

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.390 of 2015

Arising Out of PS.Case No. -37 Year- 1997 Thana -FALKA District- KATIHAR

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1. Nirmal Marandi S/o Late Rasik Marandi Resident of Village Chapraila, Police Station Falka, District Katihar.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Gyanand Roy, Adv.
Mr. Vivekanand Jha, Adv.

For the Respondent/s : Mr. Sujeet Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 09-03-2018

Vide judgment of conviction dated 29.05.2015, sole appellant, Nirmal Marandi has been found guilty for an offence punishable under Section 376 IPC, and vide order of sentence dated 01.06.2015, sentenced to undergo RI for 7 years as well as to pay fine appertaining to Rs. 10,000/- and in default thereof, to undergo SI for 6 months passed by Additional District & Sessions Judge-II, Katihar in Sessions Trial No. 139/2001. It has also been directed that the amount of fine if deposited be paid to the victim.

2. On 29.03.97, victim- PW-1, (name withheld) filed a complaint petition disclosing therein that she happens to be aged about 13 years, unmarried and accordingly, is staying at the place of her parents. On the alleged date i.e. 21.03.1997 at about 2.00 PM while she was asleep, all of a sudden, accused intruded inside her



house, put his hand over her breast whereupon, she woke up. Seeing the accused, she tried to raise alarm whereupon, her mouth was gagged and then after lifting her Sari and Saya accused pounced upon her and committed rape. During course thereof, anyhow his hand slipped whereupon she raised alarm attracting Chandu Murmu. During midst thereof, her mother also arrived and they have seen the accused indulged in raping her. The accused had torn her blouse as well as also scratched over her face. On hue and cry raised by her mother as well as Chandu Murmu, so many villagers assembled seeing whom, the accused, ran away. Then thereafter, the parents, brother had gone to the place of accused whereupon, his family members became adamant to assault them. In the aforesaid background, there was caste-panchayat whereunder accused and his family members were called upon and inquired. Accused had confessed his guilt and then undertook to marry and for that, as per prevailing custom, she was directed by the Panchayat to join whereupon, she was taken away by the accused at his place where she lived as spouse. After 4 days, she was kicked out. Accused refused to marry with her, whereupon, the police was approached but as the police declined to register a case then, complaint petition has been filed.

3. Learned Magistrate directed the concerned police



station to register a case and investigate as provided under Section 156(3) of the CrPC whereupon, Falka PS Case No. 37/97 was registered, followed with an investigation, submission of charge-sheet, facilitating the trial, meeting with ultimate result, subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial of the occurrence. Subsequently thereof, the accused had taken conflicting defence that victim was in love since long having physical relationship but, as accused had refused to marry, on account thereof, this case has falsely been instituted. Though PWs-2 and 3, parents were suggested otherwise. However, neither ocular nor documentary evidence has been adduced on behalf of defence.

5. In order to substantiate its case, prosecution had examined altogether 12 PWs, those are, PW-1, Victim herself, PW-2, Pradhan Murmu, father, PW-3, Majhli Kisku, mother, PW-4, Turu Murmu, PW-5, Narsingh Murmu, PW-6, Chhotelal Soren, PW-7, Mangal Murmu, PW-8, Bhaiya Lal Hansda, PW-9, Badka Kisku, PW-10, Shekhar Singh, PW-11, Md. Akil and PW-12, Dr. Mini Rani. Side by side had also exhibited Ext-1, Formal FIR, Ext-2, endorsement over written report and Ext-3, medical report. As stated above, neither



ocular nor documentary evidence has been adduced on behalf of defence.

6. Manifold arguments have been made on behalf of learned counsel for the appellant while challenging the finding recorded by the learned lower court. The first and foremost argument happens to be that there happens to be inordinate delay in launching the instant prosecution without any legal, acceptable explanation and that being so, the prosecution story is fit to be disbelieved. Then it has been submitted that from the conduct of the prosecutrix, it is evident that she happens to be major as well as a consenting party. That being so, no offence of rape is found on the allegation whatsoever been attributed at her end rather, it suggests that on account of some sort of differences, the continuing intimate relationship got broken whereupon, this case has been filed with an ulterior motive. Because of the fact that there happens to be no allegation at the end of the prosecution that consent was obtained under threat, coercion or under deceitful means, on account thereof, the consent which is found exposed by her conduct is to be accepted whereupon, the finding recorded by the learned lower court is fit to be erased.

