

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr. Appeal (S.J.) No. 1082 of 2008

Jitendra Rai @ Karu Rai ... Appellant
 -Versus-
 1. The State of Jharkhand
 2. Malati Kumari ... Respondents

CORAM: HON'BLE MR. JUSTICE SANJAY PRASAD

For the Appellant : Mr. Ashish Verma, Advocate
 For the State : Mr. Azeemuddin, A.P.P.
 For the Respondent No. 2 : None

JUDGMENT

Pronounced on 19.04.2024

This instant Criminal Appeal has been filed on behalf of the appellant challenging the impugned judgment of convictions dated 03.07.2008 and sentence dated 04.07.2008 passed by Sri Alok Kumar Dubey, the learned 5th Addl. Sessions Judge (F.T.C.) Dumka in Sessions Case No. 259/2007 arising out of Jama P.S. Case No. 52/2007 registered u/s 366A, 376 of IPC corresponding to G. R.No. 562/2007 by which the appellant Jitendra Rai @ Karu Rai has been convicted for the offences under sections 366/363 of IPC and has been sentenced to go R.I. for 5 years for the offence under section 366 of I.P.C. and R.I. for 3 years for the offence under section 363 of the IPC.

However, the learned Court has further directed that both the sentences shall run concurrently. The learned court below has further sentenced the appellant to pay fine of Rs 1000/- and in default of payment of fine he shall further undergo R.I. for three months.

2. The prosecution case, in brief, is that while the informant – prosecutrix aged around 14 years (name not disclosed) was sleeping outside of her house at her western side room on 17.04.2007 and her parents father , mother were

sleeping in the eastern side room then around 1:00 am on 17.04.2007 in night her Co- villager Jitendra Rai @ Karu Rai entered into her room and left her in his lap at certain distance and threatened to follow him otherwise she will face dire consequence and may be killed and he took her around one (01) K.M. on near Bhikanpur Jungle and had committed rape upon her twice against her wishes and threatened her of dire consequences . When it was around morning hour then the appellant Jitendra Rai @ Karu Rai got her on foot to village Lodhna and kept her in the house of Nand Kishore Rai (i.e. P.W.3) for 2 days, and had committed rape upon her. Thereafter he brought her to Chuto Dighi Paharia Tola and kept her for one night there and also committed rape upon her and also threatened her and next day in the morning by a Motorcycle, he took her to village-Bhorandiha in the jungle and from there she was brought to her Fufa's (P.W.6) . On 26.4.2007 Rameshwar Rai P.W.1 brought her back by a Motorcycle and thereafter she narrated the entire occurrence to her parents and others about the occurrence. She also alleged that there the appellant Jitendra Rai @ Karu Rai had threatened her to kill her, if she disclosed this fact and hence due to his fear they did not go to Police Station and they met the Higher Officer on 30.04.2007 (sic) and who asked her to go to the Police Station and hence she submitted the written application on 02.05.2007.

3. Heard learned counsel for the appellant and the learned counsel for the State.

4. Learned counsel for the appellant has submitted that the impugned judgment and sentence passed by the learned Court below are illegal and arbitrary not sustainable in eye of law. It is submitted that allegation against the

appellant Jitendra Rai @ Karu Rai in the F.I.R. are false and concocted. It is submitted that the informant has falsely implicated the appellant due to village politics at the instance for her parents. It is submitted that there is delay of 14 days in lodging the F.I.R. and for which there is no proper explanation. It is submitted that there is no corroborating evidence to support the evidence of the informant (P.W.9). It is submitted that the medical report does not show corroboration of alleged occurrence of rape and hence Medical Report does not support the prosecution case. It is submitted that the impugned judgment and sentence show non-application of mind by the learned Trial Court. It is submitted that P.W. 3 namely Nand Kishore Rai has been declared hostile. It is submitted that P.W. 2 is one Rita Pujahar who is an old lady and where the informant was kept for one night and she had not identified the accused – appellant and hence the evidence of P.W. 2 is not reliable. It is submitted that the P.W. 1 Rameshwar Rai is the cousin of the informant and he is not eyewitness and hence his evidence is not reliable and as he is an interested witness. It is submitted that P.W. 4 i.e. Bharat Lal Rai is the father and Bimla Devi i.e. P.W. 8 is mother of the informant and they are interested witnesses and they not seen the appellant for taking away the victim girl and they have kept the Victim for 14 days. It is submitted that the P.W. 5 i.e. Marwi Devi, the P.W. 6 i.e. Sadwi Devi are the Sister and Fuwa the informant and they were also interested witnesses . It is submitted that even the informant had not told about the occurrence to P.W. 6 Sadwi Devi where she had stayed there for six days. It is submitted that P.W. 7 is Dr. Pusplata Tudu who had not found any injury on the private part of the informant and had stated that Hymen

of the informant was found intact at the time of her medical examination and hence the allegation of rape is not proved . It is submitted that the P.W. 8 is mother of the victim girl who is also an interested witness and she kept mum for 14 days . It is submitted that the P.W. 10 is the Investigating Officer of this case who had conducted the perfunctory investigation. It is submitted that the learned trial court has committed error by convicting the appellant for the offences under sections 366/363 of the I.P.C. without framing fresh charges . It is submitted that offence under sections 366/363 of the IPC are not the minor sections of section 366A and 376 of the IPC and as such the appellant has been greatly prejudiced. It is submitted that when the learned trial court found that prosecution failed to prove charges u/s 366 A and 376 of the IPC, then the learned Trial Court below ought to have acquitted the appellant. It is submitted that when the learned trial court did not believe the case of rape, although repeatedly narrated by the victim cum – informant then the learned trial court should have also disbelieved the remaining prosecution story as narrated by the Victim Girl .

It is submitted that the P.W. 4 is father of the Victim girl and stated during his cross-examination that due to election schedule that he had contested also the election of Pradhani and one Mamta Devi was the candidate and thus he has falsely implicated the appellant after losing the election . P.W. 4 also admitted that he had gone to the police station twice but he had not submitted anything in writing.

It is submitted that the P.W 9 is the Victim Girl who had admitted during her evidence that her parents wanted to sell her and thus there is departure from F.I.R. Even P.W. 9 i.e. the victim girl admitted that the accused appellant is in

relation as a Nephew and the appellant never visited her house. She also admitted for not informing the father and mother of Nand Kishore Rai of offence of rape where she was kept by the appellant. Even P.W. 4 admitted that nobody had seen the appellant taking away the daughter of the informant and hence the judgment and sentence may be set-side and the appellant may be acquitted.

