

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (SJ) No.284 of 2016**

Arising Out of PS. Case No.-7 Year-2012 Thana- LODIPUR District- Bhagalpur

Md. Chhotan Khan @ Sarfuddin son of Late Md. Monafuddin, Resident of  
Mohalla- Barahpura, P.S.- Ishakchak, District- Bhagalpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

**Appearance :**

|                      |   |                                                                                      |
|----------------------|---|--------------------------------------------------------------------------------------|
| For the Appellant/s  | : | Mr. Krishna Mohan, Adv.<br>Mr. Ravi Prakash Dwivedi, Adv.<br>Mr. Praveen Kumar, Adv. |
| For the Respondent/s | : | Mr. Binod Bihari Singh, APP                                                          |

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

**09-08-2019**

Appellant, Md. Chhotan Khan @ Sarfuddin,

vide judgment of conviction dated 14.03.2016 and order of sentence dated 16.03.2016, has been found guilty for an offence punishable under Section 376 of the IPC and sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. 25,000/- in default thereof, to undergo SI for six months by <sup>1st</sup> Additional Sessions Judge, Bhagalpur in Sessions Trial No. 775/2012 arising out of Lodipur PS Case No. 07/2012.

2. Mumtaz Begum (PW-5), filed a written report on 25.01.2012 alleging *inter alia* that on the same day at about 1:00 PM while her daughter (name withheld) (PW 1) aged about seven years was playing in a mango orchard lying in front of her house. An abandoned house of one Md. Babu Khan lies by the



side of the aforesaid orchard. At that very moment, Md. Chhotan Khan @ Sarfuddin who happens to be brother of Md. Babu Khan came near her daughter and allured her over chocolate and biscuits and on that pretext, took her to the house of Babu Khan and then began to commit rape. Out of severe pain, her daughter began to cry whereupon, she rushed there and seeing the situation, raised alarm. People assembled who tried to apprehend the accused but, Chhotan managed to escape. There happens to be injury over genital of her daughter.

3. After registration of Lodipur PS Case No. 07/2012, investigation commenced and completed followed with submission of charge-sheet facilitating the trial meeting with the ultimate result, subject matter of the instant appeal.

4. 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. However, neither any specific plea has been taken up nor anything has been adduced in defence.

5. In order to substantiate its case, the prosecution has examined altogether eight PWs who are PW-1, Victim, PW-2, Md. Madin, PW-3, Md. Umar, PW-4, Md. Moib, PW-5, Mumtaz Begum, PW-6, Dr. Anupama Sahay, PW-7, Bibi



Mustarina, PW-8, Bijoy Kumar. Side by side, has also exhibited Ext-1, Statement of victim recorded under Section 164 CrPC, Ext-2, Written report, Ext-3, Medical Report, Ext-4, Formal FIR. As stated above, nothing has been adduced in defence.

6. While assailing the judgment of conviction and sentence, it has been submitted at the end of the learned counsel for the appellant that the learned lower court has acted in a mechanical manner. In order to buttress such plea, it has been submitted that it was expected at the end of learned lower court to have proper scrutiny of the evidence of each of the PWs including that of the victim and would have weighed the same to such an extent, in such a manner whether those materials have justified and satisfied and discharged the burden having over the prosecution to substantiate its case beyond all reasonable doubts. Also submitted that while considering the reliability of the evidence of the witnesses, the learned lower court should have considered the medical evidence which completely ruled out not only the case of the rape rather even possibility of an attempt whereupon, the whole prosecution case would have brushed aside by the learned lower court. It has also been submitted that when evidence of the witnesses is being minutely thrashed, it is evident that none could be a witness. In



likewise manner, the evidence of PW-1, the victim also did not justify her status to be a victim and so, the learned lower court would not have recorded the finding. It has also been submitted that objective finding of the IO relating to the place of occurrence in same way discredited the allegation having at the end of the prosecution and having conjoint consideration of the medical report as well as the objective finding of the IO relating to PO coupled with other ancillary circumstance did not justify the finding. The judgment impugned suggests that all these evidences have completely been overlooked.

7. It has also been submitted that obligation is on the prosecution to substantiate its case beyond all reasonable doubts irrespective of the status of an accused. So far this particular case is concerned, admittedly, the defence could not be able to suggest that on what ground they have deposed against the accused, even then, that will not exonerate the prosecution from proving its case and discharge the burden having over it in its conclusiveness. From the materials available on the record, the same is found not at all substantiated and so, the judgment impugned is fit to be set aside.

