

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.267 of 2015

Arising Out of PS.Case No. -281 Year- 2007 Thana -KHAZANIHAT District- PURNIA

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1. Kamlesh Das S/o Kali Das Resident of Village Ramnagar, P.S. K. Hat
(Maranga), District Purnea. Appellant/s

Versus

1. The State of Bihar Respondent/s

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Appearance :

For the Appellant/s : Mr. Kumar Praveen, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 16-03-2018

Appellant, Kamlesh Das has been found guilty for an offence punishable under Section 366A IPC and sentenced to undergo SI for 7 years as well as to pay fine of Rs. 5000/-, in default thereof, to undergo SI for 6 months additionally, under Section 376 IPC, sentenced to undergo SI for 7 years as well as to pay fine of Rs. 5000/- and in default thereof, to undergo SI for 6 months, additionally with a further direction to run the sentences concurrently, vide judgment of conviction dated 02.05.2015 and order of sentence dated 05.05.2015 passed by Additional Sessions Judge-2nd, Purnea in Sessions Trial No. 1016/2007/500/2014.

2. Victim (PW-5) filed a written report which was earlier addressed to Superintendent of Police, Purnea but after cutting the same, it was addressed to O/C, Maranga, divulging the fact that she happens to be aged about 17 years. On 18th September 2006, her co-villager, Kamlesh Das disclosed to her to accompany to Puran



Devi Mandir and after worshipping they will return whereupon, she accompanied Kamlesh to Puran Devi Mandir wherefrom he forcibly took her to village-Sarsi, Distt-Darbhanga and got married with her. After marriage, she stayed there for three days and then shifted her to village-Khudin, Distt-Madhubani, the place of his 'Phua' where they stayed for 10 days and from there to Jail Chowk, Purnea where they stayed for four days and then thereafter, to Punjab where they stayed for 20 days at the house of his Phua and then thereafter, took on rent independently. On 20.03.2007, they returned back to Purnea and stayed at the house of uncle of Kamlesh lying at Mahboob Khan Tola (Mahendra Das and Faglu Das) and during course thereof, he projected himself as her husband and behaved in the same manner with her.

3. After few days, Kamlesh, Surja Devi, Kali Das, wife of Kali Das have advanced demand of Rs. 1 Lac to be procured from her father so that they should start a business which was resisted by her stating that first of all you people have forcibly married with her and then, are illegally demanding money. Her parents happen to be poor fellow, from where, they will manage money. Just after hearing the same, she was brutally assaulted and compelled her to leave the place. She on her own tried to leave the place but, they were keeping watch. Subsequently thereof, they procured presence of an Advocate who took her signature over some papers. She had further



disclosed that she happens to be mentally instable. As the appellant was on visiting terms, on account of her mental instability she accompanied Kamlesh. Later on, she had been badly tortured on account of non procurement of Rs. 1 Lac. Out of poverty, her parents had not instituted any case. It has also been disclosed that on 20.08.2007, after brutally assaulting her, they kicked out with a direction that she will be welcomed only after having cash appertaining to Rs. 1 Lac. She came back to the place of her parents and divulged the event. Then thereafter, the written report is being placed for necessary action.

4. On the basis of aforesaid written report, K-Hat PS case No. 281/2007 was registered followed with an investigation and after completing the same, charge-sheet was submitted against the appellant whereupon trial commenced and concluded in a manner, subject matter of instant appeal.

5. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has further been pleaded that victim happens to be major and out of free will, she got married with the appellant, consummated the marriage staying with the appellant, unfortunately, got influenced by her Naiharwala when had visited their place and then, got this case filed. Furthermore, Exhibit-A, B series have been brought up on record in support of defence.



