

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.594 of 1994

Arising out of the judgment and order dated 13.09.1994 passed by Sri Umashankar Prasad, 1st Additional Sessions Judge, Araria in Sessions Trial No. 239/93 / 479/94, District Araria.

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Nityanand Sah, S/o Muni Lal Sah, Resident of Village North Maheshawri Jogbani,
P.S. Jogbani, District Araria.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance:

For the Appellant/s : Mr. (Advocate).

For the Respondent/s : Mr. (A.P.P.)

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 27-03-2018

This Criminal Appeal has been preferred by the sole appellant Nityanand Sah who has been convicted by the learned 1st Additional Sessions Judge, Araria for the offences U/S 376 and 396 of the Indian Penal Code and has been sentenced to undergo imprisonment for life and 10 years respectively vide judgment dated 13.09.1994 in Sessions Trial No. 479 of 1992.

2. The prosecution case as appearing from the *Fard-e-beyan* of Mahavati Devi (PW2), aged about 15 years, an illiterate girl is that in the past night, all of a sudden, 10-12 miscreants entered in



the courtyard (AANGAN) of her house and confined her father; one Dibiya (a kind of candle) was burning in the courtyard. The miscreants took away Rs. 500/- from the room of her Bhabhi and when her mother came out of the house on call then one person entered into the house and by putting them under threat of a knife caught hold of the hand of this informant. This informant alleged that when she switched on her torch, she saw in the torchlight that the said miscreant was Nityanand Sah (the appellant). It is alleged that the appellant asked the informant to switch off the torchlight and asked her to remain silent otherwise she would be killed. The informant further alleged that her mouth was pressed by a GAMCHHA (a piece of cloth normally kept by a villager on his body) and put her down and thrust himself upon her body. The informant alleged that the said Nityanand Sah (appellant) penetrated the private part of the informant and committed rape. The informant further alleged that on HULLA the people of the Mohalla came there and have also identified the appellant while fleeing.

3. The *Fard-e-beyan* of the informant was recorded by an S.I. of Police and two witnesses Indra Lal Sah and Bindi Devi put their signature and thumb impression respectively on the *Fard-e-beyan*. In course of trial the *Fard-e-beyan* has been exhibited as Ext.5. A formal F.I.R. giving rise to Yogbani P.S. Case No. 0082 of 1992



dated 28.07.1992 was recorded. The formal F.I.R. has been exhibited as Ext.8.

4. After investigation, police submitted a charge sheet against seven accused persons including the present appellant. Cognizance was taken and thereafter the records were committed to the Court of Sessions where charges were framed. It appears that against this appellant Nityanand Sah charge was framed U/S 376 and 396 as also U/S 412 of the Indian Penal Code whereas against other accused charge was framed only U/S 396 of the Indian Penal Code. It further appears that in course of investigation, police got recorded statements of some of the witnesses U/S 164 Cr.P.C. The witnesses, namely, Mahavati Devi (the informant), Bindi Devi, Bhola Rishi Deo, Surya Rishi Deo, Birju Rishi Deo and Kadam Lal Rishi Deo got recorded their statements U/S 164 Cr.P.C. wherein they have supported the prosecution case.

5. In course of trial, the prosecution examined as many as 18 witnesses. The learned trial court reached to a finding that the most important witness on behalf of the prosecution is Mahavati Devi (PW2), who is the informant of this case. PW1 Indralal Sah, PW8 Gulabchand Sah and PW13 Parmanand Yadav have been declared hostile. In course of trial, PW14 Dr. Arti Shrivastava, who had examined the informant, deposed that she had not found any sign of



rape on the informant.

6. Relying upon the deposition of the mother of the informant (PW6) Mosmat Jamuni, Bhabhi of the informant Bindi Devi (PW3) and the two brothers of the informant (PW5 and PW7, namely, Surya Rishi Deo and Birju Rishi Deo respectively) and on the statement of one neighbour, the trial court concluded that these witnesses have successfully proved the case U/S 376 of the Indian Penal Code against the present appellant. The trial court took a view that when the prosecutrix has made a self-incriminating statement of rape on her, the evidence of Dr. Arti Shrivastava is not required to be given much weightage.

