

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.689 of 2016**

Arising Out of PS. Case No.-44 Year-2008 Thana- MUFFASIL District- Aurangabad

Sahabuddin Khan Son of Ali Hassan Khan Resident of Village- Chapari,
Police Station- Fatehpur, District- Gaya.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Md. Jubair Ansari, Adv. Mr.Syed Asgher Najmi, Adv.
For the Respondent/s	:	Mr. Bipin Kumar, APP

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

07-11-2019

Appellant, Sahabuddin Khan has been found guilty for an offence punishable under Section 366 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 six months additionally, under Section 376 IPC and sentenced to undergo RI for eight years as well as to pay fine of Rs. 10,000/-, in default thereof, to undergo RI for six months additionally, with a further direction to run the sentences concurrently vide judgment of conviction dated 26.07.2016 and order of sentence dated 03.08.2016 passed by Additional Sessions Judge-II, Aurangabad in Sessions Trial No. 352/2008/328/2015 arising out of Aurangabad(M) PS Case No. 44/2008.

2. For an occurrence, allegedly, committed on 26.02.2008, informant, Brishpati Singh (since deceased) filed a



written report on 12.03.2008 disclosing therein that his daughter, victim (name withheld,PW-5) who has been married on 20.04.2006 with Srikant Kumar Singh son of Ram Lakhan Singh of Village-Dadhpi, Aurangabad and, thereafter his daughter had gone to her *Sasural*. After some time, she returned back from her *Sasural* and as per ritual, her *Rukhsati* was fixed on 13.03.2008. In his absence on 26.02.2008, his co-villager, Niraj Sah, Sanjiv Sao, and Sahabuddin Khan of Village-Chapri conspired and then, they succeeded in alluring his daughter followed with her disappearance on a scooter along with them. They also succeeded in taking away ornaments which she was wearing at that very moment appertaining to Rs. 45,000/-. He made hectic search and during course thereof, he came to know about the aforesaid incident. It has also been disclosed that in order to save his prestige as well as that of the victim, the delay has been caused in lodging the case.

3. The aforesaid written report led to registration of Aurangabad (M) PS Case No. 44/2008, followed with an investigation during course of which, as is evident, the victim was recovered, her statement under Section 164 CrPC was recorded and then, charge-sheet has been submitted against all the three accused, namely, Niraj Sah, Sanjiv Sao, and



Sahabuddin Khan who, accordingly, faced trial. It is further evident from the record that at the stage of argument, Sahabuddin escaped and so, after bifurcating trial, Niraj and Sanjiv were acquitted vide judgment dated 23.03.2011. Subsequently thereof, the appellant surrendered on 14.01.2016/15.03.2016, the trial recommenced and concluded against him in a manner, 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 so alleged. However, nothing has been adduced on behalf of defence.

5. Altogether nine PWs have been examined on behalf of prosecution in order to substantiate its case who are PW-1, Haribansh Singh, PW-2, Ram Bilash Singh, PW-3, Vinod Singh, PW-4, Premsheela Kuer, PW-5, victim, PW-6, Ravi Singh, PW-7, Dr. Mani Kumari, PW-8, Dr. Neelam Chaudhary and PW-9, Sona Ram Mahto. Side by side has also exhibited Ext-1, signature of victim over statement under Section 164 CrPC, Ext-2 Series, Medical Reports, Ext-3, Formal FIR. As stated above, nothing has been adduced on behalf of defence.

6. Learned counsel for the appellant has submitted that whatever allegation has been attributed at the end



of prosecution, all are palpably false, because of the fact that victim who was a major and a consenting party, joined hands with the accused person voluntarily, enjoyed company having no grievance but, after having been apprehended and then emotionally blackmailed by her parents became hostile and deposed against the appellants which, in the facts and circumstances of the case, is found properly exposed, whereupon the prosecution version is found effaceable.

