

**(2015) 08 PAT CK 0079**

**In the Patna High Court**

**Case No :** Criminal Appeal (SJ) Nos. 162 and 592 of 2007

Chandradhan Sharma and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

**Date of Decision :** 24-08-2015

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 34, 376, 395, 498A

**Citation :** (2015) 08 PAT CK 0079

**Hon'ble Judges :** Gopal Prasad, J

**Bench :** Single Bench

**Advocate :** Baxi S.R.P. Sinha, Senior Advocate, Sanjay Kumar and Rahul Nath, for the Appellant; Binod Bihari Singh, APP, Advocates for the Respondent

**Final Decision :** Allowed

## Judgement

Gopal Prasad, J—Two appeals having been heard together are being disposed of by this common judgment as two appeals arise out of the same judgment dated 20th December, 2006, passed by Shri Virendra Kumar Srivastava, learned the 1st Sessions Judge, Rohtas at Sasaram in Sessions Trial No. 365/84 of 2001/2001, by which the appellants have been convicted for offence under Sections 376/34 and sentenced to undergo rigorous imprisonment for the period of ten years and payment of fine of Rs. 2,000/- each and in default of payment of fine they had to suffer simple imprisonment for the period of one month.

2. The prosecution case as alleged in the written report by the informant Dr. Ram Ekbal Sharma P.W.3 that while he was watching T.V. in between the night of 10th -11th January, 2000 at about 1.00 A.M. then he felt sound of foot step of some of persons then he opened the door of his room then he saw accused persons Khakhanu Thakur, Purnwasi Thakur, Kapindra Thakur, Kameshwar Thakur, Chandradhan Sharma, Motilal Singh, Ayodhya Prasad along with five unknown persons armed with lathi and gun and the informant was caught by them and was threatened to kill and was also asked to keep mum and thereafter, accused persons looted the house hold articles, cash worth Rs. 2,000/-, jewelleryes, paper

of scooter, five Kishan Vikash Patra and papers of the file of the cases. Thereafter, accused persons locked the informant in a room situated towards south and they had taken the wife of the informant to the Western room and all the accused persons had committed rape upon her one by one and on pretext, the informant's wife had tried to protest then she was assaulted by butt of the gun. It is further alleged that accused persons decamped the cow and calf of the informant. It is further alleged that some day prior to the occurrence Kapindra Thakur threatened to the wife of the informant to withdraw the case against them otherwise they will kill her. The motive of the occurrence as alleged that accused persons are brother-in-law (Sala) and father-in-law and the relative of the informant had raped his second wife on 19.09.1999 for which a case had lodged bearing Case No. 151 of 1999 for offence under Sections 376 of Indian Penal Code and in that case accused persons had tried to compromise but the compromise had not been settled.

3. The case was lodged on the basis of written report received in the police station at about 4.30 P.M. on 11.01.2000 and on the basis of written report, F.I.R. had been lodged at 4.30 P.M. on 11.01.2000. After investigation, charge sheet was submitted and after submission of charge sheet, cognizance was taken against seven named accused persons in the F.I.R. Charges were framed for offence under Section 376/34 and 395 of the Indian Penal Code.

4. Trial proceeded and during trial, seven witnesses were examined by prosecution as P.W. 1 Parvati Devi, P.W.2 Prem Narayan Prasad Sah, a hearsay witness came to support dacoity but not supported rape, P.W. 3 Dr. ram Ekbal Sharma (informant), P.W.4 Sunil Sharma a hearsay witness, P.W.5 Ram Suresh Singh a formal witness only proved F.I.R., P.W.6 Dr. Suneela Singh, who had examined the victim Parvati Devi and P.W. 7 Bhagwat Srivastava who was formal witness proved the injury report formally and the injury on the person of the informant and Court witness No. 1, Punam Devi who was daughter of informant, P.W.3.

5. The defence had also examined four witnesses as D.W.1 Kalavati Devi, who is first wife of the informant, D.W. 2 Chuman Kumari, daughter of the informant, D.W. 3 Nand Kishore Mehta and D.W. 4 Rameshwar Thakur.

6. The defence of the accused persons was that they had been falsely implicated in this case. It had been contended that D.W. 1 Kalavati Devi is first wife of the informant who had filed a case against her husband (informant in this case) for offence under Section 498A of Indian Penal Code and the present case had been lodged in retaliation to withdraw the case filed by the first wife of the informant in which accused persons are father of Kalavati Devi, the first wife of informant and the three sons of the father of Kalavati Devi, i.e., the brothers of Kalavati Devi whereas Chandradhan Sharma is cousin brother of the informant who had been instrumental in arranging the marriage of the informant with Kalavati Devi.

