

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.869 of 2016

Arising Out of PS. Case No.-356 Year-2012 Thana- CIVIL LINE District- Gaya

Md. Sunni, Son of Md. Gaffar, Resident of Mohalla- Purani Karimganj, Churi Gali, Gaya, P.S.- Civil Lines, Gaya, District- Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv. Ms. Nivedita Nirvikar, Adv. Mr. Manishdhari Singh, Adv.
For the Respondent/s	:	Ms. Abha Singh, A.P.P.
For the informant	:	Mr. Baxi S.R.P.Sinha, Sr.Adv. Mr. Arvind Kumar, Adv.

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 18-10-2019

Appellant Md. Sunny has been found guilty for an offence punishable under section 376 I.P.C. and has been sentenced to undergo R.I. for seven years as well as to pay fine appertaining to Rs.20,000/- and in default thereof, to undergo R.I. for three years, additionally, under section 384 I.P.C. and sentenced to undergo R.I. for three years, under section 420 I.P.C. and sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo R.I. for two years, additionally, under section 67A of the Information and Technology Act and sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.50,000/- and in default thereof, to undergo R.I. for five years, additionally with a further



direction that the sentences should run concurrently vide judgment of conviction and order of sentence dated 19.9.2016 passed by the 9th Addl. Sessions Judge, Gaya in S.Tr.No. 159 of 2014/ 488 of 2014 arising out of Civil Lines P.S.Case No. 356/2012.

Name withheld (P.W.3) filed a written report on 23.9.2012 disclosing therein that her husband Md. Jafar Alam is employed under Dr. B.H.Khan. One Md. Rashid happens to be her tenant and Md. Sunny, who happens to be friend of Md. Rashid, used to visit and also she used to call her Bhabhi. On 3.7.2012 at about 12 noon, when her husband had gone to her place of working, children were at the school, Sunny came at her house and snapped her naked photo while she was taking bath. She, after seeing this protested but he intruded inside the bathroom and then, raped her. It has further been disclosed that at that very time he was carrying one bottle and cotton and he committed rape after having her unconscious. Since thereafter he used to sexually exploit her on the pretext of photo. On 3.8.2012 he demanded Rs.50,000/- and threatened that in case of non-payment of money he will expose her naked photo being under pressure thereof, she had paid Rs.50,000/- which was available with her (30,000/- from her Naihar and 20,000/- from her husband. He on 5.9.2012 again demanded Rs.1 lac on an assurance that after the payment, he will



remove/ erase the photo. In the aforesaid background, she apprehended blackmailing at his end on the pretext of photo having snapped by him as well as sexually exploiting her. Then thereafter, she has disclosed the incident to her mother as well as her family members. She had intended to commit suicide but on the consolation having at the end of her mother as well as her family members, she left her intention.

After registration of Gaya Civil Lines P.S.Case No. 356/2012, investigation commenced and after concluding the same charge sheet has been submitted which happens to be the basis of the trial which ultimately concluded in recording finding of guilt followed with sentence, 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 also been pleaded that so alleged victim happens to be accustomed to modern life and in order to avail the same, exploited the appellant and used him and during course thereof, also secured financially and lastly, when she knew that her affair has been exposed, then thereafter, only to save herself got this case filed with false and frivolous allegation. However, nothing has been adduced in defence.



In order to substantiate its case prosecution has examined altogether 7 P.Ws. Who are P.W.1 Md. Jafar Alam, husband, P.W.2 Sabana Khatoon, daughter, P.W.3 the victim herself (name withheld). P.W.4 Md. Safraj, P.W.5 Dr. Sangeeta Kumari, P.W.6 Yogendra Mishra and P.W.7 Imran Ahmad. Side by side has also exhibited Ext.1 written report, Ext.2 injury report and Ext.3 formal F.I.R. As stated above, nothing has been adduced in defence.

