

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.289 of 2017

Arising Out of PS. Case No.-44 Year-2016 Thana- PARAIYA District- Gaya

Pawan Kumar, Son of Satya Nand Sharma @ Satya Nand Singh, Resident of Village - Khusdihra, P.S. - Paraiya, District - Gaya.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ramakant Sharma-Sr. Advocate Mr. Shivendra Prasad-Advocate
For the Respondent/s	:	Mr. Binod Bihari Singh-A.P.P.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

06-02-2019

Appellant Pawan Kumar has been found guilty for

an offence punishable under Section 376 of the I.P.C., but no sentence has been inflicted therefor, probably under the guise of Section 42 of the POCSO Act, under Section 4 of the POCSO Act whereunder directed to undergo R.I. for eight years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo R.I. for six months by the 1st Additional Sessions Judge-cum-Special Judge, POCSO, Gaya in POCSO Case No.15 of 2016 vide judgment of conviction dated 14.12.2016 and order of sentence dated 19/21.12.2016.

2. Sita Devi (PW-2) filed written report on 28.03.2016 disclosing therein that on the same day at about 10.00 A.M., her daughter (name withheld, PW-4) has gone to school. While she has gone to hand-pipe for fetching water,



Pawan Kumar, who was present since before, caught hold her and committed rape. Due to severe pain, her daughter cried attracting other students including Rinku Kumari, Anjani Kumari and Babita Kumari (not examined), seeing whom, Pawan Kumar escaped there from. The maid-servant having been engaged at the school has also seen the occurrence. Then thereafter, she has taken the daughter to the police station.

3. After registration of Paraiya P. S. Case No.44 of 2016, investigation commenced and after concluding the same, chargesheet was submitted, whereupon trial commenced and concluded in a manner, subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced in defence.

5. Altogether seven PWs have been examined on behalf of prosecution in order to substantiate its case, who are PW-1, Matiya Devi, PW-2, Sita Devi, PW-3, Nandan Kumar, PW-4, victim herself, PW-5, Sarika Vahalia, PW-6, Dr. Puja Pradhan and PW-7, Meera Kumari. Side by side, has also exhibited, Exhibit-1, signature of PW-3 over written report, Exhibit-2, statement of the victim under Section 164 of the



Cr.P.C., Exhibit-3, medical report, Exhibit-4, seizure list, Exhibit-5, endorsement over written report, Exhibit-6, formal F.I.R. As stated above, nothing has been adduced on behalf of defence.

6. While assailing the judgment of conviction and sentence, it has been submitted at the end of learned counsel for the appellant that it happens to be a case of no evidence. That being so, the finding so recorded by the learned lower Court is not at all sustainable in the eye of law. To substantiate such plea, it has been submitted that whatever witnesses have deposed in Court, happen to be the substantial evidence and the finding is to be based thereupon. Then, exposing the status of the witnesses, it has been submitted that material witnesses that means to say, PW-1, PW-2 and PW-3 have not supported the case of the prosecution and so, they all have been declared hostile. Now, coming to the evidence of PW-4, victim, it has been submitted that her evidence is to be seen in light of evidence of PW-2, her mother/ informant as well as PW-6, Dr. Puja Pradhan. After parallel scrutiny of the same, it is evident that the evidence of PW-4 is not at all found to be reliable. More particularly in the background of her tender age, weak mental equilibrium and that happens to be reason behind that at each



and every occasion, a hitch is found at her end. Furthermore, in terms of settled principle of law guiding appreciation of evidence of the witnesses after considering in its totality, it is found there from that she had not identified the appellant to be her rapist, apart from the fact that PW-6, Dr. Puja Pradhan had not testified commission of rape upon her. Consequent thereupon, the conviction and sentence recorded by the learned lower Court is not at all found supported with the materials available on the record.

7. In an alternative, it has also been submitted that the evidence as did not support the case of penetrative sexual assault and so, in worst case, inferring against the appellant from the evidence of PW-4 solely, it should be mere a sexual assault and for that, appellant has remained under custody for more than three years and in the aforesaid background, the sentence could be modified as period having undergone.

8. On the other hand, learned Additional Public Prosecutor while repelling the submission has submitted that doctor had not opined that it was not a case of rape/ penetrative sexual assault what the opinion happens to be simply discarding the recent one. The report is dated 30th while the occurrence is of dated 28th and on that very score, there happens to be no cross-



examination. Apart from this, it has also been submitted that in usual phenomenon witnesses have fallen on the culture of compromise, but during course of examination of victim, the same is found completely sacrileged identifying the appellant Pawan Kumar to be her rapist, whereupon the judgment of conviction and sentence recorded by the learned lower Court is fit to be confirmed.

9. Coming to the evidence available on the record, it is evident that three kinds of witnesses have been examined, the first one- material witnesses falling right from PW-1 to PW-3, the second one-the official witnesses PW-5 to PW-7 and the third one-the victim (PW-4). So far status of material witnesses are concerned, it is evident that PW-1, PW-2 and PW-3 have not supported the case of the prosecution, whereupon they were declared hostile. Even thereafter, the prosecution could not be able to procure any favourable material from them.