7. The learned trial court found that there was no evidence beyond reasonable doubt to prove the presence of other accused persons on the mid-night of 28.07.1992 and, therefore, there was no proof of allegation against the other accused persons U/S 396 of the Indian Penal Code. The trial court recorded a finding that this appellant had pressed the neck of the father of the informant and as a result of which father of the informant died. Dr. Jamal Ahmad, who had conducted the post-mortem-examination on the dead body of the father of the informant deposed that the deceased Meghu had died due to Asphyxia. The learned trial court noticed that the allegation of pressing the neck of Meghu (deceased) has been supported by the



prosecution witnesses. The trial court, however, did not find the evidence beyond all reasonable doubt to prove the guilt of the appellant U/S 412 of the Indian Penal Code. In ultimate analysis, the learned trial court convicted this appellant U/S 376 and 396 of the Indian Penal Code, however, acquitted him from the charge of the offence U/S 412 IPC. In Paragraph 16 of the trial court's judgment it has been finally held that the prosecution has failed to prove the charge U/S 396 IPC against all other accused persons, therefore, they have been acquitted. The trial court has rejected the evidence of the prosecution witnesses, namely, Bindi Devi, Surya Rishi Deo and Bhola Rishi Deo, who had stated that the other accused persons had also participated in the occurrence.

8. Learned counsel representing the sole appellant has assailed the impugned judgment on the grounds inter alia that the learned trial court has failed to appreciate that the allegation of rape was not at all proved against the appellant. In this regard PW14 Dr. Aarti Shrivastava, who had examined the informant, has clearly deposed that she had not found any sign of rape on the informant. The learned trial court has not believed the case against other accused persons U/S 396 IPC. The learned trial court, it is submitted, has placed much evidentiary value to the statement of the prosecutrix. It is submitted that in Paragraph 13 of the impugned judgment the learned



trial court has itself mentioned the vacillating statements of some of the prosecution witnesses on the point of identification of the accused persons, still the submission of the defence that the witnesses have made contradictory statements in their deposition has only been accepted with respect to other accused persons save and except the present appellant. In Paragraph 16 of the impugned judgment, the learned trial court has held that all the 8 accused persons against whom charges have been framed, except as against the present appellant, the prosecution witnesses have failed to support the prosecution case beyond all reasonable doubts. Learned counsel submits that the trial court has believed the version of the informant, her Bhabhi and Bindi Devi and her mother as also the statement of the brother of the informant but while appreciating the evidences of those witnesses the learned trial court has failed to appreciate that if the evidence of the witnesses as regards the entire manner of occurrence has been disbelieved as against other accused persons, the evidentiary value of those evidences will be very weak and cannot be safely relied upon for purpose of conviction of the present appellant.

9. On the other hand, learned A.P.P. representing the State submits that the learned trial court has found the appellant guilty for the offences under Section 396 IPC as also Section 379 IPC on the basis of the evidences which are reliable and no material



contradictions may be found in the prosecution witnesses.

10. Having heard learned counsel representing the sole appellant and learned A.P.P. for the State and upon perusal of the trial court's judgment and the records, we find that as per the *Fard-e-beyan* (Ext.5) altogether 10-12 persons had entered in the courtyard of the house and they had confined the family members in the house, assaulted them and it was the claim of the informant that her Bhabhi and other persons present in the house can identify them. According to the informant, the person who entered in the house and in the room of the informant threatened her with a knife and caught hold of her hand, thereupon she claims to have switched on a torch and in the torchlight she identified this appellant. The manner of occurrence, as alleged by the informant, is not believable because she herself says that the person who entered in the house and the room of the informant had put her under threat of a knife and caught hold of her hand; in these circumstances, her further assertion that she could switch on her torch and in the torchlight she identified the present appellant, who subsequently committed rape on her cannot be believed. In her *Fard-e-beyan* she has not made any allegation of assault on her father against this appellant; she has confined the whole allegation against this petitioner as respect commission of rape; she has categorically stated that other persons / miscreants had killed her



father. There is no allegation in the *Fard-e-beyan* that this appellant had assaulted her father and killed him.

11. We also find from the evidence of PW14 Dr. Aarti Shrivastava that the informant was thoroughly examined, she was menstrual going, there was no apparent injury on her person including private part, vaginal swab was sent to Sadar Hospital, Araria and the report of the lady Civil Assistant Surgeon, Araria was received on 31.07.1992. No spermatozoa were seen, dead or alive. In the opinion of the doctor, the age of the victim was about 17 years but there was no evidence of recent sexual intercourse within 48 hours of examination. The certificate issued by the doctor has been exhibited and marked as Ext.2.

12. Further, on perusal of the evidence of PW2 (the informant) it would appear that she has, while narrating the story of rape, stated that while the appellant was committing rape, in the meantime the miscreants entered in the house of her Bhabhi Bindi Devi and by breaking open the box took away Rs. 500/-. The other accused took away one Khassi and Pathi from the house of Munni Lal Risideo. She has stated that after the miscreants fled away she narrated this story of rape to Indra Lal Sah and other persons of Mashahri Tola, she also narrated this to her mother and her Bhabhi. If this part of her statement is read with the earlier part of her statement



in course of deposition it would appear that there are material contradictions in her statement. In Paragraph 1 of her deposition she has stated that she was sleeping in the North side of her house together with her mother. If this witness was sleeping with her mother in the room, then her statement that she narrated the story to her mother leaves a doubt about her statement and the manner of occurrence. She has been talking about identifying the appellant in torchlight. In Paragraph 7 of her deposition, she has stated that the appellant snatched the torch and had thrown the same but the said torch was never recovered by the Investigating Officer or produced by the prosecution.

