

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.44 of 2016

Arising Out of PS. Case No.-62 Year-2013 Thana- KHUSRUPUR District- Patna

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Ram Babu Das S/o Dilip Das, Resident of Safipur, P.S Khusrupur, Dist Patna

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

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Appearance :

For the Appellant/s : Mr. Sheikh Arkan Ahmad, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 29-08-2019

Appellant Ram Babu Das 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 a fine of Rs.10,000/- and in default thereof, to undergo R.I. for six months vide the judgment of conviction dated 24.11.2015 and the order of sentence dated 27.11.2015 passed by the Addl. Sessions Judge IV, Patna City in S.Tr.No. 282/2014 arising out of Khusrupur P.S.Case No. 62/2013.

Victim, name withheld (P.W.1) filed a written report on 3.8.2013 on an allegation that in the preceding night (2.8.2013) at about 8 P.M. while she was cleaning utensils outside her rented house lying at village Ganichak, all of a sudden, one person came to her and disclosed that his father is a Bhagat and so, got herself treated by him. Putting faith upon him, she accompanied. When



they came near Saafipur, he took her inside an abandoned house, where she was forced to lie down and committed rape on her. After commission of rape, he left her. During course of taking her away, he has disclosed his name as Ram Babu Das, son of Dilip Das of village Saafipur, P.S. Khusrupur, District Patna. It is also to be noted that the victim has also disclosed her address as- wife of Dilip Sah of village Saafipur, P.S. Khusrupur, District Patna.

After registration of Khusrupur P.S. Case No. 62/2013, investigation commenced and after concluding the same, charge sheet has been submitted, facilitating the trial, meeting with ultimate result, subject matter of the instant appeal.

The 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 of innocence. It has further been pleaded that in the background of prevailing animosity in between the husband of the victim with the accused, this false case has been instituted. However, nothing has been adduced in defence.

Altogether 7 P.Ws. have been examined on behalf of the prosecution, who are P.W.1 victim, P.W.2 Rita Devi - mother-in-law, P.W.3 Sandeep Sah- Dewar, P.W.4 Dilip Sah- husband, P.W.5 Dinesh Kumar Singh- I.O., P.W.6 Dr. Nisha, who was one of a member of the Board being Gynecologist, who had examined the



victim and P.W. 7 Dr. Arif Abdullah, who had examined the accused. Side by side, also exhibited Ext.1 written report, Ext.2 endorsement over the written report, Ext.3 Medical report, Ext.4 Formal F.I.R., Ext.5 a FSL report, Ext.6 statement of the victim recorded under section 164 Cr.P.C. and Ext.7 medical report relating to the appellant- accused Ram Babu Das. As stated above, nothing has been adduced on behalf of the defence.

Learned counsel for the appellant while assailing the judgment of conviction and sentence has submitted that the finding so recorded by the learned lower court happens to be based upon flimsy materials. In order to substantiate the same, it has been submitted that from the evidence of P.W.4 the husband, it is apparent that whatever he has corroborated in the written report is based upon the information given by the victim. That means to say, the victim alone was at the Ganichak and from there, she was taken away. At the Ganichak she had not shown presence of any of the witness. Only to introduce the presence of the other witnesses, the place has been shifted from Ganichak to Saafipur and for that, no explanation is there. If the aforesaid change of the P.O. is properly appreciated, then, in that circumstance, the victim being major, did not put any hesitation to join the company of the appellant, indulged in sexual activity without any protest that too,



when she had on her own disclosed that she was necked at the time of commission of rape is indicative of the fact that she was a consenting party. In order to give additional support, it has also been submitted that the victim had not disclosed that in the alleged house where rape was committed, she was dragged, she was caught hold of, there was any kind of threatening using weapons, that means to say was appellant in a position to allure, took her against her will, committed rape on her or indulged in sexual activity insidiously against her will or consent.

It has also been submitted that the victim herself has shown native of village Saafipur. The appellant is also resident of village Saafipur. Then in that circumstance, the appellant would have properly been identified by the victim and so, there was no occasion for the victim to say that during course of conversation he had disclosed his identity as Ram Babu Sah, son of Dilip Sah, resident of village Saafipur, P.S. Khusrupur, District Patna.

