

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.2280 of 2017

Arising Out of PS. Case No.-569 Year-2011 Thana- COMPLAINT CASE District- Jamui

1. Manoj Mandal, son of late Arjun Mandal.
2. Mithilesh Mandal, Son of Late Karu Mandal, Both are Resident of Village- Genadih, P.S.- Giddhaur, District- Jamui.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Yogesh Chandra Verma-Sr. Advocate Mr. Arjun Pd. Keshri-Advocate
For the State	:	Mr. Bipin Kumar-A.P.P.
For the Informant	:	Mr. S. P. Parasar-Advocate

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

26-03-2019

Appellants Manoj Mandal and Mithilesh Mandal

have been found guilty for an offence punishable under Section 376(G) of the I.P.C. and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to Rs.2,000/- and in default thereof, to undergo S.I. for one month, additionally, vide judgment of conviction dated 13.06.2017 and order of sentence dated 15.06.2017 passed by the 2nd Additional Sessions Judge, Jamui in Sessions Trial No.363 of 2012.

2. At an initial stage, Complaint Case No.76(C) of 2009 was filed by the complainant (PW-4 alleged victim, named withheld), whereupon she was directed to be examined by a doctor, so was examined and then thereafter, the aforesaid complaint was sent to local police for registration and



investigation of the case in accordance with Section 156(3) of the Cr.P.C. as a result of which, Laxmipur (Gidhaur) P. S. Case No.39 of 2009 was registered, investigated upon and then, final report was submitted as false. However, during midst thereof, protest petition was filed, which was subsequently treated as complaint petition bearing Complaint Case No.569(C) of 2011, which was proceeded with under Section 202 of the Cr.P.C. and then, both the appellants summoned to face trial for an offence punishable under Section 376(G) of the I.P.C. and on the basis thereof, the trial sailed, meeting with the ultimate result, the subject matter of instant appeal.

3. The prosecution case as per allegation is that on the alleged date and time of occurrence, while complainant was returning from Guguldih market after purchasing domestic items and as soon as reached at Behri Bahiyar, Mithilesh Mandal, Manoj Mandal came out from a bush, caught hold her, whereupon she began to raise alarm. Thereafter, Manoj Mandal gagged her mouth with his muffler while Mithilesh Mandal caught hold her and on the pretext of pistol, committed rape. During course thereof, complainant had bite, scratched his face by her nail, even then, she was not spared. Subsequently thereof, Manoj Mandal had also raped her. During course of leaving the



place, both the accused, threatened that in case of disclosure at her end, she will be murdered. At that very moment, she began to weep, attracting passersby, a rickshaw puller Pappu Ram Paswan as well as occupant of rickshaw puller Bhola and Sunil Kumar Sinha, who have seen the accused persons fleeing there from, lifted her to her house. On the following morning, complainant had gone to police station, but the police had instructed to launch a case before the Court on account thereof, complaint petition was filed.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been pleaded that the complainant happens to be own Bhabhi of the appellant/accused Mithilesh Mandal while aunt of Manoj Mandal and in the background of subsisting land dispute, she with the help of others, got this case filed. In order to substantiate the same, two DWs have also been examined.

5. In order to substantiate its case, altogether five witnesses have been examined on behalf of the prosecution, who are PW-1, Sunil Kumar Sinha, PW-2, Bhola Pandey, PW-3, Parasram Paswan, PW-4, victim herself and PW-5, Dr. Lilli Besara. Side by side, has also exhibited, medical report as



Exhibit-1. On the other hand, two DWs have been examined on behalf of defence. DW-1, Jawahar Mandal and DW-2, Sachindra Nath Sahay as well as has also exhibited, Exhibit-A, application given by the villagers before the Officer-in-charge, Exhibit-A/1, Panchnama, Exhibit-A/2, proceedings of the meeting, Exhibit-B, gift deed dated 24.09.1995 and Exhibit-C, rent receipts.

6. While assailing the judgment of conviction and sentence, it has been submitted at the end of the appellants that learned lower Court had overlooked the inherent deficiencies persisting in the prosecution case. The improbability over which, attention has been drawn up is, *A) There happens to be an admission at the end of the victim (PW-4) that she happens to be bhabhi of the appellant Mithilesh Mandal and as one of the branches of their family extinguished before the last heir executed deed of gift in favour of appellant, which the victim was also claiming and so, admittedly, there was land dispute, B) Being a family members, if they have ill-intention towards her, might have subjected her to sexual exploitation at the house itself in the background of the fact that she became widow long long ago, C) There was no occasion for them to know about the victim to market and returning therefrom at night, D) The witnesses PW-1, PW-2, PW-3 the resident of different village,*



though divulged that they were not knowing the appellants by name and face. During course of evidence, shown presence of appellants by name and face suggesting their status that of interestedness towards the complainant.

