

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1268 of 2017

Arising Out of PS.Case No. -351 Year- 2013 Thana -NANHPUR District- SITAMARHI

=====

Md. Sabbir @ Md. Sabbir Alam, s/o Md. Muslim, r/v- Islampur, P.S.- Nanpur,
District- Sitamarhi.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Ashhar Mustafa

For the Respondent/s : Mr. Ajay Mishra (APP 72)

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 08-03-2018

Heard the learned counsels for the parties.

1. The appellant/Md. Sabbir @ Md. Sabbir Alam has been convicted under Sections 366A and 376/511 of the Indian Penal Code and Section 8 of the POCSO Act by judgment dated 14.12.2016 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Sitamarhi in Trial No. 13 of 2015/ 02 of 2014, arising out of Nanpur P.S. Case No. 351/2013 and by order dated 21.12.2016, he has been sentenced to undergo R.I. for five years, to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo for three months each for the offences under Sections 366(A) and 376/511 of the Indian Penal Code; and R.I. for five years, to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo simple imprisonment for three months for the offence under Section 8 of the POCSO Act; the sentences however having been ordered to run concurrently.



2. The appellant is said to have taken away the victim girl to an orchard and had attempted to commit rape on her.

3. The case of the prosecution is based on the F.I.R. lodged by one Satyendra Pandey, who has been examined as P.W. 2 in the trial and who is the father of the victim girl. He has alleged in his written report dated 26.12.2013 that his daughter, viz. Soni Kumari, aged about 14 years, had come out of house in the night of 25.12.2013 at about 9:00 P.M. for attending to the call of nature, when she was deliberately taken away by the appellant on his motorcycle towards mango grove and an attempt was made to commit rape on her. When his daughter raised hue and cry, some persons of the village came with mobile telephones and torches and they saw that the appellant dashed the daughter of the informant on the ground. Seeing the villagers coming near him, the appellant ran away.

4. On the basis of the aforesaid written report, Nanpur P.S. Case No. 351/2013 dated 26.12.2013 was instituted for the offences under Sections 366A and 376/511 of the Indian Penal Code read with Sections 12 and 18 of the POCSO Act.

5. The police after investigation submitted charge-sheet whereupon cognizance was taken and the case was tried.

6. The trial court, after examining altogether 14 witnesses on behalf of the prosecution and 2 witnesses on behalf of the defence, convicted the appellant as aforesaid.



7. The appellant has sought to assail the aforesaid judgment and order of conviction on the ground that it suffers from improper appreciation of evidence and the judgment of guilt arrived at by the trial court is against the weight of overwhelming evidence.

8. It has been argued on behalf of the appellant that the trial court did not consider appropriately that the story of kidnapping by a sole person, driving a motorcycle, was patently absurd. Apart from this, every attempt has been made by prosecution witnesses to embellish and improve upon the prosecution version which has rendered the prosecution case absolutely doubtful and untrustworthy. The victim in her deposition as P.W. 11 has introduced a new story of two more persons accompanying the appellant while she was taken away by the appellant for immoral purposes. None of the independent witnesses, put up in the witness box, have supported the prosecution version and have been declared hostile. It has been argued that the offence as alleged never took place and only because of previous enmity, this false case has been instituted against the appellant.

9. In order to appreciate the contention of the appellant, it would be first necessary to refer to the evidence of the father of the victim, on whose report the instant case was lodged.

