

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.127 of 2009**

Arising Out of PS.Case No. -136 Year- 2007 Thana -Sikandra District- JAMUI

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Md. Shahabuddin son of Md. Jalal R/O Village-Mahadeo Simariya, PS-Sikandra,  
Distt-Jamui. .... Appellant/s

Versus

State of Bihar .... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Baban Roy, Amicus Curiae

For the Respondent/s : Mr. Parmeshwar Mehta, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**ORAL JUDGMENT**

**Date: 19-11-2018**

None appears on behalf of appellant on repeated calls, whereupon, Sri Baban Roy, learned Advocate has been requested to assist the court as an Amicus Curiae.

2. Appellant, Md. Shahabuddin has been found guilty for an offence punishable under Section 376 of the IPC and sentenced to undergo RI for 7 years as well as to pay fine of Rs. 5000/- in default thereof, to undergo SI for six months additionally with a further direction that the period of custody having been undergone during course of trial be set off in accordance with Section 428 CrPC vide judgment of conviction 21.01.2009 and order of sentence dated 22.01.2009 passed by Additional District & Sessions Judge, Fast Track Court No.V, Jamui in Sessions Trial No. 119 of 2008.

3. PW-2, the victim (name withheld) filed a written report on 08.06.2007 disclosing therein that her father suffers from ailment whereupon her mother cares her along with other sisters and brothers on an earning from menial works. In the night of 19.05.2007,



while she was asleep in a room of her house, Md. Shahabuddin son of Md. Jalal R/O Village-Mahadeo Simariya, PS-Sikandra, Distt-Jamui intruded inside the room, pounced upon her as well as throttled her. She tried to raise alarm whereupon her mouth was gagged. He put pressure upon her neck and said that she would be murdered by throttling and then thereafter, broken string of her *Salwar* and committed rape forcibly. During course thereof, she wriggled unsuccessfully, tried to raise alarm but, he let off only after satisfaction of his lust. Then thereafter, he released. As soon as she was released, she raised alarm whereupon, Md. Shahabuddin ran therefrom having been chased by her mother, Rajina but, anyhow he managed to escape. Because of the fact that all the male members of the surroundings had gone to participate in a Jalsa and as her father used to ply rickshaw at Jamshedpur, taking benefit of the situation, accused committed rape after sneaking inside her room. On the following day, her mother rushed door to door in order to seek justice at the social level, whereupon Panchayati was convened but, as the accused as well as his father declined to participate, lastly, as per instruction of members of the community, the case is being filed and that happens to be the reason of delay.

4. After registration of Sikandra PS Case No. 136/2007, investigation commenced followed and concluded by way of submission of charge-sheet which happens to be the basis of trial,



meeting with ultimate result, subject matter of instant appeal.

5. 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. It has further been disclosed that at an earlier occasion, the parents of the victim came to the place of appellant/accused in order to settle the negotiation which they declined and for that, the family members of the so alleged victim have put forward a challenge threatening that for refusal, they will be given a lesson. Apprehending their illegal activity, father of the appellant/accused had already filed an informatory petition before the SDJM on 24.05.2007 bearing Sanha No. 1119. In order to substantiate the same, though no ocular evidence has been adduced but, the information having been received at the end of appellant under the Right Of Information Act relating to Sanha No. 1119, has been made as Ext-A.

6. In order to substantiate its case, prosecution has examined altogether 9 PWs who are PW-1, Mukesh Kr. Singh, PW-2, victim, PW-3, Rajina Khatoon, mother, PW-4, Md. Habib, *Nana* of the victim, PW-5, Md. Moin, father of the victim, PW-6, Dr. Vijay Kumar member of the board who had estimated the age of the victim, PW-7, Dr. Syed Naushad Ahmad, one of the members of the Medical Board, PW-8, Dr. Veena Singh, Member of the Medical Board who had examined the victim and PW-9, Jai Prakash Singh, Investigating



Officer as well as also exhibited Ext-1, Formal FIR, Ext-2, signature of informant over written report, Ext-3 series, reports in pen of PWs-6 and 7, Ext-4 series, different X-ray plates, Ext-5 series, report issued by Doctor (PW 8). Defence has also exhibited an information given under Right to Information Act as Ext-A.

