

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.800 of 2013

Arising Out of PS. Case No.-98 Year-2011 Thana- AAJAM NAGAR District- Katihar

Sk. Jasim @ Md. Jasim, son of Sk. Samiruddin, Resident of village-
Dhenaghat, P.S.-Azamnagar, District- Katihar

... .. Appellant/s

Versus

The State Of Bihar

... .. Opposite Party/s

Appearance :

For the Appellant/s	:	Sri Krishna Prasad Singh, Sr. Advocate Sri Bhaskar Shankar, Advocate
For the Opposite Party/s	:	Sri Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 20-02-2019

1. The present appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the “Cr.P.C.”) has been preferred by the sole appellant against judgment of his conviction and sentence passed in S.T. No. 367 of 2012. The sole appellant by judgment dated 10.06.2013 has been held guilty and convicted for commission of offence under Section 342 and 376 of the Indian Penal Code, 1860 [hereinafter referred to as the “I.P.C.”]. By order dated 12.06.2013 the appellant under Section 342 of the I.P.C. has been sentenced to undergo imprisonment for nine months and to pay a fine of Rs. 800/-. In default in payment of fine he was further directed to undergo



imprisonment for two months. Under Section 376 of the I.P.C. he has been sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/-. In case of default in payment of fine he was directed to further undergo rigorous imprisonment for one year. All the sentences were directed to run concurrently. The appellant has been convicted and sentenced by Sri Santosh Kumar, learned Adhoc Additional Sessions Judge, IV, Katihar (hereinafter referred to as the ‘trial judge’) in S.T. No. 367 of 2012 (arising out of Azamnagar P.S. Case No. 98 of 2011).

2. Short fact of the case is that on 20.08.2011 a written report was submitted under the signature of the victim before the Officer -in -charge of Azamnagar Police Station. In the written report P.W. 8 (victim) disclosed that on the same day i.e. on 20.08.2011 in morning at about 8.00 A.M. she had gone to Eastern side of her village namely, Dhenaghat for the purposes of drying सन्टी [a kind of fuel] which was just adjacent to her field where there was bamboo orchard. The wet सन्टी which was kept inside bamboo orchard was being carried out and spread in the field for the purposes of its drying. Suddenly Md. Jasim (appellant) aged about twenty years, son of - Samiruddin, resident of village - Dhenaghat, P.S.- Azamnagar, District – Katihar came there and enquired from her about her mother and father to which she



replied they had not come yet. In the meanwhile, forcibly he caught her and started to carry her towards bamboo orchard however she started raising *hulla*. Subsequently, appellant forcibly pushed cloth into her mouth and carried her inside bamboo orchard and laid her on ground. After removing her clothes he committed rape with her and fled away. On alarm raised by the informant her aunt- Roshni Khatoon (P.W. 6) and uncle - Sk. Sairul (not examined) came from their field and from the place of occurrence they carried her to her village. The informant narrated regarding the said occurrence to her family members and villagers. Md. Jasim -appellant had threatened the victim that if she discloses about the occurrence she would be done to death. She further stated that villagers had apprehended Md. Jasim- appellant and carried him to village- Prampur (the village of the informant) and this was the reason for belatedly coming to Police Station. On the basis of the said written report of victim – informant (P.W. 8) on the same day i.e. 20.08.2011 at 11.00 P.M. in the night a formal F.I.R. vide Azamnagar P.S. Case No. 98 of 2011 was registered for offence under Section 342/376 of the I.P.C. against the sole appellant. It is evident that appellant was apprehended immediately after the occurrence. Police after registering F.I.R. investigated the case and on 31.10.2011 submitted charge- sheet



against the appellant. On 21.10.2012 learned Chief Judicial Magistrate, Katihar took cognizance of offence and the case was committed to the court of Sessions on 25.05.2012 and it was numbered as Sessions Trial No. 367 of 2012. After commitment, on 20.07.2012 charge under Section 342 & 376 of the I.P.C. was framed against appellant which was denied by him and he claimed to be tried.