Then, it has been submitted that had the victim been not a consenting party, there was no occasion for her to accompany a stranger on mere asking that too in night without any pre-information or prefixing of time to accompany him to his place where some sort of occult exercise was to be carried out. The aforesaid eventuality is indicative of the fact that the appellant was



known since before, victim was a consenting party and anyhow her family members came to know on account thereof, only to have safeguard upon her interest got this case filed putting false and frivolous allegation.

Further more, it has also been submitted that in changed scenario that means to say, projecting the victim to be present at village Saafipur, even then, the story so advanced appears to be improbable. Presence of the appellant was not at all prefixed, rather he came on surprise, talked with her mother-in-law P.W.2, during midst thereof the victim intervened and said that she is suffering from headache and then followed the appellant along with the mother-in-law who returned back after covering some distance, is another circumstance to suggest that the victim was a consenting party otherwise, as disclosed she had not accompanied the appellant in such manner.

In the aforesaid background it has been submitted that when the evidence of P.W.5 the I.O. is being taken, it is apparent that during his examination-in-chief he failed to properly acknowledge the place of occurrence, though, during cross examination at paragraph 9 he had stated that it was the half constructed house of Radhey Rai but, nothing incriminating has



been found during the inspection of the P.O. suggesting commission of any offence.

It has further been submitted that in the aforesaid facts and circumstances of the case, presence of semen has got no relevancy, nor it would be an evidence of rape rather, in the facts and circumstances of the case, could be coitus. That being so, the judgment of conviction and sentence recorded by the learned lower court should be set aside.

Learned Addl. P.P. vehemently opposed the submission having made at the end of learned counsel for the appellant and has submitted that finding so recorded by the learned lower court is based upon the materials having available on the record. Consequent thereupon, the appeal is fit to be dismissed.

P.W.7 is the doctor, who had examined the accused on 3.8.2013 and during course thereof, also prepared slide and the same was examined by Microbiology Department, PMCH wherefrom the report has been sent showing absence of spermatozoa. However, during the course of examination, had not disclosed for what purpose slide was prepared.

P.W.6, a Gynecologist had examined the victim on 3.8.2013 and during the course of physical examination she had not found any abnormality/ wound including that on genital and in



likewise manner also could not found during the course of internal examination. Vaginal swab was taken and sent to Microbiology Department and as has been reported, semen has been found. In likewise manner, Ext.5, FSL report also supports the presence of semen over the petticoat and so, indulging in sexual intercourse by the victim is found duly substantiated.

Now the question for proper adjudication is whether it was consensual or rape.

P.W.1 is the victim. She during course of her examination-in-chief has stated that the occurrence is dated 2.8.2013 at about 8.00 P.M. At that very time, she was cleaning the utensils at the darwaja of her house lying at village Saafipur. At that very time, Ram Babu Das came and began to talk with her mother-in-law and further, inquired about her health. Her mother-in-law had disclosed that she is not feeling well. Even having shown to different doctors, she could not found cured over which he disclosed that his father is Ojha and so kindly see him. As, she was also feeling unwell and so, she also volunteered. Then thereafter Ram Babu Das accompanied her. He has taken her to Baanstal, at an abandoned house, where she was undressed and then, she was raped. At that very time, she was threatened that in case of alarm she will be strangulated. After committing rape, he



escaped therefrom. Then, she came back to her house and disclosed the event to her husband, mother-in-law and Dewar. Thereafter, they all took her to Khusrupur Hospital where, her husband written an application on her dictation and then, submitted. She had put her RTI over the same. Then she was taken to hospital where the lady doctor examined her. Then, she was taken to court where her statement was recorded before the Magistrate. Police had also examined her, identified the accused.

During cross-examination at paragraph 4 she had stated that she resides in a rented house. Fasleti Ram is the landlord. The landlord also resides in the same house. Again changed that her shop is situated in the rented house whole, she resides in her own house. Her own house is at village Saafipur. The rented house happens to be at village Ganichak. Her husband has hardware shop. The shop is opened at 10 A.M. and closes at 4 P.M. She has further stated that she had not gone to the shop, so she is unable to disclose the distance. In para 5 she has stated that on the alleged date and time of occurrence, she was at her house. At that very time, her mother-in-law Rita Devi, Dewar Sandeep Sah and husband Dilip Sah were present. In para 7 she has stated that she is suffering from some sort of illness for the last two years. Then she disclosed that she was suffering from headache. She got herself



