

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.207 of 2003

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Bhulan Mishra @ Dwarika Mishra, Son of Late Vishwanath Mishra, Resident of Village – Gurwalia, P.S. – Bettiah Muffasil, District – West Champaran.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 227 of 2003

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Upendra Mishra, Son of Shri Gorakh Mishra, Resident of Village – Gurwalia, P.S. – Bettiah Muffasil, District – West Champaran.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (SJ) No.207 of 2003)

For the Appellant/s : Mr. Harsh Singh, Adv.
Mr. Ravi Shankar Choudhary, Adv.
Mr. Tej Pratap Singh, Adv.
Mr. Kamal Kishor Singh, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

(In CR. APP (SJ) No.227 of 2003)

For the Appellant/s : Mr. Harsh Singh, Adv.
Mr. Ravi Shankar Choudhary, Adv.
Mr. Tej Pratap Singh, Adv.
Mr. Kamal Kishor Singh, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 21-03-2018

As both the above appeals arise out of same judgment, they are clubbed together and are being decided by this common Judgment, for the sake of convenience.



2. These appeals are directed against the judgment of conviction and order of sentence dated 17.04.2003, passed by Sri Jayanta Kumar Sen, the then 7th Additional Sessions Judge, West Champaran, Bettiah in Sessions Trial No. 84/93, by which the appellant Bhulan Mishra stood convicted under Section 450 and 379 of the Indian Penal Code (hereinafter referred to as the “IPC”) and was sentenced to undergo R.I. for five years and three years respectively with a fine of Rs. 2,000/- having default clause and appellant Upendra Mishra has been convicted under Section 450 of the IPC and was sentenced to undergo R.I. for five years with a fine of Rs. 2,000/- having default clause. He has further been convicted under Sections 354 and 307 of the IPC and was sentenced to undergo R.I. for two years and five years respectively with a fine of Rs. 2,000/- having default clause.

3. Prosecution case as per the fardbeyan of Malti Devi (P.W. 1), recorded by A.S.I. of police, namely, P.N. Singh at M.J.K. Hospital, Bettiah in short is that on previous night i.e. on 12.01.92 at about 9.00 P.M., She was waiting for his son to come. In the meantime, appellants Bhulan Mishra and Upendra Mishra by pushing the door entered into her room and to do some illegal act caught hold her and pushed her on the bed, on which, the informant raised hulla, then appellant Upendra Mishra took out a dagger from his waist and assaulted the informant causing injury on her left side of back rib and



appellant Bhulan Mishra took out Rs. 2,000, from below the bed and one golden *hansuli*, one *mangtika*, one *darcous* and *nathiya*, which were also kept under the bed. It has further been alleged that on hearing hulla, her son, namely, Sanjay Kumar Pandey, Devar Bijendra Kumar Pandey and other persons reached their but by that time both the accused persons had fled away. It has further been stated that she told them about the occurrence and, thereafter, she was brought to the hospital.

4. On the basis of the aforesaid fardbeyan of informant Bettiah Muffasil Case No. 6/92 was registered.

5. Police after investigation submitted charge-sheet. Cognizance of the offence was taken and the case was committed to the court of Sessions, which ultimately came to the file of Sri Jayanta Kumar Sen, the then 7th Additional Sessions Judge, West Champaran, Bettiah, for trial and disposal.

6. In order to prove its case, prosecution examined altogether six witnesses, they are; P.W. 1 – Malti Devi (informant), P.W. 2 – Ravindra Kishore Pandey, P.W. 3 –Vijendra Kishore Pandey, P.W. 4– Sanjay Pandey, P.W. 5 – Ravindra Nath Tiwary and P.W. 6- Doctor Kamal Kumar Sahay.

7. Defence of the accused persons is of complete denial of occurrence and of innocence.



8. Post trial, learned Trial Court convicted the appellant Bhulan Mishra under Section 450 and 379 of the IPC and appellant Upendra Mishra under Sections 450, 354 and 307 of the IPC and sentenced them in the manner as stated above.

