

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.67 of 2013

Arising Out of PS.Case No. -40 Year- 1994 Thana -AMDABAD District- KATIHAR

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1. Mirjiaul Haque S/O Mirsaidun Resident Of Village Gairiya, Police Station Harischandrapur, District Malda (W.B.).

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant : Mr. Rajeev Roy,
Mr. Rajendra Prasad Sah &
Mr.Makardhwaj Upadhyay, Advocates.
For the State : Mr. S. N. Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

and

HONOURABLE MR. JUSTICE SANJAY KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 06 -04-2017

The sole appellant stands convicted under Sections 366A, 372, 376, 120B of the Indian Penal Code (IPC) and sentenced to undergo R.I. for 10 years with fine, R.I. for 10 years with fine, R.I. for life with fine, and R.I. for 14 years with fine respectively. There is default clause against fine imposed under the aforesaid charge(s). The sentences have been directed to run concurrently.

2. The prosecution case as projected at the trial emancipated from the written report (Ext.1) lodged on 27.05.1994 by the brother of the victim (PW-8), in brief, is that the victim was missing from the house since 21.05.1994. Sk. Firoz (PW-4) gave



information to the informant that he had seen co-accused Rajendra Tanti taking away the victim on boat. In course of search one Bibi Guliya (not examined) informed him that one day before she had seen the appellant talking with the victim on Paharpur Bandh. This was reported to him as also to the local Mukhiya and Sarpanch. The informant suspected that victim had been kidnapped/enticed away by the appellant and co-accused Rajendra Tanti for immoral purposes. Upon retrieval of the victim her statement was recorded under Section 164 of the Cr. P.C. on 04.07.1994. PW-12 examined the victim on 30.05.1994 and submitted the injury report (Ext.2) wherein she assessed her between 16 to 17 years of age. The doctor, on examination of her private parts, found no mark of physical violence on her person. The hymen was found intact. There was no spermatozoa found. On the basis of the above, she opined that no definite opinion about the commission of rape on the victim can be ascertained. The police, upon conclusion of the investigation, submitted charge sheet against the appellant which gave rise to Sessions Trial No. 198/1996 on the file of the learned *Ad hoc* Additional Sessions Judge V, Katihar where charges were framed and read over to the appellant to which he pleaded not guilty.

3. To further the prosecution case the prosecution examined 13 witnesses. The statement of the appellant was recorded



under Section 313 Cr. P.C. wherein he pleaded his innocence. The defence also entered upon evidence and produced 02 DWs with a view to demonstrate the previous animosity. PWs-1 and 2 are mother and father of the victim. PW-4 Sk. Firoz has deposed about the victim being taken away on boat by co-accused. PW-5 Sk. Tullu is co-villager and deposed on the point of kidnapping of the victim and also recovery of victim (PW-7) from the house of her Phupha (PW-11). PW-6 is the Bhabhi of the victim whereas PWs- 7 and 8 are the victim and her brother (informant) respectively. PW-9 Shamima and PW-10 Shamim Akhtar co-villagers have been declared hostile by the prosecution. PW-12 is the Doctor who examined the victim on 30.05.1994 and submitted the injury report (Ext.2). PW-13 is a formal witness who has proved the signature of the Station House Officer on the formal FIR (Ext.6). In consideration of the evidence of the prosecution adduced at the trial, the learned Trial Court held the appellant guilty under the aforesaid charges and sentenced in the manner noted above.

4. We have heard Mr. Rajeev Roy appearing for the appellant and Mr. S.N. Prasad APP for the State.

5. It is submitted although the victim has spoken about the commission of rape on her by the appellant both in her statement under Section 164 Cr.P.C. (Ext. 3) as well as in her



deposition but her evidence requires to be appraised in the backdrop of complete picture emerging from the record. Dense cloud is created on the prosecution case if the evidence of the close relatives is appraised in the light of the first version of the prosecution case given by the informant (PW8) in the written report (Ext 1). The counsel for the State, on the other hand, submits that the victim (PW7) has supported the prosecution case. She is only 16 to 17 years of age. The evidence of victim of rape case stands on a different pedestal. From the evidence of other witnesses, it is evident that she was missing from the house since last few days and was seen with the appellant. Thereafter what actually happened with her can only be stated by the victim and none else. The evidence of the victim is not that of an accomplice. The Court should not look for corroboration. The opinion of the doctor is not a severe jolt to the prosecution case as several days after the perpetration of rape normally on physical examination of person of the victim no such physical sign would appear.