examined by a doctor but, she could not get cure. She is unable to disclose the name of the doctor, the location of his clinic, she has no prescription. In para 9 she has stated that for the last three years, she is knowing the accused. He was not on visiting term since before the occurrence. She had not seen him before the occurrence. On the date of occurrence her mother-in-law and husband disclosed his name as Ram Babu Das, son of Dilip Das. In para 10 she has stated that Ram Babu Das came at 7 P.M. It was dark night. At that very time, she had requested her husband and mother-in-law to accompany. They became ready. Her mother-in-law accompanied her. In para 11 she has stated that the place where she was raped was Baanstal but she is unable to disclose the name of the village. She is unable to disclose the boundary of the abandoned house where she was raped. She is unable to disclose the owner of the house. She is unable to disclose where it was single storeyed or double storeyed.

In para 12 she has stated that the accused anyhow succeeded in getting her mother-in-law returned from the midst of way on an assurance that he will come along with her. Her mother-in-law, after putting belief over his assurance, returned back. Ram Babu had disclosed that he was taking her to village Saafipur which is lying adjacent to the place and further, after having



incantation, she will be taken a back. She had disclosed her mother-in-law that on account of night, she should accompany her but, her mother-in-law on the pretext of cooking returned back. In para 14 she has stated that the accused had completely necked her but she is unable to say whether the accused had dishevelled himself or not. There was a sandy soil over the surface. As Ram Babu had threatened to kill on account thereof she had not raised alarm. Ram Babu was not armed with pistol, or by any weapon. Only he threatened by saying that in case of raising alarm, she will be strangulated. In para 15 she has stated that she is unable to say with regard to her activity during the course being raped. In para 16 she has stated that after remaining there for five minutes she came back to their house, disclosed the aunt and then all of them gone to the police station. She alongwith her husband both have given statement. The written petition was ascribed by her husband. She remained at the police station whole night. On the next day she was sent to the hospital. In para 17 she has disclosed that her apparels were kept by the doctor. Then at para 19 there happens to be contradiction but the same happens to be not at all fully substantiated as was not confronted to the I.O. P.W.5.

P.W.2 is the mother-in-law who during her examination-in-chief has stated that on the alleged date and time of occurrence



while she was sitting at her Darwaja and her daughter-in-law was cleaning utensils, at that very time Ram Babu came and asked about headache as she was suffering since before. She had disclosed that now I am cured but, her daughter-in-law is suffering from headache. On this he said that kindly allow her daughter-in-law to accompany to his place as his father is expert in incantation, the victim proceeded. She also accompanied her but, after covering some distance she was persuaded to return back by the accused on an assurance that just after incantation he will return alongwith her daughter-in-law. Thereafter, Ram Babu took away her daughter-in-law. After half an hour, her daughter-in-law came weeping. On query she disclosed that Ram Babu has raped her in a room lying a Baanstal. At that very time, the husband of the victim as well as Dewar of the victim both were present. Then thereafter all of them gone to the police station where, as stated by her daughter-in-law, written report was prepared and then was submitted before the police. Her statement was also recorded by the police. Identified the accused.

During cross-examination at paragraph 5 she has stated that she was knowing Ram Babu for the last five years. He was on visiting term. After the occurrence, he has not come. Ram Babu had done incantation once before the occurrence to her, while the



victim was twice before the occurrence. Ram Babu used to indulge in occultant practice at her Darwaja itself. In para 8 she has stated that his son Dilip (husband of the victim) was at his shop lying at village Gaanichak. He came in the night. After his arrival, he was disclosed about the occurrence by the victim and she came after arrival of her son. In para 10 she has stated that Baanstal is at village Ganichak while she lives in village Saafipur. In para 12 there happens to be contradiction but the remaining part which she has not admitted, has not been confronted to P.W.5 the I.O. In para 13 she has stated that the house of Ram Babu is lying at village Ganichak. In para 14 she has stated that she insisted to accompany the victim whereupon Ram Babu disclosed that whether he happens to be a person of bad repute.