9. Being aggrieved, the appellants preferred the present appeal.

10. Learned counsel for the appellants has assailed the judgment of trial court on the ground that whole case is based on the solitary evidence of P.W. 1 Malti Devi and her evidence does not inspire confidence as she has herself stated in her evidence that she has not seen the accused persons prior to the occurrence. Further she has stated she was assaulted on rib area but the injury found by the doctor is on chest and that creates a serious doubt about the evidence of P.W.

11. So far other witnesses viz. P.W. 2 to P.W. 4 are concerned, their evidences show that they are not the eye witness of the occurrence and they came to know about the occurrence from P.W. 1 Malti Devi and the aforesaid hearsay evidence also appears to be doubtful as P.W. 1 in her evidence stated that after receiving injury, she became unconscious and she was taken to hospital and when she was unconscious, it cannot be possible that she will narrate the occurrence to other witnesses after the occurrence. It has further been argued that doctor has found injury on the person of P.W. 1, grievous but no X-ray Plate or X-ray report has been brought on record and in



absence of X-ray Plate and X- ray report, finding of doctor about the injury being grievous in nature does not appear to be correct. So far other allegation of taking away Rs. 2500/- and other articles and allegation that appellant tried to outrage the modesty of P.W.1, is concerned, the same appears to be ornamental and has been levelled only to make the offence graver. In fact, there was dispute between the parties with regard to drainage. It has further been submitted that no case under Section 450 of the IPC is made out as there is no ingredient of Section 450 of the IPC is available on record that the accused persons committed the house trespass in order to commit an offence punishable with life imprisonment. Similarly no case under Section 307 of the IPC is made out as no X-ray Plate and X-ray report has been brought on record to substantiate the finding of doctor with regard to injury caused to P.W. 1 being grievous in nature or dangerous to life and evidence with regard to commission of offence under Section 354 of the IPC is also not consistent and the trial court without considering these infirmities has convicted the appellants, which is out and out perverse and not sustainable in the eye of law.

12. On the other hand, learned counsel appearing on behalf of respondent – State supported the finding of guilt, recorded by learned Trial Court and submitted that there is consistent evidence of victim P.W. 1 that on the alleged date of occurrence, appellants trespassed



her house and tried to commit rape on her and in course of that they assaulted her and took away Rs. 2,500/- and other ornaments and the said evidence of P.W. 1 has been corroborated by the evidence of Doctor, who has found injury on the person of the P.W. 1 and that too was grievous in nature and further corroborated by the evidence of other witnesses and, therefore, there is no infirmity in the impugned judgment of Trial Court and conviction of appellant Bhulan Mishra under Section 450 and 379 of the IPC and appellant Upendra Mishra under Sections 450, 354 and 307 of the IPC is just and proper and does not require any interference.

13. Heard both sides. On examination of the evidence of P.W. 1 who is the informant in this case, it appears that she has stated in her evidence that in the night of alleged occurrence, when she was waiting for arrival of her son, appellants entered into her room and appellant Upendra Mishra thrashed her on the bed and tried to undress her and on hulla being raised by her, appellant Upendra Mishra assaulted her with a dagger, which caused injury to her and appellant Bhulan Mishra took away Rs. 2,500, which was kept beneath the bed and also took away ornaments. It has also been stated by her that when her son, namely, Sanjay Pandey her *devar* Jitendra Kumar Pandey and Ravindra Pandey came and saw the accused persons fleeing and, thereafter, she became unconscious and was brought to the hospital.



She also stated she received injury on '*Panjara*' (rib area). She has been cross-examined at length and para -4 of her cross-examination disclosed that the house of accused persons is just beside her house. However, she has stated that she has no talk with them and they did not use to come to her house. On further cross-examination, she has stated that she had not seen the accused persons prior to the date of occurrence and evidence shows that this question was repeatedly asked but she gave the same answer.

