

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.716 of 2019**

Arising Out of PS. Case No.-34 Year-2013 Thana- BHANGHA District- West Champaran

Uttam Chand Das @ Uttam Chandra Das Son Of Vani Chandra Das Resident
Of Village - Jasauli

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Bimlesh Kumar Pandey, Advocate
Mr. Ashok Kumar Singh, Advocate
For the Respondent/s : Mrs. Abha Singh, APP

**CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT
Date : 21-11-2024**

This appeal is directed against the judgment of conviction and order of sentence dated 19.12.2018 and 21.12.2018, respectively, passed by the learned Additional Sessions Judge, F.T.C-IIInd, Bettiah, West Champaran in S.Tr. No. 379/2015 (arising out of Bhangaha P.S. Case No. 34 of 2013) whereby and whereunder the appellant has been convicted U/s 376/511 of the Indian Penal Code, and has been sentenced to undergo R.I. for five years and to pay a fine of Rs. 5,000/- under Section 376/511 of the Indian Penal Code and in default of payment of fine, he shall have to undergo further R.I. for one month.



2. The prosecution case, in brief, is that on 29.08.2013 in the midnight, the informant, namely *Jayanti Kumari* aged about 18 years was sleeping inside her room, and her family members including mother, father, and brother had gone to attend the *Kirtan*. The accused-appellant entered inside the house by breaking the *Tatti* and tried to outrage the modesty of the victim-informant and on *halla*, her mother and brother came there but the accused fled away.

3. After investigation, the police submitted charge-sheet under Sections 341, 323, 504, 376, 511 and 506 of the Indian Penal Code and the learned C.J.M., Bettiah took cognizance. The case was committed to the Court of Sessions vide order dated 27.07.2015. In support of the case, the prosecution has examined five witnesses and they are P.W-1; Jayanti Kumari (the victim-informant), P.W-2; Arun Kumar Das (brother of the informant), P.W-3; Surdhani Devi (mother of the informant), P.W-4; Bimal Chandra Das (cousin of the informant) and P.W-5; Naresh Chandra Das (father of the informant). The written report of the informant is marked as Ext-1 and the signature of P.W-2 over the written report is marked as Ext-1/B. The I.O. of the case has not been examined, which seriously prejudiced the appellant's case, since contradiction could not be drawn, where the informant had tried to



develop her case from the fact what she had stated in her written report and none of the prosecution witnesses except the P.W-1 can be the eyewitness to the occurrence.

4. It has been submitted by the learned counsel for the appellant that the trial court ought to have considered the fact that the alleged time of occurrence is of at 12 night and the informant has not stated in her written report that there had been any source of light or lantern to what she has said in her evidence. In the written report, the informant says that the appellant caught hold and teased her which does not make out a case of attempt of rape. The informant P.W-1 has stated that she was alone in the house since her parents and brother had gone to attend a Kirtan and as such the story of arrival of Arti Devi and Bimal Chandra Das, without opening the door becomes improbable since it is being stated by the witness that the accused had entered into the house by breaking the "*Tatti*".

5. Learned counsel for the appellant next submitted that the alleged occurrence is of midnight and there was no occasion for anyone to see or to identify the alleged offender, even in fleeing, whereas there was no occasion for anyone to witness the incident of an attempt of rape when the informant was alone in the house. The I.O. of the case has not been examined in the case



which has caused prejudice to the case of the appellant since the contradiction could not be drawn especially where the prosecution witnesses and even the informant P.W-1 have developed the case different from what they have stated before the police during investigation. P.W-1 has stated that all the family members reside in one room hut which was closed from inside. She has not stated in the F.I.R. that the “*Tatti*” was even damaged but subsequently the story of breaking the *Tatti* was brought in existence but the none examination of I.O. makes the same to be worthless.

6. Learned APP for the State has supported the conviction and supported the punishment awarded to the appellant. The defence of the appellant is denial of the occurrence.

7. I have considered the submissions of the parties.

8. P.W.-1 i.e the victim-informant has deposed that she was sleeping in her home alone. Her family members i.e. her parents and brother had gone to attend a *Kirtan* in the village and in the meanwhile at around 12 in the night, the appellant entered the house of the victim-informant (P.W-1) with intention to outrage her modesty. The victim-informant (P.W-1) protested and *halla* was raised in which the appellant was chased by other family members. The written report has been marked as Ext-1 and the P.W-1 has identified the appellant in the dock who is her co-



villager and her relative. In her cross-examination also, the defence has not been able to elicit any material favourable. In fact the informant in her cross-examination has said that the appellant had entered the house by breaking the *Tatti* and there was a lantern with the help of which she could identify the appellant.

