

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.405 of 2015**

Arising Out of PS.Case No. -99 Year- 2004 Thana -BHAGWANPUR District- BEGUSARAI

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Ram Sagun Yadav, son of Late Bhola Yadav, Resident of Village- Banwaripur, P.S.  
Bhagwanpur, Dist- Begusarai.

.... .... Appellant

Versus

The State of Bihar

.... .... Respondent

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**Appearance :**

For the Appellant/s : M/S Arbind Kumar Sharma, Kiran Sharma,  
Saroj Kumar Sharma, Randhir Kumar  
No.1, Advocates  
For the Respondent/s : Mr. Sujit Kumar Singh, APP  
For the Informant : M/S Sanjeev Kumar, Shamshad Alam,  
Advocates

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**CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA**  
**ORAL JUDGMENT**  
**Date: 20-11-2017**

This appeal arises out of the judgment of conviction dated 26.6.2015 and order of sentence dated 1.7.2015 passed by learned Sessions Judge, Begusarai in Sessions Case No. 49 of 2006 whereby appellant has been convicted under Sections 376 and 511 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for five years and imposed a fine of Rs.10,000/- and in case of default in payment of fine, to undergo simple imprisonment for six months.

2. Prosecution case, in short, is that the victim informant Sanju Kumari (P.W.4) has lodged fardbeyan stating, inter alia,



therein that while she was going to school on 28.8.2014 at about 8 A.M. and when she reached southern side of bamboo clumps of Fathi Mian, a boy caught her and forcibly brought her in the Maize field of Shiv Sah and after removing her undergarments, attempted to commit rape upon her and also molested her. On alarm raised by her, villagers, namely, Rajendra Poddar, Sudhir Singh and school teacher Ashok Singh came there and appellant fled away from the place of occurrence.

3. On the basis of aforesaid fardbeyan Bhagwanpur P.S.Case No. 99 of 2004 was registered under Sections 376 and 511 IPC against the appellant and after investigation charge sheet has been submitted against the appellant, on which cognizance of the offences has been taken and the case was committed to the court of sessions, which was kept by the learned Sessions Judge to his own file for trial and disposal.

4. On behalf of prosecution altogether 12 witnesses have been examined, they are : P.W.1 Ram Pravesh Poddar (brother of victim), P.W.2 Urmila Kumari @ Urmila Devi (mother of victim), P.W.3 Bhagwan Poddar (father of victim), P.W.4 Sanju Kumari (victim and informant), P.W.5 Rajendra Poddar



(hostile), P.W.6 Vijay Sah (hostile), P.W.7 Ashok Kumar (teacher of school), P.W.8 Sudhir Singh (hostile), P.W.9 Dr.Gopal Mishra (Medical Officer, Sadar Hospital, Begusarai), P.W.10 Dr.Ram Pravesh Rai (Surgeon, Sadar Hospital, Begusarai), P.W.11 Dr. N.K.Choudhary (Medical Officer, P.H.C. Saraiya Garha, Supaul) and P.W.12 Dr.Shashi Prabha (In-charge Medical Officer, Birpur Primary Health Centre, Begusarai).

5. Apart from the said oral evidence the prosecution had brought the following documents : Ext.1 Signature of victim Sanju Devi on fardbeyan and Exts. 2 to 2/4 Medical Board Reports.

6. Defence has not adduced any evidence either oral or documentary in support of its case but plea of defence is simply denial of the occurrence and of false implication.

7. After trial learned trial court has convicted the appellant under Sections 376 and 511 IPC and sentenced him as stated above.

8. Against the aforesaid judgment and order the appellant has preferred this appeal on the ground that the victim (P.W.4) claims that Rajendra Poddar (P.W.5) and Sudhir Singh (P.W.8)



had disclosed the name of appellant, whereas Rajendra Poddar and Sudhir Singh had not supported the prosecution case, being identified by them and so far P.W.7, Ashok Singh, is concerned, his evidence shows that he had not seen the occurrence and he saw the victim crying. It has also been submitted that the evidence of P.W.7 discloses that other teachers and 400 to 500 students were present but it looks absurd that they have not heard the hulla and only P.W.7 rushed to the place of occurrence. Further submission of learned counsel for the appellant is that identification of the appellant in court is not admissible as her fardbeyan shows that name of appellant has been disclosed by Rajendra Poddar, Sudhir Singh and Ashok Singh to the informant and she was not knowing the name of the appellant but in the court she claimed that she was knowing the appellant from before, which contradicts her earlier statement (fardbeyan). Further submission is that in such a circumstance, non-examination of I.O. is also fatal in this case, as had the I.O. been examined, defence may cross examine him on those points, as such, serious prejudice has been caused and appellant is entitled for the benefit. Submission of learned counsel for appellant is also



that Doctor has been examined in this case but evidence of doctor as well as medical report does not show any mark of injury on her private part or any other part of body, which also falsifies the prosecution story of attempt to commit rape. It has also been argued that FIR itself shows that it was rainy day but nothing is available on record to show that her cloth was muddy. It has also been argued that P.Ws. 1 and 2 are brother and mother of the victim but they are not eye-witnesses to the occurrence. It has also been argued that the informant is aged about 13-15 years and those should be taken with great scrutiny and should not be accepted without corroboration as it may be tutored.

