

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.510 of 2015

Arising Out of PS. Case No. -29 Year- 2007 Thana -KHAJEKALA District- PATNA

- =====
1. MD. RAHMAN, S/O LATE HASHMAT ALI RESIDENT OF MOHALLA- P.S KHAJEKALAN, DISTRICT PATNA.
 2. KALIM @ KALIM CHIK S/O MD. HAKIM RESIDENT OF MOH. NAUDAL, P.S KHAJEKALAN, DISTRICT PATNA.

.... **APPELLANT/S**

VERSUS

THE STATE OF BIHAR

.... **RESPONDENT/S**

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Appearance:

For the Appellant/s : Mr. Raj Bansh Dubey, Adv.

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 07-05-2018

Appellants, Md. Rahman, Kalim @ Kalim Chik, questioned the propriety of the judgment of conviction dated 20.07.2015 and order of sentence dated 22.07.2015, passed by Additional Sessions Judge, VIIth, Patna City, Patna in Sessions Trial No.290/2008 whereby and whereunder they both have been found guilty for an offence punishable under Section 354/34 of the IPC and each one has been sentenced to undergo R.I. for three years as well as to pay fine appertaining to rupees ten thousand in default thereof, to undergo S.I. for two months, additionally.

2. PW.1, Sahnaj Bano filed written report on 06.03.2007 at about 05.00 P.M disclosing therein that on the same day at about 01.30 P.M her daughter (name withheld), aged about 6 years has gone to provide food to Hafiz of the mosque. After returning therefrom, Md. Rahman, Kalim Chik, lifted her in their lap and taken away inside their shop where, Rahman put her in his lap, Kalim pressed her mouth. Rahman attempted to commit rape



whereupon, her daughter anyhow succeeded in rescuing herself, shouted whereupon, she along with others arrived at the shop of accused persons, till then, they both after closing the shop ran away.

3. After registration of Khajekala P.S Case No. 29/2007 investigation commenced and concluded by way of submission of charge-sheet, paving way for conduction of the trial, meeting with ultimate result, 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 Cr.P.C is that of complete denial. However, neither oral nor documentary evidence has been adduced in defence.

5. In order to substantiate its case, prosecution had examined altogether four PWs, PW.1-Sahnaz Bano (informant), PW.2- Md. Naushad, PW.3-Sayad Aan Mohammad and PW-4 is the victim. The prosecution had also exhibited Ext.1-written report, Ext.2-Signature of informant over the same, Ext.2/A-Signature of PW-2 over the written report. As stated above, defence had not adduced either oral or documentary evidence.

6. Very emphatic argument has been made at the end of the learned counsel for the appellants while assailing the judgment impugned whereunder it has been submitted that from the evidence of the victim, it is apparent that she had contradicted status of all the witness that means to say her parents, PW-1, PW-2. It has also been submitted that the evidence of victim has got primacy and so, will prevail upon the other evidences. From the



evidence of victim, it is manifest that though she had deposed that she was kept in lap by the accused persons but, without any ulterior motive. In its continuity, it has also been submitted that case has been compromised though, offences happens to be non-compoundable and in the aforesaid background, the evidence of PW-3 and PW-4 happens to be while PW-2, father was recalled on that very score. However, PW-1 informant did not turn up as she deserted PW.2 and so, her evidence should not be taken into consideration. Even if taken, it should be under the guise of PW.2, who being father of victim, a minor to be legally competent to enter into compromise, that too, for welfare of the minor in order to prevent from blemish.

7. Furthermore, it has also been submitted that doctor has not been examined which cast doubt over authenticity of the prosecution version, more particularly, in the background of the fact that from the evidence of PW-1, it is apparent that she had claimed to have seen certain injuries over the person of PW-4, victim which she had not corroborated and so, for that purpose, the evidence of Doctor was necessary. It has also been submitted that no independent witness has been adduced on behalf of prosecution which should also be taken into consideration. I.O has also not been examined and that being so, taking into account the evidence of the witnesses, non-examination thereof, has caused prejudice to the appellant and so, the cumulative effect did not justify the finding recorded by the learned lower court.

