

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.497 of 2003

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

- =====
1. Ganesh Sah @ Ram Ganesh Sah son of Sri Lal Sah
 2. Amla Devi wife of Ganesh Sah alias Ram Ganesh Sah
 3. Sunil Sah alias Sushil Sah, son of Ganesh Sah alias Ram Ganesh Sah.
- All resident of Mohalla- Madhepura, Station Road, Police Station – Madhepura,
District- Madhepura.

.... Appellants

Versus

State of Bihar

.... Respondent

with

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Criminal Appeal (SJ) No. 506 of 2003

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

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Sanjeev Kumar Sah @ Sanjeev @ Sanjay Sah son of Ganesh Sah alias Ram Ganesh Sah, resident of Mohalla- Madhepura, Station Road, Police Station Madhepura, District- Madhepura.

.... Appellant

Versus

State of Bihar

.... Respondent

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Appearance :

(In CR. APP (SJ) No.497 of 2003)

With

(In CR. APP (SJ) No.506 of 2003)

For the Appellant : Mr. Uday Chand Prasad, Adv.
Mr. Manoj Kumar, Adv.
Mr. B.K. Sinha, Adv

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. Appellants (Ganesh Sah @ Ram Ganesh Sah, Amla Devi and Sunil Sah @ Sushil Sah) of Cr. Appeal No.497 of 2003 (S.J.) and appellant (Sanjeev Kumar Sah @ Sanjeev @ Sanjay Sah) of



Cr. Appeal No.506 of 2003 (S.J.) have been convicted under Section 366A of the Indian Penal Code and appellant Ganesh Sah @ Ram Ganesh Sah, Amla Devi and Sunil Sah @ Sushil Sah have been sentenced to undergo R.I. for seven years with a fine of Rs.5,000/- and in default R.I. for one year, whereas appellant Sanjeev Kumar Sah @ Sanjeev @ Sanjay Sah has been sentenced to R.I. for eight years under Section 366A/34 of the IPC and also fine of Rs.8,000/- and in default R.I. for two years. Appellant Sanjeev Kumar Sah @ Sanjeev @ Sanjay Sah in Cr. Appeal No.506 of 2003 has also been convicted under Section 376 of the IPC and sentenced to undergo R.I. for ten years and fine of Rs.10,000/- and in default R.I. for 1 ½ years.

3. The prosecution case as appears from the written report of P.W.Dhruv Narain Pandey (P.W. 3) in short is that in the night of 13.7.2002, he was sleeping in his house and in the night he heard some sound on the roof top and when he went there he saw that four persons are going on the road including Amla Devi, Sunil Sah and Guria Kumari and when he came down he did not see his daughter Reena Kumari (P.W.5) in his house. He has also stated that in the day time at about 10.A.M. Amla Devi and Guria Kumari had come to his house and they were talking with his daughter Reena Kumari, as such they had gone to the house of Ganesh Sah and nobody was there and the door was open.

4. On the basis of the aforesaid written report, Madhepura



P.S.Case No.160 of 2002 was registered, police after investigation, submitted charge-sheet against all the appellants in phase-wise manner and the cognizance of the offence has been taken and the case was committed to the court of Sessions, which ultimately came to the file of Sri Uday Shanker, Ist Addl. Sessions Judge, Madhepura for trial and disposal.

5. During trial charges were framed under Section 366A/34 of the IPC against all the appellants and against the appellant Sanjeev Kumar Sah under Section 376 of the IPC.

6. In support of the charge, the prosecution has examined altogether 10 witnesses, they are – P.W. 1 Santosh Kumar Pandey son of the informant, P.W. 2 Rajkumari Devi wife of the informant, P.W.3 Dhruv Narain Pandey (informant of the case), P.W.4 Rakesh Kumar Singh, Judicial Magistrate, who has recorded statement of the girl under Section 164 Cr.P.C., P.W.5 Reena Kumari (victim girl), P.W.6 Ganesh Tripathi first I.O., P.W.7 Gayatri Devi, lady constable, who has accompanied victim girl at the time of recording her statement under Section 164 Cr.P.C. and also at the time of her medical examination, P.W.8 Indradeo Paswan (Chowkidar), who also accompanied the girl at the time of recording her statement under Section 164 Cr.P.C. and also at the time of her medical examination, P.W.9 Nirmal Kumar Ojha second I.O. and P.W.10 Dr. Suniti Kumari who has examined the girl along with the other Doctors.



