

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.538 of 2003

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Md. Rajjak Mian S/O Late Tauheed Ansari, resident of Village – Bansipur,
P.S. Bounsi, District – Banka.

... .. Appellant

Versus

State of Bihar

... .. Respondent

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Appearance :

For the Appellant : Mr. Md. Nurul Hoda, Advocate
For the Respondent : Mrs. Anita Kumari Singh, APP

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CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT

Date : 05-09-2024

1. Heard Learned counsel for the appellant and
Learned Additional Public Prosecutor for the State.

2. This appeal is filed against the judgment dated
17.09.2003, passed in Sessions Trial No. 731/1998/38/2003 on
the file of Learned Ist Additional Sessions Judge, Banka for the
charges under Sections 366, 376 and 323 of the Indian Penal
Code (hereinafter referred to as ‘IPC’), wherein the appellant
was convicted under Sections 376 of the IPC and was
sentenced to undergo rigorous imprisonment of ten years.
However, the appellant was acquitted for the charges
punishable under Sections 323 & 366 of the IPC.

3. The case of the prosecution, in short, is that
prosecutrix (P.W.-1), aged about 26 years, wife of Shankar



Prasad Gupta (P.W.-3/DW-1), lodged a Written Report on 15.05.1998 before the S.H.O. (Station House Officer), Bounsi Police Station, alleging that about 18 months prior to preferring the report, she used to work as a 'Nurse' and resided in the House of the appellant on rent. P.W.-3 used to work in a hotel and used to go to the house of the appellant rarely the night. One year prior to lodging the report, the appellant, all of a sudden, entered into the house of P.W.-1 and asked her to co-habit with him by saying that he would give her half the share of the house and land and touched her body for which she denied. Since then, he used to allure her in various ways. It is further alleged that eight months prior to preferring the report, the appellant asked the prosecutrix to move to Delhi along with her husband with an assurance to arrange good job for both of them (Prosecutrix and P.W.-3). Accordingly, the appellant along with the children of P.W.-1 forcibly brought them to Bhagalpur and from there to Delhi. At Delhi also in the absence of P.W.-3, the appellant allured her to marry and also offered to execute the share of his house and land in her favour and tried to co-habit with her. It is further the case of the prosecution that the appellant



threatened to kill P.W.-1, if she does not satisfy his desire for which P.W.-1 surrendered herself and further the appellant threatened her not to disclose the said incident to anyone. When P.W.-3 came to the house of the appellant, the appellant assaulted him and locked the prosecutrix inside the house and P.W.-3/husband of the prosecutrix fled away with fear. Since then, the appellant started co-habiting P.W.-1 forcibly and P.W.-1 and her children were kept under lock and key. P.W.-1 could not get any opportunity to flee away. On 11.05.1998, while the appellant was sleeping, P.W.-1 fled away from there with her three children and somehow managed to reach near Bhagalpur Bus Stand. On 14.05.1998, at about 2:00 P.M., the appellant caught hold of P.W.-1 and forcibly took her to his house in BanSHIPur Village, where the villagers caught both of them (P.W.-1 and the appellant) and handed over them to the Police Station, wherein P.W.-1 lodged a Written Report alleging abduction and establishing illicit sexual relationship with her forcibly by the appellant.

4. On the basis of the said Written Report, a case was registered against the appellant in Bounsi Police Station bearing Bounsi P.S. Case No. 46 of 1998 dated 15.05.1998 for



the alleged offences punishable under Sections 323, 366, 498 and 376 of the IPC. After completion of the investigation, a charge-sheet was filed against the appellant. Later, the matter was committed to Sessions Court, where it was numbered as Sessions Trial No. 731 of 1998.

5. It is pertinent to mention here that P.W.-3, who is the husband of the victim-prosecutrix was also examined as DW-1 on behalf of the defence. The trial Court has committed an error in examining the same witness as prosecution witness as well as defence witness. If at all, the defence wants to bring any facts on record through P.W.-3, who is the witness of the prosecution they ought to have filed a petition under Section 311 of the CrPC for re-examining him and for marking of any documents through him. Instead of it, the trial Court permitted P.W.-3 (the same witness) to be examined as defence witness i.e. D.W.-1. There is no such provision under CrPC to examine the same witness as prosecution witness and as well as defence witness.