10. Satyendra Pandey, father of the victim has been examined as P.W. 2 in the case. He has deposed that on 25.12.2013 at about 9 O' clock, his daughter had come out of the house for attending to



the call of nature. At that place, i.e. near the house of the appellant, the house of Raushan Kumar Pandey (P.W. 6) is also situated. The appellant is stated to have taken the daughter of the informant on a motorcycle towards mango grove where an attempt was made by him to commit rape on her. He has further deposed that in course of the appellant taking away his daughter on motorcycle, he (appellant) was chased by Raushan Kumar and Pitambar Sah, who have been examined as P.W. 1 and 5 respectively. They attempted to catch hold of the appellant but he ran away. It was further deposed that the motorcycle was left behind by the appellant who fled away. The Officer In-charge of the local police station was informed, who came to his house only in the next morning. A written report was scribed by his villager, viz. Gautam Choubey, who has been examined as P.W. 7, on which, he appended the signature. The motorcycle was seized by the Officer In-charge at the place of occurrence whereupon seizure-list was prepared which also was signed by the aforesaid Gautam Choubey.

11. The aforesaid witness has proved the signature of Raushan Kumar and Gautam Choubey. He did not get his daughter medically examined. He has also stated that he comes from a very respectable family and in the night of the occurrence, it was very cold.

12. The aforesaid witness has also stated that he knows the appellant very much from before. The appellant has a shoe shop which he runs from the rented house of one Yunus Darji and Akhtar



Darji. A suggestion was given to him that there was a dispute between Yunus Darji and Akhtar Darji and his brother Birendra Pandey but the same was denied by him. However, later the aforesaid witness admitted that earlier, Yunus Darji had filed a case against him and his brother/ Birendra vide Nanpur P.S. Case No. 85/2013. The appellant was stated to be married with children. In his cross-examination, he has also admitted that the appellant had contested for the post of Mukhiya from Gram Panchayat Rajmohini Ekrauli in the year 2006. In the same elections, the brother of P.W.2, viz. Birendra Pandey had also contested for the post of member of Panchayat Samiti but had lost. The aforesaid witness did not know whether the wife of the appellant had contested for the post of member of Panchayat Samiti. A suggestion was given that there was political dispute between the parties and therefore a false case has been lodged against the appellant but such suggestion was denied by him.

13. What appears from the deposition of the aforesaid witnesses is that while the appellant was taking away the daughter of the informant on motorcycle, he was chased by Raushan Kumar (P.W. 1), son of Hari Narayan Sah and Pitambar Sah (P.W. 5). Though, the aforesaid witnesses have supported the prosecution case but from their depositions, it appears that they had not seen the occurrence.

14. Raushan Kumar (P.W.1) has stated that at about 9 O'clock on 25.12.2013, while he was at his house, he heard sound of



cries from the orchard side which was at a distance of about 100 ft. from his house. On such alarm, he along with villagers and P.W. 2 as well as his family members went to the orchard and saw in the light of the head lamp of the motorcycle that the appellant was attempting to commit rape on the victim after tying her mouth. Thus, from his deposition, it becomes very apparent that he did not chase the appellant; rather he only saw the appellant with the victim in the orchard.

15. Similarly, Pitambar Sah, another witness to the act of kidnapping, who has been examined as P.W. 5 has only stated that he saw the appellant in the mango orchard. Later, he stated that he also saw the appellant fleeing away. This obviously was with reference to the appellant fleeing away from the mango orchard.

16. Thus, none of the aforesaid two witnesses, viz. P.W. 1 and P.W. 5 have seen the appellant taking away the victim on the motorcycle to the mango grove. Their not having seen the appellant taking away the victim renders the offence under Section 366A of the Indian Penal Code completely unproved and unestablished.

17. It is also relevant to state that P.W. 2 referred to above has deposed that the *fardbeyan* statement was scribed by Gautam Choubey, who has been examined as P.W. 7. Gautam Choubey (P.W. 7) has not supported the prosecution version and has been declared hostile.

18. In fact, P.W. 6, viz. Raushan Kumar Pandey, whose house is stated to be situated near to the house of P.W. 2, has been



tendered. Similarly, P.Ws. 8, 9, 10 and 12 have also been declared hostile.

