

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.30 of 2013

Arising Out of PS. Case No.-12 Year-2009 Thana- KAMTAUL District- Darbhanga

Md. Hasan @ Gore, son of Md. Zakir, resident of village-Ramaul, P.S.-
Kamtaul, District-Darbhangha. Appellant.

Versus

The State of Bihar. Respondent.

Appearance :

For the Appellant/s	:	Mr. Sanjeev Kumar Jha, Advocate. Mr. Madan Mohan, Amicus Curiae
For the Respondent/s	:	Mrs. Abha Singh, APP

**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date : 11-12-2018

Heard Mr. Madan Mohan, learned amicus curiae, Mr.
Sanjeev Kumar Jha, learned counsel for the appellant and
learned APP for the State on this criminal appeal.

2. This criminal appeal has been preferred against the
judgment and order of conviction dated 20.12.2012 and order of
sentence dated 22.12.2012 passed by the 1st Additional Sessions
Judge, Darbhanga in Sessions Trial No. 140 of 2010, arising out
of Kamtaul P.S. Case No. 12 of 2009, whereby the learned trial
court acquitted the accused Md. Kalam, Md. Zakir and Md.
Husaini from the charges levelled against them while convicted
the accused Md. Hasan alias Gore for the offence punishable
under Section 376 read with Section 511, 448 and 498-A of the
Indian Penal Code and sentenced him to undergo R.I. for 5 years
and also slapped him with a fine of Rs. 2000/- and in case of



default of payment of fine to further undergo R.I. for six months under Section 376 read with 511 IPC, further sentenced to undergo R.I. for one year under Section 448 IPC and R.I. for two years and also slapped him with a fine of Rs.1000/- and in default of payment of fine to further undergo R.I. for six months under Section 498A of IPC All the sentences were directed to run concurrently.

3. Factual matrix of the case is that Kamtaul P.S. Case No. 12 of 2009 was instituted under Sections 448, 323, 376 and 498-A IPC and Section 3/4 of the Dowry Prohibition Act against the accused Md. Hasan @ Gore, Md. Kalam, Md. Zakir and Md. Husaini on the basis of complaint petition filed by Jewa Khatoon, daughter of Md. Nijam on 20.01.2009 sent to the police station for registration and investigation of the case under Section 156 (3) Cr.P.C. with the allegation in succinct that on 10.12.2018 at around 8 PM, the informant was present in her house along with her younger sister. Her parents had gone to Calcutta by that time. Abruptly Md. Hasan @ Gore intruded into her house and shoving her on the bed gagged her mouth and forcibly committed rape against her. In the mean time, her younger sister, who was present in the kitchen, rushed in the room and made hulla. Responding hulla locals



congregated there and caught hold Md. Hasan @ Gore and on the intervention of the locals marriage of Md. Hasan @ Gore was performed with the informant on 13.12.2008 at the door of Md. Sarfu Hoda and Md. Taslim was witness of her marriage. She went to her marital house and stayed there for three days. Thereafter, Md. Hasan @ Gore and other accused persons named in the complaint petition started demanding Rs.1,00,000/- in dowry and on failure to cough up their demand, they drove her out of her marital house assaulting her. Her father approached to the panchayat to get the matter settled but the accused persons are avoiding the panchayati and want to get the matter hush-up.

4. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against Md. Hasan @ Gore, Md. Kalam, Md. Zakir and Md. Husaini under Sections 448, 376 and 498-A /34IPC and Section 3/4 of the Dowry Prohibition Act showing Md. Hasan @ Gore as absconder.

5. On receiving the charge sheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of Sessions and after commitment and on transfer finally the case came in the



seisin of 1st Additional Sessions Judge, Darbhanga for trial.

6. Charge against the aforesaid four accused persons was framed under Section 323, 498-A and 448 IPC and further charge against the accused Md. Hasan @ Gore was framed under Section 376 IPC. Charges were read over and explained to them by the Court to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether nine prosecution witnesses namely, Md. Akhtar as PW-1, Md. Sarfu Hoda as PW-2, Md. Talim as PW-3, Md. Zafar as PW-4, Shahnaz Khatoon as PW-5, Nasiba Khatoon as PW-6, informant Zeba Khatoon as PW-7, Md. Nizam as PW-8 and I.O. Madan Prasad as PW-9. Out of the aforesaid witnesses PWs-1 & 2 turned hostile. One more witness has been examined as CW-1, namely, Dr. Arvind Kumar. Prosecution has also proved endorsement on the complaint petition, marked as Ext.1 and signature of S.I. Ajit Kumar Singh on the formal F.I.R. marked as Ext.2.

8. Statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming to have been falsely implicated in the case as they refused to



perform marriage of Md. Hasan @ Gore with the victim. Accused persons neither adduced any ocular nor documentary evidence in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid judgment and order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, convict Md. Hasan @ Gore has preferred this Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellant and learned amicus curiae that the case has been initiated on the basis of the complaint petition filed by the victim but the victim (PW-7) herself in her testimony has denied to have filed the complaint petition in the court rather has stated about giving statement before the police and lodging of F.I.R. against the accused persons on the basis of her said statement. Thus, the basis of the prosecution case has been denied by the victim and evidence led by the prosecution without any basis of the case is



not admissible in the eye of law. It is further submitted that as per the account of the victim, Zeba Khatoon (PW-7) after the alleged occurrence of committing rape against her by the appellant, she had rushed to the police station two and two & half months later and had given the statement and on the basis of the statement the F.I.R. was lodged but no such F.I.R. has been brought on record by the prosecution which creates serious doubt about the prosecution case. It is further submitted that Md. Sarfu Hoda at whose door the marriage of the victim with the appellant is said to have been solemnized has not supported the prosecution case rather turned hostile and other witness of the marriage, namely, Md. Talim, though have supported the case of the marriage but he has not stated about witnessing the marriage. As per the prosecution case and witnesses' account several persons had arrived at the place of occurrence and caught hold the appellant but barring Md. Zafar (PW-4) no other witness has been examined by the prosecution and Md. Zafar is also not reliable as he has taken altogether different stand regarding occurrence before the court than deposed before the I.O. under Section 161 Cr.P.C. It is also submitted that as per the account of the victim he was examined after two days of the alleged occurrence of rape committed against her but no such



medical examination report has been brought on record by the prosecution rather Dr. Arvind Kumar (CW-1), who has examined the victim on 06.02.2009 i.e. after around two months of the alleged occurrence of rape, has stated in his deposition that there is no positive evidence suggesting commission of recent forceful sexual intercourse with emission though girl had been subjected to sexually intercourse previously. Moreover the said medical examination report furnished by the said doctor has not been exhibited and legally brought on record, hence it cannot be taken into consideration. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy, reliable and worth credence evidence. Hence, aforesaid judgment and order of conviction and sentence passed against the appellant is liable to be set aside and the appellant is entitled to be acquitted.

13. On the other hand, learned APP for the State advocating the correctness and validity of the impugned judgment and order of conviction and sentence submitted that the victim Zeba Khatoon (PW-7) has fully supported the occurrence of rape besides other allegations levelled against the



appellant and PW-6 Nasiba Khatoon, who happens to be sister of the victim and was present at the time of occurrence in the house, has corroborated the prosecution case and other witnesses examined by the prosecution have also corroborated the prosecution case. The ocular evidence also stands corroborated by the medical evidence and the learned trial court correctly appreciating the facts and evidence available on record has rightly passed the impugned judgment and order of conviction and sentence which is liable to be upheld and this criminal appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the record, it appears that Kamtaul P.S. Case No.12 of 2009 was lodged on the basis of complaint petition filed by the victim Zeba Khatoon before the court of C.J.M., Darbhanga on 20.01.2009, which was sent to the police station for institution and investigation of the case under Section 156 (3) Cr.P.C. but the victim Zeba Khatoon examined in the case as PW-7 has denied to have lodging any complaint petition before the court stating in para-4 of her cross-examination that she had not lodged any complaint petition in the court. She appears to be fully acquainted with the complaint petition as in para-7 of her cross-examination she has stated that complaint means filing of the case in the court. Hence, aforesaid denial of



lodging the complaint petition in the court which happens to be basis of prosecution case by the victim herself, creates serious doubt about the aforesaid complaint petition and the prosecution case.

15. From perusal of the testimony of the victim (PW-7), it appears that in para-4 of her cross-examination she has stated that 2½ months later to the occurrence she had rushed to the police station and lodged a case. She had given the written report at the police station and on the basis of the said written report the case was lodged. Likewise Shahnaz Khatoon (PW-5), who happens to be mother of the victim, has stated in para-5 of her cross-examination that she had got the case lodged by her daughter at the police station 2-3 months later to the occurrence. She and her husband had rushed to the police station along with her daughter for lodging the case. Police had lodged a case after recording the statement of her daughter. From perusal of the aforesaid testimonies of PW-5 & PW-7, it appears that as per the aforesaid account of the said witnesses, the victim had given written report before the police station 2-3 months later to the occurrence and had also given her statement at the police station and on the basis of her written report and the statement the police had lodged the case, but the aforesaid written report and



statement of victim recorded by the police has not been brought on record by the prosecution. Moreover in quite contradiction to aforesaid testimony victim (PW-7) has stated in para 9 of her cross-examination that police had taken her to DMCH, Darbhanga for her medical examination two days after the occurrence but police had recorded her statement preceding thereto, which means police had recorded the statement of victim regarding the occurrence within two days of occurrence. More so the said statement of victim which must be first information report has not been brought on record by the prosecution which creates serious doubt about the prosecution case.

