

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.430 of 2012

Arising out of P.S. Case No. 304 Year 2011 Thana Mufassil, District EAST CHAMPARAN
(MOTIHARI)

Against the judgment of conviction dated 26.03.2017 and the order of sentence dated 29.03.2017, passed by the learned 5th Additional District & Sessions Judge, East Champaran, Motihari in Sessions Trial No.698 of 2011, arising out of Motihari Muffasil P.S. Case No.304 of 2011.

Raj Kumar Thakur, Son of Late Pundew Thakur, Residing at Madhbani Ghat, P.S. Munfasil, District - Motihari East Champaran

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant	:	Mr. Sharda Nand Mishra, Advocate Mr. Dhananjay Kumar Gupta, Advocate Mr. Deepak Kumar, Advocate Mr. Harish Chandra Patel, Advocate Mr. Rajiv Ranjan, Advocate
For the State	:	Mr. A.K. Sinha, APP

**CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH
and
HONOURABLE MR. JUSTICE ARUN KUMAR**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 19-05-2017

The sole appellant has been convicted under Section 376 IPC and punished to 7 years rigorous imprisonment along with a fine of Rs.5,000/- and in default of payment of fine to undergo S.I. for three months by Sri Subhash Chandra Srivastava, 5th Additional District & Sessions Judge, East Champaran, Motihari by judgment of conviction and order of sentence dated 26.03.2017 and 29.03.2017 respectively. Before we proceed, it is relevant to notice that rule of enhancement was issued vide order, dated 22.10.2014, as the



minimum punishment for committing rape on a five year old child was 10 years, whereas the trial court awarded only seven years punishment for the offence. We would deal with this aspect of matter at the appropriate stage.

2. The informant Virendra Sharma, Son of late Mahavir Sharma, Resident of Madhubani Ghat, P.S. Muffasil, District East Champaran lodged a written report on 07.10.2011 with Muffasil P.S. Motihari stating that on 06.10.2011 at 6.30 P.M. her daughter had gone to see *Dussehra Puja Mela* situated close to the *Bazar*. In the meantime, Raj Kumar Thakur, a co-villager, aged 25 years, enticed his daughter by giving her chocolate. He took her into a *Lichi* orchard situated on an embankment east to Madhubani Ghat Bazar, which was at a distance of 300 yards from the market. While aforesaid Raj Kumar Thakur was committing rape, a co-villager Prem Chand Giri, who was passing from the nearby place, heard the cry of a small girl and on hearing the cry of a child, he moved in that direction and caught Raj Kumar Thakur red handed committing rape on the child and on his *Hulla*, a number of persons came and caught Raj Kumar Thakur. Premchand Giri lifted the girl in his lap and came to the place of local *Sarpanch*, namely, Tairun Khatoon, Panchayat Raj Madhubani Ghat. Thereafter a message was sent to the informant who found his daughter in a very painful state. Blood was oozing from her



private part. His daughter thereafter was taken for treatment to the local doctor.

3. On the basis of written report of the informant, Motihari Muffasil P.S. Case No.304/2011 was registered under Section 376 IPC. The I.O. in course of investigation took further statement of the informant and statement of other witnesses. He also arranged for treatment and medical examination of the victim. He inspected the place of occurrence and finding the case to be true, submitted charge-sheet against the appellant under Section 376 IPC.

4. The prosecution in support of his case examined seven witnesses. Out of these witnesses, Deepak Kumar (PW2) is the first person who saw the appellant committing rape whereupon he informed Prem Chand Giri (PW1) who also came to the place of occurrence and saw the accused standing near the girl who was naked. Prem Chand Giri (PW1) is stated to have informed the informant about the incident. Chandrika Prasad (PW3) is the local quack who examined the victim. Narendra Prasad Rakesh (PW4) is the I.O. of the case. Birendra Sharma (PW5) is the father of the girl and informant of the case. He has supported the prosecution case as narrated in the FIR. Bipin Kumar (PW6) is a police officer who submitted charge-sheet in the case. Nutan Sinha (PW7) is a lady doctor who conducted medical examination of the victim.



