

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3381 of 2017**

Arising Out of PS. Case No.-28 Year-2013 Thana- ARWAL MAHILA District- Jehanabad

Azad Khan S/o Shamshad Khan, Resident of Village/Mohalla- Rasidpur, P.S.-
Arwal, District- Arwal. Appellant/s

Versus

The State Of Bihar Respondent/s

Appearance :

For the Appellant/s : Mr.Ashutosh Kumar,
Mr. Rajesh Kumar Pandey, Advocates.

For the Respondent/s : Mr.S. A. Ahmad, APP

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

12-09-2019

Appellant, Azad Khan, vide judgment of conviction dated 16.11.2017 and order of sentence dated 17.11.2017, has been found guilty for an offence punishable under Section 448 IPC and sentenced to undergo RI for one year, under Section 376/511 of the IPC and sentenced to undergo RI for five years as well as to pay fine appertaining to Rs. 10,000/- in default thereof, to undergo RI for one year, additionally, with a further direction to run the sentences concurrently, by 2nd Additional Sessions Judge, Jehanabad in Sessions Trial No. 42/2014/143/2014 arising out of Arwal Mahila PS Case No. 28/2013.

2. Sunil Dutta (PW-3), filed a written report on 25.11.2013 at about 9:00 PM disclosing therein that he happens to be resident of Village-Rashidpur. He used to reside at Patna along with his children. His wife was alone at his house. Seeing alone and being deaf and dumb, Azad Khan, a ruffian intruded



inside his house and with an intention to commit rape tried to undress her and during course thereof, she was also assaulted as, has protested. During course thereof, he also snatched away chain. His wife immediately rushed to the place of his friend, Lalji Singh (PW 3) and began to weep. His friend telephonically informed that your wife is weeping. He is unable to perceive her indication. Then he came from Patna. His wife disclosed the event and took him to the house of the accused in order to properly affix identification the accused.

3. After registration of Arwal Mahila PS Case No. 28/2013, investigation commenced and completed by way of 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. It has further been pleaded that at an earlier occasion, the prosecution party got the soil carried through the tractor of the appellant and, on the score of tariff, there was dispute, in the aforesaid background, got this case filed. Furthermore, one DW has also been examined on that very score.

5. In order to substantiate its case, the prosecution



has examined altogether six PWs who are PW-1, Victim, PW-2, Lalji Singh, PW-3, Sunil Dutta, PW-4, Arun Kumar Singh, PW-5, Kumari Babita and PW-6, Puja Devi. Side by side, has also exhibited Ext-1, Written application of informant, Ext-2, Endorsement on written application of informant.

6. Learned counsel for the appellant has submitted that having a cursory glance over the judgment impugned suggests that the same has been passed in utter violation of the mandatory provisions of law whereupon, is a nullity in the eye of law. In order to substantiate his plea, it has been submitted that none is an eyewitness to the occurrence. The victim herself happens to be the sole witness of alleged occurrence. The unfortunate part is that she is dumb and only knew to sign. So, virtually, she happens to be an illiterate. During course of evidence in court, no interpreter was there to interpret correctly and further, the learned P.O. had also no expertise on that very score whereupon, there happens to be a grave doubt with regard to proper appreciation of the signal/mark having been at the end of the victim during course of deposition. Consequent thereupon, the appellant is entitled for acquittal.

7. On the other hand, learned APP challenging the submission having been made at the end of learned counsel for



the appellant, has submitted that from perusal of the deposition of the victim, it is absolutely clear that learned P.O. had properly understood the expression given by the victim, a dumb witness and further having a remark at some places fortifies the same. So, the judgment impugned is fit to be confirmed.

8. Section 119 of the Evidence Act prescribes the mode of admissibility of the evidence being deposed by a deaf and dumb witness. For better appreciation, the same is quoted hereinbelow:-

“119. Dumb witnesses.—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.”

9. The matter has been considered in depth by the Hon'ble Apex Court in the case of *State of Rajasthan v. Darshan Singh alias Darshan Lal* reported in *AIR 2012 SC 1973*, and relevant paras are extracted below:-

“16. We have also gone through the entire evidence and concur with the findings recorded by the High Court.

