

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.884 of 2013

Arising Out of PS. Case No.-113 Year-2011 Thana- Kauwakol District- Nawada

Nand Kishore Mistry Son of Shdeo Mistry Resident of Village-Taraun, P.S.-
Kauwakole, District-Nawada

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Madhurendra Kumar, Advocate Mr. Pramod Kumar, Advocate Mr. Ajay Kumar Singh, Advocate
For the Respondent/s	:	Mr. Ajay Misra (A.P.P.)

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
And
HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)

Date : 15-03-2019

Heard Mr. Madhurendra Kumar learned counsel assisted by Mr. Pramod Kumar, learned counsel for the appellant as well as Mr. Ajay Mishra learned Addl. Public Prosecutor on this criminal appeal.

2. This criminal appeal has been preferred against the judgment and order of conviction dated 18.07.2013 and order of sentence dated 20.07.2013 passed by Additional Sessions Judge-I, Nawada in Sessions Trial No. 305 of 2011 / 146 of 2011 arising out of Kauwakole P.S. Case No. 113 of 2011 whereby the learned trial court convicted the accused Nand Kishore Mistry for the offence punishable under Section 376 of



the Indian Penal Code and sentenced him to undergo life imprisonment and also slapped him with a fine of Rs. 25,000/- and in default of payment of fine to further undergo S.I. for six months under Section 376 of the Indian Penal Code.

3. The factual matrix of the case is that Kauwakole P.S. Case No. 113 of 2011 was instituted under Section 376 of the Indian Penal Code against Nand Kishore Mistry on the basis of written report dated 24.07.2011 filed by Manoj Mistry S/o Shivan Mistry with the allegation, in succinct that on 24.07.2011, there was function of *chatihar* in his house and his family members were engaged in the said function. His daughter Kanchan Kumari @ Tekni aged about eight years (hereinafter referred as the “victim”) had gone to Kalkaliya Tand located near Bolta Pahar towards East of his village for grazing she-goat. She regressed from the aforesaid place at 03:00 PM weepingly. He witnessed her pant smeared with blood, then his wife after stripping off her pant inspected and divulged him that the genital organ of the victim was bleeding and it was torn. On quizzing her daughter about bleeding, she divulged that Nand Kishore Mistry took her to a bush catching her hold and stripping off her pant committed rape against her. She started crying and bleeding, then he left the scene.



4. The aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against Nand Kishore Mistry under Section 376 of the Indian Penal Code.

5. On receiving the charge-sheet 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 seisin of the learned Additional Sessions Judge-I, Nawada for trial.

6. Charge against the accused Nand Kishore Mistry 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.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether eight prosecution witnesses namely, Kaili Devi, who happens to be aunt of the victim as PW-1, Mahesh Ram as PW-2, Dr. Nilam Kumari, who had examined the victim as PW-3, Nitu Devi, who happens to be mother of the victim as PW-4, informant Manoj Mistry as PW-5, victim as PW-6, Ram Swaroop Das, who happens to be 2nd I.O. of the case as PW-7 and Ram Vinod Singh, who happens to be



1st I.O. of the case as PW-8. The prosecution has also filed and proved some documents by way of documentary evidence in the case.

8. The 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. The accused has also examined four defence witness, namely, Suma Devi, who happens to be mother of the appellant as DW-1, Anpurna Devi, who happens to be wife of the appellant as DW-2, Prabhu Yadav, who happens to be neighbourer of the appellant as DW-3 and Sahdeo Manjhi, who happens to be father of the appellant as DW-4 in buttress of his case.

9. After hearing the parties and perusing the record, the learned trial court passed the impugned judgment and order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convict has preferred the present criminal appeal.

11. 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.

12. It is submitted by learned counsel for the appellant that there is no eye witness of the occurrence. The appellant has been falsely implicated in this case due to animosity as wages of the appellant is due to the informant and informant has not paid the same rather implicated him in the case. It is further submitted that doctor has not found any spermatozoa in the vaginal swab of the victim which rules the commission of rape against the victim by the appellant. It is further submitted that all the witnesses examined by the prosecution are family members of the victim and interested witness, and the ocular evidence also does not stand corroborated by the medical evidence. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellant beyond all reasonable doubt by adducing trustworthy, worth credence and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed against the appellant by the learned trial court is liable to be set aside and the appellant is entitled to be acquitted.

