

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.735 of 2012

Arising Out of PS. Case No.-45 Year-2011 Thana- NATHNAGAR District- Bhagalpur

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1. Charbin @ Charbin Mahton S/o Shri Nageshwar Mahton R/o Vill-Dildapur Bind Tola, P.S.-Nath Nagar, Distt-Bhagalpur.
 2. Lakshaman Mahton S/o Late Yogendra Mahto R/o Vill-Dildapur Bind Tola, P.S.-Nath Nagar, Distt-Bhagalpur.
 3. Sanoj Mahton S/o Sri Jagdish Mahton R/o Vill-Dildapur Bind Tola, P.S.-Nath Nagar, Distt-Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Sanjeev Ranjan, Advocate

For the Respondent/s : Mr. Ashwini Kumar Sinha (App)

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

And

HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)

Date : 12-04-2018

Heard learned counsel for the appellants and
learned APP for the State.

2. This appeal has been preferred against the judgment and order of conviction dated 29.05.2012 and order of sentence dated 31.05.2012 passed by 1st Additional Sessions Judge, Bhagalpur in Sessions Trial No. 849 of 2011 arising out of Nathnagar P.S. Case no. 45 of 2011, whereby the learned trial Court convicted the appellants Lakshman Mahton, Sanoj Mahton and Charbin Mahton under Section 376(2)(g) of the Indian Penal Code and sentenced them to undergo rigorous



imprisonment for life and also slapped them with a fine of Rs. 5,000/- each and in default of payment of fine, further sentenced to undergo S.I. for one month each under the aforesaid Section.

3. The factual matrix of the case is that Nathnagar P.S. Case no. 45 of 2011 was instituted under Section 376/34 of the Indian Penal Code against accused Charbin Mathon, Lakshman Mahton and Sanoj Mahton on the basis of *fardbeyan* of Babita Kumari W/o Yogendra Mandal recorded by S.I. Rameshwar Singh of P.S. Nathnagar, district-Bhagalpur on 21.03.2011 at 09:30 PM at Dildarpur Bind Toli with the allegation, in succinct that on 21.03.2011 at 09:00 AM the informant was proceeding to Shankarpur Diyara for cutting grass, on the way at around 10:00 AM, three accused persons, namely, Charbin Mahton, Lakshman Mahton and Sanoj Mahton abruptly encircled her in the maize field and started teasing her, and on protest made by her, they caught her hold and committed rape against her in turn scaring her and then left the scene sensing arrival of villagers. Then she rushed to Shankarpur Diyara and divulged the occurrence to her mother at her Basa. Her mother informed the matter to her father in turn on arrival there. Whereupon her father and



brother Nidesh gave information of the same to the villagers of the village Dildarpur Bind Toli, who organized Panchayati, but the accused persons did not turn up in the Panchayati. Lakshmi Mahton, Shivnandan Mahton@ Shibu and Pappu Das anyhow got her attire returned to her from the accused persons. Getting knowledge of the occurrence, police arrived there and recorded the farbeyan of the informant.

4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the aforesaid accused persons under Section 376/34 of the Indian Penal Code.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence against the aforesaid accused and committed the case to the court of sessions and after commitment and on transfer finally the case came in *seisin* of the 1st Additional Sessions Judge, Bhagalpur for trial.

6. Charge against aforesaid accused persons was framed under Section 376(g)/34 of the Indian Penal Code. Charge was read over and explained to them to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence,



the prosecution has examined altogether nine prosecution witnesses namely, informant Babita Kumari as PW-1, Yogendra Mandal as PW-2, Dinesh @ Nidesh Kumar as PW-3, Meena Devi as PW-4, Dr. Naz Bano who had examined the victim (informant) as PW-5, I.O. Rameshwar Singh as PW-6, Shivnandan Mahton as PW-7, Pappu Das @ Pappu Harijan as PW-8 and Lakshmi Mathon as PW-9. Out of the aforesaid witnesses, P.Ws.-7, 8 and 9 turned hostile. In documentary evidence, the prosecution has filed and proved some documents in the case.