6. In order to prove the case against the appellant beyond the reasonable doubt, the prosecution has examined four witnesses, on behalf of the prosecution. P.W.-1 is the



prosecutrix. The evidence of the P.W.-1 is nothing but the reiteration of facts of the Written Report.

7. P.W.-2, namely, Rekha Sinha, the Medical Officer, who examined the victim and issued the Injury Report i.e. Exhibit-2. On perusal of the Injury Report, it is evident that P.W.-2 examined P.W.-1 on 16.05.1998. It is specifically mentioned in the Injury Report that she examined the private parts of P.W.-1 and did not find any sign of violence except the old rupture of hymen.

8. Admittedly, P.W.-1 is a married woman and she gave birth to three children, therefore, the rupture of hymen could be quite possible and there is every chance of vagina to admit two fingers. Except the evidence of the prosecutrix, there is no other evidence on record to prove the offences punishable under Section 376 of the IPC.

9. **Section 114A** of the **Indian Evidence Acts, 1872**, reads as follows:-

“114A. [Presumption as to absence of consent in certain prosecution for rape. —In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal



Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation. — *In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).]*”

10. Admittedly, the report and the evidence of P.W.-1 disclose that since one year prior, the appellant started alluring her to co-habit with her and also stated that he would give her share in his land and house. Further, the evidence of P.W.-1 disclose that she had co-habited with the appellant for a period of eight months, without her consent at Delhi and she escaped from the clutches of appellant from Delhi and came back to Bhagalpur. The record reveals that no report was preferred by P.W.-1 either at Delhi or at Bhagalpur, where the alleged offence took place. Admittedly, no offence took place in the jurisdiction of Bounsi Police Station. As these two persons i.e. the victim and the appellant were found by the villagers, at the house of the appellant, the villagers produced them to Police Station.



11. Further, the evidence of P.W.-3, who is the husband of the prosecutrix clearly disclose that the prosecutrix never had any sexual contact with the appellant. As stated Supra, P.W.-3 was also examined as D.W.-1 and his evidence further disclose that P.W.-1 had also preferred a complaint against one Vijay Mandal for the offences punishable under Sections 376 and 379 read with Section 34 of the IPC, who is stated to be an Additional Public Prosecutor of the Civil Court, Banka.

12. P.W.-4 is the Investigating Officer and his evidence is no way helpful to the prosecution to prove the offence under Section 376 of the IPC. During the course of investigation, P.W.-4 inspected the house of appellant at Bounsi. As per the evidence of P.W.-1, the entire incident took place at Delhi. P.W.-4 has not investigated or visited Delhi to collect incriminating evidence against the appellant.

13. Except the sole evidence of the prosecutrix, there is no other evidence on record. Further, the husband of the prosecutrix also did not support the case of the prosecution. Moreover, the evidence of D.W.-1 supports the defence as to



how P.W.-1 is in a habit of filing fake rape cases others for the offences under Section 376.

14. Further, the judgment of the trial Court do not give any reasons, as to how the offence against the appellant was established/guilt proved by the prosecution beyond reasonable doubt. Further as the offences u/s 366 and 323 of the IPC were not proved the appellant was acquitted for the said charges, but was convicted under Section 376 of the IPC only.

15. Accordingly, the judgment of conviction is not sustainable, therefore, it is liable to be set aside.

16. In view of the aforesaid discussions, the conviction of the appellant for the offence punishable under Section 376 of the IPC is not sustainable and the judgment of the trial Court dated 17.09.2003 arising out of Bounsi P.S. Case No. 46 of 1998 in connection with Sessions Trial No. 731/1998/38/2003 on the file of Learned Ist Additional Sessions Judge, Banka is hereby set aside and the appellant is acquitted for the offences punishable under Section 376.



17. The bail bonds of the appellant shall stand cancelled.

18. *In result, the appeal is allowed.*

(G. Anupama Chakravarthy, J)

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AFR/NAFR	NAFR
CAV DATE	NA
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