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**(2003) 03 PAT CK 0022**

**In the Patna High Court**

**Case No : Criminal Appeal No. 433 of 1998 (D.B.)**

Chandra Singh @ Chandar Ghatwar and Dena Hazra @  
Dhena Hansda @ Anil Hansda

**APPELLANT**

**Vs**

The State of Bihar

**RESPONDENT**

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**Date of Decision : 17-03-2003**

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 34, 366, 376, 380, 451

**Citation : (2003) 2 PLJR 439**

**Hon'ble Judges : B.K. Jha, J;A.K. Sinha, J**

**Bench : Division Bench**

**Advocate : Bharat Lal and Ram Naresh Singh, for the Appellant; Bhagya Narain Gupta, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

B.K. Jha, J.—Both the appeals arise out of the judgment and order dated 21st July, 1998 passed by the then learned Addl. Sessions Judge, 1st Jamui, in Sessions Trial No. 27/1996, 3/1996, so, they were heard together and are being disposed of by this common judgment.

2. All the four Appellants have been convicted and sentenced to R.I. for one year with fine of Rs. 1000/- for the offence u/s 451/34 of the Indian Penal Code. In case of default in payment of fine they have been sentenced to six months imprisonment. They have again been convicted and sentenced to R.I. for seven years with fine of Rs. 2,000/- for the offence u/s 366/34 of the I.P.C. In default of payment of fine they have been sentenced to imprisonment for a period of 1 1/2 years. They have further been convicted and sentenced to R.I. for twelve years with fine of Rs. 3,000/- for the offence u/s 376(g) of the I.P.C. In case of default of payment of fine they have been sentenced to imprisonment for a period of two years. All the sentences, however, have been ordered to run concurrently.

3. The incident occurred in the night of 28th/29th December, 1994 in Chakai Colony of Village-Sahna, P.S. Chakai, District-Jamui. In the relevant night while the informant/prosecutrix, Priyashila Besra, P.W. 2 was sleeping in the rented house of Triveni Yadav, at about 2 A.M. five persons came at Veramdah and began to push her door. When she wanted to know their identification, they created an impression that the Officer-in-Charge of Chakai Police Station had been at the door and threatened to break open the same in case of her failure to open the door. On the impression that the Officer-in-Charge of Chakai Rs. was present at her veramdah she opened the door. As soon as she opened the door all the five persons went inside the room, caught hold of her tuft, hands and dragged her out of the room. She raised alarm of Bachao-Bachao. On hearing her saving outcry, when Hari Yadav, Advocate, and Narain Yadav, living in the adjacent room tried to come out, the miscreants threatened them with dire consequences and locked their room from the outside. Thereafter all the five persons gagged the mouth, covered the eyes of the informant/prosecutrix, forcibly lifted her and proceeded towards east. After covering some distance they uncovered her eyes and freed her to move but kept her mouth gagged. They took her to a lonely place in paddy field in Nagri Bahiyar in the east of Nagri-Village, covered her eyes, undressed her and all the five persons committed rape one by one. They also fisted and slapped her. After commission of the offence of the rape they uncovered her eyes and threatened with dire consequences in case of divulging the incidents to any one. She identified the accused Appellants, Etawa Soren and Kam Deo Hazra, she failed to identify the rest three accused persons but claimed to identify them by seeing their looks. Then she returned back weeping to the colony and found the witnesses, Hari Yadav, Advocate, Narah Yadav, Rajdeo Choudhary, Prem Kumar, Prakash Rai, Titu Pandit, there and narrated them about the incident.

4. In the very night of 28th/29th December, 1994 at 4 A.M. A.S. I. Baldeo Mahto of Chakai Police Station recorded the fardbeyan (Ext. 3) of the informant, Priyashila Besra, in the house of Triveni Yadav, Sahna Colony Chakai. On the basis of her fardbeyan a formal F.I.R. (Ext. 4) was drawn up and a case was registered against the accused Etawa Soren and Kamdeo Hazra under Sections 452,366 and 376/34 of the I.P.C. On completion of investigation police submitted chargesheet against five accused persons, namely, Kamdeo Hazra, Etawa Soren,. Sukhdeo Hazra, Chandra Ghatwar @ Chandra Singh and Dena Hazra (c) Dena Hansda under Sections 452,366 and 376/34 of the I.P.C. After commitment of their case they were put on trial for the charges under Sections 366, 376, 451 and 380 of the I.P.C. before the then learned Additional Sessions Judge 1st, Jamui. The trial ultimately culminated in the acquittal of the accused, Sukhdeo Hazra and in the conviction and sentence of the rest four accused persons as referred above.

