

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.813 of 2016**

Arising Out of PS. Case No.-32 Year-2010 Thana- JAMALPUR District- Darbhanga

Mantun Nadaf, son of Islam Nadaf, Resident of village- Jhagarua, Police Station- Jamalpur and District- Darbhanga.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Ali M. Ahmad, Adv.

Mr. A. Akhtar, Adv.

For the Respondent/s : Mrs. Anita Kumari Singh, APP

**CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT**

Date : 22-01-2024

1. Heard learned counsel for the appellant and learned APP appearing for the State.

2. The instant appeal has been filed against the judgment of conviction dated 11.08.2016 and order of sentence dated 18.08.2016 passed by the learned Additional Sessions Judge-II, Benipur, Darbhanga, in connection with Sessions Trial Case No. 468 of 2010 arising out of Jamalpur P.S. Case No. 32 of 2010, whereby and whereunder the appellant has been convicted for the offences punishable under Sections 366 and 376 of the Indian Penal Code (hereinafter referred to as IPC) and sentenced to undergo rigorous imprisonment for ten years for the offence punishable under Section 366 of IPC with a fine of Rs. 15,000/- and has also been sentenced to undergo rigorous imprisonment for

ten years for the offence punishable under Section 376 of IPC with a fine of Rs. 15,000/- and in case of default of payment of fine, additional imprisonment for six months has been awarded upon the appellant and both the sentences of imprisonment have been directed to run concurrently by the convicting trial court.

3. The substance of the prosecution's case as appearing from the written report filed by the victim's uncle namely Md. Aslam Sah (informant) is that on 25.05.2010 at about 8:00 P.M., the informant's niece (hereinafter referred to as victim) went outside of her home to attend call of nature in an open field situated nearby her home then the accused/appellant forcefully caught hold of her and thereafter, kidnapped her by putting her in fear by showing a *knife*. The informant further alleged that when the victim did not return back, he and others started searching for her and made efforts to find her in their village but they could not find out the victim and thereafter, they contacted their relatives through phones who reside in nearby villages and after that, on 26.05.2010, one of the informant's relatives, a resident of Khojari village, P.S.- Bheja, District- Madhubani, informed him that the appellant and the victim had been caught at Islampur village and then they went to Islampur village and caught the accused and brought the victim at their home. The informant disclosed the

victim's age as being 14 years at the time of commission of the alleged offences and according to him, the victim had been kidnapped by the appellant with an intention to take her somewhere.

4. Describing the above allegations, the informant Md. Aslam Sah filed a written application (Ext. 1) at Jamalpur police station, on that basis, a formal FIR bearing Jamalpur P.S. Case No. 32 of 2010 was registered under Sections 366, 366A and 376 of IPC against the appellant which set the criminal law in motion.

5. During investigation, the victim's statement (Ext. - 2/1) was recorded under Section 164 of Cr.P.C. and after the completion of the investigation, the appellant was chargesheeted for the offences punishable under Sections 366, 366A and 376 of IPC and the learned Magistrate took cognizance of the said offences and thereafter, committed the case of the appellant to the court of Sessions.

6. The appellant namely, Mantun Nadaf stood charged for the offences punishable under Sections 366, 366A and 376 of IPC.

7. During trial, the following witnesses, including the victim, were examined by the prosecution :

P.W. 1 – Kayum Sah;

P.W. 2 – Abdul Hakim;

P.W. 3 – Mokhtar Ahmad;

P.W. 4 – Md. Mustaque;

P.W. 5 – Md. Aslam Sah (informant);

P.W. 6 – Shamim Sah @ Shamshai;

P.W. 7 – Kamrai Alam;

P.W. 8 – Md. Musa;

P.W. 9 – Akhlak Ahmad Sah;

P.W. 10 – XXXXXX (victim);

P.W. 11 – Tripurari Singh;

P.W. 12 – Dr. Bedanand Jha

8. In documentary evidence, the prosecution proved the following documents and got them exhibited which are as under :-

Ext. 1 – Written FIR

Ext. 2 – Signature of one namely Akhlak Sah upon the written FIR.

Ext. 2/1 – Victim's statement recorded under Section 164 of Cr.P.C.

9. The appellant's statement was recorded under Section 313 of Cr.P.C. in which he denied the main circumstance appearing against him from the prosecution's evidences and he

claimed himself to be an innocent but he did not make any specific defence in his statement.

