

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.218 of 2009

Binod Yadav @ Binod Kumar Yadav, son of Sri Surya Narain Yadav, resident of Bela Singar Moti (Math Tola), Police Station-Nirmali, District-Supaul.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv. Mr. Lakshmindra Kumar Yadav, Adv.
For the Respondent/s	:	Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 13-12-2018

1. Appellant, Binod Yadav @ Binod Kumar Yadav has been found guilty for an offence punishable under Section 448 IPC and sentenced to undergo S.I. for six months, under Section 376/511 of the IPC and sentenced to undergo R.I. for five years as well as to pay fine appertaining to rupees one thousand in default thereof to undergo S.I. for one month, additionally, vide judgment of conviction dated 18.02.2009 order of sentence dated 19.02.2009 passed by Additional Sessions Judge, FTC, IV, Supaul in Sessions Trial No.213/2006.

2. During course of hearing of rival submission at the end of learned counsel for the appellant as well as learned Additional Public Prosecutor and after going through the lower court record, it is evident that charge against the appellant was framed for an offence punishable under Section 448 IPC, 376/511 IPC on 09-08-2006. It is further evident that during course of



evidence, the witnesses including the victim PW.2 corroborated by other PWs has categorically stated that she was raped by the Binod Yadav. That being so, the charge would have been amended/added at the end of the learned lower court as provided under Sections 216 of the Cr.P.C. but, learned lower court failed to acknowledge the same and by such activity, the learned lower court proceeded with the trial for lesser offence than whatever been alleged against the appellant to have committed.

3. Learned counsel for the appellant has submitted that in spite of presence of the allegation of rape against the appellant to have committed upon the victim, PW.2 but, the same happens to be exaggeration and on account thereof, it could not be considered during course of applicability of Section 216 of the Cr.P.C. Apart from this, it has also been submitted that 376 IPC is graver offence than 376/511 of the IPC and so, if the charge is directed to be amended then in that circumstance, appellant be given an opportunity to cross-examine the witnesses including the victim as provided under Section 217 Cr.P.C.

4. The learned Additional Public Prosecutor while controverting the submission made on behalf of learned counsel for the appellant has submitted that it is a fit case wherein matter could be remanded on account of failure having at the part of the



lower court by which, the lower court virtually allowed the appellant to go escort free in spite of categorically evidence at the end of the victim to be her rapist. Furthermore, it has also been submitted that prosecution would not fail on account of lapses at the end of the I.O. who, during course of investigation, failed to get the victim medically examined, failed to seize the cloth, failed to record statement in proper manner. Be that as it may, it has also been submitted that for the purpose of amendment/addition of charge, the evidence in its totality is not to be scrutinized like at the stage of passing of judgment and so, having the allegation of rape attributed against the appellant by the victim corroborated by the other witnesses, charge has to be framed against the appellant under Section 376 of the IPC. Furthermore, it has also been submitted that consideration of reliability, admissibility of the evidence should be left to the lower court, more so in the background of the fact that whatever has been deposed before the court, happens to be substantive evidence.

5. In Dinubhai Boghabhai Solanki v. State of Gujarat as reported in **(2018) 11 SCC 129**, it has been held:

“ 32. We may hasten to add that normally such a retrial has to be ordered by the Appellate Court while dealing with the validity and correctness of the judgment of the trial court as



this power is expressly conferred upon the Appellate Court by Section 386 of the Cr.P.C. However, in exceptional circumstances, such a power can be exercised by the High Court under Article 226 or by this Court under Article 32 of the Constitution of India. In fact, there are judicial precedents to this effect which have already been mentioned above. There are no shackles to the powers of the Constitutional Court under these provisions, except self-imposed restrictions laid down by Courts themselves. But for that, these powers are plenary in nature meant to do complete justice and to inhibit travesty of justice. Therefore, we are largely in agreement with the conclusion arrived at by the High Court to the effect that the present case was one of those exceptional cases where possibility of witnesses getting hostile because of inducement or threats cannot be ruled out.”

6. Furthermore, from the evidence of the victim as well as her parents as PW.1 as well as PW.3, it is evident that they corroborated the evidence of PW.2, the victim who properly identified the appellant to be her rapist. PW.4, also corroborated the same. That being so, the learned lower court completely overlooked its implication though the judgment impugned does



contain. So, by such activity the lower court allowed the victim to suffer, which could not be.

7. Accordingly, the judgment impugned is set aside. Appeal is allowed. Matter is remitted back to the learned lower court to proceed in terms of observation, as made hereinabove. However, it will be within wisdom of lower court to see whether it is a fit case wherein application of section 217 Cr.P.C. would be warranted after addition of the charge. Bail bond of the appellant is hereby cancelled directing him to surrender before the lower court at once. If the prayer for bail is made on behalf of appellant, the same would be considered in accordance with law by the lower court.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
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