9. On the basis of above submission, learned counsel for the appellant has submitted that in spite of any corroboration so far identification of appellant and relying only on evidence of victim, as there is no other witness except the victim girl, conviction of the appellant under Section 376/511 IPC is not just and proper.

10. On the other hand, contention of learned APP is that the victim girl has supported the occurrence in her evidence in court and she named the appellant also in court and it is her



evidence in court, which is substantive evidence and she had not been confronted with the fact that she has not identified the appellant earlier and his name was disclosed by the other witnesses and for the first time she has identified him in court. Apart from that it is also submitted by learned counsel for the State that the statement of the appellant under Section 313 Cr.P.C. clearly shows that he had not denied his presence at the place of occurrence, rather he has stated that he was there to unload gunny bags containing fertilizer and that also shows the presence of the appellant at the place of occurrence. Hence there is no infirmity in the judgment.

11. This Court examined the evidence available on record. Prosecution case as per fardbeyan is that while she was going to school the appellant caught her hand and taken her to maize field, remove her paint and attempted to commit rape and pressed her breast and on hulla Rajendra Poddar and Sudhir Singh came there and Ashok Kumar, the teacher of the school, also came running there and the appellant fled away, and his name was disclosed by Rajendra Poddar (P.W.5) and Sudhir Singh (P.W.8). In her evidence in court, P.W.4 (informant/victim) has stated that the appellant apprehended



her, taken her to maize field, undressed her and attempted to commit rape upon her. Her evidence further shows that on her alarm, Rajendra (P.W.5), Sudhir (P.W.8) and Ashok (P.W.7) came there and seeing them Ram Sagun (appellant) fled away. In court she has also identified appellant Ram Sagun Yadav. In her cross examination she claims to know the appellant from before. Her cross examination also shows that when accused dragged her, she raised alarm and on arrival of persons the appellant fled away. She has stated in her cross examination that she knows the name of the appellant as Ram Sagun Yadav and none disclosed the name to her, rather she knows him from before. She has also denied a suggestion that she had stated before police that Sudhir (P.W.5) disclosed name of accused fleeing away, is Ram Sagun. Even she has denied the suggestion that appellant has not tried to commit rape upon her.

12. On consideration of the whole evidence it appears that there is nothing in her cross examination to disbelieve the manner of occurrence. The defence has challenged identification of the appellant in court as she has stated in her fardbeyan that witnesses, Rajendra (P.W.5) and Sudhir (P.W.8), who had been declared hostile, disclosed the name of the



appellant. Law is well settled that evidence in court is substantive evidence and not the fardbeyan, fardbeyan is needed only for the purpose of corroboration and contradiction.

13. It appears that evidence of P.W.5 and 6, who are said to be eye-witnesses to the occurrence and disclosed the name to the informant in the FIR, have been declared hostile by the prosecution as they have not supported the prosecution case. Evidence of P.W.7 disclosed that he heard hulla and on hulla he went there and saw the victim in naked condition and saw two to three persons were also there and the victim girl told that Ram Sagun Yadav was trying to commit rape upon her. This witness has further stated in chief that he has not seen the appellant at the place of occurrence. This witness has also been cross examined by defence and he has stated that his statement was not recorded by police and even in his cross examination he has stated that he reached there and saw the victim complaining and crying.

14. It has been submitted on behalf of defence that the cross examination of this witness shows that his statement has not been recorded by police and also doubted the presence of P.W.7 at the place of occurrence as his evidence in cross



examination shows that there were eleven teachers and 300 students were in school, but in spite of hulla, non else reached there.

15. P.W.1 is brother of victim informant (P.W.4) and he heard that some boy had misbehaved with her sister on which he and his mother (P.W.2) went there and there the victim narrated the occurrence and also disclosed the name of appellant.

16. P.W.2 is mother of victim and she has also stated that on hulla when she went there her daughter has narrated the occurrence to her. Both the witnesses, P.Ws. 1 and 2, are not eye-witnesses, however just after the occurrence when they went there, the victim has narrated the occurrence in detail and they have been cross examined at length but there is nothing in their cross examination to show that the victim has not narrated the occurrence to them.

17. P.W.3 who is father of victim and his evidence disclosed that Ram Sagun Yadav has thrashed the victim and on her cry and hulla they had gone there and accused had fled away from the place of occurrence.