5. On the other hand, the learned A.P.P. has opposed the prayer and submitted that impugned judgment of conviction and sentence passed by the learned Court below are fit and proper and no interference is required. It is submitted that the learned Court below had rightly convicted the appellant for the offence under section 363 and 366 of the I.P.C. It is submitted that the P.W. 9 is the victim girl and she has fully supported this case against the appellant for committing rape upon her and she also stated that the appellant had taken her to 2-3 other places and where he committed rape upon her. It is submitted that P.W. 4 is father of the victim girl, P.W. 8 is mother of the victim girl and P.W. 6 is Fuwa of the victim girl and they have also supported and corroborated the prosecution case. It is submitted that P.W. 1 is cousin brother of the informant and he also supported the prosecution case by stating that he had brought the victim girl from the Jungle to her house. It is submitted that although the Doctor had not supported the offence of rape committed upon the informant but cannot Medical Report cannot reject the testimony of the witnesses including the prosecutrix. It is submitted that P.W. 10 is I.O. of this case and he fully supported and corroborated the prosecution case. It is submitted that P.W. 2, P.W.3, P.W.7 namely Rita Pujhari, Nand Kishore Rai and Dr. Puspallata Tudu respectively have

supported and corroborated the prosecution case. It is submitted that no illegality has been committed by the learned Court below by convicting the appellant for the offences under section 363 and 366 of the I.P.C. and hence this Criminal Appeal may be dismissed.

6. Perused the Lower Court Records of this case and considered the submission of both the sides.

7. It transpires that the Victim girl aged about 14 years had lodged the F.I.R on 02.05.2007 for the occurrence taking place in the night of 17.04.2007 .

8. It further reveals from the F.I.R. that the P.W. 1 Rameshwar Rai had brought the victim girl to her house by the motorcycle on 26.04.2007 itself before her parents, still the F.I.R. was lodged under section 366A and 376 I.P.C. on 02.05.2007 by submitting that he was advised by the Superior Officer of Police to move before the police station.

9. It transpires that the police, after conducting the investigation had submitted the charge-sheet against the appellant for the offence under section 366A and 376 of the I.P.C. before the learned Chief Judicial Magistrate, Dumka and the learned Chief Judicial Magistrate, Dumka had taken cognizance against the appellant for the offence under section 366A and 376 of the I.P.C. on 18.06.2007 .

10. After supplying the police papers to the appellant, charges had been framed against the appellant for the offences under section 366 A and 376 of the I.P.C. on 11.12.2007 by Sri Alok Kumar Dubey, then learned 5th Additional Sessions Judge (F.T.C.), Dumka and to which he pleaded not guilty and claimed to be tried.

11. During trial the prosecution has got examined ten (10) witnesses who are as follows:-

- (i) P.W. 1 is Rameshwar Rai ,
- (ii) P.W. 2 is Rita Pujahar
- (iii) P.W. 3 is Nandkishore Rai,
- (iv) P.W. 4 is Bharatlal Rai is father of the victim girl,
- (v) P.W. 5 is Marwi Devi,
- (vi) P.W. 6 is Sadi Devi i.e. Fuwa of the victim girl,
- (vi) P.W. 7 is is Pusplata Tudu i.e. the Doctor,
- (vii) P.W. 8 is Bimla Devi i.e. the mother of the victim girl,
- (viii) P.W. 9 is the victim girl (i.e. the informant) and
- (ix) P.W. 10 is Shiv Narayan Ram i.e. the I.O. of this case.

12. The prosecution in support of its case has got proved the following documents as the Exhibits which are as follows:-

- (i) Exhibit 1 is Written Application,
- (ii) Exhibit 2 is Medical Report,
- (iii) Exhibit 1/1 is signature of Victim Girl on Written Application,
- (iv) Exhibit 1/2 is endorsement on Written Application and
- (v) Exhibit 3 is Formal F.I.R.

13. Thereafter, the appellant was examined under section 313 Cr.P.C. on 12.06.2008 by the learned Court below and to which he denied the circumstances put forth before him.

14. Neither any defence witness was examined nor any document was marked as Exhibit on behalf of the defence i.e. the appellant .

15. Thereafter the learned Court below has convicted the appellant for the offence under sections 363 and 366 of the I.P.C and sentenced him to undergo imprisonment on different counts as mentioned earlier and hence the present

Appeal has been filed. Hence the evidence of prosecution witnesses have seen .

16. P.W. 7 is Pusalata Tuddu who is the Doctor and had examined the Victim girl on 02.05.2007 and had found the following :-

(i) The victim girl about 4'5" of height, weight 82 Lb. Teeth upper 14, lower 14. Breast developed. Auxillary hairs present but scanty. Pubic hair present. No external injury over her body externally, No internal injury over her private parts. Hymen shows intact. No foreign hairs present. Vaginal swab was taken and send to Pathology for microscopic examination. Report shows spermatozoa not found in vaginal swab. Report given by Dr. A.K. Singh In-charge Pathologist, Sadar Hospital, Dumka. X-ray of both knee joints, both wrist joints and both illiac crest were advised and X-ray plates were shown to Dr. S.N. Jha Orthopedic Surgeon, Sadar Hospital, Dumka. Report shows as following- X-ray knee joint shows upper epiphysis of both tibia and fibula united- X-ray both illiac wrist joint shows lower epiphysis of radius and ulna united. X-ray both hip bones shows crest of both illium bones well occified but still not united. According to the above findings, there is no sign of rape. As far as age is concerned. According to secondary sex characters, number of teeth and X-ray report the age of the victim is between 17-18 years.

(ii) She has proved the medical report of the victim girl marked as Exhibit -2.

During cross –examination she stated that virtually these was no sign of rape.

Thus from scrutinizing the evidence of P.W. 7 i.e. the Doctor , it would appear that no sign of rape was

found by the Doctor and she had also stated that hymen was intact and there was neither external injury nor any internal injury on her private part. Thus, the allegation of rape is not supported by the Medical Examination Report of the Victim Girl.

17. P.W. 1 is Rameshwar Rai who has tried to support the prosecution case during his evidence that the appellant took the victim girl on the fear of knife and committed rape upon her and next day she was taken to Lodhna village where she was kept two (02) days and from there she was taken to the house of Paharia at Dhighi and from there she was left at field near the house of her Fupha i.e. the Maternal Uncle by the motorcycle and threatened her of dire consequence. He had found the victim girl on 26th days i.e. 26.04.2007 and he brought her to house by Motorcycle.

During cross examination he admitted that he is cousin brother of the Victim Girl and his house is situated at the distance of 50-60 meter from the house of informant and her father Bharat Lal, mother Bimla Devi and three brothers Sibbu, Dada and Chotuwa lived there then the informant was not being seen for doing any work in the village in the house of any person. However he was not on daily visiting terms in the house of the informant. He also stated that the house of informant- prosecutrix is of one room and having two (02) verandah from both side and there is a place of keeping animal separately. He also admitted that house of Jagdish Ram is in East, house of Uncle of informant is in north of the house of the informant and the house of Mamta Devi Pradhan is also in north side and live with their family members.

He admitted that Lodhna Village is situated at the distance of 10 km from his village and there is no separate village in the name of Dhighi .However there is a Jhajhara Pahari from his village while going to village Lodhna and there is no basti Baridih , Bhikhampura in between . He admitted that there is no electricity in his village.

