

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.55 of 2014**

Arising Out of PS.Case No. -1565 Year- 2001 Thana -COMPLAINT CASE District- ARRARIA

1. Raj Kumar Mandal S/O. - Late Mahanthu Mandal Resident Of Village - Koshikapur, P.S. - Raniganj, District - Araria.

.... .... Appellant/s

Versus

1. The State Of Bihar

.... .... Respondent/s

with

**Criminal Appeal (SJ) No. 101 of 2014**

Arising Out of PS.Case No. -1565 Year- 2001 Thana -COMPLAINT CASE District- ARRARIA

1. Ramesh Mandal Son Of Shiv Narayan Mandal Resident Of Village-Koshakapur, P.S.-Raniganj, District-Araria

2. Jhabru Mandal Son Of Ninu Mandal Resident Of Village-Koshakapur, P.S.-Raniganj, District-Araria

3. Subodh Mandal Son Of Shiv Narayan Mandal Resident Of Village-Koshakapur, P.S.-Raniganj, District-Araria

4. Shiv Narayan Mandal Son Of Ninu Mandal Resident Of Village-Koshakapur, P.S.-Raniganj, District-Araria

... .... Appellant/s

Versus

1. The State Of Bihar

... .... Respondent/s

with

**Criminal Appeal (SJ) No. 156 of 2014**

Arising Out of PS.Case No. -1565 Year- 2001 Thana -COMPLAINT CASE District- ARRARIA

1. Manoj Kumar Mandal @ Manna Mandal Son Of Shiv Narayan Mandal Resident Of Village - Koshakapur, P.S. - Raniganj, Dist - Araria

.... .... Appellant/s

Versus

1. The State Of Bihar

.... .... Respondent/s

**Appearance :**

(In CR. APP (SJ) No.55 of 2014)

For the Appellant/s : Mr. Anil Kumar Singh, Advocate

For the Respondent/s : Mr. S.A. Ahmad, APP

(In CR. APP (SJ) No.101 of 2014)

For the Appellant/s : Dr. Amrendra Kumar Singh, Advocate

Mr. Ramesh Kumar Singh, Advocate

Mr. Sanjay Kumar Singh, Advocate

For the Respondent/s : Mr. Z. Hoda, APP

(In CR. APP (SJ) No.156 of 2014)

For the Appellant/s : Dr. Amrendra Kumar Singh, Advocate

Mr. Ramesh Kumar Singh, Advocate

Mr. Sanjay Kumar Singh, Advocate



For the Respondent/s : Mr. S.N. Prasad, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**ORAL JUDGMENT**

**Date: 22-05-2018**

Cr. Appeal (SJ) No. 55 of 2014 wherein Raj Kumar Mandal is the appellant, Cr. Appeal (SJ) No. 101 of 2014 wherein Ramesh Mandal, Jhabru Mandal, Subodh Mandal, Shiv Narayan Mandal are the appellants, Cr. Appeal (SJ) No. 156 of 2014 wherein Manoj Kumar Mandal @ Manna Mandal is the appellant have been heard conjointly and are being decided by a common judgment on account of having arisen from the common judgment of conviction dated 17.01.2014 and order of sentence dated 18.01.2014 passed by the Ad hoc Additional Sessions Judge 4<sup>th</sup>, Arraria in Sessions Trial No.737/2003.

2. Appellant Manoj Kumar Mandal @ Manna Mandal has been found guilty for an offence punishable under Section 376 IPC and sentenced to undergo R.I. for ten years as well as to pay fine of Rs.7,000/- in default thereof, to undergo SI for one year, under Sections 493, 313 and 120-B of the IPC, whereunder independently sentenced to undergo RI for 7 years as well as to pay fine of Rs. 5,000/- in default thereof, to undergo SI for 6 months, while appellants Raj Kumar Mandal, Ramesh Mandal, Jhabru Mandal, Subodh Mandal and Shiv Narayan Mandal have been found guilty for



an offence punishable under Sections 313 of the IPC and 120-B of the IPC and separately, independently sentenced to undergo R.I for 7 years as well as to pay fine of Rs.5,000/- in default thereof, to undergo SI for 6 months with a further direction to run the sentences concurrently.