6. We shall in the light of the submission of the parties examine the relevant evidence. PW-8 is the brother of the victim and the informant of the case. He stated that the victim was missing from the house since 21.05.1994 as was disclosed to him by his wife PW-6. She had gone to provide food to the mother and thereafter did not return. A hectic search was made by him in course



whereof PW-4, co-villager revealed to him that he had seen the victim going on boat along with Rajendra Tanti and the appellant towards Bengal. Guliya (not examined) in course of his search had disclosed him that a day prior, appellant was seen by her talking with the appellant. Few days after the occurrence PW-9, since declared hostile, brought the victim to one of the relatives of the informant.

7. We shall here refer the testimony of PW-11 who is brother-in-law of Sk. Khursid (PW-2; father of the informant) and resident of Malda (West Bengal). He has deposed that a couple of days before, the father of victim had come to his place in search of his daughter (victim). He could know subsequently that the victim was at the residence of Shamim Akhtar (PW-10). He along with his wife went to that place and identified the girl as daughter of SK. Khursid (PW-2). She was brought to his house and information was sent to PW-2. In course of talk with the victim, she had disclosed that the appellant and another co-accused had enticed her away and had committed rape on her. Subsequently, PW-2 reached the house of this witness and took the victim back to home. Obviously, this witness (PW-11) has not identified the appellant in dock. Our attention has been drawn by the counsel for the appellant to his cross-examination where he has shown his ignorance about the person who had



committed rape on the victim. This was for the reason that he did not know the appellant from before.

8. PW-2 is the father of the victim. In his brief examination in chief, he has only given a hearsay account of the fact about how the victim was kidnapped/enticed away by the appellant and then disclosure by the victim to him about commission of rape on her by him. He has, however, stated that 05 days after her missing from the house she had returned. We do not find much from the evidence of PW-3 who has been declared hostile.

9. PW-4 has taken the dock to support the prosecution case that he had seen the victim on the date of occurrence at 10-11 AM. The appellant and co-accused Rajendra Tanti took the victim on a boat towards West Bengal. After few days the victim was retrieved and restored to the family. In his cross-examination, he has flatly denied any relationship with the informant. His statement was recorded promptly by the Investigating Officer.

10. PW-5 is a co-villager who has deposed to the effect that on 21.5.1994 at about noon time when the victim had gone to provide food to her mother in the field/bahiyar, the appellant and co-accused Rajendra Tanti on way kidnapped her and sailed towards West Bengal. The father had gone to the adjoining village in West Bengal in search of his daughter. Upon recovery of the victim her



statement was recorded by the police where he narrated the same thing. Nothing substantial has been elicited by the defence through his cross-examination.

11. PW-6 is the sister-in-law (*Bhabhi*) of the victim. She has testified to the effect that on the relevant date the victim had gone to the field with the *tiffin* for her mother. On way she was forcibly taken away by the appellant and co-accused Rajendra Tanti towards West Bengal. This information was given to the family through Sk Firoj (PW-4). Upon her retrieval, the victim disclosed about the trauma undergone by her while in the hands of the appellant. The victim (PW.7) as per the prosecution case was traced and retrieved a couple of days after the occurrence. According to the informant, 5 to 6 days after her missing from the house and according to PW-2 05 days after her missing from the house. Harping on this, particularly the evidence of the informant in para 6 where the informant has stated that 5-6 days after the occurrence, his sister had come back to the house and thereafter the written report was lodged it has been argued with much vehemence that if that be the case then the informant ought to have alleged in the written report about commission of rape on the victim by the accused-appellant as the victim had disclosed everything to the informant's wife. This was not stated in the written report. Before we consider the said contention of



the appellant we would advert to the testimony of the victim who has deposed as PW-7. On the date of her examination (21.7.2005) she has disclosed her age as 25 years. We have carefully gone through her evidence. In substance, she has stated that while in the field/ bahiyar during the noon time near the riverbed she was forcibly kidnapped by the appellant and thereafter taken to his house and from there to Belgacchi where she was kept and during her stay at that place Rajendra Tanti had also joined and both of them had committed rape on her after gagging her mouth and she could not raise alarm as dagger was shown to him and threats were held out. The following morning she was taken on a boat towards the West Bengal where also the appellant committed rape on her on few occasions. Thereafter she was made to sit on the train at Katihar and the appellant disappeared. While travelling on train, she started sobbing which attracted the attention of another traveler (PW-10) who, out of sympathy, brought her to his house at Harishchandrapur and thereafter her relative (PW11) who was also resident of West Bengal was informed. PW-11 and her father PW-2 later arrived there and she came back home. Although the witness has been cross-examined at length but learned counsel for the appellant has not been able to show any serious contradiction in her deposition. The cross-examination only hovering around the attending circumstances having no direct



bearing on the case of the prosecution. However, we shall only note that in course of her cross-examination, she has detailed the ordeal/pain she suffered on account of subjecting her to the sexual assault by grown up male person, the appellant.

