

# IN THE HIGH COURT OF JUDICATURE AT PATNA

## Criminal Appeal (SJ) No.525 of 2015

Arising Out of PS. Case No. -2344 Year- 2004 Thana -EAST CHAMPARAN COMPLAINT District-  
EASTCHAMPARAN(MOTIHARI)

- =====
1. Damari Ram, s/o Late Gaju Ram r/o village – Chaknagari.
  2. Upendra Paswan s/o Ruplal Paswan r/o Village Mithanpura Both P.S.-Mehsi District- East Champaran.

.... .... Appellant/s

Versus

The State of Bihar

.... .... Respondent/s

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### Appearance:

For the Appellant/s : Mr. Patanjali Rishi, Adv.

For the State : Mr. Sujit Kumar Singh, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

ORAL JUDGMENT

**Date: 20-04-2018**

Appellant, Damari Ram has been found guilty for an offence punishable under Section 376 of the I.P.C and sentenced to undergo R.I for 7 years as well as to pay fine appertaining to Rs.5,000/- in default thereof, to undergo S.I. for 3 months additionally, appellant Upendra Paswan has been found guilty for an offence punishable under Section 376 /34 of the Indian Penal Code and sentenced to undergo R.I for 7 years as well as to pay fine appertaining to Rs. 5,000 and in default thereof, to undergo S.I for three months, additionally vide judgment of conviction dated 03.07.2015 and order of sentence dated 08.07.2015 passed by Additional Sessions Judge, Xth, East Champaran at Motihari in Sessions Trial No. 510/2006.

**2.** Name withheld, complainant PW.5 filed complaint petition no. 2344(C)/2004 on 25.11.2004 putting an allegation that on 23.11.2004 at about 6.00 P.M while she was returning from market and as soon as reached near the Mango orchard lying at village Chintamanpur, accused Damari Ram and Upendra Paswan



who were taking toddy since before, caught hold her and then, threw her on the ground. Then, thereafter, accused Upendra Paswan caught hold her both hands while Damari Ram began to commit rape over her. On hue and cry raised by her the witnesses and others who were returning from market rushed, caught hold Damari Ram, pulled him, assaulted whereupon, Damari Ram became enraged and after showing *fasuli* threatened that who will speak against him will be murdered. Witnesses have scolded him that even being cousin father-in-law he has indulged himself in such kind of sin, even then, he did not remorse himself and continued with his threatening who will disclose or pursue panchayati in the village will be given a lesson. Then thereafter, she had gone to police station where, the Officer-in-charge had said that as he is going to conduct raid so a, case be filed before the court whereupon the same has been filed.

**3.** After filing of the aforesaid complaint petition, victim was examined on S.A. and then thereafter, the case was transferred to the Court of a Magistrate in terms of Section 192(1) of the Cr.P.C to conduct an inquiry under section 202 of the Cr.P.C whereupon cognizance vide order dated 30.03.2005 was taken under Section 376/34 of the Indian Penal Code against both the accused. Subsequently thereof, presence of both the accused were procured though, during intervening period, Upendra remained absent. Vide order dated 06.06.2007, charge was framed and then thereafter witnesses were examined, statement of accused were taken and then hearing both the parties identified both the accused to be guilty for the offence as indicated hereinabove against which,



instant appeal has been filed.

**4.** Defence case as is evident from mode of cross-examination as well as statement recoded under Section 313 of the Cr.P.C is that of complete denial. It has also been pleaded that this case has been filed by the complainant who happens to be daughter-in-law of brother of accused Damari in collusion with his other brother Jogi Ram in the background of land dispute which they admitted during course of evidence and that happens to be reason behind that presence of Yogi and his wife as well as his henchman Gopal as well as his wife have been shown as a witness. However, neither ocular nor documentary evidence has been adduced on their behalf.

**5.** In order to substantiate its case, altogether five P.Ws have been examined, PW.1- Gopal Ram, PW.2- Lakshminiya Devi, PW.3- Rajkali Devi, PW.4- Yogi Ram, and PW.5, complainant herself. No documentary evidence has been exhibited. As stated above, defence is also found deficient on that very score as neither ocular nor documentary evidence has been adduced at their end. Gone through the judgment impugned from which it transpires that the case has been compromised. However, considering the evidence of PW.1 to 4 and further considering the examination-in-chief of the complainant /victim the learned lower court had recorded the finding, adverse to appellants.