7. It has further been stated that complainant happens to be the street vendor and on account thereof, had some sort of inappropriate activity, otherwise one could not imagine during marketing in night in a chilly winter season at the remote place, without any source of light, negating feasibility at either complainant at the so alleged place and in likewise manner, the presence of rickshaw puller having occupied by PW-1 and PW-2. It has also been submitted that there happens to be specific disclosure at the end of the witnesses that complainant was naked, she was taken away on rickshaw to her house where her daughter was there, but the reason best known to the prosecution, daughter has not been cited as a witness. Furthermore, on that very score, there happens to be inconsistency amongst the PWs along with victim. In its continuity, it has also been submitted that before passing an order under Section 156(3) of the Cr.P.C., the complainant was sent to the local hospital where she was examined by PW-5 on the same day, but she had not



corroborated the allegation.

8. Then, it has been submitted that there happens to be specific disclosure in the complaint petition, which she had also stated during course of her evidence that she was coming from local market after purchasing domestic items, but during cross-examination, she had stated that she got the sickle sharpen by a blacksmith at the market and so, she was equipped with a sharp cutting weapon. Had there been such kind of activity, then in that circumstance, she ought to have inflicted sickle blow causing injuries to both the appellants, more particularly in the background of the fact that she had consistently stated that she had bite and had scratched the face of the appellants, that means to say, she protested with vigour.

9. Now, coming to status of the witnesses, it has been submitted that there happens to be inconsistency amongst them exposing their status to be hencemen of the complainant.

10. On the other hand, the learned Additional Public Prosecutor assisted by learned counsel for the complainant has stated that in all criminal proceedings, some sort of deficiency persist, which happens to be the natural one. The evidence in its entirety is to be seen. When the evidence in its entirety is taken up, then in that circumstance, it is evident



that all the witnesses have supported the case of the prosecution. Now, coming to the evidence of PW-4, it has been submitted that victim has categorically supported the allegation and that being so, the judgment of conviction and sentence recorded by the learned lower Court is fit to be confirmed.

11. The instant trial suffered from two kinds of events. The first one is, a complaint was filed, victim was examined by a doctor on the direction of the Court, police was directed to register a case subsequently thereto, final report was submitted, accepted. The another circumstance, the case groomed on the basis of the protest-cum-complaint petition, witnesses were examined under Section 202 of the Cr.P.C. and then thereafter, appellants were summoned, ultimately faced trial meeting with the ultimate result, subject matter of instant appeal.

12. Apart from presence of Section 134 of the Evidence Act whereunder credibility, reliability, worthiness of evidence of a witness has been duly acknowledged and in the background of the aforesaid eventuality, it is beyond controversy crystalized that for the purpose of proving a fact, the number of witness is not at all relevant. Evidence of single witness satisfying the aforesaid ingredients could form basis for



conviction. So far victim of rape is concerned, in likewise manner, her status has been recognized and that being so, her evidence if appears to be trustworthy having right of truth, could form conviction, even though is found uncorroborated, otherwise corroboration is required. In likewise manner, though there happens to be always an opportunity available before an aggrieved how to launch a criminal prosecution, but so far heinous offences are concerned, it is expected that police should be firstly approached without delay unless and until, delay happens to be beyond the control. So far facts of this particular case is concerned, it is evident that there happens to be disclosure at the end of PW-4 that she had gone to police station, but as was not entertained, whereupon went to Court and filed a complaint petition. The complaint petition was filed on the following day. Her examination was also done on the following day. However, PW-5 as is evident from her deposition, had not found the victim to have subjected to rape, more particularly gang rape on the account of absence of corroborative nature of evidence and in likewise manner, no spermatozoa dead or alive was found. Although, as per Modi's Medical Jurisprudence, the spermatozoa is expected to be alive upto 48 hours.