6. In order to prove its case, prosecution had examined altogether 6 PWs, those are, PW-1, Yogendra Das, PW-2, Sarawati Raman Jha, PW-3, Sagar Devi, PW-4, Informant/victim, PW-5, Dr. Sushila Das and PW-6, Dinesh Prasad Das. Side by side had also exhibited Ext-1, Signature of informant over written report Ext-2, Signature of informant over statement recorded under Section 164 CrPC, Ext-3, Medical report, Ext-4, Formal FIR. Defence had also examined one DW, Rupesh Kumar Ujjawal, an Advocate as well as also Exhibited Ext-A, photograph of victim (alone), Ext-A/1, photograph of victim with Kamlesh Das, Ext-A/2, photograph of Kamlesh with victim, Ext-A/3, group photograph of victim along with Kamlesh and others, Ext-B, B/1, writing of victim, victim over a copy. Another photograph has been marked as Ext-X.

7. Learned counsel for the appellant has submitted that while passing the judgment of conviction and sentence the learned lower court failed to construe the improbability persisting in the prosecution case which, in case, would have been appreciated properly, would not have permitted judgment of conviction and sentence. In order to substantiate the same, it has been submitted that from the prosecution case, it is evident that victim remained with the appellant from 18.09.2006 to 20.08.2007, that means to say, approximately a year without having any protest, grievance. The evidence of PW-2, father, depicts the consensual activity as, he had



stated that when he had seen the victim in company of appellant going over an auto-rickshaw, even then, he had not instituted a case as, he thought that when the victim had herself accompanied the appellant, then as to why there should be institution of a case (PW-2 para-9) and that is sufficient to acknowledge the majority as well as consensual activity of the victim. In likewise manner, it has also been submitted that though victim had during course of her evidence, stated that written report was prepared by Darogaji itself but, it happens to be a typed copy and was initially addressed to Superintendent of Police, Purnea, so certainly, it would not be at the end of Darogaji.

8. At the present juncture, it has further been submitted that non examination of Investigating Officer has caused prejudice in the background of the fact that had there been examination of Investigating Officer, the conduct of the victim would have properly been exposed. It has also been submitted that from the evidence of doctor PW-5, it is apparent that the victim was put under medical examination by a Board of Doctors who had identified her age to be in between 17 to 19 years and having the flexibility of plus minus two years, it goes to 15 to 21 years and as upper limit is to be accepted, on the date of her examination so she was aged about 21 years, that means to say, on the date of alleged occurrence, she was aged about 20 years, a major one and that being so, perceiving her conduct, it could not be said that she was kidnapped and in likewise



manner, was raped repeatedly. That being so, the judgment of conviction and order of sentence recorded by the learned lower court happens to be contrary to the spirit of law whereupon, is fit to be set aside.

9. On the other hand, learned APP, controverting the submission having been made on behalf of learned counsel for the appellant, has submitted that though at initial stage, victim had joined the appellant out of her own free will but subsequently, when the appellant had seen that now the victim under his claw, pounced upon her and during course thereof, exploited her which the victim was forced to face against her will as initially she putting belief upon the appellant, accompanied alone. That being so, it was an outcome of evil design whereunder she was victimized by way of rape repeatedly which, the victim had categorically stated during course of her evidence which has not been controverted at the end of appellant. In the aforesaid facts and circumstances of the case, when the allegation having been levelled at the end of the victim has not been controverted at the end of the appellant nor subjected to cross-examination, then in that event, will tantamount to an admission justifying the finding having been recorded by the learned lower court.

10. After going through the evidence available on record, it is evident that stay of victim with the appellant is not denied.



In likewise manner, as has been suggested by the appellant that they solemnized marriage and consummate the marriage happily, is also out of controversy. The only question now one has to identify, (A) the status of victim, minor or major, (B) was a consenting party.

11. After going through the evidence of PW-2, father, who is completely silent during his examination-in-chief regarding status of the victim and in likewise manner PW-3, mother of the victim also kept silence regarding status of victim where she happens to be major or minor. Although, in the written report there was specific disclosure that she happens to be aged about 17 years, during her examination-in-chief, she had not reiterated. In the format, the court had estimated her age to be 22 years while she had shown her age to be 21 years, which could not be accepted as the aforesaid arrest happens to be before swearing of an oath. Although, the victim happens to be literate as, her signature is found at different papers including over deposition but, neither PW-2 nor PW-3 nor the victim herself had deposed that she had studied and if so, up to what class, what happens to be her date of birth and then in the aforesaid background, her status is to be seen as recognized after medical examination as deposed by PW-5 who on the date of her examination i.e. 11.09.2007 estimated in between 17 to 19 years.

