

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.11 of 2011

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Md. Jafar @ Md. Zafar, Son of Late Fakir Mohammad, Resident of Village
Amona, P.S. Jogbani, District Araria

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mrs. Abha Singh, Amicus Curiae
For the Respondent/s : Mr. AJAY MISHRA(APP)

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT

Date : 29-01-2018

No one appears on behalf of the appellant, so Mrs. Abha Singh, learned counsel is appointed Amicus Curiae to assist the Court and to appear on behalf of the appellant.

2. The solitary appellant Md. Jafar @ Md. Zafar has preferred this appeal against the judgment of conviction dated 08.12.2010 and the order of sentence dated 09.12.2010, passed by learned Additional District & Sessions Judge, F.T.C. No.-II, Araria whereby the appellant has been convicted under Section 376 of the Indian Penal Code and sentenced to undergo seven years of imprisonment and also sentenced to fine of Rs.1000/- and in case of default in making payment of fine to further undergo imprisonment for one month. Being aggrieved and dissatisfied with the aforesaid judgment and order of sentence, the appellant has preferred the present appeal.



3. The brief facts giving rise to the case is that the prosecutrix gets the case lodged by giving her fardbeyan on 02.01.1995 at 4 P.M. approximately alleging therein that last Saturday means two days back she came to village Amona to meet her daughter's sister. On 02.01.1995 approximately 5 A.M. early in the morning she proceeded from Amona for going to her house with her sister's son. When she reached near banana orchard nearby a school Md. Zafar Sah, the appellant along with one another person turned up there and proposed her for marriage as she is now widow. She denied then he caught hold of her hand and dragged her to nearby banana field and forcibly raped on the ground and also snatched her nose-pin, silver chain and cash. Case was lodged by her after lapse of two days of the occurrence. Police registered the case, started investigation and on conclusion submitted charge-sheet. The appellant was put on trial and has been convicted under Section 376 of the Indian Penal Code but acquitted from charge under Section 379 of the Indian Penal Code.

4. Mrs. Abha Singh, learned Amicus Curiae appearing on behalf of the appellant submits that the entire prosecution case is based on the sole testimony of the prosecutrix. Rest other five prosecution witnesses are hearsay witnesses on the point of charge under Section 376 of the Indian Penal Code. No other has seen the alleged offence of rape. It is strange enough that one Ashraf, son of



her sister present at the time of occurrence has not been examined by the prosecution. Even the doctor and I.O. too have not been examined causing prejudice to the case of the appellant as attention to contradictions could not be drawn in absence of examination of the I.O. The prosecutrix is a married lady of questionable character. Even no sign of rape was found by the lady doctor besides absence of mark of any resistance, so neither the prosecution has brought on record the medical examination report of the prosecutrix nor examined before the trial court. The trial court has convicted the appellant merely on the sole testimony of the prosecutrix, oral statement and another reason assigned by the trial court is that the defence has failed to bring on record any evidence for falsely implicating the appellant by the prosecutrix. It is further submitted that though the case is not compoundable but the prosecutrix has stated that she has compromised the case and also admitted in her deposition that she has also filed another case of rape against other persons.

5. Learned counsel for the State submits that the prosecutrix has proved its case and there is no illegality in the judgment.

6. Having heard rival submissions of both sides and on perusal of the records, the Court finds that the appellant has been convicted merely on the sole testimony of the prosecutrix examined as PW1. Rest other prosecution witnesses Nuroodin (PW2), Md.



Zamal (PW3), Nayeemuddin (PW4), Ainul Haque (PW5) and Sk. Siddique (PW6) are not witnesses to the alleged offence of rape. Nuroodin (PW2) has turned hostile. Md. Zamal (PW3) one of the relative of the prosecutrix has deposed that the prosecutrix left her house at 6 A.M. in the morning whereas the case of the prosecution is that she left the house at 5 A.M. in the morning in the month of January. Md. Zamal (PW3) has admitted that he has not seen the occurrence. Nayeemuddin (PW4) is also not the eye-witness likewise Ainul Haque (PW5) is also a hearsay witness as well as Sk. Siddique (PW6), so only witness is the prosecutrix, so whether her testimony is unblemished and trustworthy this has to be examined by the Court to come to the conclusion whether charge of rape against the appellant has been proved by the prosecution beyond all reasonable doubt. The prosecutrix was a married lady and the case of the prosecution is that she left her relative's house at 5 A.M. early in the morning in the month of January and it was dark. She was accompanied by one Ashraf, son of her sister. The evidence is also that she had reached only 2-3 bighas distance from her relative's house but it is very surprising that Ashraf did not raise any alarm nor the prosecutrix. The only eye-witness, as per the prosecution case, present at the time of alleged occurrence nearby the place is Ashraf. His non-examination is fatal to the prosecution case. Moreover, there is no explanation given by the prosecution that why this case of rape



was lodged after lapse of two days. Even there is nothing on the record as a seizure list with regard to the inner clothes said to be submitted by the prosecutrix to the police in order to ascertain whether any mark of recent sexual activities like presence of semen was found on the inner clothes. There is no medical examination or its report on the record with regard to such examination. The deposition of prosecutrix clearly indicates that she was examined by a lady doctor but prosecution also withheld the said report as well as the doctor who was also not examined before the trial court. The fardbeyan of the prosecutrix and her deposition indicate that force was applied by the appellant after pinning her down on the earth and she also made resistance while being raped. Had it been such case, there must have been some mark of violence or external injury on her body but nothing has been brought on record. Non-examination of the I.O. is also fatal for the reason that the appellant/accused has failed to draw the attention regarding contradictions of the prosecution witnesses including the prosecutrix testimony. Hence, taking into account the entire evidence adduced by the prosecution and the laches on the part of the prosecution and absence of clinching medical evidence and non-examination of Ashraf, it is not safe to uphold the conviction, so for the aforesaid reasons, the Court comes to the finding that prosecution has failed to prove the charge against the appellant beyond all reasonable doubt and the trial court



without properly appreciating the evidence on record has convicted the appellant, so the appellant is acquitted from the charge under Section 376 of the Indian Penal Code. He is already on bail, so he is discharged from the liability of his bail bond.

7. The appeal is allowed.

8. Let a copy of this judgment be handed over to Mrs. Abha Singh, learned Amicus Curiae and Patna High Court Legal Services Committee is directed to pay the admissible fee to the learned Amicus Curiae, namely, Mrs. Abha Singh.

(Arun Kumar, J)

S.KUMAR/-

AFR/NAFR	AFR
CAV DATE	NA
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