

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.957 of 2023

Arising Out of PS. Case No.-23 Year-2015 Thana- SAKRI District- Madhubani

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Tabassum Khatoon, aged about 20 years, Gender-Female Daughter of Md.
Habib, Resident of Village - Meghaul, P.S. - Sakari, District – Madhubani.

... .. Appellant/s

Versus

1. The State of Bihar
2. Bhawan Ji Jha, aged about 50 years, Gender-Male, Son of Braj Kishore Jha.
3. Vivek Kumar Jha @ Vivek Jha, aged about 27 years, Gender- Male, Son of
Bhawan Ji Jha.

Both Resident of Village - Meghaul, P.S. - Sakari, District – Madhubani.

... .. Respondent/s

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Appearance:

For the Appellant/s : Mr. Bimal Kumar, Advocate

For the State : Mr. Sujit Kumar Singh, APP

For the Respondent/s : Mr. Bimal Kumar Jha, Advocate

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CORAM:HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA)

Date: 01-08-2025

The present criminal appeal has been preferred
under Section 372 of the Code of Criminal Procedure
(hereinafter referred as ‘Cr.P.C’) against the judgment of
acquittal dated 26.07.2023 passed by the learned Additional



Sessions Judge-1st-cum-Special Judge SC/ST Act, Madhubani in Sessions Trial No. 322 of 2017, CIS No. 322 of 2017, arising out of Sakari P.S. Case No. 23 of 2015, whereby the concerned trial Court has acquitted the respondent nos. 2 and 3 from the charges leveled against them for the offence punishable under Sections 323, 504 and 376 of the Indian Penal Code (hereinafter referred as 'IPC').

2. Notices were issued to the Respondent Nos. 2 and 3 vide order dated 09.12.2024, upon which he appeared by filing Vakalatnama through learned Advocate, Mr Bimal Kumar Jha.

3. The prosecution case in brief is that the appellant filed a complaint case in the Court of the learned Chief Judicial Magistrate, Madhubani being Cr. Case No. 135 of 2015 stating therein that on 24.09.2014, she performed her marriage with accused, namely, Vivek Jha @ Vivek Kumar Jha in presence of her parents and other persons by Hindu Rites and Rituals and Vivek Jha brought her in his house where he kept her for 4-5 days in good manner and established physical relation with her. Thereafter, accused, namely, Bhawan jee Jha started abusing and assaulting her and asked her to be ousted from his house and accused Vivek Jha brought her to her Maika



but they use to meet together and establish physical relation but accused, namely, Bhawan Ji Jha use to torture her and due to which, accused, namely, Vivek Jha forcibly on 30.09.2014 took her to the house of his Bahnoi, namely, Raman Kumar Mishra, which is situated in village Andhra Tadi where he kept her for 15 days and used to establish physical relation with her and on 16.10.2014, he sent her to Maika where she lived about one and half months. She further alleged that on 02.12.2014 at about 8:00 AM, he took her to Delhi from Sakari by Train where he kept her in a rented house and continuously committed rape on her and accused, namely, Vivek Jha was working in a private Job at Delhi. She further alleged that on 14.01.2015, he again brought her from Delhi to Darbhanga by Sampark Kranti Train. Raman Kumar Mishra, Vikash Jha and Bhawan Ji Jha were with her husband Vivek Jha and brought her to the house but left her at Sakari Station with two unknown persons from where she herself came to her Maika. She further alleged that she got knowledge that Vivek Jha is in Madhubani Court then she along with her parents on 29.01.2015 went to Madhubani Court and from there she wants to go with her husband but Vivek Jha assaulted her and refuse to accept her as his wife and Bhawan Ji Jha and his wife caught her hair and threw her on ground and



told her that they will earn money after selling her and thereafter her parents with the help of other persons brought her, as such, all the accused persons abducted her and raped her.

4. On the basis of written complaint of the informant Sakari P.S. Case No. 23 of 2015 dated 02.03.2015, under Sections 323, 363, 366, 376, 504 of the IPC has been instituted. The police after investigation submitted chargesheet under Sections 323, 363, 366, 376, 504 and 498 (A)/34 of the IPC and thereafter cognizance has been taken in the aforesaid sections and after commitment the respondents have been charged for the offence punishable under Sections 323, 504 and 376 of the Indian Penal Code.

5. During the trial, the prosecution examined altogether eight witnesses in this case. Out of which PW 1 Muskima Khatoon, PW 2 Akhtari Khatoon, PW 3 Md. Habib, PW 4 Tabusum Khatoon (Appellant), PW 5 Md. Shahanawaz Khan (Investigating Officer), PW 6 Dr. Gargi Sinha, PW 7 Dr. Rama Jha and PW 8 Rajeev Kumar.

6. In criminal appeal against acquittal what the Appellate Court has to examine is whether the finding of the learned trial Court is perverse and *prima facie* illegal. Once the Appellate Court comes to the finding that the grounds on which



the judgment is based is not perverse, the scope of appeal against acquittal is limited, considering the fact that the legal presumption about the innocence of the accused is further strengthened by the finding of the learned trial Court. At this point, it is imperative to consider the decision rendered by the Hon'ble Supreme Court in the case of ***Surajpal Singh & Ors. Versus The State*** reported in ***1952 SCR 193***, paragraph 13 of which reads as under:

“..the High court has full power to review the evidence upon which the order of acquittal was founded. But it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.”