3. During the trial to establish its case on behalf of prosecution altogether eight witnesses were examined. Out of eight witnesses P.W. 3 (Md. Dablu) and P.W. 4 (Abdul Gaffar) were examined claiming to be eye witness to the occurrence whereas P.W. 2 (Md. Aziz) - uncle of victim, P.W. 6 -Roshni Khatoon (aunt of victim) and P.W. 7 – Md. Mokim @ Mojim were examined as if they had seen the appellant fleeing away. P.W. 2, P.W. 6 and P.W. 7 had claimed that they had seen appellant fleeing away from the place of occurrence. P.W. 5 -Dr. (Smt.) Laxmi Sen had examined the victim. The Investigating Officer namely – Md. Rahman Ansari has surprisingly been examined as P.W. 1 preventing defence to take any contradiction in respect of previous statement of prosecution witnesses. The victim has been examined as P.W. 8. After completion of prosecution evidence only formality was done in respect of recording statement under Section 313



Cr.P.C. At the time of recording statement of appellant under Section 313 of the Cr.P.C. no incriminating circumstances were put to appellant or questioned and as such it is a glaring case of non-compliance of provision contained in Section 313 of the Cr.P.C. From defence also one witness namely: D.W. 1 – Md. Atiur Rahman was examined. On examination of evidence it appears that trend of defence was that he (appellant) was implicated in the case only for the purposes of presurizing him to solemnize marriage with the victim. Same stand has been taken by D.W. 1 - Md. Atiur Rahman.

4. Sri Krishna Prasad Singh, learned senior counsel assisted by Sri Bhaskar Shankar, learned counsel for appellant after referring to entire evidence has argued that prosecution in the case has not established its case beyond all reasonable doubts, rather the case was instituted only with a view to pressurize the appellant to solemnize marriage with victim since appellant was aged about twenty years and victim, as assessed by Medical Officer, was aged about sixteen years. Sri Singh, learned senior counsel has argued that it is prosecution case that immediately after occurrence and before filing written report to the Police, the appellant was apprehended by villagers and produced before Police. The Investigating Officer knowing well that appellant was



not involved in commission of rape with victim purposely did not produce the appellant before Medical Officer for his medical examination. He submits that had appellant been examined by Medical Officer the ploy of false implication of appellant by prosecution side would have been frustrated since there was no sign on private part of appellant nor any injuries relating the commission of rape. It has been argued that the investigating agency as well as prosecution has violated mandatory provision as contained in Section 53A of the Cr.P.C. Learned senior counsel for appellant has further argued that it is also not believable that victim about 1 ½ K.M. away from her house had gone near the lonely bamboo orchard for the purposes of drying wet fuel that too alone. In written report the informant had stated that while she was raped her aunt and uncle namely Roshni Khatoon and Sk. Sairul arrived there but without any plausible explanation Sheikh Sairul was not examined during trial. The witnesses regarding whom no whisper was made by victim have come forward as if they all had arrived at the place of occurrence and seen appellant fleeing away. It has been emphatically argued that those witnesses though during investigation under Section 161 of the Cr.P.C. had stated that they were informed by victim while she returned back from bamboo orchard about the occurrence but during trial they



developed the story as if they were present at the place of occurrence. Sri Singh, learned senior counsel has argued that it is a peculiar case in which first witness who was examined was none else but the Investigating Officer. In normal course, according to learned senior counsel for the appellant, the Investigating Officer was required to be examined after examination of material witnesses, but with a view to prevent defence from taking corroboration / contradiction regarding previous statement of witnesses the Investigating Officer was purposely examined as P.W. 1. However, while the witnesses were examined their attention to their previous statement was drawn which was noted down by the learned trial judge. Learned senior counsel for appellant has requested the court that in such situation case diary may be examined. He submits that in view of exigency of the case and for doing justice this Court may also peruse the case diary as to whether witnesses had deposed the same thing which they had stated during investigation or not. It has further been argued that evidence of P.W. 5 – Dr. (Smt.) Laxmi Sen also demolishes the prosecution case. During medical examination no sign of rape was noticed by P.W. 5 and it was not mentioned in injury report which has been marked as Ext. 5. Even the evidence of P.W. 5 indicates that victim was not minor since there can be variance of upto two



years on upper or lower age of victim. As per medical report which is based on dental and radiological report her age was assessed as sixteen years, and as such, it can be eighteen years on higher side. He submits that even though victim was examined after more than ½ year during trial, she disclosed her age as sixteen years. In her evidence which was recorded on 6th March 2013 she disclosed that her marriage was solemnized and she was having a six month child in her lap. Those circumstances, as per learned senior counsel for the appellant, suggests that victim was major on the date of occurrence and there is possibility that there was a consented sexual relation and after being noticed by their parents a defence has been taken as if she has been raped. A clue can be taken from the evidence of victim herself in which she had stated that villagers had produced her as well as appellant. In paragraph no. 4 of cross examination of P.W. 1- the Investigating Officer has stated that boy and girl were produced by villagers. He submits that production of victim and appellant by villagers makes it clear that both were apprehended by the villagers while they were seen by them in compromising position. To corroborate his submission he has taken aid of evidence of P.W. 4. P.W. 4 in his paragraph no. 1 of his evidence has stated that while he went near the place of occurrence he saw that they were in compromising



position. According to learned senior counsel for the appellant besides inconsistency in oral and documentary evidence, since the Investigating Officer has violated mandatory provisions contained in Section 53A of the Cr.P.C. the judgment of conviction and sentence is liable to be set aside.