16. From perusal of the testimony of the independent witnesses, namely, PW-1 Md. Akhtar, PW-2 Md. Sarfu Hoda, PW-3 Md. Talim and PW-4 Md. Zafar, it appears that PW-1 and PW-2 have turned hostile. Though PW-4 Md. Zafar has stated in his examination-in-chief that at the time of occurrence responding hulla he arrived at the house of Md. Nijam and found the crowd there. He entered into the room of the victim Zeba Khatoon and found the rape committed against the girl. She was present in the room. She was upset. Zeba Khatoon divulged before the witnesses present there about committing



rape against her by the appellant by shoving her on bed and gagging her mouth at the time of occurrence. The appellant was also apprehended on the spot by the locals. But from perusal of para-3 of his cross-examination, it appears that attention of the said witness has been drawn by the defence regarding contradiction in his statement, regarding arriving at the place of occurrence, finding the victim upset in her room, divulgence of the commission of rape against her by the appellant, finding of semen on her attire etc., as given before the court and that given before the I.O. under Section 161 Cr.P.C. I.O. Madan Prasad examined in this case as PW-9. has also corroborated the aforesaid contradiction in the statement of the said witness given before the court and that given before him. Thus, the said witness appears to have taken altogether different stand before the court regarding aforesaid material aspect of the case and he does not appear to be reliable and trustworthy and his testimony cannot be relied upon to hold conviction of the appellant.

17. From perusal of testimony of PW-3 Md. Talim, it appears that he has stated in his examination-in-chief that on the date and time of occurrence when he arrived at the place of occurrence responding hulla he found the accused apprehended by Kamrun, Wahab, Zafar and others and they divulged that the



said accused had committed rape so he was apprehended then he regressed to his house. Thus he does not happen to be eye witness of the occurrence rather a hearsay witness. Moreover the said Kamrun, Wahab and Zafar have not corroborated the factum of divulgence of occurrence of committing rape by the appellant against the victim and apprehension of appellant by them for the said reason by them to the said witness. Hence, for want of corroboration the said statement of the PW-3 is not admissible in evidence even as a hearsay witness.

18. PW-5 Shahnaz Khatoon, who happens to be mother of the victim and PW-8 Md. Nizam, who happens to be father of the victim, are also not eye witnesses of the occurrence rather are hearsay witnesses As admittedly they were in Kolkata at the time of occurrence and were called at their home by the locals after the occurrence. In her examination-in-chief PW-5 has stated that her daughter Zeba Khatoon (victim) divulged the occurrence of committing rape by the appellant intruding into her house at the time of occurrence to her but the victim examined as PW-7 has denied to have divulged the factum of committing rape against her by the appellant to any one by stating in para-12 of her cross-examination that she had not divulged the occurrence of committing rape against her to



anyone. PW-8 Md. Nizam has stated in his examination-in-chief that he learnt about the occurrence of committing rape by the appellant intruding into his house but he has not given any source of information. Though in the same para he has stated that Akhtar Hussain, Sarful Hoda, Kamrul and Daud informed him about the occurrence telephonically but the aforesaid persons have not corroborated the factum of the divulgence of the occurrence to PW-8, hence for want of corroboration the testimony of Pws-5 & 8 regarding the occurrence of committing rape against the victim by the appellant is not admissible in evidence even as a hearsay witnesses.

19. From perusal of the testimony of Nasiba Khatoon (PW-6), who happens to be younger sister of the victim and was allegedly present at the place of occurrence at the time of occurrence and informant Zeba Khatoon (PW-7), it appears that they have made an abortive bid to support the occurrence of committing rape against the victim intruding into the house by the appellant in the night in absence of her parents by giving testimony in consonance to the prosecution case as alleged in the complaint petition but as per the prosecution case PW-6 made hulla when she found the accused appellant committed rape against her sister stepping into room but in quite



contradiction to the aforesaid prosecution case PW-6 has stated in her cross-examination that when Md. Akhtar intruded in her courtyard she made hulla and responding hulla the locals congregated there and caught hold the appellant. She has further stated that the aforesaid persons got the appellant married with the victim apprehending him in the courtyard blaming him about his entry into the courtyard. The aforesaid statement of PW-6 goes to indicate that the appellant was apprehended from the courtyard of the victim and not from the room and blaming him about his entry into courtyard of the victim locals had got him married with the victim. PW-7 has stated in para-9 of her cross-examination that in the occurrence of rape committed against her, her private part was torn and bled, the blood had fallen on the bed and on her attire. She was medically examined at D.M.C.H., Darbhanga two days after the occurrence. Police had taken her to D.M.C.H. and she had regressed to her house one day later to the medical examination, but neither her blood sodden attire or bed was seized by the I.O. nor the aforesaid medical examination report has been brought on record by the prosecution instead Dr. Arvind Kumar (CW-1), who happens to be Assistant Professor of D.M.C.H., has stated that he had examined the victim on 06.02.2009 i.e. around two months later



