

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 98 of 2014

Arising Out of PS. Case No.-130 Year-2010 Thana- KALYANPUR District- Samastipur
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Badari Kapar, son of Suraj Kapar, resident of village – Fulhara, P.S. -
Kalyanpur, District – Samastipur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

For the Appellant : Mr. Bijay Bhushan Prasad, Adv.
Ms. Vandana Singh, Adv.
Mr. Shekhar Harshwardhan, Adv.

For the Resp./State : Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 06-08-2019

The sole appellant has preferred the present appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against the judgment of his conviction and sentence passed by the trial court.

2. By judgment dated 09-12-2013, the sole appellant was convicted for offence under Sections 376 and 323 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.'). By order dated 17-12-2013, under Section 376 of the I.P.C., he was



sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 20,000/- (twenty thousand). In case of default in payment of fine, he was directed to further undergo simple imprisonment for one year. Under Section 323 of the I.P.C., he was sentenced to undergo rigorous imprisonment for six months. Both the sentences were directed to run concurrently. The appellant was convicted and sentenced in Sessions Trial No. 345 of 2011/Tr. No. 71 of 2011 (arising out of Kalyanpur P.S. Case No. 130 of 2010) by Sri Arun Kumar Sharma, learned 1st Additional Sessions Judge, Samastipur (hereinafter referred to as 'Trial Judge').

3. Short fact of the case is that on 06-08-2010 at about 10:15 AM, a written report with thumb impression of victim was submitted to the officer incharge of Kalyanpur Police Station in the district of Samstipur. In the written report, it was indicated that the victim on 03-08-2010, while was sleeping in her house with a minor daughter of one Tuntun Kapar on cot, at about 1:00 in the night, Badri Kapar (appellant), son of Suraj Kapar, resident of same village i.e. Fulhara, P.S. Kalyanpur, District – Samastipur opened the door and intruded into the house. Thereafter, he lifted the victim in his lap and laid her on the floor from the cot. She



tried to raise *hulla*, but her mouth was wrapped by the appellant through *gamachha*. Subsequently, he committed rape with the victim continuously till his lust was finally satisfied. After committing rape, she was given one slap by the appellant and she was threatened that if she speaks to anyone regarding the occurrence, she would be killed. The victim raised alarm and on her *hulla*, her *gotini* (wife of husband's brother) Gayatri Devi (P.W.3) wife of Harischandra Kapar, Nirmala Devi (P.W.1) wife of Premlal Kapar and Jagdish Kapar (P.W.8) all came there and saw entire occurrence. In the morning on 04-08-2010, she sent message to her husband Fultoon Kapar (P.W.9) and called him and explained regarding the occurrence. On 05-08-2010, a *panchayati* was held and Badari Kapar (appellant) and father of Badari Kapar (appellant) namely Suraj Kapar were called, but they refused to participate in the *panchayati* and only thereafter, the written information was submitted in the police station. From the contents of the written report, it appears that on 05-08-2011 itself, the victim had rushed to the police station. On the bottom of the written report, the victim put her right thumb impression and as a witness to the written report, Dharmendra Kapar (P.W.7) put his signature.



4. On the basis of said written report, on 06-08-2010 at 10:15 AM, a formal F.I.R., vide Kalyanpur P.S. Case No. 130 of 2010, was registered under Sections 376/323 of the I.P.C. against the sole appellant. After registering F.I.R., the investigation was handed over to P.W.10 Jagarnath Jha, who at the relevant time was Sub-Inspector of Police in Kalyanpur Police Station. After taking up investigation, the investigating officer recorded re-statement of the informant/victim and statement of number of witnesses. The victim was sent for medical examination. A Medical Board was constituted to ascertain the fact regarding rape as well as age of the victim. During investigation, the appellant was arrested on 20-05-2011 and after the case was found true, chargesheet was submitted on 18-06-2011 against sole appellant, whereupon, the learned Chief Judicial Magistrate, Samastipur on 24-06-2011 took cognizance of the offence. After completion of all the formalities under Section 207 of the Cr.P.C., the case was committed to the court of sessions on 29-06-2011 and it was numbered as Sessions Trial No. 345 of 2011. On 22-07-2011 charge under Sections 376 and 323 of the I.P.C. was framed against the sole appellant, which he denied and claimed to be tried.