P.W.3 is the Dewar. On the alleged date and time of occurrence he was at his house alongwith his Mammy as well as Bhabhi. Ram Babu came and enquired from his Mammy about her headache over which she disclosed that she is well but now her daughtr-in-law is suffering from headache. Over this, Ram Babu instructed his Bhabhi to accompany and then assured that she will be cured. His Mammy accompanied his Bhabhi but she was returned back by Ram Babu during midst of way. After 10-15 minutes, his Bhabhi came and then disclosed that she has been



raped in a room by Ram Babu at Baanstal. At that very time, her brother Dilip Sao has also arrived. Then thereafter all of them came to Khusrupur Police Station where the case was instituted.

During cross-examination at para 5 there happens to be admission at his end that he had stated before the police that his Bhabhi was taken away by Ram Babu and who committed rape in a lonely house and then escaped. Then there happens to be the other parts. In para 7 he has stated that he had not accompanied his Bhabhi. First of all his mother returned back and after some time, his Bhabhi came. They have proceeded the police station at 9 P.M.. In para 8 he has stated that Ram Babu had visited his place 5-6 times before the occurrence. They had not gone to the place of Ram Babu.

P.W.4 is the husband of the victim who has disclosed that on the date and time of occurrence he had gone to Patna to earn his livelihood wherefrom he returned back at 8 P.M. When he reached at his house, he had seen his wife, mother weeping. On query they disclosed that Ram Babu took her away on the pretext of incantation and then, committed rape in a lonely house at Baanstal. Then thereafter, they all have gone to the police station where, on a disclosure made by his wife, he had written an application, whereupon his wife had put her RTI and then, he has



put his signature and the same was handed over to the police. After registration of the case, their statement were taken. His wife was taken to Gurugovind Singh Hospital, Patna City. He had also gone alongwith her. Identified the accused.

During cross-examination at para 5 he has stated that he was informed regarding the occurrence from his wife. He had not gone to the place of occurrence. In para 6 he has stated that he had not seen the place of occurrence before inspected by the police. At para 7 he has stated that the I.O. had not seized any article from the place of occurrence.

P.W.5 is the I.O., who after having been entrusted with the investigation, visited the place of occurrence, recorded statement of the witnesses, procured supervision report, arrested the accused, procured medical report and then, completing investigation submitted charge sheet. During the course of cross-examination he has stated that he had inspected the place of occurrence at 1 A.M. on 3.8.2013 itself. He has further stated at para 9 that the P.O. house belongs to Radhey Rai. In para 10 he has stated that he had not recorded statement of Radhey Rai. He had not recorded the statement of the persons having their houses in the boundary. In para 13 he has stated that he had not seen any wound over the person of the victim.



Relevancy of the F.I.R. is for corroboration or contradiction. There happens to be the specific disclosure in the written report that the victim was present at the Ganichak house and from there, she was taken away by the accused on the pretext of incantation and during course thereof, she was raped but, in spite of the fact that during examination-in-chief she had shifted herself from Ganichak to Saafipur, her attention has not been drawn up at the end of the accused. That means to say, the inconsistency whatever be remained, remained unfounded on account of own fault of the accused. Further more, during cross-examination of the victim, it is apparent that she has not been cross-examined on the score whether being a major she was a consenting party, she was knowing Ram Babu since before the occurrence, she was not even suggested that as the family members have objected on account thereof, in order to protect herself she joined with them and got this case filed putting wrong and incorrect allegation. From the evidence of other witnesses also that means to say P.W.2, P.W.3 and P.W.4, it is evident that though presence of the appellant at their house happens to be since before the occurrence but, they also not been suggested that the victim was very much friendly with the appellant. In the aforesaid facts and circumstances of the case, whether it could be perceived that



the victim happens to be a consenting party and in order to avoid curse of his family members she got this case filed.

Section 375 of the Indian Penal Code contains definition relating to 'rape' and there also happens to be proper identification of the circumstances, more particularly over the consent, during commission of rape and further, for proper appreciation of evidence, the Explanation No.2 requires to be quoted here.

“Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.”

So, from perusal of the proviso it is evident that even if there happens to be no resistance at the end of the victim during course of commission of rape would not give an impression that she was a consenting party, that means to say, something more was required at the end of the accused to substantiate that the victim was a consenting party. From the evidence of the victim, it is apparent that that part is missing. Consequent thereupon, the instant appeal lacks 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
Uploading Date	04.09.2019
Transmission Date	04.09.2019