18. Apart from that, Vijay Sah has also been examined as



P.W.6, who has not supported the prosecution case, as such, he has been declared hostile and he has been confronted with the statement made before the I.O.

19. P.Ws. 9 to 11 are the doctors and members of Medical Board, who have examined the victim and after scanning the evidence of P.Ws.9 to 11 it reveals that at the time of occurrence the age of victim was about 13-15 years.

20. P.W.12 is In-charge Medical Officer, Health Centre, Begusarai, who has examined the victim girl and found the following :

(1) Height 4' 5", weight 30 kgs, no. of teeth 14/14, M.I. Old scar Mark on left elbow, old scar Mark on left index finger, secondary sex character, breast only nodule, pubic hair and auxiliary hair not developed. No external injury on chest, breast and abdomen and back.

Pelvic Examination :- No injury on private part. No meshing of under garments. No foreign material on private parts.

Internal Examination :- No injury in outside and inside vagina. Vaginal swab smeared made and sent to pathology deptt. for presence of spermatozoa. Spermatozoa not found. Investigation suggested- X-ray of right wrist joint, X-ray of right knee joint, X-ray of Pelvic A/P view, X-ray of mandible lateral view.

Opinion :- No definite opinion about rape can be given. Age of Sanju Kumari according to Medical Board members 13-15. This report is in my writing. It bears my signature. It is marked as Ext."2/3". This is my signature which is marked as Ext."2/4".



21. Considering the entire evidence discussed above, no doubt P.Ws. 5 and 8, who claimed to be eye-witness to the occurrence, as stated in FIR, have been declared hostile in this case but there is evidence of P.W.4, the victim informant is available on record and she has supported the prosecution case. The evidence of P.W.4 has been corroborated by evidence of P.Ws. 1 and 2, who are brother and mother of the victim and they have stated that the informant victim has narrated the occurrence to them just after occurrence that appellant has tried to commit rape upon her. The evidence of P.Ws. 1 and 2 is admissible under Section 118 of Indian Evidence Act. Further the evidence of Ashok Kumar (P.W.7) shows that he found the victim girl crying and he has supported the prosecution case and there is nothing to show that the same is tutored. Further there is nothing on record to show that there was strange relationship between the appellant and victim girl, as such, she has implicated the appellant in this case and victim girl was aged 13-15 years at the time of occurrence and there is nothing on record to show that her evidence was tutored, rather the same has been corroborated by evidence of P.W.7 as well as evidence of P.Ws. 1 and 2, as such, there is prosecution evidence is available in support of prosecution



case. It is relevant to mention here that the appellant has also admitted his presence at the place of occurrence.

22. Further submission of learned counsel for the appellant is that appellant is only bread earner in his family and moreover he is in custody for more than three years and further no case is made out under Sections 376/511 IPC against the appellant as at best, if the evidence is believed, it is a case of preparation and attempt to outrage her modesty and nothing else and Doctor has found no injury on the person of victim.

23. The aforesaid contention has been discussed by the Hon'ble Apex Court in the case of **Aman Kumar vs. State of Haryana : AIR 2004 SC 1497** and in paragraphs 10, 11, 12 and 13 of the said judgment it has been held as follows :

“10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission, it may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly shows the legislative intention to make a difference between the cases of a mere preparation and an attempt.



11. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

12. Though the prosecutrix's version in Court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by police during evidence. The evidence of P.W.11, the father who according to prosecution made departure from what he allegedly stated during investigation is to the effect that his wife P.W.9 told her that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get effected. Significantly, the evidence of prosecutrix and the doctor does not specifically refer to penetration which is sine qua non for the offence of rape.

13. There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Section 376/511 IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354 IPC are that the person assaulted must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of



the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC. The Shorter Oxford Dictionary (Third Edn.) defines the word 'modesty' in relation to woman as follows :

“Decorous in manner and conduct; not forward or lowe; Shame-fast; Scrupulously chest.””

24. If the prosecution evidence is discussed in the background of ratio decided in the above judgment it appears that in the present case there is only evidence that appellant has dragged the victim to a maize field and got her naked and tried to commit rape and thereafter people assembled there and appellant fled away and nothing is available on record to show that she was further physically assaulted and Doctor has not found any injury on the person of victim girl. Hence at best, the evidences are there against the appellant under Section 354 IPC.

25. In such view of the matter, justice will be served if the conviction of the appellant under Sections 376/511 IPC is modified to a conviction under Section 354 IPC, which is a minor offence of offence under Sections 376/511 IPC. Further it appears that appellant



has remained in custody for more than three years and submission is that he is only bread earner of his family.

26. Accordingly, the appeal is partly allowed to the extent that conviction of the appellant is modified to a conviction under Section 354 IPC and sentence is reduced to the period already undergone by him. As the appellant is in custody, he is directed to be released forthwith if not required in any other case.

**(Vinod Kumar Sinha, J)**

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