

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.413 of 2006

1. BISHUNDEO RAI Son of Jagarnath Rai

2. Ram Janam Mahto, Son of Shiv Lal Mahto

Both are resident of Village-Basuchak, P.S. - Saraiya, District- Muzaffarpur

... .. Appellant/s

Versus

State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Vipul Sinha, *Amicus curiae*

For the Respondent/s : Mr. S.A. Ahmad, APP

CORAM: HONOURABLE MR. JUSTICE SUNIL KUMAR PANWAR
CAV JUDGMENT

Date : 30-04-2024

Heard Mr. Vipul Sinha, learned *Amicus curiae* on behalf of the appellants and S.A. Ahmad, learned APP appearing for the state.

2. This appeal has been preferred by the appellants being aggrieved and dissatisfied with the judgment of conviction dt. 4.5.2006 and order of sentence dt. 9.5.2006 passed by learned Additional Sessions Judge, F.T.C. No.-III, Muzaffarpur, in Sessions Trial No. 350/2003, whereby and whereunder the appellants/convicts were convicted u/s 376(2)/34 of the Indian Penal Code. The appellants have been sentenced to undergo rigorous imprisonment for ten years for the offences punishable u/s 376(2)/34 of the Indian Penal Code and fine of Rs. 2000/- (Two Thousand) each and in default of payment of fine, they



have further been sentenced to undergo simple imprisonment for six months.

3. The prosecution case as per *fardbeyan* of the informant (P.W.-5) is that on 26.10.2002 at about 9:00 P.M. while she was sleeping in hut with her children, in the meantime, the appellants along with Rajendra Mahto entered in her hut. Suddenly, she woke up and on seeing the accused tried to raise noise, but the appellant Binshundeo Rai was having a dagger in his hand, shut her mouth by putting cloth and threatened her not to create any noise. Thereafter, appellants Ramjanam Mahato and Bishundev Rai lifted the informant/victim's *saree* and committed rape one by one. It is further alleged that co-accused Rajendra Mahato was standing at the door and keeping an eye on the outsider coming there. After committing rape, the accused persons fled away. The victim/informant started crying and screaming, upon which the people of the locality came there, to whom she informed about the incident.

4. On the basis of *fardbeyan* of the informant (P.W.-5), an FIR was registered on 27.10.2002 as Saraiya P.S. Case No. 242 of 2002 for the offence punishable under sections 376/34 of the Indian Penal Code. After completion of



investigation, investigating officer submitted charge-sheet against the appellants/convicts. On the basis of charge sheet and materials available on record, learned S.D.J.M. Muzaffarpur (West) took cognizance and the case was committed to the court of Sessions for its disposal.

5. The defense of the appellants/convicts totally denied from the charge leveled against them and pleaded for their innocence.

6. The point to be considered in this appeal before this Court is whether the prosecution has been able to prove the charge leveled against the appellants/accused beyond the shadow of reasonable doubt or not.

7. In order to bring home the guilt to the accused, altogether seven witnesses had been examined on behalf of the prosecution, namely, PW-1 Dahaury Devi, PW-2 Sharda Devi, PW-3 Parwati Devi, PW-4 Binda Devi, PW-5 Sunita Devi (victim), PW-6 Reeta Rani Chaudhary (Doctor), and PW-7 Anil Kumar Nayak, Investigating Officer. Defence has also examined two witnesses on their behalf namely, Kishore Deo Rai, D.W.-1 and Surya Devo Sahani, D.W.-2.

8. Dahaury Devi has been examined as P.W.-1 who deposed in her examination-in-chief is that the victim



(PW-5) is wife of her grandson. On the date of incident, at about 9:00 P.M., she woke up on *hulla* and came to know from the victim that the accused persons/convicts had raped her. She further deposed in her cross-examination that the victim (PW-5) is second wife of her husband.

9. P.W.-2, Sharda Devi is a resident of the same village, who deposed in her examination-in-chief that she woke up at around 9:00 PM due to noise and saw the appellants Ramjanam Mahato and Bishundev Rai running away from the victim's house. She went to the house of the victim and learned about the rape committed by the appellants/convicts. She further deposed that five minutes before the incident, co-accused Rajendra Mahot had come to her house asking for *beedi*.

