

Criminal Appeal (SJ) No.79 of 2008

Against the judgment of conviction dated 12.12.2007 and order of sentence dated 14.12.2007 passed by Ist Additional Sessions Judge, Nalanda, Bihar Sharif in Sessions Trial No.99 of 2007 arising out of Asthawan P.S.Case No.14 of 2007.

INDERDEO YADAV..... APPELLANT
VERSUS
STATE OF BIHAR RESPONDENT

with

Criminal Appeal (SJ) No. 69 of 2008

ANIL KUMAR YADAV @ ANIL PRASAD @ BUMBUM.....
APPELLANT
VERSUS
STATE OF BIHAR..... RESPONDENT

with

Criminal Appeal (SJ) No. 135 of 2008

BIRENDRA PRASAD..... APPELLANT
VERSUS
STATE OF BIHAR..... RESPONDENT

with

Criminal Appeal (SJ) No. 129 of 2008

SUNIL YADAV @ SUNIL KUMAR YADAV..... APPELLANT
VERSUS
THE STATE OF BIHAR..... RESPONDENT

For the appellants:- Sri Farooque Ahmad Khan &
Sri Raj Kishor Prasad,
Advocates.

For the State:- Sri S.N.Prasad, A.P.P.

P R E S E N T

THE HON'BLE SHRI JUSTICE DHARNIDHAR JHA

Dharnidhar Jha,J

Six accused persons including the four

appellants one each in the present batch of four appeals were charged by the learned Ist Additional Sessions Judge-cum-Special Judge, Nalanda at Bihar Sharif of committing offences under Sections 395 and 376(G) of the IPC and Section 3(1)(x), 3(ii)(v) of the Schedule Cast and Schedule Tribes (Prevention of Atrocities Act), 1989 in Sessions Trial No.99 of 2007. By judgment on 12.12.2007, the learned trial Judge acquitted Ramashray Kumar and Pramod Kumar who had jointly been tried with the appellants, while the appellants were held guilty of having committed offences under Sections 395 and 376(G) IPC. The appellants were also held guilty of committing offences under the SC and ST(Prevention of Atrocities) Act. The appellants were heard on sentence by the learned trial Judge on 14.12.2007 and were directed to suffer rigorous imprisonment for ten years on each of the two counts. The sentences were directed to run concurrently. The four appellants have filed their separate appeals to bring into question the correctness of the finding of their guilty and appropriateness of the sentences passed upon them.

2. P.W.6 Chhotu Paswan is the informant of the case and he gave his fardbeyan to S.I. Rajnarayan Rai on the road near the place of occurrence at 8.15 P.M. on 17.01.2007 stating therein that he along with

his co-villager, namely, Parmanand Paswan(P.W.1), Kishori Pandit(P.W.3) and Paroo Paswan(not examined)were coming to village-Deshna from Biharsharif after having worked there. They reached Ashthawa market at about 6 P.M. and from there they proceeded to their village on foot. When they had reached the road which had been curved in for the passage of water of river Desna at about 6.30 P.M. some criminals asked them to stop. The informant and others enquired from them as to what was the reason, then they hurled abuses on them. The criminals were armed with pistols and had torch lights with them. The informant stated that he along with his companions identified six criminals in the light of the torch flashed by them and those were the six accused persons who were put on trial by framing charges as indicated at the very outset.

3. The informant stated that the criminals put their pistols on the respective bodies of the witnesses and relieved them of their belongings. As regards P.W.6, (the informant) he was relieved of Rs.300/- and a tiffin box as also a green colour shawl. P.W.1 Pramod Paswan was relieved of Rs.750/- as also a Sonata wrist watch whereas Kishori Pandit was relieved of Rs.120/- from his pocket, and the fourth companion of the informant was relieved of Rs.50/- as

also a wrist watch and the muffler which had been put by him around his neck. The informant stated that the theft was committed at the gun point.

4. The criminals after having relieved the informant and his companions of their belongings, took them into a nearby ditch where eleven other persons including a lady had already been kept after being tied over their hands and feet and, accordingly, the informant and his companions were also immobilized in the same fashion. They thereafter, picked up the wife of Dharmdeo Paswan(i.e., Daulti Devi, P.W.7) from that particular place of confinement into a field and she was raped by appellant Sunil Kumar Yadav, Birendra Prasad and Inderdeo Yadav whereas the remaining three, namely, Anil Kumar Yadav, Anoj Yadav and Manoj Yadav kept a watch over others. The informant stated that while being sexually assaulted, the lady was shouting and after commission of the act, she was also relieved of her ornaments and other belongings.