Learned counsel for the appellant has raised many fold argument while assailing the judgment of conviction and sentence. In order to substantiate the same, it has been submitted that there happens to be specific disclosure in the written report that the mother and the family members were firstly acknowledged fact but the mother has not been examined. No explanation is there. From the evidence of the prosecutrix (P.W.3) as well as her husband (P.W.1) it is evident that the house is multi-storied. Ground floor is occupied by his one brother. Upper floor is occupied by another brother and middle floor is occupied by the so alleged victim. There happens to be no evidence that for the middle floor there was separate stair. Neither members of the ground floor nor upper floor have come to support the case of the prosecution much less to the effect that some portion of the house



of the victim was under tenancy nor to the effect that they have seen the appellant in an unusual manner. P.W.7 is the main I.O., who had visited the place of occurrence and there happens to be no description coming out at least during course of recording of objective finding of the P.O. that any portion of the house of the victim was on rent occupied by one Md. Rashid and in likewise manner, presence of common stair unless and until there happens to be the presence of Md. Rashid, presence of the appellant would not as presence of appellant is on that score. Once Md. Rashid is absent then, in that circumstance, presence of the appellant would be only after having some sort of affectionate relationship amongst them.

Then, it has been submitted that during course of investigation the I.O. had not seized the mobile set nor the victim P.W.3 had ever spoken during course of evidence that she had seen her naked photograph in the mobile possessed by the appellant. That means to say, unless and until there was naked photograph of the victim, there would not be an occasion for coercing or exploiting the victim. Once story of snapping of naked photograph is found to be unreliable then in that circumstance, again story of sexual exploitation goes away and if any, it was consensual and so,



no offence could be as there was neither deception nor threat, rather against two major opposite sex.

It has also been submitted that from the version of the prosecutrix (P.W.3) it is evident that she was a consenting party and on that very score her attention has been drawn up under paragraph 46 and the same happens to be substantiated by the I.O. (P.W.7) under paragraph 14. Apart from this, it has also been submitted that when the evidence of the victim (P.W.3) is taken in its totality, it is evident that she was a consenting party and that happens to be the reason behind that a specific suggestion was given to the victim that she was a consenting party but, after coming to know that her extra marital relationship is found duly exposed as a result of which, she could be divorced then in that circumstance, only to save herself this false case has been instituted. So, in the facts and circumstances of the case, the finding so recorded by the learned lower court is not at all found substantiated from the material available on record, whereupon is fit to be set aside.

Learned Addl. P.P. assisted by learned Senior Counsel representing the informant/ victim have vehemently opposed/ controverted/ repelled the submission made on behalf of the appellant. It has been argued that unless and until there happens to



be some sort of exposé identifying inter se relationship, in ordinary course of nature, the evidence of the prosecutrix has to be accepted without any corroboration. If the court, in the background of nature of evidence may seek corroboration. So far, facts of present case is concerned, apart from P.W.3 (prosecutrix) evidence of other witnesses P.W.1, P.W.2 and P.W.4 is available to corroborate. However, the evidence of P.W.3 inspires confidence hence is reliable, acceptable. The most crucial thing is while a woman is put to her married life at a stake by way of labeling such kind of activity against an accused, she will dare only when she has faced the exploitation at the end of an accused. It has also been submitted that it is settled at rest that in cursory manner, the evidence of the prosecutrix should not be brushed aside. That being so, the judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.

P.W.6 is part I.O., who had simply submitted charge sheet. No active role has been played by him and so, his evidence is of no consequence.

P.W.5 is the doctor, who had examined the victim. Needless to say that the victim is enjoying her married life. She is mother of six children and that being so, the ultimate finding



whatsoever been at the end of P.W.5 is in toe therewith and so, there happens to be nothing unusual.

