

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.468 of 2006

Md. Irfan, son of Late Raisuddin, Resident of village Gorumara, P.S.-
Dighlbank (Korhobari), District- Kishanganj.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr.Vipul Sinha, Amicus Curiae
For the Respondent/s : Mr. Mukeshwar Dayal, APP

**CORAM: HONOURABLE MR. JUSTICE RUDRA PRAKASH
MISHRA**

ORAL JUDGMENT

Date : 19-09-2024

1. The present appeal has been filed against the judgment of conviction and order of sentence dated 31.05.2006 passed by learned Additional District & Sessions Judge, F.T.C-I, Kishanganj in connection with Sessions Trial No. 571 of 2005, Tr. No. 42 of 2005, arising out of Dighalbank (Korhobari) P.S. Case No. 34 of 2004 dated 15.10.2004, whereby and whereunder the appellant was found guilty and convicted for the offence punishable under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years.

2. In this case, vide order dated 25.04.2024, on account of non-appearance of the counsel on behalf of the appellant, Mr. Vipul Sinha was appointed as Amicus Curiae by



a Coordinate Bench of this Court to assist this Court on behalf of the appellant.

3. The prosecution case is that the complainant filed a petition of complaint viz. Complaint Case No. 825C/2004 dated 11.08.2004 which was forwarded by the learned Chief Judicial Magistrate, Kishanganj on which Diahalkbank (Korhobari) P.S. Case No. 34 dated 15.10.2004 was registered under Sections 376, 323/34 of I.P.C in which the complainant had alleged that on the alleged date and time when she was returning after easing herself, two accused persons viz: Md. Irfan and Itwari have caught hold her from back. The complainant further alleged that when she wanted to raise hulla but the accused-appellant showing her knife stated that if she would raise alarm, she will be killed and at the same time the another accused Itwari closed her mouth with the help of cloths and both of them had taken her forcibly towards bans jhar and undressed her. Thereafter, accused-appellant raped her in presence of other co-accused who threatened her that that if she would raise alarm, she will be killed there. The complainant further alleged that she was in much painful state but the accused-appellant forcibly raped her. Another accused also wanted to assault sexually but she raised alarm and when they



saw that witnesses were coming, both fled away from there. Thereafter, the complainant narrated all the facts to the witnesses present there.

4. In this case, after registration of police case, the investigation was taken up by the police and after completion of investigation, the police submitted charge- sheet for the offence u/s 376 and 323/34 of I.P.C. against both the accused persons showing co-accused Md. Itwari as absconder. After submission of charge-sheet, the learned Chief Judicial Magistrate, Kishanganj took cognizance against both the accused persons order dated 28.6.2005 for the offence u/s 376, 323/34 of I.P.C.. Thereafter the case was committed to the Court of Sessions and the case of co-accused was separated declaring him absconder. In this case charge for the offence u/s 376 I.P.C. has been framed. The statement of accused-appellant was taken under Section 313 in which he pleaded not guilty and claimed to be tried and made over and explained to the accused.

5. In order to prove its case, the prosecution examined altogether six (06) prosecution witnesses viz. P.W.1 Md. Rahman (father of the informant) P.W.2 Jahidur Nissa (mother of the Informant), P.W.3 (complainant), P.W. 4 Md. Tasir, P.W. 5 Dr. Urmila Kumari and P.W. 6 Md. Rashid. One document was



exhibited on behalf of the prosecution Ext. 1 which is medical report of the victim prepared by P.W.5. No witness was examined on behalf of the defence, however, two documents were exhibited on behalf of the defence which are Ext. A, certified copy of Dighalbank P.S. Case No. 57 of 2004 and Ext. A/1 which is certified copy of F.I.R. of Dighalbank P.S. Case No. 35 of 2004. After conclusion of trial, the Trial Court has convicted the appellant in the manner stated above.

