returned back to her house. Door was opened by her sister. Then, her sister disclosed the same to Sardar, who made query from her. Her parents reside at Aasansol, who was also informed. After their arrival, this case has been instituted. Furthermore, it has also been disclosed that Naushad had further said that in case, she was being said anything at the end of family members, then in that event, she would dial to him. When she tried to talk with him, his mobile was found switched off.

3. On the basis of the aforesaid fard-bayan, Khaira P. S. Case No.170 of 2012 was registered under Section 376 of the I.P.C. followed with an investigation and after concluding the same, chargesheet was submitted facilitating the trial which ended adverse to the interest of the appellant, the 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 been asserted that parents of victim had tried to negotiate over marriage of alleged victim with him, which was declined by the family members of the appellant as a result of which, this case has been filed. In order to substantiate the case, the defence had also examined two DWs, who



are DW-1 Shekhawat Mian and DW-2 Subhan Mian.

5. In order to substantiate its case, prosecution had examined altogether 13 PWs, who are PW-1 Loko Mian, PW-2 Md. Yunus, PW-3 Md. Khalil, PW-4 Firoza Khatoon, sister of the victim, PW-5 Sabuji Khatoon, mother of the victim, PW-6 Md. Kudrat Ali, PW-7 Wasir Mian, father of the victim, PW-8 Dipak Kumar, I.O. of the case, PW-9 Rameshwar Singh, Part I.O., who had submitted chargesheet, PW-10 the victim, PW-11 Shyamal Kumar, Judicial Magistrate, 1st Class, who had recorded statement of the victim under Section 164 Cr.P.C., PW-12 Dr. Bibha Kumari, Gynaecologist and PW-13 Dr. Dharendra Prasad Singh, one of the members of the Board, which had estimated the age of the victim. Side by side, prosecution had also exhibited, which are Exhibit-1 endorsement over fard-bayan, Exhibit-2 seizure list, Exhibit-3 fard-bayan, Exhibit-4 signature of victim over statement under Section 164 Cr.P.C., Exhibit-5 statement under Section 164 Cr.P.C., Exhibit-6 injury report, Exhibit-7 medical report. As stated above, the defence had not adduced any documentary evidence. However, two DWs have been examined viz. DW-1 Shekhawat Mian and DW-2 Subhan Mian.

6. Now, coming to status of the witnesses, it is evident that PW-1, PW-2, PW-3, PW-6 have not stated with regard to alleged occurrence rather they have deposed that there was dispute amongst



the parties on account of refusal to marry and so, this case has been filed. PW-4, PW-5, PW-7 and PW-10 are the family members. PW-9 is the part I.O. while PW-8 is the main I.O. PW-11 the Magistrate also happens to be formal in nature as had exhibited statement under Section 164 Cr.P.C., while PW-12 and PW-13 are the doctors.

7. In order to adjudge the merit of the case, first of all, status of the victim is to be seen. As per fard-bayan, it is evident that she had disclosed her age to be 18 years. During course of medical examination exhibited through PW-13 Dr. Dharendra Prasad Singh, her age has been estimated above 19 years. From his deposition, it is evident that prosecution had exhibited the same without any protest and that being so, majority of the victim, PW-10 goes out of controversy.

8. Victim was examined by PW-12, who after examination had opined that there happens to be no sign of forceful coition though hymen was found old ruptured and so, she opined that she might have sexual experience in the past.

9. PW-10 is the victim, she had stated that it was 25.12.2012, time was 7.00 p.m. She was inside her house, Naushad dialed, which was attended by her. He disclosed that he was talking from Garhi Chowk. She enquired why he had dialed over which Naushad instructed her to come outside, over which she said why she



should come outside, over which Naushad threatened by saying that Should she come outside or she will be lifted from her house and further, will be defamed. Again, he dialed at 8.00 p.m. Out of fear, she opened the gate. Naushad pressed her mouth, took her towards Bahiyar near Jackfruit tree where after breaking string of her Salwar, he committed rape. Then he took away to the house of Kabir where she remained for 10 minutes. Then he instructed her to go to home. She returned back to her house weeping. Whole village awaken, whereupon she disclosed the event to her parents. Her parents reside at Bengal, who came on the following day and then thereafter, the case has been registered. During cross-examination at Para-3, she had stated that she had given her age during course of fard-bayan as 16 years and not 18 years. She had further stated that she is unaware that her age has been estimated as above 19 years by the Medical Board. Further, she said that house of Naushad lies one kilometer away from her house. She was not known to Naushad. He was not on visiting term. They have not talked over mobile. She had no mobile, call was over the mobile of his Bhabhi. Then had stated that she had disclosed her mobile number as well as mobile number of Naushad to the police during course of her fard-bayan. She had further stated that she had informed Naushad that it was wrong even then, Naushad dialed. She had not complained to police, to the villagers. How Naushad obtained



