

(2011) 12 PAT CK 0126**Patna High Court****Case No:** Criminal Appeal (SJ) No. 378 of 1998

Abu Bakar and Sk. Musahid

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision: Dec. 12, 2011**Citation:** (2012) 1 PLJR 527**Hon'ble Judges:** Mandhata Singh, J**Bench:** Single Bench**Final Decision:** Allowed**Judgement**

Mandhata Singh, J.

Fardbeyan of one of the victims namely Simuda Kumari is made basis for the F.I.R. which in short is that she and her cousin sister Akali Kumari were sleeping in a room of their house. Their mother, father and brother were sleeping in different rooms. It is alleged that a boy entered their room, pressed her (informant's) mouth by means of cloth and committed rape. He was identified as Md. Abu Bakar in the light of lantern. It is further alleged that her cousin sister rushed from the room to awake the family members but was caught in the courtyard by another accused Md. Musahid. Her mouth was closed and she was dragged to a culvert near a primary school. Informant also was dragged there and rape was committed upon both the informant and her cousin sister by Musahid and Md. Abu Bakar. Threatening was also given before committing rape and to keep mum. Anyhow after the actual act of rape, alarm was there on which informant's brother, father, cousin brother and villagers came but accused persons had left the place. A Punchayati was held, so it took time to lodge the case (F.I.R.). After concluding the trial the case is ended in conviction and sentence.

2. In all ten witnesses are examined on behalf of prosecution. Of them P.W.1 is Horen Das, P.W.2 is Dinu Das, P.W.4 is Sattu Das, P.W.5 is Mahendra Das, P.W.6 is Bijal Das, P.Ws 7 and 8 are victims of the case. P.W.9 is Hiran Das. P.W.3 is the doctor who examined the victim girls and P.W.10 is the I.O. of the case. P.Ws 5 and 9 are

tendered witnesses and in cross examination also they have stated nothing about taking place of the incident to favour the prosecution case. P.Ws 1, 2 and 6 are witnesses who came to the place of occurrence after the incident where both the girls were present but watched no part of the incident. P.W.10 is I.O. to state that case was properly investigated on his behalf by examining witnesses, inspecting place of occurrence and collecting other materials. P.W.3 may be corroborative to allegation leveled in the case stated by P.Ws 7 and 8.

3. Now for the real act of commitment of rape or sexual intercourse, statement of P.W.7 and P.W.8 remains to discuss. They are constant on the point that they were sleeping in their room. Accused-appellant no.1 Abu Bakar came, over powered Simuda Kumari after coming upon her, removed her clothes, pressed her mouth and committed rape. Akali Kumari came out from the room but was over powered by accused-appellant no.2 Musahid. Both the girls were taken to culvert, were committed rape after removing their Saries. Their mouth were pressed, so as they could not make alarm. After the act of real commitment of rape when Abu Bakar started to wear his Lungi, there was alarm on behalf of Simuda Kumari and both the accused left the place.

4. Innocence is the defence having no involvement in the alleged act followed by the plea that if there was any sexual intercourse then it was consented. On this point reference is made of the circumstance existing there and act of the victims. Circumstance is that both the victims were sleeping in their separate room from other family members. Brother, mother and father of victim Simuda Kumari were sleeping in other rooms. Further act of the victims that both were sleeping in a room, one of the accused persons namely appellant no.1 entered the room, committed rape upon Simuda Kumari after pressing her mouth and breast. She could not make any alarm but Akali Kumari was free and she also did not make any alarm rather preferred to rush from there to awake other family members and was caught then only her mouth was pressed. Both the girls were dragged to culvert.

5. It is stressed on the point that it is not possible that a major and matured lady is dragged by single person, he will be able to press his mouth also. Till commitment of intercourse to the satisfaction of accused, no alarm was made. There is mention about giving of threatening also on the point of knife made in paragraph 1 of P.W.1 but that disappeared after the act (rape).

6. P.W.7 in paragraph 3, P.W.8 in paragraph-6 state about coming out of blood after the intercourse but doctor's opinion is that hymen of both the girls was old torn, their vaginal canal was admitting two fingers and they were habituated to sex, so in my view there was no possibility of coming of blood. Both the girls are above 16 and matured. P.W.7 in paragraph-4 and P.W.8 in paragraph 7 state about their becoming unconscious. The used force, threatening and the circumstance that one girl indulged in sexual intercourse with one accused only there was no occasion of their becoming unconscious. P.W.3 is clear on the point that there was no violence of

other nature including injury on private or any part of the body.

7. Both the girls have been examined after a week, so certainly there is no chance of finding of any spermatozoa. In Panchaity some terms were imposed and a fine of Rs. 20,000/- was imposed upon the accused persons which was not paid on their behalf, so the case was lodged after five days. Suggestion is there to P.W.1 in paragraph 10 that false case was filed to pressurize accused persons for money. P.W.2 in paragraph 12 has been suggested about filing of false case due to enmity, so after considering the relevant paragraphs of both the victims suggested and discussed above, the act of accused persons if was without consent and was coming to the definition of rape is doubted. This much of the aspect has not been considered by the trial court, so conclusion by it is not liable to sustain.

8. The appeal is accordingly, allowed and the judgment and order of conviction and sentence passed in Sessions Case No. 139 of 1992 is set aside. Appellants are on bail. They shall stand discharged from the liabilities of their respective bail bonds.