8. On the other hand, learned APP while refuting the submission, has submitted that parrot-like statement would not



come unless and until there happens to be proper tutoring. That means to say, presence of inconsistency amongst the PWs to some extent is natural one, more particularly, in the background of delay in examination of witness, the mental capability, the mode of perception, the status of the witness, as well as environment they belong. Apart from this, when the evidence of the witness is properly scrutinized, it is apparent that neither there happens to be inconsistency nor they have tried to exaggerate the version. What they have deposed, they deposed in terms of whatever been their status with regard to the occurrence so alleged. Had there been an effort in order to give much more stress, then in that event, all the witnesses would have claimed themselves to be an eyewitness to the occurrence. It has also been submitted that the doctor, as is evident from her evidence, has just done the paraphernalia as the report is indicative of the fact that whatever is required to be performed while examining the victim of a rape case, that has completely been ignored. She has simply stated that she had seen the body of the victim and she had not found injury over her body externally or internally. The negligence and laches at the end of the doctor is further evident from the fact that she had opined the age of the victim to be less than 18 years and during course



of cross-examination, she has stated that she was aged in between 16-17 years. On the other hand, there happens to be specific disclosure in the written report that the victim was aged about seven years at the time of occurrence and even on the day of examination, the court had estimated her age to be that of ten years and that happens to be the reason behind that before examination of the victim, the court had decided her mental equilibrium whether she was capable one to depose.

9. In likewise manner, it has also been submitted that police had also investigated the case in similar way and on that very score referred paragraph-22 of the evidence of the IO wherein he has stated that after leaving the victim as well as her parents (father, mother), then had gone to see the place of occurrence and then further statement of informant was recorded. Also drew attention towards para-16 whereunder he has stated that he had not mentioned the fact as to who had shown the PO but, on his own disclosed that informant has shown the place of occurrence. But those negligence could not demolish the case of the prosecution as, from the evidence of the victim PW-1, the same is found duly substantiated, corroborated by other PWs. So submitted that the judgment impugned is to be confirmed.



10. PW-6 is the doctor. During her deposition, she has stated that victim was examined on 25.01.2012 (date of occurrence) and she had not found physical or chemical injuries on her body including over her private parts also. Vaginal swab was sent to JLNMC Hospital, Bhagalpur, Pathological Department for determination of spermatozoa. She was sent to Radiological Department, JLNMC Hospital, Bhagalpur for ascertainment of her age and then, she opined that as per X-ray report, her age happens to be below 18 years. In likewise manner, she opined that there is no evidence of recent sexual intercourse. Exhibited the Same.

11. During cross-examination at para-8, she has stated that at the time of examination the victim was in between 16-17 years of age but she is unable to disclose what was her actual age. In para-9, she has stated that if a girl aged about 7-8 years is raped by a man aged about 30 years, then she will receive severe injuries but, in this case, no evidence of recent sexual intercourse has been found. Modi in his classical book, 'Medical Jurisprudence and Toxicology' has directed as to how the examination of a victim of rape is to be carried by a doctor and for that, these are the criterion (a) age of the victim, (b) marks of resistance, if any, (c) marks of violence on the genitals



of the victim, (d) stains of blood or sperms, (e) Presence or absence of semen/blood in the vagina, (f) Rupture of the hymen, (g) indication of penetration and further identify the vulnerable part of the body where injuries are expected to be, i.e. forearms, wrist, face, breasts, chest, lower part of abdomen, inner aspects of thighs and back and injuries should be minutely observed as it may be scratches, abrasions and bruises. It has also been observed that in case of small child, the hymen is not usually ruptured but it may become red and congested along with inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum.

12. From the evidence of PW-6 along with medical report, Ext-3, it is evident that the doctor PW-6 had not cared to abide by the criterion so laid down by Modi as referred herein above.

13. Examination of the victim as it appears was done in a casual manner which suffers vagueness and the most surprising feature has rightly been pointed out at the end of learned APP that having specific disclosure in the written report regarding age of the victim to be seven years, the forwarding report of the police suggesting estimation of her age during



course of examination under Section 164 CrPC, estimation of age while examining as PW-1 at the end of the PO in consonance with the disclosure having made by PW-6, during cross-examination, identifying the victim to be in between 16-17 years speaks otherwise over conduct of the doctor and, in the aforesaid background discarding reliability of medical evidence, appears to be imperative.