13. Furthermore, from the evidence of PW-4, victim, it is evident that appellant Mithilesh Mandal happens to be her own Dewar. The reason best known to the PW-4, she had not disclosed relationship, nor whether they were residing in a common house. In likewise manner, she also kept silence at initial stage over land dispute relating to partition. Though for commission of crime, more particularly the sexual one, motive is not at all relevant, but concealment is another circumstance, which has to be seen while evaluating the situation. In the aforesaid background, now, one has to see whether there happens to be authenticity in the prosecution version. It is needless to say that it has consistently been held that Court has to form an opinion on the evidence whatsoever been adduced in Court during course of conduction of trial and normally could not see that on account of non-examination of particular witness, any kind of adverse impact has been over the prosecution, unless and until, the aforesaid witness has to be crucial one. That being so, first of all, evidence of victim is being taken up.

14. PW-4 has deposed that she had filed case against Mithilesh Mandal and Manoj Mandal. Occurrence is about seven years ago, it was 6.30 P.M. At that very time, she



was returning from Guguldih market. When she reached at Behri Bahiyar, Mithilesh Mandal and Manoj Mandal, who were sitting in a bush, came out. Out of them, Mithilesh Mandal caught hold her, she began to shout, whereupon Manoj Mandal gagged her mouth. Thereafter, Mithilesh Mandal on the point of pistol, committed rape. Thereafter, Manoj Mandal committed rape. On hue and cry, Parsuram, who was pulling rickshaw on a road having Bhola and Sunil Kumar Sinha as passengers, began to raise alarm, whereupon Mithilesh Mandal also shown pistol to them. Then thereafter, Bhola threw his towel over her and then took her to her house over rickshaw. Thereafter, they have gone. She remained at her house whole night. On the following day, she had gone to Police Station. Gate of Thana was closed. One constable was there, who had disclosed that Darogaji is sleeping, so go to Court. Then, she came to Court, got the complaint petition drafted by a lawyer, whereupon she had put her thumb impression, case was sent to police station. Police had recorded her statement, but after taking bribe, the police ruined her case. After receiving notice from the Court, she came and contested the case, identified the accused. During cross-examination at Para-2, firstly she had disowned any kind of relationship with Mithilesh Mandal. However, admitted Manoj



Mandal to be her Jout. Then thereafter, she was cross-examined over genealogical table relating to her family and then, she had disclosed at Para-3 that Karu Mandal was her father-in-law, who died leaving behind three sons namely Shankar (her husband), Mithilesh Mandal and Mukesh. Further admitted that Mithilesh Mandal is the accused. She had further admitted at Para-4 that her husband died about 20 years ago leaving behind sole daughter, who is married with Siyaram, who is Gharjamai. In Para-6, she had further admitted that her husband Shankar Mandal died in jointness. Since thereafter, she happens to be the Karta of the family. Then, again stated that Mithilesh Mandal is the Karta. Then had stated that Panchu Devi, wife of Jai Lal, who happens to be cousin father-in-law had executed gift in her favour regarding his share and is residing along with her. She had denied the suggestion that aforesaid Panchu Devi had gifted the property in favour of Mithilesh Mandal and Mukesh Mandal. Then had further admitted that with regard to the aforesaid land, case is going on amongst the parties. In Para-7, she had further admitted that land has not been partitioned. Then had stated that Guguldih lies two kilometer away from her village. She had proceeded at about 4.00 P.M. She had purchased pulse, rice, salt, spices etc. She had purchased from



the shop of Visheshwar. She had purchased five kilograms rice, one litre oil, half k.g. pulse. Then all the articles were kept in a bag (Jhola). Then had gone to the place of Narayan Vishwakarma for getting the sickle sharpen. In Para-8, she had stated that darkness had fallen down. It was dark night. She had no torch. She proceeded from the market at 6.15 P.M. She had not met with anybody in the way. She, after seeing the accused persons began to raise alarm. None of the villagers came as village lies one kilometer away. About ten minutes time was taken up during the course of raising of alarm as well as commission of the occurrence. In Para-9, she had stated that there was grappling. Both the accused caught hold her and forced to seat. At that very time none came. Then, they lie her down. She at that very time, was wearing Saree, Petticoat, Blouse. Accused persons had not undressed themselves. Accused persons torn her cloth. She sustained injury over her left leg. During course of grappling, she had not sustained injury over any part of body. In Para-10, she had stated that she was not knowing Parsuram, Bhola and Sunil since before. She had also stated that she became unconscious for ten minutes. She had not talked with them. They have taken her over rickshaw to her house. They were in possession of torch, but she is unable to



disclose her name. In Para-11, she had stated that there was nothing on the rickshaw, save and except the fish belonging to Sunil Sinha. She came over rickshaw while they followed her. At house, her daughter was there, but son-in-law was not present. In Para-12, she had stated that at that very time, she had talked with Pandey ji. She had talked with wife of Rajendra, Sukhia Devi wife of Pandit Ramdeo. She had also talked with Bhola Pandey and Sunil Sinha. In Para-13, she had stated that she had disclosed the event to Mukhiya, Sarpanch and Chaukidar after 2-4 days. Then had denied the suggestion that this case has falsely been filed in order to pressurize upon the accused to give up their claim over the land.