**6.** Learned counsel for the appellants while challenging the finding having recorded by the Learned Lower Court has submitted that from the evidence of PW 3 & 4, it is evident that appellant Damari, witness Yogi Ram and father-in-law of



complainant Badri are own brothers. It is also evident that there happens to be land dispute and for that, both the parties are litigating and for the present, 3 – 4 cases were pending. It has also been stated that apart from the Court had estimated age of Damari during course of statement recorded under Section 313 of the Cr.P.C to be aged about 62 years, PW 4 under Para 5 had estimated his age in between 60-70 years. In the aforesaid background, was it possible for the appellant on account of his old age to be competent enough to commit rape and that happens to be reason behind that instead of going to police station this case has been filed by way of complaint petition that too, after two days so that, there should not be an opportunity to trace out or challenge the veracity of her testimony nor the complainant prayed for mode of examination before the Court. Apart from this, it has also been submitted that from the evidence of the PWs, it is apparent that victim was going over road. Both the appellants were taking toddy beneath a bridge and so many persons were passing through. Then in that circumstance was it possible for both the appellants to come to road from beneath the bridge, caught hold the complainant dragged her to such distance, without any resistance as, their happens to be no disclosure at her end that she was threatened or she had resisted against the effort of the accused persons. That being so, the falsity of the case is itself found duly exposed. In its continuity it has also been submitted that there happens to be no disclosure that appellant Damari Ram was ever armed with *fasuli*, during course of alleged occurrence, *fasuli* was shown threatened, then in that circumstance, presence of *fasuli* at the later part by which threatening was given to the witnesses is a another circumstance to



suggest that the aforesaid eventuality has purposely been introduced to give severity.

**7.** It has also been submitted that the conduct of the prosecution party, is itself visualizing casting doubt over their credibility in the background of the fact that no sooner than the land dispute has been sorted out, the matter got streamlined whereunder though during course of examination-in-chief PW.5, victim had reiterated, during course of cross-examination had completely nullified the assertion whatever been alleged at the end of the other witnesses disclosing that as darkness had fallen on account thereof, she could not be able to identify. So, the cumulative effect did not justify the finding recorded by the learned lower court.

**8.** On the other hand, the learned Additional Public Prosecutor while controverting the submission has submitted that there happens to be no challenge at the end of the appellants regarding commission of the occurrence. So, commission of rape over the person of victim PW.5 is found duly established. Enmity is a doubled edged sword. It may be a motive for false implication side by side it may be a motive for commission of the occurrence. When the occurrence is out of controversy then in that circumstance, the consistent version of the witnesses could not be found sufficient to over shadow what ever been by deposed by the victim herself more particularly she had during her examination-in-chief properly established appellant Damari to be her rapist. That being so, the judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.



**9.** From the nature of the evidence it is apparent that witnesses are not the strangers to either of the party. PW.3 and 4 are the husband and wife and likewise manner PW.1 and 2. Whatever been deposed at the end of PW.1 has been melted down by PW.2, his wife. So far PW.3 and 4 are concerned they have admitted their status and further, being aggrieved against the activity of the Damari Ram, who had encroached upon their share including the share of complainant and for that, both the parties were litigating since before. It is also apparent that during course of evidence PW.1, PW. 3 and PW.4 had substantiated the case of the prosecution. However, from the evidence of PW.3, Para 5, Para 7, Para-8, Para-9 and PW.4 and Para-7, Para-8 is the circumstance which cast doubt over their credibility.

**10.** Apart from this, in a rape case it happens to be the victim whose evidence has got primacy. She had during course of evidence, examination-in-chief has reiterated identifying both the accused/ appellant who caught hold her, threw her on the ground and then, Damari Ram had committed rape on her. She had not deposed at that very moment, Upendra Paswan had caught hold her hand, she had raised alarm attracting the passers including PW.1, PW.2, PW.3 and PW.4. In the aforesaid background when her cross-examination is seen she had stated in Para-2 that Damari Ram happens to be her father-in-law land dispute has been settled out. In Para 3, she had stated that it was dark night, she had not identified the culprit. As disclosed by others, she named. In Para-4 she had stated that after coming to know about the actual affair she had compromised. In the aforesaid background, in case prosecution was aggrieved then would have taken necessary steps wherein,



failed.

**11.** Evidence means examination-in-chief, cross-examination and re-examination if any. That means to say whenever there happens to be connotation of evidence, the implied meaning will be examination-in-chief and cross-examination. That means to say whenever there happens to be consideration of the evidence it should be examination-in-chief, cross-examination. That being so, when the evidence of victim has been gone through, she on her own disowned to identify the appellants to be her rapist or abated during course of rape and in the aforesaid background, the evidence of other witnesses, at least with regard to present nature of offence being that of rape, should be considered in the background of evidence of the prosecutrix, which at least suggest reasonable doubt.

**12.** Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court did not find favour. As such, is set aside. Appeal is allowed. Appellants are on bail hence are discharged from its liability.

**(Aditya Kumar Trivedi, J.)**

Prakash Narayan

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