

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1112 of 2012**

Arising Out of PS. Case No.-213 Year-2006 Thana- BARHARA District- Bhojpur

Munna Upadyay @ Munan Upadhyay @ Manish Kumar Upadhyay S/o
Shivashwar Upadhyay, resident of Village - Chhinegaon, P.S. Barharwa
(Sinha O.P.), District - Bhojpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Ms. Divya Verma, Amicus Curiae.
For the State : Mr. Ajay Mishra, APP.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL)**

Date : 28-03-2019

The case called out repeatedly, but none turned up on behalf of the appellant. Considering the fact that the appellant is in custody, the court preferred not to defer the hearing and requested Ms. Divya Verma, learned counsel, who was present in the Court, to assist the Court as Amicus Curiae and she agreed for the same. Accordingly she was appointed as Amicus Curiae to defend the appellant in the case.

2. Heard Miss Divya Verma learned Amicus Curiae and Sri Ajay Mishra learned Additional Public Prosecutor for the State on this criminal appeal.

3. This criminal appeal has been preferred against the Judgment and Order of conviction and sentence dated



29.09.2012 passed by Adhoc Additional Sessions Judge-V, Bhojpur, Ara in Sessions Trial No. 580 of 2007 arising out of Barhara (Sinha) P.S. Case No. 213 of 2006 whereby the learned trial court convicted the appellant for the offence punishable under Section 376 of the Indian Penal Code and sentenced him to undergo life imprisonment and also slapped him with the fine of Rs. 25000/- and in case of default of payment of fine to further undergo S.I. for three months under the aforesaid Section.

4. Factual matrix of the case is that Barhara (Sinha) P.S. Case No. 213 of 2006 was instituted under Section 376 of the Indian Penal Code against the accused Munan Upadhyay on the basis of the written report dated 26.09.2006 of Lalti Devi, Wife of Manji Turha addressed to Incharge, O.P. Sinha, District-Ara with the allegation in succinct that on 26.09.2006 at around 06:30 PM she had gone near the well of the school in search of battery. In the meantime, her co-villager Munan Upadhyay divulged her that her battery is lying towards the West of the temple of Shankar Bhagwan. He also offered to accompany her to the aforesaid place. Then she followed him. He took her to the bush standing on the land of Arun Upadhyay located towards the west of the temple of Shankar Bhagwan and told her to search battery. Then she started making search



of battery. In the meantime Munan Upadhyay caught her hold from the rear side and shoved her and gagging her mouth by hand committed rape against her and left the scene. Then she rushed to Deep Narayan Singh weepingly and divulged the occurrence to him. He asked her to rush to police station. Then she rushed to Sarpanch Ram Sarekh Singh and divulged the occurrence to him. Said Ram Sarekh Singh wrote down her written report and taking the written report she rushed to O.P. Sinha.

5. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against the accused Munan Upadhyay under Section 376 of the Indian Penal Code.

6. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions and after commitment and on transfer finally the case came in the seisin of Adhoc Additional Sessions Judge-V, Bhojpur, Ara for trial.

7. Charge against the accused Munan Upadhyay was framed under Section 376 of the Indian Penal Code. Charge was read over and explained to him by the Court to which he pleaded not guilty and claimed to be tried.



8. To substantiate its case, in ocular evidence, the prosecution has examined altogether eight prosecution witnesses namely, Tribhuwan Yadav who happens to be chaukidar and witness of production cum seizure list of the Saya of the victim as PW-1, Sheo Prasad Yadav who also happens to be chaukidar and witness of production cum seizure of the Saya of the victim as PW-2, Nanhak Turha brother in law of the victim as PW-3, Dasrath Singh co-villager of victim as PW-4, Manturan Devi, Sister of the victim as PW-5, victim as PW-6, I.O. of the case namely Surendra Lal Deo as PW-7 and Dr. Kavita Singh who had examined the victim as PW-8. Out of the aforesaid witnesses, PW-4 Dasrath Singh turned hostile. Prosecution has also filed and proved some documents by way of documentary evidence in the case.

9. Statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be innocent. Accused neither adduced any ocular nor documentary evidence in buttress of his case.

10. After hearing the parties and perusing the record, the learned trial court passed the aforesaid Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

11. Being aggrieved and dissatisfied with the aforesaid



Judgment and Order of conviction and sentence, convict Munan Upadhyay has preferred this Criminal Appeal.

12. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellant beyond all reasonable doubts or not.

