Akhlaque Hussain Vs The State of Bihar

Court: PATNA HIGH COURT

Date of Decision: March 14, 2018

Acts Referred: INDIAN PENAL CODE 1860, â€" section 376 Code of Criminal Procedure, 1973, â€" section 313,212 Evidence Act, 1872, â€" section 138,146

Hon'ble Judges: ADITYA KUMAR TRIVEDI

Bench: Single Bench

Advocate: Najmul Hoda; Binod Bihari Singh;

Final Decision: Dismissed

Judgement

1. Appellant, Akhlaque Hussain has been found guilty for an offence punishable under Section 376 of the IPC and sentenced to undergo R.I. for

seven years as well as to pay fine appertaining to Rs.5000/- and in default thereof, to undergo R.I. for six months, additionally. In addition thereof,

appellant has been directed to pay Rs.50,000/- by way of compensation.

2. Bibi Badrun Nisha filed Complaint Petition No.301/2006 before the Chief Judicial Magistrate, Kishanganj on 07-04-2006 alleging inter alia that

on 25.12.2005 her daughter Jaha Ara who happens to be a divorcee and on account thereof, was staying at her place for the last so many years,

had gone to meet natures call. Perceiving some delay she along with her younger daughter Rajeka Begum gone in search of her and during course

thereof she had seen Akhlaque having over Jahan Ara and was raping while she was tossing. After seeing her, Akhlaque ran away. Then

thereafter, they saw cloth was thrust in the mouth of the victim which was taken out and then, thereafter, they made alarm attracting the villagers

whom she (Jahan Ara) disclosed regarding commission of rape by Akhlaque Hussain by putting her under threat of murder after showing chura. It

has further been disclosed that matter was taken up at the local level whereupon a panchayati was convened having presence of Akhlaque Hussain

and his family members who confessed his guilt and further, undertook to marry. In the aforesaid background, Akhlaque Hussain began to visit her

place and during course thereof, developed physical relationship with Jahan Ara as a result of which she became pregnant. Akhlaque Hussain by

way of administering the medicine made unsuccessful attempt to a bort and further, declined to marry whereupon, lastly instant case has been filed

as police refused to acknowledge.

3. Aforesaid complaint petition was sent to the local Police Station for registration as well as investigation whereupon Kochadhaman P.S. Case

No.60/2006 followed with investigation as well as submission of charge sheet facilitating the trial, meeting with ultimate result, subject matter of

instant appeal.

4. DefenceÃ¯Â¿Â½ caseÃ¯Â¿Â½ asÃ¯Â¿Â½ isÃ¯Â¿Â½ evidentÃ¯Â¿Â½ fromÃ¯Â¿Â½ mode Ã¯Â¿Â½ofÃ¯Â¿Â½ cross-examination as well as statement recorded under Section 313 of

the Cr.P.C. is that of complete denial. Furthermore, it has also been pleaded that as, the prosecution party were eager to marry the victim with the

appellant which he refused on account thereof, this false case has been registered levelling frivolous allegations. To substantiate the same, one DW

has also been examined.

5. In order to substantiate its case prosecution had examined eleven PWs who are PW.1-Matiur Rahman, PW.2-Jakir Alam, PW.3 Habibur

Rahman, PW.4-Md. Istiyaque, PW.5- Jamaluddin, PW.6-Rajna Begum, PW.7-Badrun Nishan, PW.8-Jaha Ara Begum, PW.9-Safiur Rahman,

PW.10-Nirmal Kumar and PW.11-Dr. Urmila Kumari. Side by side had also exhibited endorsement over complaint Ext.1, Formal FIR Ext.1/1,

Medical Report Ext.2. On the other hand, defence had also examined DW.1-Parmeshwar Mandal having no exhibit of the documentary evidence.

