

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.662 of 2019**

Arising Out of PS. Case No.-155 Year-2015 Thana- MANIHARI District- Katihar

Anil Mahto, age 25 years, Male, S/o Raj Kumar Mahto, R/o Nayatola,
Manihari, P.S.-Manihari, Distt. Katihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Aditya Abhishek- Advocate Mr. Sanjeev Kumar Singh-Advocate Mr. Indrajeet Kumar-Advocate
For the Respondent/s	:	Mr. Binay Krishna-Spl.P.P.

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

26-07-2019

Appellant Anil Mahto has been found guilty for an offence punishable under Section 452 of the I.P.C. and sentenced to undergo R.I. for three years as well as to pay fine appertaining to Rs.2000/- and in default thereof, to undergo S.I. for one year, additionally, under Section 354B of the I.P.C. and sentenced to undergo R.I. for three years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo S.I. for one year, additionally, with a further direction to run the sentences concurrently with a further direction that the period having undergone during course of trial be set off in accordance with Section 428 of the Cr.P.C. vide judgment of conviction dated 09.01.2019 and order of sentence dated 15.01.2019 passed by the 1st Additional Sessions Judge-cum-Special Judge, Katihar



in G.R. No.3181 of 2015 arising out of Manihari P. S. Case No.155 of 2015.

2. Supan Mandal (PW-5) filed written report on 31.10.2015 disclosing therein that in between night of 30/31.10.2015, he was sleeping at a place lying by the side of Bathan of Bhola Mahto after constructing a hut in order to keep watch over the crop having planted by him along with his wife, four children. At about 1.00 P.M., Anil Mahto and Sheikh Sonu came armed variously and getting them in deep slumber, lifted his daughter (name withheld) PW-9, aged about 11 years with an intention to commit rape after gagging her mouth and proceeded towards jungle. After reaching there, she was put over ground and then, dragged inside the jungle as a result of which, she sustained injuries over her back. Then thereafter, she was undressed by Anil Mahto, who kept vulture eye over her private part. During course of conversation with Sheikh Sonu, who was armed with masket and was keeping vigil, he disclosed that after committing rape, the girl will be eliminated. After hearing this, his daughter getting an opportunity, escaped therefrom and after reaching near them, became thunder struck, then began to cry out of shock. They consoled her and then, asked for and during course thereof, she has narrated the whole



event. Even at that very moment, she was naked. She has disclosed that after lifting her, Anil Mahto and Sheikh Sonu took her to jungle where they lie her down, dragged her inside jungle where undressed her and during course of conversation, she came to know that after committing rape, she will be murdered, so getting an opportunity of darkness slipped therefrom. In order to save themselves, they all began to shout attracting the presence of persons in surrounding namely Deep Narayan Mahto, Sadhu Mahto, Bhola Mahto, Ramdev Mahto, Longi Devi etc.

3. Furthermore, it has also been disclosed that he happens to be by caste Kharwar and is a member of Scheduled Tribe.

4. After registration of Manihari P. S. Case No.155 of 2015, investigation commenced and concluded by way of submission of charesheet, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

5. Defence case, as is evident from cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been pleaded that there was dispute on account of scraping of grass, whereupon this case has falsely been instituted and for that, has



examined altogether four DWs.

6. In order to substantiate its case, altogether nine PWs have been examined on behalf of prosecution, who are PW-1, Ramdev Mahto, PW-2, Sadhu Mahto, PW-3, Bhola Mahto, PW-4, Sarita Devi, PW-5, Supan Mandal, informant, PW-6, Ashok Kumar Sah, S.I., PW-7, Rajendra Uraon, S.I., PW-8, Ashok Kumar Ram and PW-9, the victim as well as has also exhibited as Exhibit-1, signature of informant over written report, Exhibit-1/1, endorsement over the written report, Exhibit-2, chargesheet, Exhibit-3, formal F.I.R. It is also evident that blood stain cloth has been made material Exhibit-1, while cartridge as material Exhibit-2. In likewise manner, four Dws have been examined on behalf of accused/ appellant namely DW-1, Ram Naresh Mahto, DW-2, Sunita Devi, DW-3, Raj Kumar Mahto and DW-4, Basant Kumar Mandal. No documentary evidence has been exhibited.

7. Learned counsel for the appellant has submitted that there happens to be no eye witness. That being so, the evidences of the witnesses falling under the category of hearsay could not be relied upon as the same happen to be inadmissible in the eye of law. Apart from this, it has also been submitted that right from initial version, prosecution is assertive on the fact



that after lying down the victim over ground, she was dragged inside the jungle, whereupon sustained injury over her back, but neither she has been produced before the doctor, nor there happens to be any kind of finding at the end of the police official/ I.O. Furthermore, it has also been submitted that from the evidence of the PWs, it is evident that victim slipped from the jungle where she was dragged in naked condition. Then how she got that cloth much less when there happens to be no claim at the end of the prosecution witnesses that they have gone inside the jungle at that very moment. In its continuity, it has been submitted that one of the accused being co-villager would not have been spared by the prosecution party, but they remained idle without taking any effort speaks otherwise, much less false implication and for that, substantial material has been placed by way of examining for Dws.

