

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.681 of 2013

Arising Out of PS. Case No.-66 Year-2011 Thana- ARARIA District- Araria

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Md. Subhan, son of Fakruddin, Resident Of Village - Azadnagar, P.S. and
District- Araria

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Md. Ziaul Quamar, Advocate

For the Respondent/s : Sri S.N. Prasad, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 09-01-2019

1. The present Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Cr.P.C.") has been preferred by the sole appellant against judgment of conviction and sentence passed in Sessions Trial No. 811 of 2011 / Trial No. 712 of 2012. The sole appellant by judgment dated- 16.04.2013 has been held guilty and convicted for commission of offence under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as the "I.P.C.") and by order



dated 23.04.2013 he has been sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/-. In default of payment of fine he has been directed to further undergo simple imprisonment for six months. The appellant was tried by Sri Jitendra Nath Singh, learned Adhoc Additional Sessions Judge 4th, Araria [hereinafter referred to as the “trial judge”] in Sessions Trial No. 811 of 2011 / Trial No. 712 of 2012 (arising out of Araria P.S. Case No. 66 of 2011).

2. Short fact of the case is that on 13.02.2011 at 8.00 Hours in the morning Sub Inspector of Police of Araria R.S. Police Station namely – Sri Raghubir Das (P.W. 7) recorded fardbyan of victim, aged about eight years, D/o Md. Muslim Ansari (not examined). The fardbyan was recorded in Sadar Hospital, Araria. In the fardbyan the victim, in presence of her mother- Makina Khatoon (correctly Mobina Khatoon) stated before the Police that her elder sister- Afsana / P.W. 1 was married in Azad Nagar, Araria with Md. Subhan (appellant) about 1 ½ years back. About one month back her sister had delivered a male child. Thereafter her sister came to the house of the victim for getting domestic help and she requested the mother of the victim for the same. Her mother on last Thursday had sent the victim with younger brother of the appellant namely- Sabban to Azad Nagar, Araria for such help. On



the same day at about 2.00 P.M. she reached the house of her sister. In the preceding night (11.02.2011) while she was sleeping in the house of her brother -in-law (appellant), in the night at about 2.00 her brother -in-law namely: Md. Subhan (appellant) came nearer to her and thereafter she awoke. Subsequently Md. Subhan forcibly caught her and after pressing her mouth, he committed rape with her. Due to the said occurrence from her private part blood started oozing out and she started crying. On her cry her sister awoke and she explained all those facts to her elder sister. The neighbours of her sister also arrived and subsequently she was carried to hospital on rickshaw where during treatment her fardbyan was got recorded. The said fardbyan was read over to her and after finding it correct she put her signature. As a witness to fardbyan Makina Khatoon (P.W. 2) and Md. Rafique Ansari (P.W. 6) also put their signature. On the basis of the said fardbyan on the same day i.e. on 13.02.2011 at 9.00 A.M. a formal F.I.R. vide Araria P.S. Case No. 66 of 2011 was registered for the offence under Section 376 of the I.P.C. against the sole appellant.

3. During investigation accusation against the appellant was found true, and as such, on 18.03.2011 charge sheet was submitted against him and on 23.03.2011 the learned Chief Judicial Magistrate, Araria took cognizance of the offence.



Thereafter, on 29.08.2011 the case was committed to the court of Sessions and it was numbered as Sessions Trial No. 811 of 2011/ Trial No. 712 of 2012. In the case on 03.09.2011 charge was explained to the appellant and it was framed under Section 376 of the I.P.C.

4. To prove its case on behalf of the prosecution altogether eight witnesses were examined. Out of eight witnesses, P.W. 3 , the victim and P.W. 6 / Md. Rafique Ansari (brother of the victim) have supported the prosecution case besides P.W. 8 / Dr. Hussan Ara Bibi, however, P.W. 1 / Afsana Khatoon (sister of the victim and wife of appellant), P.W. 2 / Mobina Khatoon (mother of the victim), P.W. 4 / Md. Wasiullah (neighbour) and P.W. 5 / Md. Manzoor (neighbour of the appellant) have turned hostile. The Investigating Officer- Sri Raghbir Das has been examined as P.W. 7.

5. During the trial fardbyan was proved as Ext. 1/3 whereas signature of Mobina Khatoon (P.W. 2) and Md. Rafique Ansari (P.W. 6) on the fardbyan was got exhibited as Ext. 1/1 and Ext. ½ respectively. The forwarding on the fardbyan by Officer -in-charge has been marked as Ext. ¼ and injury report has been marked as Ext. 2.