7. During the pendency of the appeal, accused khakhanu Thakur the father of

Kalavati Devi, the first wife of the informant had died and hence trial against him was abetted.

8. The Trial Court taking into consideration the evidence of the witnesses, though, acquitted the appellants from charges levelled against them for offence under Section 395 of Indian Penal Code, but convicted the appellants for offence under Section 376/34 of Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 2000/- each and in default of payment of fine they had suffered simple imprisonment for one month.

9. Learned counsel for the appellants however challenged the order of conviction and sentence recorded against the appellants on the ground that occurrence took place in the night intervening in between 10th -11th January, 2000, but F.I.R. had been lodged on the basis of written report on 11.01.2000 at 4.30 P.M. by the informant P.W.3 the husband of first wife of Kalabati Devi and on the basis of said written report F.I.R. had been lodged on 11.01.2000 at 4.30 P.M. and hence contended that there is great delay in lodging the F.I.R. and contends that allegations itself appears to be absurd, improbable and repugnant to normal common sense that father with three sons will go together to commit rape upon the second wife of the informant who were her son-in-law. It has further been contended that P.W. 3 and P.W. 1 who were informant and his second wife respectively supported the prosecution case but none else had come to support the prosecution case. It is further contended that both the informant and his second wife in their evidences clearly stated that after committing rape, they in the night itself came out of the room in which accused persons had locked their, after broken the rod of the window and they went to Dy. S.P. residence. The guard of the Dy. S.P. asked them to go to police station and when they went to police station then in the way they met Jagdish Prasad, Daroga of the police station and statement of wife of the informant was recorded at 7.00 A.M. in the morning and both husband and wife signed on the said paper at 7.00 A.M., but there was no such document having been proved, though, it has come in evidence that they had gone to police station and they met the police officer in the night itself but no statement given to Police Officer and in that night dacoity was committed in the house of one Ganga Thakur. It is submitted that in the background only two witnesses who had come to support the prosecution case about rape who are informant and his second wife only and none else, though, there were several persons. Further I.O. had not come to depose in the case and non-examination of I.O. had caused prejudiced to the accused persons.

10. Learned counsel for the State however contends that witnesses have supported the prosecution case and evidence of doctor(P.W.6) also corroborates the occurrence of rape. The Doctor P.W.6 in her evidence, though, had stated that opinion about report was reserved, but she had stated in paragraph 3 of her evidence that rape was committed.

11. However, taking into consideration the respective submissions, I proceed to consider the evidence of the witnesses in the light of submission made by the

parties.

12. The prosecution case that appellants came along with four-five unknown persons and one of the appellant died during the pendency of the appeal was Khakhanu Thakur, who is the father of the appellants Kapindra Thakur, Kameshwar Thakur and Purnwasi Thakur they went to the house of the informant and admitted case that P.W. 3 the informant is son-in-law of the Khakhanu Thakur. The first wife of the informant is Kalabati Devi, the daughter of Khakhanu Thakur and sister of Kapindra Thakur, Kameshwar Thakur and Purnwasi Thakur. It is also admitted that prior to institution of this case the Kalabati Devi, the first wife had filed a case under Section 498A of Penal Code against her husband, the informant and then being aggrieved the husband filed a case for rape on the person of his second wife P.W. 3 Parbati Devi. However it is highly improbable that Khakhanu Thakur, the father of Kalabati Devi along with his three sons will come to commit rape upon Parbati Devi, the second wife of his son-in-law, the informant P.W.3.

13. However, testing the fact on probability which is the cardinal principle of Criminal jurisprudence, it is highly improbable that father will come with three sons to loot or commit dacoity and to commit rape the second wife of his son-in-law and to the contrary the probability to lodge a false case to implicate the father-in-law and brother-in-law of his first wife due to his marriage with second wife is bit large and hence the prosecution case at the outset appears to highly improbable.

14. However, in this case, though, there was allegation of dacoity and rape on the person of second wife of the informant, but except P.W. 1 and 3, no witness has come to support the rape. The I.O. has also not been examined in the case, the trial court has itself acquitted the appellants for offence under Section 395 of Penal Code. However, in the background of the above fact, I proceed to consider the evidence of the witnesses P.W. 1 and P.W.3.

15. The P.W.1 in her evidence has specifically stated that her husband was brutally assaulted and had become unconscious. However, the doctor who examined the informant has not been examined, the injury report also had not been proved by the Doctor.