5. The informant stated that after having committed the offence, the criminals fled away, whereafter the victim of the offence raised a cry attracting villagers who came. The police also came simultaneously there, whereafter Ext-1, the fardbeyan of the informant was recorded.

6. It may appear from the evidence of P.W.9

S.I.Gajendra Kumar who was officer-in-charge of Asthawan police station on 17.01.2007 that he received the recorded fardbeyan of P.W.6 and on that basis, he drew up the FIR. He recorded the further statement of the informant and went to inspect the place of occurrence. On reaching the place of occurrence, he found that the place where the criminals had stopped the informant and his companions in fact, was the road which had been curved-in for the easier passage of water and had been topped with concrete. The place was shown to him by P.W.6, the informant. He also inspected the place where the lady P.W.7 had been taken to by the criminals and it was a field in which wheat plants had been grown. He was shown the place where the victim P.W.7 had been sexually assaulted. He, thereafter, recorded the statement of Daulti Devi and all other witnesses. He arrested accused Ramashray Kumar. He sent Daulti Devi with a requisition (Ext-3) to the doctor for her medical examination and also collected the criminal history of the accused persons to note it down in the relevant part of the case diary. Finding materials sufficient, he sent the accused persons up for trial which ultimately ended in the impugned judgment.

7. As regards the defence of the appellants, it was many fold. The defence, as it appears from the

gist of cross-examination of witnesses attempted to suggest that it was a case of wrong identification as the witnesses were faltering for want of appropriate light facilitating proper identifications. It also appears from the trend of cross-examination, specially that of P.W.6, the informant that he owed some money to appellant Sunil Kumar Yadav who was running a departmental stores and in order to avoid payment of that dues, he had falsely implicated the said appellants and others. Besides, it also appears suggested that Inderdeo Yadav might have been implicated for any other reason.

8. During the course of the trial, the prosecution examined as many as 12 witnesses out of whom P.W.11 Shri Dhirendra Mishra, was Judicial Magistrate of Ist Class who recorded the statements of four witnesses under Section 164 Cr.P.C. and those statements have been marked Ext-6 to 6/3. P.W.12 was a witness of formal character who produced the petticoat of the prosecutrix at the direction of the officer-in-charge of the police station. The petticoat has been material Ext-I. Out of the remaining ten witnesses, P.W.1 Parmanand Paswan and P.W.2 Paras Paswan are witnesses who as per P.W.6, were accompanying him while they were returning from Bihar Sharif to their village Desana. Other witnesses, like, P.W.2 Paras

Paswan, P.W.4 Naresh Paswan, P.W.5 Ali Imam and P.W.7 Daulti Devi are witnesses who were similarly captured by the criminals as were informant and his companions and were immobilized by being tied over their hands and feet and were looted of their belonging like many other passers by. Besides the above, P.W.7 Daulti Devi has also given evidence as to how she was taken to the field after being captured by the criminals initially and was subjected to sexual assault by some of them. P.W.8 Meena Devi is the mother-in-law of Daulti Devi and she has stated that Daulti Devi after having come out of the traumatic experience of being subjected to offence as has been unfolded by witnesses, came to her house and narrated the incident immediately to P.W.8. Thus, P.W.8 might not be a witness who could have had the first hand impression or knowledge about the occurrence but appears narrating the facts as was told to her by P.W.7. P.W.9, I have just pointed out, is the investigating officer of the case whereas P.W.10 is Dr. Mrs. Krishna who had medically examined P.W.7 and had issued the report Ext-5.

9. The defence did not tender any evidence and mainly based its case on cross-examination of the witnesses.

10. I was taken through the evidence of

witnesses by Sri Farooque Ahmad Khan, learned counsel appearing for the appellants in all appeals. It was contended that the occurrence was dated 17.01.2007 at about 6.30 P.M. in respect of which the fardbeyan was recorded very promptly at 8.15 P.M. and the FIR was also drawn up as promptly as could be expected on the same day at 11 P.M. but it was curious to find that the copy of the report which was required to be transmitted to the Magistrate forthwith as per Section 157 Cr.P.C. reached the court of the Chief Judicial Magistrate, Biharsharif on 19.01.2007, i.e., after more than 24 hours or so. It was contended that the prosecution had not forwarded any explanation for the delayed dispatch of receipt of the report.

