

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.434 of 2014**

Arising Out of PS. Case No.-7 Year-2013 Thana- MAHILA P.S. District- Bhagalpur

Baij Nath Bihari Mandal son of Late Brahamdeo Mandal , Rresident of
Village - Jhalludas Tola, Police Station - Rangra Gopalpur , District , District -
Bhagalpur .

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Animesh Kumar Mishra, Amicus Curiae
For the Respondent/s : Mr.Bipin Kumar, APP

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

06-08-2019

None appears on behalf of appellant, on account thereof, Sri Animesh Kumar Mishra, learned Advocate has been requested to assist the Court as Amicus Curiae.

2. Appellant, Baijnath Bihari Mandal has been found guilty for an offence punishable under Section 376 IPC and sentenced to undergo RI for 7 years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for three months, and under Section 3(1)(xii) of the SC/ST (POA) Act, sentenced to undergo RI for 2 years and further directed to run the sentences concurrently, vide judgment of conviction dated 13.05.2014 and order of sentence dated 22.05.2014 passed by 1st Additional Sessions Judge-cum-Special Judge, (SC/ST) Act, Bhagalpur in connection with Sessions Trial No.353/2013, Trial No. 13/2013



arising out of Naugachia (Mahila) PS Case No. 07/2013.

3. Victim-PW 9 (name withheld), filed a written report on 10.02.2013 alleging *inter alia* that in the night of 06.02.2013, her co-villager, Baij Nath Bihari Mandal caught hold of her, thrust cloth inside the mouth and lifted her to inside her house where committed rape. After commission of rape, he had threatened that in case of reporting, she will be murdered. On the following day, she had gone to the place of Mukhiya and disclosed the occurrence whereupon, Mukhiya consoled her and instructed her not to institute a case, whereupon, delay has been caused in institution of the case.

4. After institution of Naugachia (Mahila) PS Case No. 07/2013, investigation commenced and concluded by way of submission of charge-sheet facilitating the trial meeting with ultimate result, subject matter of the instant appeal.

5. The 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.

6. In order to substantiate its case, the prosecution has examined altogether twelve PWs who are PW-1, Pinki Devi, PW-2, Kanchan Devi wife of Purusottam Das, PW-3, Kanchan Devi wife of Umesh Harijan, PW-4, Raj Kishore Ram, PW-5,



Budhanarayan Das, PW-6, Yashoda Devi, PW-7, Bhupal Das, PW-8, Rajesh Kumar Mandal, PW-9, Victim, PW-10, Swayam Prabha, PW-11, Dr. Punam Mishra, who examined the victim and PW-12, Abhijit Kumar, Magistrate who had recorded statement of the victim under Section 164 CrPC. Side by side, has also exhibited Ext-1, Signature of Kanchan Devi on seizure list, Ext-1/1, Seizure list, Ext-2, Injury report, Ext-3, Statement under Section 164 CrPC of the victim, Ext-4, FSL report, Ext-5, is also FSL report. Nothing has been adduced on behalf of defence.

7. After going through the evidence on record, it is evident that PW-11, the doctor who had examined the victim on 10.02.2013 did not find any corroborative evidence on account of absence of injury, if any, over the private part, absence of spermatozoa and so, she concluded by way of recording that it is difficult to ascertain whether the victim was raped or not.

8. Now coming to the ocular evidence, it is evident that PW-6, 7, 8 have not supported the case of the prosecution and so were declared hostile. PW-2 to PW-5 are hearsay witnesses who deposed on the basis of disclosure having at the end of victim. The most pertinent fact coming out from their evidences is that they belonged to particular political party, CPI



(M.L) of which, the informant/victim also happens to be one of the members.

9. Now coming to the evidence of the victim, she has changed the scenario deflecting from her earlier statement by stating that on the alleged date and time of occurrence, she was not raped rather sodomized from behind by Baij Nath Bihari after lifting her to his house. During cross-examination, she completely exonerated the appellant by way of stating that he was not the person who committed sodomy rather the occurrence was committed by somebody else whom she could not identify. The worst thing at the part of prosecution is that this PW has not been declared hostile. So, her initial version was not confronted and likewise manner her attention has also not been drawn towards the statement recorded under Section 164 CrPC. On account of lapses at the end of the prosecution, the evidences of PW-12, the Magistrate has gone worthless, particularly in the background of the fact that statement under Section 164 CrPC always happens to be subject of corroboration or contraction.

10. PW-10 is the IO and in the aforesaid facts and circumstances of the case, her evidence also became worthless, more particularly, having absence of objective findings relating



to the occurrence.

11. Gone through the judgment impugned. From para-20 of the judgment, it is evident that learned lower court observed that on account of some sort of influence having at the end of appellant, she deflected from her earlier statement while, under para-22 of the judgment, took shelter of the Statement recorded under Section 164 CrPC which could not have been taken.

12. In *Ram Kishan Singh v. Harmit Kaur : AIR 1972 SC 468*, wherein it has been held as follows:-

“ 8. A statement under Section 164 of the CrPC is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness. The first information report was considered by the Sessions Judge. Any special consideration of the statement of Hazura Singh under Section 164 of the CrPC could not have produced a different result by reason of the conclusions of the Sessions Judge as to rejecting the oral evidence of Nihal Knur, Harmit Kaur and Hazura Singh as unreliable, untruthful and unworth of credence.

13. Accordingly, judgment of conviction and order of sentence passed by the learned lower court would not survive. Consequent thereupon, the same is set aside. Appeal is allowed.

12. Since appellant is under custody, he is directed



to be released forthwith if not wanted in any other case.

13. The first and the last pages of the instant judgment be handed over to learned *Amicus Curiae* for the needful.

(Aditya Kumar Trivedi, J)

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