

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.3056 of 2017

Arising Out of PS.Case No. -11 Year- 2014 Thana -DEO District- AURANGABAD

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Suraj Paswan S/o Satya Narayan Paswan, R/o Village- Panchokhar, P.S.- Deo,
District- Aurangabad.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Krishna Prasad Singh, Sr. Adv.
Mr. Mithilesh Kr. Singh, Adv.
Smt. Meena Singh, Adv.
For the State : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 07-03-2018

Appellant, Suraj Paswan has been found guilty for an offence punishable under Section 4 of POCSO Act and sentence to undergo R.I. for seven years vide judgment of conviction dated 08.09.2017 and order of sentence dated 14.09.2017 passed by First Additional Sessions Judge-cum-Special Judge, POCSO Act, Aurangabad in G.R. No.02/2014, Deo P.S. Case No.11/2014.

2. Victim (name withheld), PW.1 gave her fardbeyan on 10.03.2014 at 09:00 PM while she was admitted at Deo Hospital alleging inter alia that on the same day at about 06:00 PM she had gone to meet nature's call. As soon as she proceeded from her house, her co-villager, Jai Prakash Paswan aged about 18 years, son of Satendra Paswan, Mithilesh Paswan son of Briksh Paswan along with two unknown persons whom, she claimed to identify, caught hold her. She tried to raise alarm whereupon Jai Prakash Paswan pressed her mouth and then, Jai Prakash Paswan and Mithilesh Paswan took her in an orchard (Khari) where Jai Prakash Paswan and Mithilesh Paswan committed rape one by one. She became



unconscious. After sometime, she regained sense and then thereafter, she raised alarm whereupon, wife of Mahendra Pathak came. She again became unconscious. When she regained sense she found herself admitted at Deo Hospital where she is making her statement in presence of her cousin brother as well as mother.

3. After registration of Deo P.S. Case No.11/2014 investigation commenced and concluded by way of submission of charge sheet against four accused including the appellant whereupon trial commenced concluded in a manner, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial. However, neither oral nor documentary evidence has been adduced.

5. In order to substantiate its case prosecution had examined altogether thirteen PWs, PW.1 victim herself, PW.2- Hewanti Kunwar mother of the victim, PW.3 Suman Devi, PW.4-Anuj Sharma, PW.5 Yogendra Vishwakarma, PW.6-Basanti Devi, PW.7-Upendra Singh, PW.8 Anand singh, PW.9 Om Prakash Kumar, PW.10 Rajiv Ranjan Kumar, PW.11 Dr. Lalsa Sinha, PW.12 Dr. Ram Bhajan Choudhary, PW.13 Dr. Bibhuti. Side by side had also exhibited Ext.1-Fardbeyan, Ext.2-Signature on fardbeyan, Ext.3- Formal signature of FIR, Ext.4-Signature of Om Prakash, Ext.5-Signature of Dr. Lalsa Sinha, Ext.5/1-Supplementary report of informant, Ext.5/2-Report of Medical Board. As stated above, nothing has been adduced in defence.

6. Learned counsel for the appellant while challenging the



judgment impugned has submitted that the same happens to be perverse in the background of the fact that (a) the victim as well as appellant happens to be co-villager but, appellant has not been named by her during fardbeyan, statement under Section 164 Cr.P.C (b) there happens to be specific allegation at the end of the victim that only Jai Prakash Paswan and Mithilesh Paswan, though there happens to be presence of two more unknown persons, lifted her, gagged her mouth, taken to orchard (Khari) where she was raped by those two persons, then in that circumstance there was no occasion for third to have his presence in between as well as, to commit rape though, during course of her statement under Section 164 Cr.P.C. she had alleged that all the four had committed rape.

7. Furthermore, it has also been submitted that during course of trial when victim had, during course of victim exonerated Jai Prakash Paswan and Mithilesh Paswan, then in that circumstance, her evidence would not have been accepted by the learned lower court as, being unreliable in order to identify the appellant to be one of the rapist. That being so, the evidence of the victim of a rape, though has been found lies on upper pedestal and has to be accepted as creditworthy, trustworthy, reliable unless and until there happens to be cogent ground to discard. So far instant case is concerned, from the evidence of the victim, it is apparent that she happens to be unreliable and that being so, she lacks the intensity in her evidence to justify the finding recorded by the learned lower court.

8. Furthermore, magnifying the issue it has been submitted that being co-villager it was expected at the end of the victim to have properly identify the appellant, even in presence



thereof, there should have been positive, concrete evidence to connect the appellant with the commission of rape. During course of investigation appellant was not at all put on T.I. Parade. It is not the rule that there should be always a T.I. Parade but, in the facts and circumstances of the case, it was necessary and, the conduct of the victim did not justify recognition of the appellant in court for the first time at her end to be one of the culprit.

9. Furthermore, it has also been submitted that when evidence of PW.1 is taken together with the other PWs, it is apparent that they completely disowned any kind of occurrence having been committed with the victim. Therefore, commission of rape is not at all found duly substantiated more particularly by the appellant. That being so, the judgment of conviction and sentence impugned is fit to be set aside.