6. Heard Mr. Vipul Sinha, learned Amicus Curiae on behalf of the appellant and Mr. Mukeshwar Dayal, APP for the State.

7. Learned Amicus Curiae on behalf of the appellant submits that there is no eye witness to the alleged occurrence. In this case, the victim has not approached the nearest police station and no First Information Report was lodged rather a complaint was filed in the Court. Further, medical examination of victim was conducted after 6-7 days of the occurrence but the same has not been brought on record as evidence. Thereafter, the medical of the victim was conducted after eight months of the occurrence and the doctor P.W. 5 states that nothing was found. Learned Amicus Curiae further contends that there is previous enmity between the parties which appears



from paragraph 5 of the deposition of P.W. 5. It is further contended that there is no independent witnesses rather all witnesses are related witnesses except the doctor P.W.5. P.W. 1 and P.W. 2 are the father and mother of the victim i.e. (P.W.3). P.W.4 is Md. Tasir and P.W.6 is Md. Rashid and both are not charge sheeted witnesses and their statements were not recorded during investigation as they were not available before police. P.W.5 is Dr.Urmilla Devi who examined the Victim-complainant and issued medical report Ext.1. The medical report also does not support the case of the prosecution In this case, the investigation officer has not been examined which also prejudices the case of the appellant. Learned Amicus Curiae further contends P.W.2, in her examination-in-chief, has stated that the police station is just two *kose* (approximately 6 kilometers) away from the place of occurrence and on the next day, a complaint was lodged in the Kishanganj Court, which is 30-40 kms away from her village. There is no such plausible explanation for not going to the police station for lodging the F.I.R. although the police station was only 6 kms away from the place of occurrence and the Kishanganj Court was 30-40 kms away from the place of occurrence. In support of his contention, learned Amicus Curiae has relied on a judgment of



Hon'ble Supreme Court reported in the case of *Priyanka Srivastava and Anr. versus State of Uttar Pradesh and Ors.* since reported in *(2015) 6 SCC 287* (specially paragraph 31 thereof). Learned Amicus Curiae further states that in the medical evidence no recent incidence of intercourse and no injury was found. P.W. 5 the doctor in her deposition had stated that evidence of rape can be found only 6-7 days of the occurrence. Thus, the medical report of the victim does not support the allegation made in the complaint/F.I.R. Learned Amicus Curiae further submits that the statement of prosecution witnesses do not inspire confidence and as such the conviction of the appellant on such evidence by the Trial Court requires interference and as such prayed for acquittal of the appellant of the charges.

8. On the other hand, Mr. Mukeshwar Dayal, APP for the State submits that there is allegation of rape committed by the appellant and the victim in her statement has also stated about the same. The Hon'ble Apex Court in many cases, held that the statement of victim is sacrosanct and even her statement is sufficient for conviction of accused. Learned A.P.P. further states that the Trial Court has rightly convicted the appellant and the judgment of conviction and order of sentence



do not require any interference by this Court.

9. After hearing the rival contentions made on behalf of the parties, in order to come to a just conclusion, this Court would first think it proper to analyze the evidence of the prosecution witnesses for coming to just conclusion. P.W.1 Md.Rehman, father of the informant who is hearsay witness as he was in Srinagar, Jammu Kashmir and came to his house after 4-5 days of the occurrence and the entire occurrence narrated to him by PW.2 (Mother of informant). P.W.2, Jahidur Nissa, mother of the informant, who, in her examination-in-chief, has stated that on *hulla*, when she reached the place of occurrence, she had seen the appellant and co-accused Itwari running from the occurrence place and the alleged facts of the occurrence was narrated to her by the Prosecutrix (P.W.3). P.W.3 Rahena Khatun is prosecutrix herself and she narrated all the alleged occurrence to P.W.2, P.W.4 and P.W.6 and by the next day he came to the court and filed the case and there is contradiction in her complaint petition as she deposed that the knife was used by the Itwari but at the same time she had deposed that the knife was in the hand of the accused-appellant which he handed over to Itwari at the time of caught hold. In paragraph 8 of her examination-in-chief, she has stated that the