5. The defence of the Appellants is that they used to object Rajdeo Choudhary from utilising the prosecutrix/informant Priyashila Besra for immoral conduct by him. So, at his instance they have been falsely implicated in this case. No

witness has been examined on behalf of the defence.

6. The prosecution has examined altogether six witnesses in support of its case. P.W. 1 is Rajdeo Choudhary P.W. 2 is the informant, Priyashila Besra, P.W. 3 is Dr. Nirmala Singh who examined the informant/prosecutrix, P.W. 4, Murari Prasad, P.W. 5, Shankar Ram and P.W. 6, Rajendra Prasad Yadav are the formal witnesses. P.W. 4 has proved the fardbeyan (Ext. 3) and formal F.I.R. (Ext 4). P.W. 5 has proved the case diary of Chakai P.S. Case No. 81/94 (Ext. 5) and P.W. 6 has proved the T.I. Parade Charts (Ext. 6 and 6/1). The Investigating Officer and the Magistrate holding the Test Identification Parade have not been ? examined in this case.

7. The evidence of Dr. Nirmala Singh (P.W. 3) is that while she was posted at Sadar Hospital, Deoghar, as Civil Assistant Surgeon, she examined Priyashila Besra on 29.12.1994 and she found the following:

Weight 49 K.G. Weight 49 K.G.

Height 4" 8 1/2" Height 4" 8 1/2"

Teeth upper left side Teeth upper left side 08 08 Total

upper right side upper right side 0707 07 30 teeth.

Lower right side Lower right side 07 07

Lower left Lower left 0808 08

Both exillary and pubic hair were present.

Breast was well developed.

(i) One abraisson on left side of scalp 4" x 1/2"

(ii) One abraisson on right side of cheek 1/4" x 1/4"

(iii) Linear abrasion on posterior surface of right fore-arm 1" x 1/3"

(iv) Redness of right eye of middle part was present.

On internal examination no mark of injury on private part of body was present. Old and healed hymen tear was present. No bleeding was present. Uterus was of normal size and anteverted tenderness was present on per vaginal examination. Vaginal swab was taken and was sent for pathological examination.

X-ray of pelvic bone was done by X-ray photo No. RC-2 dated 30.12.1994. Eliacorest was completely fused with eliac bone.

Age of external injury No. (i), (ii) and (iii) was within 24 hours. Nature of injuries No. (i), (ii) and (iii) were simple and caused by hard and blunt substance. It may be by dragging.

On the basis of pathological examination report she found epithelial cells,

lecocytis. R.B.C. + spermatozoa present. According to her the age of victim was more than 18 years and sign of sexual intercourse was present.

She further deposed that the victim Priyashila Besra was examined by a Board consisting of five Doctors, namely, 1) Dr. P. Chandra, (2) Dr. N.P. Das, 3) Dr. Geeta Mishra and 4) the Dy. Superintendent and 5) herself of the hospital on the requisition of the Police Officer. She proved the medical report (Ext. No. 2). In the cross examination, she further stated that the victim was brought before her by the Chakai Police at about 7.30 P.M. She had received the pathological report on 30.12.1994 which was not before her at the time of deposition. The finding that old and healed tear hymen was present, indicated that the victim was addicted to sexual intercourse. The presence of epithelial was a matter of regular and natural discharge of vagina. She further deposed that it was not mentioned in the pathological report as to whether the spermatozoa found in the private part were dead or alive.

8. The informant-prosecutrix, Priyasheela Besra, P.W. 2, was first examined on 22.7.1997. Her evidence is that in the year 1994 she was working in Chakai Jal Shiksha Kendra and was living in the rental house of one Triveni Yadav. In the night of 28.12.1994 while she was sleeping in the room, in the midnight she heard knocking sound at her door from the outside. When she wanted to know their identification, they created an impression that the Officer Incharge of Chakai was present at the door and threatened to break open the same in case of non opening of the door by her. In the mean time they pushed open the door, five miscreants entered in her room and caught hold of her tuft. On the first day of her evidence out of the four accused present in the dock, she identified the accused-Appellants, Etawa Soren and Kamdeo Paswan. Out of the two accused, identified at the T.I. Parade, she identified the accused, Anil Hansda @ Dhena but failed to identify Chandra Singh in the dock. She has further stated that when all the five accused persons caught hold of her hair she raised alarm whereupon they assaulted, gagged her mouth, forcibly lifted and proceeded towards east. They took her to a lonely place in a field, undressed her and all of them committed rape one by one. After commission of the rape they threatened with dire consequences in case of divulging the incidence to any one and they made good escape from there. Thereafter she returned back to her Dera. She found the witnesses, Rajdeo Chaudhary, P.W. 1, Prem Kumar, Hari Yadav and Narayan Yadav, there and narrated to them about the occurrence. Her further evidence is that the Officer Incharge came at her Dera. recorded her fardbeyan and she put her signature there on (Ext. No. 1). Her statement was also recorded by the Magistrate and she put her signature (Ext. No. 1/1). - Her further examination in chief was resumed on 24.7.1997. She has further deposed that she was medically examined by a Doctor of Deoghar Sadar Hospital. The Officer Incharge seized her clothes and prepared a seizure list in presence of the witnesses. She signed the seizure list (Ext. No. 1/2) and the witnesses, Rajdeo Chaudhary and Narayan Rana also put their signatures thereon (Ext. Nos. 1/3 and 1/4). On the second day of her evidence, i.e., 24.7.1997, she identified the accused Appellant,