5. Sri Ajay Mishra, learned Additional Public Prosecutor while opposing the Appeal has argued that in a case of rape the solitary evidence of prosecutrix is enough. According to him the victim herself has categorically corroborated the case, and as such, there is no reason to interfere with the judgment of conviction and sentence.

6. Besides hearing learned counsel for parties, we have minutely examined entire evidence on record and after going through the same *prima facie* we are of view that the judgment of conviction is not required to be approved. It is a peculiar case in which the Investigating Officer -Md. Rahman Ansari has come forward as prosecution witness no. 1. In his evidence he proved signature of Officer-in-charge on formal F.I.R., which was marked as Ext. 1, endorsement on written report, marked as Ext. 2, production – cum- seizure list, marked as Ext. 3 and order of sending certain materials to F.S.L. marked as Ext. 4. Though the order for sending materials to F.S.L. and production – cum-seizure



list were got exhibited the prosecution has miserably failed to bring on record the report of F.S.L. by formally proving it.

7. P.W. 2 (Md. Aziz) is the uncle of the informant. Though nothing was whispered by victim either in her written report or during evidence regarding presence of P.W. 2, he has come forward as if he arrived at the place of occurrence and had seen appellant fleeing away. In cross examination his attention was drawn to his previous statement which discloses that he had not stated before Police that he had not seen the occurrence of commission of rape with Rozi Khatoon and for the first time he had come to depose. For our satisfaction we have perused case diary and in paragraph 14 this fact has been corroborated. We were persuaded to see the case diary since during trial the Investigating Officer was examined prior to examination of other material witnesses and defence was deprived from taking any contradiction.

8. Similarly, P.W. 3 – Md. Dablu regarding whom nothing was indicated either in written report or in evidence of victim he too during evidence has come out with a case that he had seen the occurrence of commission of rape. In paragraph no. 5 of his cross examination his attention was drawn to his previous statement and after going through the same as well as examining



paragraph no. 15 of the case diary it is evident that this witnesses had not seen the occurrence.

9. P.W. 4 is Abdul Gaffar regarding whom nothing was indicated by victim either in her written report or in her evidence, in paragraph no. 1 of his evidence he has come out with a case as if he had also witnessed the occurrence. Attention of this witness was also drawn to his previous statement in paragraph no. 4 of cross- examination and on examination of the case diary paragraph no. 12 it is evident that he had not seen the occurrence. Moreover, it is also not believable that one would commit the crime of rape in presence of witnesses.

10. P.W. 6 -Roshni Khatoon though in paragraph no.- 1 of her examination -in-chief has deposed that she had seen appellant fleeing away from the place of occurrence but on her attention being drawn in paragraph no. 5 of her cross examination as well as on examination of paragraph no. 11 of the case diary there is no reason to place reliance on her evidence of claim of witnessing appellant fleeing away.

11. The evidence of P.W. 7 – Mokim @ Mojim is also not believable. In paragraph no. 1 of his examination -in-chief he has stated that he he had not seen the occurrence of rape but he had seen appellant fleeing away. However, in paragraph no. 3 of his



cross examination his attention was drawn to his previous statement and on perusal of paragraph no. 13 of the case diary it is evident that this witness is not truthful.

12. The victim was examined as P.W. 8 and in her evidence in paragraph no. 1 she stated that occurrence had taken place about 1½ year back in morning at 8.00 A.M. At that very time she was present at Dhenaghat. There she was drying wet सण्डी . At that very time she was bringing wet सण्डी from bamboo orchard where suddenly Jasim (appellant) arrived and enquired about her mother and father where after he caught hold of her and committed rape. He also threatened her not to speak to anyone otherwise she would be stabbed. In Police Station she gave written report and she identified her signature on the written report which was marked as Ext. 6. She also identified appellant in dock. Though in her written report she had given detailed description as to who had come after hearing her cry but in her evidence she had said nothing save and except the fact that she was raped by appellant. In paragraph no. 3 of her cross examination she stated that she was married. Her marriage was solemnized about one year back and she was having one child aged about six months. Her evidence was recorded on 6th March, 2013 and in this case alleged occurrence had taken place on 20.08.2011 still at the time of



deposition she disclosed her age as sixteen year whereas in medical examination which was conducted in the year 2011 her age was assessed as sixteen years. In paragraph no. 4 of her cross examination she stated that on the date of occurrence at 4.00 P.M. she had lodged a complain. Her house from the place of occurrence was about 1 K.M. She further stated that for the first time on the date of occurrence she had gone to the place of occurrence. She further stated in same paragraph that villagers had persuaded her to lodge the case. This sentence also depicts many thing if we examine the evidence of P.W. 1 - Investigating Officer, who in his evidence has stated that victim and boy (appellant) both were produced by villagers. Besides this, in cross examination almost all witnesses were given suggestion that the present case was instituted since the appellant refused to solemnize marriage with the victim.

