

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.765 of 2016

Arising Out of PS. Case No.-141 Year-2012 Thana- KAJI MUHAMMADPUR District-
Muzaffarpur

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Nirbhay Kumar, S/o Late Sachida Nand Sharma, resident of Professors Colony, Sarjug Niwas H.No. A/22, Near Central School, Aghoria Bazar Chowk, P.S. - Kazi Mohammadpur, District- Muzaffarpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Sri Pramod Kumar Singh, Advocate

For the Respondent/s : Sri Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 13-07-2018

1. The sole appellant, was convicted and sentenced in S.Tr. No. 652 of 2012 arising out of Kazi Mohammadpur P.S. Case No. 141 of 2012, for commission of offence under Sections 376 and 343 of the Indian Penal Code, 1860 (hereinafter referred to as the “I.P.C.”) by judgment dated: 27.06.2016 passed by Sri Prabhakar Mishra, learned Additional Sessions Judge II, Muzaffarpur (hereinafter referred to as the “trial judge”) . The appellant was held guilty and convicted for offence under Sections 376 and 343 of the I.P.C. and by order dated – 30.06.2016 under



Section 376 of the I.P.C. he has been sentenced to undergo imprisonment for life and to pay a fine of Rs. 20,000/-. In default of payment of fine, he was further directed to undergo simple imprisonment for two months. Under Section 343 of the I.P.C. he has been sentenced to undergo rigorous imprisonment for 1 ½ years. Both the sentences were directed to run concurrently. After conviction and sentence, appellant preferred the present Appeal under Section 374(2) read with Section 389(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the “Cr.P.C.”). The Appeal was admitted on 05.08.2016. However, the prayer for suspension of sentence and granting bail was not pressed. Subsequently, his prayer for bail was rejected on 21.11.2016 by a Co-ordinate Bench. Thereafter, an interlocutory application vide I.A. No. 3 of 2018 was filed on behalf of appellant under Section 389(1) of the Cr.P.C. for suspending sentence and granting bail during pendency of Appeal. The said I.A. was taken up for hearing on 03.04.2018. At that very time, after examining materials available on record and considering the fact that prayer for bail of appellant was already rejected earlier, the interlocutory application again stood rejected. Since the appellant had remained in custody for more than six years, while dismissing the interlocutory application for grant of bail, this Court



directed Registry to prepare paper -book and list the case for hearing. Thereafter, the matter was taken up for final hearing. On the basis of materials available on record, it is evident that initially appellant was a Bank employee, and thereafter, he started legal practice and he was Advocate in Civil Court, Muzaffarpur.

2. Short fact of the case is that on 06.05.2012 Sub Inspector of Police Kajimohamadpur Police Station namely, Smt. Kumkum Kumari (P.W. 6) recorded 'fardbyan' of one Mukesh Kumar Singh (P.W. 2). The 'fardbyan' was shown to be recorded at 10.00 A.M. However, in the contents it was disclosed as if the informant gave his 'fardbyan' on 06.05.2012 in the night at 10.00 in House No. A/22, Professors Colony, Saryug Niwas, Aghoria Bazar. In 'fardbyan' informant disclosed that on 04.05.2012 he along with his wife - victim (P.W. 4) for doing marketing had come to Muzaffarpur. The informant is resident of village-Wayaschak, P.S.:- Goraul, District – Vaishali. When he reached Ramdayalu (Railway Station) , Muzaffarpur his wife received a telephone call from her cousin -Rinki Devi (not examined). Rinki Devi asked informant's wife to come to the house of Advocate -Nirbhay Kumar (appellant) in Professors Colony, Aghoria Bazar since the informant was in need of a rented house. Rinki Devi persuaded to see the house and have discussion for rent purpose.