11. As regards the merit of the evidence, reference was made to the evidence of P.W.2 in paragraph-2, P.W.3 in paragraph-11 and P.W.5 in paragraph-1 who have stated that they could not identify any one because the night was dark as was stated by P.W.2 Paras Paswan in paragraph-2. It was contended that it was the month of January and the time of occurrence was 6.30 P.M. and the night was dark. There was no source of identification pointed out by other witnesses in which they had identified the appellants. It was contended that the evidence of P.W.10 Dr. (Mrs.) Krishna would indicate that Daulti

Devi(P.W.7) was in a good position when she appeared before P.W.10 for her medical examination and there was neither any scratch or any other injury any where on her person and being a married lady, the finding of stain on semen on her wearing apparel may not be a circumstance supporting the charge of rape. The contention was that in light of evidence which was adduced by the prosecution during the trial, it appears that the case was out and out false and concocted as no independent witness came forward to support the charges. It was, as such, suggested to this Court that the appeals be allowed and the appellants be acquitted. It was, lastly, contended that the prosecutrix during her examination-in-chief on the first day, did not identify any one, but on the subsequent day, she was identifying and her evidence as such was also not acceptable.

12. Replying to the above argument Sri S.N.Prasad, learned A.P.P. appearing on behalf of the State was drawing the attention of the court to the explanation given by the prosecutrix P.W.7 in her evidence on her conduct of not identifying the accused persons on the day she was first examined in court and was submitting that if the court was to consider the anomalous position which has been pointed out by the learned counsel for the appellants then it could be

satisfied regarding the real reasons as to why the lady was resiling from the identification of the accused persons. It was further contended by Sri Prasad in the above connection that the defence was not suggesting to any of the witnesses as why the lady, who was married and who had a family and who was respectable by all means in the society should come forward, to depose against the appellants implicating them falsely by alleging such serious charges against them and thereby to subject herself to public ridicule and loss of respect in the estimates of her fellow villagers and others. It was contended that no reason has been shown by the defence as to why such a good and reasonable lady, like, P.W.7 should stake her prestige and self respect by deposing falsely against the accused persons. It was contended that none-finding of the injuries on the person of P.W.7 appears meaningless and inconsequential inasmuch, the occurrence had taken place in the early evening of 17.01.2007 whereas the lady was medically examined on 19.01.2007 at 11 A.M. as may appear from Ext-5 the report submitted by P.W.10 and the abrasions or lacerations which could have appeared on any part of her lady, could have healed up. As such, there was no finding recorded in that behalf by P.W.10. However, the circumstantial evidence was there which was

recorded by P.W.10 and the Forensic Science Laboratory Report which appears in the lower court record, was clearly lending corroboration to the allegation of rape. It was further contended that the delayed receipt of FIR was of no importance as the delay could not be such as to be caused on account of deliberation so as to hatching up a false story.

13. I want to take up the argument on the delayed dispatch and receipt of the FIR. There is a line of decisions which could be cited for and against the contention as was forwarded by the learned counsel appearing for the appellants. In some of the decisions, it was held that it could be fatal but in some decision it has been held that the delayed dispatch or receipt of the copy of the FIR by Magistrate may not be fatal to the prosecution charges, if there was substantial reasons assigned by the prosecution in that behalf. Some of the decisions were noticed by me while I was writing the judgment while sitting in the Division Bench of the Court in State of Bihar Vrs. Md. Zahid 2011(2)BBCJ 554. The relevant discussions have been made by me in paragraphs 43, 45 and 46 of the report and if one could consider the reasons which I have assigned, one could find that it could be fatal if the defence succeeds in pointing out to the court to its