Now remains evidence of P.Ws.1 and 2, who are material witness being family members alongwith P.W.7 I.O. The generic of the present scenario is presence of Md. Rashid as a tenant in the house of the victim. I.O., P.W.7, had visited the place of occurrence and had detailed in paragraph 2. He had not shown any portion of the house occupied by the victim on hire under occupancy of Md. Rashid nor on that very score, the I.O. was ever challenged at the end of the prosecution. At the present moment, evidence of P.W.1, husband of the victim, is to be seen who during his examination-in-chief at para-2 has stated that Md. Rashid was his tenant and Md. Sunny was on visiting term. During course of cross-examination at para-20 has stated that Rashid, who was his tenant, was residing in the flat occupied by him. At para-21 he has stated that he had removed Rashid, after 3-4 months of the occurrence. It is not evident from the record on which date they came to know regarding occurrence, and on which date Rashid was removed. It has not been adduced at the end of the prosecution whether Rashid was removed earlier to visiting of the I.O. at the place of occurrence or after visiting at the place of occurrence by



the I.O., P.W.7. In likewise manner P.W.7 I.O. has not disclosed the exact date on which he had inspected the house.

Now the status of Md. Sunny (appellant) is to be seen. From the evidence of P.W.1 (husband), it is evident that he had not found conduct of Md. Sunny suspicious nor derogant rather, he came to know about the incident only after having been disclosed at the end of the victim. However, during course of cross-examination at para-6 he has stated that he knew Md. Sunny since 3-4 years. Then he said at para 22 that Md. Sunny has got shoe shop at Mohalla Delha. In para-23 he has stated that he alongwith his friends, namely, Sunil Kumar, Binod Kumar and Sanjay Kumar has visited the shop of Sunny. In para-24 he has stated that 5-6 times he had visited the shop but he had not gone there alongwith his wife. In para-25 he has stated that he has got no information whether his wife had ever gone there alone, then has stated that he had purchased shoe, Chapal from the shop of Md. Sunny which the victim (P.W.3) has denied at paras 53, 54, 55, 56. 57, 59. 59. In para-59 she has stated that she never purchased shoe, chapal from the shop of Md. Sunny.

Learned counsel for the informant has rightly submitted that it has been settled at rest that in case, there happens to be reliability in the evidence of the victim, then in that circumstance



neither the court will see for corroboration nor will see ultimate finding of the Doctor/ medical report even given to the extent of negativity the allegation of rape as, slight penetration is sufficient to constitute the offence. Further ejaculation is not a condition precedent for constitution of rape.

So far this case is concerned, it is apparent that none is an eye witness to the occurrence irrespective of the fact that it was not a one day affair and further, there was an exploitation as alleged on the pretext of photograph having snapped by the appellant Md. Sunny while the victim was taking bath, for quite a long time.

In the aforesaid background, the evidence of the victim has got primacy and so, first of all evidence of victim (P.W.3) is taken up. She during her examination-in-chief has stated that the occurrence had taken place on 3.7.2012. It was 12 noon. At that very time, she was taking bath in her bathroom. None was present inside her house. While she was taking bath, Md. Sunny came to her house and snapped her naked photograph through his mobile. Then, after showing photograph he committed rape. He also got her unconscious by way of administering the sedative. He used to commit rape on the pretext of that photograph. She has further stated that on that very basis, apart from committing rape, he



demanded Rs.50,000/- which she paid on the pretext of deleting the photograph. Even after receiving money, he continued with blackmailing her keeping the photograph. After a month, Md. Sunny again demanded 1 lac rupees. She had not given the money. She thought to commit suicide but subsequently, she disclosed the event to her mother as well as husband. Then she had gone to the police station alongwith her family members where she had filed written report (exhibited). Also filed protest petition.