6.Learned counsel for the appellant vehemently challenged the finding having been recorded by the learned lower court on the pretext that after

going through the evidence, it is apparent that victim was major and was a consenting party which, the subsequent conduct of the victim clearly

suggest and that being so, no offence under Section 376 of the IPC is made out. Further, elaborating the issue, it has been submitted that from

going through the written report, it is apparent that no P.O. has been disclosed. In the aforesaid background, it has also been submitted that during

course of evidence of witnesses at least PW.6 and PW.7, it was expected at their end to have affixed the place of occurrence properly which, the

victim PW.8 had identified to be the banana field and in the aforesaid background when the evidence of the Investigating Officer, PW.10, is gone

through, it is evident that there happens to be inconsistency on that very score. This inconsistency will play pivotal role during course of

appreciation of the evidence as, the conduct of the victim clearly explicit to be a consenting period, indulged in physical relationship and continued

the same for years together without any protest or hitch and that being so, the finding recorded by the learned lower court found contrary to the

materials available on the record.

7. Furthermore, it has also been submitted that when the evidences are seen, it is apparent that the independent witnesses, PW.1, PW.2, PW.3,

PW.4 and PW.9 have not supported the case of the prosecution, whoever happens to be, PW.5 father, PW.6 sister, PW.7 mother and PW.8 the

victim herself whose evidence in the facts and circumstance of the case would not have been relied upon. Furthermore, the evidence of PW.10 the

Investigating Officer is not at all found akin to prosecution. The evidence of doctor PW.11 is nothing but suggest the ultimate result of indulgence of

victim under sexual activity without any precaution as a result of which she became pregnant. Accordingly, the evidence in its entirety did not

suggest that victim was ever raped. The present aspect is also to be seen in the background of long delay in launching of criminal prosecution and

only to wrap the same, complaint petition has been filed in court with false assertion that police had refused to register the case. Then, it has been

submitted that subsequent conduct, as disclosed by the prosecution witnesses themselves ruled out incident of rape, in the background of

continuing relationship amongst the party (prosecutrix with appellant) and that being so, the judgment of conviction and sentence recorded by the

learned lower court is fit to be set aside.

8. On the other hand, the learned Additional Public Prosecutor while supporting the finding recorded by the learned lower court has submitted that

being an incident of rape that too, while the victim had gone to meet natures call from her house, could

not, be seen by the villagers as till then darkness had fallen and that happens to be reason behind that there happens to be disclosure at the end of

the prosecution that while PW.6 along with PW.7 have gone in search of victim that they were carrying torch and in torch light they have seen the

accused/appellant indulged in committing rape over the victim, PW.8 and so, PW.6, PW.7 and PW.8 are the witness over the occurrence who

substantiated the same is found duly corroborated with the evidence of PW.10 Investigating Officer as well as PW.11,Ã¯Â¿Â½Ã¯Â¿Â½ the doctor.

Consequent thereupon, the finding recordedÃ¯Â¿Â½ byÃ¯Â¿Â½ theÃ¯Â¿Â½ learnedÃ¯Â¿Â½ lowerÃ¯Â¿Â½ courtÃ¯Â¿Â½ didÃ¯Â¿Â½ notÃ¯Â¿Â½ attractÃ¯Â¿Â½ anyÃ¯Â¿Â½ kindÃ¯Â¿Â½ of

interference.

9. So far evidence of prosecutrix is concerned, it has been settled at rest that unless and until there happens to be grave infirmity, improbability or

exaggeration, it should not be brushed aside on flimsy grounds or should be asked for corroboration.Ã¯Â¿Â½ Rape, so far Indian social structure is

concerned has been treated not only an offence against an individual rather it happens to be against the society as is attached with the prestige of a

women, has been treated as paramount consideration. The scar of rape is not extended only to body rather it happens to be extended to soul

which the victim has to carry till her life and in the aforesaid background. The delay in institution of prosecution as well as reliability of evidence of

prosecutrix has properly been considered by the Apex Court in State of U.P. vs. Sanjay Kumar reported in 2017 Cr.L.J. 1443:

Ã¯Â¿Â½Ã¯Â¿Â½24. When the matter is examined in the aforesaid perspective, which in the opinion of this Court is the right perspective, reluctance on the

part of the prosecutrix in not narrating the incident to anybody for a period of three years and not sharing the same event with her mother, is clearly

understandable. We would like to extract the following passage from the judgment of this Court in Tulshidas Kanolkar v. State of Goa (2003) 8

SCC 590:

Ã¯Â¿Â½Ã¯Â¿Â½5. We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first

information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in

lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only

puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see

whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or

exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is

weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally

unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way

render the prosecution version brittle.Ã¯Â¿Â½

25. In Karnel Singh v. State of Madhya Pradesh (1995) 5 SCC 518), this Court observed that:

Ã¯Â¿Â½Ã¯Â¿Â½7...The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens

to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does

not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts

doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily

indicate that her version is false...Ã¯Â¿Â½

26. Likewise, in State of Punjab v. Gurmit Singh & Ors. (1996)2 SCC 384, it was observed:

Ã¯Â¿Â½Ã¯Â¿Â½8...The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly

the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the

prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged...Ã¯Â¿Â½

27.Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½ xxx

28.Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½ xxx

29.Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½ xxx

30.Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½ xxx

31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has

cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are

compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the

victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement

before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus,

to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without

corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek

corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate

one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a

woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why

should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses

tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance {See Bhupinder Sharma v. State of Himachal

Pradesh(2003) 8 SCC 551}. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is

discussed hereinabove.

10. In the aforesaid background, first of all evidence of PW.8, victim is to be seen. PW.8 during course of examination-in-chief had stated that the

occurrence happens to be about one year and ten months ago. It was night then corrected 06:00 PM. She had gone to meet natures call towards

eastern-southern direction from her house where banana cluster lies. At that very moment, Akhlaque Hussain came, caught hold her, gagged her

mouth and committed rape upon her. Identified the accused. As a result of rape, she became pregnant. He continued the same for subsequent four

months then thereafter, she was forcibly administered medicine in order to abort which she vomited. Later on, she gave birth to a child who was in

her lap and recorded by the learned lower court. During cross-examination she had stated that she made statement before the police (Investigating

Officer as well as Superintendent of Police). She had further stated that earlier she was married to Sakil about 20-22 years ago and then

thereafter, he divorced her. At para-4, she had further stated that she was knowing Akhlaque Hussain since before the occurrence. In para-5 she

had further stated that she had five brothers Sakil, Jasim, Khalid, Wahir, Ekbal. They are not witness of this case. Panchayati was convened on

that very score. In case the accused would have married her then in that circumstance instant case would not have been registered. Then had said

at the present moment, she is not remembering what she had talked with her mother. Then had disclosed that no talk was there. In para-6, she had

shown the boundary of the field having banana cluster. North-Nepal, South-Kuresa, East-West Bengal, West-Uttarpradesh. That field belongs to

her. In para-9 she had stated that she is unable to disclose actual age of the accused. He had wife, children. At the time of marriage of the accused

she had not taken birth. Then had explained the event of rape according to her own perception. In para-10 she had disclosed that accused had got

30-35 bighas of land. In para-11 she had denied the suggestion that as accused declined to marry on account thereof, this false case has been

filed.

11. PW.11 is the doctor who had examined the victim on 10-08-2006 and found the following:-

P/A- Uterus 26-28 week size. Pelvic exam-carvic sat ultrasonography - Shows pregnancy of 29 weeks 3 days Ã¯Â¿Â½ 7 days. She is carrying

pregnancy of 29 week.

Accordingly to doctor she was carrying pregnancy of 29 weeks. From cross-examination, it is evident that she was not at all cross-examined on

the score of her finding.

