

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.427 of 2017

Arising Out of PS. Case No.-10 Year-2015 Thana- SABAUR District- Bhagalpur

Rajesh Mandal, son of Mahendra Mandal, Resident of Village- Pannuchak,
P.S.- Ghogha, District- Bhagalpur.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr.Rajeev Ranjan, Advocate
For the Respondent/s : Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 23-09-2022

The present criminal appeal has been preferred against the judgment of conviction dated 28.02.2017 and order of sentence dated 06.03.2017 passed by the 1st Additional Sessions Judge, Bhagalpur, G.R. case No.185 of 2015 (arising out of Sabour P.S. Case No. 10/2015), whereby and whereunder appellant Rajesh Mandal has been convicted under Sections 376D and 342 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and has been sentenced to undergo rigorous imprisonment of twenty years along with fine of Rs. 50,000/- and in default of payment of fine, the appellant has to undergo six months further imprisonment. No separate



sentence has been awarded under Section 342 of the Indian Penal Code and Section 4 of POCSO Act. The Trial court has further ordered that the period of custody undergone during trial by the appellant shall be set off from the period of sentence.

2. The prosecution story, in brief, is that the informant made her fardbeyan before the S.H.O. Rita Kumari (P.W.6) at Abhat Diyara near Lahar Khet on 19.01.2015 at 4 p.m. wherein she alleged that on 18.01.2015 at 8:00 am, she alongwith her friend namely Aduliya Kumari (P.W.4) as per usual routine proceeded towards her field and reached there at 11 a.m. While looking after her field, she collected some fire woods and made log of the same. Thereafter, she left the place at 2 p.m. along with her friend through Abhat Diyara and at about 3 p.m., suddenly somebody caught hold of her from behind and threw away the log on the ground, untied the rope and kept the rope with him. Another accused person after holding her hand took her towards maize field and gagged her mouth with cloth and tied both her legs with rope. Thereafter took her to *Laharkhet* of Abhat Diara and laid her on the ground where the victim identified the face of both accused persons as Sajan Yadav and Rajesh Mandal (appellant) of village Palluchak, P.S.-Ghogha, District- Bhagalpur. In the *Laharkhet*, the accused-appellant Rajesh Mandal



(appellant) told the victim to perform court marriage as he belongs to rich family having six brothers. Thereafter, the victim started crying and requested him to leave her but of no avail. Accused Sajan Yadav disrobed her forcefully and thereafter both the accused persons one by one raped her whole night, so the victim became unconscious. In spite of that the accused persons continued to rape her till 11 a.m. on 19.01.2015 and whereafter the accused persons threatened her that if she will disclose the incident to anyone, her entire family members would be killed. After threatening the victim, the accused persons left her and proceeded towards north direction. Thereafter, while the victim was going home, on the way, near Ram Nagar Abhihar, she met with one Parma Mandal of her village, who informed the family members and villagers about the incident and called them. Thereafter, all of them again went to place of occurrence and searched the accused persons but did not find them whereafter the victim reached the police station and gave her fardbeyan.

3. On the basis of fardbeyan of the victim, Sabour P.S. Case No. 10/2015 was registered under Sections 342, 376(D), 506 of the Indian Penal Code and Section 4 of POCSO Act and Section 3(1)(XII)(2)(V) of SC/ST Act and investigation was taken up.



4. After investigation, the police submitted charge-sheet and cognizance was taken by the Jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions. Charges were framed against the appellant namely Rajesh Mandal. The accused-appellant pleaded not guilty and claimed to be tried. So far co-accused Sajan Yadav is concerned, since he was found to be a juvenile on the date of occurrence, therefore, vide order dated 27.05.2015, his trial was separated and sent to Juvenile Justice Board.

5. During trial, the prosecution examined altogether six witnesses, namely, Nageshwar Das (P.W.1) (father of the victim), victim (P.W.2), Manki Devi (P.W.3) (mother of the victim), Aduliya Kumari (friend of the victim), Alpana Mitra (P.W.5) (the doctor who examined the victim) and Rita Kumari (P.W.6) (investigating officer of the case). Prosecution has also produced exhibits, namely, Ext. 1 (medical report), Ext. 2 (fardbeyan of the victim) and Ext. 3 (formal F.I.R.). The defence has produced two witnesses namely Jangali Mandal (D.W.1) and Devendra Mandal (D.W.2) in support of its case. After conclusion of the trial, the learned Trial Court convicted the appellant in the manner indicated above.