5. During the trial, to establish its case on behalf of the prosecution, altogether 10 witnesses were examined. Victim, who was about 19-20 years old, was examined as P.W.4. P.W.1 Nirmala Devi, P.W.3 Gayatri Devi and P.W.8 Jagdish Kapar, who were relatives of the victim, were examined on the point that immediately after the occurrence they had seen the appellant fleeing away. In similar manner, P.W.2 Bulbul Devi, who was an independent witness, has stated that she too had seen the appellant fleeing away immediately after the occurrence. P.W.7 Dharmendra Kapar has identified his signature on the written report, which was marked as Ext.5. P.W.9 Fultoon Kapar is husband of the victim, who in his evidence, has stated that he was informed by the victim regarding the occurrence. P.W.5 Dr. Shobha Sinha on 06-08-2010 was posted as Deputy Superintendent in the Sadar Hospital, Samastipur and she was Chairman of the Medical Board, which was constituted to examine the injury as well as age of the victim and she identified the medical report, which has been marked as Ext.1. P.W.10 Jagarnath Jha on 06-08-2010 was Sub-Inspector of Police of Kalyanapur Police Station and on the same date he was given charge of investigation of the present case and P.W.6 Mahesh



Chandra Pandey, A.S.I. in Kalyanpur Police Station took charge of investigation on 14-08-2010 after the transfer of first investigating officer (P.W.10) and he during investigation arrested the appellant however; he did not record statement of either of the witnesses. During evidence, he proved formal F.I.R., which was marked as Ext.2, written report Ext.3 and endorsement in the written report of the officer incharge, which was marked as Ext.4.

6. After conclusion of the prosecution evidence, the circumstances and evidences, which were brought on record against the appellant, were explained to him and his statement under Section 313 of the Cr.P.C. was recorded on 26-09-2013, in which, he claimed to be innocent.

7. Sri Bijay Bhushan Prasad, learned counsel for the appellant, after placing entire evidence, has argued that it was not a case of barbatic rape, rather it was consented sexual intercourse in between the appellant and the victim and since the relatives of the victim had seen the occurrence, a story was built up, as if, the appellant had committed forcible rape on the victim. To substantiate his submission, learned counsel for the appellant has argued that had it been a case of forcible rape, there was every possibility of finding injury on the person of the deceased,



however; while the victim was examined by the Medical Board, no injury was found either on the external body of the victim or on internal part. He submits that the Medical Board had not recorded any finding regarding commission of rape with the victim.

8. It has further been argued by learned counsel for the appellant that the appellant was falsely implicated due to the reason that there was some dispute in between the appellant and family of the victim regarding the passage. He submits that house of the appellant was behind the house of the victim and there is possibility that the appellant might had been falsely implicated in the present case. Besides this, it has been argued that the evidence of victim may not be relied upon due to the reason that there were several inconsistency in her evidence during the trial and her assertion made in the written report.

9. Learned counsel for the appellant has further argued that no plausible explanation has been given by the prosecution regarding belated information being given to the police station, whereas alleged occurrence had taken place in the night on 03-08-2010, but written report was submitted in the police station belatedly on 06-08-2010 without any explanation.



10. It has also been argued that had it been a case of forcible rape, in that situation, if the victim was sleeping with a minor girl, on alarm being raised, there was every possibility that minor girl would have also seen the occurrence, but nothing has been brought on record by the prosecution. On aforesaid ground, it has been argued that the learned Trial Judge has incorrectly passed the judgment of conviction and sentence.

11. Alternatively, it has been argued that the appellant at the time of alleged occurrence was in his early age and on the date of recording his statement under Section 313 of the Cr.P.C., his age was recorded as 22 years old by the learned Trial Judge. Learned counsel for the appellant submits that considering the early age of the appellant as well as the fact that appellant had already spent more than seven years in custody, this Court may take lenient view by way of reducing the sentence to the period already undergone.

