

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.532 of 2017

Arising Out of PS. Case No.-10 Year-2013 Thana- NAYAGAON District- Begusarai

Raushan Singh, Son of Ashok Singh, Resident of Village- Balahpur, P.S.
Nayagaon, District- Begusarai.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 463 of 2017

Arising Out of PS. Case No.-10 Year-2013 Thana- NAYAGAON District- Begusarai

Kamlesh @ Latifan Singh @ Kamlesh Singh @ Latifan Singh, Son of Vijay
Singh, Ballahpur, P.S.- Nayagaon, District- Begusarai.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 532 of 2017 and CRIMINAL APPEAL (DB) No. 463 of 2017)

For the Appellants : Mr. Ashok Kumar, Advocate

For the Respondent : Mr. Abhimanyu Sharma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 08-09-2023

The criminal appeals arise out of common judgment of conviction dated 30.03.2017 and order of sentence dated 03.04.2017, hence they have been heard together and are being disposed of by this common judgment.

2. Both the criminal appeals have been preferred against the judgment of conviction dated 30.03.2017, and order of sentence



dated 03.04.2017, passed by Shri Manmohan Choudhary, Fast Track Court No.I, Begusarai in Sessions Trial Case No.601 of 2013 arising out of Nayagaon P.S. case No.10 of 2013, whereby and whereunder the appellants of both criminal appeals have been convicted under Sections 376(2)(g)/34 of the Indian Penal Code (referred to 'I.P.C.') and have been sentenced to undergo rigorous imprisonment for life with fine of Rs.5000/- each for the offence under Sections 376(2)(g)/34 of the I.P.C. and in case of default of payment of fine, further undergo simple imprisonment for six months.

3. The prosecution case, as per the written report of informant Sushila Devi (PW3), wife of Sunil Tanti, submitted before Officer-Incharge, Nayagaon P.S. on 24.02.2013 at 3 a.m. is that on 24.02.2013 in the morning the informant was sleeping inside her house, three persons were forcing the door to open and they were also dashing her door. Due to fear, the informant opened the door of her room. She saw three persons, namely, Kamlesh alias Latifan Singh son of Bijay Singh, Raushan Singh son of Ashok Singh and Gautam Singh son of Sailan Singh, all of them resident of village Ballahpur, P.S. Nayagaon, District Begusarai. It is further alleged that Raushan Singh closed here mouth with his hand and Gautam Singh pointed pistol on her



head. On hulla raised by the informant, her mother-in-law Rajiya Devi wife of Ram Balak Tanti came out from room, Gautam Singh threatened her if she will raise alarm, he will shoot her and so due to fear she did not oppose and became silent. Kamlesh Singh alias Latifan and other two accused persons dragged the informant in a maize/barely field which was at few distance from her house. The informant has further alleged that all the three accused threatened her and firstly Gautam committed rape, then Raushan Singh committed rape while Kamlesh alias Latifan was standing there armed with pistol.

4. On the basis of written report of the informant, Nayagaon P.S. case No.10 of 2013 was registered. After completion of investigation, the Investigating Officer submitted charge sheet under Sections 376(2)(g)/34 of the I.P.C. and thereafter cognizance was taken by the Jurisdictional Magistrate and thereafter the case was committed to the court of Sessions. Charges were framed against the appellants to which the appellants pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined altogether eight witnesses, namely, Debu Kumar (PW1), Rajiya Devi (PW2), Sushila Devi-informant (PW3), Parmila Devi (PW4), Dr. Shashi Prabha (PW5), Shailendra Kumar (PW6), Balkrishna Ram (PW7)



and Janak Kishore Singh (PW8). In support of its case, the prosecution has also produced exhibits as Ext.1 and 2 (written report and signature of informant on the statement made under Section 164 Cr.P.C.), Ext.3 (writing and signature of witness on injury report), Ext.4 (seizure list), Ext.5 (formal F.I.R.) and Ext.6 (writing and signature of the informant on the pagination of written report). Sushila Devi has also been examined as Court Witness. After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants in the manner as indicated above.

6. Learned counsel for the appellants has submitted that the trial of the instant prosecution suffers from several infirmities that have been overlooked by the learned trial Court and, therefore, the impugned judgment is not sustainable in the eyes of law. It has been contended that from perusal of the fardbeyan and prosecution witnesses, it is clear that the time of occurrence is 3:00 a.m. in the night which implies that it was dark, and the same has also been stated by PW 2 and PW 3 in their depositions that it was dark night. It has been further asserted that the victim has specifically stated in her cross examination that she was not able to identify the persons, who have committed rape upon her due to the darkness and she was forced by the police official to



disclose the name of the accused persons. Thus, it was contended that the appellants had been falsely implicated in the case and had no role to play whatsoever in the commission of the alleged offence. It was also pointed out that it was surprising on part of PW 1 and PW 2 that when the victim was taken away from the house, they did not make any effort in saving the victim from the accused persons. Learned Counsel for appellants further submits that it is a settled principle that suspicion howsoever strong cannot be the basis of conviction of the accused and in the case at hand the learned trial Court has relied on the suspicion that it were the appellants, who have committed the alleged crime. It has been pointed out that after minute appreciation of the entire evidence viz, fardbeyan of the informant and deposition of prosecution witnesses, there is no revelation that it could connect the appellants with the alleged offence. Therefore, it has been argued that there are severe lacunae in case of the prosecution and the chain of circumstances do not unerringly point towards the guilt of the appellants. Hence, the findings of the learned trial Court are bad in law, wrong on facts, bereft of legal reasoning, devoid of merit and the judgment of conviction is fit to be set aside.



