

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.288 of 2015

Arising Out of PS.Case No. -221 Year- 2011 Thana -FATEHPUR District- GAYA

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Bhutkun Das @ Satendra Das, S/o Sarju Das, resident of village-Badua, P.S. Fatehpur, District Gaya.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Nand Kishore Prasad Sinha-Advocate
Mr. Satish Kumar-Advocate

For the Respondent/s : Mr. S. A. Ahmad-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 10-01-2018

Appellant Bhutkun Das @ Satendra Das has been found guilty for an offence punishable under Section 376/ 511 of the I.P.C. and sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for two years, additionally, vide judgment of conviction dated 17.04.2015 and order of sentence dated 20.04.2015 passed by the Additional Sessions Judge-9th, Gaya in Sessions Trial No.71 of 2014.

2. Name withheld, victim (PW-5), filed written report on 06.09.2011 alleging inter alia that she happens to be a nine years old kid and resides with her maternal grandfather-mother at village-Barua. Her parental house is at village-Bagahi, P.S. Fatehpur, District-Gaya. On 31.08.2011 at 7.00 p.m. while she had gone to maize field



of Janki Sah for meeting nature's call and had sat to ease herself during course thereof, Bhutkun Das @ Satendra Das, son of Sarju Das came from behind, threw her on the ground and jumped over her belly. She raised alarm, whereupon he tried to gag her mouth with one hand and with the other, he tried to untie her string, she again cried as a result of which, Janki Sao, who was near about, rushed and seeing whom, Bhutkun Das escaped leaving her. Janki Das rushed to apprehend him, but he managed to escape. On the alleged date, her parents were at Dhanbad, so she submitted that in order to commit rape, Bhutkun Das has indulged in such kind of activity, but was saved on account of timely arrival of Janki Sao. Because of the fact that no responsible person was at the house to inform the police, whereupon after arrival of her father, she along with her maternal grandmother Sukri Devi come to police station to file complaint. Accordingly, Fatehpur P.S. Case No.221 of 2011 was registered on the basis of the aforesaid written report, whereupon investigation commenced and after culminating the same, chargesheet was submitted, facilitating the trial, meeting with ultimate result, subject matter of instant appeal.

3. 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 also been



submitted that on account of land dispute with Jagan Sao, maternal grandfather of the informant, this false case has been instituted at his instance. However, nothing has been adduced in defence.

4. In order to substantiate its case, prosecution had examined altogether six PWs, who are PW-1 Janki Sao, PW-2 Arjun Sao, PW-3 Komal Sao, PW-4 Dilip Kumar, PW-5, victim herself and PW-6 Md. Hanif, formal. The prosecution had also been exhibited, the signature of informant over written report as Exhibit-1, written report Exhibit-2 and formal F.I.R. Exhibit-3. As stated above, nothing has been adduced in defence.

5. While assailing the judgment of conviction and sentence, it has been submitted on behalf of learned counsel for the appellant that learned lower Court had approached in mechanical way and that happens to be reason behind that in spite of presence of so many flaws in the prosecution case that has completely been ignored. To substantiate the same, it has been submitted that learned lower Court failed to consider that the maternal grandfather, maternal grandmother have not been examined in this case. In likewise manner, I.O. has also not been examined. From the evidence of the PWs, whoever been examined, it is crystal clear that there happens to be material exaggeration in their evidences and on account thereof, non-examination of the I.O. caused prejudice. In likewise manner, there



happens to be inconsistency with regard to actual place of occurrence as well as the places where prosecution witnesses claimed their presence as, when their evidences have been minutely gone through, it is apparent that their presence was not at all plausible. That suggest their presence either at the instance of the prosecution party or being aggrieved with the affair of the family of the appellant. Furthermore, it has also been submitted that delay has not been properly explained though father of the victim has turned as one of the PWs, but due to non-examination of the maternal grandfather, maternal grandmother, explanation of delay is found non-acceptable. In likewise manner, it has also been submitted that falsity of the prosecution case is itself apparent from the fact that at an initial stage, victim had simply stated that appellant had pounced upon her, sat over her belly, but during course of evidence, she had developed a story by way of submitting that she was raped. Had there been, then in that circumstance, being a minor, there was every possibility of injury over her private part followed with oozing out of blood. None of the witnesses including the victim had deposed regarding injury over her private part, or oozing out of blood and in likewise manner, she was not at all medically examined. Therefore, such development is indicative of the fact that appellant has been victimized, whereupon whole prosecution case is bound to fail apart from the fact that the lower Court did not



accept the same, as a result of which, the judgment of conviction and sentence recorded by the learned lower Court happens to be illegal, perverse, cryptic and is accordingly, fit to be set aside.

6. On the other hand, learned Additional Public Prosecutor while supporting the finding recorded by the learned lower Court has submitted that from the version of the prosecution witnesses, it is evident that they remained intact so far initial version is concerned and that being so, the conviction and sentence recorded by the learned lower Court happens to be just, legal and proper and is fit to be confirmed.