12. Sri Ajay Mishra, learned Addl. Public Prosecutor, by way of referring to the evidence, submits that the prosecution has successfully established the case against the appellant on both counts i.e. commission of rape as well as regarding assault given by the appellant on the victim. He submits that the victim was



handicap by her one of the leg and this was the reason that the appellant had forcibly lifted her from the bed and thereafter, committed rape. The victim's version is consistent, ofcourse, there are some variations in between the written report and the evidence before the court below, however; such inconsistencies are not enough to discredit the evidence of the victim. He submits that besides the victim, number of witnesses after hearing alarm of the victim had rushed to the place of occurrence and saw appellant fleeing away. He submits that all the circumstances categorically corroborate that the appellant had committed rape and thereafter, he had also assaulted the victim, which fact has been reiterated by the victim in her evidence as well as in her written report.

13. Regarding delay, it was submitted by Sri Mishra, learned A.P.P. that in the evidence, it has come that husband of the victim at the time of occurrence was staying about 60 km away from his village and he was working in a hotel. After message was conveyed to the husband of the victim, he (P.W.9) on the next morning reached the village and thereafter, steps were taken to get the dispute raised before the *Panchayat*, however;



the appellant and his father refused to participate in the *panchayati* and this was the reason that some delay has occurred.

14. Sri Mishra, learned Addl. Public Prosecutor submits that on perusal of the written report, it is evident that on 5th June, 2010 itself, the victim had visited the police station, but to the reasons best known to the officer incharge, the receipt of information in the police station has been mentioned as 10:15 AM on 06-08-2010 and on the same date and time, formal F.I.R. was lodged. He further submits that though the victim was got examined by the Medical Board, since there was lapse of about 3 days from the date of occurrence, there was no possibility to notice any mark of rape on the person of the victim, that too the victim was a married lady. He submits that P.Ws. 1, 2, 3 and 8 are consistent on the point that after the occurrence, while they reached the place of occurrence, they saw the appellant fleeing away. Accordingly, it was submitted by Sri Mishra that the learned Trial Judge has rightly passed the judgment of conviction. On the point of sentence, Sri Mishra has opposed that considering the nature of accusation this Court may not reduce the period of sentence.



15. Besides hearing learned counsel for the parties, we have minutely examined entire evidence on record and after going through the same, we do not find any apparent error in the judgment of conviction. *Prima facie*, the prosecution has established its case beyond all reasonable doubt, however; before proceeding, it would be necessary to discuss the evidences, which have been brought on record.

16. The victim was examined as P.W.4. In her evidence, she reiterated that the occurrence had taken place about 1:00 in the night. At that very time, she was sleeping in her house on a cot with a minor girl, who was daughter of one Tuntun Kapar. The appellant arrived there and from the cot, she was laid on the floor. On floor, he wrapped her mouth and thereafter, he committed rape.

17. Ofcourse, in examination-in-chief, she had not disclosed exactly what the appellant had done, but the sentence, which has been recorded, was sufficient to draw an inference that she wanted to convey that she was raped by the appellant. However, the learned Trial Judge had put a question on the point, thereafter, in paragraph - 3 of her evidence, she clarified regarding the rape. She further deposed that after commission of



rape, the appellant slapped her and threatened not to disclose this fact to anyone. Only thereafter, the victim started raising *hulla* and then Bulbul Devi (P.W.2), Nirmala Devi (P.W.1) and Gayatri Devi (P.W.3) arrived there. This witness identified the appellant in dock. In cross-examination, suggestion was given, as if, there was some dispute regarding the passage in between the appellant and the family of the victim, however; same was denied, but she admitted that earlier there was one case. She was further given suggestion that she was having good relation with the appellant, but same was denied. On the trend of cross-examination, it appears that defence was taken on two different points. Firstly, a suggestion was given, as if, there was some dispute in between the appellant and the family of the victim and another stand was taken, as if, the victim was having some relation with the appellant and this was the reason that at the time of argument, learned counsel for the appellant had emphasized, as if, the victim and the appellant in a compromising situation was seen by the witnesses and thereafter, a false case was made out. However, on going through the evidence of P.W.4/victim, we do not find any substance in the suggestion, which was advanced from the defence side.



18. P.W.1 Nirmala Devi, P.W.2 Bulbul Devi, P.W.3 Gayatri Devi and P.W.8 Jagdish Kapar, all were examined on the point that after hearing *hulla*, while they reached the place of occurrence, they saw the appellant fleeing away. Ofcourse, all those witnesses were cross-examined at length and they were also given some suggestion, but same was denied by all the witnesses. On examination of evidence of aforesaid witnesses, there is no reason to raise any doubt on the point that appellant was seen by those witnesses, while after committing rape, he was fleeing away.

