

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.361 of 2015

Arising Out of PS.Case No. -19 Year- 2005 Thana -AWADPUR District- KATIHAR

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Md. Nawaz Alam @ Md.Nawaz @ Nawaz Alam, Son of Late Shahabuddin,
Resident of Village - Sirajmani, P.S. - Abadpur, District - Katihar.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Md. Helal Ahmad, Adv.

For the State : Mr. S.A. Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 26-06-2018

Appellant, Md. Nawaz Alam @ Md.Nawaz @ Nawaz Alam has been found guilty for an offence punishable under Section 376 of the IPC and sentenced to undergo R.I for 7 years as well as to pay fine appertaining to Rs.20,000/- in default thereof, to undergo S.I for 6 months, additionally, with a further direction that the period having undergone during course of trial be set off as provided under Section 428 of the Cr.P.C. vide judgment of conviction dated 29.04.2015 and order of sentence dated 04.05.2015 passed by Second Additional Sessions Judge, Katihar in Sessions Trial No.232 of 2006.

2. Victim (name withheld) PW.14 filed written report on 01.04.2005 disclosing therein that on 20.06.2004 at about 07:00 PM while she had gone north to her house to meet nature's call, her co-villager Md. Nawaz Alam came, grabbed her. She was about to raise alarm but, was prevented by way of gagging her mouth and then she was raped. Md. Nawaz Alam also threatened that in case



of disclosure, she will have to face dire consequence. He had further offered to marry. However, she disclosed the event to her parents whereupon, her parents talked with Md. Nawaz Alam and during course thereof, he assured that he will marry with her but, first of all he will have to take his parents in his confidence and for that, he is going to take proper step. Under the pretext of promise to marry he continued himself in gleaning physical intimacy with her. In order to project himself conscious in getting the marriage solemnized, he took her to Barsoi where there was pair photography. After returning therefrom, he again began to delay the matter whereupon, villagers were informed and then, there was panchayati on 19.12.2004 participated by local mukhiya, members of the panchayat samiti and others wherein Md. Nawaz Alam along with her parents, brother, sister were present and during course thereof, they became ready for marriage. Subsequently thereof, their family members got Md. Nawaz Alam disappeared and then, advanced rupees fifty thousand as dowry and said that without payment of aforesaid 50,000/-, marriage would not be solemnized. As, her parents failed to fulfill the demand of dowry, they declined as a result of which complaint petition no.19/2005 was filed. Later on Md. Nawaz Alam got himself married at some other place, hence the case is being filed.

3. After registration of Abadpur P.S. Case No.19/2005 investigation was taken up and after concluding the same charge sheet was submitted facilitating the trial which concluded recording acquittal relating to other co-accused while appellant being convicted and sentenced in a manner as indicated



hereinabove, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of innocence. Furthermore, it has also been pleaded that whole family has been implicated on account of land dispute. One DW along with documentary evidence has also been adduced in support thereof.

5. In order to substantiate its case, prosecution had examined altogether fourteen PWs who are PW.1-Dr. Laxmi Sen, PW.2-Iltaf Hussain, PW.3-Md. Rafikul, PW.4-Abdul Samad, PW.5-Murtaza, PW.6-Bari, PW.7-Muzibur Rahman, PW.8-Safikul, PW.9-Anizh, PW.10-Md. Walid, PW.11-Asimuddin, PW.12-Lili Khatoon, PW.13-Kalo Khatoon, PW.14-victim. Prosecution had also exhibited injury report, as Ext.1. Defence had also examined one DW, DW.1-Kanak Lal, formal in nature and had also exhibited, Ext.A-Certified copy of evidence of PW.6 examined while proceeding under J.J. Act, Ext.B-Deposition of PW.7 and Ext.C-Certified copy of Complaint petition No.19/2005.

6. Now coming to the ocular evidence, it is evident from the lower court record that prosecution had adduced three kinds of evidence, the first one that of Dr. Laxmi Sen PW.1, who had examined the victim on 02.04.2005 and during course thereof, had not found external or internal injury. Hymen was found ruptured, admitting two fingers and so, opined to be accustomed to the sexual intercourse. On the basis of the radiological finding she shown age of the victim in between 18-19 years.