Thereafter, informant with his wife (victim) reached at the house of appellant and they noticed that Rinki Devi with one another unknown old lady were present there. The informant with his wife examined the house for rent purpose of Wakil Sahab (appellant). Thereafter, Rinki Devi requested them to stay in the house of Wakil Sahab (appellant). Since it was late night, he along with his wife stayed in one room and in another room Rinki Devi with old lady stayed. In the next morning on 05.05.2012 when informant with his wife started to go out, Wakil Sahab (appellant) and Rinki Devi asked informant to stay further in the house. Thereafter, informant stayed there, whereas, Rinki Devi had already left . After few hours, again when informant was ready to return back, then he was stopped by Wakil - Nirbhay Kumar (appellant). In this way, forcibly preventing him, it was late night. In the night at 8.30 appellant locked the informant in a room and put a lock from outside. The appellant took wife of informant (victim) in an another room and closed from inside. In the next morning on 06.05.2012 appellant ousted the informant from room and asked that they will stay there. Informant stated that in the morning appellant did not permit informant to talk to his wife. In the evening after getting some chance his wife informed him that appellant had raped her in the night. Repeatedly she was raped.



While she opposed appellant put pistol and threatened her not to raise alarm. He threatened that victim and her husband will be done to death. The informant further stated that appellant forcibly asked the victim to take bath in the morning and also compelled her to wash the clothes. It was alleged by informant that appellant forcibly took Rs. 2,000/- from him which he had carried for marketing and also forcibly took golden ear ring and 'dholna' of gold of his wife (victim). The informant further disclosed that anyhow in the evening after getting some chance he jumped from the roof and came to Police Station and thereafter, victim was recovered from the house of appellant. On the basis of 'fardbyan' of informant a formal F.I.R. vide Kajimohamadpur P.S. Case No. 141 of 2012 was registered on 06.05.2012 at 11.00 P.M. for offence under Sections 342/ 343/376/379/506 of the I.P.C.

3. After registering F.I.R. the case was investigated and on 30.06.2012 charge -sheet was submitted against the sole accused, in which, on 24.08.2012 learned Chief Judicial Magistrate, Muzaffarpur took cognizance of offences. The case was committed to the court of Sessions on 28.09.2012, and finally, on 07.08.2013 charge under Sections 376, 379, 506 & 343 of the I.P.C. was framed against the appellant. To establish its case, from prosecution side altogether seven witnesses were examined.



Out of seven witnesses, the informant - Mukesh Kumar Singh was examined as P.W. 2. The victim was examined as P.W. 4. Doctor - Smt. Krishna Singh, who medically examined the victim was examined as P.W. 5. P.W. 7 (Prem Singh) is the brother of victim, whereas, P.W. 1 (Avinash Kumar, S/o Late Ramadhar Sharma) and P.W. 3 (Avinash Kumar, S/o Late Ram Ekbal Singh) did not support the prosecution case and were declared hostile. The Investigating Officer -Smt. Kumkum Kumari was examined as P.W. 6. After conclusion of prosecution evidence, on 19.05.2015 circumstances and evidences collected during trial against the appellant were explained to him and his statement under Section 313 of the Cr.P.C. was got recorded. In statement under Section 313 of the Cr.P.C. the appellant denied the accusation and took plea that he was falsely implicated and he also claimed to examine defence witnesses. Thereafter, from defence side altogether five witnesses were examined, namely: Sarita Devi (D.W. 1), who is cousin sister of appellant, D.W. 2 (Prabhat Kumar) - neighbor of the appellant , D.W. 3 (Abhishek Kumar) who was a student and residing in the house of appellant, D.W. 4 (Vibhu Kumar) who for some time was inside jail with the appellant and he proved the document pertaining to physical verification of appellant and that document was marked as Ext. A



and D.W. 5 is Vishwanath Singh, who has proved the document, which was marked as Ext. C.

4. Sri Pramod Kumar Singh, learned counsel for the appellant, after placing entire evidence, has argued that it was out and out a case of false implication. He submits that the very initiation of the case i.e. lodging of F.I.R. itself appears to be ante-dated and ante -timed. He has drawn our attention to the top of 'fardbyan' which is written in English. He submits that the Investigating Officer, herself has stated that she recorded 'fardbyan' of the informant on 06.05.2012 at 10.00 A.M., however, in the content of 'fardbyan' it was disclosed as if informant gave his 'fardbyan' on 06.05.2012 at 10.00 in the night in the house of appellant. He has further referred to the evidence of informant (P.W. 2) paragraph no. 2 at running page no. 15 of the paper-book. He submits that informant stated that after Police recovered the victim, he along with victim went to the Police Station and in Police Station his fardbyan' was recorded, however, contents of 'fardbyan' indicates as if it was recorded in the house of appellant and that too apparent falsification has been noticed, which is the timing i.e. 10.00 A.M., which indicates that actually 'fardbyan' was recorded in the next morning at 10.00 A.M. Sri Pramod Kumar Singh, learned counsel for the appellant submits that one