He also admitted that he had not seen any one lifting the informant -victim girl and even on the next day he had received no information that the appellant had taken away her. He learnt about occurrence on 25th April , however, they have not searched the house of the appellant, rather she was being searched in the house of her relatives and particularly in the house of her Mama, Sister , Fuwa at village Garbaria, Akai and Bhorandia. He had also searched her. He had no given any information to police and he advised the Mama Bhart Lal for informing the police station but the matter was informed at Jama P.S. He stated that around 150-200 people live in his village consisting of several caste Chamar, Paharia , Santhal and one Chowkidar Puran Ram is also in relation, live in the village and he advised him to inform the police station . Purandih is situated at the distance of 35-40 km from his village. He informed the matter to nearby persons namely Devendra Singh, Sital Ram, Gopal Ram .

He also admitted to have learnt about the occurrence from Fuwa of the informant on 25th April i.e. 25.04.2007 that the informant is in her house and then he had informed to her parents and he went to the house of his Fuwa by Motorcycle which belonged to her friend Raju Ram and said Raju Ram is nephew of Chokidar Puran Ram and he alongwith the victim girl left the house of her Fuwa

at around 3:00 P.M. and brought the informant to her parents . Thereafter he brought the victim girl to the police station on 03.05.2007. Although he had informed the occurrence to the Police Personnel on 28th days but they did not do anything and then they returned. He also admitted that on 03.05.2004, he was in police station and where written application was submitted and thereafter they came to the hospital.

He also admitted that Bhartlal (Father of the victim girl) had contested the election of Pradhani and Mamta Devi had also contested the said election and Mamta Devi was elected as 'Pradhan'.

He denied the suggestion that the appellant has been implicated as the family members of the appellant had not given the vote to Bharat Lal.

He further proved the signature on fardbeyan marked as Exhibit -1

He also admitted during cross examintion that this written application i.e. the Exhibit 1 was written in the house of Bharat Lal on 02.05.2007 but he had not handed over this written application in the police station and he had put signature in the house.

Thus, from scrutinizing the evidence of P.W. 1 , it is evident that he is the cousin brother of the informant and he had met the victim girl in the house of her Fuwa i.e. P.W. 6 on 25.04.2007, however he brought her to the house of her parents on 26.04.2007. He also admitted for writing the FIR in the house Bharat Lal i.e. the Father of the victim girl on 02.05.2007. He also admitted that Mamta Devi mother of appellant had won the election of Pradhan and Bharatlal Mama also contested the election of Pradhani and

thus, the evidence of P.W. 1 is not reliable as he is an interested witness.

18. P.W. 2 is Rita Pujahar and she stated during her evidence that she had not seen the occurrence and she had stated that on the summer day a girl came to her house and requested to stay there in the night and she will leave in the morning and she was alone and she had not seen anyone accompanying her later on she was not aware of any thing. The police has recorded her statement but she denied to have stated that the appellant had kept the house, the daughter of Bhartlal in her house. She also stated that she does not identified the appellant and she had not supported the prosecution case and she denied to have seen the appellant taking away the Victim Girl by Motorcycle. Although the witness has not been declared hostile but her evidence reveals that she had not supported the prosecution case.

During cross-examination she stated that the Victim Girl had merely asked her to stay in her house and her parents wanted to sell her to Uttar Pradesh and she left in the morning. Thus P.W. 2 has not supported the prosecution case and hence her evidence is not reliable.

19. P.W. 3 is Nand Kishore Rai and who stated during his evidence that he is not aware of the occurrence and police had not recorded his statement. This witness P.W. 3 has been declared hostile by the prosecution.

Thus, the evidence of P.W. 3 is not reliable.

20. P.W. 4 is Bharatlal who is the Informant of this case and stated during evidence that occurrence took place in the night of 17.04.2007 around 1:00 a.m. and they were sleeping in the house and it had rained . However the

appellant took her daughter at the point of knife near Bhikhampur Jungle at some distance thereafter he searched her and informed the villagers but he could not trace her and he had also gone to the police station and informed about missing of her girl. Thereafter on 26 days i.e. on 26.04.2007 his Bhagna Ramesh brought his daughter back to his house from the house of his Sister situated at village Bhujandia and his sister is namely Sadi Devi . On inquiry from her daughter she informed that the appellant took her by showing the fear of knife and had committed rape upon her and left her Bhujandia in the Jungal , thereafter he had gone to police station at Dumka on 30th days (30.04.2007) and case was instituted 2nd day of fifth month i.e. on 02.05.2007.

During cross-examination he admitted that he alongwith wife Bimla Devi , Victim Girl and sons namely Sibbu , Dada and Chotwa lived in the village and he is Pujari of Chuto Mandir which is at a distance of two (02) km from his house and used to go there in the morning and return in the evening and on the date of occurrence he had taken meal in the night at 6-7 O'clock . They were sleeping in the house in the night and there was no noise in the night and he woke up in the morning at 5-5:30 a.m. and gone in the morning to ease out and returned back but he had not seen his daughter and he had returned home at 7:00 pm in the evening.

He also admitted that the appellant is in relation as Grandson. He had admitted that the appellant used to visit his house regularly and his daughter used to visit his house. There is a jungle in the East of his house and there is house of his brother Dwarika in North and thereafter there is house

of Mamta Devi (Pradhani) and houses of Jagdev Oraon , Satyanarayan Ram also . He also informed the villagers but could not learnt about his daughter. Bhikhampura village is situated at the distance of 1-2 km from his village whereas Bhurandia village is situated at the distance of 40-45 km from his village. He admitted that water falls from the field the appellant to his field which is situated near by and for which there are altercation between them also . He had gone to Jama P.S. after 2-3 days but police had not taken his signature.

He admitted that he was also a candidate of Pradhani and Mamta Devi was also candidate and Mamta Devi had won the election and he had filed the appeal.

He denied for requested the family members of the appellant for casting vote in his favour .

He admitted for not having gone to the house of his sister at Bhurandia during search. Earlier also his daughter had gone to Bhurandia and she used to go there some times. Ramesh brought her daughter by Motorcycle on 26th day i.e. 26.04.2007 and he had informed Jama P.S. with his daughter on 27th day i.e. 27.04.2007 but police had not instituted the case. The police had not also recorded any statement. He informed the police that the appellant took his daughter by putting her under fear of knife and had left her at Bhurndiha forest. He had gone to Superintendent of Police on 30.04.2007 and who asked him to visit P.S. and the police recorded the statement of his daughter and she put her signature and he returned to his house, the statement was not recorded.

21. Thus from scrutinizing the evidence of P.W. 4 ,it is evident that P.W. 4 is father of the victim girl but he had not

lodged the F.I.R. till 02.05.2007 , Although he stated that after recovery of the victim girl on 26.04.2007 , he went to the police station to lodge the F.I.R. but his case was not instituted and then he had gone the Superintendent of Police and then the F.I.R. was lodged but this statement does not appear to be correct, as he remained completely silent from the night on 17.04.2007 till 02.05.2007.

Even during cross-examination he admitted in para 7 that he had not gone to the house of his sister at Bhurandia, although he had stated in para 1 of his evidence that he had searched her daughter in the house of his relative.

22. Thus, from the evidence of P.W. 4 it is evident that the appellant was on visiting terms with him and the appellant used to visit his house regularly and even his daughter i.e. the Victim Girl used to visit the house of the accused –appellant .