9. P.W-2 has deposed that on the date and time of occurrence, he had gone to attend the Kirtan along with his mother and father leaving her sister (P.W-1) alone in the house. Taking advantage of the same, the appellant entered the room and outraged her modesty. He was informed by the P.W-1 (victim-informant) that the appellant tried to commit rape with her and on *halla* being raised, the family members i.e. P.W-2, 3, 4 and 5 came there and chased the appellant. The statement of the P.W-2 was recorded by the I.O. and he has signed the written report, marked as Ext. 1/b. He has also identified the appellant in the dock.

10. P.W-3 has deposed that she had gone to attend Kirtan along with her husband and son leaving the victim-informant in the room at 12 in the night, the appellant entered the house and tried to commit rape with the victim-informant (P.W-1). On *halla* being raised, her sister-in-law Arti Devi came and her husband Bipin Chandra Das reached the place of occurrence but the accused-appellant fled away. P.W- 4 & 5 also reached the place of



occurrence after hearing about the same and they also chased the accused-appellant.

11. Though in the F.I.R., the informant has said that the appellant caught hold of her but in her statement in Court she has slightly improved the statement and has said that the appellant pressed her chest. P.W-1 has identified the appellant who as per her is related to her but the defence has argued that the appellant was not related to P.W-1 but is a co-villager. The victim and other witnesses are consistent in their evidence that the appellant tried to outrage the modesty of the victim-informant i.e. P.W-1 and on *halla* being raised, the appellant fled away. P.W-1, P.W-2 and P.W-5 are consistent in there statements insofar as the fleeing away of the appellant is concerned and P.W-1 who is the victim has said that the appellant tried to outrage her modesty.

12. From the evidence on record, I am unable to take a different view which has been taken by the trial court so far as the conviction of the appellant is concerned. In my opinion, the prosecution version is truthful and credible. The appellant had tried to outrage the modesty of the prosecutrix but on *halla* being raised by her, she fled away and she was saved.

13. The only question which has to be considered is as to what offence has been committed by the appellant. The Trial



Court has convicted the appellant under Sections 376/511 of the Indian Penal Code.

14. The Hon'ble Supreme Court in the case of *Tarkeshwar Sahu V/s State of Bihar (Now Jharkhand)* reported in *(2006) 8 SCC 560* has held after examining the facts of the case that slight degree of penetration of the penis in the vagina is sufficient to hold the accused guilty for the offence under Section 375 IPC punishable under Section 376 IPC.

15. In the present case, no offence under Section 376/511 is made out as there is no penetration. There has been no attempt of penetration. The appellant has not been found undressed or did not undress the victim. The appellant was charged under Sections 341, 323, 504, 506 and 376/511 of Indian Penal Code. He was convicted under Section 376/511 of Indian Penal Code but he was acquitted under Sections 341, 323, 504 and 506 of the Indian Penal Code. The question arises as to whether if the appellant is found not guilty under Section 376/511 of Indian Penal Code whether he can be convicted for committing any other offence pertaining to outraging the modesty of the victim. This question has again been answered in the case of *Tarkeshwar Sahu (Supra)* and it has been held that when an accused is charged with major offence and ingredients of the major offenses are missing



and ingredients of minor offence are made out then he may be convicted for the minor offence even though he was not charged with it.

16. Section 354 of the Indian Penal Code reads as follows:-

“354. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

17. Intention to outrage the modesty of a woman or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence under Section 354 of Indian Penal Code. The intention of the accused is the crux of the matter and any action on the part of the offender which is capable of shocking the decency of a woman will result in conviction of the accused under Section 354 of the Indian Penal Code.

18. In my opinion, though the appellant cannot be convicted under Section 376/511 of the Indian Penal Code but as the appellant has outraged the modesty of the victim, the ingredients of Section 354 are attracted, and on the basis of evidence, the conviction of the appellant under Section 376/511 of Indian Penal Code is unsustainable, and consequently his conviction by the Trial Court under Section 376/511 of Indian



Penal Code is hereby set aside. On examination of the evidence and materials on record, the appellant is held guilty of the offence under Section 354 of Indian Penal Code and is convicted under Section 354 of Indian Penal Code and is sentenced to undergo rigorous imprisonment for one year.

19. The appeal is partly allowed and disposed of accordingly. The appellant shall be taken into custody to serve the sentence.

(Sandeep Kumar, J)

Shishir/-

AFR/NAFR	N.A.F.R.
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