10. The appellant did not give any evidence in his defence.

11. It has been argued by learned counsel for the appellant that the prosecution's story as described in the FIR is completely improbable and unbelievable and the same has been falsified by the medical evidence of the victim as any sign of rape has not been found by the Doctor concerned who examined the victim and victim's statement recorded under Section 164 of Cr.P.C. is not reliable as she was in the custody of the police when she was produced before the Magistrate and the victim is stated to have been recovered from Islampur village and as per the allegation, the victim and the appellant were found in the said village and they were kept in the house of one namely Md. Enul but the said person was not produced and examined before the trial court and there is a serious contradiction regarding the number of persons who are stated to have gone to Islampur village after getting the information about the presence or recovery of the victim and appellant at Islampur village and the factum of victim's presence in Islampur village was not given in the knowledge of police.

12. It has been further submitted that all the material witnesses, except the victim, upon whom the trial court has placed reliance are interested persons and none of them claimed to have seen the appellant taking the victim away with him and the place where the victim was raped by the appellant when she was on way with the appellant could not have been established by the prosecution and any resident of Islampur village was not produced and examined before the trial court to prove the recovery of the victim with the appellant from Islampur village.

13. It has been further submitted that the victim went missing on 25.05.2010 but in this regard, no information was given to the police by the informant or victim's other family members and as per prosecution's story, the appellant along with the victim was directly produced at the police station concerned and the said conduct of the prosecution party raises a serious doubt in the truthfulness of the allegation.

14. It has been further submitted that the appellant has completed more than eight years in jail against the major punishment of ten years and during trial, he remained in custody since 26.05.2010 to 20.01.2011 and thereafter, since the date of conviction i.e. 11.08.2016, he has been languishing in jail.

15. Learned APP has opposed the appeal and argued that before the trial court, the prosecution succeeded to prove the victim's recovery in the company of the appellant at Islampur village and serious allegations of kidnapping and rape were made by the victim against the appellant which were supported by the victim in her statement recorded under Section 164 of Cr.P.C. as well as in her court evidence and there was no reason on the part of the victim to make a false allegation against the appellant and as per the medical evidence, the victim was below 16 years of age while the appellant was more than 25 years old and also a married person, so there was no possibility of any type of relation in between the victim and the appellant and the said fact is sufficient to draw the inference that the victim was kidnapped by the appellant with an intention to commit a wrong with her and the allegation of rape made by the victim in her ocular evidence is sufficient to convict the appellant for the alleged offence of rape despite the victim's medical evidence going against the prosecution as it is settled principle of law that ocular evidence, if it is trustworthy, will prevail over the medical expert's opinion given in sexual assault matter, hence, the appellant has been rightly convicted by the trial court and there is no force in this appeal and the same is liable to be dismissed.

16. Heard both the sides, perused the judgment impugned and evidences available on the case record of trial court and also gone through the statement of accused.

17. In the present matter, as per the allegation, the victim who happens to be niece of the informant (Md. Aslam Sah/P.W. 5) went to attend call of nature on 25.05.2010 at about 8:00 P.M. and then the accused/appellant finding her alone, firstly, caught hold of her and thereafter, forcefully took her to Islampur village and in that course, he put the victim in fear by showing a knife and thereafter, the villagers of Islampur village noticed both in their village on the same night of the occurrence and finding them in suspicious condition, stopped them and kept in the house of one namely Md. Enul and thereafter, informed one namely Md. Musa/P.W. 8, who is a resident of another village and having relationship at victim's village and he was informed because his acquaintance with the victim's family was in the knowledge of villagers of Islampur village and thereafter, the said person Md. Musa informed the victim's family and after that, victim's uncle, her relatives and some other persons went to Islampur village and recovered the victim and the appellant.

18. In respect of the alleged recovery of the victim with the appellant, the evidence of P.W. 8/Md. Musa is very relevant.

He deposed that one namely Md. Enul, a resident of Islampur village informed him that the victim and the appellant had been caught in his village and on asking, they revealed their names and identity and the appellant revealed that he had been taking the victim away. The victim's recovery along with the appellant was also supported by the prosecution witnesses P.W. 5/Md. Aslam Sah and P.W. 9/Akhilak Ahmad Sah and both the witnesses are said to have gone to Islampur village after getting information about victim's presence in the said village. Though the said witnesses are relatives of the victim and some of their companions, who also went along with them to Islampur village, turned hostile but the facts deposed by them in their examination-in-chief in respect of victim's recovery at Islampur village are supportive to the evidence of P.W. 8/Md. Musa so their evidence appears to be credible and in cross-examination, they remained firm to their stand. Accordingly, the evidence of P.W. 8, P.W. 5 and P.W. 9 appears to be reliable in respect of prosecution's allegation as to victim's recovery with the appellant in another village Islampur and in this regard, the victim's own evidence is also very relevant.