14. P.W. 2 is also an F.I.R named witness and his evidence shows that on hulla, he came there and P.W. 1 Malti Devi informed him that appellant Upendra Mishra assaulted her by *Chaku* (knife). Evidence of this witness does not show that P.W. 1 Malti Devi disclosed him any other thing. No doubt, some suggestion has been given to him in cross-examination about the evidence before the police but the I.O. has not been examined in this case.

15. Evidence of P.W. 3 also disclosed that on hulla, he came there and P.W. 1 disclosed to him that appellant Upendra Mishra assaulted her and he had seen injury on her person and both the accused persons have taken away some articles. His evidence further disclosed that Bhulan Mishra has taken away cash and ornaments but this witness himself has stated that he has not seen anyone fleeing away from the house of P.W. 1.



16. P.W. 4 is the son of P.W. 1 and he has also stated that on hulla, he came there and saw appellant Upendra Mishra and Bhulan Mishra going out of his house and Bhulan Mishra had a polythene bag in his hand. His evidence also disclosed that he was informed that the appellant Bhulan Mishra had entered inside the house to outrage the modesty of P.W. 1 Malti Devi and thrashed her on the bed and appellant Upendra Mishra assaulted her by *Chaku* (knife) and at the time of fleeing away appellant Bhulan Mishra took away Rs. 2,500/- and other ornaments. This witness has also stated that four to five days back appellant Upendra Mishra has made indecent assault to P.W. 1 but this is not the prosecution case as no where it has been mentioned in the F.I.R. He has also stated that drainage of the accused persons was flowing through the west of his house and admitted that appellants are his cousin brothers.

17. As such from the evidence as discussed above, it appears that P.W. 1 is the sole witness in this case and other witnesses are only hear say witnesses and though evidence of P.W. 1 in cross – examination shows that she became unconscious after the occurrence, however, other witnesses claimed that occurrence has been disclosed to them by P.W. 1 Malti Devi. P.W. 5 is a formal witness, who has proved the F.I.R. and P.W. 6 is the doctor, who examined the injured and found the following injuries.



(i) One penetrating wound 1"x ¼" x cavity deep situated over the Postero-lateral aspect of the left side of the chest.

and in the opinion of doctor, the injury was grievous in nature. In cross – examination, this witness has admitted that no X-ray Plate was before him and he could not say whether the injured was conscious or not.

18. Defence has also examined two witnesses viz. D.W. 1 Ramakant Pandey and D.W. 2 Ajay Pandey to show that appellants and informant are descendants of one ancestor and there was property dispute between them.

19. On consideration of entire evidence, it appears that the case is based on solitary evidence of P.W. 1 and she has stated that she had not seen the appellants prior to the date of occurrence in spite of repeated question of the court. Apart from that she has stated that she was assaulted by the appellant Upendra Mishra on her *Panjara* (rib area), whereas the injury was found on the chest. So far other witnesses are concerned, they are not the eye witness of the occurrence rather they came to know about the occurrence from P.W. 1. It further appears that P.W. 1 in her statement, she has stated that after assault she became unconscious and was brought to the hospital, in such a situation, the evidence of other witnesses that P.W. 1 disclosed them about the occurrence, looks improbable. Apart from



that the allegation of house trespass with an intention to outrage the modesty of informant (P.W. 1) is also not free from reasonable doubt and in such a situation, appellants are entitled for at least benefit of doubt in the present case, however, it appears that the trial court has not considered these infirmities in the prosecution case, while convicting the appellants.

20. Accordingly, these appeals are allowed. Judgment of conviction and order of sentence dated 17.04.2003, passed by Sri Jayanta Kumar Sen, the then 7th Additional Sessions Judge, West Champaran, Bettiah in Sessions Trial No. 84/93, is set aside.

21. As the appellants are on bail, they are discharged from liability of bail bonds.

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	NAFR
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