satisfaction that, firstly, it was deliberate and, secondly, the deliberate attempt was to create a story for falsely implicating some innocent persons. But at any rate, in order to taking the advantage of the delayed dispatch of the report or its delayed receipt, the defence has, firstly to bring on record some foundational facts by cross-examining the police officer who could be responsible for the dispatch of the report to the nearest Magistrate. In the present case, the officer-in-charge of the police station, i.e., P.W.9 was in the witness box. He was cross-examined almost on all aspects of the matter, but no question appears put to him as to what was the mode by which the report was dispatched by whom, on what date and at what time. All aspects of the investigation in a criminal case which have been formulated in the Bihar Police Manual Rule 164 could require the dispatch of the copy of the case diary and that requires the time date and other details along with the messenger by which the copy of the case diary were transmitted. There are relevant rules in the Bihar Police Manual regarding the dispatch of the copy of the report to the nearest Magistrate and that requires an entry put in the station diary of the police station as to on what date, at what time and by which messenger the report was dispatched to the nearest

Magistrate. One could simply expect the defence to have cross-examined P.W.9 on all these points to have laid the foundation so as to submitting that the delayed dispatch of Ext-2 was with a purpose and that purpose was to deliberately suppress truth so as to framing facts for implicating some innocent persons.

14. Here, in the present case, after having considered the evidence of P.W.9 I could not find that any such foundational facts were introduced in the plethora of evidence which was brought into notice of the court so as to even faintly suggest that the delay in dispatching Ext-3 had a purpose and that purpose was for defeating the ends of justice as also for falsely implicating the accused persons. In the view of the matter, I find that the contention does not held good and cannot be accepted.

15. The other contention which was raised before me by the learned counsel for the appellants was on the question of sufficiency of light at the place of occurrence so as to facilitating the identification of the culprits. It was contended by reference to the evidence of P.W.2 Paras Paswan in paragraph-2 that there was no light and as such, the identification was impossible. Reference was also made to the evidence of other witnesses, like, P.W.3 in paragraph-11, P.W.5 in paragraph-1 that the same was

the reason that these witnesses had stated in their evidence that they could not identify any one. It was further contended that even the victim (P.W.7) during her examination-in-chief on the first day, i.e., on 22.03.2007 was refusing to identify any of the accused who were present in dock as the perpetrators of incident specially on that part of it which related to P.W.7 being raped. It was, as such, contended that it was the handy work of the prosecution than the truth narrated by the witnesses and as such, this court should reject their evidence on identification.

Except P.W.2 no one has said that it was a complete dark night making it impossible to identify any one. In fact the basic fact stated in the fardbeyan is that the criminals were having torch. It is true that P.W.6 has not stated the above fact that the criminals were having torch and they flashed light and, as such, they had identified the criminals but one of the witnesses, namely, P.W.3 Kishori Pandit who was also accompanying the informant has stated that the criminals flashed their torch-lights and surrounded them. There is no denial of the above fact even by throwing a suggestion to P.W.3 that he was making a false statement as regards the criminals possessing torch lights and flashing the same. Besides, the evidence which I have just discussed, it

could be in common knowledge that criminals cannot indulge in criminal activities without having their own sources of light, specially, when they indulged in such activities as is the subject matter of the present case. They were on a robbing spree. Besides, they were robbing persons by immobilizing them properly so that they continued doing it for a longer period on the high way with persons who could be the common men or who could be a passenger travelling by any transport through the place of occurrence. As such, it could be very difficult for me to hold that there was no light sufficiently for facilitating the identification of the criminals.

16. It is true that P.W.6 has stated in his fardbeyan that P.W.7 was raped by the accused persons named therein, but he has not stated the same facts in his deposition. On consideration of the evidence what I find is that there is a consistency in the evidence of all witnesses who have deposed to that particular part of the occurrence that after having robbed the four persons, i.e., the informant and his three companions, the criminals took them to a particular place to tie them down their hands and feet where some more persons had been put in the same condition which included Daulti Devi(P.W.7). The criminals after putting four persons, the informant and his three

companions there in the ditch, picked up the lady and took her to the adjoining field which had been described by the investigating officer while deposing on the place of occurrence. The lady stated that she was put down on the ground in the field and was raped. It was never the case of the prosecution nor does it appear from the evidence of witnesses that any of the them had seen the actual act of rape being committed by the accused persons upon P.W.7. The solitary evidence comes from P.W.7. P.W.7 was a lady of 20 years, when she was deposing in court on 22.03.2007, i.e., after three months of the occurrence. I could hold that she could be around 20 years of age on the day of occurrence which had taken place some three months prior to her evidence being recorded by the learned trial Judge. She has narrated the incident fully by pointing out as to how she was picked up by the criminals after she had been put down on the ground to be taken into the field for being raped.

