

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.937 of 2016**

Arising Out of PS. Case No.-90 Year-2013 Thana- MURLIGANJ District- Madhepura

Sunil Yadav son of late Satya Narayan Yadav, resident of Village- Manhara,
Police Station- Murliganj, District- Madhepura

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Rajendra Prasad Sah, Advocate
For the Respondent/s	:	None

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

ORAL JUDGMENT

Date : 04-08-2022

By this appeal, the appellant/accused is challenging the judgment and order dated 24.08.2016 and 30.08.2016 respectively, passed by the learned Additional Sessions Judge-III, Madhepura, thereby convicting him of the offences punishable under Sections 366 and 376 of the Indian Penal Code. On each count he is sentenced to suffer rigorous imprisonment for ten years apart from imposition of fine of Rs. 50,000/-. In default, the appellant is sentenced to suffer imprisonment for six months for each offence. The learned Trial Court had directed that substantive sentences shall run consecutively. For the sake of convenience, the appellant shall



be referred to in his original capacity as an accused.

2. Facts leading to the prosecution of the accused projected from the Police report can be summarized thus:-

(a). The victim of the crime in question is an adult unmarried woman to whom I shall refer as Ms. N (identity concealed). She used to reside along with her father PW 9 Mr. F (identity concealed), her mother PW 10 Mrs. M (identity concealed) and her brother PW 11 Mr. B (identity concealed) at village Manhara falling under jurisdiction of Police Station Murliganj in Madhepura District of State of Bihar.

(b). The prosecution case set out in the complaint lodged by PW 9 Mr. F is to the effect that the accused, on 04.05.2013 had deceitfully enticed his daughter PW 12 Ms. N by alluring her with a promise to marriage. On the basis of this complaint lodged in the Court of the Chief Judicial Magistrate, Madhepura, and as a consequence of the order passed under Section 156(3) of the Cr.P.C., the crime in question came to be registered at the Police Station Murliganj vide Police Case No. 90 of 2013 for the offences punishable under Sections 363 and 366 of the Indian Penal Code. During the course of investigation, after about two months, the accused came to be arrested and the victim woman Ms. N came to be recovered.



She was then sent for medical examination to the Sadar Hospital Madehpura, where she came to be examined by the Medical Board comprising of PW 5 Dr. Bipin Kumar Gupta and PW 6 Dr. Poonam Kumari. Routine investigation followed and, ultimately, the accused came to be charge sheeted.

(c). The learned Trial Court had framed and explained the charges to the accused. He pleaded not guilty and claimed trial.

(d). In order to bring home the guilt to the accused, the prosecution has examined as many as thirteen witnesses. PW 1 Subhash Kumar Yadav and PW 2 Bablu Kumar Yadav are relatives who are alleged eyewitnesses to the incident. PW 3 and PW 4 are co-villagers who have also claimed to have seen the incident. PW 5 Dr. Bipin Kumar Gupta and PW 6 Dr. Poonam Kumari of the Sadar Hospital Madhepura, had examined the victim women. PW 7 Asharfi Yadav is relative of the prosecuting party. PW 8 Mrs. M is mother of the victim whereas PW 9 Mr. F is her father. PW 10 Manjula Devi is relative of the prosecuting party. PW 11 Mr. B is brother of the victim women. She is examined as PW 12 Ms. N. PW 13 Upendra Prasad Singh is the Investigating Officer.

(e). Defence of the accused as gathered from the



line of his cross-examination of prosecution witnesses as well as from the statement under Section 313 Cr.P.C. is that of total denial. However, he did not enter in the defence.

(f). After hearing the parties, the learned Trial Court by the impugned judgment and order was pleased to convict and sentence the accused as indicated in the opening para of this judgment.

3. I heard the learned counsel appearing for the appellant at sufficient length of time. By taking me through the entire record and proceedings, he argued that the prosecution has failed to prove the offences alleged against the accused. As usual none appeared for the state.

4. I have considered the submissions so advanced on behalf of the appellant and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution.

