IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2932 of 2019

Arising Out of PS. Case No.-43 Year-2018 Thana- INARWA District- West Champaran

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DEEPAK MAHTO @ Deepak Kumar, Son of Gudar Mahto, Resident of Village- Khamhiya, P.S.- Inarwa, District- West Champaran.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :

For the Appellant/s : Mr.N. K. Agrawal, Sr. Advocate.
Mr. Vijay Anand, Advocate.

For the Respondent/s : Mr. Zeyaul Hoda, APP.

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

C.A.V. JUDGMENT

Date :12-04-2021

The sole appellant Deepak Mahto was charged under Section 376 of the Indian Penal Code and Section 6 of the POCSO Act in connection with Inarwa P.S. Case No. 43 of 2018 corresponding to CIS No. 218 of 2018. However the learned trial Judge convicted the appellant for offence under Section 18 of the POCSO Act for the reason that the trial Judge was of the view that no case of aggravated penetrative sexual assault was made out rather a case of attempt to commit penetrative sexual assault was proved against the appellant. Accordingly, the learned Special Judge, POCSO, West Champaran at Bettiah

sentenced the appellant to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 2 lacs. In default of payment of fine, two years further imprisonment was ordered. Out of the aforesaid fine amount, Rs.1 lac was ordered to go to the victim. The judgment of conviction dated 12.06.2019 and order of sentence dated 15.06.2019 are under challenge in this appeal.

2. The prosecution case as disclosed in the written report (Ext.2) in the pen of Isteyaq is that the prosecutrix aged about 13 years was in her house in village-Khamhiya, P.S.-Inarwa, District-West Champaran. On 16.06.2018 at about 12 night, the appellant entered into her house and forcefully established sexual relationship. The informant tried to make alarm, but the appellant pressed on her mouth. Further allegation is that the appellant lifted her and was carrying her to commit her murder, but the family members came and the appellant was apprehended and was handed over to the police.

3. On the basis of the statement aforesaid, Inarwa P.S. Case No. 43 of 2018 was registered on 17.06.2018 under Section 376 IPC and Section 6 of the POCSO Act vide Ext.-2.

4. After investigation, the police submitted chargesheet under Sections 376 and 511 of the Indian Penal Code and Section 6 of the POCSO Act. Accordingly the

appellant was put on trial.

In the statement recorded under Section 164 Cr.P.C. on 18.06.2018, the prosecutrix stated that the appellant had not ravished her rather attempted to commit rape, but he could not succeed. A copy of the statement under Section 164 Cr.P.C. is Ext.-X.

During trial, the prosecution examined altogether seven witnesses. The medical examination report of the victim is Ext.-5 on the record, whereas chargesheet submitted by the police under Section 173 Cr.P.C. is Ext.-4. The production cum seizure list is Ext.-3.

5. Learned counsel for the appellant contends that none of the prosecution witnesses produced have supported any allegation against the appellant, hence the case is of “no evidence”, but the learned trial Judge misunderstood the legal principles and relied upon the statement recorded under Section 154 Cr.P.C. as well as under Section 164 Cr.P.C. for coming to the conclusion that the prosecution has proved the charge against the appellant beyond reasonable doubt. Learned counsel contends that Dr. K.M.P. Parwe who had performed radiological examination of the prosecutrix was not produced in Court nor Dr. Rubi Kumari who had examined the victim was produced by

the prosecution rather injury report has been proved by Dr. Keshwar Jamil (PW-7) who was not present at the time of examination of the victim. Hence his evidence was completely hearsay evidence and the accused prejudiced in not getting opportunity to cross-examine the expert.

6. Learned counsel for the State contends that a victim of rape hesitates in disclosing what has happened against her openly at each and every opportunity faced by her and the statement of the prosecutrix as PW-1 would reveal that she has supported her earlier statement given before the police or before the Magistrate. Therefore, she is wholly a reliable witness and corroboration is not the requirement of law. Hence, the judgment of conviction requires no interference.

7. PW-1, the prosecutrix of the case has deposed as follows:-

> "I am informant of this case. After the occurrence, I was medically examined. A lady doctor had examined me. In the past also, I had made statement before the Court. A female constable had accompanied me for statement along with Daroga Jee. The same female constable took

me to M. J. K. hospital before a doctor. A female doctor there-at examined me. In Court, "Judge Sahab" had recorded my statement in the past and I had stated everything correctly before him."

"On my complaint, the police had come into action and investigated the case. It is not a fact that the parents had expelled me from the house. I am still residing with my parents. At the police station, a lady police officer had made queries from me. Police had arrested the accused. I am not in love with that boy nor I want to marry with him."

"At the time of occurrence, my family members were not at the house. On their arrival, I disclosed about the occurrence to them. The villagers caught the accused Deepak Mahto and handed over him to the police."

"The occurrence took place in the night. At present, I could not remember what

I had stated before Judge Sahab. If the boy comes before me, now I could not recognize him. At the time of occurrence, father was in jail and mother was not in the house."

8. The aforesaid statement of the prosecutrix does not disclose as to what offence was committed against her.

Evidence given in a Court on oath coupled with opportunity of cross-examination to the accused has great sanctity and that is why the same is called substantive evidence. It is well settled by a catena of judicial pronouncements that statements under Section 154 Cr.P.C. or under Section 161 Cr.P.C. or under Section 164 Cr.P.C. can be used for corroboration and contradictions only.