day after recovery of victim, her statement under Section 164 of the Cr.P.C. was recorded on 08.05.2012. On examination of disclosure made by victim in her statement recorded under Section 164 of the Cr.P.C. it is evident that story built -up in 'fardbyan' is entirely different. He submits that in 'fardbyan' it was disclosed by informant as if from his village with his wife he had gone to Muzaffarpur for shopping, whereas, the victim in her 164 Cr.P.C. statement stated that from her village she along with her husband had come to Muzaffarpur to visit the house of appellant for the purposes of hiring room on rent. It has also been argued that the victim was shown to be recovered in the night of 06.05.2012, but without any plausible explanation she was not immediately medically examined by doctor. In this case, victim was got examined by the Medical Officer on 08.05.2012. However, in her medical examination no mark of sexual assault was found. Even no injury was noticed on the person of victim, however, in 'fardbyan' it was disclosed that victim was assaulted at the time of committing crime. Learned counsel for the appellant further submits that it is a peculiar case in which prosecution has taken a stand that victim and informant were confined in the house of appellant for two days, but neither victim nor informant raised any alarm so that, the neighbourers would have noticed



that something was happening in the house of appellant. He further submits that since it was a case of false implication. The Investigating Officer purposely did not examine either of the neighbourers. However, none of the neighbourers has come forward to support the prosecution case as to whether they heard any alarm or cry from the house of appellant. Sri Pramod Kumar Singh, learned counsel for appellant has specifically drawn our attention to the evidence of Investigating Officer (P.W. 6) . He submits that it is case of prosecution that informant after finding some chance escaped from confinement and he rushed to Police Station and he informed about confinement of victim, the Investigating Officer in her evidence has stated that she got information from Superior Officers, and thereafter, she rushed to the house of appellant and recovered the victim. Again, it has been argued that though it was case of prosecution that appellant after committing rape had taken 2,000/- rupees from the informant, taken ear ring and gold 'dholna' of victim, during search nothing was recovered by Police. Even though the victim had disclosed that at the time of committing rape she was threatened by showing pistol by the appellant, there is no recovery of any arm from the house of appellant. All those circumstances, according to learned counsel for the appellant, suggests that it was out and out a case of



false implication. Alternatively, it has been argued that at least it is a case in which prosecution has not been able to establish its case beyond all reasonable doubts, and as such, appellant is entitled to get benefit of doubt.

5. Sri Ajay Mishra, learned Additional Public Prosecutor has vehemently opposed the Appeal. He submits that in a case of rape, the evidence of prosecutrix is itself enough for convicting an accused. In the present case, according to learned Additional Public Prosecutor the evidence of victim is very much consistent and there is no reason to raise any doubt on her evidence. He further submits that it is case of the prosecution that after being raped the victim was forced to take shower and this was the reason that during medical examination nothing was found showing commission of rape on her .

6. Besides hearing learned counsel for the parties, we have also perused entire evidence available on record and after going through evidences on record, prima facie, we are of the opinion that prosecution has not been able to establish its case beyond all reasonable doubt. Before proceeding further, it would be necessary to examine the evidence on record. At the very outset, it is necessary to notice as to what the informant has stated in his evidence. The informant (Mukesh Kumar Singh) was