13. P.W. 5 – Dr. Laxmi Sen on 22.08.2011 was posted in Sadar Hospital, Katihar and at 11.30 A.M. she examined the victim and noticed the following facts:-

“About rape – no injury on body and private part. Hymen recently torn at 7 O’ Clock, one lacerated wound at 12 O’ clock size 1/6” x 1/4” x 1/4”, no bleeding at the time of examination. Duration of injury within 72 Hrs. Vaginal canal admits one finger ligatly. Vaginal report shows no spermatozoa. Injury may be caused due to sexual torture.”



She also proved her report which was in her pen and signature and the same was marked as Ext. 5. In her evidence she stated that age of victim was assessed as sixteen years on the basis of clinical, dental and radiological investigation though in cross-examination in paragraph no. 3 she stated that age was subject to variation upto two years. Again in her cross examination she stated that in course of normal intercourse also the present injuries may be caused. Meaning thereby that whatever minor injuries were noticed that was possible in course of normal intercourse. The doctor has clarified in its evidence that neither on body or private parts of the victim she could notice any injuries. On examination of medical evidence vis-a-vis oral evidence there is no difficulty in coming to conclusion that oral evidence is not supported by medical evidence.

14. The Investigating Officer – P.W. 1 in paragraph no. 1 of his evidence has stated that on 20.08.2011 he was posted in Azamnagar Police Station and Officer-in-charge had entrusted investigation to him in respect of Azamnagar P.S. Case No. 98 of 2011. He visited the place of occurrence but from perusal of his evidence it appears that while inspecting the place of occurrence nothing could be found by him showing commission of such crime. He recorded re-statement of victim and also recorded



statement of other witnesses. He further stated that he took defence statement of the accused (appellant). The victim was medically examined and after getting approval from senior police officials he had submitted charge sheet. In paragraph no. 4 of his cross examination he stated that at the place of occurrence he had not seized anything and girl and boy (victim and appellant) were produced by villagers. In this paragraph he further stated that he had not noticed any scratch injury on the person of victim nor any seized articles were available at the time of his evidence. On examination of evidence of P.W. 1- Investigating Officer it is evident that after the occurrence appellant was apprehended and appellant along with victim were produced by villagers to Investigating Officer. P.W. 1 – Investigating Officer had recorded defence statement of appellant, but to the reasons best known to him, he did not bother to get the appellant medically examined by medical expert, whereas on the same day he had got the victim examined by medical expert. In the Cr.P.C. Section 53A was incorporated primarily with a view to prevent false implication. In the present case though appellant after occurrence was apprehended and was produced before Police he was not got medically examined. Had he been immediately examined by doctor there was every possibility to notice some material sign on



private parts of appellant. We are in agreement with the submission of Sri Krishna Prasad Singh, learned senior counsel for appellant that purposely appellant was not medically examined otherwise result would have been different. Law is settled on the point that in case of rape, medical examination of accused, if apprehended, within a reasonable time from the occurrence is must. In the present case this statutory provision has not been complied with, and as such, it would not be safe to rely on prosecution evidence. Moreover, on examination of entire evidence it is difficult to place reliance on evidence of either of witnesses. Though victim has come forward to support the prosecution case but non examination of appellant by doctor in a case in which he was immediately arrested is sufficient to draw an adverse inference against prosecution and as such, we are of opinion that prosecution has not been able to establish its case beyond all reasonable doubts, and as such, by way of extending benefit of doubt, it is desirable to interfere with the judgment of conviction and sentence.

15. Accordingly, judgment of conviction dated 10.06.2013 and sentence dated- 12.06.2013 passed by Sri Santosh Kumar, learned Adhoc Additional Sessions Judge IV, Katihar in S.T. No. 367 of 2012 (arising out of Azamnagar P.S. Case No. 98



of 2011) is hereby set aside and appeal is allowed. The appellant is in custody and since judgment of conviction and sentence has been set aside, he is directed to be released forthwith, if not wanted in any other case.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

praful/-

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