7. As stated hereinabove, the victim (PW-5), who happens to be informant herself had filed written report wherein there happens to be specific disclosure that while she sat to ease herself, appellant Bhutkun Das came from behind, pushed her as a result of which, she lied down, pounced upon her belly and then, by one hand, he gagged her mouth while he began to untie string of her and that on her alarm, Janki Sao came seeing whom, Bhutkun Das escaped.

8. PW-1 is Janki Sao, who had deposed that on the alleged date and time of occurrence, he was away from the field where victim had gone to ease herself. After hearing alarm of the victim, he rushed and seeing him the accused (identified) fled after dressing himself. He had also seen the girl tying her in standing



position. He had further stated that victim had disclosed that Bhutkun Das has outraged her modesty. Then thereafter, he carried the victim to the place of her maternal grandmother-father, who disclosed that they are going to inform parents of the victim. After arrival of the father of the victim, case has been instituted. During cross-examination at Para-2, though he shown his inability to disclose the khata number, khesra number, but he had disclosed the boundary of the land in which he was working viz. South-Dahlu Thakur, East-Chattar Sao, North-Naresh Thakur and West-Naresh Thakur. Then had detailed the crops standing in the boundary field. At that very time, none was present in those fields. He had further stated that there happens to be no dispute amongst the father of the Bhutkun Das as well as maternal grandfather of the victim. He had further stated that victim is residing at her Mamhar since after birth. In Para-3, there happens to be contradiction as well as admission wherein he had stated that he had not stated before the police that he had seen the accused and the victim standing at one place. He had made statement before the police that Bhutkun Das rushed outside village. He had further admitted that he had not stated before the police that the victim as well as the accused were wearing. He had further stated that he had not stated before the police that the victim had disclosed that accused Bhutkun Das had outraged her modesty.



9. PW-2 is the father of the victim, who had stated that he works at Dhanbad. Victim is his daughter, who resides with her maternal grandfather-mother. At the present, she happens to be 12 years of age. The occurrence is of dated 31.08.2011, at that very time, he was at Dhanbad, on being informed rushed and arrived 6-7 days after the occurrence. On query, victim had disclosed that while she sat for easing herself, Bhutkun Das came and pounced over her belly, whereupon she raised alarm attracting Janki Sao seeing whom, he escaped. He had not inquired more than that. Subsequently thereof, he took away his daughter to Dhanbad. He had gone to police station along with his daughter where her statement was recorded by the police, whereupon she put her signature (exhibited). Then had stated that out of fear, victim had not disclosed to him that Bhutkun Das had raped. During cross-examination, he had stated at Para-3 that only victim was staying at the place of her maternal grandmother-father. Rest children are residing with him. His daughter was studying at Barua School where she was admitted by his father-in-law. He had not met with Janki Sao nor talked with Janki Sao. He had shown ignorance with regard to any kind of land dispute in between Janki Sao and Sarju Das.

10. PW-3 is the co-villagers, who had stated that on the alleged date and time of occurrence while victim had gone to ease



herself in maize field, she was outraged by Bhutkun Das, whereupon there was uproar. Janki Sao had disclosed the event. Identified the accused. During cross-examination at Para-2, he had stated that victim had not disclosed to him regarding the occurrence. Then had denied the suggestion that he had not stated before the police that Janki Sao divulged regarding the occurrence.

11. PW-4 had stated that victim happens to be daughter's daughter of Jagan Sao. On the alleged date and time of occurrence, he was plucking vegetables from his field. At that very time, he saw Satendra Das gagging mouth of the victim with cloth. At that very time, victim raised alarm to rescue her. He had seen both of them in sleeping condition. Bhutkun fled away before his arrival at the P.O. He had seen the victim in naked condition. He as well as Janki Sao arrived at the P.O. at the same time. None others came. After dressing the victim, both of them carried the victim to the place of her maternal grandfather. She had disclosed that she has been raped by Bhutkun Das. During cross-examination, he had admitted that Jagan Sao happens to be his cousin uncle though they have got separate residence. In Para-6, he had further stated that victim happens to be his sister's daughter. Then had denied the suggestion that she is unable to understand on account of her tender age. In Para-7, he had further stated that he is unable to disclose khata number, khesra



number of the land in which, he was plucking vegetables, but had shown the boundary of the aforesaid land as North-Gonu Sao, South-Jagan Sao, East-Jodhi Sao and West-Tuni Sao. He had further stated that at that very time, none were present in the boundary fields. At Para-9, there happens to be contradiction wherein relevant part happens to be that he had not stated before the police that victim had disclosed that accused had committed rape upon her. Then at Para-11, he had denied the suggestion that there happens to be land dispute amongst Sarju Das as well as Jagan Sao.