examined as P.W. 2. In his evidence he has stated that occurrence had taken place on 05.05.2012 at 8.30 P.M. On 04.05.2012 he by train in the evening had arrived at Ramdayalu Railway Station for the purposes of marketing with his wife (victim). Thereafter, on mobile of his wife a call from Rinki Devi was received. Rinki Devi informed that place is vacant in the house of Nirbhay Kumar -Wakil Sahab (appellant) and she asked informant and his wife to come there. Thereafter, he along with his wife reached there and in his evidence he virtually reiterated the fact which was stated in his 'fardbyan'. In his evidence at running page no. 13 of the paper-book he stated that during continuity of occurrence while appellant had gone outside the house, then his wife narrated entire story. If it was case of informant that he was locked in a separate room and his wife was locked in another separate room and he noticed that appellant had gone outside the house, it is difficult to perceive as to under what circumstances his wife narrated him regarding entire episode. It is also difficult to perceive that once the appellant had already gone outside the house and informant was in a position to meet with his wife, then there was no restriction. They would have left the house, but informant preferred to remain in the same house. From his evidence it is further evident that while he along with Police reached at the



house of appellant for the purposes of recovery / getting free his wife, he noticed that appellant was sitting on 'veranda'. It is difficult to perceive that once appellant had noticed that one of the confined persons had already fled away, then, in casual manner, his presence in 'veranda' creates serious doubt on the prosecution case. In paragraph no. 2 of his evidence he deposed that he went and knocked the door, then the appellant enquired as to who is he? He saw the administration on the vehicle. He further stated that then appellant asked the administration people who were on vehicle to come inside. This also creates serious doubt in the mind of the court. In normal course, if the appellant had confined the victim inside his house, his conduct of asking Police Officials to come inside creates serious doubt on the prosecution case.

7. P.W. 4 (victim) in her evidence has identified her signature on her statement recorded under Section 164 of the Cr.P.C. The same statement during trial was got exhibited and marked as Ext . 2. In her statement under Section 164 of the Cr.P.C. she stated that her maternal cousin sister- Rinki Devi telephonically had called her. With her husband, then she went there. From Muzaffarpur Railway Station Rinki Devi brought her with her husband to the house of appellant. When she went to the house of appellant, the appellant locked her husband in a room



and carried the victim to his own room and thereafter, she was un-dressed and forcibly she was raped for whole night. Thereafter, he assaulted her and forcibly took her mobile. She stated that her husband was also assaulted. From his room the appellant brought a small pistol and threatened her. This P.W. 4 in her statement recorded under Section 164 of the Cr.P.C. further stated that Rinki Devi had taken money from Wakil Sahab (appellant). Her husband was also locked in a room. After committing rape she was forced to take bath and she was not allowed to talk to her husband. On examination of her statement recorded under Section 164 of the Cr.P.C. and her evidence before the court below, it is evident that much contradictory stand has been taken. The statement of victim recorded under Section 164 of the Cr.P.C. contradicts entire prosecution story. Even it belies the 'fardbyan'. In the 'fardbyan' the informant disclosed as if while he reached Ramdayalu Station Rinki Devi telephonically called his wife to visit the house of appellant, however, in her statement under Section 164 of the Cr.P.C. she (P.W. 4) states as if from Muzaffarpur Station Rinki Devi carried informant and victim to the house of appellant. The victim in her evidence during trial stated that occurrence had taken place on 04.05.2012 in the night at 8.00. She and her husband -Mukesh Kumar Singh (P.W. 2)



were coming to Muzaffarpur for marketing. Rinki Devi telephonically told her that there is one room in the house of appellant and she had talked for the rent. She asked her to come and see the room. Then she with her husband went to the house of appellant where she saw Rinki Devi with one old lady present there. Thereafter, she stated that she was locked in one room and her husband was locked in another room. She was raped. She was repeatedly raped. She was forcibly un-dressed. In the night at 3.00 appellant forcibly asked her to wash herself and wash her clothes also, which she did. She stated that she was not allowed to talk to her husband, however, in the morning she narrated the story to her husband. She further stated in paragraph no. 1 of her evidence that appellant had forcibly taken her entire ornaments.

8. P.W. 1 (Avinash Kumar, S/o- Late Ramadhar Sharma) and P.W. 3 (Avinash Kumar, S/o Late Ram Ekbal Singh) have not supported the prosecution case and they were declared hostile.