7. Substantiating such plea, it has been submitted that it was unfortunate for the appellant that the conducting learned counsel failed to draw attention of the victim towards her previous statement recorded under Section 164 CrPC wherein she had admitted her intimacy with the appellant while staying at Rourkela but, as the statement is available on the record, on account thereof, could be looked into and, after having parallel scrutiny with the deposition of PW-5 appears to be sufficient to annul the finding so recorded by the learned lower court. Furthermore, it has also been submitted that for the negligence of conducting counsel or incompetency thereof, should not be considered as hurdle in inferring so, irrespective of non cross-examination of victim on that score while parting natural justice. In order to highlight the issue, conduct of the



victim has been magnified by way of stating at the end of learned counsel for the appellant that remaining with the appellant for such a long period without any protest is indicative of the fact that the victim was a consenting party and so, the judgment of conviction and order of sentence recorded by the learned lower court happens to be fit for setting aside.

8. On the other hand, learned APP has submitted that engagement of learned counsel whether he was competent enough or not, was at the end of appellant himself and so, he will have to share the burden. Statement under Section 164 is not a substantive piece of evidence rather it happens to be for the purpose of corroboration or contradiction. Once, defence failed to contradict, then in that event, the court cannot infer adverse on the basis of such statement. Then it has been submitted that from the evidence on the record much less that of PW-5, the victim, it is apparent that she had given minute to minute details as to how she was made captive during the intervening period and was ravished repeatedly against her will putting her in a hapless condition by way of tying her hands as well as legs. Consequent thereupon, the judgment of conviction and order of sentence recorded by the learned lower court is fit to be confirmed.



9. From the record, it is evident that PWs-1, 3, 6 have not supported the case of the prosecution *in toto* and so, they were declared hostile. PW-2 was partly hostile to the prosecution relating to accused, Niraj and Sanjive (since acquitted) but, he has deposed against the appellant, Sahabuddin claiming himself to be an eyewitness while carrying the victim over a scooter. PW-4 is mother who was not present at the time of occurrence. She came after having been informed regarding the incident while staying at Rourkela and so, her evidence happens to be that of hearsay category. Informant, Brishpati Singh has not been examined as he died. PWs-7 and 8 are doctors who have examined the victim and estimated her age to be in between 17-19 years. As she was married, so other findings confined to the factum of rape is not at all found properly opined save and except that on the date of examination i.e. on 13.05.2008, she was carrying pregnancy of about 9 weeks 4 days. The date of occurrence is 26.02.2008 and so, the pregnancy happens to be on account of sexual indulgence during intervening period. PW-9 is the I.O.. So in the aforesaid facts and circumstances of the case, it is evidence of the victim which has got primacy.

10. It is needless to say that the evidence of the



victim of rape is to be accepted in ordinary course of nature as well as did not require corroboration unless and until, her evidence is found unactuated, unadepted. Unadorned conduct could be perceived from her evidence as well as from surrounding circumstances. soaked with some other circumstances and, which could be traced out only therefrom.

11. PW-5, during course of her evidence has stated that the occurrence is about 8-9 months ago. At that very time, she was at her house lying at Village-Babhandi. It was 12 Noon. She was alone at that very time. There was a knock at the door of her house. She opened the door and saw Sahabuddin who, all of a sudden, pounced upon her and tied her mouth, eyes with the cloth and then, lifted her. He took her to his village-Chapri where she was physically assaulted. He kept her for two days and during intervening period, her hands, legs were tied and then, she was raped. Then thereafter, she was taken to Haldia, Kolkata. At Haldia also, her hands and legs were kept tied in usual course. She was regularly raped by him. He had not indulged himself with talking with her nor he allowed, nay any opportunity was available. One day, she anyhow, got an opportunity whereupon, she informed her mother over mobile. Sahabuddin came and then crushed the mobile. Sahabuddin,



