

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3425 of 2017

Arising Out of PS. Case No.-31 Year-2011 Thana- BARACHATTI District- Gaya

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Anil Chaudhary, Son of Chamaru Chaudhary, Resident of Village - Sabalpur,
P.S. - Barachatti, District - Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (SJ) No. 280 of 2018

Arising Out of PS. Case No.-31 Year-2011 Thana- MOHANPUR District- Gaya

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Rajesh Chaudhry, Son of Kailu Chaudhary, aged about 24 years, Resident of
Village - Rampur, P.S. - Mohanpur, District - Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (SJ) No. 3425 of 2017)

For the Appellant/s : Mr. Dharendra Kumar Sinha, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, A.P.P.

(In CRIMINAL APPEAL (SJ) No. 280 of 2018)

For the Appellant/s : Mr. Dharendra Kumar Sinha, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

C.A.V JUDGMENT

Date :13-04-2021

These appeals are against judgment of conviction. Both the appellants were put on trial for offences under Section 366-A of the Indian Penal Code. Appellant Rajesh Chaudhary was further charged for offence under Section 376 of the Indian Penal code. By the impugned judgment dated 08.11.2017 passed in Sessions Trial No. 248 of 2017 arising out of Mohanpur (Barachatti) P.S. Case No. 31 of 2011 corresponding to G.R. No. 114 of 2011, the learned Fast Track Court-II, Gaya found both the appellants guilty



for offence under Section 366-A of the Indian Penal Code. Appellant Rajesh Chaudhary was further found guilty for offence under Section 376 of the India Penal Code. By the impugned order of sentence dated 14.11.2017, both the appellants were sentenced to undergo rigorous imprisonment for five years and to pay a fine of rupees three thousand for offence under Section 366-A of the Indian Penal Code. In default of payment of fine, appellants were directed to undergo further one month rigorous imprisonment. Appellant Rajesh Chaudhary was further sentenced to undergo rigorous imprisonment for seven years and to pay a fine of rupees five thousand for offence under Section 376 of the Indian Penal Code. In default of payment of fine, two years rigorous imprisonment was ordered.

2. The prosecution case, as disclosed in the written report of P.W. 2 Shakhichand Ravidas father of the victim-girl, is that the victim, aged about 15 years, was missing from the house without informing any one of the family from 08:00 a.m. on 20.01.2011 from village Rampur (Dema), P.S. Mohanpur, district Gaya. The informant gave a written information to the police and was making search of the victim. After a wide search out, the informant came to know that appellant Anil Chaudhary has induced the victim to go with him and appellant Rajesh



Chaudhary, who is co-villager, was in the house of his friend Anil Chaudhary.

3. The aforesaid written information was lodged on 03.02.2011 and on the basis whereof Mohanpur (Barachatti) P.S. Case No. 31 of 2011 was registered.

After investigation, the police submitted charge-sheet and, accordingly, appellants were put on trial.

4. Order dated 26.02.2011 reveals that the girl and appellant Rajesh Chaudhary appeared before the police. Police arrested Rajesh Chaudhary and got remanded him to judicial custody on the same day. Besides statement of the girl was recorded under Section 164 Cr.P.C. before the learned Magistrate. Thereafter, the police filed a petition, since no family member of the boy or the girl were ready to take the girl to their home, to the effect that the girl should be sent to Nari Niketan. Accordingly, the learned Sub-Divisional Judicial Magistrate, Sherghati, Gaya sent the girl to Nari Niketan, Patna.

5. In the statement, under Section 164 Cr.P.C., the girl disclosed her age as nineteen years and stated that she was getting tuition from the appellant Rajesh Chaudhary. During that period, they were in physical relation since last one year. At one occasion, when the victim was talking on mobile with appellant Rajesh



Chaudhary, the family members saw it and the mother was attempting to administer her poison. The mother assaulted her and expelled her from house on 19.01.2011. Thereafter, the victim phoned to appellant Rajesh Chaudhary and called her at Guraru railway station. From there, both went to Delhi on 20.01.2011 by train. Appellant Rajesh hired a house at Delhi Haryana Border and both lived there as husband and wife. On 20.02.2011, appellant Anil Chaudhary, his brother Ajay Chaudhary and brother-in-law Vijay Chaudhary came there as the second brother of Anil Chaudhary was residing in the same locality. Thereafter, all returned on 21.02.2011 to the house of appellant Anil Chaudhary in village Sabal Bigha. The girl and Rajesh Chaudhary performed Court marriage on 22.02.2011 at Gaya Court and thereafter they returned to the house of appellant Anil Chaudhary. A day before the statement, under Section 164 Cr.P.C., they came to Court and went to Mohanpur Police Station on the advice of their lawyer. From the police station, Rajesh Chaudhary was remanded to custody and the victim remained at the police station along with a female Constable for the night and next day she reached the Court for making statement before the Magistrate. The victim expressed desire to not to go to the house of her mother, rather desired to go with appellant Rajesh Chaudhary.



During trial prosecution examined altogether seven witnesses.

6. Learned counsel for the appellants submits that statement of the victim-girl (P.W. 4) is totally inconsistent with her previous statement before the learned Magistrate under Section 164 Cr.P.C. and she has been confronted with her previous statement. Moreover, a perusal of her entire testimony would reveal that she is not consistent in her testimony, rather has changed her entire statement which makes her testimony unworthy of credence. Learned counsel next submits that the prosecution has failed to prove that the victim was a minor, by adducing evidence of exact age. According to informant P.W. 2, he learnt that the appellants had kidnapped to the victim but the source of his learning is not disclosed nor any prosecution witness claims to have seen the victim along with the appellants.