Basic argument which has been advanced by both the parties before us is on the admissibility and credibility of sole eye-witness Geeta (PW.16).

Admittedly, Geeta (PW.16) had not been administered oath, nor Jaswant Singh (PW.1), her



father who acted as interpreter when her statement was recorded in the court. In view of provisions of Sections 4 and 5 of the Oaths Act, 1969, it is always desirable to administer oath or statement may be recorded on affirmation of the witness. This Court in *Rameshwar S/o Kalyan Singh v. The State of Rajasthan* : AIR 1952 SC 54, has categorically held that the main purpose of administering of oath to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, further such matters only touch credibility and not admissibility.

However, in view of the provisions of Section 7 of the Oaths Act, 1969, the omission of administration of oath or affirmation does not invalidate any evidence.

17. In *M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors.* : AIR 1954 SC 300, this Court held that a person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (See Section 119 of the Evidence Act) or the like.

18. The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter.



However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.

19. In *Meesala Ramakrishan v. State of A.P.* : (1994) 4 SCC 182, this Court has considered the evidentiary value of a dying declaration recorded by means of signs and nods of a person who is not in a position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that 'verbal' statement does not amount to 'oral' statement. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

20. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write.

A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.

21. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be



so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.

10. The evidence of the victim is to be taken note of, on priority basis who also happens to be PW-1. To see whether the same fulfills the criteria laid down by the Apex Court as referred above. The court before examination has tested the witness after tracing her out to be a dumb. The court after query has recorded :-

“ The witness is unable to write more and is not in position to say by sign when or about what period since before the occurrence took place but she has been giving the episode which took place in occurrence by sign.”

11. It is not evident from the deposition form that she was capable to take oath. From the order-sheet dated 24.06.2014, there happens to be no specification that the witness was administered oath. As no cross-examination is there, and further there happens to be presumption on that very score, unless rebuttal, hence, it could be accepted that oath has already been administered.



12. This witness has stated that door was open. Then pointed out towards the accused, Azad Khan, came inside through the door and then closed the door. She became afraid of. She retreated but, he came, caught hold of her breast, lied her down, lifted Sari-Saya and then tried to commit rape, gagged her mouth, slapped over her cheek, snatched away her chain, squeezed her breast. The neighbour informed her husband over mobile. He caught hold of her through his hands. She had protested whereupon, he assaulted her. After assault, accused fled away. Her husband came and then took her to police station. During cross-examination, she has stated that she also had put her signature at the police station. As soon as her husband came, they had gone to the police station. At para-3, she was unable to understand the question/ and failed to answer when she was asked in which direction accused fled away after the occurrence and, in likewise manner, location of house of the accused intervened by how many houses. At para-4, she has stated that after having been thrown over the ground as well as assaulted, she sustained hurt. Then she was suggested that she has deposed falsely.

13. PW-2 is Lalji Singh, friend of husband of the victim, PW-1. He has stated that on the alleged date and time of



occurrence, he was taking meal. At that very time, wife of Sunil came to his house and began to weep in her own tone which he could not understand. Then he inquired from her whether he should inform her husband and after getting nod, he informed her husband. Thereafter, he said to the victim that her husband is coming. Her husband came in the night near him. Her husband disclosed that a boy, namely, Azad Khan has misbehaved with her and on account thereof, he has instituted a case. During cross-examination, at para-3, he has shown the house of the accused lying south to the house of the victim intervened by 3-4 houses belonging to Madhav Mahto, Rajendra Mahto, Alam Khan and Sardin Khan. Then has shown boundary of the house of the informant as North-Gali, South-Barren land. In para-4, he has shown ignorance of the fact that there was dispute in between informant and accused over tariff over carrying of soil. In para-6, he has stated that he is unable to file call details of his mobile. In para-8, he has stated that he had made statement before the police at the house of the informant.