8. The statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence. The accused persons have neither adduced any ocular nor documentary evidence in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convicts have preferred the present Criminal Appeal.



11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellants beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellants that there is no eye witness of the occurrence. PW-1 to PW-4 examined by the prosecution are informant and her family members and interested witnesses of the case and barring prosecutrix, all the witnesses are hearsay witnesses and the solitary evidence of the prosecutrix is not unblemished and reliable. Doctor has not found any spermatozoa in the vaginal swab. Thus, the ocular evidence does not stand corroborated by the medical evidence. Doctor has also not found any injury on abdomen, hand, chest, thigh and leg of the victim which creates serious doubt about the prosecution case. It is further submitted that the appellants have not been examined by the doctor and there is no finding that they were capable of performing sexual inter course, and semen found on the attire of the victim was not matched with that of the accused to establish the guilt of the appellants in the occurrence. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case by adducing



trustworthy, consistent and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellants by the learned trial court is liable to be set aside and the appellants are entitled to be acquitted.

13. On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence, submitted that prosecutrix has fully supported her case. Other witnesses examined by the prosecution have also corroborated the occurrence of committing rape against the prosecutrix by the appellants and the ocular evidence also stand corroborated by the medical evidence. After correctly appreciating the facts and material on record, the learned trial court has rightly passed the impugned judgment and order of conviction and sentence, which is liable to be upheld and this appeal is shorn of merit and is liable to be dismissed.

14. From perusal of record, it appears that to substantiate its case, prosecution has examined seven material witnesses in the case. Out of them, P.Ws-7, 8 and 9 turned hostile while PW-2 (Yogendra Mandal), PW-3 (Dinesh @ Nidesh Kumar) and PW-4 (Meena Devi) are hearsay witnesses of the occurrence. As PW-2 (Yogendra Mandal) has stated in



paragraph 1 of his examination-in-chief that his wife Meena Devi (PW-4) divulged the occurrence to him and in paragraph 5 of his cross-examination, he has stated that at the time of occurrence, he was at his house and not at basa and when he arrived at his Basa at 02:00 PM, his wife divulged the occurrence to him. Said Meena Devi examined in the case as PW-4 has not corroborated the factum of divulgence of occurrence to her husband (PW-2). Hence, for want of corroboration, the aforesaid statement of PW-2 is not admissible in evidence even as a hearsay evidence. PW-3 (Dinesh @ Nidesh Kumar) has stated in paragraph 1 of his examination-in-chief that his father divulged him that Charbin Mahton, Lakshman Mahton and Sanoj Mahton had committed rape against his elder sister Babita Kumari in the maize field located in Bairiya Diyara. In paragraph 3 of his cross-examination, he has further stated that he learnt the occurrence at 3:00 PM at his house. He had not gone to Basa. In paragraph 4 of his cross-examination, he has further stated that his mother, father and sister regressed to their house, then his father and elder sister divulged the occurrence to him, but neither father of the said witness (PW-2) nor his elder sister (PW-1) have corroborated the factum of divulgence of



occurrence by them to the said witness. Hence, for want of corroboration, the aforesaid statement of said witness is not admissible in evidence even as a hearsay witness and PW-4 (Meena Devi) has stated in paragraph 1 of her examination-in-chief that her daughter divulged her that Charbin Mahton, Sanoj Mahton and Lakshman Mahton had committed rape against her in Bairiya Diyara.

15. Now, only witness left to be considered is the prosecutrix. From perusal of testimony of the said witness, it appears that in her examination-in-chief, she has stated in consonance with the prosecution case as alleged in the FIR that on 21.03.2011 at 09:00 AM, she was proceeding to Shankarpur Diyara from her house for cutting grass. Her mother Meena Devi was living there. When she arrived at Bairiya Diyara at around 10:00 AM abruptly Sanoj Mahton, Lakshman Mahton and Charbin Mahton emerging from maize field encircled her and teased her. On protest made by her, all the three accused persons lifted her, one of them gagged her mouth and taking in the maize field they shoved her there. Thereafter, they disrobed her and committed rape against her in turn. She fell senseless. Then the accused persons left the scene. On regaining sense, she proceeded further from there.