9. P.W. 5 (Dr. Krishna Singh) on 08.05.2012 had medically examined the victim, however, she did not notice any mark of rape on her (victim's) person or any internal or external injury on the body of victim. She proved the medical report, which was marked as Ext. 3 and she also proved pathological



report , which was marked as Ext. 3/1. On medical examination

P.W. 5 recorded the following findings:-

“Secondary sex character. Axillary hair present, breast developed per abdomen no external injury found. Public hair present. Hymen old ruptured and admits two finger. No internal and external injury found on her private part. Vaginal swab and semen taken and send in Sadar Hospital Muzaffarpur in Pathology Dept. Muzaffarpur for Microscopic examination for presence of spermatozoa. Pathological report received on 9-5-12 and as per report spermatozoa not found.”

10. P.W. 7 (Prem Singh) has been examined claiming to be brother of victim and he deposed that he was called by Police and then he went to Police Station. The evidence of Prem Singh, who has claimed to be brother of victim has got no much relevance, and as such, there is no need to examine his evidence in detail.

11. P.W. 6 (Smt. Kumkum Kumari), Sub Inspector of Police, was the Investigating Officer of the case. During her evidence she proved her endorsement on ‘fardbyan’, which was marked as Ext. 1/1. In paragraph no. 20 of her cross -examination this witness has stated that she had written name of husband of victim as Rakesh Kumar. She stated that this name was disclosed by the victim herself. Meaning thereby that there is some doubt regarding the entity of informant as to whether he was actually



husband of victim or not. In paragraph no. 25 of her cross examination she was specifically asked as to whether she had obtained details regarding mobile of victim , appellant and Rinki Devi. She stated that she had not done this. In paragraph no. 49 of her cross- examination she further stated that she had not obtained C.D.R. In paragraph no. 1 of her examination –in-chief , P.W. 6 (Investigating Officer) has stated that on 06.05.2012 she was posted in Kazimohamadpur Police Station and on the said date she received information from Senior Officers and on such information she went to the place of occurrence, whereas, it is case of prosecution that informant after his escape from confinement of appellant, went to Police Station, informed the Police, then Police rushed to the place of occurrence i.e. house of appellant. This statement of P.W. 6 again creates some doubt regarding the correctness of receipt of information from the informant in Police Station. This witness was cross-examined in detail as to whether she conducted any investigation or enquiry regarding permanent address of victim i.e. regarding address of her in –law’s house or parental house, whereas, at one stage the victim had stated to be resident of Vaishali, whereas in her statement recorded under Section 164 of the Cr.P.C. she disclosed as if she was resident of Muzaffarpur. Of- course during her



further evidence she tried to develop a case that Muzaffarpur was her parental house. This again creates doubt as to once she was married and it was a case that she was coming from Vaishali to Muzaffarpur, in that event after her recovery, in her statement recorded under Section 164 of the Cr.P.C. on 08.05.2012 there was no reason for disclosing her address as Muzaffarpur. On examination of evidence of P.W. 6 it is also apparent from paragraph no. 3 of her cross – examination that she stated that in supervision note it was mentioned that steps be taken for arresting Rinki Devi. Again in paragraph no. 4 of her cross-examination she states that she was not aware regarding whereabouts of Rinki Devi, however, it was indicated as if supplementary investigation was going on. In paragraph no. 5 of cross – examination a categorical statement was made by the Investigating Officer that from the place of occurrence no article was recovered. In paragraph no. 32 of cross -examination she has stated that informant was accused in a case for offence under Section 302 of the I.P.C., however, it was not written in case diary. In paragraph no. 53 of her cross – examination she stated that on 02.04.2014 and 19.05.2014 the victim in her statement had stated that as per direction of S.P. Sahab, Rinki Devi was called at Police Station and after taking money she was left, however, she stated that she



had not met with Rinki Devi. At last she was given suggestion that appellant was falsely implicated as per instance of Sri Bachcha Singh, Town Dy.S.P. and Sri K.K. Qurashi, however, the suggestion was denied.