Therefore the evidence of P.W. 4 suggests that both the appellant and the victim girl were known to each other and they used to visit the house of each other .

23. Even delay of lodging F.I.R. can be seen with caution and this will be discussed later on after the evidence of Victim Girl.

24. P.W. 5 is Marwa Devi who had stated that the appellant had taken away the victim girl at Bhikhampur Jungle and had misbehaved with her by putting her under fear of knife .

During cross-examination she stated that Bharatlal is her brother in relation of village and she is cousin sister of the informant and she also stated that the police had not recorded her statement and she is giving

evidence for the first time in the Court and she had met the victim girl after two days.

25. Thus the evidence of P.W. 5 is also not reliable as she is a hearsay and an interested witness and she is giving evidence for the first time in the learned Court below.

26. P.W. 6 is Sadi Devi who is sister of the informant and supported the prosecution case to the extent that the victim girl came to her house but spoke nothing. After six days she was taken by Ramesh who is son of her sister and she learnt from the victim girl that the appellant had misbehaved with her in fear of knife and kept her in jungle for six days.

During cross examination she stated that the victim girl is her own Niece and her house is situated at some distance from her village and it takes around one hour to arrive there by foot. She had admitted that the victim girl had never come to her house and she cannot say as to when she arrived her house but she had seen her in her house at 12 noon and she stayed there in her house for 5-6 days and she was not carrying her cloth and she had given clothes to her .

Even she asked to her from where she came but she did not speak anything. Thereafter she informed her brother (i.e. the father of informant) then she sent one Muslim boy from her village to her brother but her brother had not arrived.

She also admitted that her statement was not recorded by the police and she is giving evidence for the first time in the Court.

She admitted that one Ramesh and Raju arrived at her house at around 12 noon and taken away the victim girl

from her house . She admitted that the victim girl had stayed there 6-7 days and she used to visit and even she had taken food and she used to talk with them. Raju is nephew of Chowkidar of her parental home. She had shown ignorance about dispute between her brother and the father of appellant in Pradhani election.

Thus, from the evidence of P.W. 6, it is evident that the victim girl had remained in her house and she is a hearsay and interested witness and the Victim girl had stayed in her house for 5-7 days and during this period she had not shown any grievance against the applicant and she had not informed even her brother that the victim girl was living in her house, even after the fact of knowing the alleged occurrence from her Niece.

Thus the evidence of P.W. 6 is not reliable.

27. It is further evident that the Fuwa P.W. 6 Sadi Devi had stated during her evidence that victim girl had not informed her anything when she arrived at her house and also stated that she was not aware as to when the Victim Girl arrived at her house.

Thus, the evidence of P.W. 6 Sadi Devi to the effect that the appellant Jitendra Rai @ Karu Rai misbehave with her, is not believable and cannot be relied upon because when she was confronted during her cross-examination on the point of disclosure of fact by the victim girl regarding the occurrence , she stated that the Victim Girl had not stated anything about the appellant at that time.

Thus, P.W. 6 is a tutored and an interested witness and hence her evidence is not reliable.

28. P.W. 8 is Bimla Devi , mother of the victim girl and who stated that occurrence took place 12-13 months ago during night while she was sleeping in the house and she had not seen the Victim girl in the house . In the morning she learnt from the villagers that Jitendra Rai @ Karu Rai was also not present then she suspected that he might have taken away the victim girl and after returning she disclosed the fact of her husband . She further stated that her daughter was recovered after nine (09) days in the house of her Nanad Sadi Devi (i.e. the P.W. 6) who was residing at Village Bhurandiha and his Bhagna Ramesh Ram brought her back. During inquiry from her daughter, she learnt that the appellant Jitendra Rai @ Karu Rai had misbehaved with her and taken her to village Lodna from Bhikhampura, Jungle and kept her there for two (02) days and from there she was brought to Pahadhia Tola and kept her for whole night and from there she was brought to house of her Nanad .

During cross- examination she stated for not remembering the year of marriage but she has got six children. The victim girl, Dada, Chotu Ram and she alongwith her husband reside in the house, whereas her two daughters and son Sibu reside in the house of Mama but she does not remember his name and her Narhiyar is in Sona Ram Gari , District Deoghar and her house is one room and one Verandah where the cattle are kept and they sleep in the room and the door in the middle.

She also stated that all of them had slept at around 8.00 P.M. in the night after taking meal and there was no alarm raised in the night but she notice at around 12:00-1: 00 a.m. in the night that her daughter is not in

the bed and then she awoke her husband but no alarm was raised in the night , she thought that her daughter may have gone outside to attend the call of nature and then she again slept. However on that night her daughter had not returned. She further stated that the appellant Jitendra Rai @ Karu Rai happens to be Grandson in relation and resides near his house and they were not on the visiting terms and even his victim daughter had not gone to his house but they talked on the way. In the next morning Goraite, Gopal Ram, Pulesh Ram and Nanad of the village and other were informed about the occurrence but they have not inquired about her daughter in the house of her Nanad Sadi Devi i.e. the P.W. 6. In the next morning they searched her in the village and near by places but she could not be found . However she had not sent any information to the police station. The police had recorded her statement and she arrived at Dumka Court after 5-6 days and met the Advocate in the Court and filed an application that his daughter is missing. However she went to police station after arrival of her daughter and sent her daughter to the police station for instituting the case when she arrived from the house of Sadi Devi. She sent her Bhagna at around 12:00 noon by Motorcycle and who returned 5.00 p.m. by Motorcycle . On the next day she went to the police station and thereafter took the victim girl before the Superintendent of Police and filed the application in writing before him about the occurrence, her daughter had gone inside and from there Superintendent of Police had informed Jama P.S. through phone and the police came around 10:00 am in the morning and they had recorded the statement of

her daughter and had taken the signature of her daughter. She was also question on date and day and thereafter she had not met the police / officer in-charge.

She also admitted that her husband was a candidate at Pradhani Election and one Mamta Devi was also a candidate and she had won. At the time election her husband had not asked Jitendra Rai @ Karu Rai to caste vote in his favour.

She had denied the suggestion that due to this enmity they had filed this case.

She also admitted to have not seen the victim girl going away with the appellant Jitendra Rai @ Karu Rai but Jitendra Rai @ Karu Rai was also not present in his house and hence she had suspected that he may have taken away her daughter.

Her daughter had not gone to Bhikhampur, Lodhna, Paharia Tola prior to the occurrence. Her daughter works in Deoghar.

She had denied the suggestion for sending her daughter for work and had spread a hummer that the applicant Jitendra Rai @ Karu Rai had taken away her daughter and instituted this false case due to arriving in election .

Thus, from the scrutinizing the evidence of the P.W. 8 , it is evident that the P.W. 8 is mother of the victim girl and admitted that she had not gone to the police station after nine days and after recovery of the victim girl , she had gone to the police station after nine days and tried to this had not lodged any complain. She also admitted that she had not search her daughter i.e. the

victim girl in the house of her Nanad namely Sadi Devi i.e. P.W. 6 .

She had also not seen the appellant Jitendra Rai @ Karu Rai taking away the victim girl. Thus the evidence of P.W. 8 cannot be relied upon.

