

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.2083 of 2017

Arising Out of PS.Case No. -450 Year- 2015 Thana -MUFFASIL District-
WESTCHAMPARAN(BETTIAH)

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Hasmuddin, S/o Mustakim Alam @ Mustakim Mian, resident of village- New
Bus Stand, Bettiah, P.S.- Bettiah Town, District- West Champaran.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

with

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Criminal Appeal (SJ) No. 2135 of 2017

Arising Out of PS.Case No. -450 Year- 2015 Thana -MUFFASIL District-
WESTCHAMPARAN(BETTIAH)

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Raj Kumar, Son of Sh. Surendra Sah @ Harendra Sah, R/o New Stand, Durga
Nagar, P.S.- Bettiah Town, District- West Champaran.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

with

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Criminal Appeal (SJ) No. 2266 of 2017

Arising Out of PS.Case No. -450 Year- 2015 Thana -MUFFASIL District-
WESTCHAMPARAN(BETTIAH)

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Rahul Kumar @ Rahul, Son of Teeman Prasad, R/o New Bus Stand Road, P.S.-
Bettiah Town,District- West Champaran.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

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Appearance :
(In CR. APP (SJ) No.2083 of 2017)
For the Appellant/s : Mr. Sanjeev Kumar-Advocate
Mr. U. P. Singh-Advocate
For the Respondent/s : Mr. Binod Bihari Singh- A.P.P.
(In CR. APP (SJ) No.2135 of 2017)
For the Appellant/s : Mr. Ram Yash Singh-Advocate



For the Respondent/s : Mr. Zeyaul Hoda-A.P.P.
(In CR. APP (SJ) No.2266 of 2017)

For the Appellant/s : Mr. Bimlesh Kumar Pandey-Advocate

For the Respondent/s : Mrs. Abha Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 16-02-2018

Cr. Appeal (S.J.) No.2083 of 2017 wherein Hasmuddin is the appellant, Cr. Appeal (S.J.) No.2135 of 2017 wherein Raj Kumar is the appellant and Cr. Appeal (S.J.) No.2266 of 2017 wherein Rahul Kumar @ Rahul is the appellant commonly originate against the judgment of conviction dated 19.06.2017 and order of sentence dated 22.06.2017 passed by the 1st Additional Sessions Judge-cum-Special Judge, West Champaran at Bettiah in Bettiah (Mufassil) P. S. Case No.450 of 2015, S.G.R. No.69 of 2015 whereby and whereunder all the appellants have been found guilty for an offence punishable under Section 4 of POCSO Act and sentenced to undergo R.I. for 10 years as well as fined of Rs.10,000/- and in default thereof, to undergo S.I. for one month, additionally, under Section 6 of the POCSO Act and sentenced to undergo R.I. for 10 years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for one month, additionally, with a further direction to run the sentences concurrently with a further direction that the period having undergone during course of trial will be set off in accordance with Section 428 of the Cr.P.C., accordingly, been heard together and



are being decided by a common judgment.

2. Name withheld, the victim (PW-1) filed written report on 01.08.2015 at about 5.00 p.m. alleging inter alia that she happens to be aged about 15 years. She is resident of village-Khuda Nagar, P.S.-Town Motihari, District-East Champaran and for the present, she is residing with her sister at her sasural lying at village-Damkakola, P.S. Nautan. During course of in and fro from Motihari to the place of her sister, she developed acquaintance with Raj Kumar son of Sh. Surendra Sah @ Harendra Sah aged about 22 years, resident of mohalla-New Bus Stand, P.S. Town, Bettiah and on account thereof, they indulged in frequent conversation over mobile. Continuing with the aforesaid event, he used to call her at Bettiah where she used to enjoy his company and then, returned back to place, sasural of her sister. On 31.07.2015 at about 1.00 p.m., he (Raj Kumar) informed her to come ready and accordingly, she came at Nautan Chowk and was waiting for him. He came on bike. She accompanied him. He came to Bettiah Railway Station where his two friends were present since before whom, Raj Kumar disclosed as Rahul Kumar @ Rahul aged about 23 years son of Teeman Prasad and the another Hasmuddin aged about 25 years son of Mustakim Alam @ Mustakim Mian of New Bus Stand, P.S. Town Bettiah. Then thereafter, all the three took her to Raja Line Hotel where she was



kept in a room. The owner of the hotel Rinku Kumar provided accommodation. When the hotel closed at about 11.00 p.m., Rahul Kumar, Hasmuddin and Masoom along with Raj Kumar raped her one by one. She raised cry, wept, but they have not listen and continued in raping her. Then thereafter, she was confined in a room. Today, at about 11.00 a.m., Raj Kumar and his associate took her to Imli Chowk and left her directing to go to her house. After their departure, anyhow she came to Police Station where submitted written report.

