

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.117 of 2013

Arising Out of PS. Case No.-187 Year-2009 Thana- Katoria District- Banka

Kailash Yadav @ Kaila S/o Late Sujabi Yadav R/o Village - Butudih, Police Station - Katoriya, O.P. Jaipur, District - Banka

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr. Ajay Mukherjee, Advocate.

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

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date : 09-10-2018

Heard learned counsel for the appellant as well as
learned APP for the State on this criminal appeal.

2. This criminal appeal has been preferred against the Judgment and Order of conviction dated 23.01.2013 and order of sentence dated 31.01.2013 passed by Ad hoc Additional Sessions Judge-II Banka in Sessions Trial No. 1114 of 2009 arising out of Katoria P.S. Case No. 187 of 2009, whereby the learned trial court convicted the accused Kailash Yadav @ Kaila for the offence punishable under Sections 307, 376/511 and 324 of the Indian Penal Code and sentenced him to undergo R.I. for five years and also slapped him with the fine of Rs. 20,000/- under Section 376/511 of the Indian Penal Code, R.I. for 10 years and also slapped him with the fine of Rs.30,000/- under Section 307 of the Indian Penal Code and further sentenced him to undergo R.I. for one year and slapped him with the fine of Rs.



10,000/- under Section 324 of the Indian Penal Code and in default of payment of fine to further undergo S.I. for two years. All the sentences were directed to run concurrently.

3. Factual matrix of the case is that Katoria (Jaipur O.P.) Case No. 187 of 2009 was instituted under Sections 376/511/307/324 of the Indian Penal Code against the accused Kailash Yadav @ Kaila on the basis of the fardbeyan of Churka Kisku, Son of late Rangata Kisku recorded by A.S.I. Digvijay Singh of Katoria (Jaipur O.P.) at 02:30 PM with the allegation in succinct that on 07.09.2009 at around 8 AM, his daughter Maharani Kisku aged about 10 years was proceeding to her school located in Charka Pathar. On the way, Kailash Yadav @ Kaila interrupted her near the Beliadih river and offered her to make her cross the river, but after crossing the river he shoved her on the ground and tried to commit rape against her. When the girl started making hulla, he stabbed on her face in order to do away with her life making her face badly injured and then left the scene dumping her in the mid stream of the river. One Radhe Shyam Manjhi gave the information of the occurrence to him at 1 PM and on the said information they rushed to the river and found her badly injured there. On grilling, she divulged the entire occurrence to him.



4. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against the accused Kailash Yadav @ Kaila Manjhi under Sections 376/511/307/324/325 of the Indian Penal Code.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions and after commitment and on transfer finally the case came in the *seisin* of Ad hoc Additional Sessions Judge -II, Banka for trial.

6. Charge against the accused Kailash Yadav @ Kaila was framed under Sections 376/511, 307 and 324 of the Indian Penal Code. Charge was read over and explained to him by the Court to which he pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether eight prosecution witnesses namely, Parmanand Mandal as PW-1, Bahamuni Hansda as PW-2, informant Churka Kisku as PW-3, Pragan Tuddu as PW-4, Matru Soren as PW-5, A.S.I. Digvijay Singh who has recorded the fardbeyan of the informant as PW-6, victim Maharani Kisku as PW-7 and Dr. Rajeev Kumar Pandey



who has examined the victim as PW-8. Out of the aforesaid witnesses, PW-1 turned hostile. Prosecution has also filed and proved several documents by way of documentary evidence in the case.

8. Statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be innocent. Accused has also filed and proved the certified copy of the judgment of Sessions Trial No. 484 of 1996 in buttress of his case.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, the convict has preferred this Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellant beyond all reasonable doubt or not.

12. It is submitted by learned counsel for the



appellant that none of the witnesses examined by the prosecution happens to be eye witness of the occurrence barring the victim (PW-7). Victim in her statement has stated that whatever she has stated before the court is as per the dictate of her parents and she has not given any statement before the I.O. Thus the victim happens to be tutored witness of the case. As per the account of the informant, his wife and the victim, earlier the sister of the victim had lodged a case of rape against the appellant. As per the account of the victim, the aforesaid case was compromised taking money which goes to indicate that the informant and his family members are habitual of lodging the case against the appellant just to extract money and they have also filed this false and frivolous case against him with the aforesaid purpose. But on refusal of the appellant to oblige them again, matter could not be compromised. It is further submitted that as per the prosecution case and the witnesses' account, the appellant had assaulted her by means of knife, but the doctor in his cross-examination has stated that such injury may be inflicted due to falling on sharp stone. Aforesaid statement of the doctor also goes to create serious doubt about the prosecution case and virtually rules it out. As per the prosecution case and witnesses' account, Radhe Shyam



Manjhi has divulged the factum of finding the victim senseless at the bank of the river to the informant and his family members and on the same information they had rushed there, but the aforesaid Radhe Shyam Manjhi has not been examined by the prosecution. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and the charge levelled against the appellant beyond all reasonable doubt by adducing consistent, trustworthy and reliable evidence. Hence aforesaid judgment and order of conviction and sentence passed against the appellant is liable to be set aside and the appellant is entitled to be acquitted.