3. Alleged victim (name withheld) filed a complaint petition on 24.08.2001 against all the appellants showing the date of occurrence from 27.01.2001 to 23.08.2001 divulging the fact that she happens to be a minor girl. On the alleged date i.e. on 27.01.2001, while she was coming from a field carrying bundle of grass over her head and as soon as reached near bamboo cluster lying west to her house, accused Manoj Mandal @ Manna Mandal on the point of fire arm forced her to keep silence, dragged her inside bamboo cluster and then committed rape. When she begun to weep, Manoj Mandal consoled her that he will marry but, also threatened not to divulge anybody otherwise she will be murdered. On account of fear as well as prestige of herself along with her family, she had not disclosed the event and taking advantageous position thereof, Manoj Mandal whenever got an opportunity, consummated with her on the false pretext of marriage. Once upon a time, while he was engaged in copulation, was seen by her younger brother Ravindra Mandal, whereupon, Manoj Mandal threatened to his life. In the aforesaid



background, she also advised him not to disclose, who on account of threat to life, kept mum. On account of prolonged copulation, she became pregnant. She divulged the fact to Manoj, who assured her not to worry as he will marry with her. Her mother perceiving the same, enquired whereupon, she disclosed the event. Then thereafter, her parents had gone to the place of accused Manoj Mandal, but they on one pretext or other, delayed the matter. On the other hand, Manoj Mandal gave some medicines and said that it happens to be good for her health if it be taken by her and after administering the same, she aborted. Even thereafter, she pressed for marriage which Manoj Mandal declined and in the aforesaid background, Panchayati was convened wherein the accused persons directed to pay Rs.50,000/- as a dowry, on account of non-payment of the same, accused persons declined to marry.

4. On the basis of the aforesaid complaint petition, an enquiry under Section 202 CrPC was taken up and after concluding the same, accused persons were summoned to face trial and after whose appearance, the trial commenced and concluded in the manner subject matter of these appeals.

5. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C is that of complete denial. It has further been pleaded that the



victim was a lady of easy virtue having illicit relationship with Phoolchand Mandal, with whom she was subsequently married on 28.07.2001, but that marriage did not survive, whereupon, she was deserted and in the aforesaid background, coerced the appellant/accused, Manoj Mandal to marry which he refused and on account thereof, in the background of land dispute got this case filed. Defence had also examined 7 DWs who are D.W-1 Janardhan Thakur, D.W-2 Khelanand Jha, D.W-3 Parmeshwar Sah, D.W-4 Birahani Devi, D.W-5 Sahdeo Das, D.W-6 Rakesh Kumar Mandal and D.W-7 Bidyanand Choupal.

6. In order to substantiate its case, the prosecution had examined altogether nine witnesses who are P.W-1 Dinesh Mandal, P.W-2 Rabindra Kumar Mandal, P.W-3 Sadanand Mandal, P.W-4 Singheswar Mandal, P.W-5 Satya Narayan Mandal, P.W-6 Damodar Mandal, P.W-7 Deo Narayan Mandal, P.W-8 Dinesh Yadav and P.W-9 Sushil Kumar Jha. Side by side, had also exhibited Ext.1, Complaint petition, Ex.2 C.C of S.A. of complainant.