the phone number, she could not say. Then, had stated that she had received call on 25.12.2012 thrice and then, she had gone to the place of Ashin Mian where non was present. In Para-5, she had stated that Naushad pressed her mouth by one hand. As Naushad had threatened on account thereof, she had not removed his hand from her mouth. Again, she said that Naushad lifted her in his lap by both hands, but out of fear, she had not raised alarm. She had not resisted out of fear. She is unaware whether her Bhabhi as well as sister have gone in search of her or not. Naushad had taken half kilometer away from her house near Jackfruit tree of Ashique Mian. Out of fear, she had not resisted. Naushad indulged in physical relationship. During course thereof, both the hands of Naushad were over her chest. Even at that very time, she had not raised alarm nor protested. She had not sustained any kind of scratch over her body. She had not tried to flee there from. She had accompanied Naushad to the place of Kabir Mian, whose house lies at village-Nimatand where Ganni and Saddam were present. She had not disclosed the occurrence to them and then thereafter, she returned back to her house weeping. She had not dialed Naushad after arrival at house. In Para-6, she had stated that her Bhabhi and sister were not present at the door, door was opened. Her sister and bhabhi had not enquired from her where she had gone. She had denied that she was in love with Naushad.



10. Admittedly, PW-4, PW-5 and PW-7 are not an eye witness to occurrence and they reiterated the version of prosecutrix. PW-4, sister had stated that on the alleged date and time of occurrence, Naushad had called victim. She came out after opening door. Naushad took her away. Subsequently, victim had disclosed that she was raped by the accused. In Para-2, she had stated that call was attended by the victim. Victim had disclosed to her Bhabhi that Naushad is calling her. They have not said anything. Victim on her own opened the door and came outside. She had further stated that when Naushad caught hold the victim, they have raised alarm. Whether victim had raised alarm or not, she is unable to say. She had further stated that her sister returned back at about 3.00 p.m. At that very time, they have not allowed her to enter inside the house. She remained at the verandah for remaining period.

11. PW-5 is the mother, who had stated that while she was staying at Bengal, she was informed regarding the occurrence. On query, victim had also disclosed that Naushad used to dial her regularly. During course of cross-examination, she had stated that they were on frequent talking term. PW-6 is the father, who had stated that he received call to the effect that Naushad had lifted the victim and raped. Then, he came, gone to the place of accused and then thereafter, case has been registered. During cross-examination at Para-



2, he had stated that since before 25.12.2012, there was no complain by his family members against Naushad Ansari.

12. After going through the evidences as referred above, it is evident that victim during course of her evidence had resiled from her initial version over which her attention has been drawn under Para-7 of her cross-examination. Furthermore, it is also evident that the date of occurrence happens to be chilly winter season i.e. last week of December and so, had she not been a consenting party, then in that event, there was no occasion for her to open the door to come out from her house, to go to the place of Md. Asif and from there, she covered a distance of half kilometer having in the lap of appellant Naushad Ansari without any hitch and hindrance. The aforesaid event speaks a lot with regard to conduct of the victim, wherein she indulged herself with Naushad, as she became apprehensive as she was not allowed to come inside the house, on return at 3.00 a.m. as is evident from the evidence of PW-4, her sister on that very score, this case has been filed. Apart from this, it is also evident that all the prosecution witnesses had stated that it was mobile belonging to Bhabhi of the victim, whereupon call was attended, but she has not been examined nor there happens to be any explanation. Some sort of slackness is found at the end of defence also, during course of cross-examination of PW-8, the I.O. as failed to get the call details an



exhibit of the record, which the I.O. had obtained during course of investigation. Be that as it may, the conduct of the victim did not inspire truthfulness in her assertion that she was not a consenting party. Furthermore, considering her conduct whereunder she had tried to conceal her age from 18 to 16 years, though is found exposed by the evidence of PW-13 identifying her above 19 years did not justify the finding recorded by the learned lower Court.

13. In ***Krishan Kumar Malik vs. State of Haryana reported in (2011) 7 SCC 130***, it has been held:-

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her S.164 statement, S.161 statement (Cr.P.C.), FIR and deposition in Court.



Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the Appellant.”

14. In ***Rai Sandeep @ Deepu vs. State (NCT of Delhi) with Hari Singh vs. State (NCT of Delhi) reported in (2012) 8 SCC 21***, it has been held:-

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately



before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more



precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

23. On the anvil of the above principles, when we test the version of PW-4, the prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated in the complaint and what was deposed before the Court at the time of trial. There are material variations as regards the identification of the accused persons, as well as, the manner in which the occurrence took place. The so called eye witnesses did not support the story of the prosecution. The recoveries failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instill the required confidence of the Court in order to confirm the conviction imposed on the appellants.”

15. That being so, the conviction and sentence recorded



by the learned lower Court is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liabilities.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	22.08.2017
Transmission Date	22.08.2017