8. Apart from this, it has also been submitted that neither Section 452 of the I.P.C. nor Section 354B of the I.P.C. would be applicable as from the evidence of the witnesses, it is apparent that the hut had no door that means to say, its ferment was not akin to a house and so, Section 452 of the I.P.C. would not be and in likewise manner, in a dead night, victim being a minor and having absence of evidence that at the time of



disrobing the victim, any kind of criminal force was used, hence no offence under Section 354B of the I.P.C. is made out. As such, the cumulative effect did not justify the finding so recorded by the learned lower Court.

9. On the other hand, learned Additional Public Prosecutor in spite of supporting the finding with regard to Section 452, 354B of the I.P.C. recorded by the learned lower Court submitted that acquittal of the appellant for an offence under S.C./S.T. (Prevention of Atrocities) Act as well as under POCSO Act was not at all legal, because of the fact that the reason whatsoever been enumerated in the judgment impugned are not at all in accordance with law. So, submitted that in the interest of justice, the appellate Court is competent enough to pass appropriate order on that very score.

10. Because of the fact that no appeal is there challenging the finding of the learned lower Court with regard to acquittal of the appellant relating to offences punishable under S.C./S.T. (Prevention of Atrocities) Act as well as POCSO Act, at the end of prosecution, hence it did not look wise to consider the same. Moreover, it will be a time procedure. As the appellant is under custody is another factor. As such, the matter is left without any remark.



11. Now, coming to the status of the witnesses, it is evident that there happens to be an admission at the end of the parents of the victim that at the time of lifting, they were in deep slumber, whereupon they could not perceived lifting of victim. So, their evidences that means to say, evidence of PW-4 and PW-5 (parents) are based upon the information having been conveyed by the victim as well as with regard to subsequent event which they have seen that means to say, coming of victim in naked condition, her mental as well as physical condition, her conduct after seeing them, how she been able to disclose the horror, which she faced, appears to be a theme of res gestae admissible in accordance with Section 6 of the Evidence Act. The remaining witnesses, PW-6, PW-7, PW-8 are the police officials and PW-9 is the victim. PW-1, PW-2, PW-3 have not supported the case of the prosecution, whereupon they all have been declared hostile.

12. Evidence of PW-9, victim has got primacy, hence taken note of. She has narrated that on the alleged date and time of occurrence, while she was sleeping over a cot in a hut, Anil Mahto and Sheikh Sonu lifted her towards jungle, where she was undressed and then, her private part was minutely eyed by them. During course thereof, they both



indulged in gossiping man while she slipped therefrom, rushed to hut where she disclosed the whole event to her parents. Identified the accused. During cross-examination at Para-4, she has stated that at the time of lifting her by both the accused, none had seen. It was dark night. In Para-6, she has stated that Anil Mahto happens to be her co-villager. In Para-7, she has stated that she was not medically examined. In Para-8, she has stated that institution of this case by her parents is genuine one and then, she denied the suggestion that she has deposed wrongly, falsely. No such kind of occurrence had ever taken place with her.

13. PW-4 has stated that on the alleged date and time of occurrence while they all were sleeping in the hut including the victim aged about 11 years. She was taken away by Anil Mahto and Sheikh Sonu after gagging her mouth towards jungle where she was undressed and then, they minutely observed her body. They were about to commit rape, meanwhile getting an opportunity while they were engaged in gossiping, her daughter escaped and coming to them, she disclosed the horrifying experience. She was naked. On the following day, case was instituted by her husband. Identified the accused. Also stated that accused is threatening from jail.



During cross-examination at Para-3, she has stated that just after the occurrence, she had disclosed the event to the person of surrounding namely Ramdev Mahto, Bhola Mahto, Bhukhal Mahto, Sadhu Mahto, Raj Kumar Mahto and others. In Para-7, she has stated that she had not gone to the house of Anil Mahto at that very moment. In Para-9, she has stated that it was dark night. In Para-10, she has stated that till then, Anil Mahto not committed rape over her daughter. In Para-15, she has stated that the hut was constructed over the land of other, but she is unable to disclose his name. Hut was not fenced nor door was affixed. In Para-18, she has stated that she had not taken away the victim to hospital. Then has stated at Para-28 that she had not taken the victim to hospital as it would have caused hindrance during solemnization of marriage. At that very time, Chandni Kumari was a student of Class-II. Then she denied the suggestion that this case has falsely been filed.