7. Learned APP for the State, on the other hand, has submitted that the judgment of conviction and order of sentence under challenge require no interference as the prosecution has been able to prove the case beyond all reasonable doubts. It has been argued that the appellants were named in the F.I.R and in furtherance of their common intention came to the house of the victim and forcibly committed gang rape upon her. It has been contended that the prosecution witnesses have remained consistent in the testimony during the course of trial. Therefore, there does not remain any hiatus in the chain of circumstances and the guilt of the appellants has been satisfactorily proved by the evidence adduced during the course of trial and hence, there is no infirmity in the judgment of conviction of the learned trial Court.

8. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire materials available on the record, the following issues arise for consideration in the present appeal:

(I) Whether reliance can be placed on the testimony of PW 1 regarding the alleged involvement of the appellants?



(II) Whether the prosecution has been able to prove the participation of the appellants in the commission of the alleged offence?

(III) Whether the failure of the prosecution to conduct medical examination of the appellants under Section 53A of Cr.P.C. is fatal for the case?

9. With reference to issue no. I, it is found upon thorough examination of the entire material available on the record that PW 1 in para no. 13 of his cross examination has stated that the victim returned to the house after 3 hours from the alleged incident, and for this time span PW 1 and PW 2 were left free by the appellants. It is worthy to take note of the fact that PW 1, who claims to be the only male member present in the house when the victim was dragged out from the house, had neither taken any step to inform the police or anyone from nearby nor he had raised any alarm, rather he decided to sit silently in the house and wait for the mishappening to take place. Such conduct on the part of PW 1 does not appear to be normal and reliable. In this regard, it would be relevant to refer to the decision of Hon'ble Supreme Court in the case of ***Ramdas versus State of Maharashtra***, reported in ***(2007) 2 SCC 170*** wherein it was observed that:

“It is worth noticing that the prosecutrix has not even referred to the presence of PW 5 in her first information report nor about his attempt to rescue



her. The only reference to him is to the effect that he had earlier been threatened by appellant Ramdas. Even in the course of her deposition, PW 2 the prosecutrix did not say that her uncle PW 5 had intervened. The prosecutrix has also not stated that 3 or 4 days later PW 5 had accompanied her to the police station. It is not even the prosecution case that minor Sharda had gone to inform him earlier in the night about someone concealing himself behind their house. Thus almost every factual statement made by this witness appears to be false. Moreover, his conduct was rather unnatural. Assuming that he had been threatened by appellant Ramdas, it is too much to believe that after the appellants took away the prosecutrix from her house, he could not at least inform the villagers and seek their help. In fact he does not claim to have even narrated the incident to anyone and kept himself confined in his house. ..”

Therefore, in light of the above consideration, it is evident that being the family member of prosecutrix, reaction and conduct of PW 1 does not appear to be normal, rather it appears to be quite unnatural and doubtful. Moreover, the presence of this witness (PW 1) was not admitted by PW 2 who claims to be present when the appellants were taking her daughter-in-law from the house. It is pertinent to take note that even the victim (PW 3) has not admitted the presence of PW 1 when she was being dragged out from the house by the miscreants. Thus, the presence



of PW 1 has become doubtful in light of the deposition of PW 2 and the victim (PW 3).

It was further observed that it was deposed by PW 1 in para no. 5 of his examination-in-chief that he has identified the appellants in the light. However, the victim herself stated that there was darkness, so she was unable to identify the accused persons. The PW 2 in her cross examination has stated that the victim did not disclose the name of the accused. In view of the aforesaid statements of the victim (PW 3) and her mother-in-law (PW 2) and further no source of identification at the house of the victim was found by the Investigating Officer, the statement of PW 1 cannot be relied upon.

Accordingly, the issue no. I, is decided in negative.

10. With reference to issue no. II, it is found that there are severe lacunae in the present case to connect the appellants with the alleged offence. It has been stated by PW 3 (victim) in para no. 3 of her cross examination that at the time of occurrence there was darkness and as a result of which she was not able to identify the accused persons who had committed the offence and she told the same to her mother-in-law (PW 2) which is evident from the deposition of PW 2, as PW 2 in para 4 of her cross examination had clearly stated that victim had informed her that three persons



had committed rape upon her, and no disclosure of name was made by her. PW 3 has further stated in para 3 of her cross examination that she was very shocked and nervous because of the offence that was committed upon her and due to which she didn't read the written report and simply put her signature. She had given the same statement to the police officer, but she was forced by the police officer to give the names of the accused persons and due to which she had named the appellants. On the strength of the aforesaid facts as occurring in the statement of PW 3, it is quite evident that the name of appellants were the tutored name and she was not able to identify the miscreants who had committed wrong upon her due to the darkness.

