

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1975 of 2017**

Arising Out of PS. Case No.-104 Year-2006 Thana- CHOUTARWA District- West
Champaran

-
1. Suresh Kurmi Son of Dudhan Kurmi,
 2. Mahendra Kamkar, Son of Ganesh Kamkar,
 3. Jang Bhar @ Jag Bhar, Son of Jamuna Bhar, All Resident of Village-
Manjhariya, P.S.- Bhairoganj, District- West Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellants N0.2 & 3: Mr. Baxi S. R.P. Sinha, Sr. Adv
Mr.Zainul Abedin, Adv.

For the Appellant No. 1 : Mr. Deovind Kumar Singh, Adv.

For the Respondent/s : Mr. Syed Ashfaque Ahmad, APP

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

22-08-2019

Appellants, Suresh Kurmi, Mahendra Kamkar,

Jang Bhar @ Jag Bhar vide judgment of conviction dated 12.06.2017 and order of sentence dated 14.06.2017, have been found guilty for an offence punishable under Section 452 of the IPC and each of them has been sentenced to undergo RI for seven years as well as to pay fine appertaining to Rs. 10,000/- in default thereof, to undergo SI for one year, under Section 376/511 IPC, sentenced to undergo RI for five years as well as to pay fine of Rs. 5000/- in default thereof, to undergo SI for six months, additionally, with a further direction to run the sentences concurrently, by ^{1st} Additional Sessions Judge, Bagaha, West Champaran, in Sessions Trial No. 298/2008



arising out of Chautarwa (Bhairoganj) PS Case No. 104/2006.

2. Name withheld (PW 1) filed written report on 13.08.2006 disclosing therein that in the preceding night at 1:00 AM while she was sleeping alone in her room and her mother, Bhaujai were sleeping in the Angan, father and brother were sleeping at Darwaza, her neighbours, namely, Suresh Kurmi, Mahendra Kamkar, Jang Bhar @ Jag Bhar intruded inside her room after removing the latch and thereafter, all of them, caught hold of her hands, legs. Mahendra, after gagging her mouth with Gamchha began to untie her Salwar, during midst thereof, she tried to shout but she was overpowered. All of them were carrying intention to commit rape. All of them were saying that allow them to act which they want, otherwise, she will be murdered. All of a sudden, the hand of Mahendra got slipped over her mouth, whereupon, she shouted attracting her mother, Bhaujai, father, elder brother, uncle, aunt as well as neighbours, namely, Keshwar Sah, Chhatthu Kurmi and his wife Gayatri Devi and other, seeing whom, she disclosed the event to them, whereupon, her father and brother closed the door through which all of them have intruded inside the house. They also began to call other persons, till then all the three accused assaulted her and then, after removing the bricks which were



stopped there, escaped. They were chased but could not be apprehended.

3. On account of aforesaid written report Chautarwa PS Case No. 104/2006 has been registered, followed with investigation as well as submission of charge-sheet, facilitating the trial meeting with the ultimate result, subject matter of 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 of occurrence. It has specifically been pleaded that one of the sisters of the informant, namely, Sankela Devi got married with Mahendra Kamkar who was in love since the age of 10 years and for that, Chautarva PS Case No.176/2006 has been registered, wherein the alleged victim, Sankela Devi was examined under Section 164 CrPC admitting her marriage with Mahendra Kamkar and on the basis thereof, the police report was submitted as occurrence not true. During course of prevailing turmoil in the family of the prosecution party on account of revolt by Sankela Devi projected the informant, a minor, an illiterate, of below average mental understanding and then, got this case filed. Furthermore, documentary evidence has been adduced at their



end in order to substantiate the same.

5. Altogether four PWs have been examined at the end of the prosecution namely, PW-1, Victim, PW-2, Anar Devi, mother of the victim, PW-3, Gayatri Devi, a stranger, PW-4, Satya Narain Bhar, father of the victim. Side by side, has also exhibited Ext-1, Statement of victim recorded under Section 164 CrPC. On the other hand, no oral evidence has been adduced but Ext-A, photo copy of certified copy of order-sheet of Chautarva PS Case No. 173/2006, photocopy of certified copy of FIR of Chautarva PS Case No. 173/2006, Ext-C, Photo copy of certified copy of statement of 164 CrPC, Ext-D, photo copy of certified copy of final form of Chautarva PS Case No. 173/2006 have been brought up on record. It is needless to say, that all the documents whatever been adduced on behalf of defence would not have been exhibited because of the fact that neither it happens to be a primary evidence nor secondary evidence.