7. While assailing judgment impugned, learned Amicus Curiae fairly submitted that in rape cases the evidence of the victim has got priority unless and until it is found soaked with falsehood and in the aforesaid background, it needs corroboration. So far this particular case is concerned, the evidence of victim could not be accepted nor she could be accepted as creditworthy witness whereupon, the finding so recorded by the learned lower court did not justify its relevancy.

8. In order to raise the specific points on that very score, it has been submitted that the occurrence is alleged in between night of 19/20.05.2007 while the written report has been filed on 08.06.2007 without any cogent, legal explanation. Then, it has been submitted that because of the fact that the victim was adamant to pressurize upon the appellant to marry, which he refused and for that, after weaving the false and frivolous story, the prosecution has been launched, that being so, in order to shield the corroborative evidence to come on the record, in case would have come, completely demolished the prosecution case and that being so, delay has



purposely been introduced. Furthermore, evidence of other witnesses which taken together with the evidence of the victim coupled with the medical evidence, it is crystal clear that appellant has fallen victim of circumstance at the end of the prosecutrix. Consequent thereupon, judgment of conviction and sentence could not survive. It has also been submitted that for the evidence of remaining witnesses who are own family members, did not corroborate the victim to such extent, to justify the allegation. The subjective finding of the Investigating Officer, as well as conduct of the prosecutrix rules out the allegation.

9. On the other hand, learned APP while supporting the finding recorded by the learned lower court, has submitted that so far rape case is concerned, delay is but natural, more particularly, in the background of Indian social culture whereunder rape happens to be a stigma upon the victim as well as also adversely affect upon the prestige of the family. Then coming to the evidence on the record, it has been submitted that witnesses have corroborated the evidence of the prosecutrix and that being so, the judgment impugned is fit to be confirmed. It has also been submitted that false acquisition at least concerning rape is unknown as an unmarried girl will not sacrifice herself knowingly and intentionally unless and until she is being raped.

10. Now coming to the material placed at the end of the prosecution, it is evident that PW-1 is the formal witness. PW-2 is



the prosecutrix herself. PW-3 is the mother of the victim, PW-4 is the maternal grand-father of the victim, PW-5 is the father of the victim, PWs-6, 7, 8 are the doctor and PW-9 is the Investigating Officer. PWs, 6, 7 and 8 are members of the medical board which was constituted for examination of the victim. In the opinion of the doctor, age of the victim has been estimated in between 16 to 17 years on the basis of the ossification report. PW-8 is the Gynecologist who examined the victim and as per her opinion she was not at all conclusive whether the victim was subjected to rape, more particularly, in the background of the fact that vagina was admitting one finger easily as well as she had not found any sign of rape. Naturally on account of lapse of time.

11. PW-9 is the Investigating Officer who, after registration of the case, investigated the same, got the victim examined by the Medical Board, inspected the place of occurrence which happens to be the house of the victim having boundary, East- her own parents' land, West- house of Md. Nazir Mian, North- barren land of Mustakim Mian and South- barren land of Idris Mian. Examined the witnesses. Procured the injury report and then, submitted the charge-sheet. In para-4, there happens to be cross-examination relating to previous statement of the victim whereunder there was no discloser with regard to lantern as well as event of Panchayati. Then had denied the suggestion that the table



investigation has been done.

12. PW-2, victim, during course of her evidence has deposed that on the alleged date and time of occurrence she was sleeping inside a room of her house. Shahabuddin came inside her room, climbed over cot and then gagged her mouth. He had also threatened that in case of raising of alarm, she will be done to death and then, after untying the string of her Salwar, he committed rape. She tried to raise alarm as well as also wriggled but accused had not spared her. Then has stated that when Shahabuddin ran therefrom, on her alarm, her mother chased him but, he managed to run away. She has further stated that lantern was burning in the room whereupon, she identified him. On the following day, there was Panchayati. 3-4 times, dates of Panchayati was rescheduled but, accused persons failed to participate. Lastly, she had gone to police station on 08.06.2007 and filed written report. Exhibited the same. Also stated that she was medically examined.