29. P.W. 9 is the victim girl who stated during her evidence that the occurrence took place on 17.04.2007 on Tuesday on that day she was sleeping in her courtyard and when it started raining then she went inside the house to sleep in the room of Western side but there was no door in that room and there is chatty of *Khas* hanging over the room . she had also stated that the appellant Jitendra Rai @ Karu Rai stated dragging her after informing into inside the room then she awoke and wanted to raise alarm but he threatened her of dire consequences and took her in the up and brought her at Bhikhampura forest in Dador side and had forcibly committed rape upon her. Thereafter he took her to Lodana at 4.00 a.m. at the morning at the house of one Nand Kishore i.e. the P.W.3 in the house of Nand Kishore at Lodhna for two (02) days and also committed rape upon her there and thereafter she was taken to the house of Churo Dighi Pahariya and also committed rape upon her by the appellant Jitendra Rai @ Karu Rai and from there she was taken to her Fuwa in the morning situated at village Bhurandih.

She was brought to Bhurandih by Janardhan (NE) and he asked her not to disclose this fact in the house of her Fuwa in the village Bhurandih , if she want to save her life .

She disclosed to her Fuwa only that her parents wanted to sell her and hence she had fled away and she remained in the house of her Fuwa for about 5-6 days . Father of Janardhan had arrived there to see her but she had not disclosed the fact to her Fuwa. Then Ramesh i.e. P.W. 1 and took her by motorcycle and then she narrated about the incident to her family member.

She also stated that D.I.G. had arrived there and from there she was sent to the police station and application was written by Ramesh i.e. P.W. 1 and she had put signature on it which was marked Exhibit 1/1.

During cross-examination she stated that she is an illiterate and she is youngest of all sister among three sisters and three brothers , however her parents had slept in the house and her uncle is Dwarika Prasad whereas her Fuwa Sadi Devi i.e. P.W. 6 who married to Ram having two daughters and one son. There is no electricity in her village. The accused Jitendra Rai @ Karu Rai happen to be her nephew in relation and lives in his village and his house is situated after two (02) house from her house.

Her house is consisting of one room and two verandah . Jagu Ram, Dawarika Rama, Mamta Devi (Pradhan) Jagdev Ram etc. reside near her house and there will be 60-70 houses all together and population of the village is 600-700 people.

She also admitted that earlier she was working in the house of one Bipin Yadav at Deoghar for around three (03) but presently she was not working anywhere.

Her Father, mother, brother and sister were sleeping in the Courtyard and when it started raining

then all of them went inside to sleep. They slept in the Courtyard at around 11.pm in the night and after around one hour it started raining, then they went inside and that room she and two brother had slept whereas her mother and father were sleeping in the Verandah and thereafter after 1-1 ½ hours Jitan i.e. the appellant Jitendra Rai @ Karu Rai came inside and while she was sleeping on the land he dragged her but she could not recognize him at that time . She raised alarm and asked identity upon which he threatened her of dire consequences while she was sleeping and tried to raise alarm but he closed her mouth for which she could not raise alarm and then he got her lifted in his lap she was lifted in one hand and her mouth was closed by other hand and hence she could not raise alarm. She never talked with him and she never had gone to the house of the appellant Jitendra Rai @ Karu Rai and she had never proposed her marriage with him. However, she had been proposed for marriage from jail but she could not remember date of such proposal.

Bhikhampur Forest is situated at the distance of two (02) kilometer from her house and she arrived there at around 1-2 a.m .in the night and she was taken by lifting her but she had not raised any alarm on the way.

Initially no rape was committed upon her and she also tried to flee away.

She also stated that no blood came out from her private part and she had remained there whole night and the accused also slept there till 4:00 O'clock. Thereafter she was taken to Ladna from Bikhampur which took around 3-4 hours. On the way there was Jhargra

Pahariya, Madhusone, Amla Chater, Sardi Mugri Mola, Sikuwari, Chandni Chow etc. places and she arrived Lodhna at around 10:00 O'clock , however she had not raised alarm on the way and she had not taken breakfast but she took breakfast at Lodhna.

She also stated that she was acquainted with Nand Kishore i.e. P.W. 3 prior to the occurrence and she had met the father and mother and wife of Nand Kishore but she had not informed about the occurrence. She and appellant Jitendra Rai @ Karu Rai slept in the one room in the night of Nand Kishore i.e. P.W. 3 and there was no washroom in the house of Nand Kishore . She had also taken meal in the house of Nand Kishore but she had not disclosed the fact of occurrence to anyone and after living there for 2-3 days in the same cloth, She had not disclosed her relationship with the appellant Jitendra Rai @ Karu Rai to them.

After staying Lodhna in two (02) night they left in the morning at 6-7 a.m. and arrived at Churudighi by foot for around 3-4 hours and many villages were following in the middle namely Magru , Lujhar and she arrived in the house of Magru Lujhar and stayed there for one (01) day but she has not disclosed any fact to them also and there house consisted of two rooms and one room she alongwith the appellant Jitendra Rai @ Karu Rai had stayed in the night and had taken the meals. The house of Paharia is situated at one (01) km from her house. She stayed there in the house of Paharia . There was no injury on her person when rape was committed upon her. From there she was taken to Bhrundhia by the Motorcycle which is situated distance

at 40-45 KM but she was not aware as to whether Motorcycle belong to whom. She stated that own elder brother of the appellant Jitendra Rai @ Karu Rai had arrived at house of Paharia by Motorcycle and handed over motorcycle to the appellant Jitendra Rai @ Karu Rai and Janardhan took her to village Bhurandia (i.e. house of Fuwa Sadi Devi i.e. P.W. 6) .

She also stated that her Fuwa , her Fufa and three (03) children of Fuwa reside there but she had not disclosed about incident to any person there . She also met her Fuwa who inquired from her then she stated that her parents wanted to sell her and hence she had fled away. However her Fuwa had not stated Fuwa to inform about her residing and prior to this occurrence she had gone to her Fuwa twice.

She stayed in the house of her Fuwa for six (06) days, but she had not disclosed about the incident to her fuwa and fufa nor she asked them to send her to her residence and her father and mother had not searched her in between . After six (06) days Ramesh came there and then she arrived with him and arrived in her residence in the evening and narrated about the incident to her father, mother, brother and sister.

Ramesh used to visit her house every day and she also used to go to his house which is situated after two (02) house from her residence . Thereafter she alongwith her parents went to the police station in the next morning and stated about the occurrence to the Officer-in-charge who asked her to give in writing. She arrived at Police Station at around 10-11a.m. in the morning and stayed

there for around ½ -1 hours , thereafter the police had not inquired her.

On taking contradiction of her statement under section 161 Cr.P.C. she stated to have informed the police that after opening her eyes she wanted to raise alarm but she was threatened of dire consequences.

However she admitted for not stating before the police that one Janardhan had brought her to village Bhurandih and Jitendra Rai @ Karu Rai i.e. the appellant had not brought her there but he threatened her of dire consequences. On taking further contradiction from her statement recorded under section 161 Cr.P.C. she stated before the police that on asking question and answers from she again stated that her parents wanted to sell her and hence she had fled away. Lateron, she changed her statement again and stated that she had not stated this fact rather she stated that father of Jagardhan had came to inquire.

