

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

**Criminal Appeal (SJ) No.2879 of 2018**

Arising Out of PS.Case No. -353 Year- 2009 Thana -SAKRA District- MUZAFFARPUR

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Surendra Thakur Son of Hardeo Thakur Resident of Village : Majhauri Pachdahi,  
P.S. Sakra, District: Muzaffarpur.

.... .... Appellant

Versus

The State of Bihar.

.... .... Respondent

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**Appearance :**

For the Appellant/s : Mr. Rabindra Kumar, Advocate

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

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**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH**

ORAL JUDGMENT

**Date: 06-09-2018**

Heard learned counsel for the appellant and learned  
counsel for the State.

2. With the consent of the parties, this appeal has been  
taken up for final hearing.

3. The sole appellant was put on trial for the charge under  
Section 376 read with 34 of the Indian Penal Code. Since he was  
found guilty of the charge, the trial court convicted him for the said  
charge and sentenced him to undergo rigorous imprisonment for  
eight years.

4. Learned counsel appearing for the appellant has  
submitted that in absence of any legal evidence against the appellant,  
he has been convicted for the offence of rape. He submitted that  
altogether six witnesses were examined in the case, out of whom



P.W.1, Madan Sah, P.W.2, Ranjay Kumar and P.W. 4, Ram Jyoti Devi did not support the case of prosecution as against the appellant. P.W. 5, the victim did not turn up for cross-examination. Hence, her evidence could not have formed basis for conviction. The other two witnesses, namely, P.W.3 and P.W.6 are the official witnesses. They are the investigating officer of the case and the doctor who examined the victim respectively. On the basis of their evidence also, the appellant could not have been held guilty for the charge of rape.

5. On the other hand, learned counsel appearing for the State submitted that the victim is none else but the daughter of the present appellant. In her fard-beyan, she has alleged that the appellant had ravished her. She also supported the allegation in her examination-in-chief but, unfortunately, she did not turn up for cross-examination after the date on which her examination-in-chief was recorded. He contended that the circumstantial evidences are also against the appellant. Hence, the judgment of the court below cannot be held to be bad or erroneous.

6. I have heard learned counsel for the parties and carefully perused the record.

7. The first information report is based on the fard-beyan of the victim, which was recorded by one Dhananjay Kumar, Sub Inspector of Town Police Station at Sadar Hospital Mahila Ward, Muzaffarpur on 20.09.2009 at 10.00 p.m. In her oral statement, she



has alleged that she is aged about 17 years. Her mother had died during her childhood. She has two brothers and one sister. Her father had ousted his two brothers and grandmother prior to Holi and in the house, she was alone. On the eve of Holi, her father came drunk and established physical relationship with her. On protest, he threatened her. She has further alleged that thereafter, her father used to exploit her of and on. She further alleged that her father and his friend Ramod Kumar (Lohar) used to come in inebriated condition at house. Subsequently, Ramod Kumar also established physical relationship with her and assured that he would marry her. He promised that he would first construct his own house and, thereafter, marry her. In the meantime, she became pregnant. When her pregnancy was of 6-7 months, she was ousted by her father from the house. Thereafter, she came to Bhagwanpur Chowk by bus from where she came to Muzaffarpur Hospital where her treatment was going on.

8. On the basis of said statement, after instituting the first information report under Section 376 read with 34 of the Indian Penal Code against the appellant and Ramod Kumar, the officer-in-charge of the police station handed over investigation of the case to one O.P. Mishra, S.I. of Sakara Police Station.

9. On completion of investigation, the appellant was sent up for trial. The learned Magistrate after taking cognizance of the



offence and supplying documents, as required under Section 207 of Code of Criminal Procedure, committed the case to the court of session for trial. Thereafter, the trial court framed the charge on 20.09.2009 against the appellant under Section 376 read with 34 of the Indian Penal Code. Since the appellant did not plead guilty, the trial commenced.

10. In course of trial, six witnesses were examined on behalf of the prosecution. They are P.W.1, Madan Sah, P.W.2, Ranjay Kumar, P.W.3, Om Prakash Mishra, P.W.4, Ram Jyoti Devi, P.W.5, the victim and P.W.6, Dr. Prabha Sinha.

11. On perusal of the evidences adduced on behalf of the prosecution, I find that P.W.1 Madan Sah and P.W.2, Ranjay Kumar were declared hostile by the trial court at the request of the prosecution, as they did not support the case of the prosecution. The prosecution cross-examined them, but from their cross-examination also the prosecution case gets no help.

12. P.W.4 Ram Jyoti Devi has stated in her examination-in-chief that her grand-daughter was subjected to rape on the eve of Holi. She stated that the daughter of one Raj Kumar had taken her granddaughter to the house of one Ramod Thakur, who ravished her, as a result of which she became pregnant. She has not uttered a word against the appellant in her examination-in-chief. In cross-examination, she stated that accused Ramod and his sister-in-law



were instrumental in getting the case instituted against the appellant. She further stated that the appellant is innocent. The prosecution made no request to the court for declaring the said witness hostile. Thus, her evidence remained intact. The defence can rely upon the same to plead innocence of the appellant.