13. During cross-examination at para-4, she has stated that the house of accused lies 100-150 yards away from her house. She has further stated that the house of none lies in the boundary of her house. In para-5, she has stated that there was door affixed in the room in which she was sleeping, but it was opened. The main entrance door was shut but, not bolted. She has further stated that there happens to be Osara adjacent to that room in which she was



sleeping. Her mother was sleeping over that Osara. On the alleged date of occurrence, only her mother and sisters, Tarannum Parveen, Gulabsa and Gulnar were present (not examined). Her sisters were sleeping in another room. In para-6, she has stated that as door was not closed so, there was no sound of opening of the door. When accused came over her cot, then she woke up. She attempted to raise alarm but till then, her mouth was gagged by the accused who also threatened. She has further stated that during course of rape, the accused kept gagging her mouth. However, her both hands were free. She has not tried to resist by her hand, freely. She had not tried to pull his hair. She had not indulged in clawing and tearing with her hands. In para-7, she has stated that she had not tried to push the accused by her leg. She had not tried to bite as the accused was persistently threatening her. She tried to resist but without any injury over her body. In para-8, she has stated that she had not sustained injuries over her private part, though there was swelling. She had not visited the place of the doctor. There was stain over her clothe but she had not shown the same to the Investigating Officer. In para-7, she has stated that after escaping of accused, she had raised alarm whereupon, none other than her mother came. She had disclosed the occurrence to the persons. In para-10, she has stated that none came even on the alarm of her mother. She has further stated that Panchayati was scheduled 2-3 days after the occurrence. Then there happens to be contradiction



with regard to the development relating to identification of accused in lantern light as well as over Panchayati. In para-12, she had shown genealogical table of her maternal grandfather wherefrom it is evident that appellant happens to be son of brother of her maternal grandfather. She had further disclosed that talk of marriage was not initiated before the occurrence rather after the occurrence. Then had denied the suggestion that because of the fact that the family members of the appellant declined to marry whereupon this case has falsely been instituted.

14. PW-3 is the mother of the victim. She has stated that on the alleged date and time of occurrence she was sleeping at her Osara while her daughter was sleeping alone in the room. When Shahabuddin began to flee, during course thereof, she woke up and tried to apprehend him but, the accused succeeded in his escape. Then thereafter, her daughter had disclosed that Shahabuddin has ravished her. On the following day, she had disclosed the occurrence to her father, brother whereupon they tried to convene a Panchayati which could not succeeded on account of absence of accused persons. Then thereafter, police was informed. During cross-examination at para-3, she has stated that on the alleged date and time of occurrence only she along with victim was present in the house. It was a dark night. Shahabuddin was 50 yards ahead from her and then managed to escape. At para-4, she has stated that she had not disclosed to anybody



regarding the occurrence. She had raised alarm whereupon, the neighbours came, out of whom, she recognized, Samua, Isudh Mian, Manzoor, to whom, she had disclosed regarding the occurrence. In para-5, she has stated that Panchayati was convened on the following day wherein the accused persons declined to participate. On the same day, she took the victim to the doctor who had examined her. In para-6, she had admitted that there was talk of marriage but, as it did not materialize, then thereafter, this case has been instituted.

15. PW-4 is the maternal grandfather of the victim. He has deposed that on the alleged date and time of occurrence while he was sleeping at his house, rushed towards the house of his daughter, after hearing alarm. When he reached there, had seen his daughter Rajina Khatoon and daughter's daughter (victim) present outside their house and were shouting. Then thereafter, his daughter had disclosed that Shahabuddin has committed rape upon the victim. Victim had also disclosed regarding occurrence. He has further stated that the male members of the village had gone to another village to participate in a Jalsa. On the following day, Panchayati was convened but, on account of absence of the accused persons could not materialized. Then thereafter, this case has been instituted. In para-3, there happens to be cross-examination relating to location of his house lying at the distance of 50-60 metres away from the house of his daughter intervened by a river as well as houses of Narayan Mistri