apart from raping her constantly, advanced demand of Rs. 10 Lacs for her release. Sahabuddin snatched away all the ornaments and after selling the same, possessed the sale proceed. No other person was along with Sahabuddin. As disclosed by her, her mother came at Haldia along with police personnel whereupon, she was rescued. Then thereafter, she was medically examined. She was examined under Section 164 CrPC and exhibited her signature (exhibited). Her statement was also recorded by the police. Her attention has been drawn towards her statement relating to accused Niraj and Sanjiv by the prosecution. Identified the accused, Sahabuddin in the dock while declined to identify Niraj and Sanjiv (since acquitted). During cross-examination at para-16, she has stated that on the date of occurrence, she was at her house. She occasionally visited her village. At para-17, she has stated that her marriage was solemnized about 2 ½ years prior to the occurrence. She was residing at Orissa where her father was running a grocery shop. She has two brothers and two sisters. All were residing at Orissa. At para-18, she has stated that she was residing at the village, 2-4 days prior to the occurrence. She was alone with her father. As she was not residing at her Village frequently, on account thereof, she was not knowing the villagers. In para-19,



she has stated that when the accused had lifted her, she attempted to shout but, as her mouth was gagged, her voice could not come out from her mouth. She was taken away over a vehicle but she is unable to disclose the type of vehicle. She was directly taken to the house by the accused. In para-20, she has stated that she was not intimate with Sahabuddin even at Orissa. In para-21, she has stated that she is unable to say in whose house, Sahabuddin used to stay at his village. In para-22, she has stated that she is unable to say whether any certificate relating to her marriage with Sahabuddin was ever prepared. In para-23, she has stated that she had seen the house of Sahabuddin for the first time after her kidnapping. At para-24, she has stated that she begotten a daughter about a year ago who died subsequently. She has further stated that, for the present, she is residing at Rourkela. At para-25, she has stated that she is unable to disclose the date, time on which date, police had recorded her statement. Then has stated that she had not made statement before the police. Then she has stated that she had made statement before the court once prior to the present statement. She has further stated that whatever been stated by her at an earlier occasion, the same has been reiterated at the present moment. Then she denied the suggestion that no such



kind of occurrence has taken place. Accused has falsely been implicated in this case.

12. PW-4 is the mother. She, during course of her examination-in-chief has deposed that the victim (name withheld) is her daughter. The occurrence is of about nine months ago. At that very time, the victim was residing at her Village-Babhandi. Sahabuddin kidnapped her. At that very time, she was not present at her house. She was at Rourkela. No other person was involved during course of aforesaid occurrence. She came to know that Sahabuddin used to keep her daughter confined in a room, did not provide food and kept in Bengal, sold away her ornaments, raped her. None other was along with Sahabuddin. Her statement was not recorded by the police and then thereafter, she was declared hostile relating to Niraj and Sanjiv and paragraphs-4, 5, 6, happens to be the previous statement of this witness which has been confronted to her. Para-7, 8, 9 and 10 is the cross-examination having on behalf of Niraj and Sanjiv while no cross-examination has been at the end of Sahabuddin.

13. PW-9 is the I.O. During his examination-in-chief has stated that on 12.03.2008, he was ASI posted at Aurangabad Mufassil Police Station. On that day, he was



entrusted with the investigation of Aurangabad (M) PS Case No. 44/2008 which was based upon written report submitted by Brishpati Singh (Then exhibited relevant documents). He proceeded with investigation and during course thereof, he recorded further statement of the informant. He inspected the place of occurrence which happens to be the house of the informant lying at village-Babhandi. Then has detailed the same. Shown the boundary as North-Road, South-land of Ramnandan Singh, East-land of Jagarnath Singh, West-house of Ramnandan Singh. Then recorded statement of witnesses, Premshila, Binod Singh, Haribansh Singh, Rambilas Singh and Ravi Kumar. During course of investigation, he was informed that the victim has been kept at Mednipur. For recovery of the victim, he took permission from DIG, gone to Mednipur where he apprehended the victim as well as the kidnapper, Sahabuddin. Then thereafter, he carried both of them to police station after taking permission from the CJM, Mednipur. Then the victim was medically examined, produced before the Magistrate for her statement under Section 164 CrPC and then, as per wish of the victim, she was handed over to her parents, received supervision note. Arrested co-accused, Niraj Sah. From record, it transpires that Sanjiv had already surrendered before the court. Then after



