

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.500 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- DARBHANGA

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1. Raju Kumar @ Rakesh Kumar S/O Rameshwar Prasad
2. Bambam Singh S/O Rajendra Chaudhary,
Both residents of B.M.P.-13, P.S. Bahadurpur, District Darbhanga
..... Appellants

Versus

State of Bihar

..... Respondent

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Appearance :

For the Appellants : Mr. Baban Roy, Advocate (Amicus Curiae)
For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 09-03-2018

Heard the parties.

2. Both the appellants are convicted under Sections 376/511 of the Indian Penal Code and sentenced to undergo R.I. for five years and also pay fine of Rs.2,000/- and in default of fine, they are directed further to undergo six months' imprisonment by the judgment dated 29.9.2003 and order dated 30.9.2003 passed by Sri Arun Kumar, Ist Additional Sessions Judge, Darbhanga in Sessions Trial No.132 of 1999.

3. The prosecution case stands on the basis of written report lodged by Jaymasi Kongari on 14.4.1998 that on 14.4.1998 his wife had sent his daughter aged about 14 years to Gate No.2 to purchase washing shop and when she did not return, his wife went to



see her but she was not found and she went inside the house of Rameshwar Prasad and found his daughter along with son of Rameshwar Prasad, Raju Kumar and nephew of Dharnidhar Singh, Bambam Singh and Bambam Singh had pressed her mouth and caught hold her and Raju Kumar was trying to remove her cloth and thereafter her wife abused them and took her daughter. She also alleged that Rajeev Kumar was guarding outside.

4. On the basis of aforesaid written report, Bahadurpur P.S.Case no.80 of 1998 was registered under Sections 376/511/34 of the IPC against the appellants and accused Rajeev Kumar, police after investigation submitted charge sheet against the appellants and Rajeev Kumar and the cognizance of the offence was taken and case was committed to the court of Sessions which ultimately came to the file of Sri Arun Kumar, Ist Additional Sessions Judge, Darbhanga for trial and disposal.

5. Appellants and other accused person, Rajeev Kumar stands charged under Sections 376/511 of the IPC to which they have denied the charge and claim to be tried.

6. The prosecution in order to prove his case examined altogether four witnesses and they are P.W. 1 Sishir Kongari (mother of the victim girl and claims to be eye witness), P.W.2 Jaymasi Kongari (informant and father of the victim girl) , P.w.3, Anil Kumar



Srivastava, I.O. of the case and P.W.4 Kanhaiya Singh second I.O. of the case. It further appears that the victim girl has been examined as court witness no.1. On behalf of the defence also two witnesses have been examined and they are D.W.1 Baldeo Ram and D.W.2 Chandra Mohan Prasad.

7. The defence of the appellants from the evidence adduced on behalf of them, is that no such occurrence has taken place on such date and at the shop Raju Kumar was not sitting rather Sunil Kumar was sitting and D.W.2 is the constable no.148 and according to him he was on duty on Gate No.2 on 14.4.1998 and wife of the informant had not made any complaint on that date and no *hulla-gulla* was made at that time as such no occurrence has taken place.

8. On behalf of the prosecution, following documents have been brought on records, they are Ext.1 writing and signature on the written report, Ext. 2 forwarding of written report and Ext. 3 F.I.R.

9. On behalf of the defence, alone one document has been brought on record. Ext.A. the endorsement on the forwarding report of Ramesh Paswan.

10. The learned trial court on conclusion of the trial has found the appellants guilty under Sections 376/511 of the IPC and sentenced them as indicated above and he has acquitted the other accused person Rajeev Kumar from the charges levelled against her.



11. On being aggrieved by the charges, the present appeal has been preferred by the appellants.

12. Sri Baban Roy, Advocate has been appointed as the Amicus Curie to assist the Court and contention of Sri Baban Roy is that in this case though P.W.1 has been examined as court witness but she could not be cross-examined as she was not understanding the question and the court has given his opinion regarding that; in such a case her evidence is not admissible. Further submission is that P.W.2, who is the informant in this case, is not an eye witness rather his evidence shows that he heard from his wife and though his wife has supported the prosecution case but in spite of occurrence being taken in the day time and at the gate of BMP Quarter there is no independent witness to the occurrence that creates a doubt about the credibility of P.W.1, however the learned trial court without considering the same has convicted the appellants. Further submission of the learned counsel for the appellants is that though P.W.1 has stated in his evidence that Bambam Singh pressed her mouth and Raju Kumar has removed her *Salwar* and trying to do some wrong. However on perusal of the FIR it will appear that it is only mentioned in FIR that Raju Kumar was trying remove the dress, as such it appears that they have tried to improve the prosecution case and stated so in the court as such the same is not believable and even if it is



believed , no case under Sections 376/511 of the IPC is made out and at best it is a case of outraging the modesty.