13. When I look to the deposition of PW-5, I find that it has rightly been pointed out by the learned counsel for the appellant that the said witness did not turn up for cross-examination after the date on which her examination-in-chief was conducted. In order to be sure, as to whether opportunities were granted to the prosecution to produce P.W.5 for cross-examination or not, I have looked into the lower courts records. I find that the case was adjourned on several occasions for producing witness, but P.W.5 did not turn up after 11.05.2012, the date on which her examination-in-chief was conducted. Under such circumstances, the trial court ought to have discarded her evidence. Surprisingly, the trial court has placed reliance on her evidence for holding the appellant guilty. It would be highly unsafe to rely on the statement of a witness who had not appeared for cross-examination after recording of the examination-in-chief. Further, from examination-in-chief of the victim, it would appear that there are material contradictions in her statement made in the fard-beyan and the statement made before the court. She has alleged in the FIR that she was ravished in her house by the



appellant, but in her examination-in-chief, she stated that on the eve of Holi, it was sister of Ramod Kumar, who took her to her house on the pretext that her sister-in-law was not well and when she went to her house, she shut the door of her room in which she was present. In the said room, Ramod Kumar was present from before, who ravished her and told not to disclose about the same to anyone. She further stated that she was taken to hospital by the sister and sister-in-law of Ramod Kumar and from there they escaped. She stated that the doctor asked her about her details. When she disclosed all the things even a press reporter had come. Thereafter, a police officer recorded her statement. She proved her signature on the fard-beyan. It was marked as Ext.1. She further stated in her examination-in-chief that her mother had died in her childhood. In the house, she used to live with her grand-mother and father. Her father is a drunkard and had established physical relationship with her once.

14. When I compare the deposition of the victim given in the court and the FIR, I find that there are lot of contradictions. Firstly, in the FIR, she alleged that it was her father who ravished her first, but in examination-in-chief, she stated that she was taken to the house of Ramod Thakur by her sister on the pretext that her sister-in-law was not well and when she reached there Ramod Thakur ravished her whereas, in the FIR, she has alleged that her father came in inebriated condition and ravished her first. Secondly, in the FIR,



she alleged that she was ousted from her house by her father when her pregnancy was of 6-7 months, but in the deposition, she stated that it was the sister and sister-in-law of Ramod Thakur, who had taken her to hospital from where they escaped. Thirdly, she has stated in the FIR that Ramod Thakur had ravished her in her house when he was drunk and, thereafter, repeatedly established physical relationship with her on the pretext of marriage, but in her deposition, she had not stated anything about the promise of marriage. However, in her examination-in-chief she has stated that Ramod Thakur ravished her firstly when she was taken to his house by his sister on a false pretext. These are all vital contradictions. Be that as it may, since she did not turn up for cross-examination, her statements given in examination-in-chief recorded by the trial court has got no evidentiary value. Her evidence has to be discarded for all purposes.

15. Having discussed the deposition of independent witnesses, now I would like to appreciate the deposition of the two official witnesses i.e. the doctor and the investigating officer. The investigating officer of case has stated that in course of investigation, he had apprehended the appellant and produced him before the court from where he was remanded to judicial custody. He recorded the statement of the victim and other witnesses and after receiving the supervision note submitted charge-sheet in the case. He has proved



his signature on the fard-beyan. In cross-examination, he admitted that in the statement of the victim recorded in course of investigation she had not alleged anything against the appellant. He further admitted that in her further statement recorded in Para-40 of the case diary, the victim had stated that her father was innocent. She stated that she became pregnant because Ramod Thakur had ravished her. He stated that a separate charge-sheet was also filed against Ramod Thakur. Thus, the evidence of P.W.5 also would point out towards innocence of the appellant, as the victim gave him a clean chit in the further statement. There is no other factor in the deposition of investigating officer on the basis of which the appellant could have been held guilty of the charge framed against him.

16. So far as P.W.6, the doctor is concerned, she medically examined the victim immediately after institution of FIR. She has simply stated that the victim was habitual to sexual intercourse and on the date of her examination her pregnancy was of 26 to 28 weeks.

17. If this was the quality of evidence, I fail to understand as to how the trial court reached to the conclusion that the prosecution has proved its case beyond reasonable doubts. As seen above, P.Ws. 1 and 2 were declared hostile, P.W. 4 has stated that the appellant was innocent, P.W. 5 did not turn up for cross-examination and evidences of P.Ws. 3 and 6 also do not support the case of the prosecution as far as the appellant is concerned.



18. Hence, in my considered opinion, in the given set of evidence, by no stretch of imagination the appellant could have been held guilty of charge of rape.

19. In view of the discussions made above, the impugned judgment of conviction and order of sentence dated 12.06.2018 passed by the learned 13<sup>th</sup> Additional District and Session Judge, Muzaffarpur in Session Trial No. 239 of 2010 are set-aside. The appellant is directed to be released forthwith, if not wanted in any other case.

20. The appeal stands allowed.

**(Ashwani Kumar Singh, J)**

Kanchan/Ranjeet

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