13. PW3 Bindi Devi has stated that when she woke up on Hulla, she found 4-5 miscreants had entered in the house. She has stated that they caught hold of her and asked her to sit outside the house. She has made the statement that 4-5 persons remained near her and rest of them entered in the house, they killed her father-in-law by pressing his neck. She states that while the miscreants were fleeing away, she had identified the appellant. She states that the informant had told her about the rape committed by the appellant. In her cross-examination, she has stated that the persons who had entered in the house were unknown to her. If this part of the statement of PW3 is considered along with the statement of PW2 it would appear that there



are material contradictions inasmuch as PW3 does not say that Nityanand Sah (the appellant) who was known to her had entered inside the house. This witness has further said that she had identified this appellant while he was fleeing away in the torchlight of Lakhi Chand, who is a neighbour. Thus, according to the statement of PW3, she had not found any known person entering in the house and she has not named this appellant among 3-4 persons who had caught hold of her and brought her outside the house and asked her to remain silent. This witness has accepted the fact that the land of this appellant is situated near the house of this witness. The defence case was that because of the dispute of damaging the crops of the appellant, this appellant has been falsely implicated.

14. Similarly, other prosecution witnesses have went on narrating the story of identification, however, neither the torch of the informant was produced nor the torch of Lakhi Chand could be produced.

15. On a close scrutiny of the evidence of the Investigating Officer (PW6) it would appear that Sri Krishna Prasad, who was at the time of occurrence posted at Jogbani, has stated in Paragraph 38 that he did not find any Dibiya in the house of the informant. The Investigating Officer was not shown any Dibiya when he visited there. In Paragraph 39 he has stated that –



“39. खून लगा कुछ नहीं मिला। मैंने साया जब्त नहीं किया। डाक्टर ने 48 घंटे के अन्दर Rape का निशान नहीं पाने की बात लिखी थी— Mark of Violence on private part नहीं था। डाक्टर ने पिड़िता की जाँच घटना से 12 घंटे के अन्दर की थी।”

16. In the statement U/S 313 Cr.P.C. we find that the materials brought by the prosecution against the appellant were not brought to his notice. As usual, only two formal questions were asked from the appellant which he denied stating that it is a case of false implication.

17. On the perusal of the evidences available on the record which we have discussed here-in-above we come to a conclusion that there is no material to show that this appellant was identified in the torchlight. The informant has claimed that she had switched on the torch which was later snatched by this appellant and was thrown, the said torch has not been found; if it was thrown from the room where the appellant was allegedly committing rape the torch should have been recovered from the house of the informant. The informant and her Bhabhi claim that Dibiya was burning in the courtyard of the house but when the Investigating Officer visited there, the said Dibiya was neither shown nor seized by the Investigating Officer.

18. PW3, who happened to be the Bhabhi of the informant, has stated that 3-4 miscreants had entered inside the house who were not known to her, therefore, we have reasons to believe that this appellant, who was well known to PW3, was not seen inside the



house. The trial court has already given benefit of doubt to all other accused persons on the point of identification, we see no reason why the same benefit would not be available to this appellant. Neither in the *Fard-e-beyan* nor in the deposition of the witnesses any evidence has come on the point that this appellant had pressed the neck of the father of the informant, rather the allegation of pressing the neck of the father of the informant are against other miscreants who have already been acquitted from the charge U/S 396 IPC. We also find that the allegation of rape is baseless and there is no evidence at all on the point of commission of rape. The doctor has stated with enough clarity that no sign of rape or injury on the private part of the informant could be found. The informant was examined within 12 hours of rape and if the doctor (PW14) did not find any sign of rape or injury on her private part and on examination of vaginal swab no sign of rape could be established, coupled with the fact that the Investigating Officer did not find any blood spot and had not even seized the clothe (SAAYA) of the informant, we are compelled to take a view that the entire story of rape is only concocted and baseless. There are material contradictions in the statements of the witnesses which we have already discussed here-in-above.

19. In the result the appeal is allowed. The conviction of the appellant is hereby set aside. The appellant is acquitted from the



charges U/S 376 and 396 of the Indian Penal Code and he is discharged from the liability of his bail bonds.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Dilip, AR

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