12. PW.10Ã¯Â¿Â½ is theÃ¯Â¿Â½ InvestigatingÃ¯Â¿Â½ OfficerÃ¯Â¿Â½ whoÃ¯Â¿Â½ hadÃ¯Â¿Â½ deposed that after receiving copy of the complaint from the court, he had

registered the case (exhibited the same). Proceeded with the investigation. Took further statement of informant Badrun Nisha, inspected the place

of occurrence which happens to be south to the house of the informant. Disclosed the boundary P.O. as East-Barren land of Mahboob, West-

House of informant, North-Road, South-Jute field of the informant. Examined the victim as well as other witnesses, sent the victim to hospital for

medical examination, procured the medical report and then thereafter, as he was transferred handed over charge to the Officer-in-charge. During

cross-examination he had stated that he had not taken statement of the person whose land lies in the boundary of the P.O. Then had denied the

suggestion that his investigation happens to be cryptic one.

13. PW.7 is the informant/mother of the victim. She had stated that her daughter had gone to meet natures call east to her house on the alleged

date and time of occurrence. Perceiving some delay, she along with her another daughter Rajida Begum gone in search of her and during course

thereof, had seen appellant Akhlaque Hussain committing rape over the victim he had thrust cloth inside the mouth of victim. He had committed

rape on the pretext of chura. Seeing them, accused escaped therefrom. There was hue and cry whereupon, panchayati was convened wherein,

accused confessed his guilt and offered to marry but, could not marry. He tried to administer medicine to the victim to facilitate abortion but, the

victim averted. Now the child has begotten. Identified the accused. During cross-examination at para-4 she had stated that her daughter was

married with Sakil about 25, 26 years ago but was divorced. She had further stated that she had not gave evidence before institution of the case.

Her husband, son accompanied her to court. She happens to be Pardanashin lady. Her sons, husband have accompanied them. Then, she was

confronted with the word Ã¯Â¿Â½BalatkarÃ¯Â¿Â½ which she explained as per her own understanding. In para-5 she had stated that she had not talked with

her daughter. Her daughter had not begotten a child who died subsequently. In para-6 she had disclosed the age of the appellant to be 70 years.

She had further disclosed that had accused married with the victim, no case would have been instituted. At para-7, she had disclosed about the

family status of the accused/appellant then had denied the suggestion that victim was never raped by the accused. She had further denied the

suggestion that she wanted the accused to marry with her daughter which he refused and on account thereof, this false case has been instituted.

14. PW.6 is the younger sister of the victim, who during course of examination-in-chief had supported the version of her mother, begotting of a

child by the victim on account of rape having committed by the accused and then, identification of the accused. During cross-examination she had

stated that this case has been instituted by her mother. She had further stated that at an earlier occasion she had gone to police station and had

made her statement. She further stated that she had seen Akhlaque Hussain in naked condition. She had further stated that victim Jaha ara was

married with Sakil, but Sakil had divorced her. After 12 years of the event of divorce this occurrence had taken place whereupon, case has been

instituted. Then had stated showing the family status of the accused. Then had denied the suggestion that as accused failed to accede with their

demand to marry with the victim, on account thereof, instant case has been registered.

15. PW.5 is the father of the victim who, on the factum of rape happens to be hearsay witness and the source having been disclosed at his end

happens to be the victim as well as his wife. Then had deposed over the panchayati and continued physical intimacy under the garb of an

undertaking having at the end of the appellant in the panchayat that he is going to marry with the victim. During cross-examination, he was cross-

examined on the score of marriage, divorce of the victim. He had further disclosed with regard to begetting of a child by the victim who is 9-10

months old. There also happens to be disclosure on the score of panchayati. He had further been tested on the score of filing of the case having at

the instance of his wife. Victim had not disclosed that she had instituted a case. He had further stated that he had not taken intended for getting his

daughter married with the accused. He had further stated that he had got no document of divorce. Then had denied the suggestion that he along

with his family members have hatched a conspiracy to get the victim married with the accused and for that, this case has been instituted.