10. P.W.-3 Parvati Devi along with P.W.-4 Binda Mahot have been declared hostile by the prosecution.

11. The informant is victim of the case who has been examined as P.W.-5, deposed that on the date of incident, she was sleeping along with her three children in hut. Her husband was not present there. Suddenly, these appellants along with co-accused Rajendra Mahto entered her house and Bishundeo Rai caught hold her body in sleeping



condition with a dagger in his hand. When she tried to raise alarm, he stuffed a cloth in her mouth. After that, appellants Ramjanam Mahato and Bishundeo Rai lifted the victim's *saree* and committed rape one by one. She further deposed that co-accused Rajendra Mahato was standing at the door and keeping an eye on the outsider coming there. The accused persons fled away after committing rape. In her cross-examination, the victim deposed that while she was protesting against rape, her blouse was torn. She also sustained pain in the right side below her chest.

12. P.W.-6, Reeta Rani Chaudhary is doctor who deposed that she had examined the victim on 28th October, 2002 at 12:00 noon at *sadar* hospital. The doctor had not found spermatozoa and opined that the evidence is not suggestive of rape and the victim is habituated in sexual activities. She further deposed in her cross-examination that there was no external or internal injury on the private part of the victim's body.

13. Anil Kumar Nayak, the Investigating Officer (I.O.) of this case has been examined as P.W.-7. He deposed that on that day at 7:00 A.M. in morning, he took the statement of the victim/informant. He did not seize the cloth



of the victim which she had wore at the time of occurrence and he also did not take the statement of the informant's *sautan* child as she was a small child.

14. Mr. Vipul Sinha, learned counsel is appointed as *Amicus Curiae* for assisting the Court in this appeal who submitted in manifold. It is further submitted that the victim is sole witness on the point of alleged occurrence and except her, no any eye witness has been examined in this case though there is evidence that after the alleged occurrence on *hulla* the witnesses reached the place of occurrence to whom the victim narrated the story. P.W.-1 and P.W.-2 are not reliable witnesses as they are related to the victim. PW-2 in his evidence stated that she had seen the accused running away from the house of the victim, but it was not possible to identify anyone at night. It is further submitted that there is no consistent or corroborative evidence in the case. The prosecution witnesses have contradicted to each other and have not supported the prosecution case consistently on the manner, genesis and place of occurrence. It is further submitted that the Investigating Officer (I.O.) of this has not collected the clothes i.e. *blouse* & *sari* of the victim and produced in the trial court which creates reasonable doubts



about the alleged occurrence. The medical report is exhibited as ext.1, has not supported the prosecution case. Doctor had not found any spermatozoa and opined that the medical evidence of the victim did not suggest of rape. The trial court has committed an error in not considering the particular aspect that it is a case of non-corroborative or consistent evidence.

15. *In contra*, learned APP appearing for the state has opposed and submitted that the judgment of conviction and order of sentence passed by the trial court is based on consistent and cogent evidence especially P.W.-5, which are produced during the trial against the appellants and the same is fit and proper.

16. On careful scrutiny of the evidence of the witnesses examined in this case and considering the rival submissions made by the learned counsel for the appellants and learned APP for the state. In this case, Vitim Sunita Devi P.W.-5 has deposed the entire manner of occurrence as alleged in *fardbyean*. She deposed that the occurrence took place in night at around 9 PM while she was sleeping in her house. She specifically deposed that the accused persons/appellants came there and firstly Ram Janam Mahto



