

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1264 of 2017

Arising Out of PS. Case No.-138 Year-2015 Thana- KUMAR KHAND District- Madhepura

Mithelesh Singh @ Mithelesh Kumar Singh @ Bholi Singh S/o Niranjan Singh @ Nunu Singh, R/o Village- Bishanpur Korlahi, P.S.- Kumarkhand, District- Madhepura.

... .. Appellant

Versus

1. The State of Bihar
2. “X”

... .. Respondents

Appearance :

For the Appellant	:	Mr. Rajesh Kumar Singh, Sr. Advocate Mr. Chandra Mohan Jha, Advocate Mr. Shailendra Kumar Singh, Advocate
For the Respondents	:	Mrs. Usha Kumari No. 1, Spl.P.P.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 10-11-2022

This appeal has been preferred under Section 374(2) of the Code of Criminal Procedure Code, 1973, (Cr.P.C. for short) by the appellant, assailing a judgment of conviction dated 31.08.2017 and an order of sentence dated 11.09.2017 passed by 1st Additional District and Sessions Judge-I-cum-Special-Judge, Madhepura in POCSO Case No. 01 of 2017/CIS No. 01 of 2017, whereby the appellant has been convicted and sentenced as under:

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376D of the Indian Penal Code	RI for 20 years	1,00,000/-	One year RI.
3(1)(w)(i) of the Scheduled	Six Months	500/-	Two months



Caste and Scheduled Tribe (Prevention of Atrocities) Act	imprisonment		imprisonment
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2. The informant’s name, who has been examined at the trial as P.W.-5, is being concealed in the present judgment and order and has been referred to as the 'X' or P.W.-5/the informant.

3. We have heard Mr. Rajesh Kumar Singh, learned Senior Counsel representing the appellant and Ms. Usha Kumari No. 1, learned Special Public Prosecutor for the State.

4. The process server has reported valid service of notice upon the informant (P.W.-5)/the respondent No. 2.

5. A written report of the informant dated 22.10.2015 is the basis for registration of the concerned Kumar Khand PS Case No. 138 of 2015 leveling offences punishable under Sections 376 read with Section 34 of the Indian Penal Code (IPC for brevity) and Section 3(1)(w)(i) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SC/ST Act' in short). She alleged in the First Information Report (FIR for brevity) that she was aged about 15 years and that she had gone out of her house in the night at 7:00 pm for attending the nature’s call. The appellant and his two full brothers, who were lurking outside, captured her and all of them forcibly took her to a nearby agricultural field. After that, the accused, Chunnu Kumar Singh, committed sexual intercourse with her. When she tried to scream,



co-accused Awadhesh Kumar Singh shoved a piece of cloth (*Gamchi*) in her mouth; after that, he also committed sexual intercourse with her. Thereafter, the appellant told her that he would also be committing rape and, in fact, committed rape. The date and time of occurrence have been mentioned in the written statement as 21.10.2015 at 7:00 pm.

6. Further, all three full brothers, one by one, sexually assaulted her two times each. After the occurrence, she somehow or the other managed to return to her house, and when the mother of the informant, on seeing her soil-stained clothes, inquired from her, she explained to her mother the entire occurrence. Thereafter, the informant's mother (P.W.-9) and her brother (P.W.-4) and Laxmi Devi (P.W.-7) went to complain to the father of the aforesaid accused. When they complained to the father of the appellant, he, wielding his position as an old *Jamindar* of the village, abused them, taking their caste name and told them that, in fact, he himself had sent his three sons to rape the informant ('X').

7. Based on the allegation made in the written report as noted above, the appellant, his two brothers, Chunnu Kumar Singh and Awadhesh Kumar Singh and his father, Niranjan Singh, were made accused in Kumarkhand P.S. Case No. 138 of 2015.



8. The informant was examined by a lady doctor on 23.10.2015, who recorded the following finding:-

“Auxillary hair present. Breast developed. Pubic hair present. No bruise or abrasion found on any part of the body including private parts. Labia majora separated. Hymen torn. Vaginal canal admits two finger easily. Spermatozoa not found in vaginal swab test. Pregnancy test negative. Features of intercourse present.”

9. A medical Board was constituted to determine the informant's age. The Board concluded that the informant's age was between 14-16 years as of the date of examination by the Board on 23.10.2015.

10. More than one month after lodging of the FIR, the statement of the informant was recorded before the Magistrate under Section 164 of the Code of Criminal Procedure (Cr.P.C. for brevity) (Exhibit-2) in which she disclosed the date of occurrence to be 20.10.2015 instead of 21.10.2015, when she had gone to ease herself at 7:00 in the evening and when the appellant and his two brothers had raped her in a nearby paddy field after shoving a piece of cloth in her mouth.

