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**(2003) 07 JH CK 0033**

**Jharkhand High Court**

**Case No:** Criminal A. No. 84 of 1996

Babulal Sao

APPELLANT

Vs

State of Bihar

RESPONDENT

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**Date of Decision:** July 8, 2003

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 212, 215, 464
- Penal Code, 1860 (IPC) - Section 323, 354, 376

**Citation:** (2004) CriLJ 2465 : (2004) AIR Jhar HCR 1314 : (2004) 3 EastCriC 140

**Hon'ble Judges:** Amareshwar Sahay, J

**Bench:** Single Bench

**Advocate:** A.S. Dayal and P.S. Dayal, for the Appellant; I.N. Gupta, APP, for the Respondent

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### **Judgement**

Amareshwar Sahay, J.

The appellant was charged u/s 376, I.P.C. for committing rape on Sakunwa Devi on 23rd September, 1993. He was further charged u/s 354 and 323, I.P.C. for outraging the modesty of Chamelwa Devi and also has voluntarily caused hurt to her. However, the trial Court convicted the appellant, u/s 376/511, I.P.C. and sentenced him to undergo R.I. for 10 years. He was further convicted under Sections 354 and 323, I.P.C. and was sentenced to undergo R.I. for 1 year u/s 354, I.P.C. and 6 months u/s 323, I.P.C. All the sentences were ordered to run concurrently.

2. The prosecution case, as stated in the Fard Beyan of Chamelwa Devi-P.W.4, is that on 19-9-1993, while she was going to her house, Sumitri Devi (P.W.1) stopped her on the way and informed her that at about 9 a.m., while she (Sumitri Devi) was washing her mouth, she saw Babulal Sao (appellant) committing rape on her daughter Sukawa Kumari, aged about 5 years, and when she (Sumitri Devi) raised Halla then Babulal Sao fled away. The further case of the prosecution is that when the informant went to interrogate the appellant, at that time he was not available. On

23-9-1993 in the morning when she interrogated the appellant, she was assaulted by the appellant by means of "Danta" and he molested her breast. On her alarm Rani Devi-P.W.2, her husband Pyare Gope and others came to the place of the occurrence.

3. To establish the charges altogether by witnesses were examined-on behalf of the prosecution, out of whom P.W.5 and P.W.6 were tendered. P.W.4 is the informant. P.W.5 is the husband of the informant and P.W.7 is the victim girl whereas P.W.1 and P.W.2 are the witnesses who according to the prosecution, informed the informant about commission of rape by the appellant.

4. Mr. Dayal, learned counsel appearing for the appellant has vehemently argued that the charges framed against the appellant are wholly defective as there is no charge to the effect that the appellant either tried to commit rape or committed rape on the victim on 19-9-1993. Rather the charge framed was for committing the said offence on 23-9-1993, which is not the prosecution case at all, and, therefore, on this ground alone the whole trial is vitiated.

Learned counsel for the appellant next submitted that even while recording the statement of the appellant u/s 313, Cr.P.C., no date of occurrence has been put to the accused for the alleged commission of crime. He further submitted that according to the informant, she was assaulted by the appellant by means of a "Danta" and she was examined by a Doctor, but neither the injury report has been brought on record nor the Doctor, who treated the informant, has been examined as a witness in this case. The learned counsel of the appellant has cited a decision of Patna High Court reported in (1992 (2) PLJR (154) in the case of Samad Mian alias Md. Samad v. State of Bihar in support of his contention.

5. The decisions cited by the learned counsel for the appellant reported in (1992 (2) PLJR 154) in the case of Samsad Mian alias Md. Samsad v. State of Bihar is not applicable in the present case, as the facts of the case and the point involved therein, are quite different. In the said case, in course of examination u/s 313, Cr.P.C., each of the appellant were questioned with regard to a dacoity with murder committed on 19th October, 1969 and no question w.r.t. occurrence on 19-9-1979 was put to them.

Even in the said case Patna High Court has not held that because of the said mistake, the whole trial had vitiated. Therefore, the said decision is of no help to the learned counsel for the appellant.

6. Section 212 of the Cr.P.C. speaks that the charge shall contain such particulars as to the time and place of alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

On plain reading of this Section, it appears that while framing charge, the particulars i.e., the time and place of the alleged occurrence has to be stated to the accused.