committed rape by lifting her *sari* and *saya* and thereafter Bishundeo Rai committed rape. Co-accused Rajendra Mahto (not facing trial) was standing at the door to keep watch so that no one else could come. She further categorically deposed that the accused Bishundeo armed with a dagger and thrust *sari* to close her mouth and despite the protest of victim, the accused persons committed sexual intercourse with her. During the occurrence, her blouse was torn and she received bruise injury on left side of her abdomen. It is apparent that the accused persons/appellants are familiar as they are co-villagers. The identification of the accused persons has not been challenged by the defense. P.W.-1 & 2, though they are not eye witnesses but they corroborated the case as they have seen the accused persons running away from house of the victim. P.W.-3 & 4 have not supported the prosecution and declared hostile. In the present case, one of the accused was armed with a dagger and created fear in the mind of the victim and threatened to kill her if she raised any alarm. There is no question of any injury to victim's body due to fear of her life due to threats from the accused. She did not expect to resist strongly to the accused persons likewise in ordinary course of nature which can be expected from a



normal lady. In this case, the doctor (P.W.-6) has not found any external or internal injury on the private part of the victim. The doctor has also not found any spermatozoa in vaginal swab of the victim. In this juncture, the medical evidence regarding absence of spermatozoa from the examination of swab taken from the victim is concerned, it has been stated by the Doctor that the sign of rape may diminished. Admittedly, the victim had been examined two days later from the occurrence as the incident took place on 26.10.2002 around 9 PM and the swab was taken by the doctor on 28.10.2022. It has also been found by the doctor that the victim was habitual to sexual intercourse. The victim is a married woman blessed with a child and has been married for more than five years, so naturally, the victim may have habituated of sexual intercourse. I found no force in the contention raised on behalf of the defence in respect of not finding spermatozoa and any external or internal injury on the victim's body as well as on her private part. The victim deposed that she had shown bruise and torn blouse to darogaji but the I.O. had not seized the cloth which she worn at the time of occurrence. Since, there is no fault on the part of the victim, rather it is the fault of the investigating officer



for not collecting and seizing her clothes.

17. In this case, the defence raised submission that accused Ramjanam Mahto was in relation with one Jaypati Devi (sautan of the victim) who was alleged to have been ousted by the victim and not allowing her to live in the house, for which a Panchayati also took place in the leadership of appellant Ramjanam Mahto. Accused Ram Janam Mahto and Vishundeo Mahto who are friends to each other have been falsely implicated by the victim. On this point, two witnesses have been examined on behalf of the defence, who deposed about the holding the *panchayati* on account of Jaypati Devi being ousted from the house by the victim. In my view, the story of defence has no life to stand and will not make the story of rape improbable by the evidence of D.W.-1 and D.W.-2. The victim flatly denied in her evidence regarding falsely implicating the accused appellants.

18. After considering the evidence, discussed above, I am of the view that the appellants had committed rape with the victim on the alleged date and time of occurrence which has been established by prosecution evidence. I found no illegality and irregularity in the



judgment of conviction. The prosecution has been able to prove the charge leveled against the appellants beyond all reasonable doubt. The judgment of conviction is fit and proper and need not to customize in it. The judgment of conviction under Section 376(2)/34 is hereby confirmed.

19. In this case, the victim is married lady and she has a child. The accused persons/appellants are facing ordeal of trial since beginning of this case i.e from year of 2002. The appeal relates to year of 2006. As per report, the appellant No.1 remained in judicial custody approximately five years and appellant no.2 remained in custody for six years and two months.

20. I found and hold the conviction is proper but keeping in mind over all the view of the matter, sentence of ten years is reduced to rigorous imprisonment for the period already undergone by the appellants as under trial prisoners as well as convict in connection with this case.

21. Accordingly the instant appeal is hereby dismissed with modification in order of sentence.

22. Mr. Vipul Sinha, learned *Amicus Curiae* was appointed to represent the appellants/accused. I put on record the words of appreciation for able assistance rendered by him



in arriving this Court at the proper conclusion in deciding the instant appeal. The Patna High Court, Legal Services Committee is, hereby, directed to pay Rs. 6,000/- (rupees six thousand only) to Mr. Vipul Sinha.

(Sunil Kumar Panwar, J)

Amandeep/-

AFR/NAFR	NAFR
CAV DATE	15.4.2024.
Uploading Date	30.4.2024.
Transmission Date	30.4.2024.