13. On the other hand, learned APP advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence submitted that the victim has fully supported the prosecution case and the statement of the victim also stands corroborated by the medical evidence and the learned trial court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction and sentence which is liable to be upheld and this criminal appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the record, it appears that to



substantiate its case, prosecution case examined altogether six material witnesses of the case. Out of them, PW-1 turned hostile. From perusal of the testimony of the rest of the witnesses, it appears that barring the victim all the witnesses do not happen to be eye witness of the occurrence rather they have given their statement regarding the aforesaid occurrence on the premise of the averment made by the victim barring the factum of falling the victim senseless at the bank of river. So far as the victim Maharani Kisku (PW-7) is concerned, from perusal of the testimony of the said witness, it appears that though in her examination-in-chief she has stated in consonance to the prosecution case. But from the perusal of the aforesaid testimony of the victim, it appears that sustaining injury she fell senseless which means that she would not have witnessed the occurrence happened to her after falling senseless. But in her examination-in-chief she has stated that on falling her senseless Chura Kaila tied her neck by means of rope and dumped her in the water. He started digging the pit at the bank of the river. A woman arrived there and asked him about reason for digging the pit, whereupon he divulged that he is digging the pit to bury her. When the woman made protest asking that how her family members would witness her, Kaila made good his escape. Then



a passerby asked the victim about the name of her parents. She divulged him the name of her parents. Then he asked about her name whereupon she divulged her name as well. Then he rushed to her house and took her parents to her. Her parents lifted her then she divulged the occurrence to them. Aforesaid statement of the victim goes to create serious doubt about the sanctity of her testimony as had the victim fallen senseless sustaining injury, then how she could have witnessed the aforesaid occurrence and divulged the aforesaid occurrence to her parents.

15. Informant Churka Kisku (PW-3) has stated in para-4 of his cross-examination that Radhe Shyam Manjhi arriving at him at 3 PM divulged him that his daughter is lying senseless in the river. In Para-5 of his cross-examination, he has further stated that when he arrived at the aforesaid place, his daughter was lying senseless there. In Para-6 of his cross-examination, he has also stated that on the way to Deoghar at 6 PM she regained a bit sense and in the hospital she regained complete sense after four days. He has further stated that she was writhing in pain and was unable to speak at the time of arrival at P.S. The aforesaid statement of the informant indicates that the victim had fallen senseless after sustaining



injury and regained complete sense in the hospital after four days and preceding to that she was unable to speak, but from perusal of the fardbeyan, it appears that the aforesaid fardbeyan was recorded by the I.O. on 07.09.2009 at 02:30 PM and in the aforesaid fardbeyan, informant has stated that when he arrived at the bank of river, he found her daughter injured and on grilling she divulged the entire occurrence to him but in view of the aforesaid discussions as made by me hereinabove, as the victim fell senseless sustaining injury and was lying senseless at the place of occurrence and regained complete sense in the hospital after four days and prior to that she was unable to speak, then how she would have divulged the entire occurrence in detail to the informant on the date of occurrence itself which creates serious doubt about the prosecution case and the sanctity of the F.I.R.

16. PW-2 Bahamuni Hansda has stated in para-2 of her examination-in-chief that earlier Kailash had committed the occurrence of rape against her elder daughter as well. Informant Churka Kisku (PW-3) has stated in para-3 of his cross-examination that the accused had committed the occurrence of rape against his daughter earlier and a case was lodged for that in which the accused was acquitted. The victim



Maharani Kisku (PW-7) has stated in para-4 of her cross-examination that Paanmani Kisku is her elder sister. Paanmani Kisku had also lodged a case of rape against Chura Kaila (appellant). Her parents had compromised the aforesaid case taking money. From perusal of the Exhibit-A which is certified copy of the Judgment of Sessions Trial No. 884 of 1996 filed by the appellant, it appears that the aforesaid Sessions Trial was conducted on the basis of the F.I.R. lodged by the elder daughter of the informant namely Paanmani Kisku which ended into acquittal of the appellant as both the informant and her mother turned hostile. Aforesaid statement of the informant, his wife and the victim and aforesaid document conjointly indicates that earlier a rape case was lodged by the elder daughter of the informant against the appellant and the informant had got the said case compromised taking money. The informant perhaps has again filed the case under hand against the appellant for allegedly committing rape against her another daughter to extract money on the premise of alleged statement of the victim given to him at the place of occurrence. While as per the discussion made by me hereinabove victim was senseless by that time and she was unable to speak and regained complete sense after four days in the hospital.



17. Moreso the victim (PW-7) has stated in para-3 of her examination-in-chief that the police had not grilled her. She has given the statement before the court what has been told to her by her parents. Aforesaid statement of the victim also goes to indicate that the victim has given statement as per the dictate of her parents and she had not given any statement before the I.O. under Section 161 Cr.P.C. Thus the victim happens to be a tutored witness.

18. From perusal of the testimony of the Dr. Rajiv Kumar Pandey (PW-8) and the injury report, it appears that though the doctor has found multiple sharp cut injuries all over the face of the victim, swelling on her face, bleeding from both the nostrils due to depressed fracture of right frontal bone and opined the nature of injury as grievous in nature, but in Para-3 of his cross-examination, he has stated that such injury may be caused if a person falls on sharp stone. Aforesaid statement of the doctor goes to suggest that the victim might have sustained aforesaid injury due to falling on the sharp stone at the bank of the river. Thus, ocular evidence of the victim also does not stand corroborated by the medical evidence.

19. As per the prosecution case and the witnesses' account, Radhe Shyam Manjhi has divulged the informant



about finding the victim senseless at the bank of the river and on the said information informant and his family members had rushed there. But the said Radhe Shyam Manjhi has not been examined by the prosecution and no plausible and convincing reason has been assigned by the prosecution for his non-examination. Hence adverse inference is drawn against the prosecution.

20. In the facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case beyond all reasonable doubts by adducing consistent, trustworthy and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial court against the appellant is set aside and the appellant is acquitted from the charge levelled against him. As the appellant is on bail, he is discharged from the liability of his bail bonds.

21. Accordingly, this criminal appeal is allowed.

(Prakash Chandra Jaiswal, J)

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