14. PW-5, during course of examination-in-chief, has reiterated his initial version. During cross-examination, he has stated that he is unable to disclose the date, month and year of the occurrence. At Paras-6, 7, 8, he was cross-examined over going to police station and further, he has stated that statement of his wife as well as his daughter was recorded at the police



station itself. Police came on the following day. The Darogaji had requested that victim be examined before a Court, but they refused. In likewise manner, they also refused for medical examination. At Para-13, he has further stated that when police came at his house, victim had appeared before Darogaji. In Para-15, he has stated that at the time of occurrence, it was dark night. Victim had disclosed regarding the occurrence.

15. PW-6 is the police official, who had simply submitted chargesheet and so basically appears to be formal in nature.

16. PW-7 is also formal in nature as he was Investigating Officer for a very short period and during course thereof, he had taken recourse to apprehend the accused only.

17. PW-8 is the main I.O., who during course of examination-in-chief, has stated that after registration of the case, investigation was entrusted to him. Accordingly, he proceeded to place of occurrence on 01.11.2015. He reached at the P.O. and investigated the same. He has given topography of the hut occupied by the prosecution party on the date of occurrence wherefrom victim was lifted towards jungle. Identified the same by boundary North-hut of Jai Narayan Mahto and then, Parti land (bank of river Ganga), West-Ramdev



Mahto and then, jungle, North-Bhola Mahto, South-Jungle. Recorded statement of the witnesses. Then had requested the prosecution party/ victim for medical examination as well as statement, which was refused. Exhibited relevant documents. During cross-examination at Para-2, he has stated that during course of inspection of the P.O., he had met with the victim. He has further stated that victim had not known the P.O. (jungle). He has further stated that victim had not come to police station. He had not met with victim. He had not recorded statement of the victim. He has further stated that there happens to be an administrative order whereunder male police official has been forbidden to take statement of a lady. He had not referred to matter to Mahila Police Station.

18. Four witnesses have been examined on behalf of defence, out of whom, DW-1, has stated that there was dispute in between accused Anil Mahto with a lady over scraping of grass and then, from DW-2, proper identification has been introduced in between Anil Mahto and wife of Supan Mandal and daughter of Supan Mandal, whereupon DW-3 and DW-4 also examined. But during course of cross-examination, they have admitted with regard to institution of the present case.

19. Cross-examination is a theme by which, the



veracity, reliability of a witness is tested. Not only tested rather it is a methodology whereby the narration so given by a witness during course of examination-in-chief is being challenged/controverted. That happens to be reason behind that whenever the word 'evidence' is being used, it connotes the examination-in-chief, cross-examination and re-examination, if any, and that is the spirit of Section 138 of the Evidence Act. Furthermore, times without number, it has been propagated at the end of the Apex Court that whenever an accused or adverse party failed to cross-examine a witness on any particular point that will tantamount to an admission. In ***Gian Chand & others vs. State of Haryana reported in 2013(4) P.L.J.R. 7 (S.C.)***, it has been observed:-

“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.” (Emphasis supplied)

(See also: Ravinder Kumar Sharma v. State of Assam & Ors., AIR 1999 SC 3571; Ghasita Sahu v. State of Madhya Pradesh, AIR 2008 SC 1425; and Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181).”

12. The defence did not put any question to the



Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/contraband articles. Thus, no grievance could be raised by the appellants in this regard.

20. From perusal of evidence of PW-9, victim, it is evident that she has not been cross-examined on the material point that means to say, over the occurrence and that being so, the deficiency on that very score, at the end of the appellant, is to be seen in the background of principle so laid down by the Apex Court as referred herein above.

21. Apart from this, so far status of victim by child is concerned that has not been questioned at the end of the appellant either before examination praying the Court to test nor during course of cross-examination of PW-9. There happens to be no embargo under the Evidence Act that the evidence of child witness should not be accepted. The only deficiency whatever been prescribed in accordance with Section 118 of the Evidence Act is with regard to incompetency of a witness in proper appreciating or fail to give rational answer. In likewise manner, Section 134 of the Evidence Act deals with a situation that in order to prove the fact in issue counting is not at all relevant one rather it is the quality which matters. Moreover, so far this



particular case is concerned, there happens to be specific disclosure at the end of the informant (PW-5) that they were in deep slumber while the victim was lifted, corroborated by PW-4, mother. In that circumstance, PW-9 happens to be sole witness to depose over woe, which the defence failed to depose.

22. Consequent thereupon, the finding recorded by the learned lower Court did not attract interference, whereupon the appeal sans merit and is accordingly, dismissed. Appellant is under custody, which he will remain till saturation of the period of sentence.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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