

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.827 of 2016

In
CRIMINAL APPEAL (DB) No.875 of 2016

Arising Out of PS. Case No.-37 Year-2009 Thana- GARKHA District- Saran

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Sunil Chaudhary, son of Rameshwar Chaudhary, resident of village Mithepur,
P.S. Garakha, District Saran

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

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Appearance :

For the Appellant/s : Mr. Dhananjay Mishra, Adv.

For the Respondent/s : Mr. Abhay Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 19-09-2019

Appellant Sunil Chaudhary has been found guilty for an offence punishable under section 376 I.P.C. and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.25,000/- and in default thereof, to undergo S.I. for one year additionally, with a further direction that the period of custody having undergone during course of trial will be set off in accordance with section 428 Cr.P.C. vide judgment of conviction dated 23.7.2016 and order of sentence dated 26.7.2016 passed by the Addl. Sessions Judge Vth, Saran at Chapra in S.Tr.No. 591/2011 arising out of Garkha P.S.Case No. 37/2009.

Nashruddin (P.W.1), father of the victim gave his Fard Beyan on 16.3.2009 disclosing therein that on 24.2.2009 at about 8 P.M. while he came to house after doing menial work at the shop



of triloki Prasad, he saw his daughter (name withheld P.W.4), aged about 8 years and his wife Shabnam Khatoon weeping. His daughter was crying out of pain. He has seen blood oozing out from her genital. On query, his daughter disclosed that at about 7 P.M. while she was going to the place of Lalan Chaudhary to participate in a Tilak ceremony and as soon as reached near the house of Mali Manjhi, Sunil Chaudhary met in the midst of way who disclosed that her Mummy is calling on. She, without paying any heed, proceeded on account thereof, the aforesaid Sunil Chaudhary lifted her, gagged her mouth and took her in a castor field, where, he after undressing her committed rape, as a result of which she felt severe pain and bleeding from her vagina. After committing rape, he left her. Anyhow, she came to house and disclosed the event to her Mummy. Thereafter, he took the victim, wife alongwith Wasah Mian as well as daughter of Wasah Mian to Primary Health Centre, Garkha where she was treated. After treatment, Dr. Upendra Prasad has directed him to go to house. Further more, in order to protect the prestige of his family, he did not take proper step at that very moment but in due course of time, all the persons came to know about the same. Then thereafter the persons of his Biradari took him to Janta Darbar, organized at the end of the Commissioner, Saran where he filed an application and



then thereafter, the police came before whom he gave his Fard Beyan.

Garkha P.S.Case No. 37/2009 was registered followed with an investigation as well as submission of charge sheet meeting with the ultimate result, subject matter of the instant appeal.

Defence case, as is evident from the mode of cross-examination as well as statement recorded under section 313 Cr.P.C. is that of complete denial. It has further been pleaded that on account of religious disharmony this case has been instituted putting false and frivolous allegation. However, nothing has been adduced in defence.

In order to substantiate its case altogether 6 P.Ws. have been examined on behalf of prosecution, who are P.W.1 Nasruddin, P.W.2 Dr. Smt. Nila Singh, P.W.3 Shabnam, P.W.4 victim, P.W.5 Krishnadeo, the I.O. and P.W.6 Birendra Kumar Pandey, a formal witness. Side by side also exhibited signature of the informant Ext.1, Fard Beyan Ext.1/A and injury report Ext.2.

While assailing the judgment impugned, it has been argued at the end of learned counsel for the appellant that the learned lower court had failed to perceive with regard to the presence of inherent lacuna in the prosecution case. In order to



justify the same, it has been urged that there happens to be inordinate delay in institution of the case and the explanation whatsoever been furnished could not be accepted. In criminal case unreasonable delay without any explanation is itself a good ground to discard the prosecution version.

Then it has been submitted that not even a single independent witness has been examined much less, Basah Mian and his daughter Hasima Khatoon, whose presence in the Fard Beyan is there, who accompanied the prosecution party to hospital. In likewise manner, it has also been submitted that during course of investigation, the I.O. had not been examined then their non-examination is found un-forbearing. So alleged Dr. Upendra Prasad of Primary Health Centre, Garkha, who, as per prosecution, had examined the victim on the alleged date of occurrence itself had also been kept out of screen to the reason best known to the prosecution. Had there been it a case of rape, then in that circumstance, the doctor was under obligation to have informed the Officer In-charge of the local Garkha Police Station by issuing O.D. slip with regard to presence of victim of cognizable offence. Non-following of aforesaid mandate at the end of Dr. Upendra Prasad is indicative of the fact that it was not a case of rape and, non-examination of Dr. Upendra Kumar during course of



investigation further strong than the plea that no occurrence of rape was over there. Out of religious fiction appellant has been implicated after such long interval in order to ward off requirement of substantiating the occurrence by cogent reliable evidence in its continuity, it has also been submitted that none is an eye witness to the occurrence. The witnesses who have been examined, in spite of hearsay, are family witness. After having their evidence partially scrutinized with the evidence of victim coupled with surrounding circumstance, it is evident that the prosecution case is found duly intrigued. That being so, the judgment impugned is fit to be set aside.

On the other hand, learned Addl. P.P. while controverting the submission made on behalf of the appellant has submitted that the judgment itself speaks proper appreciation of materials available on record justifying the finding whereupon, needs no interference.