Her father had contested the election of Pradhan but he had lost and Mamta Devi had won the election. Jitendra Rai @ Karu Rai i.e. the appellant and her father had make propaganda in favour of Mamta Devi and casted the vote. Hence there was dispute between both the family members and hence she implicated them.

She also stated that she arrived from Deoghar for 1-1 ½ years ago . She denied the suggestion for falsely implicating the appellant Jitendra Rai @ Karu Rai in false case.

She also denied the suggestion for meeting the appellant in jail for proposing marriage with him.

30. Thus, from scrutinizing the evidence of P.W. 9 i.e. the victim girl, it is evident that she had alleged against the appellant for having committed rape upon her several time but she had not disclosed this fact in the house of Nand Kishore Rai i.e. the P.W. 3, Jarnadhan (not examined) and her Fuwa Sadi Devi i.e. P.W. 6 . It is also appears that her Fufa i.e. husband of Sadi Devi i.e. P.W. 6 and one Jarnadhan had not been examined. However, she also not disclosed incident to anyone while she was taken away from village Lodhna to Bhurndih and from village Bhikhampur to Bhuwandhia although they were several villages following between these places.

31. P.W. 10 is Shiv Narayan Ram i.e. the Investigating Officer, of this case and had stated that the Officer –in charge had instituted the present case on the application filed by the informant giving rise to Jama Case No. 52/07 under section 366A, 376 of the I.P.C. and he was handed over investigation of this case . He proved the endorsement on the written application marked as Exhibit 1/2, he further proved the Formal F.I.R. in signature of Binay Kumar marked as Exhibit 3, thereafter he had recorded the statement of victim girl, Bharat Lal P.W. 4. Bimla Devi i.e. P.W. 8 at the police station, then he proceeded the place of occurrence and first place of occurrence in the house of victim girl at village Dighi which was made of soil and Kharpra and house consisted of two (02) rooms one wall in the Eastern and other is Western and one Verandah at Western side and the victim girl was sleeping in the Western room and he described the boundary of the P.O. and stated about the houses of person present nearby there.

The second place of occurrence is Jungle from village Bhikhampur in western side at nundih place and there are trees, plants there.

The 3rd place of occurrence is one (01) KM away at village Chulunath where he visited. Thereafter, he returned to Police Station and send the victim girl to Sadar Hospital, Dumka for her medical examination.

He went to P.O. on 03.05.2007 and had recorded the statement of witnesses Rameshwar Rai i.e. P.W. 1, Marwi Devi i.e. P.W. 5 and from there he proceeded to village Paharia and had recorded the statement of Nand Kishore Rai i.e. the P.W. 3 where it was alleged that the appellant had committed rape upon the victim girl in the night. The house of Nand Kishore Rai was made of soil and Kappra having two (02) rooms, thereafter he went to the village Bhurandiha and recorded the statement of Sadi Devi i.e. P.W. 6 and from there he came to village Paharia Tola and Dighi on 04.05.2007 and visited the forth place of occurrence which house of late Gopal Pujhar made of sail and Khappra. He had described the boundary of the house, thereafter recorded the statement of Rita Pujhar i.e. P.W. 2. Thereafter the accused had surrendered on 07.05.2007 in the Court and recorded his statement and obtained the Medical Report on 10.05.2007, thereafter he submitted the charge-sheet on 07.06.2007.

During cross-examination he stated that after taking investigation of this case he met father of the informant and prior to the occurrence he was acquainted with the father of the informant.

He has shown ignorance as to whether from 28.04.07 to 02.05.2007 any information was given in the police station or not, but he stated that no information was

given to him. He had not seized any article from the house of the informant.

He also stated that he had not received any telephone call or information from the Superintendent of Police and he had recorded the statement of the informant.

He denied the suggestion for not recording the statement of Bharat Lal on the ground of not producing his daughter.

He also admitted to have not recorded the statement of Dwirika (Uncle of the informant), Jagdev Ram and Nand Lal Ram . He went to the Lodhna Village. He was not met Nand Kishore Rai from earlier. He went to village Bhurdhia and he was not acquainted with Sadi Devi (P.W.6) prior to the occurrence.

He denied the suggestion for not mentioning in the diary as to whom disclosure, he had gone there i.e. house of Sadi Devi (i.e. P.W. 6).

He further stated the distance between 1st place of occurrence to second place of occurrence is around one (01) km but he had not mentioned the distance between the second P.O. to third P.O. and not mentioned the distance between the third P.O. to fourth P.O.

He had not inquired about the Motorcycle from which the informant was brought to her residence. He admitted that one Puran Ram is Chowkidar of his Police Station but he had not recorded his statement and even statement of Nephew Raju Ram was not recorded by him

He had admitted that the victim girl had not stated before him that firstly she opened her eyes and wanted to raise alarm but the accused threatened her of dire consequences .

He also stated that the victim girl had not stated before him but disclosed her Fuwa that her parents wanted to sell her and hence she had fled away.

32. Thus , from scrutinizing the evidence of P.W. 10 , it is evident that he is I.O. of this case , and it would appear that he had visited at the P.O. but he had not mentioned the distance of the second P.O. and third P.O. and fourth P.O. , he had also not recorded the statement of nearby persons all of the place of occurrence.

33. It is well settled that evidence of chance witness has to be seen with care and his evidence requires greater scrutiny. 34.

It has been held in the case of **Patel Chela Viram vs. State of Gujarat reported in AIR 1994 SC 1250** at Para-5 as follows:

“Para-5:-As mentioned above, the High Court mainly relied on the evidence of P.W. 2. We find from the judgment of the Sessions Court that P.W. 2 admitted that there are two rival factions and he filed an application against the accused in the year 1976 for binding over them and consequently proceedings were launched against the accused and that there were certain other instances which would show that P.W. 2 was inimical towards the accused. Therefore, it cannot be said that he is an independent witness. Further, there is some force in the submission of the learned counsel for the appellant that P.W. 2 appears to be a chance witness. He deposed that he went to this particular field which is away from his house to answer the call of nature. On his being a chance witness it is necessary to have a closer scrutiny of his evidence. Coming to the medical evidence we find only four contusions yet the evidence of P.W. 2 is to the effect that all the other four accused dealt blows with sticks. This part of the evidence is not corroborated by the medical evidence. It is pointed out in number of cases by this Court when the case rests on the sole testimony of the single witness, the same should be wholly reliable. We find in the instant case that P.W. 2 is not only an interested witness but the version given by him is highly doubtful apart from the fact he being a chance witness. The view taken by the Sessions Court is quite reasonable.” 83. It has been held in the

case of Bahal Singh vs. State of Haryana reported in AIR 1976 SC 2032 at Para-10 as follows: “Para-10:-As to the presence of P.Ws. 4 and 5 at the time and place of occurrence the trial Court entertained grave doubts. If by coincidence or chance a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness. And if such a person happens to be a relative or friend of the victim or inimically disposed towards the accused then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but does require cautious and close scrutiny. In the instant case, P.Ws. 4 and 5 were agnatic relations of the deceased-one of them a close one. The reasons given by them for being at the place of occurrence did not appear to be true to the trial Court. There was not any compelling or sufficient reasons for the High Court to differ from the evaluation of the evidence of the two chance witnesses. It may well be as remarked by the High Court that the respondent was also their collateral but they appeared to be partisan witnesses on the side of a prosecution and hence their testimony was viewed with suspicion by the trial Judge.”