19. P.W.7 Dharmendra Kapar, in his evidence, has stated that the written report, which was submitted in the police station with thumb impression of the victim, was under writing and signature of this witness and same was marked as Ext.5.

20. P.W.9 Fultoon Kapar is the husband of the victim and he deposed that he was given information over phone, while he was in his hotel where he was working and then immediately thereafter, he rushed to the village. After his arrival, he was given information by the victim regarding the occurrence, so this witness is 'hearsay witness' and his evidence has been corroborated by the evidence of the victim, who too has disclosed those facts in her evidence.



21. P.W.5 Dr. Shobha Sinha on 06-08-2010 was posted as Deputy Superintendent in the Sadar Hospital, Samastipur and a Medical Board was constituted under her chairmanship. On the same date at 2:10 PM, the Medical Board examined the victim, however; during examination, no such fact was noticed regarding commission of rape or any injury on the person of the victim. Her age was assessed in between 19 or 20 years old. P.W.5 identified the medical report, which was marked as Ext.1. Since in the present case, alleged occurrence had taken place at 1:00 in the night on 03-08-2010 and victim was a married lady, certainly, there was no possibility to notice any mark of rape after lapse of more than three days. The victim was examined by the Medical Board on 06-08-2010 at 2:10 PM. Accordingly, non-finding of any substance regarding commission of rape on the victim by the Medical Board may not be treated adverse to the prosecution case, where there is specific oral evidence of the victim herself, which was corroborated by other four witnesses, who had seen the appellant fleeing away after the occurrence.

22. P.W.6 Mahesh Chandra Pandey on 13-10-2010 was Assistant Sub-Inspector of Police in Kalyanpur Police Station. After transfer of the first investigating officer, he took up charge of



investigation on 14-10-2010. However, during investigation, he did not examine any witness, but he arrested appellant and finally, submitted chargesheet. During his evidence, he identified formal F.I.R., which was marked as Ext.2, written report Ext.3 and endorsement of the officer incharge on the written report, which was marked as Ext.4.

23. P.W.10 Jagarnath Jha on 06-08-2010 was posted as Sub-Inspector of Police of Kalyanpur Police Station. After formal F.I.R. was lodged, he was handed over charge of investigation and during investigation, he recorded re-statement of the victim and statement of other witnesses. He ensured examination of the victim by the Medical Board and this witness has visited the place of occurrence and in his evidence, he has given description of the place of occurrence, which was thatched room of the victim with a door of *chachri*.

24. After conclusion of the prosecution evidence, entire circumstances were explained to the appellant and his statement under Section 313 of the Cr.P.C. was recorded, in which, he denied all the charges.

25. On examination of entire evidence, there is no difficulty in coming to the conclusion that the prosecution has



successfully established its case beyond all reasonable doubt and as such, there is no reason to interfere with the judgment of conviction. However, so far as question on sentence is concerned, learned counsel for the appellant has rightly argued that considering the early age of the appellant, this Court can take lenient view in the matter. It has also been argued that appellant has remained in custody for more than seven years and if the sentence is reduced to the period already undergone, it will suffice the object.

26. In view of facts and circumstances, we do not find any error in the judgment of conviction and as such, the judgment of conviction dated 09-12-2013 passed by Sri Arun Kumar Sharma, learned Ist Additional Sessions Judge, Samastipur in Sessions Trial No. 345 of 2011/71 of 2011 (arising out of Kalyanpur P.S. Case No. 130 of 2010) is, hereby, approved.

27. So far as sentence part is concerned, considering the early age of the appellant as well as the fact that during evidence, no such fact has been brought on record that it was a case of barbaric rape, we are of the opinion that if sentence is reduced to the period already undergone i.e. more than seven years in custody, same will serve the purpose. Accordingly, the



sentence is modified to the extent of period already undergone by the appellant in custody.

28. The appeal stands dismissed with modification in sentence. Since the sentence has been reduced to the period already undergone by the appellant in custody and the appellant namely Badari Kapar is in custody, he is directed to be released forthwith, if not wanted in any other case.

(Rakesh Kumar, J.)

(Anjani Kumar Sharan, J.)

Anay

AFR/NAFR	AFR
CAV DATE	NA
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