8. It has further been submitted that even considering the evidence of PW-4, it is evident that Rahman and Kalim both got



her in their lap which itself suggest improbability as she would not have been in the lap of two persons at a time. Furthermore, mere keeping in lap a minor would not cast criminal liability unless and until she alleged with ulterior motive. From the evidence of PW.4, it is apparent that nothing adverse has been alleged at her end hence no offence under Section 354 of the IPC is made out.

9. It has further been submitted that for outraging modesty of a women the activity of the accused should be derogatory to the status of a female which, in the facts and circumstances of the case, has not been substantiated by the prosecution. As such, in any view of the matter the judgment impugned would not survive.

10. Furthermore, it has also been submitted that after analyzing the evidence available on the record, it is found that two kinds of evidences are there. The first one, deposed by the mother, PW-1 while the other kind happens to be that of PW-2, PW-3 and PW-4 the victim. It is sound principle of law that the version leaning in favour of accused is to be accepted whereupon, the appellant should be acquitted by setting aside the judgment impugned.

11. The learned Additional Public Prosecutor refuting the submission made on behalf of appellant has submitted that the learned lower court after scrutinizing the evidence more particularly, that of victim, PW-4 which is found corroborated with PW-1 and even giving some sort of slip on recall, PW-2 had also substantiated, did justify the finding recorded by the learned lower



court, so the judgment impugned did not attract interference.

12. It is needless to say that, at an earlier occasion, PW-1 and PW-2 deposed on merit of the case. Then thereafter, case has been compromised and in the aforesaid background, the subsequent witnesses ceased their tenders whereunder PW-3 has been declared hostile and in likewise manner PW-4, the alleged victim save and except claiming that both the appellants, namely, Rahman and Kalim called her inside her shop and then thereafter, took her in their lap but, had not done anything more. She was declared hostile whereupon she was confronted with her previous statement. As I.O has not been examined on account thereof, that had gone non-cognito. During cross-examination, it is evident that she had admitted quarreling of her mother with the accused persons on account of meat. Then had stated that as she had fallen near her house on account thereof, had sustained injuries over her person. Then had stated that she was not at all tutored by her parents what to depose. Again, she said that her mother had directed her to depose before the Court that accused persons took her in their lap and then rubbed her cheek. She had also admitted that accused persons had not committed any kind of occurrence with her.

13. PW-2, as stated above, deposed on merit but, he was recalled after filing of the compromise petition. He had further stated that his wife had deserted him for the last 3 ½ years. In para-32 he had stated that he had not seen the occurrence. He had deposed in this case as per information given by his daughter.



14. PW-1 is the mother. She had deposed that the occurrence is of dated 06.03.2007 in between 01:30 P.M to 02:45 P.M. At that very moment victim had gone to provide food to Hafij of the mosque. During course of return when she reached near the place of Rahman and Kalim they both took her to their shop where, Rahman confined her in his lap while Kalim pressed her mouth and then they both attempted to commit rape. They have indulged in kissing her daughter as a result of which, there was scar over the cheek of the victim. Victim raised an alarm whereupon, she along with her husband and the people of the Mohalla reached. Seeing whom, the accused persons leaving her daughter, escaped away after closing the shop. Then thereafter, they have gone to police station where her employee Shamshad had also gone, took dictation and also read over the same and finding it correct, put her signature. Her husband also put his signature. Identified the accused. She had also stated that victim was examined by the Doctor. Her statement was recorded by the I.O.

15. During cross-examination, Para-4, 5, 6, 7 happens to be with regard to topography of the locality. In Para-8 she had stated that grocery shop of accused Rahman lies at the distance of 10 steps from her house. There happens to be no other shop near about vicinity.