13. On the other hand learned counsel for the State has defended the judgment stating that though the victim has been examined as court witness 1 but she could not be examined due to her inability to understand the questions about which the court has given finding in the evidence but in the present case P.W.1 is eye witness and she has stated in court also that Bambam Singh had pressed the mouth of the victim and Raju Kumar had removed *Salwar* and trying to do some wrong act and P.W.1 has stated so to her husband (P.W.2) immediately after the occurrence on which written report has been filed, as such evidence of P.W.2 husband is also admissible and as such finding of the learned trial court holding the appellant guilty under Sections 376/511 does not suffer from any infirmities, as such it does not require any interference by this Court.

14. In the background of the submission and on consideration of the evidence, it appears that P.W.2 is the father of the victim girl who is not eye witness of the occurrence but he has stated that he was informed by his wife about the occurrence and his wife P.W.1 has also stated so in her evidence in court and the evidence of P.W.1 shows that when she entered inside the house of Rameshwar Prasad she found Bambam Singh pressing mouth of her daughter and



Raju Kumar has removed her *Salwar* and trying to do some wrong act, however, the FIR earliest version does not show that *Salwar* was removed and Raju Kumar was trying to do some wrong with her rather it shows that Raju Kumar was trying to remove cloths in the meantime, his wife came and abused them and took her daughter , as such evidence of P.Ws. 1 and 2 is contradictory to the FIR , the earliest version. It further appears that the victim girl has been examined as C.W.1 with the help of one interpreter and in the chief she has stated with the help of interpreter about removing of *Salwar* and commission of wrong act. On being cross examination she was found unable to understand and the learned trial court has discharged CW1 without further cross examination and as such evidence of C.W.1 does not appear admissible in absence of cross examination which according to the evidence act is made to verify the credibility and reliability of evidence of a witness while deposing in the court and in absence of that the defence has been denied an opportunity. The learned trial court has not considered this aspect of the matter and tried to justify the same by saying that the chief was recorded with the help of interpreter and in which she has stated about the attempt to commit rape but the learned trial court has failed to understand that the interpreter has not been sworn affidavit prior to taking his help and considering the same also evidence of C.W.1 is



not admissible. It further appears on scrutiny of the evidence that evidence of P.W. 1 (Mother of the victim girl) remains unrebutted and corroborated by the evidence of P.W.2 (father of the victim girl). However, there is improvement in the evidence in court as from the earliest prosecution version i.e. Ext.1 does not show any attempt to commit rape but the evidence discloses that Bamban Singh has pressed her mouth and Raju Kumar removed her clothes and trying to do a wrong act. The aforesaid evidence does not disclose a case under Section 376/511 of the IPC and at best it is a case under Section 354 of the IPC of indecent assault or trying to outrage the modesty of the victim girl.

15. The learned trial court has not considered the aforesaid aspect of the matter while convicting the appellants under Section 376/511 of the IPC, as such conviction under Section 376/511 is not sustainable in the eye of law but as there is consistence evidence that Bambam Singh pressed her mouth and Raju Kumar was trying to remove her clothes, as such there are sufficient evidence to hold them guilty under Section 354 of the IPC. Accordingly, conviction of the appellants under Section 376 /511 of the IPC is modified to conviction under Section 354 of tee IPC but submission of the learned counsel for the appellants is that before amendment the maximum sentence under Section 354 of the IPC is of two years, whereas the appellants



has remained in custody for long, which will also appear from the order-sheet of this Court that they have remained in jail for 2 ½ years, accordingly the sentence is modified to the extent R.I. for two years and the period during which the appellants have remained custody shall be set off as per provisions of Section 428 of the Cr.P.C.

16. With the aforesaid modification in conviction and sentence, this Appeal is dismissed.

(Vinod Kumar Sinha, J)

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