6. Be that as it may, from the evidence available on the record, it is evident that the aforesaid theme is found duly admitted at the end of the prosecution witnesses and the reliability of the version of the prosecution witness has to be seen in the aforesaid background. In its continuity, it is also to



be seen that neither IO has been examined, nor Bhaujai as well as brother of the victim has come up to support the case of the prosecution. In its continuity, it has also to be seen that the Sankela whose presence was there has also not been examined and virtually as she happens to be at the centre point around whom the whole event revolves, hence, her evidence was very much relevant.

7. PW-1 had stated that on the alleged date and time of occurrence, she was sleeping at her house. Door was just shut as latch was damaged through which, Mahendra Kamkar, Jang Bhar @ Jag Bhar, Suresh intruded inside her room after pushing the door. Mahendra covered her face with Gamchha, Suresh caught hold of her leg and Jag Bhar caught hold of her both hands. Mahendra had untied her Salwar. They had come in order to take away her prestige. She protested and indulged in grappling with them. During midst thereof, hand of Mahendra removed from her mouth. She raised alarm attracting mother, father, brother who also raised alarm. Seeing this, the accused persons, after removing the bricks, having kept at the space left for fixing window, fled away. Identified the accused. Further disclosed that a lantern was also burning. Also said that she had gone to the police station and filed written report whereupon,



she had put her RTI. Her statement was also recorded under Section 164 CrPC. During cross-examination at para-8, there happens to be a genealogical table of her family showing presence of Sankela, one of the sisters. In para-10, she has show the house of the accused. In pars-12, 13 and 14, there happens to be cross-examination relating to family status of the accused. In para-14, she has stated that this case has been instituted by her father after taking her to the police station. She has further stated that the paper on which she had put her thumb impression was blank. She has further stated that 8-10 days thereafter she came to know that the case has been registered. She has further stated that her parents (father & mother) both had gone. They had also put their thumb impression. In para-15, there happens to be topography of her house. In para-16, she has stated that in her room, save and except her, none other had slept. In the room adjacent south to her room, none had slept. All were sleeping in the *Angan*. Then she has shown the main entrance to be at eastern flank of the house. In para-17, she has stated that on account of having her sister, Sankela enticed away by Mahendra, her mother had instituted a case against him. In that case, her sister was traced out, her statement was recorded in the court. In that statement, her sister had disclosed that she was



not at all kidnapped, rather, she had married with Mahendra and she wants to reside with him. That case is not running. In para-18, she has stated that at the time of her statement in court, police and her father were present at the door of the court room. In para-20, she has stated that for the last one year, the door of the room in which she was sleeping, was damaged. She has shown boundary of her house as North-house of her uncle, South- house of her another uncle, East-her own thatched house, West-Road. In para-22, she has stated that all the family members have woken up on her alarm. In para-23, she has stated that they had gone to the house of the accused at that very moment itself. None of them was present. They had talked with their family members. Then she has denied suggestion that on account of her sister having married with Mahendra, this case has falsely been instituted putting false and frivolous allegation by her parents after forcing her.

8. PW-2 is the mother. She has stated that on hue and cry raised by her daughter, they had rushed as, accused, Mahendra Kamkar, Suresh Kurmi, Jang Bhar @ Jag Bhar intruded inside the room with an intention to commit rape over her daughter. During cross-examination at para-5, she has stated that she also had gone to the police station for institution of the



case where she had put her thumb impression over paper. That paper was ascribed but she is unable to disclose as to what was written on that paper. She has further stated that she had seen all the three persons conjointly while they had intruded inside her house but, she had not disclosed the same to the victim nor to her husband. In para-6, 7, and 8, there happens to be cross-examination relating to family status of the accused. At para-9, she has admitted that Mahendra is married. Right from para-10, she had admitted the scenario relating to her daughter Sankela with Mahendra having married, institution of the case, inclination of her daughter to stay with Mahendra and then, though, Sankela has been married at some other place, subsequently, but no divorce has taken place. In para-27, she has disclosed that after hearing alarm, she reached at the place of occurrence within two minutes. At that very time, her daughter was sitting over a Chowki. She carried her to Angan where she sat over the ground. She talked with her in the Angan. At that very time, her daughter-in-law, Dayadin, daughter-in-law of Dayadin and other villagers were also present. Then has denied the suggestion that in the background of the activity having in between her daughter, Sankela with Mahendra, this case has falsely been instituted.