police station was 2-3 kose away from her home but she did not go there and her parents took her to the Kishanganj Court. In paragraph 4 of her examination-in-chief, she has stated that after 5-6 days of the occurrence, she went to lion's club where her medical examination was conducted but no such medical report is on record which creates serious doubt on the case of the prosecution. P.W. 4 Md.Tashir is independent witness and P.W.6 Md.Rashid own uncle of prosecutrix, both are not charge-sheeted witnesses and they reached the place of occurrence after hearing the *hulla* from bhans-jhar where the victim alleged that accused had forcibly sexually assaulted her with the help of Itwari. P.W.5 is Dr. Urmilla Kumari who examined the victim after the lapse of 8 months of the alleged occurrence and, as such, in medical report nothing was found regarding sexual intercourse. P.W. 5 stated in her examination-in-chief that the sign of rape may be found within 7 days and in this case there is too much delay. Thus, the medical report does not support the allegation made in the complaint. Further, all the prosecution witnesses are closely related to the informant and are highly interested witnesses hence, it is not safe to put reliance on their evidences, whereas the independent witness (P.W. 4) are also hearsay witness. In this case, the Investigating



Officer has also not been examined by the prosecution and the first medical report conducted 5-6 days of the occurrence was also not exhibited by the prosecution or not brought on record. The factum of non-examination of the Investigating Officer by the prosecution goes to show that the prosecution has not come up before the Court with clean hands.

10. From perusal of the records and on going through the evidences of the prosecution witnesses, this Court finds that none of the prosecution witnesses except the informant (P.W. 3) have seen the occurrence nor any witness, during the course of investigation has come forward to claim himself to be the eye witness to the occurrence. Further the reliance placed on the case of *Priyanka Srivastava (supra)* in which the Hon'ble Apex Court held that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3) and both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. The Hon'ble Supreme Court further held that these provisions will deter a



person to casually invoke the authority of the Magistrate under Section 156(3). Thus, non-approaching to police station which is nearer to the place and filing of a complaint before the Court also makes the prosecution case doubtful. Further, in the absence of non-production of first medical examination of victim conducted 5-6 days after the date of occurrence, it can be inferred that the prosecution has failed to establish its case beyond the shadow of all reasonable doubts with respect to the manner and motive of the occurrence. Moreover, there is contradiction in the evidences of the prosecution witnesses and most of the witnesses are interested witnesses.

11. It is the fundamental principle of criminal jurisprudence that the prosecution has to prove its case by conclusive proof “beyond all reasonable doubt” and in absence of that the benefit of doubt should go to the accused. In the present case, the prosecution has failed to prove its case beyond all reasonable doubt and the defence has succeeded to raise the doubt in the prosecution case as also the ordeal of trial faced by the appellant since the beginning of the case, the judgment and sentence passed by the Trial Court requires interference by this Court.

12. Accordingly, the present criminal appeal is



allowed. The judgment of conviction and order of sentence dated 31.05.2006 passed by learned Additional District & Sessions Judge, F.T.C- I, Kishanganj in connection with Sessions Trial No. 571 of 2005Tr. No. 42 of 2005, arising out of Dighalbank (Korhobari) P.S. Case No. 34 of 2004 dated 15.10.2004, is hereby set aside. Since the appellant is on bail, he is discharged from the liabilities of the bail bonds.

13. Before parting with the appeal, I record my appreciation for the able assistance rendered by Mr. Vipul Sinha, learned Amicus Curiae.

14. The Patna High Court Legal Services Committee is hereby directed to pay a sum of Rs. 5,000/- to Mr. Vipul Sinha in Cr. Appeal (SJ) 468 of 2006 as consolidated fee for the services rendered by him.

(Rudra Prakash Mishra, J)

Pankaj/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	04.10.2024
Transmission Date	04.10.2024