15. PW-1 is Sunil Kumar, a residential of Kandhaur, who had stated that on 28.02.2009 at about 6.00 P.M. while he was returning from Guguldih Market on the rickshaw of Parsuram Paswan and reached at Behri Bahiyar lying near Kali Temple, he had seen a female raising alarm from the bush, whereupon he directed co-passenger Bhola Pandey to see. Then, they have gone and found Mithilesh Mandal committing rape over the victim. Mouth of victim was gagged with muffler and Manoj Mandal was armed with revolver. On hue and cry, large number of persons assembled. Then thereafter, he lifted the



victim over rickshaw to her house giving towel to protect herself as she was naked. After arrival of the victim at her house, they have gone to their house. Identified the accused in dock. During cross-examination, he had shown ignorance with regard to inter se relationship as well as land dispute in between complainant with accused. At Para-4, he has stated that on account of presence of guest at his house, he had gone to market to purchase pulse, Chili, surf, fish. It took two and half hours. While he along with Parsuram (rickshaw puller) was taking tea, Bhola came and also joined. In Para-5, he had stated that houses lies 300 yards away from the alleged P.O. He had further stated that he is not on visiting term with any of the resident of village-Genadih. He had further stated that he has got no intimacy with the resident of Genadih. At Para-6, he had stated that when they reached at Baheri Bahiyar, they heard sound coming from a distance of about 50 yards. He had further stated that all the three have gone to the place conjointly wherefrom victim was raising alarm. She was shouting in order to save herself. They also shouted, whereupon two old women came. Accused persons fled away. They tried to apprehend them, but accused persons pointed pistol towards them. At Para-7, he had stated that they have met with the victim for the first time, though



were seeing her since before. She was a Hawker. Then had disclosed the colour of blouse, petticoat, sari of the victim. He had further stated that they have not possessed torch. In Para-8, he had stated that within five minutes from the P.O., they have reached at the house of the victim. Houses of so many persons were adjacent to her house. He had not talked with anybody. He had simply stated to the daughter of the victim to see. Then had denied the suggestion that they are henchmen of the victim on account thereof, they have deposed falsely.

16. PW-2, a resident of Guguldih, during his examination-in-chief, had stated that on 23.01.2009 at about 6.30 P.M. while they were coming over rickshaw of Parsuram Paswan. Sri Prakash was along with him. When they reached at Behri Bahiyar, they heard alarm raised by one female as “Bachao Bachao”, whereupon all the three have gone there and had seen Mithilesh Mandal engaged in committing rape upon the victim. Manoj Mandal had caught hold her hand. They both ran away after seeing them. They chased, but the accused persons took out pistol, whereupon they returned back. Victim was naked, whereupon he had given his towel. Then thereafter, they carried the victim to her house. Identified the accused. During cross-examination at Para-3, he had stated that he had



proceeded from his house to Dhanbad alone where his brother Sadanand Pandey resides. He had further stated that he was knowing Sunil Kumar since before, whereupon he also joined his company. He had further stated that Parsuram was also known to him for the last 3-4 years. In Para-4, he had stated that darkness had fallen down, it was not moonlit night. They were not possessing torch. When they reached at Behri Bahiyar, they heard cry of a woman asking for rescue. In Para-5, he had stated that they were not known to the accused since before. When they were about 20 feet away, accused began to flee. When they reached at the spot, accused persons have already gone. She was lying and was weeping. In Para-6, he had stated that at that very time, victim was naked. Petticoat, blouse, Sari were thrown in the bush, which they could not traced out on account of darkness. They have given towel. In Para-7, he had stated that after seeing them, victim got up. She was sent to her house on rickshaw followed by them. In Para-8, he had stated that they have not tried to locate Petticoat, blouse, Sari. He had further stated that he was not knowing the victim since before. In Para-9, he had stated that on query, she had disclosed her identity. In Para-11, he had stated that after returning from Dhanbad, he met with the victim.