11. According to her statement under Section 164 of the Cr.P.C. (Exhibit-2), she was thereafter taken by the appellant to a



banana orchard where also they raped her. They then took her to their house and confined her there for two nights and one day. At 4:00 am in the morning, they left her in the same paddy field. When her mother and brother questioned her about her absence for two days from the house, she explained the entire occurrence to them. When the informant's mother went to the father of the appellant and his two brothers to complain, he abused the informant's mother and forced her to leave the place.

12. The police, upon completion of the investigation, submitted a charge sheet for the commission of the offences punishable under Section 376D of the IPC, 3(1)(w)(i) of the SC/ST Act and Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' in short) against (i) the appellant, (ii) Chunnu Singh and (iii) Awadhesh Singh on 23.07.2018. The accusation against the sole remaining accused, i.e., the father of the appellant, was found not substantiated by the police. Based on the charge sheet so submitted, the Special Court, Madhepura, took cognizance of the offences punishable under Section 376/34 of the IPC and Section 3(1)(w)(i) of the SC/ST Act and Section 4 of the POCSO Act by an order dated 19.09.2018. Subsequently, charges were framed against the appellant for the commission of the offence punishable under



Section 376D of the IPC, 3(1)(w)(i) of the SC/ST Act and Section 4 of the POCSO Act, which was explained to the appellant in Hindi; however, the appellant denied the charges and sought to be put to trial before the Trial Court.

13. It is to be noted, at this juncture, based on the submission made on behalf of the appellant, that charges against the co-accused Chunnu Singh and Awadhesh Kumar Singh were framed on 22.11.2018 for the same offences. In a separate trial held, they were acquitted by a judgment and order dated 23.01.2020 passed in POCSO No. 05/2018 (S), CIS No. 05/2018. A copy of the said judgment of the Trial Court dated 23.01.2020 is available on record by way of Annexure-2 to IA No. 01 of 2021 filed in the present appeal.

14. Be that as it may, the correctness of the finding recorded by the Trial Court in the present appeal needs to be tested based on the evidence adduced at the trial at hand.

15. At the trial, altogether, 12 witnesses were examined for the prosecution. Further, the prosecution also proved the medical report (Exhibit-3) and the Medical Board report (Exhibit-3/1) at the trial. The signature of the informant of her statement recorded under Section 164 of the Cr.P.C. came to be proved as Exhibit-2. The defence did not adduce any evidence, either oral or



documentary.

16. Based on circumstances emerging against the appellant based on the evidence of the prosecution's witnesses the appellant, the appellant was asked to explain. The appellant's response was, however, a complete denial of the prosecution's case.

17. Out of 12 witnesses, P.W.-9 is the mother of the informant, P.W.-4 and P.W.-6 are the brothers of the informant, and P.W.-7 is the sister of the informant.

18. Disclosing the primordial grounds to assail the impugned judgment, Mr Rajesh Kumar Singh, Learned Senior Counsel appearing on behalf of the appellant, has submitted that the testimony of the informant (P.W.-5) is not at all creditworthy for various reasons. Firstly, her narrations of the date and manner of occurrence are substantially different at different stages. The facts disclosed in her written statement, which is the basis for the registration of FIR, differ materially from what she told subsequently in her statement under Section 164 of the Cr. PC.. Secondly, she developed another story in her evidence at the trial. Thirdly, the nature of the accusation of commission of multiple rapes by three full brothers upon her on the same day is not corroborated by the medical report based on her medical



examination conducted on 23.10.2015 itself. Fourthly, there are material contradictions in the evidence of the prosecution's witnesses, which demolish the entire case of the prosecution.

19. Learned Special Prosecutor representing the State has vehemently defended the finding recorded by the Trial Court and has submitted that minor contradictions in the evidence of the witnesses should not be a ground for this Court to interfere with the judgment of conviction. She has contended that the Trial Court has rightly recorded the finding of conviction based mainly on the evidence of the informant, which has been corroborated by other witnesses. Such a finding does not require interference by this Court on the ground that the accusation of multiple rapes is not confirmed by medical examination, which was held two days after the date of occurrence.

20. We will be referring to the elaborate submissions made on behalf of the parties, the gist of which has been noted hereinbelow after noticing the evidence of the prosecution's witnesses. It would be apt to refer to the evidence of the informant (P.W.-5) first.