6. After completion of evidence circumstances and evidences brought against the appellant were explained to him and on 23.04.2012 his statement under Section 313 of the Cr.P.C. was recorded in which he claimed to be innocent and examined one witness as defence witness namely - Md. Mukhtar as D.W. 1. D.W. 1 was examined to suggest as if the appellant was having clean antecedent.

7. Mr. Md. Ziaul Quamar, learned counsel for the appellant after placing entire evidences has argued that prosecution has not been able to establish its case beyond all reasonable doubts. He submits that during the trial prosecution has miserably failed to explain the reason for delay in lodging F.I.R. He submits that admittedly occurrence had taken place in the night of 11.02.2011 whereas fardbyan was got recorded on 13.02.2011 at 8.00 A.M. without any explanation in respect of delay. He submits that delay in recording fardbyan suggests that victim since was earlier annoyed by the activities of the appellant and this was the reason that a false case was instituted. Learned counsel for the appellant has further argued that despite the fact that it was the prosecution case that in the occurrence profused bleeding had taken place from private parts of the victim, neither clothes soaked with blood was seized nor it was sent for its examination to



Forensic Science Laboratory. It has been emphatically argued that in the case mother and own sister of the victim has not supported the case. It has been argued that brother of the victim, who was examined as P.W. 6 is only a hearsay witness. According to learned counsel for the appellant injury report i.e. Ext. 2 also has not corroborated oral evidence, and as such, it is a fit case in which this court may interfere with the judgment of conviction and sentence.

8. Sri Satya Narayan Prasad, learned Additional Public Prosecutor opposing the Appeal has argued that it is specific case in which the victim in categorical words has deposed as to how while she was sleeping in the house of the appellant, in the night was raped by the appellant. In the occurrence the victim received serious injuries on her private part and blood started oozing out and this was the reason that she was carried to hospital. In hospital O.D. slip was issued and thereafter Police Officer recorded fardbyan in the morning on 13.02.2011. The doctor who examined the victim had examined her on the next day i.e. in the morning of the date of occurrence (i.e. 12.02.2011). He submits that though learned counsel for the appellant has taken the plea regarding non explaining of delay in lodging fardbyan, in view of evidence of P.W. 7 / the Investigating Officer, it is evident that he has properly



explained the delay in recording fardbyan. He submits that Investigating Officer has stated that after receiving O.D. slip on 12.02.2011 he rushed to hospital but the victim was in unconscious state of mind and as such, on the next day in morning he recorded fardbyan. According to learned Additional Public Prosecutor oral evidence has been corroborated by medical evidence since injuries on private parts of the victim was noticed by the doctor / P.W. 8

9. Besides hearing learned counsel for the parties, we have minutely examined the evidence on record. However before proceeding it would be necessary to first refer to the evidence of the victim, who has been examined as P.W. 3 in the present case. The victim in her evidence has virtually reiterated what she had stated in her fardbyan. In her evidence she stated that she was a student of Class VII in Middle School Araria R.S. and she had lodged case against Subhan Miya (appellant). The name of her elder sister is Afsana (P.W. 1). She was married in Araria with Subhan (appellant). Her sister Afsana had delivered a male child and thereafter Afsana (P.W. 1) had called the victim to her in-law's house, then she went there. In the night of the date of the occurrence, while she was sleeping in the house of appellant, the appellant had forcibly committed rape and thereafter blood from



her private parts started oozing out. She raised alarm and explained the entire fact to her sister and other witnesses who had assembled there. Her sister on a rickshaw carried her to Government hospital, Araria where she was treated. In hospital Daroga Ji had recorded her fardbyan which was read over to her and after finding it correct she had put her signature. She further stated that she had explained regarding the occurrence to her mother (P.W. 2) and her brother – Md. Rafique Ansari (P.W. 6). He proved her signature as well as signature of her mother and brother on the fardbyan which were marked as Ext. 1, 1/1 and ½ respectively. This witness was cross- examined at length, however, nothing could be extracted to create any doubt on the credibility of her evidence. Lastly a suggestion was given that she received injuries since she had fallen from bed, however such suggestion was flatly denied by the victim.

10. P.W. 1 / Afsana Khatoon (sister of victim) and P.W. 2 – Mobina Khatoon (mother of victim) since had not stated exactly what they had stated during investigation under Section 161 of the Cr.P.C. they were declared hostile, however, in examination- in- chief both the witnesses had accepted that on the date of occurrence the victim was in the house of the appellant. This fact has also been admitted that the victim had received



injuries on her private parts, however, a U -turn was taken by them that such injury was caused due to fall from bed. Accordingly, first part of their evidence can be taken into account which corroborates that on the date of occurrence the victim was in the house of the appellant and she had received injuries on her private parts.

11. P.W. 4 / Md. Wasiullah and P.W. 5 / Md. Manzoor, who were neighbours of the appellant had flatly refused to say the truth, and as such, they were declared hostile however their attention to their previous statement was drawn.