7. While assailing the judgment of conviction and sentence, learned counsel for the appellants have submitted that none is an eyewitness and that being so, on account of non examination of the victim, prosecution has got no leg to stand. Accordingly, the finding having been recorded by the learned lower Court appears to be



unreasonable and is fit to be set-aside. It has further been submitted that prosecution case is to be bifurcated in three parts as per allegations so attributed. The first part happens to be commission of rape and further, indulgence in copulation out of free will under the banner of promise at the end of appellant, Manoj Mandal. The second part happens to be after becoming pregnant and divulgence of the aforesaid fact to Manoj Mandal, he provided some medicines and abetted by instructing victim to consume which she swallowed leading to abortion and the third event with regard to denial of the family members to acknowledge and accept the victim by way of facilitating solemnization of marriage in between the victim with Manoj Mandal. Admittedly, at first two incidents, the remaining appellants that means to say, Raj Kumar Mandal, Ramesh Mandal, Jhabru Mandal, Subodh Mandal and Shiv Narayan Mandal have got no presence and so far, third incident is concerned, it suffered from vagueness. That being so, the cases of these appellants are quite separable, whereupon, could not be convicted under Section 313 IPC as well as 120B IPC.

8. With regard to appellant Manoj Kumar Mandal, it has been submitted that no one had seen the activity whatsoever been alleged against him. The status of all the witnesses happens to be hearsay which is inadmissible in the eye of law, more particularly, in



the background of the fact that victim has not been examined. Even though, by way of examination of PW-7, Deo Narayan Mandal, a theme has been introduced with regard to the death of the victim but, as the cause of death is not under the prosecution, on account thereof, her evidence, that means to say, the S.A. (Ex.-2) is not at all legally entertainable. Hence, no case is made out against the appellant Manoj Kumar Mandal @ Manna Mandal and so, the conviction and sentence recorded against him appears to be illegal, cryptic and so, is fit to be set aside.

9. On the other hand, the learned APP while supporting the findings recorded by the learned lower Court, has submitted that examination of DWs and the facts coming out therefrom is indicative of the fact that the victim, a minor was improperly tackled at the end of the accused persons whereupon, the finding recorded by the learned lower Court is fit to be affirmed.

10. From the suggestion having been given to the respective witnesses to the effect that victim had developed illicit relationship with one Phoolchand coupled with other instance that they got married and then having been deserted by the aforesaid Phoolchand and examining the DWs on that very score who had stated that they both solemnized love marriage, actually, under the garb of aforesaid theme had questioned over the character of victim



and the same is found non permissible in the eye of law as provided under Section 53-A of the Evidence Act.

11. So far remaining appellants than appellant Manoj Kumar Mandal @ Manna Mandal are concerned, it is apparent that they not at all been shown under mainstream rather their appearance happen to be in ancillary way, whereunder they have been shown to have declined to resolve during course of Panchayati on the pretext of asking for fulfillment of Rs.50,000/- as dowry and the vagueness surrounded on the very score, did not inspires confidence coupled with the fact that they have not been alleged to have abetted the offence of abortion whereupon, the findings recorded by the learned lower Court relating to them, are set aside. Consequent thereupon, Cr. Appeal (SJ) Nos.55/2014 as well as 101/2014 are hereby, allowed. Appellants, namely, Raj Kumar Mandal [Cr. Appeal (SJ) No. 55 of 2014], Ramesh Mandal, Jhabru Mandal, Subodh Mandal, Shiv Narayan Mandal [Cr. Appeal (SJ) No. 101/2014] are on bail, hence are they are discharged from their liability of bail bonds.

12. Now coming to the status of appellant Manoj Mandal @ Manna Mandal, admittedly, victim had not been examined. Because of the fact that victim has not been examined on account thereof, Ext-2, S.A. could not be entertainable in the eye of law nor the contents of the complaint petition as, there happens to be absence of maker of the



documents. In likewise manner, a deposition during course of enquiry will be only for the purpose of corroboration a contradiction being previous statement.