5. Case of the prosecution as set out in the complaint lodged by none else than the father of the victim women i.e., PW 9 Mr. F is to the effect that the accused had deceitfully enticed his daughter on 04.05.2013 on the pretext of marrying her. This complaint seems to have been filed in the month of May 2013 by which time the victim women PW 12



Ms. N could not be traced out. Let us, therefore, examine evidence of the prosecution in order to find out whether Ms. N was proved to be deceitfully enticed by the accused on the pretext of marrying her. Considering the nature of offence which is abduction for the purpose of compelling the victim women to marry with any person and that of commission of rape on her, fate of the prosecution case to a large extent hinges on the testimony of the victim. It is in evidence of PW 12 Ms. N that the incident in question took place at about 5:00 PM. At that time her grandfather as well as her mother PW 8 Mrs. M were present in the house. She testified that the accused came to her house and informed her that he has arranged a job for her and she will have to sign on the requisite documents for getting employment. The accused did not allow her to inform this fact to her mother. She further deposed that then she disclosed this fact to her grandfather who could not hear it as he is an old person. Then, according to PW 12 Ms. N, the accused took her by walk to a bamboo hut where he had kept his motorcycle. By his motorcycle, the accused then took her to Murliganj for signing the documents. Thereafter, the accused took her to Madhepura. In the evening hours of that day, the accused took her to one room where one another person was also present. As per the



version of this victim, after sometime that unknown person left the room. The accused then closed the door, assaulted her and threatened to kill her. Then he committed rape on her. PW 12 Ms. N further deposed that even on the next day, she was confined in that room. The accused recorded her obscene videos. He continued to rape her throughout for a period of about two months. As per her version when the accused used to leave that place for two or three days, he used to depute one unknown person to keep watch on her and while leaving, he used to tie her hands and legs and he used to gag her mouth by means of an adhesive tape. The victim further deposed that after a period of about two months, police apprehended the accused and then the person who used to keep watch on her took her and left her near the Police Station. She was then taken to the Court as well as Hospital by police.

6. To test the veracity of version of this witness, she was subjected to cross-examination. In cross-examination PW 12 Ms. N has categorically stated that she used to visit the house of the accused and the accused used to visit her house frequently. She has accepted the fact that she was a college going girl at the time of the incident. As per her version in the cross-examination, she has disclosed to the learned Magistrate,



while recording her statement under Section 164 of the Cr.P.C., that she and the accused slept on one cot during the whole night and the accused had made all arrangements for providing food to her. She further accepted the fact that she had disclosed to the Magistrate that as and when the accused used to return after two or three days, she used to sleep with the accused. She further accepted the fact that the accused had provided clothes to her during her stay in that room. She accepted the fact that she had not made hue and cry during her stay in the room but has attempted to explain this conduct by stating that because of fear of the person who was watching her she had not made hue and cry whenever the accused left that room. PW 12 Ms. N further accepted the fact that she had not disclosed to the learned Magistrate that the accused had committed forcible intercourse with her.

7. The cross-examination of this adult women, who had taken college education, indicates that she was a consenting party to what was going with her and the accused during the period of about two months when she was in the company of the accused. Being an adult women, on the backdrop of the fact that the accused used to leave that room for a period of about two to three days, there were tons of occasion with the victim to make



hue and cry in order to extricate herself from the clutches of the accused. However, she had not made any such attempt and had chosen to continue to stay with the accused. Her evidence regarding presence of some unknown persons in the room, in absence of the accused, for want of any further details is hard to accept. No such man was found by the Investigator.

8. Be that as it may, the prosecution has recorded statement of the victim under Section 164 of the Cr.P.C. through the concerned Judicial Magistrate. True it is that the prosecution has not got that statement proved formally by examining the concerned Magistrate but that by itself will not prevent the defence in making use of such statement. It is well settled that the documents of the prosecution which are not proved by the prosecution can not be used by the prosecution for establishing the guilt of the accused but the accused can certainly make use of such documents if such document favour his defence.

9. Thus the defence can certainly make use of the statement of the victim recorded by the prosecution under Section 164 of the Cr.P.C. If the said statement is perused then it is clear that PW 12 Ms. N has reported to the Magistrate while recording her statement that after reaching at the room of the accused, she and accused slept on one bed and they had



indulged in sexual intercourse during that night. She has further reported to the learned Magistrate that the accused used to provide food to her and the accused used to return to that room after a gap of about two to four days regularly during the course of her stay in that room. She has further stated to the learned Magistrate that during her stay in that room provided by the accused, on several occasion she and the accused indulged in sexual intercourse. In her statement under Section 164 of the Cr.P.C., PW 12 Ms. N has not disclosed that as and when the accused used to leave that room, he used to tie her hands and legs and he used to gag her mouth by an adhesive tape. She has not whispered that the accused used to keep one person for keeping watch on her during his absence from that room. She has not stated that the accused used to indulge in forcible sexual intercourse with her.