7. Then it has been submitted that the version of the prosecutrix could not be accepted as a gospel truth. Furthermore, relying upon the *Deelip Singh @ Dilip Kumar v. State of Bihar*



reported in (2005) 1 SCC 88 as well as *Abbas Ahmad Choudhary v. State of Assam* (2010) 12 SCC 115, it has been submitted that the circumstances visualizing from the evidence of prosecutrix appears to be sufficient to throw her assertion and that being so, considering the evidences of PWs-2 and 3 being parents, the independent witnesses, PWs 4 to 9 who have not supported the case of the prosecution and so the cumulative effect did not justify the finding recorded by the learned lower court.

8. Apart from this, it has also been submitted that PW-12, doctor had examined the victim. Although she had found hymen old ruptured having subject to sexual activity at an earlier occasion but had not found any kind of external injury over any part of body including genitalia and that being so, question of rape or forceful intercourse does not arise. It has also been submitted that from the medical evidence, it is apparent that age of victim has been ascertained in between 16-17 years and so she was major, at least at the verge of majority and so, taking into account her conduct, it could be said that her indulgence happens to be in continuance and so, the appellant would not be found guilty for the commission of rape. As such, appeal is fit to be allowed.

9. On the other hand, learned APP, opposing the submissions made on behalf of appellant, submitted that so far Indian



Continent is concerned, verginity of a girl is of paramount consideration. That being so, unless and until, there happens to be some sort of activity at the end of accused against the victim, victim would not dare to come to court to say that she has been ravished and that happens to be reason behind that consistently, it has been held that delay in institution of a case so far rape is concerned, would not prove fatal. In likewise manner, it has also been settled at rest that unless and until there happens to be some sort of positive evidence with regard to unscrupulous activity of the victim, ordinarily the evidence of the victim is to be accepted. In the aforesaid background when the evidence of the victim is taken along with other evidences, it is apparent that she was ravished at the end of the appellant whereupon, the finding having been recorded by the learned lower court did not attract interference and is, accordingly, fit to be confirmed.

10. Before coming to the merit of the case, from the record it is evident that occurrence happens to be in two stages. The first one happens to be commission of rape on 21.03.1997 and then thereafter, the subsequent event whereunder Panchyat was convened and as per prevailing customs amongst Santhal, after confession at the end of appellant and further having an undertaking at his end to marry, he took the victim at his place where she was kept for four



days duly recognized as wife and then thereafter, kicked out. When the aforesaid theme has been properly scrutinized, it is evident that allegation has been levelled only with regard to rape having been committed on 21.03.1997 and the same happens to be the factum of charge as well as statement recorded under Section 313 CrPC. That means to say, the subsequent activity whatsoever been asked to be after effect did not connect with the episode which took place on 21.03.1997 whereunder victim was raped. So, the matter for adjudication is whether on 21.03.1997, victim was raped or not.

11. Before coming to evidence of prosecutrix and her parents who stood as PWs-1, 2 and 3, the evidences of other witnesses have to be seen. Learned counsel for the appellant is right in arguing that PWs-4 to 9 were not found loyal to the prosecution and so, were declared hostile but, when their evidences have minutely been gone through, PW-4, during cross-examination at para-5 had stated that at the time of occurrence he was at Dumka. PW-5 had deposed that the person who had committed rape over prosecutrix, he does not identify him. In para-6 of his cross-examination, he had stated that at the time of occurrence he was at Punjab. PW-6 at para-6, had stated that he does not know with regard to occurrence while PW-7 at para-6 had stated that he had not heard from anybody with regard to occurrence. At the time of occurrence, he was at Haryana. PW-8, at



para-5 had said that he had not heard from anybody with regard to occurrence. PW-8 at para-5 had stated that he had not heard any kind of occurrence. From the evidence of hostile witnesses as referred hereinabove, it is crystal clear that they have not stated that no such type of occurrence had ever taken place rather they have given some sort of explanation that at the time of occurrence they were not present in the village, one had spoken that he was at Dumka, other had said that he was at Haryana and some had spoken that he had not heard. So far PW-6 is concerned, though had claimed to at Punjab, during course of occurrence but in his examination-in-chief alone he had stated that rape was committed over the victim.

12. The evidence of hostile witness supporting the prosecution case is to be accepted. Times without number, it has been held by the Hon'ble Apex Court that mere declaring a witness hostile will not be subject his/her evidence to be outrightly rejected.

13. In *State through PS Lodhi Colony v. Sanjeev Nanda* reported in (2012)8 SCC 450 It has been held as follows:-

99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system.