5. Counsel for the appellant has assailed the impugned order on a number of grounds. He submits that the informant in the FIR states that he learnt about the incident of commission of rape of his daughter from Prem Chand Giri (PW1). However, Prem Chand Giri in his evidence stated that he has not seen the occurrence, rather learnt about it from Deepak Kumar (PW2). Prem Chand Giri (PW1) has denied giving any information about the incident to the informant Birendra Sharma (PW5). Furthermore, the medical report only shows that there was an attempt to commit rape and there was no actual commission of rape. Learned counsel alternatively argued on quantum of sentence that the appellant was a young person of 20 years of age at the time of occurrence and even assuming the prosecution case to be true, this was his first offence.

6. On the other hand, learned Additional Public Prosecutor for the State submits that the appellant is guilty of attempting to commit rape on a five years old girl.

7. We have heard the counsel for the parties and perused the materials on record.

8. As per prosecution case, the informant's daughter had gone to visit *Mela*, which was situated very near to her house, at about 6.30 P.M. It appears from the evidence that this appellant enticed the victim girl by giving chocolate and took her to a *lichi* orchard situated



near an embankment east to Madhubani Ghat Bazar. One Deepak Kumar (PW2) a co-villager was passing from near by the place where he was going to answer the call of nature. He heard the cry of a small girl coming from close to the lichi tree and when he went in that direction, he saw the appellant committing rape on a small girl. He raised *hulla* whereupon Prem Chand Giri (PW1) also arrived. Appellant Raj Kumar Thakur was caught at the spot. Prem Chand Giri (PW1) stated that the girl was naked and the zip of the pant of the appellant was open. Blood was oozing from the private part of the girl and she was semi unconscious. PW1 lifted her and brought her to a local doctor for treatment. The medical report shows that an attempt was made to commit rape. As per medical report, there was erosion on inner side of external genital area, i.e., inner side of labia majora. It would be evident from the medical report that the hymen was intact and it appears that as soon as the appellant started indulging in sexual act with a child of five years, Deepak Kumar (PW2) saw the incident and raised *hulla*, whereupon Prem Chand Giri (PW1) came and the appellant was caught while trying to flee.

9. Counsel for the appellant had argued that no actual rape was committed. The term 'rape' is defined in Section 375 IPC and as per the explanation attached to the provision, penetration is sufficient to constitute the sexual intercourse necessary to the offence



of rape. In the instant case we find that appellant had just indulged in the act of sexual intercourse, when Deepak Kumar (PW2) witnessed the incident and raised *hulla*, whereupon the appellant let loose the girl to escape. As such, we are of the considered view that the prosecution has succeeded in making out a case of rape against the appellant.

10. Now the other issue is the quantum of punishment to be awarded to the appellant. The trial court has convicted and sentenced the appellant to 7 years rigorous imprisonment. A Bench of this Court vide order, dated 22.10.2014 has issued rule of enhancement as the punishment awarded was inadequate and contrary to the statute. It is relevant to state here that as per the IPC as it stood amended much before 2013, the minimum punishment for committing rape on a girl below the age of 12 years would be ten years. By 2013 the provision has been extended even in case a girl up to the age of 16 years, thus it is evident that the punishment of 7 years awarded by the trial court is contrary to the statutory provision and it could not have been less than ten years.

11. Learned counsel for the appellant submits that this is the first offence of the appellant and he was 20 years of age on the date of the occurrence and as such lenient view should be taken in the matter. Taking into consideration that the appellant was a young boy



and this was his first offence, we award him the minimum punishment of 10 years. The appellant, who is in custody, would remain in jail till he serves the sentence with possible remissions.

12. In the result, the appeal is accordingly, dismissed.

(Samarendra Pratap Singh, J.

(Arun Kumar, J.

S.Kumar/-

AFR/NAFR	NAFR
CAV DATE	NA
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