19. The victim deposed in her examination-in-chief that in the night of the alleged day of occurrence when she was out of her house to attend call of nature, the appellant caught hold of

her by showing a knife and on the way, she was raped by him. She further deposed that the villagers of Islampur village noticed them when the dogs started barking at them and thereafter, they were caught by the villagers and after that, her uncle Md. Aslam Sah, Akhlak Ahmad Sah, Mokhtar Ahmad and Md. Musa came there and she and the accused were handed over to them and thereafter, they were taken to Jamalpur police station. In this regard, the evidence of the investigating officer who was examined as P.W. 11 is also relevant.

20. P.W. 11 deposed that the victim and the accused were produced at the police station by the informant and at that time, Shamim Sah, Mokhtar Ahmad, Akhlak Ahmad Sah, Abdul Hakim and some others also came with the informant at the police station and the said statement of the investigating officer is also supportive to the above allegation to some extent.

21. Though in the present matter, one namely Md. Enul, a resident of Islampur village in whose house the victim was kept after recovery with the appellant, was not examined before the trial court and also any of the villagers, who noticed the victim and the appellant and caught them, was also not produced before the trial court as witness but merely by this fact, the prosecution's

above allegation as to victim's recovery with the appellant at Islampur village does not appear to be unreliable.

22. The non-official witnesses of the prosecution, who are residents of the village of victim and appellant, did not reveal any fact in their evidence regarding any kind of enmity or dispute in between the victim's family and the appellant and from perusal of their evidence, this Court does not find any reason on the part of the victim and her family to make a false allegation of sexual assault against the appellant and furthermore, there was a considerable gap of age between the victim and the appellant who was already a married person at the time of occurrence so there was no probability of intimacy in between them. In this regard, the prosecution's witnesses were cross-examined but none of them revealed any kind of intimacy or love affair in between the victim and the appellant.

23. Though, in the present matter, the medical evidence in respect of the allegation of sexual assault given by P.W. 12/Dr. Bedanand Jha goes against the prosecution as the witness deposed that no any positive evidence to suggest the commission of recent sexual intercourse with the victim was found but in the facts and circumstances of this case, the said medical evidence does not help the appellant as he was a fully developed man at the time of

commission of the alleged occurrence while the victim was a minor girl and according to her allegation, the appellant firstly caught hold of her and after that put her in fear by showing a knife and thereafter, dragged and took her and on the way, he raped her. When a physically strong person put a minor girl in fear by showing a knife in darkness and overpowers her and thereafter, establishes sexual relation with her then, in such a situation, there is less possibility of any sign of forceful sexual intercourse. The same situation is available in the present matter and victim's evidence appears trustworthy and the appellant could not have justified his presence with victim in the night in another village. Accordingly, I am of the view that the non-supportive medical evidence does not cast a serious doubt in the prosecution's allegation and moreover, it is settled principle of law that in the offence of sexual assault, the victim's ocular evidence, if trustworthy, shall prevail over the medical opinion regarding the allegation of rape or sexual assault and in the present matter, the victim fully supported the allegations levelled by her against the appellant and she remained firm to her allegation and did not say anything contrary to her allegation in her cross-examination.

24. Here, it is important to mention that during investigation, the victim was examined before the Judicial

Magistrate under Section 164 of Cr.P.C. where she also supported the allegations levelled by her before the trial court.

It has been further argued by learned counsel for the appellant that the said statement is not reliable as the same was recorded by the victim under the influence of police. I find no force in this submission as the victim was examined on 28.05.2010 before the Judicial Magistrate while she had been recovered on 26.05.2010 and as per the evidence of the investigating officer, she was handed over to her family members on the same day of her recovery.