12. P.W. 6 – Md. Rafiuqe Ansarai is the elder brother of the victim. In his evidence he stated that after the occurrence when he reached hospital he was informed by the victim regarding the occurrence and the victim explained to her that she was raped by appellant and this was the reason of her injury. It may be noticed that victim (P.W. 3) in her evidence has stated that she had explained entire fact to her mother and her elder brother. This has also been corroborated from the fact that victim / P.W. 3 in paragraph no. 2 of her evidence has categorically stated that in presence of her mother and elder brother -Md. Rafique Ansari Police had recorded fardbyan and on the said fardbyan her elder brother- P.W. 6 / Md. Rafique Ansari had also put his signature.



This witness has also stated that blood from private parts of the victim was oozing out. This witness was also cross examined at length however nothing could be extracted to raise any doubt on the evidence of P.W. 6.

13 P.W. 8 / Dr. Hussan Ara Bibi on 12.02.2011 was posted as Medical Officer in Sadar Hospital, Araria and she had examined the injured (victim) and noticed the following facts:-

“Height 4ft 8 inch ,
weight -47 Kg
Axillary and Public hairs unerected
Breast -developing
Teeth - Upper 14
Lower - 14
total- 28

Injuries:- No marks of fresh injury found on any part of body except **private part**.

Hymen ruptured teared vagina. Second degree 1/2”x 1/4” muscle deep bleeding wound.

Microscopic examination of swab taken from vagina – No spermatozoa either dead or alive present in any of microfetal

X Ray Pelvis shows eppiphis of elise present breast not appeared. Normally it appears at the age of fourteen in female.

In my opinion she is about **12-13** (twelve to thirteen) years old. About rape- she has been attempted for sexual assault within 24 hours.

M.I. One black til on right jaw”

She proved the injury report which was marked as Ext.

2. In her cross- examination she categorically stated that except finding injuries on private parts she had not noticed any other injuries. It is pertinent to be noticed that victim’s age was assessed by the doctor in between 12-13 years and victim consistently right from fardbyan had stated that she was aged about eight years. In



any event fact remains that victim was minor on the date of occurrence.

14. The Investigating Officer /Sri Raghbir Das has been examined as P.W. 7 . In his evidence he has proved the fardbyan which was marked as Ext. 1/3. He further proved endorsement and forwarding made by Officer- in -charge of Araria Police Station, which was marked as Ext. ¼. In paragraph 11 of his cross evidence he has stated that on 12.02.2011 he had received O.D. slip and since victim in hospital was in unconscious condition he recorded fardbyan on the next day. The Investigating Officer had recorded statement of witnesses on the date of recording of fardbyan itself and thereafter he visited the place of occurrence however he did not find any mark at the place of occurrence. It is true that during investigation the Investigating Officer had not seized the clothes of the victim but in his evidence P.W. 7 has stated that since at the time while he recorded fardbyan the victim was wearing clothes, he did not take any step for seizing the clothes.

15. On examination of aforesaid entire evidence this fact is very much clear that as per evidence of P.W. 3 (victim) as well as evidence of P.W. 6 / Md. Rafique Ansari (elder brother of victim) the prosecution has established the case of rape



committed by the appellant on her (victim). The oral evidence has also been corroborated by medical evidence i.e. Ext. 2 and the evidence of P.W. 8 /Dr. Hussan Ara Bibi. P.W. 1 (elder sister of victim as well as wife of appellant) and P.W. 2 / Mobina Khatoon (mother of victim) has not exactly supported the prosecution case but to the extent that on the date of occurrence the victim was staying in the house of the appellant has been accepted by both the witnesses. They have not supported further case of the prosecution. One can draw an inference about the reason for not supporting the case. P.W. 1 is non else but the wife of the appellant and obviously she has not truthfully supported the prosecution case. Similarly, mother - P.W. 2 with a view to save her son-in-law has taken U-turn. Even then for the time being, if the evidence of P.W. 1 and P.W. 2 is not taken into account, the evidence of P.W. 3, P.W. 6 and P.W. 8 is itself sufficient to draw the inference that prosecution has proved its case beyond all reasonable doubts. Accordingly, there is no reason to interfere with the judgment of conviction and sentence, and as such, the judgment of conviction dated: 16th April 2013 and sentence dated- 23.04.2013 passed by Sri Jitendra Nath Singh, learned Adhoc Additional Sessions Judge 4th, Araria in Sessions Trial No. 811 of 2011 / Trial No. 712 of 2012 (arising out



of Araria P.S. Case No. 66 of 2011) is approved and the Appeal stands dismissed.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

praful/-

AFR/NAFR	AFR
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