7. Neither the oral nor documentary evidence has been adduced on behalf of the appellants, however, from the trend of the cross examination and from the statement under Section 313 of the Cr.P.C. their defence appears to be of false implication as the informant who is Peon in the Civil Court has taken money for providing job to the son of the appellant Ganesh Sah but he could not provide the job and also not returning the money and when the appellants demanded money back, they have been falsely implicated in the concocted case, as alleged against them.

8. The learned trial court hearing the parties has convicted the appellants under Section 366A/34 of the IPC and also convicted the appellant Sanjeev Kumar Sah under Section 376 of the IPC and sentenced them as stated above.

9. Being aggrieved by the aforesaid judgment and order, the present appeal has been preferred by the appellants in two sets. As both the appeals arises from a common judgment, they are disposed of with a common judgment.

10. Contention of the learned counsel for the appellants is that the learned trial court has convicted the appellants under Section 366A of the IPC, though the medical report shows that she was aged in between 17 to 19 years at the time of examination and if the same is accepted, she was not minor rather she was major at the time of occurrence, as such there shall be no conviction under Section 366 A



of the IPC. Further submission of the learned counsel for the appellants is that P.Ws. 1 to 3 who are family members of the victim girl claim that appellants had kidnapped the daughter of the informant but offence shows that they are not eye witness of the occurrence and only on the suspicion, they have been made accused and further submission is that their evidence also does not probablize the manner of occurrence. Similarly the evidence of P.W.5 does not probablise the manner of occurrence and it does not appear to be probable that the girl will keep mum while being taken to the Katihar station and from Katihar to Balia, then Patna, Hajipur, Darbhanga and other places and she did not raise any *hulla* in the train and other public transport. Further submission is that though she has alleged of commission of rape at all the places by Sanjeev Kumar Sah but her evidence does not show that there was any person there and it is well settled principle that a person can not rape of a major girl without help from any other person. Furthermore the conduct of the victim of not raising any *hulla* and never called any person for help also creates suspicion about the manner of the occurrence and as such the whole prosecution case is not believable and the appellants have been falsely implicated in this case, however, the learned trial court has not considered the aforesaid aspect of the matter and convicted the appellants under Section 366A/34 of the IPC and appellant Sanjeev Kumar Sah under Section 376 of the IPC.



11. Contrary to that learned counsel for the state has submitted that the girl who is most important witness in the case in the facts and circumstances has consistently stated that she was forcibly taken by the accused appellants from her house and thereafter she was taken to Katihar and some other places by Sanjeev Kumar Sah and she has further stated that on the point of knife he forcibly committed rape upon her and evidence of the victim girl also finds corroboration from her statement under Section 164 Cr.P.C. also as such conviction of the appellant is just and proper and does not require any interference by this court.

12. On the background of the rival contention on examination of the evidence it appears that P.Ws. 1 to 3 are relatives and P.W.3 (informant) has stated in his evidence that in the night at about 12 night to 02 O'clock he heard some sound at the roof top and when he went there, he saw the accused persons going in the lane and thereafter he came down and found that his daughter is not in the house, however, on the other hand P.Ws.1 and 2, who is the son and wife of the informant has stated that they heard some sound on the roof top and they went there and saw the accused persons in the lane, however, she has further stated that at that time P.W.3 was sleeping and she woke him up and narrated the occurrence, as such there is contradiction. It further appears from the evidence of P.W.2 that they had gone to the police station in the morning and they were returned



