

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.252 of 2004

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1. SK. NIZAM, s/o SK. Sultan, resident of village Balamchak, P.S. Dhoraiya, District Banka.
 2. SK. Mukhtar alias Md. Mokhtar, s/o Sk. Amanat, resident of village Balamchak, P.S. Dhoraiya, District Banka

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Md.Nurul Hoda
For the Respondent/s : Mr.Pp.

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

Date : 08-08-2024

1. The appeal is preferred against the judgment of conviction and order of sentence dated 19.03.2004 passed by the IInd Additional Sessions Judge, Banka in Sessions Case No. 727 of 2002, whereby both the appellants were convicted and sentenced to undergo rigorous imprisonment for a period of seven years for the offences punishable under Section 376 of the Indian Penal Code.

2. The case of the prosecution is that on 28/29.10.2001 the informant/prosecutrix was sleeping in the night alone in her house. At that particular point of time, her husband was out of station. The appellants Saikh Nizam and Saikh Mukhtar entered into her house, caught her hands, threatened her not to raise her voice and committed rape one after the other on her against her



will. When the prosecutrix raised her voice, they fled away. Then neighboring people came to her house and she narrated them the incident. On the next day morning, when people started talking for having a Panchayati, the accused persons fled away. Due to fear, the prosecutrix did not go to the police station. On 03.11.2001 when the husband of the prosecutrix returned to home, she gave a report to the police. Basing on the report a FIR was registered against the accused bearing Dhoraiya P.S. Case No. 95 of 2001 for the offences punishable under Section 376 read with Section 34 of the Indian Penal Code.

3. After due investigation a charge-sheet was filed against both the appellants for the offences punishable under Section 376 read with Section 34 of the Indian Penal Code. Cognizance was taken on 10.07.2002 against the appellants. During the course of trial prosecution altogether examined nine witnesses. P.W. 1 to 6 did not support case of the prosecution and were declared hostile. P.W. 7 is the prosecutrix. P.W. 8 is the husband of the prosecutrix. P.W. 9 Nawal Kishore Yadav is the formal witness/advocate clerk through whom the F.I.R. was exhibited.

4. It is contended by the Learned counsel for the appellants, that except the evidence of the prosecutrix, there is no



other evidence on record to prove the offence against the appellants for the offences punishable under Section 376 read with Section 34 of the Indian Penal Code. It is also contended that the Doctor and the Investigating Officer were not examined before the Court and there is no medical report on the record to corroborate the statement of the prosecutrix and therefore, prayed to set aside the judgment of conviction and order of sentence dated 19.03.2004 passed by the 2nd Additional Sessions Judge, Banka in Sessions Case No. 727 of 2002. It is also contended by the Learned counsel for the appellants that there is no material evidence to corroborate the version of the prosecutrix.

5. On the other hand, learned Additional Public Prosecutor also contended that the Investigating Officer and the Doctor are not examined before the court.

6. Heard the arguments of learned counsel for the appellant as well as Learned Additional Public Prosecutor.

7. On perusal of the entire record, it is evident that except the evidence of P.W. 7 i.e. the prosecutrix there is no material available on record to corroborate the version of the prosecutrix. Admittedly, there is a delay of six days in lodging the F.I.R. No satisfactory reason was given as to why the written report was not given by the informant/prosecutrix. P.W. 8 who is



the husband of the prosecutrix is no way helpful to the prosecution as it is a hearsay evidence and therefore, there could be no corroboration as to the evidence of P.W. 7. P.W. 9 is an Advocate Clerk. Admittedly, the evidence of P.W. 9 is also nowhere helpful for the prosecution in any manner as he is not the witness to the incident. This Court is unable to understand as to how the trial court has permitted the prosecution to mark the F.I.R. through an Advocate Clerk, who has no knowledge about the incident. Document can be marked by the party or the person who has knowledge about the facts pertaining to the case. The P.W. 9/Advocate Clerk is neither the witness to the incident nor having knowledge about the facts of the case. Non-examination of the doctor and Investigating Officer is also fatal to the case of the prosecution. On perusal of the records, it is evident that the medical report do not support the case of the prosecution in any manner. In a case of Rape medical evidence plays crucial role, which corroborate the oral evidence of prosecution. In the absence of such corroboration there cannot be any conviction against the appellant herein for the offence punishable under Section 376/34 of the Indian Penal Code. Prosecution has miserably failed to prove the guilt of the appellants for the offences punishable under Section 376 read with Section 34 of the I.P.C. The record also



reveals that both the appellants remained in custody for more than 3½ years prior to getting themselves enlarged on bail. In view of the above discussion, the judgment of conviction and order of sentence passed against the appellants is liable to be set aside.

8. In result the appeal is allowed and the judgment of conviction and Order of sentence dated 19.03.2004 passed in Sessions Case No. 727 of 2002 arising out of Dhoraiya P.S. Case No. 95 of 2001 on the file of learned 2nd Additional Sessions Judge, Banka is hereby set aside and the appellants are hereby acquitted for the offences punishable under Section 376/34 of the Indian Penal Code.

9. Interlocutory Application(s), if any, shall stand disposed of.

(G. Anupama Chakravarthy, J)

amitkr/-

AFR/NAFR	NAFR
CAV DATE	N/A
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