12. Learned counsel for the appellant has strenuously argued on the strength of the evidence of the informant that the victim had already returned to home when the written report was lodged on 27.5.1994. She had disclosed her trauma to her 'bhabhi' and naturally PW-6 informant had the knowledge of the fact that not only the victim was kidnapped or enticed away by the appellant but was also subjected to rape by him. It was expected of him to say so in the written report which has not been done. This creates serious doubt over the entire prosecution case. In this connection, he has also placed the findings of the Medical examination of the victim recorded by PW-12 who had examined the victim on 30.05.1994 and authored the injury report (Ext. 2). It has been submitted that the victim was assessed between 16 to 17 years of age. On examination, her hymen was found intact. The pathological examination showed no spermatozoa. On the basis of the above, the Doctor has opined that no definite opinion about commission of rape on the victim can be ascertained.

13. What shall be the value of such medical



examination several days after the commission of rape. Intact of hymen is not conclusive proof to negate the commission of rape. There are many reasons. In the attended facts of the case, the opinion expressed by the Doctor upon physical examination of the person of the victim would pale into insignificance. Had it been done so within one or two days after the alleged commission of rape on the victim there might have been positive sign(s) either to confirm or negate the commission of rape.

14. On a conspectus of the relevant evidence adduced by the prosecution it is found that the victim was only 16 to 17 years of age when she was forcibly kidnapped by the appellant. At least PWs 4 and 5 have detailed the ocular account of forcibly taking away the victim by the appellant. Both the witnesses have identified the appellant in dock. A serious dispute may be raised against such identification as appellant is the resident of Bengal province. The doubt in this regard is cleared when we go through the evidence of PW-4 at para-8 where he has set out the unique topography of the place. The village of the informant in the State of West Bengal is separated by a small riverbed. On one side of it is the village of the informant in the State of Bihar whereas on the other side of the bank is the village of the appellant in the State of West Bengal. The informant at para 6 has stated that the village of appellant situates at a



distance of 1 k.m. from his village. The fact that she was kidnapped from Bahiyar by the appellant, from the evidence discussed above stands established. What thereafter happened with her is only to be stated or disclosed by the victim.

15. Before we deal with the evidentiary value of rape victim, particularly, of minor girl we would again advert to the contention of Mr. Roy that if the victim had been restored in the house before lodging of the written report on 27.5.1994 it ought to have been disclosed in the written report lodged by her brother with a further allegation of victim having been subjected to rape by the appellant. The same is, however, missing in the written report which encircles the prosecution case with grave doubts. To clear this doubt we perused the investigation report and find that soon after recording of the FIR on 27.5.1994 the Investigating Officer visited the house of the informant and found his father PW-2 had already left the house to take back his daughter who was traced by PW-11 Sk. Rajjak, his brother-in-law. It appears that as the family got the information about the victim staying in West Bengal in the house of PW-10, the father (PW-2) proceeded to confirm and bring her back and in the meantime on 27th May 1994 itself the informant rushed to the police station and lodged the case. This was probably so done considering the fact that few days had already lapsed in not reporting



the case to the police about her kidnapping by the appellant. It is also natural conduct of the family of the victim to first initiate a hectic search for the victim. We do not find any serious lacunae in the prosecution case on this count alone as argued by the counsel for the appellant to discredit the case put up by the prosecution. The rule enunciated in this regard has hardened into one of law is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge.

16. In 2007(1) PLJR SC 188 (State of Kerala vs. Kurisum Moottil Antony) the Hon'ble Supreme Court in para-8 observed as under:-

*“8. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in “the case of an accomplice to a crime”. (See **State of Maharashtra vs. Chandra Prakash Kewalchand Jain** [1990(1) SCC 550]. Why should be the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles’ fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.”*