13. Be that as it may, from the complaint petition itself, there happens to be divulgence that victim was minor. While, she was examined on S.A, the Court had estimated her age to be 16 years. Furthermore, from the complaint petition it is evident that while appellant was engaged in copulation with her, they were seen by the Rabindra Mandal, younger brother of victim who was also threatened at the end of the appellant to be killed, in case, there happens to be divulgence at his end and in the aforesaid background, she also advised her brother not to divulge. Considering the tender age of the victim as well as thumb impression happens to be over the complaint petition suggests the victim to be illiterate, the aforesaid activity is found normal one. The appellant might have received these documents in terms of Section 207 of the Cr.P.C. That means to say, status of victim being minor was duly under his acknowledgment and so, at least, during course of cross-examination, there would have been at least suggestion at the end of the appellant that victim was major and their activities were consensual. On the contrary, the appellant Manoj Mandal had completely denied his involvement and shown the victim to be associated with Phoolchand and whatever



subsequent resultants were on account of attachment with Phoolchand.

14. From the evidence available on the record, it is evident that P.W-1 Dinesh Mandal, P.W-3 Sadanand Mandal, P.W-4 Singheswar Mandal, P.W-5 Satya Narayan Mandal, P.W-6 Damodar Mandal and P.W-7 Deo Narayan Mandal, based their evidence, so far first two parts are concerned, that means to say, incident of rape and continuing copulation, pregnancy, termination of pregnancy by way of administering medicine in deceitful way to have acknowledged through the victim and so their evidences on that very score, happens to be non recognizable in the eye of law.

15. Now, remains evidence of P.W-2, Rabindra Mandal whose presence as indicated above, was right from the complaint petition against whom it has been disclosed that he had witnessed an incident of copulation having been at the hut of the appellant. During examination-in-chief, he had stated that about 3 and ½ years ago, while Manoj Mandal was committing sin with his sister at his hut, he had seen. He had also seen him whereupon he threatened that in case you disclose the incident, you will be murdered. He had not raised alarm and then there happens to be incident relating to subsequent effect. Identifying the accused.

16. During course of cross-examination, at para-4, he has



not been cross-examined directly on that very score. He had stated that when he had gone inside the room, he had not found cattle. Manoj Mandal, in the room itself had threatened him that in case of raising of alarm, he will be murdered. Manoj had threatened even subsequently and that being so, he had not disclosed the incident to his parents. But so far theme of copulation is concerned, which he had seen, no cross-examination was there. Paras 5 & 6 happens to be relating to subsequent event.

17. Section 134 of the Evidence Act did not require number of the witnesses to be examined in order to prove a fact rather evidence of a single witness, if inspires confidence will be sufficient to record finding of the guilt.

18. Furthermore, in **Gian Chand & others v. State of Haryana** reported in **2013(4) PLJR 7 (SC)** it has been held:-

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in **Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.**, AIR 2013 SC 1204 observing as under:

*“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it,*



*which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”*

19. Because of the fact that there happens to be no cross-examination on that very score challenging the status of P.W-2 Rabindra Mandal not to be an eyewitness of copulation, while appellant Manoj Mandal was engaged with the victim, then in that circumstances, it will tantamount to an admission and that being so, the conviction recorded by the learned lower Court relating to Section 376 of the IPC is found duly substantiated and is accordingly affirmed.

20. So far Sections 313 as well as 493 and 120-B of the IPC are concerned, those are not at all found duly substantiated and to



that extent judgment of conviction and sentence recorded by the learned lower Court is set aside. In terms thereof Criminal Appeal No.156/2014 is partly allowed.

21. However, considering the fact that victim has not been examined and considering the fact that even having been seen by the PW-2, victim had not complained that she was being raped though being minor was incapable to give consent, on account thereof, the sentence inflicted by the learned lower Court is reduced to seven years, the minimum sentence so prescribed retaining the fine and its default clause. Appellant, namely, Manoj Kumar Mandal @ Manna Mandal [Cr. Appeal (SJ) No. 156 of 2014] is under custody, on account thereof, he will remain till saturation of the sentence.

**(Aditya Kumar Trivedi, J)**

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