100. This court in [State of U.P. v. Ramesh Mishra and Anr.](#) [AIR 1996 SC 2766] held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. [In K. Anbazhagan v. Superintendent of Police and Anr.](#) [AIR 2004 SC 524], this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in [Sidhartha Vashisht @ Manu Sharma v. State \(NCT of Delhi\)](#) [(2010) 6 SCC 1] and in [Zahira Habibullah Shaikh v. State of Gujarat](#) [AIR 2006 SC 1367] had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, [Section 193](#) of the IPC imposes punishment for giving false evidence but is seldom invoked.

14. So far PW-10 and 11 are concerned, admittedly,



they happen to be formal in nature and their evidence happens to be in the background of non examination of the Investigating Officer.

15. So far PW-12, Dr. Mini Rani is concerned, she had examined the victim on 14.04.1997, after so many days of the alleged occurrence and that being so, she rightly found absence of any kind of external injury save and except tracing out the hymen old ruptured, torn and on that very score opined the victim to be subjected to sexual intercourse. At the present moment, the finding of doctor relating to her age is also to taken into consideration whereunder she estimated the age of the victim to in between 16-17 years. From the injury report (Ext-3), it is evident that victim was not at all examined by the medical board or at least by an Orthopedic or Radiologist having expertise on the subject and that being so, to what extent her finding being a Gynecologist would be relevant over estimation of age of the victim cast a mark of interrogation. Irrespective of the fact that she was X-rayed by Dr. S.P. Saha, Radiologist, who though given some sort of finding on that very score but not over the age which happens to be an independent finding of PW-12.

16. In the aforesaid background, now the evidence of the prosecutrix, PW-1 is to be seen. She had deposed that the occurrence approximately happened five years ago. It was day time. At that very time, she was sleeping at her house over a cot. She woke



up after perceiving some pressure over her breast whereupon she saw appellant having his hand over her breast. Identified the accused in dock. She tried to raise alarm whereupon, her mouth was gagged. Then, after removing her clothe, he committed rape. During midst thereof, his hand got removed from her mouth whereupon she raised alarm. Her mother and Chandu Murmu arrived. At that very time, accused was committing rape upon her. On hue and cry raised by her mother and Chandu Murmu, so many persons came seeing whom, accused ran away. Then she had disclosed the whole event to the persons assembled there. Thereafter, case has been instituted, she was medically examined. During cross-examination, she had stated at para-4 that the house of accused happens to be adjacent to her house and is known since childhood. At para-5, she had further stated that her parents are alive. She happens to be three brothers as well as two sisters. All the three brothers are elder to her. The eldest brother is aged about 40 years. Her younger sister is aged about 20-22 years. At para-11, she had stated that she was not in love with the accused. She had not developed physical intimacy with anybody. In para-14, she had stated that after having hand of the accused over her breast, she woke up. She raised alarm attracting Chandu Murmu, then her parents along with co-villagers came. Accused ran away. In para-15, she had stated that she had removed hand of accused from her breast. While



he was removing her Sari and clothe, she tossed. She stood up leaving cot. In finishing all the work, it took half an hour. She had protected her genitalia by her hand. There was no discharge of semen. In para-16, she had stated that Panchayati took place on 27.03.1994. She had also participated. The accused and his father had also participated. It was resolved in Panchayati that accused will keep her after marrying. It happens to be the custom of Santhal community to which she belonged. Accordingly, she had gone to Nirmal's house, stayed there for 5-6 days. During midst thereof, he developed physical intimacy with her and then thereafter, she was kicked out as the accused refused to marry. In para-17, she had stated that the case has not been compromised. She has not yet been married. She is residing at the place of her father. In para-18, she had stated that it is not a fact that she has got a bad character. She again denied the suggestion that she was in love with Nirmal and under the garb of aforesaid event, she had developed physical intimacy with him. She had further denied that she wanted to marry with Nirmal but as he refused, on account thereof, instant case has been registered. She had further stated that she was medically examined one day after the occurrence.

17. PW-2 is Pradhan Murmu, father of the victim. He had deposed that the victim happens to be his daughter and on the alleged date and time of occurrence, he along with his wife had gone



to do menial work leaving prosecutrix alone. After hearing some sort of commotion, he rushed. On query his daughter has disclosed that while she was sleeping, Nirmal intruded inside the house and then raped her. When he reached at the house, Chandu Murmu and his wife were present since before who had disclosed that they have seen the accused, Nirmal fleeing therefrom. Then had gone to the house of Nirmal and inquired about the same. There was Panchayati in the village whereunder accused had also participated. He confessed his guilt. He took the victim to his place where kept her as his wife and then kicked her out whereupon instant case has been registered. During cross-examination at para-4, he had stated that he has three sons and two daughters. In para-5, he had further stated that they all have gone on work. In para-6, he had stated that house of Nirmal lies adjacent to the house in the middle of village and are on visiting terms. His statement was recorded by the police. In para-8, he had stated that he had gone to his field along with his wife. After hearing noise, his wife firstly rushed. He came later on. In para-10, he had stated that when he reached at the place of occurrence 10-15 persons were present since before. He talked with his wife, daughter. On that day, he had not gone to anybody. On the following day, Panchayati was convened, then detailed the same with regard to event of Panchayati as well as keeping the victim at his place by the accused



