

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.912 of 2017

Arising Out of PS. Case No.-57 Year-2010 Thana- KAHALGAON District- Bhagalpur

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Sekh Magan @ Md. S. K. Magan, son of late Domi, R/o. Village- Dhanoura,
P.S. Rasalpur, District- Bhagalpur

... .. Appellant

Versus

The State Of Bihar

... .. Respondent/s

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WITH

CRIMINAL APPEAL (SJ) No. 1051 of 2017

Arising Out of PS. Case No.-57 Year-2010 Thana- KAHALGAON District- Bhagalpur

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Md. Nisar son of late Tasleem, resident of village- Dhanoura, P.S. Kahalgaon,
Distt- Bhagalpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (SJ) No. 912 of 2017)

For the Appellant/s : Mr.Rajive Ranjan Singh, Advocate

For the Respondent/s : Smt. Abha Singh, APP

(In CRIMINAL APPEAL (SJ) No. 1051 of 2017)

For the Appellant/s : Mr.Jyoti Ranjan Jha, Advocate

For the Respondent/s : Mr.Abhay Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

CAV JUDGMENT

Date : 12-03-2021

The appellants, above named, faced trial in Sessions Trial No.1054 of 2010/785 of 2011, arising out of Kahalgaon (Rasalpur) P.S. Case No.57 of 2010, before the learned Additional Sessions Judge-I, Bhagalpur, for offences under Sections 366A and 376 of the Indian Penal Code.



By the impugned judgment dated 31.01.2017 and sentence dated 08.02.2017 both the appellants were found guilty for offence under Section 366A of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.2000/-. In default of payment of fine the appellants were directed to undergo further two months imprisonment.

Appellant Sheikh Magan was found guilty for offence under Section 376 of the Indian Penal Code also and was ordered to undergo rigorous imprisonment of seven years and to pay a fine of Rs.5,000/-. In default of payment of fine three months further imprisonment was ordered. Sentences against Sheikh Magan were ordered to run concurrently.

2. The prosecution case as disclosed in the written report of Md. Rahim, the father of the victim girl, is that on 10.02.2010 when the informant and his wife were not at the village home, co-villager Sheikh Magan and co-villager Md. Nisad (appellants herein) forcefully lifted to his daughter on a motorcycle. Co-villager Md. Kalim (PW 1) and Md. Ansar (PW 2) had witnessed the occurrence of kidnapping and on their protest against the act of the appellants, the appellants allegedly threatened them of dire consequences. The



informant kept on searching the victim at his own level. Hence, the matter was reported to the police after delay of nine days i.e., on 19.02.2010.

3. On the basis of statement aforesaid the above mentioned P.S. case was registered and after investigation police submitted charge sheet. During trial prosecution examined altogether seven witnesses. PW 1 Md. Kalim and PW 2 Md. Ansar were declared hostile by the prosecution and attention of the witnesses aforesaid was drawn to their statement under Section 161 Cr.P.C. made before PW 6 Mahesh Kumar. However, attention of PW 6 was not drawn that PW 1 and PW 2 had made such statement before him.

PW 3 Bibi Sahana is mother of the victim girl. She deposed that she got information about the occurrence of kidnapping of her daughter from PW 1 Md. Kalim and PW 2 Md. Ansar. Identical is the statement of PW 4 Md. Rahim, who is informant of this case and father of the victim girl. PW 3 and PW 4 are purely hearsay witnesses as they are not corroborated as to from whom they had heard about the occurrence inasmuch as neither PW 1 nor PW 2 stated that they had disclosed about kidnapping to PW 3 or PW 4 nor the victim (PW 5) has deposed that she had disclosed, about



whatever happen against her, to her parents. Thus, the prosecution case is based on the sole testimony of PW 5 the victim girl.

PW 6 Mahesh Kumar is Investigating Officer of the case and PW 7 Dr. Pusp Sudha had medically examined the victim. PW 6 supported the investigation done by him in a routine manner. PW 7 Dr. Pusp Sudha deposed that she did not find any sign of violence present in or outside the private parts of the victim. No foreign hair was noticed around the genital part or at the garment of the victim. The report of the pathological swab did not show the presence of any spermatozoa. According to the medical report submitted by some other doctor the age of the victim was below 18 years. The witness admitted that the victim was examined after five days of the occurrence.

4. The defence also produced three witnesses. DW 1 Sheikh Makbul and DW 2 Sheikh Mangla deposed that they were working as labour along with appellant Magan and the informant of this case at the N.T.P.C. Barh. There was dispute for non-payment of the wages to these witnesses as well as to Mangan by the informant and that is why the false case was lodged. PW 3 Md. Tahir Hussein deposed that he



was never a teacher of the victim girl as claimed by her.

5. Learned counsel for the appellants would contend that the testimony of the victim girl is shrouded with suspicion and the conduct of the victim would make it abundantly clear that she has not come up with clean hands. Hence, in absence of corroboration conviction cannot be based or sustained on the sole testimony of the victim of the case. Reliance has been placed on the case of **Santosh Prasad @ Santosh Kumar V. State of Bihar** reported in **(2020) 3 Supreme Court Cases 443**. Learned counsel further contends that defence put to the prosecution witnesses would reveal that there was property dispute between the two families for purchase of some land; whereas the defence witnesses have stated that for non-payment of wages there was difference between the appellants and the informant and for that reason false implication is there. The learned trial Judge had not considered the aforesaid infirmity in the prosecution case.