14. PW-3 is the husband. He has stated that on the alleged date and time of occurrence, he was at Patna. At about mid-day, his friend Lalji Singh telephonically informed him that his wife has come to his house and is weeping over which, he



directed Lalji to inform his wife that he is coming. Then he came to his house over motorcycle and inquired from his wife whereupon, she by sign stated that at about 10:00 AM, Azad, after undressing her, has tried to commit rape. Gotia of Azad Khan, namely, Gayasu Khan's house happens to be adjacent to his house in which, his old mother resides only. Before the occurrence, Azad Khan used to peep into his house after coming over roof of Gayasu Khan and for that, his wife had made complaint. She further stated that at that very time, she was alone. She further stated that Azad Khan intruded inside the house and caught hold of her breast, lifted her Sari-Saya and on being protested at her end, she was assaulted by him and then, took away golden chain. In order to confirm proper identity of the accused, he inquired about the house of the accused, whereupon, she took him to the house of Azad and then properly signalled fixing identity of the accused to be Azad Khan. Then thereafter, he came to the police station along with his wife where he had furnished written report. Identified the accused. During cross-examination at para-4, he has stated that his wife is not a *Pardah-nasheen* lady. She used to visit outside. In para-5, there happens to be topography with regard to his house. He has also disclosed that he happens to be six brothers out of



whom only Arun Kumar resides in the village. Rest brothers as well as Pattidars remained outside in order to earn their livelihood. He has further stated that his brother Arun has also seen Azad fleeing from his house and coming out of his wife in a disorderly manner. He had also informed the same. He further stated that he does not know whether the accused has tractor or not. There was no occasion for him to inform the accused to supply supply soil over his tractor. Then denied the suggestion. In para-4, he has shown location of the house of the accused. In para-5, he has stated that after coming to his house, he has not talked with anybody else than his wife before going to the police station. By sign, his wife had narrated the whole event and then thereafter, they both proceeded to the police station. At para-7, he has stated that he had also seen Azad peeping into his house from the roof of Gayasu Khan after having been intimated by his wife but he had not mentioned those things in the written report. In para-8, he has stated that detailed description of occurrence with minute details has not been incorporated in the written report. Only gist of the occurrence has been reported. He also had not mentioned with regard to catching of both breast of his wife by the accused in the written report. Further he has stated that in order to confirm the proper identity of the accused,



his wife had taken him to his place and that part is also incorporated in the written report. He has further stated that there happens to be no disclosure in the written report regarding lifting of Sari-Saya. In para-9, he has stated that when he came to the village he had not found the accused at his house. Then has denied the suggestion that in the background of the dispute over payment of unloading of soil, this false case has been registered.

15. PW-4 is Arun Kumar Singh, brother of the informant. He has stated that on the alleged date and time of occurrence, he had found Azad son of Shamshad Khan coming out from the house of the victim, wife of Sunil after opening the door and then rushed towards his house briskly. Within a minute, he had seen the victim coming outside in a disorderly manner, weeping. On the aforesaid impression, he too opined with regard to any kind of misdeeds having been committed with her. His statement was recorded by the police. Identified the accused. In para-7, he has stated that informant is his full brother. In para-11, he has stated that house of both the brothers are in front of each other. In para-12, he has stated that at the time of occurrence, he was alone at his house. In para-13, he has stated that he had not raised alarm seeing Azad fleeing from the



house considering the fact that Sunil happens to be LIC Agent and on that very pretext, people frequently, visit. In para-14, he has stated that at that very time, apparel of her Bhabho was not in proper way. He has stated in para-15 that he had not raised alarm, nor he had intimated any of the villagers. In para-17, 18, there happens to be contradiction. Then has denied the suggestion that he did not know Azad Khan.

16. PW-6 is the wife of Lalji Singh, namely, Puja Devi, she has stated that the occurrence had taken place with the victim. She does not know anything about the occurrence. When the victim came to her house weeping, then she perceived something wrong. At that very time, her husband was taking meal. Then thereafter, her husband informed husband of the victim whereupon, he said that he (her husband) is coming. The witness has not identified the accused. During cross-examination, she has stated that she (herself) happens to be Bahu of the village. She has further stated that she is unable to understand the signs/signals of the victim.