During cross-examination at para-9 she has stated that she had paid on 3.7.2012. One month after giving of money, she met Md. Sunny. At that very time, there was no talk. At para-10 she has stated that when he came one month thereafter, stayed for an hour. At para-11 she has stated that at that very time her husband was not there, her children were not there. The house was vacant. In para-13 she has stated that he stayed about an hour. He stayed in her room. The main gate was open. In para-14 he has stated that his repeate visit to her place, was disclosed to her husband. In para-16 she has stated that she had disclosed about 15-20 days prior to institution of the case. She had disclosed to Sarfaraj and Sadam. In para-18 she has stated that neither she raised alarm nor she disclosed to anybody when Sunny visited at subsequent time. In para-21 she has stated that she had taken bath



in the bathroom being in naked condition. In para-22 she has stated that on 3.7.2012 sin was committed. In para 23, 24, 25, 26 there happens to be cross-examination relating to her posture during course of commission of rape which she delicately answered. In para 27 she has stated that she had not raised alarm after coming out from the bathroom. At para 28 she has stated that she had grappled with Md. Sunny and during course thereof, she had sustained injury over her waist. In para 33 she has stated that she had disclosed the incident to Sadam and Sarfaraj and before that, she had already disclosed to mother and husband as is evident from para-35. Then at para-39 she has stated that she was raped second time one month thereafter but where she was raped, she is unable to say. At para-40 she has stated that she was raped at third, fourth time in a room but again said that she is unable to say whether in a room, varandah. Her attention has been drawn with regard to her previous statement made before the police that she had indulged with physical relationship voluntarily. When her husband came to know about the incident, she was directed to file case and the same happens to be substantiated by P.W.7, para-14. In para 49 she has stated that her naked photo was snapped by Md. Sunny but she had not disclosed the same to her other family members who were residing at ground floor as well as at upper



floor. At para 51 she has stated that she was not possessing the mobile and so, denied the suggestion having at para 52 that she was in regular contact with Sunny. From para 53, 54, 55, 56, 57, 58, 59 there happens to be cross examination regarding status of the accused Md. Sunny and whether her husband used to purchase shoe, chappal from the shop of Sunny or not. In para 60 she has stated that the railway line lies after 5-7 building from her house. She had thought to commit suicide after coming over the railway line but after having talk with her mother, she relinquished her intention. In para 61 she has shown the accused to be young as well as having sufficient means. In para 62 she has also claimed herself to be smart. There happens to be contradiction with regard to her previous statement under paras 63, 64, 65, 66, 67 but those things have not been confronted to the I.O.. P.W.7. In para 68 she has stated that she had not shown the sachets of medicine by which she was made unconscious. In para 69 she has stated that she had shown the cloth by which she had cleaned her body, to the police. At para 70, 71 she had denied the suggestion that she was a consenting party and she exploited the accused. She developed physical relationship with him voluntarily and in likewise manner also snatched the money from him and then, having known to the husband, got this case filed with false frivolous allegation.



P.W.1 is the husband. Admittedly, he is not an eye witness to the occurrence. He has deposed that after going to the job and children to the school, his wife are to remain alone at his house. One Md. Rashid was his tenant where Md. Sunny used to visit. On 3.7.2012 at about 12 noon while his wife was taking bath in her bathroom, none was present, at that very time Md. Sunny snapped semi naked photograph of his wife and on that very pretext, he had raped her. He had shown semi naked photo of his wife and on that very score continued with sexually exploiting her. His wife became very much perplexed over presence of the photograph. Md. Sunny also succeeded in procuring Rs.50,000/- on the pretext that after the money he will delete the photograph but he had not deleted the same. After some time, Md. Sunny demanded Rs. 1 lac. His wife disclosed that she had no money. Then said that Rs.50,000/- was paid (20,000/- his money and 30,000/- mother's money). Even thereafter, Md. Sunny continued with sexually exploiting her. On account thereof, his wife intended to commit suicide. However, she disclosed the event to her mother and then, she disclosed to all of them. Thereafter all the family members have come to the police station where his wife had filed written report (Ext.1). He has further stated that after arrest of Md. Sunny, his friends came at his shop and threatened him of dire



consequences. All the events what he has deposed is based upon information given by his wife. Identified the accused.