10. On the other hand, while refuting the submission having made on behalf of learned counsel for the appellant, the learned Additional Public Prosecutor has submitted that from the medical evidence it is crystal clear that victim was raped. It has also been submitted that though, appellant has not been named at initial stage but during course of trial has been properly identified by the victim to be one of her rapist whereupon, the finding so recorded by the learned lower court did not attract interference.

11. PW.11 is Dr. Lalsa Sinha who was one of the member of the board which was constituted by an order of Deputy Superintendent for examination of the victim whom the board had examined on 11.3.2014 and found the following:

1. Black til on left, 2. one black teel on right



cheek teeth 14/14 total 28 teethes. Dental opinion by Dr. Vibhuti Parsanna report attached. Secondary sexual character L.M.P. 22.2.14 as per statement given by her. Auxiliary and pelvic hair developed, breast developed, Auxiliary pubic hair coarse black and curly.

General examination:-She is intelligent adolescent looking well oriented in time and space get normal. She is passing stool and urine normally and washed her private part after the incident. Injuries present over body. Multiple small abrasion of different shapes and sizes present over lower back with slight crushed on surface and tendered to touch. Cause of injury-friction on rough surface. Age of injury-24 hours.

(2) One round abrasion 5 mm x 5 m.m. on the back of right elbow covered with crushed red-dish in colour. Duration of injury written 24 hours. Cause of injury friction and rub on hard surface.

(3) Multiple small abrasion on anterior surface of both legs of different sizes in different direction red-dish to deep red-dish looking. Cause of injury friction by some rough object. Age of injury within 24 hours.

(4) Pelvic examination:-Hymen ruptured in vagina admits one finger easily slight in direction with redness seen on the fourth toe tenderness to touch duration of 24 hours. Cause of injury sexual act. No abnormal discharge no form body seen rigor mortis taken and sent to pathological examination. Victim admitted for radiological examination. No stencil on the surface of Salwar opinion reserved till reports coming. Second supplementary pathological and radiological



reports of Runa Kumari as above mentioned. Pathological. Report submitted by Dr. R.B. Choudhary. Report attached. As per his report no spermatozoa found on either sides. Radiological report by Dr. M.P. Sinha. Report attached. Xray plate no.20593/dated 11.3.14 as per his report of X-ray.1. X-ray right wrist<LAT> partial furrier of radios and ulna. 2. X-ray right elbow. A.P. lateral head of radium Loleta none process of ulna fused. 3. X-ray pelvis. A.P. vies left pressed not found. 4.X-ray chest A.P. view estronoclavichor joint not fused. X-ray face lateral view right and left 7-1/1/7/7-1-1/7=28 teeth spacing present for eruption of third moral. Opinion regarding sexual act on the basis of finding disturb above. She seems to undergone (sexual act recently with injuries caused over body suggestion sign of struggle of victim on the basis of general appearance. Dentist finding and radiological finding members of broad opined age of victim girl approximately 16.1/2 to 17.1/2 years. She has also stated that both reports are in her pen and also hears the signature of board members namely Dr. Vibhuti Parsanna, Dr. R.B. Choudhary and Dr. M.P. Sinha. Both reports has already been marked as Exts.5 and 5/1.

PW.10, PW.12 and PW.13 are other members of the Board who had affirmed their presence, examination, finding.

12. As per medical report, although the same happens to be contrary to the direction having given by the Apex Court time to time that the age of the victim should not be ascertained, on the basis of the medical report exclusively rather it should be ascertained in accordance with the procedure, having prescribed under Juvenile Justice Act to ascertain the age of Juvenile in conflict



as held with law in **Jarnail Singh Vs. State of Haryana** reported in **2013 Cr.L.J. 3976** and in **State of Madhya Pradesh vs. Anoop Singh** reported in **(2015) 7 SCC 773**. However, the age of the victim has been ascertained in between 16 ½ to 17 ½ years. That means to say giving benefit of plus two years, victim happens to be major and in the aforesaid background, there would not be application of POSCO Act.

13. Now coming to other aspect, it is evident that PW.2 who happens to be her mother had simply corroborated the story of teasing of the victim that too by unknown persons whereupon she was declared hostile, even then nothing has been procured by the prosecution and the same status happens to be with regard to remaining material witnesses i.e. PW.3, PW.4, PW.5, PW.6, PW.7, PW.8. That means to say there witnesses not only discarded event of rape, rather having been teased that too by unknown persons.