to the occurrence. Though the said doctor has stated that there is no positive evidence for suggesting commission of recent forceful sexual intercourse with emission but the girl had been subjected to sexually intercourse previously. But the aforesaid medical examination report of the said doctor has not been exhibited and the same has not been legally brought on record, hence the same cannot be considered as an evidence. In view of the aforesaid aspects of the case and also in view of denial of lodging of the complaint petition before court rather giving written report before the police, which has not been brought on record, in my considered opinion, the said testimony of PW-6 and of victim has no potential to substantiate the occurrence of committing rape against victim by the appellant. Thus, I find that prosecution has utterly and miserably failed to substantiate the occurrence of committing rape against the victim by the appellant by adducing consistent, convincing, reliable and worth credence ocular and medical evidence.

20. So far as the offence under Section 448 IPC is concerned, as per the testimony of PW-6 and PW-7 the accused appellant intruded into the room of the victim and shoving her on the bed gagged her mouth and forcibly committed rape against her and appellant was apprehended from the said room



by the locals but in quite contradiction to the aforesaid prosecution case Nasiba Khatoon (PW-6) has stated that the appellant was apprehended from the courtyard of the victim. The aforesaid contradictory statement between the testimony of the witnesses creates serious doubt about the allegation levelled against the appellant under Section 448 IPC and charge under aforesaid section does not stand established by the prosecution by adducing consistent, trustworthy and worth credence evidence. Regarding 498-A IPC it is the case of the prosecution that after the occurrence the locals called the parents of the victim from Kolkata and got the appellant married with the victim at the door of Md. Sarfu Hoda (PW-2) and Md. Talim (PW-3) was also witness of the said marriage and as per account of PW-3 as given by him in para-4 of his cross-examination Maulana Jafar Ali had read out the Nikahnama in the marriage but the said Md. Sarfu Hoda (PW-2) examined in the case has turned hostile and Md. Talim (PW-3) has not whispered about witnessing the aforesaid marriage rather has simply stated in his examination-in-chief that on the following day of the occurrence the marriage was performed after intervention of the panchayat people. But in quite contradiction to the aforesaid statement of PW-3 the victim has stated in para-1 of her examination-in-chief



that panchayat was organized on the 3rd day of the occurrence and in complaint petition she has stated that her marriage was performed with the appellant in presence of the family members on 13.12.2008 i.e. on third day of occurrence. In view of the aforesaid contradiction between the testimony of PW-3 and prosecution case and testimony of the victim regarding date of performance of marriage of the appellant with the victim before the panchayat the said testimony of PW-3 regarding marriage is not admissible in evidence and he appears to have not witnessed the said marriage. Said Maulana Jafar Ali who had read out the Nikahnama in the marriage has not been examined by the prosecution. Though PWs-5, 6, 7 & 8 have stated in their respective examination-in-chief that the marriage of the victim was solemnized with the appellant after alleged occurrence of committing rape against the victim by the appellant on the intervention of the locals in presence of the panchayat but as discussed by me herein above, neither Md. Sarfu Hoda, on whose door the marriage was solemnized, nor Md. Talim who is said to be witness of the marriage has supported the case of the prosecution nor Maulana Jafar Ali who is said to have read out the Nikahnama in the marriage has been examined by the prosecution. Barring the aforesaid witnesses, no other witness



has been examined by the prosecution in substantiation of the aforesaid case of the marriage of the appellant with the victim. Thus, the marriage of the appellant with the victim does not stand established by the prosecution by adducing consistent, convincing, reliable and worth credence evidence. As the marriage of the appellant with the victim which happens to be sine qua non for the offence under Section 498-A IPC does not stand established by the prosecution, hence the charge levelled against the appellant under Section 498-A IPC also does not stand established.

21. In the facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubts by adducing consistent, convincing, reliable and worth credence evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial court against the appellant is set aside and the appellant is acquitted of the charges levelled against him. As the appellant is on bail, he is discharged from the liability of his bail bond. Accordingly, this criminal appeal is allowed.

22. Let a copy of the first and last page of this



judgment be handed over to the learned amicus curiae, Mr. Madan Mohan and the learned amicus curiae be paid prescribed fee by the Patna High Court Legal Services Committee.

(Prakash Chandra Jaiswal, J)

Trivedi/-

AFR/NAFR	AFR
CAV DATE	NA
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