13. It is submitted by learned Amicus Curiae that offence of rape was allegedly committed against the victim in the bush i.e. on the rough surface, so the victim must have sustained some injury on her person particularly on her back, leg, hand, etc., but on medical examination of the victim doctor has not found any external or internal injury on the person of the victim which completely rules out commission of offence of rape against the victim by the accused forcibly. As per the account of the victim, after the occurrence she rushed to Deep Narayan Singh and Sarpanch Ram Sarekh Singh and divulged the occurrence to them. Ram Sarekh Singh recorded her written report. But neither the said Deep Narayan Singh nor Ram Sarekh Singh has been examined by the prosecution which also creates doubt about the prosecution case and the aforesaid written report does not stand proved by the prosecution. Moreover aforesaid written report does not bear the signature of its author Ram Sarekh Singh. It is further submitted that as per



the account of the victim, her father was present in the house at the time of occurrence but he has not been examined by the prosecution and ocular evidence also does not stand corroborated by the medical evidence. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charge levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy and reliable ocular and medical evidence. Hence, aforesaid judgment and order of conviction and sentence passed against the appellant is liable to be set aside and the appellant is entitled to be acquitted.

14. On the other hand, learned APP for the State advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence submitted that the victim in her statement has supported the prosecution case in toto. The semen stained Saya was produced by the victim and was seized by the police and sent to FSL for its chemical examination and on its chemical examination though no spermatozoa was found on any of the stain on saya but semen was found on it which corroborates the prosecution case and learned trial court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction and sentence which is liable to be



upheld and this criminal appeal is shorn of merit and is liable to be dismissed.

15. From perusal of the record, it appears that out of the six material witnesses examined by the prosecution, PW-4 Dasrath Singh turned hostile. PW-1 Tribhuwan Yadav and PW-2 Sheo Prasad Yadav happen to be witnesses of the production cum seizure list of the Saya of the victim, while PW-3 Nanhak Turha and PW-5 Manturan Devi are the hearsay witnesses of the case. Though aforesaid witnesses have stated that the victim had divulged the occurrence to them, but the victim has not corroborated the factum of divulgence of the aforesaid occurrence to the aforesaid witnesses. Hence for want of corroboration, aforesaid statement of the said witnesses is not admissible in evidence even as a hearsay witness. As per the account of the victim, her father was present in the house at the time of occurrence and she had divulged the occurrence to him, but father of the victim has not been examined by the prosecution

16. Though the victim examined in this case as PW-6 has made an abortive bid to support the prosecution case by stating in her examination-in-chief in consonance to the prosecution case as adumbrated in the written report that at the time of occurrence she had gone near the well in search of



battery. Munan Upadhyay was present there. On quizzing Munan Upadhyay about her battery, he divulged that her battery is lying in the bush near the temple. He took her to the bush located on the land of Arun Upadhyay in search of the battery and asked her to search it out. When she started searching the battery, he caught her hold from rear side and shoved her and gagging her mouth committed rape against her. But from perusal of the medical examination report marked as Exhibit-5 and testimony of the Dr. Kavita Singh examined as PW-8, it appears that the doctor has not found any external or internal injury on the person of the victim. She has also not found any sign of injury or stain on her private part. Doctor has not given any definite opinion regarding commission of rape against the victim. As the victim was shoved on the bush and was allegedly raped forcibly by the appellant, she must have sustained some injury on her person particularly on her back and rear portion of leg, hand, etc., but the doctor has not found any injury on any part of the person of the victim. Thus aforesaid testimony of the victim does not stand corroborated by the medical evidence.

17. Though saya of the victim was produced before the police by the victim on the next day of the occurrence and was sealed and sent to FSL for its chemical examination, but from perusal of the FSL Report (Exhibit-6), it appears that on



examination of Saya no spermatozoa was detected on it rather semen was detected, but finding of the semen on the Saya of the victim is not sufficient to indicate the complicity of the appellant in the occurrence as the said semen was not matched with that of the appellant as the I.O. has not made any effort to take the semen of the appellant in jail and got the DNA test done by taking permission of the Court as evident from Para-14 of the cross-examination of the I.O.

18. From perusal of the record and statement of the victim, it appears that instead of rushing to her house and police station from the place of occurrence, the victim preferred to rush to Deep Narayan Singh and Sarpanch Ram Sarekh Singh and divulged the occurrence to them which happens to be against natural course of conduct. Moreover said witnesses have not come forward in corroboration of the divulgence of the occurrence to them by the victim. Though as per account of victim, written report was written by Sarpanch Ram Sarekh Singh but it does not bear signature of said scribe and said written report has not been proved by the prosecution.

19. In the facts and circumstances of the case, we find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charge levelled against the appellant beyond all reasonable doubts by



adducing consistent, trustworthy and reliable ocular and medical evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial court against the appellant is set aside and the appellant is acquitted of the charge levelled against him. As the appellant is in custody, he is directed to be released forthwith from the custody if not wanted in any other case. Accordingly, this criminal appeal is allowed.

20. Let a copy of the first and last page of this judgment be handed over to the learned Amicus Curiae, Ms. Divya Verma and the learned Amicus Curiae be paid prescribed fee by the Patna High Court Legal Services Committee.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

mantreshwar/-

AFR/NAFR	AFR
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