17. PW-5 is the IO. She has stated that on the alleged date and time of occurrence, she was ASI at Arwal PS. After registration of Arwal Mahila PS Case No. 28/2013, investigation was entrusted to her. During course of



investigation, she had taken further statement of the informant. With the help of informant, she recorded statement of the victim, inspected the P.O. which happens to be the half constructed building of the informant. Then she shown the manner of ingress-outgress. Also located the room where occurrence has been alleged to have taken place. Shown the boundary as East-Kamta Prasad, West-Gali, North-Land of Lalji Singh, South-Gali, then house of Gayasu Khan. Recorded statement of the witness. There after completed the investigation and submitted the charge-sheet. Exhibited all the relevant documents. During cross-examination at para-10-11, she has been questioned over non filing of the relevant proforma, a formal FIR. In para-12, she has admitted that CJM has seen the FIR on 27.11.2013. In para-13, she has stated that she is unable to disclose the cause of delay as it happens to be the duty of the Officer Incharge. In para-14, she has stated that as the victim was dumb, so, she has recorded her statement with the help of her husband. The narration was given by her husband. She is unable to understand the sign/signal of a dumb. In para-17, she has stated that the victim has taken her to the house of accused but, she had not mentioned the same in the C.D. In para-20, she has stated that she has not seen any injury over the victim. In



para-21, she has stated that she had not seen any sign of snatching of chain. The room where the occurrence has been alleged to have committed, has been properly identified. In para-24, she has stated that she had not found incriminating material at the P.O.. She had recorded statement of Lalji and Arun only. She had not recorded statement of Kamta Prasad and Gayasu Khan. She had not recorded statement of other persons having houses in the vicinity of the accused. She had not traced out tower location of mobile of Sunil as well as Lalji Singh. At para-30 and 31, there happens to be contradiction relating to Lalji Singh and para-32 relating to Arun Kumar. She has further stated that she had not requisitioned an expert for getting signal of the victim properly interpreted.

18. DW-1 has also been examined over dispute having arisen in between informant as well as accused with regard to tariff over unloading of soil but, during course of cross-examination, he failed to disclose even the registration number of the tractor.

19. From the evidence available on the record, it is evident that none is an eyewitness to occurrence. From the evidence, it is further apparent that the victim had not found inclined to go to the house of Arun Kumar Singh, her Bhainsur



(PW 4), instead thereof, after covering some distance had gone to the place of Lalji Singh and from there, the informant was intimated. So, presence of PW-4 has become doubtful as had there been his presence, having house in front of house of informant, being full brother of informant, would have been approached first. It is further evident that in spite of presence of informant at a later part, neither he had contacted, Arun Kumar Singh (P W 4) rather he, after taking information from the victim and after verifying the same gone to police station. Further, PW-2 has himself said that after filing of case, informant came to this place and narrated the same. PW-3, informant deposed whatsoever been stated by his wife, victim, PW-1 and in order to lend assurance, had gone to the house of the accused which was pointed out by the victim. It is also evident that during course of evidence of PW-1, victim, though she has stated with regard to manner of occurrence, was not at all tested by way of cross-examination. It is needless to say that in order to challenge the testimony of a witness, cross-examination has to be conducted relating thereto, otherwise, it will be deemed to be admitted one as has been observed by the Apex Court in *Gian Chand & others v. State of Haryana* reported in **2013(4) PLJR 7 (SC)** the relevant para is quoted



below:-

“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.”

20. Now coming to propriety of the judgment



impugned, four stages have been identified for completion of commission of an occurrence and those are:- (1) Intention to commit, (2) Preparation to commit, (3) Attempt to commit and (4) Attempt being successful, then completion of the offence.

21. The allegation as is evident is of chasterlization and so far an allegation to commit a rape, that is not at all found duly substantiated, as in worst case, accepting the evidence, the victim was only lying down and then, her Sari-Saya were lifted without having an allegation that there was an attempt at the end of the accused to commit rape with proper identification of an activity towards the same. That being so, it would be a case under Section 354 IPC and is, accordingly, modified.

22. Appellant remained under custody since 20.12.2013, so sentence is reduced as period already undergone. That being so, appellant, Azad Khan is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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