16. At Para-9, he had stated that she met with her daughter in the midst of way. After commission of the occurrence, she heard shout of her daughter whereupon, she rushed. At that very time, her husband was at her house. She had disclosed the names of tenant of her house as Javed, Md. Jahangir. In Para-11,



she had stated that her daughter had shouted from the shop of Md. Rahman. At that very time, 6-7 persons from their respective houses rushed. Then there happens to be detailed cross-examination over manner of occurrence whereunder she had stated that when they reached at the place of occurrence, at that very time victim was inside the shop of the accused persons. At that very time, accused Rahman had kept her daughter in his lap. At that very time, victim was wearing Salwar and Samij. She along with her husband and others gone inside the shop where, 6 -7 persons of Mohallawala also arrived and then, all of them rescued her daughter. They could not be able to apprehend the accused as, they escaped though, there was scuffle. She had further stated that when they rescued the victim from the clutches of Rahman, she had found mark of bite over her cheek, both side. Her daughter had also sustained injury over nose, forehead and back. However, she denied that she had not seen injury over other parts of body. The salwar of her daughter was completely torn but, it was not separated from the body. In Para-13, she had stated that accused persons after closing the shop, escaped. She had further stated that accused persons have closed their shop in their presence. when the accused persons were putting lock over his shop, she returned back to her house along with the victim and during midst thereof, accused persons escaped. In para-16, she had admitted that no other grocery shop is present in the vicinity. They used to purchase articles from the shop of the accused. Then had denied the suggestion that they were taking meat from the shop of accused. Then had denied the suggestion that they were taking



goods on deferred payments and due to demand, accused persons have been falsely implicated. Then at para-10, 21 there happens to be contradiction.

17. From the evidence available on the record, as discussed hereinabove, it is apparent that victim had deposed that Rahman had kept her in his lap and on that very score, there happens to be no cross-examination although, she had stated that nothing more was done at the end of the appellant. Though, during course of examination-in-chief she had not divulged regarding injury but defence was very much apprehensive whereupon she was cross-examined and she answered that while she was in a way had fallen and sustained injury. This part of evidence if taken along with PW-1, informant is found duly corroborated. PW-2 though at an earlier occasion had faced the rigor of cross-examination, even then, being recalled in the background of compromise having effected amongst the parties, at para-32 had stated that he had not seen the occurrence but had deposed of an information whatever given by his daughter. His evidence, on that very score is also found corroborative in nature.

18. 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."

(Emphasis supplied)"

19. From the evidence of the victim, it is apparent that she was not at all cross-examined on the score whether Rahman had kept her in his lap out of affection or not. That being so, that part remained unchallenged. It is settled principle of law that the evidence of hostile witness would not be out-rightly rejected rather it has to be admitted to the extent of supporting the case.

20. Now coming over factum of outraging the modesty of a girl. In ***State of Punjab vs Major Singh*** reported in **AIR 1967 SC 63**, it has been held:-

"The offence punishable under Section 354 is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not



define „modesty“. What then is a women's modesty?

.....The essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section.

A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a body, seven-and-half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex.”

21. So far evidence of child witness is concerned, the Hon'ble Apex Court in **State of M.P vs Ramesh And Anr.** reported in **2011 Cr.L.J 2297** has been held:

“10. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him.



(Vide: Himmat Sukhadeo Wahurwagh & Ors. v. State of Maharashtra, AIR 2009 SC 2292).

11. In State of U.P. v. Krishna Master & Ors., AIR 2010 SC 3071, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

12. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516)."

22. Considering the evidence available on the record, irrespective of the fact that case has been compromised but, in the facts and circumstances of the case it is found and held that the learned learned lower court had rightly convicted the appellant Md. Rahman and Kalim @ Kalim Chik for an offence punishable under Section 354 of the IPC holding that prosecution has succeeded in proving its case and the same is accordingly, concurred and on



account thereof, this appeal is found deficient one, consequent thereupon, is dismissed. Both the appellants are on bail hence their bail bonds are cancelled with a direction to surrender before the learned lower court within fortnight to serve out remaining part of sentence, failing which, the learned lower court will be at liberty to proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	09.05.2018
Transmission Date	09.05.2018