6. Learned counsel for the appellant submits that the prosecution has failed to prove its case beyond the shadow of reasonable doubt against the appellant for which he has been charged and convicted. Learned counsel for the appellant further submits that the place of occurrence has not been proved by the prosecution as no evidence has been adduced in support thereof. In course of argument, learned counsel submitted that there is inordinate delay in filing of F.I.R. and therefore, it cannot be relied upon. Learned counsel also submitted that the medical evidence is completely inconsistent with that of the ocular evidence of the victim. Further, it has been argued that non-examination of the material witness, who has been named in F.I.R., has caused prejudice to the appellant. Thus, the learned Trial Court has failed to appreciate the evidence on record and the prosecution has failed to prove its case beyond the pale of reasonable doubt. Therefore, learned counsel submits that the judgment of conviction and order of sentence is required to be set aside.

7. Learned A.P.P. for the State has submitted that the judgment of conviction and order of sentence under challenge requires no interference as the prosecution has been able to prove its case beyond all reasonable doubts. From the evidence, which has been adduced by the prosecution, the guilt of the appellants is



satisfactorily proved and there is no infirmity in the judgment of conviction and order of sentence rendered by the Trial Court. Learned APP submitted that the testimony of the victim can be the sole basis for the conviction of the appellant.

8. After hearing the arguments advanced by the learned counsels appearing for the parties and perusing the materials available on record, following issues arise for consideration in this appeal:-

(i) Whether the prosecution, taking aid of the evidence produced and submitted before the Court, has been able to prove the place of occurrence beyond reasonable doubt?

(ii) Whether the FIR is belated and thus creates doubt on the manner of occurrence, as narrated by the informant?

(iii) Whether, the non-examination of material witness has caused prejudice to the case of the appellant?

(iv) Whether the medical evidence corroborates the ocular evidence of the victim, brought on record by the prosecution?

(v) Whether the evidence, brought on record by prosecution, read in its totality and the story projected by the victim can be relied upon to convict the appellant?

9. Now, adverting to the first issue, the informant, in her deposition, has stated that she was continuously subjected to rape by both the appellants in the field of standing crop since 3 p.m. of 18.01.2015 till 11 a.m. of 19.01.2015. However, the Investigating



Officer (P.W.6) while giving description of place of occurrence in her deposition has not stated anything regarding any marks of struggle or trampling of crops at the place of occurrence. P.W.1, father of the informant in his deposition, has stated that after being informed by P.W.4 of the said place where the offence is alleged to have taken place, in the evening of 18.01.2015, he along with 20-25 villagers went to the said field in order to search for her daughter but he could not find her at the said place. Taking into account that the prosecution has failed to bring on record any evidence, by way of oral evidence regarding struggle marks at the alleged place of occurrence in support of the allegation that the victim was subjected to rape by two accused persons continuously for a period of approximately 20 hours, we are of the opinion that there is no evidence on record for proving the alleged place of occurrence. Hence, the prosecution has not been able to prove the place of occurrence beyond reasonable doubt.

10. So far the second issue is concerned, P.W.4, in her deposition, has stated that after the accused persons took away the victim to the field, she ran to her house and narrated the entire incident to her own parents as well as to the parents of the victim. but also narrated the same to the parents of the victim. P.W.1 has also stated in his deposition that he was informed about the said



incident on 18.01.2015 by P.W.4. But in spite of the information received by P.W.1 on 18.01.2015, he did not approach or inform the police about the said incident for registering the case. The witness in his deposition has not explained the reason for non-approaching the police in order to register the case. Further the Investigating Officer, in her deposition, has stated that she received information about the said incident at 11 a.m. on 19.1.2015 but surprisingly the fardbeyan of the informant-victim was recorded at 4 p.m. and the case was registered thereafter. Thus, from the record, it is evident that the present F.I.R. is belated F.I.R. Therefore, the non-explanation of delay by P.W.1 with respect to registration of the case and the inordinate delay in registering of first information report against the appellant also creates doubt on the manner of occurrence as narrated by the informant.