Chandradeo Singh, out of the two accused, identified at the Test Identification Parade. She has further stated that all the five accused persons, present in the dock, committed rape upon her, one by one. She has further stated that she was previously living in the rental house of one Logda Soren at Ambataar and lived there about fifteen days. She left that place because of evil intention of the accused, Etawa Soren of Ambataar and came to Chakai. She has further stated that Rajdeo Choudhary, was running the institution in his house and the payment was being made by him. Her further evidence is that they first caught hold of her hair, covered her eyes and gagged her mouth. Thereafter they took her to a lonely place, uncovered her eyes and pinned her down on the ground. They again covered her eyes and committed rape one by one. After commission of the rape her eyes were uncovered. Her further evidence is that her statement was recorded first at her Dera and thereafter she went to the Police Station at 6 A.M. and her further statement was recorded there. She was sent to Deoghar Hospital and was medically examined there. She has further stated that after the occurrence she lived for one month in Chakai and then again came back to Madhupur. At para 14 her evidence is that after six months of the occurrence test identification was held in which she was noticed and participated the parade. Her further evidence is that Kamdeo Hazra was known to her from before the occurrence. At para 20 her evidence is that her statement was recorded by the Magistrate in which she had stated that except Etawa Soren and Kamdeo Paswan, rest three had masked their faces.

The evidence of P.W. 1, Rajdeo Chaudhary, is that in the intervening night of 28/29.12.1994 while he was in his house, about 2 A.M., he heard the outcry of Priyasheela Besra, P.W. 2. He went to the living room of Priyasheela Besra and found that the electric bulb was on, door was open but she was not present there. He heard some sound coming from adjacent room and found the room closed from the outside. He opened the room and found Hari Yadav and Narah Yadav there. He learnt from them that the victim, Priyasheela Besra, was kidnapped by the miscreants and was taken away from her room. A search was made but she could not be located. In the mean time Priyasheela Besra came there and narrated about the occurrence with identification of rapists, Etawa Soren and Kamdeo Paswan.

9. Thus, the prosecution case rests on the sole testimony of the Victim-prosecutrix-informant, Priyasheela Besra, P.W. 2. Her evidence reveals that in the night of 28/29.12.1994 while she was sleeping in her room, and electric bulb was on she heard knocking sound at her door. When she wanted to know their identification, they created an impression that the Officer Incharge of Chakai Police Station was at that door and threatened to break open the same in case of non opening of the door by her. On the impression that the Officer Incharge of Chakai Police Station had come she opened the door. As soon as she opened the door all the five accused persons entered in the room, forcibly abducted and took her to a lonely place in a field in the east of Nagari Bahiya of Deonagari and committed gangged rape. She identified the accused Appellants, Etawa Soren

and Kamdeo Hazra and claimed to identify the rest three by seeing their faces. On 29.12.1994 she was examined by a board of five Doctors including Nirmala Singh, P.W. 3 at Sadar Hospital, Deoghar and the commission of rape upon her was affirmed. Further Test Identification Parade was held on 5.7.1995 and 22.7.95 in which the prosecutrix informant, Priyasheela Besra, identified the two accused, Chandra Singh @ Chander Ghatwar and Dena Hazra @ Dena Hansda @ Anil Hansda.

10. The learned Counsel for the appellants in Criminal Appeal No. 433 of 1998 contended that the Magistrate holding the Test Identification Parade has not been examined in the case and so the T.I. Charts Ext. Nps.6 and 6/1) are not-admissible, the trial court wrongly convicted both the Appellants on the basis of the inadmissible documents of T.I. Charts. He has placed his reliance on the case of Ramadhar Chamar and Anr. Appellants v. State of Bihar...Respondent, reported 1986 C.L.J. 684 : 1986 PUR 27. In this case it has been held that

where a chart of Test Identification Parade is not proved by the, Magistrate who held the T.I. Parade and full particulars of the identification are not given by him, such report is no evidence of the identification. Conviction of the accused on the basis of such report is illegal.