7. The question is, "that if there is omission or error in stating the time, place and date of the alleged occurrence, at the time of framing of charge, what would be the effect of such error? Whether the whole trial would be vitiated? as has been argued by the learned counsel for the appellant.

8. Section 215 of the Cr.P.C. speaks about the effect of errors in framing of charge which reads as under :--

"Effects of errors -- No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence of those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of Justice."

Some illustrations have also been given in Section 215, Cr.P.C. Illustration No. (d) says as under :--

"A is charged with the murder of Khoda Baksh on the 21st January, 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 28th January, 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haider Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial."

8. In the present case, during the trial, which was held in presence of the accused/appellant, all the witnesses have referred the date of occurrence of commission of rape to be on 19-9-1993, which is different from the date, mentioned in the charge in which it is stated to be on 23-9-1993. The appellant was not charged with any other case of rape and, therefore, it cannot be said that for mentioning of a wrong date in the charge, the appellant was misled in any way nor it can be said that by mentioning a wrong date at the time of framing of charge it has occasioned in failure of Justice. My view is supported by a decision of the Calcutta High Court in the case of [Araj Sk. Vs. State of West Bengal](#), .

9. Moreover, section 464, Cr.P.C. provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge, including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has, in fact, been occasioned thereby.

10. In view of the above provision of law and my finding above, the submission of the learned counsel for the appellant that because of the mentioning of a wrong date in the charge, the whole trial is vitiated, cannot be accepted and as such as,

hereby, rejected.

11. From the evidence of P.W.4, it appears that she stated in her evidence that the Sumitri Devi (P.W. 11) informed her (the informant) that Babulal Sao, the appellant, had made her daughter naked and was trying to commit rape on her but on halla, raised by her, the appellant fled away. The statement of P.W.4 has fully been corroborated by P.W.1 (Sumitri Devi). P.W.1 in her deposition, she has stated that she saw Babulal Sao, the appellant, trying to commit rape on the daughter of the informant. She further stated that the age of the victim girl was only 5 years and further that on her hulla, the appellant fled away and she informed Chamelwa Devi (P.W.4) about the said occurrence. The statement of P.W.4, on the point of attempt of commission of rape on her daughter, has further been corroborated by P.W.2 Rani Devi. The victim Sakunwa Kumari who has been examined as P.W.7 has narrated the entire story as to how the appellant tried to commit rape on her and she further stated that she informed about the occurrence to her mother as well as to "Daroga Jee".

12. It has been argued on behalf of the appellant that P.W.7, the victim girl was not examined by the I.O. during investigation and was not a charge-sheeted witness and, therefore, her evidence cannot be considered to be reliable.

P.W.7 has, in very specific term, stated that the I.O. had interrogated her during the investigation and she told him about the occurrence and involvement of the appellant in the commission of the alleged occurrence. If the Investigating Officer failed to record her statement in the case diary or failed to mention her name as a witness in the charge-sheet, in my view, the said omission on the part of the Investigating Officer in mentioning the name of the victim girl as a charge-sheeted witness, cannot be said to be a ground to discard the evidence of the victim girl herself, on whom the rape was attempted by the appellant.

13. The learned trial Court had rightly convicted the appellant u/s 376(1)/511, I.P.C.

14. So far the charge under Sections 354 and 323, I.P.C. for outraging the modesty of Chamelwa Devi i.e. the informant (P.W.4) is concerned, I find that she has stated in her evidence that while she went to the appellant on 23rd of September, 1993 to interrogate him as to why he tried to commit rape on her daughter, the appellant assaulted her with "Danta" and molested her breast. From the close scrutiny of the evidence of this witness, I find that the defendant has not been able to take out any contradiction with regard to her molestation by the appellant. So far, the assault by "Danta" by the appellant on P.W.4 is concerned, I find that neither there is injury report nor there is any corroborating evidence in support of the assault and, as such, in my view, the conviction u/s 323, I.P.C. cannot be sustained, but the charge u/s 354, I.P.C. has been established.

15. In view of my discussions and findings above, I hold that the conviction u/s 376(1)/511 and u/s 354, IPC passed by the trial Court, does not require any

interference and, therefore, the conviction and sentence u/s 376(1)/511, IPC as well as conviction u/s 354, IPC are hereby confirmed. But the conviction and sentence u/s 323, I.P.C. is hereby set aside.

16. In the result, this appeal is partly allowed. The appellant who is on bail, his bail bonds are hereby cancelled and he is directed to surrender to serve out the sentence.