7. The remaining witnesses are found to be classified under the independent witnesses out of whom PW.4 was tendered while PW.2, PW.3, PW.6, PW.8 were declared hostile. PW.5 is the hearsay witness and likewise status happens to be relating to PW.7. PW.9 and PW.10 who had claimed that they have seen the victim weeping and on query, she disclosed that she was raped by the appellant on the alleged date at evening hours.

8. Now the remaining witnesses are PW.11, father of the victim, PW.12 sister of the victim PW.13 mother of the victim and PW.14 the victim herself. Admittedly, PW.11, 12, 13 are not the eye witness of occurrence but, when their testimony are taken together, it is apparent that they have twisted the prosecution version though, admitted that victim as well as Md. Nasim Alam were in love and what they have acted, on account of continuance of aforesaid event. PW.12 even had disclosed during examination-in-chief itself that she along with victim was taken away by the appellant to the place of his Bahnoi where they remained for three days during midst thereof, pair photography with the victim was snapped as well as steps for marriage was also taken up though, could not materialized.

9. PW.11 also admitted that his daughter had loved Md. Nawaz (Para-7) when PW.13, mother was cross-examined at para-3 she had stated that both were in love but again controverted that not. She had further stated at para-4 that at the time of occurrence, victim was not of marriageable age. For the present, she happens to be aged about 24 years.



10. PW.14 is the victim who during her examination-in-chief had stated that on the alleged date and time of occurrence while she was going to meet nature's call, she was raped by the accused Md. Nawaz Alam but, the subsequent activity whereunder on the pretext of marriage both the parties continued with their physical relationship as disclosed under written report have been completely bypassed. In para-4 of her cross-examination she had stated that accused was also willing to marry as well as she was also willing to marry. However, at para-5 she had stated that both were not in love. At para-17 she had stated that at the time of occurrence darkness had fallen down whereupon identification by face was not plausible but, as the accused had raped her, on account thereof, she had identified him.

11. Investigating Officer has not been examined. Because of the fact that there happens to be no contradiction visible in the evidence of the PWs on account thereof, it could not be said that on account of non-examination of the Investigating Officer serious prejudice has been caused moreover, in the background of blatantly denial of the occurrence.

12. At an initial stage, delay in launching prosecution was duly explained on account of continuity of the relationship under the garb of promise of marriage which could not materialized in the background of non-fulfillment of demand of dowry to a tune of Rs.50,000/- but, keeping out of screen the intermediary event has exposed the weakness of the prosecution case over inordinate delay in launching the prosecution which is found not at all



explained. In likewise manner, according to the evidence of PW.11, PW.12 the victim was aged about 23 years at the time of alleged occurrence while PW.13 had controverted the same by way of stating that she was not of marriageable age at the time of alleged occurrence, is found completely watered down by the victim herself who had not disclosed /claimed herself to be a minor at the time of the occurrence. Moreover, prosecution had not challenged radiological finding whereupon PW.1 had estimated age of the victim in between 18-19 years and so, her age could be in between 20-21 years, on account of permissible variance of age $\pm$ two years and further, the age leaning in favour of the appellant is to be accepted.

13. Had there been disclosure at the end of the victim PW.14, which she concealed during course of her evidence regarding continuance of physical relationship under the garb of promise would have given a different sphere. But, cutting of the same makes the situation ridiculous while appreciating the evidence of the victim who disclosed that just after rape he had offered to marry with her. When the allegation of rape is taken together with her cross-examination (Para-4 & 5), the factum of rape became suspicious rather, it speaks otherwise, and, being major, the victim was quite competent to nod.

14. By catena of judicial pronouncement it has been settled at rest that the evidence of prosecutrix would be sufficient to record finding of guilt in case, is found reliable. In the present context, it is apparent that the evidence of victim in the facts and



circumstances indicated hereinabove, is found unreliable as, the activities whatever been alleged appears to be consensual one which, the victim being major was very much capable and that being so, the finding recorded by the learned lower court is not at all found justifiable. Consequent thereupon, same is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
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