

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.316 of 2003

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

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Md. Ganiya @ Md. Jainya S/O Md. Kashim
Resident of Mohashamunda, P.S. Rahalgaon, District- Bhagalpur.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Ms. Sweta Raj, Advocate

For the Respondent : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 25-06-2018

Heard the parties.

2. In spite of repeated calls, nobody appears on behalf of the appellant in this case, as such Ms. Sweta Raj, Advocate has been appointed as the *Amicus Curiae* to assist this Court.

3. This appeal has been preferred by the sole appellant against the judgment and order 19.4.2003 passed by Sri Vijay Kumar Sinha, Additional District and Sessions Judge, Fast Track Court, Bhagalpur in Sessions Case No.62 of 2001/ Trial No.150 of 2002 by which he has convicted the appellant under Section 376 of the Indian Penal Code and sentenced him to undergo R.I. for ten years.

4. The prosecution story in short is that while the informant was sleeping along with her mother and *Bhabhi* in her



house on 15.10.2000 at about 10.00 P.M. the appellant entered inside her house armed with Pistol and on the point of pistol taken her away to nearby cow-shade and subjected to her rape for two hours. It is also the prosecution case that she returned and thereafter informed the same to her mother and *Bhabhi*. It is also the case of the prosecution that in the morning, they had gone to the house of the appellant but the family members of the appellant abused and also tried to assault them, thereafter they went to the Mukhiya (P.W.4) who advised her to lodge a case.

5. On the basis of the written report of the informant, a case bearing Kahalgaon P.S.Case no.341 of 2000 was registered, post investigation, the charge-sheet has been submitted and cognizance of the case has been taken and eventually after committing the case, it was transferred to the file of Sri Vijay Kumar Sinha, Additional District and Sessions Judge, Fast Track Court, Bhagalpur for trial and disposal.

6. During trial it appears that altogether six witnesses have been examined and they are – P.W.1Bibi Rajda @ Bibi Bagata (prosecutrix), P.W.2 Md. Jaisan (mother of the informant) P.W.3 Dr. Dr. Jaya Padma Sinathu Tigga (Doctor who has examined her) , P.W.4 Md. Fateh Alam, P.W.5. Bibi Bilkis (Bhabhi of the prosecutrix) and P.W.6 Ram Krishna Paswan, S.I. who has



investigated the case.

7. Apart from the above, writing and signature of the Doctor on the injury report is marked as Annexure '1', endorsement on the fardbeyan is marked as Annexure '2' and formal FIR is marked as Annexure '3'.

8. On behalf of the defence, no evidence has been adduced either oral or documentary and their simple defence is of not guilty and of innocence.

9. The learned trial court on conclusion of the trial has convicted the appellant under Section 376 of the IPC.

10. The learned *Amicus Curiae* has assailed the judgment on the ground that in this case P.Ws. 1, 2 and 5 are the family members of the prosecutrix and so far P.W.4 is concerned, he is Mukhia of the village and he was informed in the morning that appellant is not ready for marry and he advised for lodging the case, and evidence of P.Ws. 1, 2 and 5 who are relatives of the prosecution have not supported by the P.W.4, who is independent witness as he has stated that she had come and told that the appellant is not ready to marry her. Further contention of the learned *Amicus Curiae* is that in this case it is alleged that she was subjected to rape for two hours by thrashing on the ground but in spite of that no injury was found on the private person or any part of the body of the prosecutrix and further



the Doctor has not found any sign of rape upon her or not. Further submission is that it is alleged that she was taken to cow shade and there she was subjected to rape but the I.O. (P.W.6) who has investigated the case has found the place of occurrence empty place of nearby *Baithka* of Jalim Khan and that disbelieve the prosecution story of commission of rape in the cow-shade.

11. On the basis of submission as made, the learned Amicus Curiae has submitted that the learned trial court has not considered the aforesaid inconsistencies and infirmities while convicting the appellant under Section 376 of the IPC. Moreover the written report itself shows that she was major aged about 18 years though later on in her statement she had stated that she was aged about 16 years, on the other hand the Doctor has assessed her aged below 18 years but it is well established that the error of margin in the medical test can be Minus-Plus of two years and considering the same in favour of the accused, it appears that she was major at that time and as such even if it is assumed, it appears it was consensual.

12. Heard learned counsel for the State. He has supported the impugned judgment and order of conviction of the appellant and also submitted that the victim girl has narrated the whole story and P.W.2 and 5 who are natural witness as being mother and *bhabhi* of prosecutrix (P.W.1). It has further been submitted that just after the



occurrence the prosecutrix came and stated about the commission of rape to them as such there are sufficient material in support of the prosecution case, hence conviction of the appellant does not require any interference.

13. In the background of the submissions of the rival parties, on perusal of the evidence, it appears that P.W.1 is the prosecutrix and she has supported the prosecution case in her evidence in chief and her evidence further shows that on the point of pistol the appellant had taken her to the cow shade and subjected her rape.

14. Evidence of P.W.1 found support from evidence of P.W.2 and 5 who are mother and *bhabhi* of the prosecutrix as they have stated that after the occurrence, the prosecutrix came and informed about the commission of rape, however, in this case, the prosecution case is that in the morning they had gone to the house of the appellant where they abused and tried to assault the prosecutrix and her mother and thereafter they went to P.W.4 Mukhia to inform about the same who had asked them to lodge the case, however, on perusal of the evidence of P.W.4 Mukhia it appears that he has not supported the evidence of P.W.1 and 2 and stated that P.W.2 had come to his house to say that the appellant is not ready to marry her, on which he asked the appellant why he is not marrying her on which



the appellant refused to marry her and from perusal of the whole evidence, it appears that he had not supported the story that P.W.2 has informed that P.W.1 was subjected to rape by the appellant. This witness has also not been declared hostile and his evidence has remained intact. Apart from that the Doctor has been examined as P.W.3 in this case and the evidence of the Doctor who has examined the girl on 17.10.2000 disclosed that he has not found any external injury over her body and further stated that there was no sign of rape so it is difficult to say whether she has been subjected to rape or not. The Doctor has ascertained her aged below 18 years.

15. On perusal of the evidence of P.W.1 and 2 it appears that the prosecutrix had stated that she was thrashed on the ground and subjected to commission of rape for two hours; in spite of that not finding any injury on the person of prosecutrix creates serious doubt about the prosecution version and raises reasonable doubt. Even if prosecutrix is considered to be minor, the case of the prosecutrix does not find support from the P.W.4. Further the medical evidence also does not support the prosecution case of rape as not any sign of rape was found. Hence, evidence of prosecutrix does not appear to be impeachable, as such the appellant is entitled for benefit of doubt.

16. Considering the entire aspect of the matter, the impugned judgment and order does not appear to be sustained in the



eye of law.

17. Accordingly, this appeal is allowed and the impugned judgment and order is set aside as the appellant is in jail, he is directed to be discharged from liabilities of his bail bond.

(Vinod Kumar Sinha, J)

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AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	28.06.2018
Transmission Date	28.06.2018