17. It was contended that on 22.03.2007 when P.w.7 was examined-in-chief, she was refusing to identify any one and was categorically stating that she did not identify any one and further that no incident had taken place. However, on 24.03.2007 when she was examined-in-chief further in court, she was identifying the appellants and offering an explanation

that on the first day, i.e., on 22.03.2007, when she refused to identify the accused persons or stated that nothing other than the incident of robbery had occurred to her, she was making a false statement. The reason for making a false statement which was assigned by P.W.7 was that she was frightened and as such, purposely did not identify any one. She further stated that due to fear, she was also stating that nothing had happened to her. The brother of one of the appellants and his friends had threatened her and frightened her. Another person Sadhu Yadav had also threatened her and on that account, she was completely frightened. They had held out the threats that if she deposed against the appellants, they will get her liquidated along with her children and create a situation when she, who was the start witness of the case, will be no longer to depose against the appellants. On consideration of her evidence paragraph-4 in cross-examination, I find that the defence had tested her above statement by putting certain questions both searching and leading. Searching in the sense that in paragraph-4 she was put a question as to how many persons had accompanied her on 24.03.2007, when she had come to depose in court. Other searching questions were as to had any police personal besides her villager and relatives had

accompanied her on 24.03.2007 up to Court and she replied that yes, she had been seen even by the officer-in-charge of Asthawan police station. These very relevant searching questions were put to P.W.7 to show to the Court in case of getting any answers favourable to the defence that the explanation offered by P.W.7 on 24.03.2007 for neither naming or identifying any one was a hoax and the truth was that nothing had happened to her and she had never identified any one. But her replies in paragraph-4 would convince any one even an untrained person in marshaling of facts that it was an honest statement which she was making in paragraph-3 while being examined in chief further on 24.03.2007. She stated that after she was examined-in-chief on the first day, she went back to her husband's house where she stated the facts of being threatened and frightened not to depose to her family members and besides them, to some of the office bearers of the level of local self government including the police officer could be reason that feeling their pride and prestige both being trampled variously and thereafter finding that the lady who had been subjected to such an offence was not being allowed to depose, to the whole community was coming to the courts as a shield to her so that she was giving her evidence. This inference arises

from her evidence in paragraphs-4, 5 and also in paragraph-6. In paragraph-6 she was put certain questions regarding narrating the fact of being threatened to be killed in case she deposed. She stated that after he had deposed to on the first day she narrated about the threat given to her family members, both on her parental side as also on her husband's the side, besides to persons who were local authorities, like the members of the Panchayat Samiti. The lady has given reply to questions, put so her, as may appear from the answers which have been recorded by the court below, quite intelligently and meaningfully to dislodge the plea and the lady was making false statements both on identification and the commission of rape upon her. On consideration of the explanation which was given by the lady, any one could be convinced that it was only on account of the threat and the restraint applied upon her that the lady was forced to make false statement on the first day of her evidence in court. On consideration of the evidence of the lady in its entirety, there does not remain any doubt that she was raped by criminals in a planned and concerted manner.

18. Other witnesses specially those who were accompanying the informant who has supported being robbed, have not identified the appellants. One could

find the obvious reason for such conduct of witnesses as was coming out of P.W.7. Threats of being liquidated with their entire family appears deterring them to narrate the truth and to identify the real culprits. Criminals of the class as established the facts of the present case, usually do it successfully and they had succeeded in the most as well with only exception of P.W.7 which was only due to the security provided to her.

19. It was contended in the above connection that the lady admitted in her evidence that she was accompanied by the elder brother of the husband, but he has not been examined While I was perusing the evidence of P.W.9, the investigating officer of the case, I came across an answer to a question which has been recorded by the court below in paragraph-8 of P.W.9 that he did not question either the husband of P.W.7 or the elder brother of the husband and as such, their statements were not found recorded in the case diary. If the police had not questioned and recorded the husband of the prosecutrix or his elder brother, how could the prosecution be faulted for not producing the two witnesses. Besides, it does not appear clearly from the evidence that they had in fact been put in the similar situation like the other witnesses had been put and they were also a necessary witness so as

to unfold the material facts of the case. It is too well known to be pointed out that it is upon the prosecution to prove its case by examining witnesses as desired by it and it could not be compelled to examine all witnesses more so, when no particular number of witnesses is required to prove a fact. It is often said that it is the quality of evidence that counts and not the quashing of witnesses.