12. PW-5 is the victim herself, who had stated that on the alleged date and time of occurrence, she was residing at village-Barua along with her maternal grandfather-mother. On the alleged date and time of occurrence, she had gone to the maize field of Janki Sao to ease herself. While she sat to ease, at that very moment, one came from behind, gagged her mouth and then, began to untie her paint. He was Bhutkun Das (identified). He after untying his own, committed sin with her. She had given bite over palm of accused as a result of which, he removed his palm over her mouth having an opportunity to raise alarm, whereupon Janki Sao and Dilip Kumar came seeing whom, Bhutkun Das fled away. Dilip Kumar had chased Bhutkun Das, but he managed to escape. Then Janki Sao dressed her and took her to the place of her maternal grandmother. She had



disclosed the event to her maternal grandmother. After having been informed, his father came six days after the occurrence from Dhanbad and then was taken to police station where she gave her fard-bayan, which was scribed by the police and then, she put her signature (exhibited). During cross-examination at Para-2, had stated that the P.O. land lies after 12 plots from the house of her maternal grandfather. At Para-3, she had further stated that field of Bhutkun Das lies near the field of her maternal grandmother wherein he was present since before. At that very time, none others were present in surroundings. In Para-5, she had stated that at the time of occurrence, the maize crop was of sufficient height. Bhutkun Das had lied her down back side on account of which, she had not sustained any kind of bruise or abrasion or hurt. In Para-6, she had stated that she had given a bite at the palm of the accused, but it was not cut. In Para-7, she had stated that Dilip Kumar happens to be her maternal uncle, who at that very time, was at his shop. She had further stated that Bhutkun was over her body for five minutes. At that very time, there was no cloth over her body. In Para-8, she had stated that Janki Sao arrived approximately after six minutes. Janki Sao is an old person. Before arrival of Janki Sao, Bhutkun Sao escaped. In Para-9, she had stated that she was not medically examined at the instance of police nor her maternal grandfather-mother taken recourse thereof. Then had



denied the suggestion that at the instance of her maternal grandfather-mother, she falsely instituted this case.

13. From her evidence, at Para-4 of his cross-examination, there happens to be contradiction relating to her further statement. However, her attention had not been drawn towards the written report/ fard-bayan.

14. From the evidences available on the record, it is evident that PW-2, father happens to be very fair in his conduct, who had deposed to the extent whatever been divulged by the victim. Evidence of PW-3 is inadmissible in the eye of law, because of the fact that neither he disclosed that on the alleged date of occurrence, occurrence was disclosed to him by Janki Sao, nor by the victim. PW-4 is the close relative of the victim whose evidence is found full of improbability in the background of the fact that had his presence in the field, he would not have allowed the accused to undress and further, to allow the victim, who was none else than his cousin sister's daughter to become pray at the end of appellant. At least, his normal conduct would have been to raise alarm challenging the accused not to indulge in such kind of activity and further, when the evidence of victim is taken, it is evident that at that very time, he was not in field rather he was at his shop. Moreover, there happens to be material contradiction which he had admitted that he had not stated before the



police with regard to commission of rape being disclosed by the victim. PW-1 is the witness, who stood the test and had succeeded to establish his presence at the P.O. which happens to be his field where he found the victim naked at the other end seeing the accused fleeing there from and that part of his deposition is found not at all shaken at the end of the appellant. Now, coming to the evidence of PW-5, victim, it is evident that though she had exaggerated during course of deposition, her mental equilibrium has not been tested by the learned lower Court before recording of evidence, on account of her the tender age which she was possessing at the time of commission of the occurrence. She had not been properly questioned what does it mean, whether she was capable to understand and in the aforesaid background, when her evidence has been gone through, it is evident that neither she was cross-examined on the place of occurrence, nor whether she found the act of sin in what manner.

15. Completion of four stages ultimately constitute commission of an offence viz. *A) intention, B) preparation, C) attempt and D) actual commission of the offence*. Save and except certain exceptional cases, intention and preparation happen to be out of purview. It happens to be preparation which in certain cases have been found punishable, but in normal course, it is an attempt which does attracts application of penal provision and for that, Section 511



of the I.P.C. has been introduced. It is to be governed by the ingredients of the major Section and that happens to be reason behind absence of presumption of any kind of sentence. From the evidence available on the record, it is found conclusively proved that victim was pushed to lie down and then, appellant pounced upon her belly. While she sat in maize field to ease herself, but no activity at his end which could suggest that there was an attempt to commit rape. Had further been divulged so, sitting over belly of a girl certainly comes within the purview of outraging her modesty and for that, appellant is found guilty for an offence punishable under Section 354 of the I.P.C. instead of Section 376/ 511 of the I.P.C. The finding, as recorded by the learned lower Court, is accordingly modified. So far sentence is concerned, appellant remained under custody for one and half years and that being so, is modified as sentence already undergone retaining the fine inflicted by the learned lower Court with further modification that in default thereof, will undergo S.I. for six months, additionally.

16. With the aforesaid modification, appeal is partly allowed. However, it is made clear that the fine amount should be deposited within eight weeks till then, the appellant will continue to avail the opportunity of bail. In case, the fine amount is not deposited within the aforesaid stipulated period, then in that circumstance, the privilege of bail which the appellant is availing; will cease to survive.



Consequent thereupon, the learned lower Court will be at liberty to proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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