During cross-examination, at para-6 he has stated that Md. Sunny is known to him for the last 3-4 years. He is unable to say from which time his wife knew him. He is known to his wife. Then at para-8, 9, 10, 11, 12 he has disclosed the photography of his house being multi-storied. Ground floor is occupied by his younger brother while upper floor is occupied by his elder brother. Middle portion is occupied by him. Also disclosed that five children and a wife of his elder brother is residing over the upper house. At para 10, 11, 12 (there is wrong numbering) there happens to be details of his house. Just after entering inside his house there happens to be Varandah having 3' width. The stair leading to the upper floor is situated in the aforesaid Varandah. Then, there happens to be bathroom. The door of bathroom is towards Northern side. Both side of the bathroom, that means to say, East and West there happens to be a room. Altogether four rooms are in his possession. Then has disclosed that the bathroom is opened. No door is affixed. Again said that at the time of taking bath, the door of bathroom was opened. In para-17 he has stated that he knew about the occurrence from his mother-in-law, wife three months after the occurrence and during midst thereof, the



accused used to visit his house. In para-18 he has stated that he came to know about the sexual exploitation of his wife as well as taking of Rs.50,000/- once. He had not informed the other family members. His tenant Rashid was residing in the middle portion of the house being allotted to his share. In para-21 he has stated that about 3-4 months after the occurrence, he removed him. In para-23 he has stated that he had got no occasion to see naked photograph of his wife. Then at para 24, 25 there happens to be cross-examination with regard to constitution of the Committee in the mohallah. In para 26, 27, 28, 29, 30 there happens to be cross-examination with regard to identity of Md. Sunny as shopkeeper and having his visit at his shop, alongwith friends as well as alone having purchased the shoe and chapal from his shop. At para 32, 33, 34 his attention has been drawn with regard to previous statement but from the evidence of P.W.7 (para-15) only one statement has been confronted, that too with regard to presence of Rashid. Then at para-36 he has stated that he is unaware with the fact when sexual exploitation of his wife begin and when it ended. Then at para- 37 and 38 there happens to be cross-examination over the event of intention to commit suicide.

P.W.2 is the daughter. During her examination-in-chief, she has reiterated the same version. During cross-examination at



para-5 she has stated that no occurrence had taken place in her presence. In para-7 she has stated that accused used to visit but there was no cordial relation. At para-8 she has statd that she has got no personal knowledge. At para 9, 10 she has stated that Md. Sunny was not on visiting term. In para-11 she has stated that she had not seen any photograph.

P.W.4 is Md. Sarfraz, who has disclosed that the occurrence took place with the victim about 3 years ago. He came to know about the occurrence just 15 days after the occurrence. She had disclosed that while she was alone at her house and was taking bath, Md. Sunny came and snapped her photograph and then, committed rape on that very pretext, also managed to procure Rs.50,000/- on the pretext of deleting the photograph and then also demanded Rs.1,50,000/-. Identified the accused.

During cross-examination at para 11, 12 there happens to be description with regard to presence of the family members of the elder, younger brother of P.W.1 at the upper as well as ground floor of the house respectively. In para-21 he has stated that the victim had not disclosed how many times she was raped. He had not seen the photograph. In Para-22 he has stated that he had not seen visit of Sunny during day time. Then has denied the suggestion.



P.W.7 is the I.O. During his examination-in-chief he has stated that after he was entrusted with the investigation of the case, (exhibited all the relevant documents) he had taken further statement of the informant, statement of the relevant witnesses. Sent the victim to hospital. Inspected the place of occurrence which happens to be the house of the victim. She resides in the middle floor. At the ground floor as well as upper floor brother of the husband of the victim resides. Then has disclosed the boundary of the house. Conducted raid to apprehend accused who was found absconding. He took proper step for proclamation. However, as has been transferred, on account thereof, handed over the charge. During cross-examination at para-5 he has stated that he had not found broken bangle glass, cloth having spot at the place of occurrence. He had not recorded statement of the brother of the husband of the victim as well as their family members. In para-9 he has stated that he had not mentioned the length and width of the bathroom. There was no door in the bathroom. It was open. He had not seen dirty cloth in the bathroom. Then at para-13 has stated that doctor had not found it a case of rape. Then para-14 there happens to be contradiction relating to the victim, para-15 relating to Jaffar Alam (P.W.1). At para-16 he has stated that during the



course of investigation he had not been able to see naked photograph of the victim.