7. On the other hand, learned counsel for the State contends that on the date of alleged occurrence, the victim was a minor. Hence, her consent or no consent is wholly immaterial. Corroboration of testimony of the victim is not the mandate of law and in material particular, she is wholly consistent. Therefore, the judgment of conviction requires no interference.



8. P.W. 1 Lal Muni Devi is mother of the prosecutrix i.e. P.W. 4. She has deposed that she heard about the occurrence from the prosecutrix. The prosecutrix is already a matriculate. She further deposed that she cannot say about the age of the prosecutrix.

P.W. 2 Shakhichand Ravidas, who is informant of this case, has supported the prosecution case as hearsay evidence.

P.W. 3 Babita Kumari is sister of the prosecutrix and she has also supported the case as hearsay evidence.

P.W. 5 Dr. Shakuntala Nag, who examined the victim, did not find any recent sign of sexual assault or injury, rather noticed a case of old sexual relationship. The Doctor, who performed radiological examination of the victim, was not produced by the prosecution and he has assessed the age of the victim as eighteen years, plus-minus six months.

P.W. 6 Pitambar Rai is the investigating Officer of the case and he has supported the investigation done by him.

P.W. 7 Uma Shankar Prasad is a formal witness who has proved the first written report submitted to the police.

9. Thus, the prosecution case is based on sole testimony of the prosecutrix P.W. 4. According to P.W. 4, on the date of occurrence, she had gone to answer the call of nature. As she was



returning back, both the appellants took her on a motorcycle forcibly by pressing on her mouth. Thereafter, they got her boarded on a bus to reach Guraru station and from Guraru station, they took a train for Delhi. At Gurgaon, appellant Rajesh Chaudhary kept her in the house of his Bua and brother for a month and Rajesh raped her. When appellant Anil Chaudhary informed that father of the prosecutrix has lodged a criminal case, all returned to the village in the house of appellant Anil Chaudhary and Rajesh Chaudhary was pressurizing for marriage and took photographs along with the prosecutrix. She admitted her signature on the statement recorded under Section 164 Cr.P.C. Her attention was drawn vide paragraph 6 and 7 regarding what she had stated before the Magistrate under Section 164 Cr.P.C. which she has denied to have made any such statement. However, she is specific that she had signed on the statement under Section 164 Cr.P.C. after finding the same correct. In the cross-examination, she admitted that appellant Anil Chaudhary has not mentally or physically ever abused her.

10. From the testimony of the prosecutrix, it is evident that she is not consistent on manner of occurrence, nature of occurrence and place of occurrence. Therefore, the victim does not appear to have passed the test of a “sterling witness” as stated in



Rai Sandeep V. State (NCT of Delhi) reported in **(2012) 8 SCC**

21. Paragraph 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.”

11. If the testimony of the prosecutrix is not wholly reliable, it must find corroboration by other trustworthy evidence. There is nothing on the record to corroborate the testimony of the prosecutrix. Therefore, in my view, for this reason alone, the prosecution version cannot be accepted as wholly reliable. The case is wholly covered by the ratio decided in **Santosh Prasad @ Santosh Kumar V. State of Bihar** reported in (2020) 3 SCC 443.

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 about the exact age of the victim.

In **Sunil v. The State of Haryana** reported in AIR 2010 SC 392, the Hon’ble Supreme Court held that conviction cannot be based on an approximate age of the victim.

In the case of **Jarnail Singh V. State of Haryana** reported in 2013 CRI. L. J. 3976, the Hon’ble Supreme Court said that the age of the victim of rape should be determined in the manner provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, there is no difference as



regards minority between the child in conflict with law and the child who is victim of crime.

12. Under the said rule for determination of the age the preferential evidence to be brought on the record is the date of birth certificate from the school, or the matriculation or equivalent from the concerned examination board, if available and in absence thereof, the birth certificate given by a corporation or a municipal authority or a Panchayat and only in absence of both the above, the age is to be determined by ossification test. P.W. 1 has admitted that the prosecutrix is a matriculate, hence, the best evidence would have been the certificate granted by the School Examination Board which was not produced by the prosecution. Ext. 6 is a letter written by the Headmaster of Ram Pyare Singh Uchcha Vidyalaya, Kanchanpur disclosing the fact that the date of birth of the prosecutrix is entered in the school record as 18.04.1994. The student took admission in the school in the year, 2010. However, it is not mentioned as to in which class the prosecutrix was admitted in the said school in the year, 2010 nor the school admission register was produced before the Court. Hence, the letter cannot be treated as a prove of exact date of birth of the prosecutrix.

13. In the case of **Rajak Mohammad V. State of Himanchal Pradesh** reported in **(2018) 9 SCC 248**, the case was



of consensual intercourse and the prosecution had failed to prove that the victim was a minor on the date of occurrence. Hence, Hon'ble Supreme Court set aside the judgment of conviction recorded by the High Court. Paragraph 9 of the judgment is being reproduced below:

“9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.”

14. What noteworthy infirmities and discrepancies in the prosecution case and evidence are that the prosecutrix is not consistent in the matter of manner of occurrence, nature of occurrence and place of occurrence. The prosecution has led evidence of only approximate age of the prosecutrix. The expert, who performed radiological examination, did not appear before the Court to substantiate his conclusions. Due to aforesaid infirmity and in absence of any corroboration, in my view, conviction of the



appellants would not be safe. The learned Trial Judge has not considered the aforesaid infirmities in the prosecution case. Hence, the impugned judgment of conviction and order of sentence are hereby set aside and these appeals stand allowed.

15. Appellant Anil Chaudhary is on bail. Let him be exonerated from the liability of bail bond.

16. Appellant Rajesh Chaudhary is in jail. Let him be set free at once.

(Birendra Kumar, J)

Kundan/-

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