12. On going through entire evidences on record, it is evident that prosecution has not been able to establish its case beyond all reasonable doubt. The very fact disclosed in 'fardbyan' in view of facts disclosed by the victim in her statement recorded under Section 164 of the Cr.P.C. itself appears to be doubtful. The informant though stated that he went to Police Station and thereafter, he with Police party arrived at the house of appellant appears to be not believable in view of evidence of Investigating Officer, who in her evidence has stated that as per direction of Superior Officer she had visited the place of occurrence. Non finding of any material at the place of occurrence also creates serious doubt on prosecution case, whereas, it was consistent case of the victim as well as informant that after committing crime appellant had forcibly taken 2,000/- rupees from informant and took ornaments of victim, but there is no recovery to that affect. It was case of the victim that she was threatened and she was shown a small pistol by appellant, however, while Police conducted raid, there was no recovery of any arms. It also creates



serious doubt on prosecution case that once informant along with Police had arrived at the place of occurrence in which it was alleged that informant's wife (victim) was forcibly confined by appellant, nothing has been indicated by Investigating Officer as to whether the victim was locked in a room or not, rather evidence has come that while Police arrived the appellant was found in 'verandah' and after knocking the gate he came out and he himself asked Police Officials to come inside the house. The other reason for testing the case as doubtful is that the Investigating Officer had not bothered to collect telephone / mobile call details, whereas, right from the beginning it was case of prosecution that while informant reached Muzaffarpur on mobile one Rinki Devi, so- called cousin sister of victim, called them to see room for rent, whereas, the informant has stated that from Vaishali to Muzaffarpur they had arrived for the purposes of shopping and again non -examination of the so -called Rinki Devi also creates serious doubt on prosecution case. It was case of prosecution that at least for two days victim along with informant were confined in the house of appellant. Meaning thereby that there was every reason to believe that they had raised cry and alarm, but none of the neighbourers had come forward to support the prosecution case nor Investigating Officer had bothered to record statement of any



such person to corroborate the case of confinement of informant and the victim. Again there is every reason to consider the case as doubtful in view of the fact that though Police had claimed that it rescued the victim from the premises of appellant, who was repeatedly raped by the appellant, there is no explanation as to why immediately after recovery she was not got examined by Medical Officer. In this case recovery of victim was made on 06.05.2012 at 9.00 in night, however without any plausible explanation she was got medically examined on 08.05.2012 and during such examination no sign of rape on the person of victim was found.

13. From defence side one document has been got exhibited i.e. Ext. A through D.W. 4 (Vibhu Kumar). On examination of Ext. A it is evident that on chest and entire body of appellant there were remarkable wound marks and to this affect a specific question was asked to victim as to whether at the time while occurrence was being committed by the appellant she had noticed any visible mark on the person of appellant, it was denied by her, though, it was case of victim that while she was being raped at least on one occasion appellant was shown to be completely undressed along with victim. The defence through D.W. 1, who is cousin sister of appellant has brought on record



the fact that she (D.W. 1) along with her daughter had visited house of appellant on 04.05.2012 and she remained there up to 05.05.2012 and in afternoon she returned back. She has stated that save and except Abhishek Kumar who was already staying in the said premises, none had come. This has also been corroborated by the evidence of other D.Ws. It is true that in a criminal trial much reliance is not required to be placed on the evidence of defence witnesses, but while examining the evidence in totality, certainly, in view of the facts and circumstances of the present case, it was required to notice such fact.

14. On examining entire evidence on record, we are of the considered opinion that prosecution has not been able to establish its case beyond all reasonable doubt. Accordingly, by way of extending benefit of doubt, it is desirable to interfere with the judgment of conviction and sentence, and as such, judgment of conviction and order of sentence dated: 27.06.2016 and 30.06.2016 respectively passed by Sri Prabhakar Mishra, learned Additional Sessions Judge II, Muzaffarpur in S.Tr. No. 652 of 2012 arising out of Kazi Mohammadpur P.S. Case No. 141 of 2012 is hereby set aside and Appeal is allowed.



15. Since appellant is in custody and his conviction and sentence has been set aside, it is hereby directed to release him forthwith, if not wanted in any other case.

16. The Appeal stands allowed.

(Rakesh Kumar, J)

(Arvind Srivastava, J)

praful/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	24-07-2018
Transmission Date	24-07-2018