16. The further case that after the occurrence of dacoity and rape on the person of P.W. 1 the accused persons went away, then the victim P.W.1 came out of the house by breaking the window by removing the rod of the window thereafter, both P.W.1 and 3 went to the house of the Dy. S.P. which is at a distance of 400 yards from the P.O. and then the guard of Dy. S.P. asked them to go to the Police station and then as per evidence of P.W.1 she went to police station where the statement of P.Ws. 1 and 3 were recorded correctly, whereas as per evidence of P.W. 3 that in the way itself to police station they met with Daroga then Daroga came in his house at 7.00 A.M. in the morning and recorded their statements of P.Ws. 1 and 3 and at that time there were 80-85 villagers and the Daroga

recorded the statement of villagers namely Ganga Thakur, Dharmendra, Mohan, Sanjay and Prem Narayan Sah (P.W.2). However, the statement recorded by the Daroga at 7.00 A.M. as per evidence of P.Ws. 1 and 3 finds missing from the record. The record shows that the F.I.R. had been lodged on the basis of written report recorded at 4.00 P.M. Hence, it is apparent that earlier version recorded by Daroga at 7.00 A.M. is missing and the earlier version of the informant and statements of witnesses recorded at 7.00 A.M. had been suppressed.

17. The I.O. had also not been examined who had recorded the statement of the informant and P.W.1 at 7.00 A.M. had also not been examined to query what happened to those earlier statements recorded by Daroga of the informant and other witnesses and no opportunity was given to the defence to know about the earlier version or any explanation by I.O. as to what was happened to those statement recorded at 7.00 A.M. by I.O.

18. Further evidence of P.W. 6 doctor who examined the victim was great emphasis given by the learned counsel for the State that P.W.6 Doctor had supported the prosecution case and had found commission of rape on the person of the victim. However, it is prominent to go to the evidence of the P.W. 6 who was doctor found the following injuries on the victim:--.....

"(i) she was of average height and limit. She was married and child bearing woman;

(ii) a lacerated wound  $1\frac{1}{2}$ "x $1\frac{1}{4}$ "x $1\frac{1}{6}$ " back of right little finger;

(iii) a lacerated wound  $1\frac{1}{2}$ "x $1\frac{1}{4}$ "x $1\frac{1}{6}$ " on the back of right finger;

(iv) no foreign hair found on her clothes or on her genital region;

(v) some whitish stains found on her petticoat (under cloth) a piece of that cloth was handed over to police to forward it to the Forensic Science Laboratory for the examination of stain.

On internal examination further found that;

(i) her hymen was absent, old tears found on her posterior vaginal wall;

(ii) vagina was patulous and admits two fingers;

(iii) uterus retroverted and on normal size.

On microscopic examination of vaginal swab, spermatozoa not found even dead or alive;"

and the victim was examined on 11.01.2000 itself whereas occurrence in intervening night of 10th -11th January, 2000. However, no time had been mentioned of examination of the victim.

19. However, the doctor in her report stated that opinion about committing rape was reserved till the receiving the report of Forensic Science Laboratory. Later on

after receiving the Forensic Science laboratory report she had clearly stated that rape was committed and she had supported that rape had been committed upon the victim P.W.1. From perusal of Exhibit 2/1 it also transpired that human semen was found on her petticoat which was sent to F.S.L. for chemical examination and report that petticoat wore by the victim at the time of commission of rape also. However, the said F.S.L. report had not been proved in the case, though, in her evidence of P.W. 6 stated opinion about commission of rape was reserved till F.S.L. report received, but F.S.L. report had not been proved. Further P.W. 6 in her evidence firstly not mentioned about commission of rape, but later on she supported about commission of rape. Further in the F.S.L. report about found of semen, but it may be possible that semen of her husband. However, evidence of the doctor about rape based on F.S.L. report but said F.S.L. report had not been proved and the court recorded her statement was misdemeanor.

20. Having regard to the facts and circumstances of the case, earlier version has been suppressed as per evidence of P.W. 1 and 3. Further, I.O. had not examined in this case. Further, in the background of the case P.W. 3 was informant who was husband of P.W. 1 whereas father-in-law and his three sons of first wife of the informant were made accused and hence, allegation that they have committed rape the victim (second wife of the informant) appears to be absurd in the Indian society as highly improbable that father whatever alleged along with three sons of first wife of the informant who were none else than son-in-law about commission of rape by them. Moreover, it is also apparent a case for offence under Section 498A Penal Code had been filed by the first wife of the informant and further fact that earlier version had been suppressed and I.O. in this case had not been examined caused prejudiced seriously of the accused persons.

21. Having regard to the facts and circumstances of the case, I find that prosecution had not been able to prove the charges beyond reasonable doubt and had caused serious doubt to accept the prosecution case. Hence order of conviction and sentenced recorded by the Trial Court is hereby set aside. Two appeals are allowed.