35. It has been held in the case of **(Alamat Ansari vs. State of Jharkhand)** reported in [(2006) 1 BLJR 236 (Jhar.)] at para 12 to 15 as follows:-

“**Para-12:-** So far as the offence of Section 182 of the IPC is concerned the Supreme Court in the aforesaid decision has also held that every incorrect statement or false statement made by a witness does not make it incumbent on the Court to order prosecution. The Court has to exercise judicial discretion in the light of all the relevant circumstances, when it determines the question of expediency. The Court orders prosecution in the larger interest of the administration of justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Two frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely that the Court should direct prosecution. “

“**Para-13:-** It appears that the learned Sessions Judge misunderstood the evidence of the petitioner and also failed, to apply his mind to the question of expediency. The learned Sessions Judge also failed to

appreciate that the petitioner deposed in the trial as a hearsay witness only, which was not substantive evidence on the basis of which the accused could have been convicted.”

“ Para-14:- In this view of the matter, the learned Sessions Judge has gravely erred in directing prosecution against the petitioner who was only a witness in Sessions Trial. “

“Para-15:- In view of the discussions and findings above, this application is allowed. The impugned order of the Court below dated 20.08.2004 refusing to discharge the petitioner for the offence under Sections 182 and 211 of the IPC is hereby set aside and the petitioner is discharged.”

36. In view of contradiction in evidence of prosecution witnesses and medical evidence, total circumstances have to be seen.

37. It has been held in the case of **State of Karnataka vs. F. Nataraj** reported in **2015(4) JBCJ 397 (SC)** at Para 11, 14 and 16 as follows:

“Para-11:- The medical examination of the prosecutrix took place on 16.11.2003 and she was examined by Dr. M. Latha (PW-5) who was the Lady Medical Officer at the Government Hospital, Hiriyur. Her deposition was that upon examination, no injury was found on the private parts of the prosecutrix and her hymen was intact. She also stated that there were no signs of recent sexual intercourse as the prosecutrix was not subjected to sexual intercourse during the past seven days from the dated of her medical examination and she issued a certificate Ext.P-7 to this effect. But she could not say clearly as to whether the prosecutrix was subjected to sexual intercourse previously or not.

Para-14:- Learned counsel for the respondent relied upon the case of *Radhu vs. State of M.P.*, (2007) 12 SCC 57, wherein this Court had laid down the principle that a conviction of rape can be based on the uncorroborated testimony of the prosecutrix and even the absence of injuries on the private parts of the victim will not falsify the case of rape, but at the same time, the Courts must bear in mind

that the question whether there was rape or not would depend ultimately on the facts and circumstances of each case.

Para-16:- In the present case, the gaps in the evidences of the prosecutrix and the medical officer make it highly improbable that sexual intercourse took place. It would be erroneous to rely upon such discrepant testimonies and convict the accused. It can thus be stated with certitude that the solitary evidence of the prosecutrix, in absence of any corroboration by the medical evidence, is not of such quality which can be relied upon. The accused-respondent is, therefore, entitled to benefit of doubt.”

38. It has been held in the case of **Rabi Kumar & Anr. vs. State of Jharkhand** reported in **2015 (4) JBCJ 537 [HC]** at Para 20 to 27 as follows:

“Para-20:- It is also well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of the prosecutrix is more reliable than that of any injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons, which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of the victim of sexual assault alone to convict the accused, where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of the injured witness. Even minor contradiction or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out, and otherwise, reliable for prosecution case.

Para-21:- We are examining the present case on the anvil of aforesaid principles. Let us scan the evidence of the prosecutrix to form an opinion, whether she is a sterling witness on whose

evidence the conviction of both the accused for such a serious charge can be maintained or it is suffering from certain inherent infirmities, which knock at the bottom of the case so as to dislodge the case of the prosecution in its totality. It is unfortunate that the prosecutrix has failed to pass the tests mentioned above. Her statement, when rescanned very minutely vis-à-vis the grave charge of gang rape slapped upon both the accused, we are of the view that it is not free from doubt as she, for the reasons best known to her, made an attempt to improve upon her case when stepped into the witness box. When her evidence is appreciated along with the evidence of P.W. Navin Das, who happens to be her relative also and the pradhan of the village, it appears that the very case set up by the prosecutrix is not the true account of the occurrence, rather there is tinge of very vital improvement made during the trial inasmuch as the prosecutrix made an attempt to develop a story of her choice to make her case more weighty stating that her clothes got blood stained on account of bad act committed upon her by both the accused, which fact is totally washed away in the light of the evidence available on record. Not only that, the case set up by her is falsified by the medical evidence. Admittedly, immediately after the occurrence, she was with the police till she was examined by the 49 P.W.- Doctor Mita Singh, therefore, there could not be any occasion for her to even wash her genitals. In this eventuality, the histopathological examination would have supported her version, whereas contrary to it, it indicates that no spermatozoa was found either alive or dead. P.W. Doctor Mita Singh, has also stated that there appears to be no history of recent past sexual intercourse with the prosecutrix. Even if we give some margin to the case of the prosecutrix, she being a married lady, but the fact of the matter is that she is a widow and that her medical examination should have given some indications of sexual intercourse, which fact is conspicuously missing in the case on hand, if one examines the medical evidence available on record.

Para-22:- What disturbs us in this case is that there is also no evidence available with regard to the medical examination of both the accused so as to say that they were physically fit to perform sexual intercourse. Although, we do find the medical slip available on the trial court record with regard to the medical examination of both the accused, but the doctor, who medically examined the accused for that purpose, has not stepped into the witness box. Not only that, his name does not figure in the list of witnesses. Undoubtedly, there appears to be a lapse on the part of the Investigating Officer in this regard as he should have taken the pain to show him in the list of witnesses. Equally, the Additional Public prosecutor has also been casual about it, otherwise, he could file an application before the trial court under Section 311 Cr. P.C for examining the doctor, being an important witness. Be that as it may, the fact of the matter is that the medical examination of the accused is not available on record. This aspect, in any case, would also be a ground to be taken in favour of the accused and no latitude can be shown to the prosecution, where the accused are facing such a serious charge. We may state here that had the Investigating Officer bothered to go in for DNA test in this case of the prosecutrix as well as of the accused, as is now the requirement after incorporation of Sections 53-A and 164-A of the Code of Criminal Procedure with effect from 23.06.2006, it would have really facilitated the prosecution to prove its case to a great extent, if the 50 accused were actually involved in the commission of offence.