Furthermore, it has been pointed out by PW 2 and PW 3 in their depositions that it was dark at the time of the alleged occurrence. Also, this Court has also taken note of the fact that at the time of the incident, it was definitely a dark night as the alleged occurrence had taken place at 3:00 a.m. in the night of February. Further, from the perusal of the deposition of PW 6 (Investigating Officer), neither any evidence has been brought on record to show that there is any light or bulb which could have been used for the identification of the appellants when the victim was dragged by the miscreants nor there is any evidence to show



that there was any light or any electric pole available at the alleged place of occurrence where the rape was committed. It would be relevant to take note of the decision of Hon'ble Supreme Court in the case of ***State of Madhya Pradesh versus Ghudan*** reported in ***(2003) 12 SCC 485*** wherein it was observed that:

“.. If really there was a tube light by which PW-26 identified the respondent then investigating agency would certainly have shown the existence of a tube light and its placement in the sketch because it was a very important fact mainly because the identification of the accused is a vital factor to be proved by the prosecution. The benefit of the omission to point out the existence of such light in the sketch, in our opinion, should go to the accused. ..”

Therefore, in light of the aforesaid discussion, coupled with the fact that victim herself has stated in para 3 of her deposition that it was dark night and due to which she was not able to identify the persons who has committed rape upon her, it is amply clear that there is no credible evidence on record to connect the appellants with the alleged offence.

Accordingly, the issue no. II, is decided in negative.



11. With reference to issue no. III, it is found upon thorough examination of the entire material available on the record that there is failure on part of the prosecution to subject the appellants to medical examination, as stipulated under section 53A of Cr.P.C. In this context, it is pertinent to refer to decision of the Hon'ble Supreme Court, passed in the case of ***Rajendra Pralhadreo Wasnik versus State of Maharashtra*** reported in ***(2019) 12 SC 460***, wherein it has been observed that the prosecution would be well advised to take advantage of Section 53A of Cr.P.C. where reasonable grounds exist to believe that medical examination will afford sufficient evidence. It has also been observed in the case of ***Krishna Kumar Mallick versus State of Haryana*** reported in ***(2011) 7 SCC 130*** that after the incorporation of Section 53A of Cr.P.C, it becomes necessary for the prosecution to conduct medical examination as it would facilitate the prosecution to prove its case against the accused. Furthermore, a three judge bench of the Supreme Court in the case of ***Chotkau versus State of Uttar Pradesh*** reported in ***(2023) 6 SCC 742*** has observed that if DNA profiling is not conducted then an adverse inference could be drawn for the prosecution. We have also taken note of the recent judgment of the Hon'ble Supreme Court passed in the case of ***Prakash Nishad @ Kewat Zinak Nishad versus State of***



Maharashtra, reported in **2023 SCC OnLine SC 666** wherein it was observed that medical examination of the appellants under Section 53A of Cr.P.C would enable the Court to ascertain the involvement of appellants and where there is failure to subject the appellants to medical examination, it would create a gap in the chain of circumstances. In the case at hand, no such compliance of Section 53A was made. Moreover, it was found from perusal of the deposition of the Investigating Officer (PW 6) that the seized petticoat of the prosecutrix was not even sent for FSL. Therefore, such lapses and non compliance has resulted in huge gaps in the chain of circumstances in the instant case as such compliance would have resulted in bringing out the clear picture regarding their involvement in the alleged offence.

Accordingly, the issue no. III, is decided in affirmative.

12. It is needless to emphasize that no one can be held guilty of committing an offence unless such participation and allegation are proved up to the hilt by cogent evidence. It is the duty of the prosecution to prove the case beyond reasonable doubts by establishing that the chain of evidence are unerringly pointing towards the guilt of the accused persons and no other hypothesis is possible. And, in the present case, on the basis of the discussions made above, we are unable to hold that the



prosecution has successfully established its case beyond all reasonable doubts, resultantly, we believe that it is appropriate to give benefit of doubt to the appellants.

13. Therefore, both the criminal appeals stand allowed and the judgment of conviction dated 30.03.2017 and order of sentence dated 03.04.2017 passed by Shri Manmohan Choudhary, Fast Track Court No.I, Begusarai in Sessions Trial Case No.601 of 2013 arising out of Nayagaon P.S. case No.10 of 2013, are set aside.

14. Since the appellant Raushan Singh of Criminal Appeal (DB) No.532 of 2017 is in jail custody, he is directed to be released from custody forthwith, if not wanted in any other case. The appellant Kamlesh Singh @ Latifan Singh of Criminal Appeal (DB) No.463 of 2017 is on bail, he is discharged from the liability of his bail bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	NAFR
CAV DATE	29.08.2023
Uploading Date	08.09.2023
Transmission Date	08.09.2023