17. PW-3 is a rickshaw puller, who had deposed that on the alleged date and time of occurrence, he was coming from Guguldih chowk carrying passengers namely Bhola Pandey and Sunil Kumar Sinha. When they reached at Behri Bahiyar, they heard shouting. Then, they have seen Manoj Mandal armed with pistol while Mithilesh Mandal engaged in committing rape over the victim. They have gone there and had seen the occurrence. They have seen the victim in naked condition, whereupon lifted her and took her to house over rickshaw. Identified the accused. During cross-examination, he had stated at Para-4 that at that very time, they were not possessing torch. He is not knowing whether it was dark night. Bush was near place of occurrence having four feet in height. In Para-5, he had stated that cry was coming from Eastern side of the road. He stopped the rickshaw and then thereafter, they all rushed. Sunil Kumar Sinha was ahead followed by Bhola and then, he himself. When they reached, accused persons began to flee. They lifted the victim. Sari, petticoat, blouse was thrown by her side, Bhola and Sunil lifted the same. In Para-7, he had stated that they were not knowing the victim since before nor the victim was knowing them. They were also not knowing the accused persons. In Para-8, he had stated that after having the



apparel worn by the victim, he took her over rickshaw. He had put towel over the waist and then, Sunil Sinha put sari over her body. Then, as per instruction, he got her to house having at a distance of 2-3 kilometers. Then had stated that Bhola and Sunil, both have accompanied to Genadih her place.

18. PW-5 is the doctor, who had examined the victim on an order of the learned Chief Judicial Magistrate on 24.01.2009 and had not found external and internal injury over her person nor she found sign of any kind of forceful coitus.

19. Defence had also examined DWs, out of whom, DW-1, Jawahar Mandal, happens to be one of the signatory over an application addressed to the police official containing the fact that on account of dispute over partition, the victim, who happens to be the Bhabhi of Mithilesh Mandal got this case filed and had exhibited his signature over the aforesaid application. During cross-examination, it is evident that he was not at all cross-examined over factum of occurrence. DW-2 had exhibited a deed of gift executed by Pachu Devi in favour of Mithilesh Mandal and Mukesh Mandal.

20. After going through the evidence available on the record, it is evident that there happens to be inconsistency amongst them over proper mode of identification of the accused.



PW-1, PW-2, PW-3, though admitted that they were seeing the victim, but refused to divulge proper identification of the victim as well as accused. Even then, they identify the accused not only by face rather also by name, which appears to be surprising. Furthermore, to enable proper identification, PW-4 disclosed that they were possessing torch, which PW-1, PW-2, PW-3 have disowned. They have claimed that night had fallen. They have claimed that while they were 20-25 steps away from the P.O., accused fled away. They have not claimed that during course of fleeing, they have got an occasion to see the face of the accused. Accused was not put on T. I. Parade. Then in that circumstance, whether identification in Court for the first time after elapse of such long interval could be considered to be an authenticated one.

21. Now, coming to the status of the victim (PW-4). What was reason to conceal the inter se relationship. What was the reason to conceal the existing land dispute. The inter se relationship needless to say is that of Dewar and Bhabhi, Jout and aunt. She had not stated that the house, which was occupied by her, was in her exclusive possession having no presence of accused. Furthermore, her status to be hawker is also admitted. Then in that circumstance, commission of rape at such lonely



place while she was returning from the market, when she had herself stated that apart from the household articles, she had sickle in her possession (Para-7) is a circumstance, which is to be perceived as neither PW-1 nor PW-2 nor PW-3 have spoken on the score of having the bag containing the household articles, the sickle nor the victim had herself stated that those articles were thrown away, taken away. Apart from this, some of the witnesses have stated that Sari, petticoat, blouse was not there while PW-2 had stated that it was thrown in a bush and due to darkness, they could not search out while PW-3 had stated that PW-1 got the sari over the person of the victim. PW-4 did not corroborate the same. Apart from this, when the evidence of PW-4 has been, she had alleged that firstly Mithilesh Mandal raped and then, Manoj Mandal. While PW-1, PW-2 and PW-3 have stated that they have seen Mithilesh Mandal committing rape, seeing them, both of them fled away. After giving anxious consideration of the evidence on record, it is crystal clear that the prosecution failed to substantiate its case above board and that being so, the judgment of conviction and sentence recorded by the learned lower Court needs interference.

22. Accordingly, the appeal is allowed. Appellants, who are under custody, hence are directed to be



released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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AFR/NAFR	A.F.R.
CAV DATE	N.A.
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