by the police and then they went to the Advocate Kaushal Babu on his instruction the paper was prepared and written by Shashidar Babu Advocate and that was read over and explained to the informant who put his signature and the same was given in the police station. Though P.W.3 has not stated so but the evidence also shows that he got application written by some other person. His contradiction has also been taken from her earlier statement before the police and the I.O. has been confronted with the aforesaid contradictions in para 12 and 23 of this witness, from para 34 of the I.O. it appears that there is contradictions in the evidence of P.W.3. Even if the evidence of the witnesses P.W.1 to 3 is accepted that they claim that they had seen the appellants in the lane, there is nothing that they had seen the appellants taking away the victim girl in the Jeep or any other means. Evidence of P.Ws. 1 to 3 also discloses that the girl returned on 31.7.2002 and narrated about the occurrence that the appellants had taken her forcibly and sent her with Sanjeev Kumar Sah on Jeep and he traveled at Katihar, Balia, Patna, Hajipur and other places and he has also committed rape upon her. Further, they had gone to the Railway Station, Bus Stand etc. in search of his daughter and thereafter in the morning they had gone to the police, as such doubt appears to the court that if they were aware of the fact that his daughter has been kidnapped by the accused appellants as to why they have not informed the police immediately in the night, though they



had gone to the nearby railway station and the bus stand in the night.

13. Further it appears that evidence of P.W.5 in her evidence also disclosed that appellant Sanjeev Kumar Sah and his brother caught hold her and forcibly taken to his house and from there they had taken her in a jeep to the railway station and from there Sanjeev Kumar Sah had taken to Patna and some other places where she was kept from 31.7.2002 and at all the places she was subjected to rape by the appellant Sanjeev Kuamr Sah on the point of knife and also by threatening her.

14. Evidence of P.Ws. 1 to 3 also discloses age of the girl as 14 years. P.W. 5 has also stated as per version of her mother, her age was 14 years, however, she has admitted that she has appeared in the examination of the matriculation but no certificate of matriculation has been brought on record to support the prosecution case, on the other hand the girl has been examined by the Medical Board and the Doctor has stated in her evidence as follows :

- (i) *Abrasion ½” diameter on the left aide of the face 1” lateral and left from the left eye.*
- “(i) *There is no any injury found on her face, forehead and other part of the body.*
- (ii) *Auxiliary hairs are present, colour of the hair is blackish.*
- (iii) *Both breast are well developed and there are no any external injury and mark of violence present on them.*
- (iv) *Abdomen is soft and thore is no presence of linea alvican’s on lower abdomen.*
- (v) *Pubic hairs are present, colour black.*
- (vi) *Vilva- Labia majora and labia minora, posterior commission are normal, nor any*



- swelling, laceration & no any injuries.*
- (vii) *The hymen membrane is not intact.*
- (viii) *The uterus is normal in size. There is no any discharge and stain present on finger during P/Vaginal examination.*
- (ix) *Specullem examination does nto show any laceration in vaginal wall and canal. No any discharge on the external OS of the uterus.*
- (x) *The external OS is obliterated. Canal is empty having no any discharge.*
- (xi) *The perineum is normal. There is no any mark of injury or laceration.”*

and regarding age she has stated that age according to the dental examination by Dr. D.P. Gupta, age of the victim is above 17 years. Age according to the radiologist or Dr. R.R.Singh, age of the victim is between 17 to 19 years. At the time of assessing the age, the reports of Dr.D.P.Gupta and Dr. R.R. Singh were present before her. She has also shown age of the girl as 17 to 19 years. According to the evidence of the Doctor (P.W.10) it appears that she was aged about between 17 to 19 years. Except that there is no other documentary evidence to show the age of the girl. On the other hand P.W.1 who is the brother of the girl has stated in his evidence at para 10 that Reena Kumari (victim girl) was 7 to 8 years younger to him and P.W.1 was aged about 25 years and he is deposing the same in the year 2003 as such it appears that the age of the girl would be more than 16 years of age. However, it appears that the learned trial court in spite of the assessment of the age by the Medical Board as 17 to 19 years considered her age as 14 years. Considering that in her statement recorded under Section 164 Cr.P.C. in which her age has been