Admittedly there happens to be delay in institution of the case. It is also self explanatory that basically the delay in initiation of criminal prosecution casts doubt over authenticity of the version but, in rape case, ordinarily delay is bound to occur more particularly when it relates with prestige of the family coupled with status of the victim to be unmarried as, so far Indian



continent is concerned, virginity happens to be the sole of a gist which she is bound to preserve till her marriage. The sex before marriage is virtually sin and so, it has adverse impact over future life personality of a girl and that happens to be the reason behind that the Hon'ble Apex Court times without number has deprecated rejection of the prosecution case on the sole ground of delay. More recently, in the **State of H.P. vs. Sanjay Kumar @ Sunny**, reported in 2017 Cr.L.J. 1443, it has been observed that the delay in rape cases should not be considered as a deficiency in the prosecution case if the same is found otherwise proved.

After going through the material available on record, it is crystal clear that Basah Mian and his daughter Hasina Khatoon have not been examined. It is also crystal clear that Dr. Upendra Prasad has not been examined by the I.O. during course of investigation nor, there was any effort at the end of the I.O. to produce injury report, if any, issued by Dr. Upendra Prasad during course of investigation. It is also evident that not even a single independent witness has been examined. It is also evident that none is an eye witness to occurrence. On the other side, it is also evident that neither it has been suggested to any of the P.W. that there was turmoil prevailing in the society due to inter-religious differences nor there happens to be any alternative suggestion with



regard to prevalence of animosity amongst the parties since before. That being so, no occasion was prevailing for any kind of implication on that very pretext. More over none would dare, much less an unmarried girl to sacrifice herself for aged about 8 years tricaplicating without any cogent reason.

Now coming to the status of the witnesses, it is apparent that P.W.1 and P.W.3 are the parents of the victim who, certainly are not an eye witness to the occurrence but, they are over the fact, much less corroborative in nature by way of stating that they have seen bleeding from the genital of the victim and on that very score there happens to be some sort of version at the end of the appellant during course of cross-examination.

Now, the only evidence remains that of the victim P.W.4. During course of her examination-in-chief, she has stated that while she was going to the place of Lalan Chaudhary on the eve of Tilak during midst of which, the appellant Sunil Chaudhary caught hold her, took her to castor field, undressed her and then raped her, as a result of which there began bleeding from her genital. Anyhow, she came at her house where she narrated the incident. She was examined by the doctor on the same day and then, she was also examined later on. In para-4 she has stated while identifying the accused to be perpetrator of the rape that he is the



person who had oozed out the blood from her vagina. On court question at para-5 she has disclosed that there was bleeding from the lower part of her body, bleeding was on account of tearing of her vagina on account of insertion of penis by the accused.

During course of cross-examination, it is evident that the learned defence counsel has not tested her over the factum of rape. Even during cross-examination at para-6 she has identified the place of occurrence with boundary North empty land, South Chakki, East land of Jatan and West plot of somebody else. In para-7 she has further stated that castor plants were there in the P.O. field which belongs to Jatan Chaudhary. In para-8 she has further stated that she cried for help but her mouth was gagged. Further more, there was loud music and so, no one could perceived. It has also been disclosed that the house of the accused lies near about her house. Before the occurrence, they were on talking term. In para-9 she has stated that before going to the hospital, she was not at all examined by any doctor. Her treatment was also done at Chapra. In para-10 she has admitted that none is eye witness to the occurrence. She has further stated that she remained at hospital for 5-6 days. In para-11 she has stated that the cloth had already been taken by the I.O. and thereafter, it was



thrown away. Then denied the suggestion that she has instituted false case.

P.W.5 is the I.O. First of all, on 16.3.2005 a written complaint was received from Garkha Police Station whereupon, there was S.D. entry and then, the matter was inquired into. After having some substance then, he had gone to village Mithepur where recorded Fard Beyan of Nasiruddin (exhibited the same). It has also been disclosed by him that one O.D. slip was also received from PHC Garkha but he is unable to say whether it was in the pen of Dr. Upendra Kumar or not. He took up investigation. Recorded further statement of the informant. Recorded statement of the witnesses. Recorded statement of the victim, her mother, took the victim to Sadar Hospital for medical examination. He investigated up to 12.7.2009 and then, thereafter, handed over the investigation to the Officer In-charge. He has further identified the place of occurrence, as pointed out by the informant happens to be plot lying at Pasi Tola, adjacent to Meena Bazar. He had found castor plant having over the plot. Some plants were trampled. Rest portion was vacant having boundary North plot of Yamuna Shah, South Meena Bazar, East could not be ascertained, West Mango tree of Paras Shah. During cross-examination he has stated that he



had not seized the apparel of the victim nor he had tried to seize the same.

In **Gian Chand & ors. v. State of Haryana**, reported in 2013(4) PLJR 7 (SC) it has been observed that in order to test the veracity of the witness as well as in order to challenge the allegations so attributed, one has to cross-examine the witness on that very score. If the witness is not being cross-examined then, in that event, it will tantamount to an admission. For better appreciation the relevant passage 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. vs. 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.”

After going through the evidence available on record, it is evident that P.W.4 victim has not been cross-examined in order to discredit her testimony with regard to allegation having attributed against the appellant of commission of rape. The most surprising feature is visualizing from the evidence of P.W.2 the doctor, who during course of examination-in-chief, after examining the victim had opined that it was an attempt of rape but, during course of cross-examination the appellant himself expanded the field with regard to finding having at the end of the doctor, who said that it was a case of penetration. Penetration to any



extent satisfies the ingredient of rape as found under Section 375 of the I.P.C.

Regard being had to the facts and circumstances of the case, as discussed hereinabove, it is evident that the evidence of the victim with regard to commission of rape by the appellant is found duly substantiated and that being so, the finding so recorded by the learned lower court did not attract interference. As a result of which, the instant appeal sans merit and is accordingly, dismissed. The appellant is in custody which he will remain till saturation of the period of sentence.

(Aditya Kumar Trivedi, J)

Surendra/-

AFR/NAFR	NAFR
CAV DATE	NA
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