At a bit distance, someone finding her nude provided *gamchi*, she covered her person by the said *gamchi* and arrived at her mother at Shankarpur Diyara and divulged the occurrence to her. Her mother divulged the occurrence to her father in turn and her father divulged the same to her younger brother Nidesh. On arriving at the house they went to Dildarpur Bind Toli where the villagers organized Panchayati, but neither the accused persons nor their family members did turn up there. Anyhow on getting information, the police arrived in the Panchayati and then she divulged the entire occurrence to the police who recorded her fardbeyan. She has further stated that Charbin Mahton had taken her attire which was produced before Panchayati by the villagers and the same was seized by the police. The prosecutrix was subjected to lengthy cross-examination, but from perusal of cross-examination of the prosecutrix, it appears that nothing convincing and cogent has been elicited in her cross-examination by the defence having potential to rule out the occurrence of committing rape against her by the accused persons. The aforesaid testimony of the prosecutrix appears to be unblemished and wholly reliable. The evidence of prosecutrix in the case of sexual assault happens similar to the evidence of an injured complainant/



informant or witness and the testimony of the prosecutrix, if found reliable by itself may be sufficient to convict the culprit and to hold conviction of the accused and no corroboration of her evidence is required.

16. *Hon'ble Apex Court in Ravindra V. State of M.P. reported in (2015) 4 Supreme Court Cases 491* has been pleased to rule that notwithstanding the report of the chemical examiner that the sample of the semen found on garments of the victim was not sufficient to link the same to the accused and notwithstanding absence of spermatozoa in the vaginal smear, the same could not be allowed to tell against the version of the prosecutrix. Where accused caught the hand of the prosecutrix, pushed her down and committed sexual intercourse without her consent, while she was doing labour work in his field and prosecutrix in her statement very categorically made allegation against the appellants, minor contradictions or insignificant discrepancies in the evidence of the witnesses are not of a substantial character. The statement of the prosecutrix was reliable and prompt FIR was lodged by her and no further corroboration of her statement was required. Evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of the



prosecutrix, if found reliable by itself may be sufficient to convict the culprit and no corroboration of her evidence is necessary. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations.

17. Prosecutrix in paragraph 6 of her cross-examination has stated that the accused persons were biting on her face during course of rape. Though, PW-4 & PW-3 are hearsay witnesses regarding occurrence of committing rape by the appellants against the prosecutrix, but the aforesaid witnesses had witnessed teeth biting injury on the cheek of the prosecutrix soon after the occurrence as PW-4 has stated in paragraph 1 of her examination-in-chief that there was sign of teeth biting on the cheek of her daughter and her daughter arrived at Basa clad in *gamcha* which was provided to her by someone, then she accorded her attire to put it on and PW-3 Dinesh @ Nidesh Kumar has stated in paragraph 4 of his cross-examination that on arrival of his sister at his house, he noticed teeth biting injury on the cheek of his sister which was slightly oozing. Though doctor on examination of the victim has not found any teeth biting injury on the cheek of the



victim at the time of her examination, but as there is consistent ocular evidence of inflicting teeth biting injury on the cheek of the prosecutrix by the accused persons during course of occurrence, the aforesaid ocular evidence of said witness is reliable and said aspect of the case stand established by the prosecution.

18. Prosecutrix has stated in paragraph 11 of her cross-examination that maize field crops were trampled where the accused persons had shoved her down and PW-3 has stated in paragraph 3 of his cross-examination that maize crops was damaged at the place of occurrence and I.O. examined in the case as PW-6 has also found the maize crops damaged at the place of occurrence as evident from his statement recorded at paragraph 3 of his examination-in-chief. Prosecutrix has stated in paragraph 14 of her cross-examination that there was stain of mud and semen on her frock. She had displayed aforesaid stain to the police and handed over the frock to the police. The semen had fallen on her attire from her genital part. In paragraph 1 of her examination-in-chief, she has stated that her attire was taken by Charbin Mahton which was produced by the villagers in the Panchayati and police had seized the aforesaid attire. PW-