assessed by the learned Magistrate as 14 years. I failed to appreciate the aforesaid finding of the learned trial court as there is no other document available on the record and the report of the medical board also shows that she was aged between 17 to 19 years and if considered the same in higher side, it appears that she was major. The witnesses had stated the age of the girl as 14 years and the medical board had assessed her age as 17 to 19 years, in such a situation, the learned trial court ought to have relied upon the medical board in absence of any documentary evidence. As such to my opinion, the girl was not minor at the time of occurrence. Second question which arises for consideration as to whether the appellants has done intercourse with the victim girl against her will and it appears that the learned trial court has nullified the version of the prosecutrix in the case and failed to analyze the evidence of P.W.5 victim girl who is sole witness of the occurrence. On the other hand the evidence of P.W.5 also shows that she was kidnapped forcibly from the house by the appellant Sanjeev Kumar Sah and Sunil Sah in conspiracy with all the appellants and as per the prosecution case in the house, the whole family members of P.W.5 were sleeping at that time and they had heard also the sound but in spite of that there is nothing in their evidence to show that they had not seen taking her by the appellant and they had also not stated about presence of any jeep. She has also stated that she was taken to Katihar by Jeep by Sanjeev and from there



to Patna and Balia and other places and there she was subjected to rape. To a cross examination, she has also stated that she was taken in train also but when she was taking to different places by Train and other means she could not raise any *hulla* and not tried to make complaint to any person. Explanation given by this witness is that she was threatened and due to fear she could not disclose same, however, it is not about one place rather she visited different places along with the appellant Sanjeev Kumar Sah and according to evidence no other person was there, in such a situation it looks improbable that she could not make *hulla* or make any complaint to the neighbourhood as such conduct of appellant certainly creates doubt about the manner of occurrence.

15. Further point for consideration is that she has stated about the commission of rape by the appellant on the point of knife but she was subjected to rape at different places for so many days and she could not make any complaint while she was visiting one or other places, in such a situation, it appears that she was consenting party in the intercourse. Her evidence also discloses that when she was subjected to rape she was ready to make marry with the appellant but he did not agree to marry, that evidence clearly shows that commission of rape was consensual in the hope of marry with the appellant Sanjeev Kumar Sah. Though this witness has also stated that she had received injuries on her hand but that injury was not shown to



the Magistrate and in respect of that she has stated that he had not asked about the same so she has not disclosed the same to the learned Magistrate. Evidence of the Doctor also shows that he has found not any external injury on the person of the victim.

16. From the discussion made above, the prosecution story of commission of rape to her by the appellant does not inspire confidence rather it appears to be consensual. Evidence of P.W.7 who is the lady constable discloses that the mother of victim used to meet her while she was in her custody and that shows she was under pressure of the mother and her family members.

17. Now the question arises whether consent was under fear or misconception. It appears that consent was not under fear as she has stated that she visited other places along with the appellant, later on she has stated that rape was committed to her so she thought to marry with the appellant but he did not became ready as such it can not be said that the consent was given under fear. Secondly so far second question is concerned there is nothing available on the record to show that the appellant was eager to marry with her and proposed her to marry rather evidence of the victim girl shows that she later on became ready to marry with him but he did not became ready as such in the circumstances of the case it can not be said that the consent was under misconception. On the other hand the circumstances available in the present case, clearly shows that she was consenting party.



Further the doctor has not found any sign of rape. No doubt conviction can be based for rape on solitary evidence of prosecutrix, if it is free from any infirmities and inconsistencies, but in the present case, evidence of prosecutrix does not inspire confidence.

18. Learned trial court has not considered the aforesaid aspect of the matter and convicted the appellants under Section 366A and 376 of the IPC, which in my opinion suffers from inconsistencies and infirmities as discussed above. Accordingly, this appeal is allowed, impugned judgment and order is set aside.

19. As the appellants are on bail in both the cases, they are discharged from the liabilities of their bail bonds.

(Vinod Kumar Sinha, J)

chn/-

AFR/NAFR	AFR
CAV DATE	N/A
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