12. Learned counsel for the appellant rightly argued that the aforesaid finding is always subject to variance plus minus two



years and the upper age is to be considered whereupon the age varies in between 19 to 21 years and if it is tallied with the date of occurrence, certainly she was major being above 18 years of age. So, her subsequent conduct is to be perceived identifying her status to be major.

13. PWs-2 and 3 are parents who have not alleged that the victim was taken away forcibly out of threat or coercion or inducement and the same is coming out from the deposition of the victim. PWs-2 and 3 are not at all competent witness over intervening period as whatsoever they deposed happen to be on the basis of discloser having at the end of the victim and that being so, the evidence of victim is to be seen in order to adjudge whether the finding recorded by the learned lower court happens to be just, legal and proper.

14. Victim had deposed that on the alleged date i.e. on 18.09.2006, she was unmarried. At that very time, she was offering Puja. Kamlesh Das came to her house and disclosed her that he was going to Puran Devi Mandir. As she was also willing, accompanied Kamlesh to Puran Devi Mandir over a tempo. Then thereafter, he offered 'Prasad' and after taking the same, she became unconscious. Then thereafter, she was taken to village-Sarsi, Distt-Darbhanga where she was kept for three days. During her stay, he committed rape on her against her wish. Then thereafter, she was injected, as a result



of which, she again became unconscious and then she was taken to Khudin, Distt-Madhubani, place of his 'Phua' where she was kept for 10 days and during course of her stay, she was subjected to rape. During aforesaid intervening period, she was also subjected to assault whereupon, his 'Phua' ousted them. Then Kamlesh took her Jail Chowk, Purnea where she remained for 2-3 days and then thereafter, accused had taken her to Punjab where, he kept her at the place of his 'Phua' at Ropar district and during course of stay, he continued with raping her as well as she was also assaulted. Then thereafter, that 'Phua' also ousted them. Then the accused took her to Purnea and stayed at the house of his uncles, Mahendra Das and Falgu Das lying at Mohalla, Mahboob Khan Tola where she remained for three months. During stay, she was raped as well as assaulted. His uncle, aunt, grand-mother, all were assaulting her. She tried to escape therefrom but was under surveillance. Then anyhow, she slipped on 20th day of 2007 and had gone to the place of her parents and then disclosed the event whereupon, her mother took her to police station where she had narrated the event. Darogaji had noted down and then got it typed and as per instruction, she put her signature without reading the same or having been read to her. She had further stated that her statement under Section 164 CrPC was recorded which she had deposed as per instruction given by Darogaji. Identified the accused.



15. During cross-examination, para-5 to 10 relates with the incident taking place after the occurrence, that means to say, regarding her marriage. In para-12, she had disclosed that appellant kept her along with himself from 18.09.2006 to 20.08.2007, during midst thereof, she did not volunteer herself as his spouse. In para-13, she had stated that she had not incorporated in the written report that accused had forcibly married with her. In para-14, she had stated that the written report was not read over to her. In para-15, she had stated that she was taken by train via Forbesganj from Puran Devi Mandir. Passing through so many station but she was unconscious till Darbhanga. Then at para-16 to 20, there happens to be cross-examination relating to different photographs and have been made exhibits of the record on an admission having made at her end. In para-21, she had further stated that 'Mangalsutra', necklace and ear rings were given by the accused. In para-22 and 23, she had admitted that whenever accused had gone to factory, she had incorporated the same in the copy. She had further exhibited her writing at last page of the copy containing "*Priti sang Kamlesh, Kamlesh and Priti*". In para-25, she had further disclosed that after stay for 20 days at the place of his 'Phua' the accused hired building where they remained for three months. At para-26, she had stated that when she was brought from Punjab to Purnea, she remained at the place of uncle, aunt of accused for four months. Then there happens to be