6. The learned counsel for the respondent contends that the prosecutrix has fully supported the charge against the appellants and in the matter of evaluation of evidence of the prosecutrix it has been settled by a catena of decision that the Court must remain alive to the fact that no



self-respecting woman will come forward just to make a humiliating statement against her honour. Learned counsel further contends that plurality of witness is not the requirement of law to prove the charge of rape. The prosecutrix of the present case is wholly reliable.

7. The law is well settled that the evidence of a victim of sexual assault stands on a par with the evidence of an injured witness. Corroborative evidence is not an imperative component of judicial credence in every case of rape. The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfied its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her. Reference may be made to the **State of Punjab V. Gurmit** reported in (1996) 2 SCC 384.

However, in a case where the testimony of the prosecutrix suffers from inherent and material improbabilities, and her conduct depicts a case of suppression of material fact, the Court may insist/look for corroboration to lend assurance that no innocent is punished.

In **Raju V. State of M.P.** reported in (2008) 5 SCC 133, the Hon'ble Supreme Court said that it cannot be



lost sight of that rape causes the greatest distress and humiliation to the victim, but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication.

8. In the case on hand, the victim does not say that she was kidnapped in presence of the villagers. According to the victim, she was kidnapped when she was on the way to her school; whereas her father reported to the police that the victim was kidnapped from the house in presence of the villagers. At one place the victim says that from 10.02.2010 to 18.02.2010 she was in village Tulsipur and appellant Magan ravished her on each day. The witness is specific that the people who were residing in the house at Tulsipur had disclosed the name of the village as Tulsipur. In the house an old lady was there besides two to four others. During cross-examination, she deposed that the appellant Magan took her to village Mordiha from Tulsipur on a motorcycle and she was kept in a hut-like room. The appellant Magan disclosed that the people residing in the house were his relatives. One man and two women including an old lady were there in the house, besides some children. Here the victim deposed that from 10th February to 18th February she



was in village Mordiha. She was in talking term with the house inmates at Mordiha. She further deposed that the appellant was keeping her, thereat, as wife and when appellant Magan brought her to Kahalgaon for the purpose of performance of marriage on 19.02.2010, both stayed in a hut and taking advantage of situation of sleeping mode of Magan, the victim escaped and went to Kahalgaon police station. However, her statement was not recorded by the police till 20.02.2010 when Rasalpur Sub-Police Station was informed and the victim was handed over to Rasalpur police.

9. Thus, the testimony of the victim reveals that she is suppressing some material fact regarding her kidnapping and rape inasmuch as she never made any protest or alarm while travelling along with appellant Magan to different places nor she made any protest when she was voluntarily going on foot with Magan to marry with Magan at Kahalgaon.

The house inmates in whose house the victim was kept in village Tulsipur or in village Mordiha were not examined by the police nor produced during trial to lend assurance about the claim of the victim.

10. Once the informant was noticed by PW 1 and PW 2 that the victim has been kidnapped by the appellants on



10.02.2010 and the family members of the appellants showed their inability to help; rather protested against the complaint of the informant, the informant should have readily reported the matter to the police and the delay on the pretext of search of the victim at his own level creates serious doubt regarding chances of consultation and concoction, which creates cloud on the trustworthiness of the prosecution case. Moreover, the informant is not corroborated by the witnesses from whom the informant got information about the occurrence.

Thus, the totality of the factual scenario is that the prosecutrix of this case is not wholly reliable due to sifting and conflicting statement made by her in material particular as referred above. There is non-corroboration of her testimony by any evidence including the medical evidence. The prosecution case gets shaky due to non-corroboration of the first information report by the named witnesses or any other witness as direct evidence. No reasonable explanation is there as to why the statement of the victim was not recorded by Kahalgaon Police Station though the victim at her own appeared before Kahalgaon Police Station on 19.02.2010 and claims to have narrated the incident to the police officer thereat.



11. In the case of **Rai Sandeep V. State (NCT of Delhi)** reported in **(2012) 8 SCC 21**, the Hon'ble Supreme Court said that before relying on the sole testimony of the prosecutrix the Court must be satisfied that the prosecutrix is a "sterling witness". Para 22 of the judgment is being reproduced below:

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be



any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version



can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

12. As discussed above, in my view, the prosecutrix does not pass the test of a “sterling witness”. A careful and deep scrutiny of the testimony of the victim it cannot be completely ruled out that she was not a consenting party. The prosecution has failed to prove that the victim was below the statutory age limit to give consent. In **State of Madhya Pradesh V. Munna @ Shambhu Nath** reported in **(2016) 1 SCC 696**, the Hon’ble Supreme Court held that the evidence on approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim. In this case, prosecution has failed to prove the exact age of the



victim. Hence, conviction of the appellants would not be safe in absence of corroborative evidence. Other infirmities in the prosecution case, as notice above, adds to the doubt against prosecution version. Hence, the appellants deserve the benefit of doubt.

The learned trial Judge has overlooked the aforesaid infirmities in the prosecution case. The ratio decided in **Santosh Prasad's** case (supra) squarely covers this case as the facts and circumstances of the case are identical to **Santosh Prasad's case**.

13. In the result, the appellants are acquitted of the charges levelled against them. Both the appeals, accordingly, stand allowed.

14. Let appellant Sekh Magan @ Md. S. K. Magan, who is in custody, be set free at once. Appellant Md. Nisar is exonerated from the liability of his bail-bonds.

(Birendra Kumar, J)

Mkr./-

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