9. PW-3 is a stranger who has deposed that on the alleged date and time of occurrence while she was sleeping at her house, woke up after hearing alarm of the victim. She had gone to the Darwaza of victim. It was a moonlit night. She had seen coming out Mahendra Kamkar, Suresh Kurmi, Jang Bhar @ Jag Bhar from the house of the victim who ran therefrom. Victim had disclosed that all the three have come with an intention to commit rape. When she raised alarm, then they fled away. Identified the accused. During cross-examination at para-4, she has stated that accused persons have not tried to commit rape upon her nor any villager. At para-7, she has stated that she had talked with the victim but she is unable to disclose exact time. At para-8, she has stated that with regard thereto, she had not talked with Satya Narain nor with his wife, neither with neighbours. At para-10, she has stated that she met with the victim inside her house. At that very time, her main door was open. Family members were present. She has further stated at para-11 that her husband was there. She has denied that sister of victim has married with Mahendra out of her own volition. In para-14, she has stated that no occurrence has taken place in her presence. She has further stated that Prakash and Satya Narain had gone to institute a case.



10. PW-4 is the father of the victim who has deposed that on the alleged date and time of occurrence, he was sleeping outside while her daughter-in-law, daughter(victim) were sleeping inside the house. Mahendra had intruded inside the house while two remained outside. When Mahendra began to untie Ganji of the victim after extinguishing the lantern in order to commit rape, his daughter shouted attracting family members. He also rushed. Mouth of her daughter was gagged by Mahendra, as a result of which, there were swelling. Mahendra after dismantling the window ran away. Two persons who were standing outside, also ran away. Identified. During cross-examination paras-2, 3, 4, and 5 is with regard to affair in between Sankela and Mahendra. Then he denied the suggestion that in the background of love affair in between Sankela and Mahendra, this false case has been instituted.

11. Usually non examination of IO would not cause dent to the prosecution unless and until the non examination has caused prejudice to the interest of the accused. So far instant case is concerned, all the prosecution witnesses save and except PW-3, it is apparent that Sankela happens to be elder sister of the victim and she had an affair with Mahendra over which, a case was instituted and as is evident from the evidence of PW-1,



the victim, Sankela had admitted that she had married with Mahendra and further, the case had gone. The documents whatever been filed at the end of the defence could not be looked into on account of deficiency but as admitted, just looked into in order to proper identification wherefrom, it is evident that the case of kidnapping of Sankela was instituted after institution of this case. So, the affair was continuing on the alleged date of occurrence of presence case. That means to say, grievance was persisting. In the aforesaid background, when the evidences have minutely been gone through, it is evident that PW-4, the father had disclosed that two persons remained outside the house while one person, the said Mahendra had gone inside who engaged in putting of the Ganji. On the other hand, the victim herself has disclosed that all the three had intruded inside her room and all the three were engaged and further, when there was an attempt to untie the string of the Salwar, she raised alarm, on account of removing of hands of Mahendra from her mouth whereupon, all of them, managed to escape after removing the brick which were kept over the space left for fixing window. Had there been examination of the I.O., the defence would have been in a position to bring on record the topography of the house, physical condition of the door,



window, in order to trace out truthfulness in the prosecution version which was relevant.

12. In the aforesaid background, it looks unsafe to rely upon the evidence having been adduced at the end of the prosecution, more particularly, when other family members, that means to say, Bhaujai, brother, sister, Sankela and uncles who have got house in the boundary of the informant's house and further have their presence.

13. It is needless to say that in such kind of cases, there should be proper collection of material which could have only on account of examination of independent witnesses for the purpose of corroboration supported the objective finding of the I.O. Thus, being completely deserted, the finding so recorded by the learned lower court did not find favour. Hence, same is set aside.

14. Appeal is allowed. Appellants are under custody, they are directed to be set as liberty forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

perwez

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	27.08.2019



Transmission Date	27.08.2019
-------------------	------------