7. In the case of ***Ghurey Lal versus State of Uttar Pradesh*** reported in ***(2008) 10 SCC 450*** in paragraph 75, the Hon'ble Supreme Court reiterated the said view and observed as under:

“The trial Court has the advantage of watching the demeanor of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable.”



8. On meticulous examination of all evidences mentioned in impugned judgment, it is evident to note that PW 4 in her deposition at para 3 has stated that she got the case typed and gave it to the Court and after finding the written material correct, she had put her thumb impression on it whereas in para 4 of her cross-examination, she stated that she do not remember the day, date and month on which she had filed the case in the Court. Further in para 12 of her deposition she stated that she doesn't remember the date of occurrence in the complaint which has been filed in the Court. But from what has been written in the complaint and which has been supported by the witnesses, it is clear that the Complainant is a Muslim girl, where the age of marriage is less than Hindu law and the Complainant has said in her evidence that she was an adult when she got married and accused Vivek Jha was also an adult. If there was marriage between the two and there was physical relationship in which both of them had consented then this does not come under the definition of "rape" given under Section 375 of the IPC because both the parties got married and had physical relationship with their consent, so a case of violation under Section 376 of the IPC does not arise. Section 375 of the IPC read as:



“375. Rape.- A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

(First)- Against her will.

(Secondly)- Without her consent.

(Thirdly)- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt,

(Fourthly)- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly)- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly)- With or without her consent, when she is under eighteen years of age.

(Seventhly)- When she is unable to communicate consent.



Explanation 1- For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1- A medical procedure or intervention shall not constitute rape.

Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

9. Further various documents were marked as exhibits on behalf of the accused and from the examination of these documents, it is clear that the case filed by the parents of complainant was declared false by the complainant herself. PW5 is the investigating officer who submitted the charge sheet and PW8 Rajeev Kumar is also an investigating officer who in his examination-in-chief has supported the investigation report and in paragraph 15 of his cross-examination he stated that as per the complaint and statement of the complainant, he had inspected the place of occurrence only once. More than one place of occurrence has been mentioned in the complaint. In para 17, he stated that he had not tried to obtain the affidavit



mentioned in the complaint. During the entire investigation, he had not seen the affidavit regarding their marriage nor he had instructed complainant to obtain the affidavit of the so-called marriage. PW6 Dr. Gargi Sinha, PW7 Dr. Rama Jha had examined the complainant in this case and submitted their reports in which no medical evidence of rape has been found at the time of examination. The age of the victim is about 18 years. PW1 and PW2 are the hearsay witnesses. PW3 is the father of the victim and he has not disclosed about the rape in his deposition. Further, the named witnesses in the complaint have not been brought on trial, so material witnesses have been withheld by the prosecution and the same has caused prejudice to the defence.

10. As the prosecution has not come with a clean hand and the deposition of the complainant/victim is itself contradictory and not consistent.

11. While appreciating the kind of materials on the record, we keep in mind the ratio of the judgment of Hon'ble Supreme Court in *Sharad Birdhichand Sarda versus State of Maharashtra* reported in (1984) 4 SCC 116 and *Dilavar Hussain and Ors. v. State of Gujarat and Anr., (1991) 1 SCC 253*. Paragraph '153' of *Sharad Birdhichand Sarda*



(supra) is quoted here-under for a ready reference:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793: 1973 SCC (Cri) 1033: 1973 Cri LJ 1783 where the following observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047] “Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.” (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

12. Thus, on the basis of the evidence placed on



record and the ratio laid down by the Hon'ble Supreme Court in various cases on circumstantial evidence, it is held that the charges against the accused/respondents are not proved beyond shadow of all reasonable doubts and the necessary elements mentioned in the charged sections are lacking to hold them guilty under the charged sections. In the totality of the circumstances which appears from the evidence on the record, we are of the considered opinion that the learned trial Court has not committed any error in appreciation of the evidences.

13. We are dealing with an appeal against acquittal and shall keep in mind the principles governing the cases of appeal against acquittal. The principles have been reiterated by the Hon'ble Supreme Court in catena of decisions and one of them is the case of *H.D. Sundara and Others vs. State of Karnataka* reported in (2023) 9 SCC 581. Paragraph '8' whereof is recorded here-under for a ready reference:-

"8. In this appeal, we are called upon to consider the legality and validity of the impugned judgment State of Karnataka v. H.K. Mariyapp, 2010 SCC OnLine Kar 5591 rendered by the High Court while deciding an appeal against acquittal under Section 378 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C"). The principles which govern the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378



Cr.P.C can be summarized as follows:

“8.1. The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to re-appreciate the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after re-appreciating the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible.”

14. It is a case of acquittal in which the presumption of innocence of the accused is, in fact, affirmed by the learned trial Court. In fact, this Court is of the opinion that the prosecution has failed before the learned trial Court to prove the charges leveled against the respondents as opined by the learned trial Court. In ultimate analysis of the entire materials and record, we find no reason to interfere with the judgment of



the learned trial Court.

15. This appeal has no merit. It is dismissed accordingly.

(Sudhir Singh, J)

(Ramesh Chand Malviya, J)

Anand Kr.

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