16. Now coming to the evidence of rest of the witnesses, PW.1, PW.3, PW.4 and PW.9 have not supported the case of the prosecution.

However, PW.2, though was declared hostile but had divulged that he heard about inter se relationship of the victim with Akhlaque Hussain and on

account thereof, she became pregnant.

17. AfterÃ¯Â¿Â½ meticulous examination ofÃ¯Â¿Â½ the evidenceÃ¯Â¿Â½ ofÃ¯Â¿Â½ the witnesses it is apparent that victim along with her mother and sister were not

at all cross-examined at the end of the appellant either on the score of rape or panchayati, an undertaking having at the end of appellant to marry

and under garb of aforesaid undertaking availed physical relationship with the victim furthermore and that being so, the same remained intact. It is

further evident that victim was not cross-examined over the place of occurrence. That means to say whatever been asserted at their end, PW.6

and PW.7 to be an eye witness of commission of rape by the Akhlaque Hussain and further having been duly elaborated by the victim, PW.8 is

found unshaken.

18. InÃ¯Â¿Â½ GianÃ¯Â¿Â½ ChandÃ¯Â¿Â½ &Ã¯Â¿Â½ othersÃ¯Â¿Â½ v.Ã¯Â¿Â½ StateÃ¯Â¿Â½ ofÃ¯Â¿Â½ Haryana reported in 2013(4) PLJR 7 (SC) it has been held:

Ã¯Â¿Â½Ã¯Â¿Â½11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in

Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 observing as under:

Ã¯Â¿Â½31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards

the correctness of the sta tement of a witness, the said witness must be given an opportunity to explain his sta tement by drawing his attention to

that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law

has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to

cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision

stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter,

the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any

doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events

provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must

provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and

fairness in dealing with witnesses.Ã¯Â¿Â½

Ã¯Â¿Â½(Emphasis supplied)

19. Had there been any sort of cross-examination at the end of the appellant over the occurrence and in likewise manner had there been at least a

suggestion at the end of the appellant that being major it was a consensual activity of the victim or had there been suggestion at the end of the

appellant that victim being major voluntarily indulged in physical relationship with the appellant then, inÃ¯Â¿Â½ thatÃ¯Â¿Â½ circumstance,Ã¯Â¿Â½ theÃ¯Â¿Â½

matterÃ¯Â¿Â½ wouldÃ¯Â¿Â½ haveÃ¯Â¿Â½ beenÃ¯Â¿Â½ viewedÃ¯Â¿Â½ with different prospect but, considering the suggestion apart from having lapses at the end of the

appellant in properly cross-examining the victim over the factum of rape, denying any sort of intimacy with the victimÃ¯Â¿Â½ ratherÃ¯Â¿Â½ suggesting

thatÃ¯Â¿Â½ in order toÃ¯Â¿Â½ coerce theÃ¯Â¿Â½ appellantÃ¯Â¿Â½ to marry with the victim this false case has been instituted, exposes complete illusion of the

appellants.

20. At the present moment, certain defects persisting on the record needs to be taken note of. Although offence of rape has been alleged on

25.02.2005, but in the format of charge it has been shown as 12.12.2015, and in likewise manner, in the statement recorded under Section 313

Cr.P.C. So far defect in charge is concerned, it is found to be of no consequence as under Section 212 Cr.P.C., and in likewise manner, during

course of statement, as appellant had faced trial and so, was well acquainted with the allegation. Moreover, the Apex Court in Yogesh Singh vs.

Mahabeer Singh & Ors. reported in (2017) 11 SCC 195 has properly explained the same.

21. As such, instant appeal sans merit and is accordingly dismissed. Appellant is on bail, his bail bond is cancelled directing him to surrender before

the learned lower court within fortnight to serve out remaining part of sentence, failing which the learned lower court will be at liberty to proceed

against the appellant in accordance with law.