14. Right from initial version, that means to say, written report, none has claimed to be an eyewitness. Therefore, the victim alone is the sole witness to occurrence and on account thereof, her evidence has got primacy. She has been examined as PW-1. During her examination-in-chief, she has stated that while she was playing away from her house along with her friends, Chhotan came and said to her to accompany him as he is going to give her chocolate and biscuits. Out of greed, she accompanied. Chhotan took her inside the house of Babu Khan. None resides therein. He took her inside a room. On that day, she had worn Janghia. Then she was undressed, Chhotan got himself undressed and inserted his genital in her genital as a result of which, she sustained severe pain. She began to cry. Her mouth was gagged. Anyhow she rushed weeping. On query made by her parents, she disclosed the



event. Parents chased Chhotan to apprehend but he managed to escape. There was severe pain at her genital, blood was oozing out. She was taken to police station by her parents wherefrom, she was taken to Sadar Hospital where she was examined. She was interrogated by the police, identified the accused. Her statement was also recorded before the Magistrate. During cross-examination at para-11, she has stated that she is unable to disclose as to how many days are in a year. In para-12, she has stated that none had tutored her as to what she has to depose in the court. In para-13, she has stated that she had not gone inside the house of Babu Khan since before. She does not know how many rooms were there. At that very time, it was *Kuchcha* house having tiled roof. In para-14, she has stated that she is unable to disclose the direction of the house. There was one door affixed at the *Darwaza*. No window was there. In para-15, she has stated that she is unable to disclose whether any house lies in the vicinity of the house of Babu Khan. On Court's question, she has stated that she had gone inside the house of Babu Khan only once. In para-16, she has stated that chocolate and biscuits which the accused had given to her was given to mother by her which, her mother had thrown away. In para-17, she has stated that she was playing with Nafisa. She is unable to



disclose name of her father. She was studying in Anganwari School along with her. In para-18, she has stated that there is no dispute in between her father and the accused. Then has stated that house of Babu lies at the distance 150 yard from her house. Then she has stated that house of Babu Khan cannot be seen from her house but after coming out from her house one could see the house of Babu Khan. At para-19, she has stated that while she was playing, mother was preparing 'Papar' at the house. Her father is a tailor and was present at the house. In para-21, there happens to be contradiction but the same is not at all found corroborated by PW-8, the IO. At para-23, she has stated that the houses of Md. Khurshid, Seema Khala and Ghuru Bhaiya lie in the vicinity of her house. In para-26, she has stated that she was admitted at Hajipur Hospital for three days. In para-30, she has stated that blood stained *Janghia* was thrown away by her mother after a month. In para-31, she has stated that she was knowing Chhotan since before the occurrence. In para-32, she has stated that Chhotan was not on visiting terms. Then at para-33, she denied the suggestion that on being tutored by her mother, she has deposed like so.

15. PW-2 is the father while PW-5 is the mother. They both, as is evident corroborated the evidence of the victim



by stating that they came to know from the victim that she was raped by Chhotan. PW-5 further has said that after hearing cry of the victim, she along with other rushed seeing whom, Chhotan managed to escape. She has seen the victim and at that very time, blood was oozing out from her genital. During cross-examination, PW-2 at para-11 has stated that they have not given blood stained cloth to the police. At para-6, PW-2 has stated that at the time of occurrence, she was studying. While PW-5, during cross-examination has stated that the victim was not admitted at Sadar Hospital rather she was examined and then, medicine was prescribed on the following day. Then she was taken to Mayaganj Hospital. In the background of aforesaid event, the victim had disclosed that she was admitted at the hospital for three days. In para-9, she has stated that she had seen the injury over genital of her daughter and blood coming out therefrom. In para-10, she has stated that she had not given blood stained *janghia* to the police. In para-13, she has stated that her daughter had gone to play along with Nafisa. At para-14, there happens to be contradiction. She has also disclosed that at the police station, Darogaji had also seen the blood coming out from genital of her daughter. In para-15, she has stated that she had not gone to the place of Babu Khan as that



house is abandoned one. She has further stated that when police had come she had also accompanied while visiting the PO, she is unable to say how many persons had accompanied the police. At para-16, she has stated that one day after the occurrence, police had come. Then corrected, he was Dy. SP. At para-20, she has stated that at the time of occurrence, victim was reading at Anganwari School. On the date of occurrence, she had not gone to school. At para-21, she has denied the suggestion that no occurrence as alleged had taken place. She denied the allegation that they got Chhotan implicated in this case through the victim.