11. In adverting ourselves to the third issue, the informant (P.W.2) in her fardbeyan as well as in her deposition, has categorically mentioned the name of one Parma Mandal, a co-villager who informed about the victim to her parents when she was in way of returning to her home, after being subjected to rape. The informant has also stated that the aforementioned person along with other villagers went to the place of occurrence in



search of the accused persons including the appellant. Further, P.W.1 in his deposition has also stated that he was informed by Parma Mandal, co-villager, that his daughter was returning to her home and after being informed, he also rushed to see her after which the victim told him about the incident wherein she was continuously subjected to rape by the accused persons including the appellant. But the said Parma Mandal has not been examined by the prosecution to prove the truthfulness of its case against the accused persons including the appellant. The appellant got no opportunity to test the veracity of the fact that the informant-victim was returning from the alleged place of occurrence after being subject to rape. Therefore, the non-examination of Parma Mandal has caused prejudice to the defence.

12. With regard to the fourth issue, from the record, it appears that the medical examination of the victim was conducted on 19.01.2015 itself at around 3.45 p.m. by P.W.5, who examined the victim and prepared her medical report. From the deposition of P.W.5 as well as the medical report of the victim (Ext.1), it is apparent that there was no physical or chemical injury found on the body of the victim, including her private parts. Further, the vagina swab of the victim was sent for detection of spermatozoa to Department of Pathology, J.L.N.M.C.H. but no spermatozoa was



found. The doctor opined that there is no evidence of recent sexual intercourse with the victim. From perusal of the medical report of the victim supported by the deposition of P.W.5, there appears to be contradiction between the medical evidence, brought on record by the prosecution, and the ocular evidence of the victim as stated in her deposition that she was continuously subjected to rape since 3 p.m. of 18.1.2015 to 11 a.m. of 19.1.2015 i.e. for about 20 hours. We would like to underscore here that the victim has been examined physically on 19.01.2015 itself and there has been no delay in her physical examination by a doctor. In spite of this, as discussed above, there is no injury found on her person, including her private parts. It will also not be out of place to mention that the investigating officer (P.W.6) in her cross-examination has categorically stated that when she saw the victim for the first time, neither there was any mark of injury on the body of the victim nor her clothes were torn. Therefore, in view of the discussion made hereinabove, we are of the opinion that the medical evidence does not corroborate with the ocular evidence brought on record by the prosecution.

13. In light of the issues considered above, we now advert ourselves to the last issue formulated above. Before coming to the merits of the case in hand, this Court deems appropriate to



briefly discuss the law in regard to the appreciation of evidence of rape victims. It is the fundamental principle of criminal jurisprudence that the burden of proving the case beyond reasonable doubt lies on the prosecution and this onus never shifts, even when the offence is of rape. In this regard, the Hon'ble Supreme Court in **Narender Kumar vs. State (NCT of Delhi)**, AIR 2012 SC 2281 in paragraph Nos. 29 and 30 has observed that:

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. The conviction can be based on sole testimony of the prosecutrix



provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.

(emphasis supplied)

The Hon'ble Supreme Court in ***Tameezuddin @ Tammu***

v. State (NCT of Delhi) (2009) 15 SCC 566 with respect to the appreciation of evidence in cases of rape, in paragraph No. 9 observed that:

“It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable.”

(emphasis supplied)

Therefore, in light of the settled decisions of the Hon'ble Supreme Court, the evidence of victim has to be appreciated in its totality, in order to sustain the conviction of the appellant. Therefore, taking into consideration the deposition of victim as against the medical evidence brought on record by the prosecution, the deposition of investigating officer with respect to the place of occurrence and the unexplained delay in the institution of F.I.R. as also the non-examination of the material witness, this Court finds,



that the evidence of victim, when considered in its totality, renders the case of prosecution improbable and difficult to be relied upon.

14. On the basis of the findings arrived at on the issues formulated above, we are of the considered opinion that the conviction of the appellant is not sustainable in the eyes of law as the prosecution has failed to prove its case beyond all reasonable doubts.

15. Therefore, the present appeal is allowed. The judgment of conviction dated 28.02.2017 and order of sentence dated 06.03.2017, passed by the 1st Additional Sessions Judge, Bhagalpur, G.R. case No.185 of 2015 (arising out of Sabour P.S. Case No. 10/2015), are hereby set aside. Since the appellant is in custody, he is directed to be released forthwith, if not required in any other case.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

AFR/NAFR	NAFR
CAV DATE	
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