and others. In para-4, he has stated that when he reached at the place of his daughter, so many persons were also present but, he is unable to disclose their names. In para-5, he has stated that there was no talk of marriage in between Shahabuddin with the victim. Then has denied the suggestion that on account of denial by the parents of the accused, this case has been instituted. In para-7, he has stated that three times date of Panchayti was fixed but, all the times there was absence of the accused. Then on that very score, there happens to be contradiction. In para-8, he has stated that the victim was taken to doctor by her mother, maternal uncle but he is unable to divulge how many days after the occurrence. Again said that it was about 10-15 days after the occurrence.

16. PW-5 is the father of the victim. He has stated that on the alleged date and time of occurrence he was at Tata engaged in rickshaw pulling. 2-3 days after the occurrence, he was informed by his family members regarding the occurrence whereupon came to the village. Thereafter, his wife as well as the victim disclosed about the occurrence. His daughter had stated that on the alleged date and time of occurrence she was raped by Shahabuddin. He tried to convene Panchayati but the accused persons declined to participate whereupon, case has been instituted. During cross-examination at para-4, he has stated that Panchayati was convened even before his arrival. After his arrival, he again tried to convene a



Panchayati. He has also denied the suggestion that there was talk of marriage which was turned down by the parents of the accused whereupon this case has falsely been instituted in order to pressurize.

17. After going through the evidence available on the record, it is evident that the occurrence is of mid-night. Place of occurrence has been shown to be the room in which the victim was sleeping. At the Osara of that room, PW-3, her mother was sleeping. She has not said anything with regard to intervening eventuality. During course of which, the victim was raped after hearing presence of accused through door which was not bolted since before, rather she woke up while the victim was 50 yards away from her. She has not disclosed source of identification which, as is evident been introduced at the end of the informant/victim, PW-2 subsequently during course of trial. However, being relative the identification could not be under dispute. From the evidence of PW-5, it is evident that he was not at all present at his house rather he was away in order to earn his livelihood and that also happens to be the version of the PW-3. Even presence of PW-3, she had not claimed to be an eye witness, and the same status also happens to be of PW-4. Furthermore, from the evidence of PW-4, it is evident that victim was taken to doctor by her mother and maternal uncle after 10 days of the alleged occurrence, while PW-3 had stated that victim was taken to doctor on the next day of the occurrence. Had there been genuine conduct of the prosecution, the



name of doctor would have been disclosed, examined. In order to corroborate the factum of rape, nor the said doctor was ever examined by the PW-9, the Investigating Officer during course of investigation and for that, prosecution has got no answer.

18. Now coming to the evidence of the victim, it is evident that there happens to be some sort of deficiency at her end whereunder at para-6 and 7, she had categorically admitted that though her hands were free, she had not used the same in order to ward off the incident nor she used her legs in order to thrash the accused. There happens to be no discloser that accused was duly armed with. Moreover, the doctors, PWs-6 and 7 estimated her aged to be in between 16-17 years having variance of plus minus two years, that means to say, the status of victim happens to be major along with the finding of the PW-8, Gynecologist who was not at all conclusive over the finding whether the victim was raped or not, more particularly, in the background of vagina having admitted one finger easily coupled with the fact of delay. Apart from this, from the evidence of PW-2, victim it is manifest that not only door of her room was not bolted, rather the main door of the house was also not bolted, and the reason therefor has not been explained, which suggest otherwise, more particularly, when the appellant happens to be distant relative within permissible degree.

19. Consequent thereupon, the judgment of



conviction and sentence recorded by the learned lower court is, hereby, set aside. Appeal is allowed.

20. Since appellant is on bail, he is discharged from the liability of bail bond.

21. The first and last pages of the instant judgment be handed over to the learned Amicus Curiae for the needful.

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(Aditya Kumar Trivedi, J)

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| CAV DATE          | N/A        |
| Uploading Date    | 22.11.2018 |
| Transmission Date | 22.11.2018 |