for five days and then kicking her out. At para-11, he had further stated that during course of statement before police, he had stated that the victim had disclosed that while she was sleeping, she was ravished by Nirmal. He had also disclosed that Chandu Murmu and his wife had disclosed that they have seen the accused fleeing from his house. In para-12, he had stated that he talked with Nirmal during course of Panchayat. Then had denied the suggestion that as he intends to forcibly marry the prosecutrix with Nirmal, on account thereof, this case has been filed. Then had disclosed that prosecutrix is still unmarried. He had denied that she has been married with Vishnu Hembram.

18. PW-3 is mother of the victim. During her examination-in-chief, she had stated that on the alleged date and time of occurrence while she was working in her field along with her husband, she heard noise coming from her house whereupon, she rushed as her daughter, prosecutrix was alone. Alarm was being raised by her daughter. When she reached, she found Nirmal, her co-villager, coming out from her house and then ran away. She tried to caught hold of him but he escaped after pushing her. Her daughter had disclosed that while she was asleep Nirmal came, caught hold of her breast and then raped her. On that very score, there was Panchayati whereunder Nirmal accepted his guilt and volunteered to marry. He



took away prosecutrix as per prevailing custom. After retaining 2-4 days, kicked her out. On account thereof, the instant case has been registered. Furthermore, it has also been disclosed by her that on account of instant occurrence, none is ready to marry with her daughter. During cross-examination at para-7, she had stated that her daughter alone had raised alarm. Nirmal was there. He was wearing Lungi and Kameez. He flew towards western direction. He was chased by villagers as well as her husband. She fell down on push given by Nirmal. While prosecutrix had disclosed regarding the occurrence, at that very time, so many villagers have assembled but she is unable to disclose their names. In para-9, she had stated that Panchayati took place on the following day but she is unable to say the names of the persons who participated therein as was not present. In para-10, she had stated that before Panchayat, Nirmal had accepted his sin and also volunteered to marry. At the subsequent stage, her husband had gone to inquire. Then had denied the suggestion that as Nirmal refused to marry with the prosecutrix, on account thereof, this false case has been instituted. She had further stated that if Nirmal marries her daughter, then in that circumstance, this case will be withdrawn.

19. It is needless to say that both the parties belonged to scheduled tribes. From the evidence available on the



record, the status of the victim is found to be illiterate. Referring the evidence of prosecutrix (para-9) on the score that she happens to be major, is found ridiculous in the background of the fact that she has shown age of her eldest brother as 40 years while age of her father (PW 2) to be 45 years. Moreover, during course of cross-examination of her parents, age of victim has not been tested nor there happens to be suggestion at his end that prosecutrix happens to be major. In likewise manner, PW-1, prosecutrix also not been tested on the score that she happens to be major one.

20. To impeach the evidence of the witness or to extract something positive from the witness, the witness has to be confronted on that very score. The court would not form its own opinion in absence of cross-examination or the material being deficient one.

21. In *Gian Chand & others v. State of Haryana* reported in 2013(4) PLJR 7 (SC) it has been held:-

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in **Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.**, AIR 2013 SC 1204 observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if



a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

(Emphasis supplied)

22. That being so, it is conclusively found as the status of the victim which she had specifically narrated in the complaint petition to be aged about 13 years which never been controverted at the end of the defence at least by way of suggestion and in absence thereof, the defence had admitted status of the victim to be minor. Furthermore, it is also evident that defence even during course of suggestion having been given to the prosecutrix under para-



18 whereunder it was suggested that she was in love with him and had also admitted that she was continuing with physical intimacy, is indicative of the fact that sexual indulgence at the end of appellant is found admitted one. In that background, for proving consent, that too voluntarily would have been properly flashed by way of cross-examination that too, identifying her status to be major, that means to say, aged about more than 16 year at the relevant time, one of the exception of rape as prescribed under Section 375 CrPC and that being so, the learned lower court had rightly found the appellant guilty for an offence punishable under Section 376 IPC.

23. Consequent thereupon, instant appeal sans merit and is accordingly dismissed.

24. Appellant is on bail, his bail bond is, hereby, cancelled directing him to surrender before the learned lower court within a fortnight to serve out the remaining sentence, failing which learned lower court will proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

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