10. Thus, if the material elicited from cross-examination of the victim is considered in the light of her statement under Section 164 of the Cr.P.C. then it is seen that of her own, the victim women who was adult at the time of the incident had joined the company of the accused and had stayed with him happily for a period of about two months out of her own volition and free will. She had not complained to the



learned Magistrate that the accused had ever committed rape on her. On the contrary, she had repeatedly referred their act as act of sexual intercourse.

11. Now let us examine other evidence adduced by the prosecution in support of the charge. It is seen that the prosecution has adduced evidence of near and dear ones of the parents of the prosecuting party. Her parents, brother as well as her near relative have given a complete go by to the prosecution case of deceitful enticement of the victim. On the contrary, they have attempted to put forth the theory of forcefully taking the victim, i.e., PW 12 Ms. N, by the accused. These witnesses have categorically claimed that they are eyewitnesses to the incident of taking PW 12 Ms. N by the accused. Surprisingly enough, the victim i.e., PW 12 has not named any of these witnesses as a person who had seen her when she was allegedly abducted by the accused. PW 1 Subhash Kumar Yadav and PW 2 Bablu Kumar Yadav so also co-villagers PW 3 Jagdish Yadav and PW 4 Bechan Yadav have stated while in the dock that they had seen the accused taking PW 12 Ms. N on the motorcycle. As per their version they attempted to stop the accused but he did not budge and had left the spot in a great speed. PW 7 Asharfi Yadav, PW 8 Mrs. M (mother of the victim) and PW 9 Mr. S



(father of the victim) have also reiterated the same theory of forcefully taking the PW 12 Ms. N by the accused. PW 7 Asharfi Yadav has claimed that he has seen the accused taking the victim by walk up to the bamboo hut and thereafter on motorcycle. PW 8 Mrs. M has stated that in her presence, the accused dragged her daughter PW 12 Ms. N to the bamboo hut and thereafter he took her by motorcycle and flee from the spot. Her father PW 9 Mr. S has stated that he came to know about the incident of forceful taking of his daughter PW 12 Ms. N by the accused through his bike. As against this, his complaint is to the effect that the accused had enticed his daughter with a promise of marriage. The victim woman has not named any of these witnesses as a person who had seen her while leaving the house in company of the accused for alleged purpose of signing a document regarding employment.

12. The conduct of victim i.e., PW 12 Ms. N in remaining in company of the accused without any protest for a period of two months creates a doubt in the prosecution case about deceitful enticement of the victim by the accused. That apart evidence adduced by the prosecution is not consistent with the prosecution case. There is no element of either enticement or taking in order to make out the offence of abduction against



the accused as the evidence indicates that the victim who happens to be the adult woman had joined the company of the accused of her own by leaving her parental house.

13. So far as offence of rape is concerned, evidence of the victim is not corroborated by any other evidence. She was subjected to medical examination and her ossification test was also conducted. Even according to the prosecution case, the victim was major at the time of the incident. PW 5 Dr. Bipin Kumar Gupta has reiterated the prosecution case by stating that the victim was aged about 20 to 22 years on perusal of the X-rays of the victim.

14. PW 6 Dr. Punam Kumari had medically examined PW 12 Ms. N on 04.07.2013. According to the version of the victim, the accused, during the period of about two months, was repeatedly committing rape on her. In the backdrop of this evidence of the victim, PW 9 Dr. Punam Kumari has stated that the victim was having an old hymenal tear which was not of a recent origin. She had not found any marks of injury over any part of the body of the victim including private parts. Therefore, PW 6 Dr. Punam Kumari while in the dock has not given his opinion regarding commission of rape or otherwise on the victim woman. The statement under Section



164 Cr.P.C. of the victim is creating doubt in her version about commission of rape by the accused. Possibility of consensual sexual relationship between two adult persons is not eliminated by the prosecution by adducing clear, cogent and trustworthy evidence.

15. In the result, it needs to be held that the prosecution has failed to prove the charges leveled against the accused beyond all reasonable doubt thereby entitling the accused for acquittal. As such, the order :

The appeal is allowed.

The impugned judgment and order of conviction and resultant sentence imposed on the appellant/accused is quashed and set aside. The appellant/accused is acquitted of the offences held to be proved against him. He be set at liberty if not required in any other case.

16. Let the Lower Court Records be sent back to the learned Court below with a copy of this judgment and order.

(A. M. Badar, J)

Mkr/Aditi/-

AFR/NAFR	NAFR
CAV DATE	NA
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