3. Bettiah Sadar (Mufassil) P. S. Case No.450 of 2015 was registered under Section 4, 6 of the POCSO Act followed with an investigation as well as submission of chargesheet, which happens to be the basis for conduction of trial which concluded in a manner, subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence. However, neither ocular nor documentary evidence has been adduced on their behalf.

5. In order to substantiate its case, prosecution had examined altogether six PWs and those are PW-1, victim, PW-2, Sheikh Afsar, PW-3, Islamun Nesa, PW-4, Zikrullah, PW-5, Dr. Manju Jaiswal and PW-6, Om Prakash, the I.O. Side by side, had also exhibited the signature of informant over written report as Exhibit-1,



her signature over statement under Section 164 of the Cr.P.C. as Exhibit-2, medical report as Exhibit-3, endorsement over written report as Exhibit-4, formal F.I.R. as Exhibit-5. As stated above, nothing has been adduced on behalf of defence.

6. While challenging the judgment of conviction and sentence, it has been submitted on behalf of learned counsel for the appellants that there happens to be no legal, reliable evidence available on the record and that being so, the finding having recorded by the learned lower Court happens to be perverse. To justify such submission, it has been submitted that PW-2, PW-3 and PW-4 have not supported the case of the prosecution and that being so, they were declared hostile. Furthermore, it has been submitted that PW-3 happens to be the father of the victim and as, he had not supported the case of the prosecution that being so, is bound to affect adversely over the credibility of the evidence of victim (PW-1). In likewise manner, it has also been submitted that when the evidence of PW-1, victim, is properly scrutinized, it is apparent that she had made contradictory statement to such extent which could visualize her status to be unworthy and in the aforesaid background, the evidence of doctor (PW-5) as well as I.O. (PW-6) could not give any support to the prosecution.

7. It has also been submitted that the sister of the



alleged victim (PW-1) has not been examined by the prosecution in order to substantiate that victim was frequent visitor at her place and on the alleged date also she was staying at her place wherefrom she left to meet with accused Raj Kumar with whom, she went to Bettiah Station over motorcycle. PW-3, father, did not support the version of the prosecutrix on that very score and so, claiming that she came to know Raj Kumar during course of such frequent visit is found suspicious one and in likewise manner, proper identification relating to other co-accused/ appellants and under the aforesaid facts and circumstances of the case, she lost her credibility.

8. Furthermore, it has also been submitted that victim was examined on 02.08.2015 by the doctor and the finding recorded by PW-5 completely demolished the allegation having attributed at the end of the prosecutrix. At the present moment, it has also been submitted that as per medical evidence, age of the victim has been estimated in between 17-19 years and as per permissive fluctuation, it happens to be plus-minus two years which in the facts and circumstances of the case, suggest the age of the victim to be more than 21 years, a full grown up lady and that being so, there would not be application of POCSO Act and that being so, appellants would not have convicted and sentenced for under the POCSO Act. Learned counsel for the appellants has also referred the decisions viz. **Mohd.**



Ali @ Guddu vs. State of Uttar Pradesh reported in (2015) 7 SCC 272, Ragul vs. State by Inspector of Police, Nallipalayam Police Station under Cr. Appeal No.391 of 2016 with Cr. M.P. No.9192 of 2017 and Sait Tarajee Khimchand and others vs. Yelamarti Satyam @ Satteyya and others reported in (1972) 4 SCC 562.

9. It has further been submitted that evidence of I.O. after having closed scrutiny again divulges the dubious character of the prosecutrix (PW-1) and that being so, the cumulative effect did not justify the prevalence of the judgment impugned whereupon, is fit to be set aside.