9. In **R. Shaji v. State of Kerala** reported in **(2013) 14 SCC 266**, the Hon'ble Supreme Court said that a proposition to the effect that if statement of a witness is recorded under Section 164 Cr.P.C., his evidence in Court should be discarded, is not at all warranted. As the defence had no opportunity to cross-examine the witness whose statement was recorded under Section 164 Cr.P.C. or under Section 161 Cr.P.C., such statements cannot be treated as substantive evidence.

10. In **Dharma Rama Bhagare v. State of**

Maharashtra reported in **(1973) 1 SCC 537**, the Hon'ble Supreme Court said that the first information report is never treated as a substantive piece of evidence. It can only be used for corroborating or contradicting its maker when he appears in Court as a witness.

11. In **Utpal Das and Anr. v. State of West Bengal** reported in **(2010) 6 SCC 493**, the Hon'ble Supreme Court said as follows:-

> "15. It is needless to restate that the first information report does not constitute substantive evidence. It can, however, only be used as a previous statement for the purposes of either corroborating its maker or for contradicting him and in such a case the previous statement cannot be used unless the attention of witness has first been drawn to those parts by which it is proposed to contradict the witness. In this case the attention of the witness (PW-14) has not been drawn to those parts of the F.I.R. which according to the appellants are not in conformity with her evidence.
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> 16. Likewise the statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence of truth of the facts but may be used for

> contradictions and corroboration of a witness who made it. The statement made under Section 164 Cr.P.C. can be used to cross-examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness. In the present case it was for the defence to invite the victim's attention as to what she stated in the first information report and the statement made under Section 164 Cr.P.C. for the purposes of bringing out the contradictions, if any, in her evidence. In the absence of the same the court cannot read the Section 164 statement and compare the same with her evidence."

12. The impugned judgment reveals that the learned trial Court has accepted, the statements of the prosecutrix made prior to her examination as a prosecution witness as substantive evidence. As such, the impugned judgment suffers from non-application of correct principle of law while appreciating the evidence during a criminal trial.

13. PW-2 Mona Khatoon is mother of the prosecutrix. In her examination-in-chief, she stated that when she woke up in the night and came out of the room, the accused had already fled away and the prosecutrix disclosed about the occurrence. In the

cross-examination, she stated that she does not know who had entered into her house. Subsequent to the occurrence, she could not make any attempt to know about the person who had entered into the house. The witness is not specific what the victim disclosed to her about the incident nor the victim (PW-1) stated that she had disclosed anything to PW-2.

14. PW-3 Sabra Khatoon is sister of the father of the prosecutrix. PW-4 Saddam Mian is full brother of the prosecutrix. Both the witnesses have been declared hostile by the prosecution. Though their attention was drawn to their statement made before the police which they denied but attention of the investigating officer PW-6 Manoj Kumar was not drawn to the confrontations to PW-3 or PW-4. Unless Manoj Kumar deposes that PW-3 and PW-4 had made such contrary statement before him that has got no legal value. Therefore, the fact remains that even the family members of the prosecutrix have not supported the prosecution case.

15. PW-5 Vina Devi had recorded the statement of the victim under Section 161 Cr.P.C. Since she was a female and the investigating officer PW-6 Manoj Kumar was a male, recording of statement by the female officer was not against the mandate of Section 161 Cr.P.C. However unless the victim deposes that

she had made such statement to PW-5, the testimony of PW-5 is not a direct evidence and as such is fit to be rejected only for the reason that oral evidence must be direct.

16. As noticed above, none of the doctors who had occasion to examine the victim were produced as witness during the trial. PW-7 deposed that since the Dr. Rubi Kumari was on maternity leave and was likely to join on 15th of June, she could not appear before the Court. PW-7 was examined on 31.05.2019. Therefore, attendance of Dr. Rubi Kumari was feasible after 15th of June 2019. Hence non-examination of Dr. Rubi Kumari or the doctor who had performed the radiological examination would be fatal for the prosecution case as the accused could not get opportunity to cross-examine them. Moreover, their report at Exhibit-5 is not a substantive piece of evidence unless the expert appears before the Court and supports the medical performance done by them. Therefore, in fact, this is a case of no evidence. Hence the impugned judgment of conviction and sentence is fit to be set aside.

17. The learned trial Judge has referred to Sanskrit shloka and gajals of Late Jagjit Singh while awarding the sentence against the appellant. A trial Judge especially a Judge having power to award death sentence must have correct

knowledge of legal principles and zeal to its proper application while exercising the most onerous responsibility of taking decision on the life and liberty of person before him. Lack of knowledge of legal principles leads to miscarriage of justice and unnecessary harassment to the parties to the litigation. Bias and prejudices, conjectures and surmises and personal views contrary to the material on the record have no place in the court of law.

18. The impugned judgment reveals that the trial Judge has accepted the conflicting prosecution case as disclosed in the statement of the prosecutrix under Section 154 Cr.P.C. and under Section 164 Cr.P.C. for recording conviction without appreciating the fact that the aforesaid are not substantive piece of evidences and the evidence brought during trial does not disclose commission of any offence or identity of the perpetrator of the offence.

19. In the result, the impugned judgment and sentence passed against the appellant are hereby set aside and this appeal is allowed.

Let the appellant be set free at once.

20. In my view, this judgment as well as the judgment of the learned trial Judge requires to be forwarded to the

Director, Bihar Judicial Academy to ensure proper academic training to the judicial officers to make them conversant with the correct legal proposition.

21. Hon'ble the Chief Justice may deem it proper that the trial Judge who has passed the impugned judgment needs special training at the Judicial Academy. Hence let a copy of this judgment along with trial court judgment be placed before Hon'ble the Chief Justice for needful.

(Birendra Kumar, J)

mantreshwar/-

AFR/NAFR	A.F.R.
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