17. The accused cannot cling to a fossil formula



and insist on a corroborative evidence in a case like this as has been observed by the Hon'ble Supreme Court in AIR 1988 SC 753 that in the Indian setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. In our permissive society a girl or a woman would be extremely reluctant even to admit that any incident reflecting on her chastity or dignity had ever occurred. If the victim has opened her mouth and narrated the incident of how she was subjected to rape at the hands of the appellant it is difficult to brushed aside her evidence on the ground that her presence in the house at the time of lodging of the FIR was not stated by the informant. Through the evidence of PW-10 and 11 we would find the state of affairs of the victim when she was found and the fact about commission of rape on her by the appellant was disclosed to these witnesses is a kind of credence to the version of the victim. We do not find from the trend of cross examination of these witnesses any plausible reason for them to have falsely depose against the appellant. Similar is the case with PW-4 (Sk Firoz) and PW-5(Sk Tullu) who are co villagers and unconnected with the family of the informant. That apart, no reason is forthcoming to us through the evidence providing any motive to the informant to falsely implicate the appellant in the crime at the cost of the dignity of his unmarried minor sister. We have, in this regard,



also perused the statement of the appellant made under Section 313 Cr. P.C. While pleading his innocence he has not set out any reason for his false implication by the informant or the victim of the case.

18. We may also notice here the principle enunciated in this regard by the Hon'ble Apex Court in the case of **State of Himachal Pradesh vs. Sanjay Kumar Alias Sunny report in (2017) 2 SCC 51** wherein it has been re-emphasized the Court should take stalk of the realities of life where the girls are sexually abused and that the testimony of the victim/prosecutrix if found trustworthy having no shadow of doubt, the Court should accept her version even without looking for any corroboration. The conclusions derived from the discussion above establish the guilt of the appellant for the charge punishable under Section 376 of the IPC.

19. The counsel for the appellant has contended that through the evidence of the prosecutrix (PW-7) it does not appear that she was kidnapped for the purpose of prostitution. What we find from the evidence of the prosecutrix is that she was enticed away/kidnapped by the appellant and taken to places where she was subjected to rape by the appellant and another co-accused. The appellant thereafter made her to sit on a train at Katihar and disappeared. Although in the written report it is alleged that the appellant had kidnapped/enticed away the victim for the purpose of



selling her in the flesh market however, in course of trial neither the informant himself, his father (PW2), his mother (PW-1) nor his wife (PW-6) or for that matter any of the prosecution witness has stated so. The informant PW-8 at para 6 has said that no case of inducement/kidnapping or selling of any girl has been lodged against the appellant in his locality of 8-10 villages. Thus, we find that the prosecution has failed to prove that the victim was kidnapped/induced by the appellant with the intention of making her to have sexual intercourse with any other person or with the intention of selling her for prostitution.

20. On a consideration of the above, in our view, the judgment of conviction and order of sentence imposed upon the appellant under Section 372 of the IPC is not sustainable. Similarly, it has been argued that the conviction imposed upon the appellant under Section 120B of the IPC, in the facts and circumstances of the case, would also not be sustainable in law. On careful evaluation of the evidence we find that the prosecution has alleged specifically against the appellant and another co-accused of having kidnapped/enticed away the victim. No evidence has come that the appellant had done so in conspiracy with any other accused. In face of the direct evidence available on record against the appellant we see no justification in holding the appellant guilty under Section 120B of the IPC as well.



He had induced and kidnapped the minor victim for which a separate charge was framed and has been held guilty by the learned Trial Court.

21. We find from the order of sentence passed by the learned Trial Court that the appellant has been ordered to undergo R.I. for life under Section 376 of the IPC with imposition of fine of Rs. 15,000/- with default clause. It has been urged before us that the sentence imposed on him is excessive. The appellant was 56 years of age when his statement under Section 313 Cr.P.C. was recorded on 23.03.2012. Accepting his age as 56 years on 23.03.2012 he was hardly 36 to 37 years of age at the time of commission of crime. The appellant, by now, is a senior citizen. We further find from the record particularly the deposition of PW-7 that she is now married and well settled in life. Nothing has come on record that the appellant had earlier been booked or convicted for any such offence. No prosecution witness has said so. In the setting of facts noticed above, we are persuaded to hold that his sentence to undergo RI for life imposed under Section 376 of the IPC by the learned Trial Judge is too excessive.

22. In the light of the discussions made above, the conviction of the appellant under Sections 376 and 366A of the IPC is upheld. The sentence imposed upon him under Section 376 of the IPC



is modified to R.I. for 10 years with fine as ordered by the learned Trial Court. In default of payment of fine, he shall further undergo RI for 03 months. In case the fine is realized, the same shall be paid to the victim (PW-7). The judgment of conviction and order of sentence imposed upon the appellant under Sections 372 and 120B of the IPC is/are set aside. He is acquitted of these charges. The appeal is dismissed with the modification(s) in the findings and the sentence as indicated above.

(Kishore Kumar Mandal, J)

I agree

(Sanjay Kumar, J)

Shyam/-

AFR/NAFR	NAFR
CAV DATE	23.03.2017
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