10. On the other hand, learned Additional Public Prosecutor while supporting the finding recorded by the learned lower Court has submitted that medical evidence in the facts and circumstances of the case is not at all found relevant for the purpose of adjudicating upon whether the prosecutrix, a minor was raped or not in the background of the fact that victim was examined more than 24 hours after the occurrence. Furthermore, it has also been submitted that victim even during course of lengthy cross-examination substantiated the allegation, which is found duly corroborated by the PW-6, the I.O. as victim had shown the place of occurrence and that being so, the finding recorded by the learned lower Court did not attract interference.



11. PW-1 is the victim, she had disclosed that she was residing at the place of his sister Nastaima, whose sasural lies at village-Shivrajpur, P.S. Nautan. She was in contact with Raj Kumar for the last two months and accordingly, was on talking terms. She was suffering from fever. Raj Kumar called her through phone, whereupon she disclosed that she is suffering from fever, whereupon he directed to come at Nautan and then thereafter, she will be shown to the doctor. She came at Nautan from Shivrajpur through Bus where Raj Kumar was waiting for her with motorcycle. Raj Kumar took her to Railway Station, Bettiah where his two friends were present since before. He introduced one of them as Hasmuddin, but failed to disclosed name of other, though claimed to identify him. Then thereafter, Raj Kumar took her to Raja Line Hotel. He kept her adjacent to the Hotel where served food. Thereafter, Raj Kumar took her to Raja Line Hotel. Raj Kumar, Hasmuddin and one more came there, Raj Kumar and Hasmuddin committed wrong act with her. Then thereafter, they took her to Imli Chowk where Raj Kumar left her. It was 11.00 a.m. Then, she had gone to Mufassil P.S. and disclosed the occurrence to the Officer-in-Charge, who noted it down and then, read over, whereupon she put her signature (identified). Then thereafter, she returned back. She also identified her signature over her statement recorded under Section 164 of the Cr.P.C. She had



identified Hasmuddin and Raj Kumar in dock, but she had not claimed identification of third accused, who disclosed his name as Rahul Kumar. During cross-examination at the end of Rahul Kumar, she had stated in Para-11 that she had not read written report before putting her signature. In Para-12, she had stated that she had visited place of her sister at an earlier occasion also. In Para-13, she had stated that she had no occasion to visit Raja Line Hotel at an earliest. In Para-14, when query was made that what is written therein, she is not knowing over which she said 'Yes'. On behalf of accused Raj Kumar, she had stated at Paras-16 and 17 that she had filed petition that Rinku Kumar @ Shamshul Hoda and Masoom were innocent. In Para-21, she had denied to have shown her age as 19 years in an affidavit. She in Para-22, had stated that people of Beldari Mohalla took her to Police Station whereupon, she said 'Yes'. In Para-23, she had further admitted that the written report was scribed by the person of Beldari village. At Para-25, she had admitted that she had not disclosed number of motorcycle. She had further disclosed that she had not seen Raja Line Hotel. She had further admitted that she had not prepared written report. People of Beldari had recorded written report. It was not read over to her. She had put her signature without reading the same. She had further admitted that she has not been raped. She had seen Hasmuddin in a photo, which was shown to her



by the people of Beldari on the basis thereof, she had identified Hasmuddin in Court. She had further stated that Hasmuddin had not raped her. Again, there was cross-examination at the end of Raj Kumar after having his plea rejected by the Juvenile Justice Board to be minor in conflict with law. In Para-26, she had stated that written report was dictated by her, but was not read over to her. She had further stated that names of the accused persons were not at all disclosed by the people of Beldari. In Para-27, she had narrated that she was not knowing since before the place where occurrence took place with her. In Para-22, she had stated that it was dark night. She was knowing Raj Kumar. She was ill. She has come for treatment along with her sister Nastima. In Para-29, she had stated that she was in illicit relationship with Raj Kumar since before. In Para-31, she had stated that she did not identify the persons, who had committed occurrence with her. She had further stated that the persons, who had dictated the written report, had also disclosed the names of accused. The persons of Beldari have disclosed about the assailant and the same has also been narrated by her. She had further stated that she had not seen the Bettiah Station. Then had stated that accused persons have not committed sin with her.

12. PW-2 Sheikh Afsar, who had completely denied the prosecution case and that being so, he was declared hostile.



13. PW-3 is Islamun Nesa, who also did not opt to support the case of the prosecution and accordingly, was declared hostile.