20. Some of the witnesses might have said as do P.Ws.2, 3, 4 and 5 that they had not identified any one but on consideration of the evidence of these witnesses also what one could find is that they have also stated that an occurrence had taken place as was testified by P.W.6 and other supporting witness. In that manner, the evidence of those witnesses who had not supported the prosecution, as regards the identification of appellants or other accused, could also be used for seeking corroboration to the charges. Those witnesses also stated the same story as regards the occurrence taking place as was stated by other witness and thus were supporting the prosecution story. On consideration of their evidence, it is very difficult to accept the contention that the evidence indicated as if the case were out and out false one.

21. As regards the contention on non-examination of the independent persons, firstly, most

of the persons who were victims of the occurrence have been examined. I have already pointed out that the witnesses might not have been identified the real culprits but their evidence, though, indicated that the occurrence had taken place in the manner as alleged. It is stated by the witnesses that after the culprits had run away from the scene of occurrence, they raised hue and cry which attracted persons. Naturally, on the very strength of their statement to the above effect, persons who had arrived at the scene of occurrence after hearing the hue and cry of witnesses, could not be said to be witnesses to the facts which could be constituting the offence and their non-examination does not appear of any substance.

22. Having examined the arguments regarding the credibility and credulity of the prosecution witness, and having answered them, what remains to be considered is the submission of the learned counsel for the appellants about proof of the commission of offence of rape on the prosecutrix. It was contended that the prosecutrix was found by P.W.10 Dr.(Mrs.)Krishna in good disposition and there was no scratch or any injury on her person and finding of some stains on her wearing apparel may not be a supporting circumstantial evidence as regards the

commission of rape.

The doctor had examined the P.W.7 on 19.01.2007 at 11 A.M. The offence had taken place in the early morning of 17.01.2007. It was the month of January, the time was evening. One has to assume that it would have been severe cold and even if there was no evidence coming from any of the P.Ws., it could be said without any hesitation the lady must have put on sufficient clothes to protect herself from cold, which must have acted as a pad in between her skin and the surface of the field. In addition to the clothes, P.W.9 the I.O. of the case stated that it was a field shown with wheat and the plants were trampled. The wheat plants in the month of January must have grown to such height as to cover the surface of the field quite thickly. Considering these aspects of the case, one may not wonder if there was no injury found by P.W.10 on the person of P.W.7.

23. P.W.10 Dr. Krishna has stated that she did not find any injury on the private part of P.W.7(P.W.10 paragraph-2). It is admitted that the lady was married. Her hymen was bearing old rupture. But her petticoat was bearing some sperm stains and vaginal swab was found having the trace of some dead spermatozoa. The report submitted by the F.S.L. on the chemical analysis of the stains present on the cutting

of the petticoat indicated the trace of human semen on it. In addition to those evidences, the P.W.5 have stated that the appellants took the lady from the ditch into the field, from where they heard her shouting and crying. She(P.W.7)herself stated as to how she had been ravished and by whom. Her mother-in-law(P.W.8) stated that on having come to her house, P.W.7 stated to her as to what had been done to her by the appellants. Above all, there was no reason for the lady to falsely implicate the appellants and thereby invite rebuke and disrespect from the general mass of the locality. The evidence appears establishing the charge under Section 376 IPC.

24. On consideration of the evidence which was adduced by the prosecution, I am satisfied that the conviction of the appellants for offences under which they were directed to serve sentences, were properly passed, as a result of which, the four appeals appear of no merits. The same are dismissed. The four appellants are on bail. Their bonds are hereby cancelled.

25. Before I part, I want to note that I have perused the F.S.L. report dated 06.05.2009 which was not exhibited due to the trial having ended on 12.12.2007 due to delivery of judgment in the case. It

is a material piece of evidence, and in exercise of the Court's power under Section 391 Cr.P.C., it is directed that it shall form part of the prosecution evidence.

(Dharnidhar Jha,J.)