10. So far official witnesses are concerned, PW-5 is the Magistrate, who had recorded statement of the victim during course of statement under Section 164 of the Cr.P.C. and exhibited the same. In spite of the fact that during cross-examination, she had stated that at Para-7, that on due conversation with the victim, she formed an opinion that she



was fit to give statement, but those things are not at all visible from Exhibit-2. Moreover, at Para-4 of her cross-examination, it is evident that she had disclosed that she had inquired from the victim whether police had threatened, whereupon she had disclosed that she has come along with her mother, but she was very much afraid of. Though, nothing has been disclosed at her end either in her examination-in-chief or during cross-examination that she had given sufficient time to console herself (victim) and that being so, that part is found completely blurred.

11. PW-6 is the doctor, who had examined the victim on 28.03.2016, that means to say, on the date of occurrence itself, though report is dated 30.03.2016. Apart from other finding, she had found hymen ruptured, however, no mark of violence present over her body nor even on her private part. Vaginal swab was taken out and sent for pathological examination, which was received on 30.03.2016 and as per pathological report, neither alive or dead spermatozoa was found. The ultimate finding recorded by the doctor happens to be no recent sign of sexual intercourse, but rape cannot be denied. During cross-examination, she had stated that rape is not only a criteria for rupture of hymen rather so many events are responsible, more particularly horse riding, cycling etc.



12. PW-7 is the I.O., she has stated that on 28.03.2016, she took up investigation of Paraiya P. S. Case No.44 of 2016, recorded further statement of the informant, statement of the victim, got the victim examined by the doctor, seized panty worn by the victim (exhibited), got the X-ray conducted and then, visited the place of occurrence, which happens to be middle school, Kushadihra. She had also shown the hand-pipe nearby. She had also visited the second P.O. lying nearby having bushes where rape was committed. Then had taken statement of the witnesses, got the victim examined under Section 164 Cr.P.C., procured the medical report. Procured the supervision note, sent the panty to F.S.L. and then, completing the investigation, submitted chargesheet. During cross-examination at Para-2, she has stated that she has not received the F.S.L. Report concerning panty till submission of chargesheet. In Para-5, she has stated that she had seen the medical report wherein rape has not been ruled out, but the report is not specific with regard to commission of the rape, but on that very basis, chargesheet has been submitted under Section 376 of the I.P.C. In Para-7, she has stated that he had not recorded statement of Kanika Singh, whose house stood in the boundary. In Para-8, she has stated that when victim came



before her, she was fully conscious. She had not inspected her body.

13. PW-4 is the victim. Before her examination, the Court had tested and then, her examination was allowed. During course of examination-in-chief, she has stated that she used to visit school at 9.00 A.M. Hand-pipe is available at the school where they go to fetch water. At Para-7, she has further stated that the accused, who is present in dock, has not committed any kind of occurrence with her at school. At Para-8, the Court inquired from her *“whether you have disclosed about six months ago to her mother that Pawan had committed rape on her near hand-pipe at her school and the answer is, she had disclosed to her mother that Pawan had committed rape on her at hand-pipe.”* She has further stated that she was taken to police station. Then at Para-10, she has stated that police had not inquired from her. In Para-11, she has stated that police had taken her to doctor. At Para-12, she has further stated that in Court, Magistrate Sahab had inquired from her. In Para-13, when the Court asked that whose name she had disclosed, the answer is witness became silent having tear in her eye. In Para-14, she has stated that she is unable to identify Pawan regarding whom, she has disclosed the allegation. During cross-examination at Para-15, she has disclosed that she does not know the meaning of ‘Balatkar’. In Para-16, she has stated



that she has deposed before the Magistrate whatever instructed by the Darogaji.

14. It is needless to say that the statement recorded under Section 164 of the Cr.P.C. is not substantive piece of evidence rather it happens to be only for the purpose of corroboration or contradiction. That being so, no inference could be drawn on the basis of the statement recorded under Section 164 Cr.P.C. Apart from this, the victim (PW-4), during course of examination-in-chief appears to be inconsistent though not been declared hostile (Para-7), which has been taken cared of by the Court itself under Para-8, but the same become worthless as prosecution failed to explicit from her that Pawan, who is present in dock, was the same person, rather at Para-14, she has stated that she is unable to identify Pawan against whom, she had alleged. Even then, neither disclosed her hostile nor confronted with her earlier statement so recorded under Section 164 Cr.P.C. or under Section 161 Cr.P.C. and that being so, the link got missed over proper identification. As held above, the evidence in Court happens to be the substantive evidence that means to say, there should have been proper identification of the culprit in Court and having infirmity, deficiency at the end of the prosecution as well as the witnesses to identify the



accused in dock that will certainly have an adverse impact, whereupon the accused could not be dragged irrespective of nature of the offence.

15. Consequent thereupon, the finding so recorded by the learned lower Court is not at all found maintainable, whereupon the same is set aside. Appeal is allowed. Appellant is under custody, hence he is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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AFR/NAFR	A.F.R.
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