14. PW-4 is Zikrullah @ Jakir Hussain, father of the victim, who also failed to corroborate the prosecution case and was accordingly, declared hostile.

15. PW-5 is Dr. Manju Jaiswal, who had examined the victim on 02.08.2015 and found on physical verification:-Secondary sex character well developed. There was old tag of rupture hymen was present. There was no external or internal injury present over her private part. On pathological examination, no spermatozoa was found and so, she opined that there was no recent sign of sexual assault. She had also identified the age of the victim to be in between 17 years to 19 years on the basis of the radiological examination.

16. PW-6, Om Prakash, is the I.O., who had deposed that on the basis of the written report furnished by the victim, Bettiah Mufassil P. S. Case No.450 of 2015 was registered dated 01.08.2015, whereupon investigation was entrusted to him. Exhibited the relevant documents. Then had stated that during course of investigation, he recorded further statement of the victim. Although, he had narrated the further statement of the victim, which happens to be inadmissible



in the eye of law as hit by Section 162 of the Cr.P.C. as well as in the background of the fact that victim was not at all declared hostile by the prosecution. In Para-6, he had deposed that he arrived at the place of occurrence along with the victim, which happens to be Raja Line Hotel and then, inspected the same, which happens to be the house of Rinku Kumar @ Shamshul Hoda converted as Raja Line Hotel where victim had narrated that she was raped. He had identified the P.O. as North-Ziyaul Haque, South-road, East-Feyaz, West-kachchi road and then, shop of Tabrez Alam. Recorded statement of witnesses. His attention has also been drawn towards statement of the hostile witnesses under Paras-7, 8, 9. He got examination of the victim under Section 164 of the Cr.P.C. Got victim medically examined and then, after concluding investigation, submitted chargesheet. During cross-examination, he had stated at Para-12 that chargesheet was submitted only against three accused persons keeping investigation pending against the remaining. Because of the fact that he has been transferred on account thereof, the further investigation has been handed over to the Officer-in-Charge relating to Masoom and Rinku. He had further stated that he is unable to disclose, who had scribed the written report. The same was not scribed in his presence. He had not taken signature of victim over the same. In Para-14, he had admitted that he had not gone to the place of sister of victim nor he recorded her statement. In



Para-15, he had further admitted that he had not seen the mobile of the victim nor took out call details. Then had stated that P.O. was identified by the victim. He had further admitted that in Para-5 of the case diary, he had scribed that this is not the place of occurrence. Then again he had mentioned in the same paragraph that she took him to the place of occurrence. Then had denied the suggestion that he had not conducted impartial investigation.

17. From the evidence of the witnesses having been examined on behalf of prosecution, it is apparent that PWs-2, 3 and 4 have not supported the case of the prosecution. From the evidence of PW-5, doctor, it is apparent that there happens to be no sign of recent sexual assault. Furthermore, victim has been found in between 17 years to 19 years, which is subject to variance of two years and the age befitting with the defence case is to be accepted. That means to say, she happens to be a grown up lady. From the evidence of PW-6, I.O., it is apparent that the P.O. was inspected by him as identified by the victim herself, but without any objective finding substantiating the occurrence. Now, remains the evidence of victim (PW-1). The reason best known to her, right from her examination-in-chief, she began to twist the case whereunder at first occasion declined to identify Rahul Kumar in dock while admitted to have entered into compromise with Rinku and Masoom against whom investigation remained pending.



When the evidence of the victim has been taken in its entirety, it is apparent that she herself did not find the consistency and lastly, she had deposed that none of the accused persons had committed rape on her. Furthermore, from her evidence, it is found that she had not narrated that she had gone to the place of occurrence along with I.O. and identified the P.O. It is also apparent from her evidence that she was under consensual relationship with Raj Kumar since before. Though during course of recording of evidence, some sort of deficiency in consonance with the procedure prescribed under POCSO Act has been identified, but considering the nature of the evidence as indicated hereinabove as well as conduct of the prosecutrix, the same is not considered adverse to such extent for remitting the matter.

18. Considering the evidence in its entirety, it is found and held that prosecution has not been able to substantiate its case beyond all reasonable doubt. That being so, the judgment impugned is set aside. All the Appeals are allowed. Appellants are under custody, hence are directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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