From perusal of the evidence as discussed hereinabove, it is abundantly clear that presence of the bathroom is found just in front of Varandah which lies soonafter having entrance inside the house. Although, during the course of examination-in-chief P.W.7 has not disclosed with regard to location of the bathroom, whether door was affixed or not in front of the bathroom, no sketch map has been to locate property the inner side of the house but during cross-examination though he has not disclosed the location but has disclosed that no door was affixed in the bathroom. However, there happens to be inconsistency on that very score with the evidence of P.W.1 (para-60). More over, the victim is completely silent with regard to location of the bathroom as well as having door affixed therewith or not. There also happens to be no evidence whether there was door on the main entrance or not. Those things are very much relevant because of the fact that the victim was knowing since before that the door was not available, there happens to be presence of stair to go to upper floor then in that circumstance, there should have been proper precaution as to avoid any kind of exposure. Further more, there happens to be no evidence that accused came to bathroom and then snapped the photograph. So,



snapping of photograph is a circumstance which would have been properly explained. When she found that her conduct would suggest otherwise, got the appellant in possession of sedative, which he used and then raped. So, actually rape was committed before snapping or after snapping. That means to say, whether rape was committed on the pretext of naked photograph, mother after being unconscious on account of sedative used by the accused. Apart from this, from the evidence of the victim herself more particularly at para-62, she has claimed herself to be a smart. Then in that circumstance, even having been raped at that very moment on that very pretext, would not have spared the culprit nor would have allowed to be exploited at his end for such long period on the pretext of photograph having been snapped by him in stead of would have divulged the whole event more particularly to her husband as well as other family members who were residing over the ground floor as well as upper floor. Even at that very moment had she taken proper step, then in that circumstance, the accused would not have an opportunity to slip. Further more, from the evidence of the victim, it is evident that she allowed herself to be exploited without any protest, knowing fully well that the photo happens to be inside the mobile of the accused which she never tried to snatch even during such precarious stage or even at the



time when Rs.50,000/- was paid. However, from her evidence more particularly at para 21,22, 23, 24, 25 it is evident that she has controverted or at least created doubt over her own version, whether she was raped on the pretext of photograph or after becoming unconscious.

It is the prosecution who has to prove its case. Had there been a single incident of rape, then in that circumstance it would have been a different colour but indulgence for such long period and for that, there happens to be an allegation that after snapping naked photograph while victim taking bath and then on that very pretext continued with committing rape, speaks otherwise more particularly when the house is occupied not only by the victim herself rather two other family members who not only shown their isolation by way of absence in becoming witness rather, would not have allowed the appellant to commit such kind of occurrence unless and until there would have been some sort of green signal at the other end. Further more, had the victim not been a consenting party, then in that circumstance, subsequent visit of accused would have led him to custody being apprehended by her family member, and in likewise manner relating of mobile, as the story of snapping, in absence of mobile happens to be mere an imagination. Apart from this, the most surprising feature is, presence of victim



relating to Md. Rashid at the time of occurrence. In likewise manner, during subsequent visit of accused. Not only this, when Rashid was present inside the house, having no door at the bathroom, would allow the victim to take bath nakedly. After having minute scrutiny of the evidence of the victim, did not inspire confidence, that being so, the appellant is found entitled for acquittal.

Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is hereby set aside. The appeal is allowed. The appellant is under custody. Hence, he is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Surendra/-

AFR/NAFR	NAFR
CAV DATE	NA
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