13. 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 has fully supported the prosecution case and other witnesses, though do not happen to be eye witness of the occurrence, but have unanimously stated about finding of blood on the pant of the victim and her genital organ bleeding when she regressed from the forest. Parents of the victim have also stated that the victim had divulged the commission of occurrence against her by the appellant which has been corroborated by the victim also. Doctor examined the victim has also found the commission of rape against the victim. Thus, the ocular evidence also stands corroborated by the medical evidence and the learned trial court correctly appreciating the facts and evidence on record has rightly passed the impugned judgment and order of conviction and sentence which is liable to be upheld and this appeal is shorn of merit and is liable to be dismissed.

14. From perusal of record, it appears that the victim examined in the case as PW-6 supporting the prosecution case as adumbrated in the written report in toto has stated that at the time of occurrence, she had gone near the *pahari* along with her she-goat. Nand Kishore Mistry arrived there and committed rape against her stripping off her pant. On screaming by her, he



gagged her mouth. Her genital organ started bleeding, then Nand Kishore made good his escape. Thereafter, she regressed to her house and divulged the occurrence to her parents. In paragraphs 6 and 7 of her cross-examination, she has stated that there was abrasion on her back, hand and leg due to shoving her on the ground by the accused. Doctor had also examined the aforesaid abrasion. There was injury in her genital organ. PW-4 (Nitu Devi) and PW-5 (Manoj Mistry), who happen to be parents of the victim corroborating the aforesaid prosecution case, have unanimously stated in their respective examination-in-chief that the victim had gone to Kalkaliya Tand located near Bolta Pahar for grazing she-goat. She regressed from there weepingly at the time of occurrence. They witnessed blood stain on her attire, then after removing her pant, PW-4 inspected her genital organ and found it bleeding. Then on grilling the victim, she divulged that Nand Kishore Mistri took her to the bush alluring her and stripping her pant committed rape against her and he made good his escape following screaming made by her. Victim in her examination-in-chief has also corroborated the factum of divulgence of the occurrence to PW-4 and PW-5 by her.

15. PW-1 (Kaili Devi) and PW-2 (Mahesh Ram)



though do not happen to be eye witnesses of the occurrence, but they have also found blood on the attire of the victim and her genital organ bleeding when she regressed from the forest weepingly. As PW-1 (Kaili Devi) has stated in paragraph 2 of her examination-in-chief that after regression of the victim from the forest, she witnessed blood stain on the pant and frock of the victim and her genital organ bleeding. PW-2 (Mahesh Ram) has stated in paragraph 1 of his examination-in-chief that he had witnessed blood stain on the pant of the victim. I.O. (PW-8) has stated in paragraph 4 of his examination-in-chief that during inspection of place of occurrence, he had found the branches and leaves of the weed damaged and soil trampled at the place of occurrence. From perusal of the aforesaid ocular evidence of the prosecution, it appears that the prosecution has successfully established the commission of rape against the victim by the appellant by adducing consistent, trustworthy, convincing and reliable evidence.

16. Dr. Nilam Kumari, who had examined the victim has been examined by the prosecution as PW-3. In her examination-in-chief, she has stated that on examination of the genital organ of the victim, she found slightly vaginal bleeding and the Hymen slightly torn. She also found slightly vaginal



scarp. She has opined that the rape has been committed against the victim. She has proved the medical report marked as Ext-1. Thus, the aforesaid ocular evidence of the prosecution also stands corroborated by the medical evidence.

17. In such an offence of committing rape against the victim at desolate place, possibility of the presence of the eye witness is very bleak. Hence, non-examination of any eye witness of the occurrence by the prosecution, in our considered opinion, is not going to effect the merit of the case by any stretch of imagination. So far as the argument of the appellant that case of rape does not stand established as doctor has not found any spermatozoa in vaginal swab of the victim, does not appear to be convincing and plausible. As the victim was examined after about 22 hours of the occurrence and doctor (PW-3) in paragraph 2 of her cross-examination has candidly stated that spermatozoa may be washed out by urinal in case of examination after such a long span of time.

18. Though, appellant has examined four defence witnesses in the case, but as the prosecution has fully succeeded to substantiate its case beyond all reasonable doubt by adducing consistent, trustworthy, convincing and reliable ocular and medical evidence, hence, in such circumstances, defence



evidence is of not much importance. Moreover, on examination of defence witnesses, we do not find any worth in the evidence of defence witnesses particularly in the wake of such a credible evidence of prosecution.

19. Having regard to the facts and circumstances of the case and discussions made by us hereinabove, we find and hold that the prosecution has succeeded to substantiate its case beyond all reasonable doubt by adducing consistent, trustworthy, convincing and reliable evidence. Hence, the aforesaid judgment and order of conviction and sentence passed by the learned trial court does not warrant any interference by this Appellate Court and is hereby upheld. Accordingly, this Criminal Appeal is dismissed.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

rohit/-

AFR/NAFR	AFR
CAV DATE	N.A.
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