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**(2008) 12 JH CK 0095**  
**In the Jharkhand High Court**

Ujjawal Kumar Sinha and Karunakar Prasad

APPELLANT

Vs

The State of Bihar

RESPONDENT

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**Date of Decision :** 23-12-2008

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 147, 342, 376, 380, 427

**Citation :** (2008) 12 JH CK 0095

**Hon'ble Judges :** Jaya Roy, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

Jaya Roy, J.—The appellants have filed the instant appeal for setting aside the judgment of conviction and order of sentence dated 25.1.1991 passed by the Additional Sessions Judge, Godda in Sessions case; No. 143/89 whereby the appellants have been convicted under Sections 376 and 342 of the Indian Penal Code . The appellants have been sentenced to undergo R.I. for a period of ten years u/s 376 IPC but no separate sentence u/s 342 IPC has been passed. There were seven accused persons including the appellants but the charges having been not proved against them, the other five co-accused were acquitted.

2. The prosecution case, in brief, is that one Ajit Bhushan Prasad appeared before the Godda police station on 2.4.89 and made a report (presumably oral) informing the police that immediately before his arrival at the police station when he was on the way from Sahibganj to Godda by cycle and reached at village, Punasia, he heard bulla from the side of his village and thinking that some mishap had taken place in his village, he had come to the police station to inform the police for taking necessary action. This report was entered as S.D, entry No. 54 dated 3.4.89. On such report the S.I. reached the village and recorded the fardbeyan of the informant, Tillotama Kumari in the village itself. She in her fardbeyan stated that on 2.4.89 her parents had gone to Godda and her younger brothers had also gone out of the house for playing. At about 12 a.m. the appellants came to her house and forcibly dragged her to their house and

confining her in a room, they committed rape upon her one by one. Thereafter, they locked the room from outside and went away. It is alleged that at about 1.30 P.M. she, some how or other, managed to escape from the room and reached her own house at 4. p.m. When her parents returned, she narrated the entire story. Thereafter, there was some hot exchange of words between the parents of the informant and the convicts appellants. It is said that the appellants threatened the entire family of the informant.

It is further alleged that appellant No. 1, Ujjawal called his father, Kirti Bhushan Prasad, the co-accused, from Dumka and then all the seven accused persons armed with lathi and bhala started abusing the informant's family. They entered into the informant's house, threw the movable articles of the house in the courtyard and took away the utensil etc. On the basis of the said fardbeyan a case was lodged and after investigation charge sheet was submitted.

3. The defence of the accused persons was denial of the charge and pleading of their innocence. Defence case is that on 3.4.89 at about 7.30 P.M. appellant No. 1, Ujjawal and one Bhuneshwar Mahto were returning from Godda on a motorcycle and when they reached Punasia Kurmi tola Bijay Bhushan Verma, PW4 and Anil Kumar Verma, PW 1, stopped them and started assaulting by means of kora and danta. In the meantime, the uncle and grand father of the appellant No. 1 came: and saved them. It is alleged by the defence that appellant the No. 1 Ujjawal also lodged a case being Godda PS case No. 69/89 against the informant in which, after investigation, the police submitted charge sheet.

4. The prosecution, in order to substantiate its case, examined 13 witnesses and filed some documents which were duly exhibited. Similarly the defence also produced certain documents which were also marked as exhibits.

5. The trial court, after considering the entire oral and documentary evidences, came to the inclusion that these appellants, i.e. Ujjawal Kumar Sinha (appellant No. 1) and Karunakar Prasad (appellant No. 2) were guilty of the offence under Sections 376 and 342 IPC and accordingly convicted, and sentenced them in the manner as aforesaid. The other five accused persons, having been found not guilty of the charges levelled against them, were acquitted.

6. Mr. P.P.N. Roy, learned Senior Counsel appearing on behalf of the appellants submitted that the alleged occurrence took place on 2.4.89 at 12 P.M. but the FIR was lodged by the prosecutrix on 3.4.89 at about 23.15 hours though in her fardbeyan she has stated that she narrated the entire occurrence to her parents just after reaching her house i.e. nearly at about 4 P.M. on 2.4.89 itself.

7. According to the prosecution there are two parts of the occurrence. First part of the occurrence is that on 2.4.89 at about 12 hours the informant was taken away by these two appellants to their house and was raped by both of them one by one. The second part is that on 2.4.89 Ujjawal went to his father, at village Kuntaith in the district of Dumka and returned With his father on the next day

i.e. on 3.4.89 and at about 9 P.M. he along with other persons named in the FIR (seven in total) armed with lathi and bhala, entered into the informant's house and threw the movable articles of the house in the court yard and took away the utensils etc.

8. From the judgment I find that the trial court has disbelieved the second part of the occurrence and held that the prosecution has failed to prove the charges u/s 147, 427 and 380 IPC against any of the accused beyond all reasonable doubt and hence acquitted all of them.

9. Now the only question which requires consideration is as to whether the charges under Sections 376 and 342 IPC have been proved against the present two appellants beyond all doubts. Regarding this part of the occurrence the important witnesses are PW8, the victim girl, PVV 5, the mother of the victim girl and PW6, the doctor who examined the prosecutrix.

10. I have meticulously gone through the evidence of the aforesaid witnesses. P.W.8, Tiloltama Kumari, the prosecutrix has stated in her evidence that she was alone in her house at the time of the alleged occurrence and the convicts, Ujjawal and Kaunakar forcibly took her to Karunakar's house. Thereafter Karunakar caught her and Ujjawal raped her and then in the same fashion, Karunakar also raped her. After leaving her in the room these appellants left the place. She has said that then some how or other she managed to escape from the room and came to her own house and narrated the entire thing to her parents. PW 5 the mother of the informant is a hearsay witness. She has corroborated the evidence of the prosecutrix. So far medical evidence is concerned, I have perused the same and I find that there is no positive evidence on the point of rape. The doctor who examined the victim girl has stated as follows:

No injury seen. Hymen absent. Vagina admitted one finger Private parts were clean as the incident took place 48 hours before.

P.W.6 the doctor has further stated in her evidence which I quote hereinbelow:

9. I cannot give my opinion whether the injured girl was virgin because live hymen was absent. Hymen can be ruptured even without coitions on account of fall or if she is a sports girl and other reasons. There was no data to come to the conclusion that hymen was absent since 48 hours.

10. Since the vagina admitted one finger it is not necessary that penile penetration by a young boy should necessarily cause injury on the vagina or vaginal wall.

11. I cannot say hundred percent that injured was raped. There must be injury in the vagina in a case where there was forceful intercourse with the injured by two young persons one after another.

11. It is now well settled law that conviction can be based on the sole testimony

of the prosecutrix if it transpires confidence and if it is worthy of credence. As stated earlier, the medical evidence of the doctor, PW 6 contradicts and belies the testimony of the prosecutrix. Further more, the testimony of P.W.12 clearly shows that the prosecutrix, at the time of lodging of the FIR, did not mention that she had sustained injury on her body due to committing of rape forcibly.

12. Taking over all view of the matter and considering the entire facts and circumstances of the case the possibility of bringing a false charge of rape against these appellants by the prosecutrix to defend her three brothers i.e. PWs 1, 3 and 4 from the charges levelled against them in the counter case, cannot be ruled out. I am, therefore, of the opinion that the appellants are entitled to the benefit of doubt in this case.

13. In the result, this appeal is allowed, the judgment of conviction and order of sentence is hereby set aside. The appellants are acquitted of the charges levelled against them under Sections 376 and 342 IPC. The appellants are on bail. They are released from the liabilities of their bail bonds.