Para-23:- What appears to the Court, while examining the entire prosecution case, is that the witnesses, who have been declared hostile, in this case, were the witnesses of corroboration. The weak evidence of the prosecutrix when not getting any corroboration from any source, makes it further weak so as to place reliance on the same. As stated above, the evidence of Navin Das, the pradhan of the village, which is in the shape of hear-say evidence, is also not convincing, which would lend any support to the case of the

prosecutrix as his name does not figure in the initial complaint lodged by the prosecutrix with the police, whereas he projects himself to be there at place of occurrence with the prosecutrix as the villagers called him immediately after the occurrence. The witnesses, who were immediately informed of the occurrence, have been declared hostile. Even otherwise, the evidence of P.W.-Navin Das is at variance with the evidence of the prosecutrix, therefore, no credence can be attached to his evidence.

Para-24:- In the decision rendered in case of Krishan Kumar Malik Vs State of Haryana, reported in (2011) 7 SCC 130, in respect of offence of gang rape under Section 376 (2)(g) IPC, in para-31, it has been held as under : “31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.”

Para-25:- As a sequel to the aforesaid discussion, we find that the solitary version of the prosecutrix cannot be taken as a gospel truth in the absence of any other supporting evidence, rather the medical evidence, on the other hand, demolishes her case in totality. Viewed thus, there is no scope to sustain the conviction. In our 51 considered view, the prosecution has miserably failed to establish the guilt of gang rape falling within the mischief of Section 376(2)(g) IPC against the present two accused. They deserve acquittal.

Para-26:- The appeal, on hand, thus, stands allowed and the judgment of conviction and order of sentence dated 21st January, 2015 and 22nd January, 2015, respectively, passed by learned 1st Additional Sessions Judge, Seraikella in Sessions Trial No.173 of 2011, are, hereby set aside.

Para-27:- Both the appellants, named above, are acquitted of the charges. They shall be set at liberty forthwith, if not required in any other case.”

39. It is also evident that P.W. 3 Nand kishore Rai has not supported the occurrence and he has been declared hostile by the prosecution, therefore the allegation of committing rape upon the Victim girl in the house of Nand Kishore Rai i.e. P.W. 3 is not proved. It is doubtful that the stranger i.e. the appellant will keep her the Victim girl in the house of P.W. 3 and would commit rape upon the Victim Girl in the house of Nand Kishore Rai. i.e. P.W. 3.

Therefore the allegation of commission of committing rape upon the Victim girl by the appellant in the house of Nand Kishore Rai is not proved.

40. It is further evident that no sign of rape on the person of the Victim girl was found by Dr. Pusplata i.e. the P.W. 7.

41. It further evident that the Victim girl had stayed for two (02) days and she had not made any attempt to flee away the house of Nand Kishore Rai.

42. It is further evident that the Victim Girl had not raised any alarm in the house of P.W. 3 Nand Kishore Rai for committing rape upon her by the appellant Jitendra Rai @ Karu Rai and as such the statement of the Victim girl is doubtful.

43. It is further evident that the Victim Girl had not stated anything about the appellant for committing rape upon her in the house of her Fuwa Sadi Devi i.e. P.W. 6 and she remained there for 5-6 days and as such the prosecution case is doubtful.

44. It is also unbelievable that a person would carry the Victim girl having weight of 41 kg in his lap for several hours which is not possible for any person to move in such a manner and which also makes the prosecution case doubtful.

45. There is distance of 40 km from the house of the Victim girl to village Bhurndia and it is not possible that a person can carry the victim girl weight around 40 kg on lap or by foot to village Bhrundia and no person would have seen them during this period.

46. It is further evident that there is delay of 13-14 days in lodging the F.I.R. because the occurrence took place in the night of 17.04.2007 and the victim girl was recovered from the house of her Fuwa i.e. P.W. 6 on 26.04.2007 but still F.I.R. was lodged on 30.04.2007.

Thus it is evident that there is great delay 13-14 days for lodging the F.I.R. which makes the prosecution doubtful.

47. Even the P.W. 2 Rita Pujhar had not identified the appellant for keeping the Victim girl in her house by the appellant and thus the prosecution case differs from the evidence of PW-5 and PW-6 namely Marwi Devi and Sadi Devi respectively.

48. From the evidence of P.W. 7 i.e. Dr. Pushplata Tudu, it would appear that the Victim girl was aged about 17-18 years and no sign of rape was found and which also makes the prosecution case.

49. Even the prosecution had not produced any document or certificate for showing the age of the Victim girl for around 14 years and thus the verification of the age of the Victim girl is not done by the prosecution.

50. It is further evident that the Investigating Officer had not examined one Jagdish who was residing near in the house of the informant and Uncle of the Informant who was residing in the North of the house of the Informant.

51. It is also evident that P.W. 4 i.e. Bharatlal had informed the matter of missing of his daughter victim girl to nearby person namely Devendra Singh, Sita , Gopal Ram and Drarika Prasad however none of the said persons were examined by the prosecution.

52. It is further evident from the evidence of P.W. 4 and P.W. 8 that P.W. 4 also admitted that he was candidate of Pradhani Election against Marwi Devi and P.W. 4 had lost the election and Marwi Devi had one Pradhani Election .

53. It transpires that I.O. had not recorded the statement of the person who had taken the victim girl from the house of her Fuwa i.e. P.W. 6 Sadi Devi to her residence. Even the Motorcycle No. and Motorcycle which had been used for taking back to the Victim girl to her house, had not been brought on record. Therefore, mere allegation on the point of missing of Victim girl from her house /residence to the house of her Fuwa P.W. 6 Sadi Devi for around 9-10 days and thus, the recovery of the Victim girl at the residence of her Fuwa Sadi Devi P.W. creates suspicion and makes the prosecution case doubtful.

54. Even the I.O. i.e. P.W. 10 had not examined the Muslim boy . Even P.W.6 also has not taken the name of Muslim boy who was firstly seen by P.W. 6 to the house of his brother P.W. 4 Bharatlal Rai .

55. From the impugned judgment, it is evident that learned Court below had rightly acquitted the appellant for the offence under section 376 of the I.P.C. but learned Court below committed error by convicting and sentencing the appellant for offences under section 363/366 of the I.P.C.

56. In view of the discussion made above and in view of law made Hon'ble the Supreme Court , it is evident that the

prosecution has failed to proved charges under Sections 363/366 of I.P.C against the appellant Jitendra Rai @ Karu Rai for committing rape upon the Victim girl and as such judgment of conviction dated 03.07.2008 and sentence dated 04.07.2008 passed by Sri Alok Kumar Dubey, learned 5th Addl. Sessions Judge (F.T.C.) Dumka in Sessions Case No. 259/2007 (arising out of Jama P. S. Case No. 52/2007 corresponding to G. R. No. 562/2007) is set-aside and the appellant Jitendra Rai @ Karu Rai is acquitted for the charges under section 363/366 of the I.P.C. and the appellant Jitendra Rai @ Karu Rai is also discharged from the liability of his bail bonds.

57. Thus this Cr. Appeal (S.J.) No 1082 of 2008 is allowed.

Let the Original Lower Court Record be sent to the learned Court below at once by the Office.

(Sanjay Prasad, J.)

Bibha/