14. Now remains sole testimony of PW.1, the victim. She had shown her age to be 16 years on the date of her examination she had deposed that she was raped about ten months ago. It was 06:00 PM. At that very time, she proceeded to meet natures call. She was caught hold by Suraj then, after gagging her mouth she was taken towards khand where shrubs were there and then she was raped. She was raped by Suraj. Others fled away. She could not identify others who were along with Suraj nor she knew them by name. At that very time she was not conscious. After regaining her sense she found herself at hospital. Police came at hospital. She was at Deo Hospital. Police took her statement and then thereafter she put her signature over the same after properly hearing, understanding the same. Mother and her cousin brother were present at that very time



at the hospital who also to be signature (exhibited). Police had seized her apparel including panty. Identified the accused (appellant Suraj) rest were not identified. During cross-examination on behalf of Jai Prakash Paswan and Mithilesh Paswan she had categorically stated that she was not raped by Jai Prakash Paswan and Mithilesh Paswan. She had further stated that she had not named them during course of statement before the police. She had not named them during course of further statement. Then had said that she knew only to sign. Fardbeyan was not read to her in presence of her mother as well as brother. On behalf of Ravikant she had stated that whatever been deposed by her, happens to be fully understood by her. On behalf of Suraj (appellant) she had stated that she happens to be her co-villager but she is not identifying him. Then had stated that she could identify after seeing her. In para-7 she had stated that her statement was recorded in court at an earlier occasion wherein also, she had named Suraj. Then at para-9 had stated that she had put her signature over the statement which was read over to her and then, after getting it correct, she put her signature. She had also stated that just after regaining her sense, she had disclosed regarding the occurrence to her mother. In para-10 she had stated that she was raped for an hour. It was not dead of night. In para-13 she had stated that her house lies 4-5 steps away from the place of occurrence. While house of Suraj lies twenty meter away from the place of occurrence. Again said that she had not seen house of Suraj so, unable to disclose the same. In para-14 she had stated that she was not acquainted with Suraj since before the occurrence.

15. PW.9 is the Investigating Officer. He had stated that on 10-03-2014 he was entrusted with the investigation of the case.



Accordingly, he visited place of occurrence. The place of occurrence happens to be a land situated eastern-south side of Khari of the barren land of Sunil Singh. Waste materials were found accumulated thereupon. Panty was seized therefrom which belong to the victim as was identified by her sister. Then had disclosed boundary of the P.O. East-Surendra Pathak, West-Markat Pandey and then house of Anjan Singh and then house of victim, North-house of Ramesh Sinha and South-House of Pramod Pathak. He had examined witnesses, recorded further statement of the victim, got the victim examined under Section 164 Cr.P.C., apprehended the accused, procured medical report, received supervision note, sent the seized material for forensic examination and then submitted charge sheet. During cross-examination nothing substantial is found. PW.10 is the formal witness who had simply exhibited formal FIR.

16. After giving anxious consideration towards the evidences having adduced on behalf of prosecution, it is apparent that from PW.2 to PW.8 have not supported case of the prosecution. The most devastating event to the prosecution happens to be, in spite of disclosure by the victim that she had narrated the occurrence to her mother and cousin, who also stood as FIR attesting witness, did not opt to corroborate the same. With regard to evidence of doctors, it is evident that though the status of the victim is found to be major but, there happens to be presence of injuries over the person of the victim more particularly over her vagina and further the doctor had also opined that she was subjected to sexual intercourse recently. So, it is found supporting the case that she was subjected to sexual intercourse.

17. It has been settled at rest by catena of decisions that



the evidences of victim, unless and until there happens to be cogent ground or some sort of deficiency is found persisting, should be accepted. More recently, in ***Mohd. Ali v. State of U.P.*** reported in **(2015) 7 SCC 272**, it has been held:

“30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely does not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the appellant-accused for the alleged offences and the High Court has fallen into error, without reappreciating the material on record, by giving the stamp of approval to the same.”

18. Now the evidence of PW.1 has to be tested within the ambit of aforesaid frame work. Before adjudicating upon her testimony, it is apparent that nothing has been cross-examined at the end of the appellant with regard to her previous testimony relating to her fardbeyan as well as her statement under Section 164 Cr.P.C coupled with her statement under section 161 of the Cr.P.C. That being so, whatever deficiency does exist on the score of some sort of unworthiness attributed against the victim that has not been properly exposed at the end of the appellant and so, that part remained unshattered save and except from para-9 of her cross-examination it is apparent that she was tested over fardbeyan whereupon she had stated that before putting her signature over fardbeyan same was read over to her as well as in presence of her



cousin, mother and if it is taken together with the examination-in-chief, the same is found duly substantiated. Furthermore, she had also admitted that her statement was also recorded by the magistrate. After perusal of both the statement, it is crystal clear that name of appellant did not find place. Then in what basis she has been charge sheeted was expected at the end of Investigating Officer to be properly explained, wherein he failed. Though, PW.1 was not declared hostile which she ought to have been, but in the fact and circumstances o the case, her testimony implicating the appellant to be her rapist could be found truthful as, during examination-in-chief, she identified the appellant by name as well as also identified in dock, but during cross-examination, she specifically stated that she was not knowing him since before. Thus, the evidence in its entirety clearly suggest that prosecution could not be able to substantiate its case.

19. That being so, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed. Appellant is under custody, hence is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
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