25. The victim was examined as P.W. 10 and she deposed that when she went out of her house in the night to attend call of nature then the appellant caught hold of her by showing a knife and thereafter, took her to Islampur village and on the way, he raped her forcefully and in Islampur village, they were caught by the villagers of the said village when the dogs started barking at them and after that the villagers got their details (names and address) from them and then informed her relatives by phone call. She further deposed that after getting information of her presence at Islampur vaillage, her uncle Md. Aslam Sah and some other persons namely Akhlak Ahmad Sah, Mokhtar Ahmad and Md. Musa arrived at Islampur village and thereafter, she and the

appellant were handed over to them and from there, they were taken to Jamalpur police station and after that, her uncle filed a written application at the police station and thereafter, her medical examination was done and her statement was also recorded before the Judicial Magistrate. The victim proved her statement recorded by her before the Judicial Magistrate that was marked as Ext. 2/1. The victim did not say anything in her evidence to show the existence of any kind of intimacy in between her and the appellant prior to the commission of the alleged occurrence and she denied the suggestion that she fled away with the appellant on account of having love affair with him, hence the victim's evidence, who is the most important witness of the prosecution, goes in favour of the prosecution's allegation and the same appears to be reliable and there is no material to make the victim's allegations to be suspicious.

26. So far as the victim's age is concerned, as per the FIR, the victim is stated to be 14 years old at the time of commission of the alleged occurrence. During trial, the victim's father, uncle and other relatives who were examined before the trial court supported the factum as to the victim being minor at the time of alleged occurrence. As per the medical evidence, the victim's age was between 16 and 17 years. Furthermore, one

independent witness P.W. 8/Md. Musa deposed that the victim was appearing to be 13-14 years old when she was recovered. In the light of these evidences, this Court has no reason to disbelieve the factum as to the victim being minor as mentioned in the FIR.

27. Learned counsel for the appellant has placed reliance upon the order of the Hon'ble Apex Court passed in the Case of **Yerumalla Latchaiah vs. State of A.P reported in (2006) 9 SCC 713**. In this order, the Hon'ble Apex Court mainly observed that *“the age of the victim was only eight years at the time of alleged occurrence and she was examined immediately after the occurrence by P.W. 7/Dr. K. Sucheritha, who stated in her evidence that no injury was found on any part of the body of the victim, much less on private part, hymen was found intact and the doctor specifically stated that there was no sign of rape at all and no sperm was detected in the vaginal smears, accordingly, the evidence of the prosecution was belied by the medical evidence, hence, the High Court was not justified in upholding the conviction.”*

The facts and circumstances of the present matter are completely different from the facts of above referred case as in the cited case, the victim was only eight years old and her hymen was found intact but in the present matter, the victim is said to be about 14 years old and her hymen was not found intact and moreover, in the present matter, as per the allegation, the victim remained in the

custody of the appellant for some hours in the dark night and she was put in fear by the appellant by showing a knife and the alleged occurrence was committed in the night, so in view of these circumstances, there was a less possibility of any sign of rape on the person of the victim as she was under full clutch of the accused during the relevant period of occurrence. Accordingly, the above referred case of Hon'ble Apex Court does not help the appellant in the present matter.

28. In view of the above discussion of the prosecution's evidences, this Court forms the opinion that the appellant, who was fully physically developed person at the time of commission of the alleged occurrence, firstly, over-powered the victim by showing a knife and thereafter, dragged and took her to Islampur village in the night and on the way, he raped her also and these occurrences took place in the night when the victim went outside of her house to attend call of nature and the appellant was caught with the victim at Islampur village by the villagers of the said village and thereafter, the relatives of the victim were informed and there is sufficient evidence to prove the victim's recovery with the appellant in suspicious condition in the night at Islampur village and at the time of commission of the alleged occurrence,

the victim was a minor girl and in respect of the allegation of rape, the victim's evidence seems to be reliable and trustworthy.

29. Hence, the appellant's conviction by the trial court for the alleged offences punishable under Sections 366 and 376 of IPC appears to be proper and legal and this Court finds no reason to interfere in the conclusion of the trial court.

30. So far as the quantum of punishment is concerned, the appellant has completed more than eight years in jail against the punishment of 10 years of rigorous imprisonment awarded upon him for the alleged offences punishable under Sections 366 and 376 of IPC and in view of the background of the case, the said undergone period appears to be sufficient to serve the ends of justice. Accordingly, the conclusion of the trial court holding the appellant guilty of the alleged offences punishable under Sections 366 and 376 of IPC is upheld but the punishment of imprisonment awarded for the said offences is reduced to the period of custody which the appellant has undergone till date.

31. In the result, the instant appeal stands dismissed with the above modification in the quantum of sentence.

32. Let the judgment's copy be sent immediately to the trial court as well as the jail authority concerned for compliance and needful information.

33. Let the LCR be sent back to the trial court
concerned forthwith.

(Shailendra Singh, J)

annu/-

AFR/NAFR	AFR
CAV DATE	NA
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