16. PW-4 has stated that on the alleged date and time of occurrence, after hearing the uproar, he came out from his house and then had seen daughter of Madin weeping who was taken away by Madin to his house. At that very time, he came to know that she was raped by Chhotan. Identified the accused. During cross-examination at para-6 has stated that he has not deposed before the police that when he came he heard that daughter of Madin was raped by Chhotan.

17. PW-7 has stated that on the alleged date and time of occurrence, she was sleeping inside her house and after hearing commotion she came out and gone to the place where there was a large number of persons. The victim was there. She



has not seen or heard anything whereupon, she was declared hostile. Nothing substantial has been found.

18. PW-8 is the IO. He during his examination-in-chief has stated that after registration of the case, investigation was entrusted to him. During course of investigation, he took the victim, her parents (father-mother) along with Mahila Chowkidar to Sadar Hospital, Bhagalpur where he furnished an application for medical examination but, her X-ray etc. was not done. He has gone to the place of victim, recorded further statement of the informant and as pointed out by parents of the victim, he inspected the place of occurrence which happens to be house of brother of the accused. It has got southern front. It is a tiled roof building. Identified the same by disclosing the boundary, North- house of Md. Mohib, South-barren land and then half constructed house of brother of the accused, East-Orchard, West-Gali and then house of Md. Umar. He recorded statement of the witnesses. He took the victim along with her parents and a Mahila Chowkidar to Mayaganj Hospital where X-ray was done. Then came to court where statement of victim was recorded under Section 164 CrPC. Received supervision note of the superior officials. Gone to jail and recorded the statement of the accused. After completing investigation



submitted charge-sheet (exhibited all the documents).

19. During cross-examination at para-10 he has stated that he had not mentioned the date and time of recording statement in the case diary. In para-16, he has stated that place of occurrence is incorporated in para-10 of the case diary but he had not mentioned therein who shown the PO. On his own, he volunteered that PO was shown by the informant but he failed to mention the same. In para-17, he has stated that he had not mentioned as to how many doors, windows were there inside the house (PO). In para-18, he has stated that he had not seen any injury over the person of the victim. In para-19, he has stated that there happens to be conjoint statement of Bibi Mustabina and Md. Moin. In para-21, he has stated that he had not recorded statement of the victim as well as her statement under Section 164 CrPC. In para-22, he has stated that after leaving the victim and her parents, and Mahila Chowkidar at the hospital, he came to the PO and, recorded further statement of the informant but he has not mentioned the time. In para-23, he has stated that he had not seized chocolate, biscuits as well as cloth of the victim. At para-24, 25, there happens to be contradiction relating to Bibi Mumtaz and Md. Moin. In para-27, he has stated that he had not mentioned the distance in



between the place of occurrence as well as house of victim.

20. From the evidence available on the record, it is evident that the victim has not been cross-examined at the end of appellant on the factum of rape. Therefore, that part of allegation remained uncontroverted.

21. In *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.”***

***(Emphasis supplied)***

22. More or less evidence of PW-2 as well as PW-5 happens to be corroborative in nature and on that very score, they remained static. From the evidence as discussed above, it is abundantly clear that it happens to be unfortunate that both the govt. officials, the reason best known to them, became clown to ruin the prosecution irrespective of the fact that a minor aged about seven years has been subject to rape. So far conduct of the doctor is concerned, the same has already been exposed during analyzing her status. So far I.O. is concerned, it is evident from his evidence that he had not gone inside the house where victim was raped. In likewise manner, from his evidence it is also manifest that he had not recorded statement of the victim nor statement recorded under Section 164 CrPC. His further suspected conduct is found from para-22, wherein he had stated that he taken the victim with her parents to Mayaganj Hospital on the other hand, said that he come to PO, village, recorded further statement of the informant. Be that as it may, it is evident from the evidence of the PWs that there happens to be no



motive which could be the ground for false implication. So far sexual offence is concerned, it did not occur/being committed in the background of the motive rather it happens to be an animal passion whereunder minor innocents are subjected to rape for satisfying lascivious desire. So far this particular case is concerned, as stated above, PW-1 has not been challenged over the factum of rape having been committed inside the abandoned house of the brother of the accused on the pretext of providing chocolate and biscuits.

23. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is affirmed. Appeal is dismissed.

24. Appellant is under custody which he will remain till its saturation.

**(Aditya Kumar Trivedi, J)**

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