19. In this context, it would be necessary to examine the deposition of the victim. She has deposed before the trial court as P.W. 11. She has narrated a different story than what has been stated by his father and other witnesses before the trial court. She has deposed that while she had come out of her house in the night of 25th of December, 2013, the appellant along with two other persons came on a motor-bike and forcibly made her sit on it. She was then taken to a mango orchard, where she was subjected to sexual intercourse. When she raised alarm, her clothes were torn. On her cries, he parents, uncle and others came to the mango orchard and saved her. The appellant, leaving his motorcycle, fled away.

20. This story, according to the learned counsel for the appellant, is absolutely unbelievable. If she is to be believed, then the deposition of other witnesses are absolutely incorrect. It is not the prosecution case that she was subjected to any rape. Also, for the first time, the story of two other persons, accompanying the appellant, has been introduced by the victim.

21. Thus, from conspectus of the deposition of the P.Ws. 1 and 11, it becomes very obvious that the manner of occurrence as narrated by them are substantially different, which go to the root of the matter, rendering the prosecution version absolutely doubtful. In that



event, it is difficult and unsafe to rely upon the deposition of either of the P.Ws., viz. P.W. 2 and P.W. 11.

22. The falsity of the case further gets confirmed from the deposition of Barun Kumar Tiwary, the I.O. of this case, who has been examined as P.W. 13. He has deposed that on 25.12.2013, he was posted at Nanpur Police Station as Sub-Inspector of Police. On 26.12.2013, the then S.H.O., Sanjeev Kumar had instituted this case and had handed over the investigation to him. He along with the S.H.O. had reached the place of occurrence and had recorded the further statement of P.W. 2 and of other witnesses. He had prepared the seizure-list of motorcycle and had proved the seizure-list, which had been marked as Ext. 3.

23. Since seizure of motorcycle was effected on 26.12.2013, it is quite obvious that the motorcycle would not have been seized at the mango orchard but only from the house of P.W. 2 (the informant of the case). The evidence of P.W. 2, it has been seen earlier, is that on the next day of the occurrence, the S.H.O. had come to his house. P.W. 13 has further deposed that he had arrested the appellant from his house and had remanded him to custody. He has also mentioned in the case diary that the motorcycle was seized from the house of the informant. No torn clothes of the victim were found at the P.O. He had recorded the statement of the victim on 02.01.2014 but no attempt was made by him to get her statement recorded under Section 164 of the Cr.P.C. The victim was also not sent for any medical examination.



Before him, the victim did not state that the appellant was accompanied by two persons when she was abducted by him.

24. Thus, this Court finds that every attempt has been made to improve upon the prosecution case and the deposition of none of the witnesses inspire confidence. The background of political enmity also appears to be apparent. The prosecution version of a sole person trying to take away a girl in the dead of the night also appears to be doubtful when there are many houses in the neighbourhood. What further strikes the attention of this Court is that P.Ws. 2 and 11, the informant and the victim come from a respectable class of people and it is not expected that in the dead of night, that also in the winter month of December, a young girl would be permitted to go out of the house to attend to the call of nature.

25. Seeing the prosecution case in whole, the allegations against the appellant do not appear to be worthy of any credence. Where did the appellant run away from the mango orchard and why did the villagers not catch hold of him, also remain a mystery to this Court. Admittedly, the appellant was arrested from his house. Had the narration about the occurrence been true, the appellant would not have stayed back in his home to be arrested by the police.

26. On the aforesaid grounds, this Court is of the view that the prosecution has not been able to discharge its burden of proving the case to the hilt, i.e. beyond all reasonable doubts.



27. As such, the appeal is allowed. The judgment and order of conviction and sentence dated 14.12.2016 and 21.12.2016 are set aside.

28. The appellant is in custody. He is directed to be released forthwith from jail, if not wanted in any other case.

29. A copy of the judgment be sent to the Superintendent of the concerned jail for information, compliance and record.

(Ashutosh Kumar, J.)

Rakhi

AFR/NAFR	
CAV DATE	N.A.
Uploading Date	13.03.2018
Transmission Date	13.03.2018