On the other hand, learned Counsel for the State contended that the evidence a witness about the identification in court substantive evidence and the evidence the Test Identification is only corroborative of the substantive evidence. He has placed his reliance on a case of Naresh Kumar Mahto and Ors.... Appellants v. State of Bihar, reported in 1998 (3) P.L.J.R. pag 725 wherein it has been observed that

The test identification parade belongs to the investigation stage and the evidence of test identification parade is not a substantive evidence-evidence given by the witnesses regarding identification in court is a substantive evidence and the evidence of the test identification parade is used only to corroborate the substantive evidence given in court-there is no rule that in absence of earlier test identification parade the evidence of the witness regarding identification in the court is to be rejected outright.

Thus, there is no merit in this contention of the learned Counsel for the Appellants.

11. The learned Counsel for the Appellant, Chandra Singh @ Chander Ghatwar in Criminal Appeal No. 433 of 1998 further urged that the informant-prosecutrix, Priyasheela Besra, P.W. 2, failed to identify him in dock on the first day of her evidence on 22.7.1997 but identified him on the second day of her evidence on 24.7.1997 which creates a doubt about his identification by her and there was no, whatsoever, substantive evidence to warrant his conviction. It must be mentioned here that the Appellant, Chandra Singh @ Chander Ghatwar, was not identified on the first day of the evidence of the informant but his identification on the second day of her evidence was not challenged by the defence. This being

the position the defence contention that the informant-prosecutrix gave a tutored false version in order to falsely implicate the Appellant, Chandra Singh @ Chander Ghatwar, must be thrown overboard. Thus, I find no substance in the submission of the learned Counsel for the Appellant, Chandra Singh @ Chander Ghatwar.

12. The learned Counsel for the Appellants lastly contended that there was delay of two days in forwarding the F.I.R. to the Magistrate and no plausible explanation was given by the prosecution in respect of the said delay, so this delay is fatal to the prosecution case. In the present case, the F.I.R. was registered on 29.12.1994 and was sent to the Magistrate on 31.12.1994. During this intervening period the informant-prosecutrix, Priyasheela Besra was medically examined on 30.12.94 and ancillary steps were taken in course of the investigation of the case. In this context reference may be made of a case of State or U.P... Appellant v. Gokaran and Ors.. Respondent, reported in AIR 1985 SC Page 131. It has been held in this case that

where the steps in investigation by way of drawing inquest report and other panchnamas started soon which could only follow the handing over of F.I.R., the delayed receipt of the special report by District Magistrate would not enable the court to dub the investigation as tainted one nor could F.I.R. be regarded as ante-timed and ante-dated.

This contention of the learned Counsel for the Appellants also has got no merit.

13. The position of law is that if the evidence of the victim does not suffer from any basic infirmity, there is no reason to insist on corroboration except from medical evidence. Testing the evidence of the informant-prosecutrix, Priyasheela Besra, P.W. 2, from this perspective, her evidence inspires confidence. I refuse to accept the suggestion made by the defence that they have been falsely implicated in this case at the instance of Rajdeo Chaudhary, P.W. 1. It is not alleged that Priyasheela Besra, P.W. 2. the informant had any motive to falsely implicate these Appellants. The medical evidence provided by P.W. 3, Nirmala Singh, fully supports the finding of the court below that they committed rape upon her one by one. The conclusion reached by the trial court requires no interference by this Court.

14. Now, the only question remains for consideration is regarding the sentence. In view of the fact that they have got no criminal antecedent, I am of the opinion that the ends of justice will be served if the substantive sentence imposed by the trial Court for the offence u/s 376(g) of the I.P.C. is reduced from 12 years to 10 years. The sentence of fine and in default of fine will of course remain undisturbed. Their sentences imposed in respect of the offence under Sections 451/34 and 366/34 of the Indian Penal Code will remain intact.

15. With the above modification both the appeals are dismissed. The Appellants, Etawa Soren and Kamdeo Hazra, are in custody. The Appellants, Chandra Singh @ Chander Ghatwar and Dena Hazra @ Dhena Hansda @ Anil Hansda are on

bail, so their ail bonds are cancelled with a direction to surrender in the court below and all the four Appellants will serve out the remaining period of imposed sentence.

A.K. Sinha, J.

16. I agree.