3 (Dinesh @ Nidesh Kumar) has stated in paragraph 8 of his cross-examination that villagers had accorded attire of the prosecutrix at Dildarpur Bind Toli and he had put his signature on the seizure list of the said attire. Corroborating the aforesaid statement of the prosecutrix and PW-3, I.O. has stated in paragraph 5 of his examination-in-chief that attire of the victim was produced before him by her father which was frock, full pant and panty. He had seized the aforesaid attire. The aforesaid seized attire was sent to FSL for its chemical examination and from perusal of Ext-3 which is FSL report of the aforesaid attire, it appears that blue panty bore brownish stains and some greyish white stains which were stiff to feel, which produced characteristic bluish white fluorescence in ultra violet light and semen was detected on the said attire.

19. From perusal of record, it appears that occurrence is of 21.03.2011 at around 10:00 AM and the firdbeyan of the prosecutrix was recorded on the same day at 09:30 PM at Dildarpur Bind Toli where the prosecutrix along with her parents had gone and Panchayati was organized but failed due to non-arrival of the appellants and their family members there, and on arrival of the police at the aforesaid place and the FIR was lodged on the same day at 11:15 PM at



the P.S. which is located 2 Km. from the place of occurrence and the aforesaid FIR was sent to the court on the following day. A bit delay in giving statement by the prosecutrix to the police has been sufficiently explained by the prosecution as the time taken in organizing Panchayati which was organized in the night of date of occurrence but failed. Thus, it appears that FIR was lodged by the prosecutrix promptly.

20. Victim was medically examined by Dr. Naz Bano examined in the case as PW-5 and the said doctor has found (i) two scratch abrasion with reddish brown scab on upper lip each $\frac{1}{2}$ cm. X $\frac{1}{2}$ cm. in size, superficial to skin (ii) Bruise on upper side of back reddish brown in colour 5"x 2" in size and on vaginal examination, she found vaginal oriphis red, congested and foul smelling. Doctor also found lacerated and inflamed forchette. Hymen circular inflamed and congested and has opined that considering the situation of above noted injuries, it indicates that some forceful sexual activities happened without emission of semen. Though, no spermatozoa was found on pathological examination of the vaginal swab of the prosecutrix and doctor has opined that no semen had emitted during course of occurrence, but I.O. has found semen stain on the attire of the victim and on chemical



examination, semen was found on her attire and moreover for commission of offence of rape ejaculation of semen is not necessary rather mere penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. ***Hon'ble Apex Court in Narayanamma V. State of Karnataka reported in (1994) 5 SCC 728*** has been pleased to rule that notwithstanding the absence of spermatozoa in the vaginal smear could not be allowed to tell against the version of the prosecutrix.

21. Thus, from perusal of aforesaid evidence of the prosecution, it appears that unblemished and wholly reliable evidence of prosecutrix also stand corroborated by finding maize crop damaged at the place of occurrence, semen on the attire of the victim, injury on her person as well as on her genital part.

22. In the aforesaid facts and circumstances of the case, we find and hold that the prosecution has succeeded to substantiate the prosecution case and bring home the charge levelled against the appellants beyond all reasonable doubts by adducing convincing, cogent, consistent and worth credence evidence. Hence, the impugned judgment and order of conviction passed by learned trial court is upheld.



23. So far as sentence awarded by the learned trial court is concerned, it appears that learned trial court has awarded life imprisonment to the appellants for the aforesaid offence. But from perusal of record, it appears that the appellants happen to be young chap of the age ranging from 23 to 25 years at the time of occurrence and the prosecutrix happens to be major aged about 20 years at the time of occurrence and the appellants have been facing rigor of the case for fairly quite time of more than seven years as they have been languishing in custody since 25.03.2011. Hence, considering the facts and circumstances of the case, the sentence awarded by the learned trial court is reduced to R.I. of 10 years, which in our considered opinion, would subserve the ends of justice. However, the monetary punishment awarded by learned trial court will remain intact.

24. Accordingly, this Criminal Appeal is dismissed with the aforesaid modification in the quantum of sentence.

(Dr. Ravi Ranjan, J)

rohit/-

(Prakash Chandra Jaiswal, J)

AFR/NAFR	AFR
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