contradiction relating to her previous statement made under Section 164 Cr.PC with regard to demand of Rs. 1 Lac and for that, subjected to torture. Furthermore, when they were kicked out, accused took a building on rent and then they stayed there. Then had denied the suggestion that while she visited the place of her parents, accused had gone to effect her Bidai but, she was emotionally overpowered by her parents whereupon no Bidai effected and for that Sanha was given by the accused. At para-38, she had also disclosed that the place where she was kept by the accused was at a distance covering five minutes time to reach at the place of her parents. Then had denied the suggestion that she voluntarily married with accused and subsequently, being emotionally overpowered by her parents, got this case filed with false and frivolous allegation.

16. In order to impeach the evidence of a witness, the witness has to be tested/cross-examined on that very particular point so that there should be an opportunity to the witness to explain the same. The aforesaid legal proposition has been settled at rest by the Hon'ble Apex Court in the case of *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.”

17. From the evidence of PW-4, it is apparent that she had categorically stated that while she was made captive by the appellant, she was ravished against her will and wish. However, after going through cross-examination of PW-4, it is evident that she was not at all cross-examined on that very score. In likewise manner, she was not at all cross-examined with regard to her conduct though at the first instance, she was tested while going from Puran Devi Mandir to



Sarsi on train via Forbesganj, during course of which, she stated that she remained unconscious. Furthermore, it is also evident that she had shown to be assaulted at different places as well as subject to rape at the end of appellant. It has also been exposed that while moving from Puran Devi Mandir to Darbhanga and from Darbhanga to Madhubani, sedative was administered to her, but since thereafter, no such allegation has been attributed.

18. It is obligatory on the part of the prosecution to support its case beyond all reasonable doubt. The manner whereunder PWs-2, 3 and 4 admitted appellant, Kamlesh suggests that he was duly recognized since before carrying affectionate relationship with the victim otherwise there would not have been discloser at the end of PW-2 (para-9) that he had not thought to launch a case when, his daughter had gone along with Kamlesh and also is the same approach of PW-3. If such situation was not prevailing since before there was no occasion for Kamlesh to come with a discloser that he was going to Puran Devi Mandir whereupon the victim accompanied him. When the aforesaid event is taken together with the evidence of PW-3, it is apparent that she happens to be quite inconsistent with the version of victim, PW-4 as PW-4 had disclosed that at that very time, she was worshipping. Kamlesh came alone divulging the fact that he was going to Mandir whereupon she accompanied while PW-3 had stated that Kamlesh, his uncle came, asked for water, whereupon she



directed the victim to fetch water and during course thereof, Kamlesh took her away. It is further evident that uptil, Khudin lying at Madhubani district, victim had explained that she was put under sedative but then thereafter, she kept mum regarding her physical, mental condition and in likewise manner, whether she was put under threat. After showing relevant entries having made by her in a copy, she was cross-examined, at para-22, 23, she had admitted that while appellant Kamlesh used to go to factory, the aforesaid entries were made by her to record how many days he had gone to work.

19. Gone through the entries made in the copy (Ext-B) which suggests that the victim was very much conscious as to how he is working and how many days he had gone to work. Furthermore, the writings on the last page of the copy under Ext-B/1 is another circumstance which speaks contrary to the allegation whatever been alleged as aforesaid writings were not under duress or compulsion.

20. Had there been any sort of compulsion, coercion, threat then in that circumstance, there was every opportunity for the victim to have her grievances properly redressed by informing law enforcing machinery as the accused/appellant used to go to factory leaving her alone and from Ext-B, it is apparent that it happens to be not only for days rather months together.

21. In the aforesaid situation, it could not be said that the victim was not a consenting party. That being so, considering



her status to be major, being a consenting party, neither offence punishable under Sections 366A IPC nor 376 IPC are made out.

22. Consequently thereof, the judgment impugned rendered by the learned lower court is set aside. Appeal is allowed.

23. Since appellant is on bail, he is discharged from the liability of bail bond.

(Aditya Kumar Trivedi, J)

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