completing investigation, submitted charge-sheet. During cross-examination at the end of Sahabuddin at para-3, he has stated that further statement of the informant was recorded at the police station. He had not mentioned time with regard to inspection of the place of occurrence, examination of the witnesses. He has further stated that he had not inquired from the persons of the locality with regard to character of the victim. Victim was married but, he had not recorded statement of her husband, father-in-law, mother-in-law. He has further stated that he had not mentioned in the case diary that at the time of conduction of raid, mother of the victim was along with them. The place wherefrom, the victim as well as accused was recovered is the house of *Sasuralwala* of brother of accused. He had not found anybody at that very moment. He had not recorded statement of anybody. He was joined by the local police (Pachpura Police Station). There was no protest. First of all, the accused as well as victim were taken to Pachpura Police Station on 07.05.2008 at about 1.30 PM. He had not seized any mobile nor he inquired about the mobile from the victim. He had not inquired whether the victim used to talk over mobile with anybody or not. He had not inquired about the scooter as there was no disclosure with regard to its registration number.



He had not inquired from the accused regarding the scooter. At para-14, he has stated that on an information having received by him based upon statement of witness, he had gone to West Bengal. The victim has talked with her mother which her mother had disclosed to him whereupon, he got positive information regarding presence of victim at Haldia. First of all, he had approached Pachpura Police Station. Mother of victim was along with them and then thereafter, victim as well as accused were apprehended. At that very time, he had not recorded statement of the victim. At para-15, he has stated that he had not recorded statement of victim rather, he had produced the victim before the Magistrate for statement recorded under Section 164 CrPC. The victim was brought to Aurangabad on 11.05.2008. He had not investigated whether there was love and affection amongst the victim and Sahabuddin. Then there happens to be cross-examination at the end of Niraj and Sanjiv under para-7 and 8.

14. From the statement recorded under Section 313 of the CrPC, the appellant/accused has not claimed that the victim was major and she voluntarily, joined his company and enjoyed the same, marriage was solemnized in between them. It is needless to say that save and except under Special Marriage



Act, marriage of a Muslim with a lady belonging to other religion is null and void in the eye of law. Apart from this, had there been positive assertion at the end of the appellant that victim being major, to each other, were well acquainted, having been affectionate towards each other, joined hands voluntarily, accompanied voluntarily, married as per Special Marriage Act, duly suggested and substantiated, would have composite repercussion against the allegation having so levelled at the end of prosecution. In likewise manner, had there been cross-examination, at the end of the appellant or any other kind of exposure that from her house, the victim accompanied him to Haldia through train or bus, that means to say, presence of both of them at different places having every opportunity available before the victim to resist, asked for help not only from police official rather an individual in order to suggest that had she been kidnapped, then in that event, passing through different places was not at all possible. In likewise manner, even during course of cross-examination to victim, even ignoring the fact that she was not at all confronted with some relevant parts which she stated during course of statement under Section 164 CrPC, she should have been cross-examined that at the places, where she was residing along with Sahabuddin (appellant), she had full



opportunity of access to outside without any restriction and in likewise manner, there should have been cross-examination that the house which was being occupied by them were also occupied by so many other persons and she had frequent talks with them. In likewise manner, the I.O. should have been also cross-examined on that very score, at least when he apprehended the accused and the victim, they were having uninterrupted physical movement. When the evidence has come up that victim had talked with her mother and then her mobile was crushed by the appellant, her mother had accompanied the police to Haldia, then in that circumstance, PW-4 would have been cross-examined on that very score. So, in order to controvert the allegation of PW-5, victim that she was confined at the place, Haldia having her hands and legs duly tied and was frequently subjected to rape in such condition, would have been challenged by way of proper cross-examination which could have also revealed that she was a consenting party, whereupon, no offence could have been made out but, the non-cross-examination at the end of the appellant has completely changed the scenario whereupon, the allegation whatsoever at the end of victim remained intact.

15. In Gian Chand & others v. State of Haryana



reported *in 2013(4) PLJR 7 (SC)* it has been held:-

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.”

16. As a result of which, instant appeal sans merit and is accordingly, dismissed. Appellant is under custody wherein, he will remain till saturation of the sentence so



inflicted by the learned lower court.

(Aditya Kumar Trivedi, J)

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