21. The deposition of P.W.-5 was recorded by the Trial Court on 08.05.2017. P.W.-5, in her deposition, said that she did not remember the date and month of occurrence, which had



occurred nearly two years ago when she was 15 years of age. She had gone to ease herself at 7:00 in the evening alone. The accused, Awadhesh Kumar, this appellant and Chunnu Kumar Singh forcibly put clothes in her mouth, caught her and took her to a nearby paddy field. Chunnu Kumar Singh raped her first and thereafter accused Awadhesh Kumar raped her. Thereafter this appellant told her that he would also be raping her and took her from there to a banana orchard and raped her. From the banana orchard, he brought her to his house, where he kept her for two nights and one day. There also, all three raped her. Subsequently, they dropped her at the same place from where she was lifted by them. After returning to her house, she narrated the occurrence to his mother and brother. After learning about the occurrence, the informant's mother (P.W.-9) and his brother went to the accused, Niranjana Singh, father of the appellant, to make a complaint. Niranjana Singh abused her mother, taking her caste name and forcing her to leave the place. An attempt was made to convene a *Panchayati*, but the *Panchas* did nothing. In her cross-examination, she further deposed that the three accused persons had raped her one by one, and when one person was committing rape on her, the other two were just standing there. She also deposed that they had physically assaulted her also, because of



which she sustained injuries on her back and cheek. She was raped for one and a half hours. She proved her signature on her statement recorded under Section 164 of the Cr. PC.. In response to a query as to whether there was any injury caused by shoving clothes in her mouth, she answered in the affirmative, which she had shown to the doctor and the police officer. She also deposed that after Chunnu Singh had raped her, Awadhesh Kumar Singh had raped her for 10-15 minutes; thereafter, the appellant raped her for 20-25 minutes. She further deposed that, though she had experienced pain because of the repeated rape committed by accused persons, there was no mark of any injury on her body. The apparel she was wearing had become blood-stained, which she had shown to the doctor. In the morning, at about 5:00-6:00 am, the family members of the informant had gone to the house of the persons named in the FIR.. A *Panchayati* was held at about 7:00-8:00 am, which was attended by 50-60 persons near her house. The accused, Niranjana Singh @ Nunu Singh, was present in the *Panchayati*, which had continued for 1-1.5 hours. As no decision was taken in the *Panchayati*, she left for the police station. From the police station, she was taken to Sadar Hospital, where medical examination was held on the next day at 11:00 am. She admitted during the cross-examination that the father of the



informant used to do agricultural work on a piece of land belonging to accused Nunu Singh. Subsequently, the accused, Nunu Singh himself, started ploughing the land and dispossessed the informant's father from the said land. Her attention was drawn to the fact that she had not disclosed to the IO during the investigation that the informant was taken to the banana orchard and, from there, to their house, where she was kept and raped also.

22. P.W.-9, the mother of the informant, in her deposition recorded on 23.05.2017, also did not give a specific date of the occurrence. She deposed that she had gone to ease herself in the evening at 7:00 pm nearly a quarter to two years ago. She, however, did not return. Despite a search made by the family members after two nights and one day, she returned at 4:00 am. When she inquired where she had gone, the informant told her that the appellant, Sonu and Awadhesh, had raped her in the paddy field and from there, they had taken her to a banana orchard, where also they raped her. After the informant narrated the occurrence, she summoned *Panchas*. As asked by the *Panchas*, she approached to father of the appellant Niranjana Singh who abused her, taking her caste name and making her leave the place. She, thereafter, went to the police station. In her cross-



examination, she also deposed that there was a meeting of *Panchas* in which nearly 50-60 persons were present.

23. She denied the suggestion that she had not told the IO that the informant had gone to ease herself on the northern side of her house, and when she did not return, she had made efforts to search her out. She also denied the suggestion that she had not told the IO that the accused, Niranjana Singh, had abused her by taking her caste name.

24. The next most important prosecution witness is one of the brothers of the informant, P.W.-4. He deposed that the informant had gone to ease herself in the evening nearly one and half years ago, and as she had not returned, they made attempts to search her out. She, however, returned after two days. On inquiry, the informant disclosed to him the occurrence of rape. A *Panchayat* was thereafter convened. When he (P.W.-4) and his mother (P.W.-9) approached the father (Niranjana Singh) of the appellant for *Panchayat*, he abused them and took their caste name.

25. In his cross-examination, P.W.-4 gave the exact date and time of occurrence, i.e. 21.10.2015 at 7:00 pm when the victim had gone out of the house to ease herself. He also gave the date and time, i.e. 23.10.2015 at 3:00-4:00 am when she had



returned. In the meanwhile, family members had attempted to search her out. He further deposed that he had given the missing information to the police. He had disclosed to the police about the *Panchayat* having been convened. In the *Panchayat*, since the father of the appellant refused to come, they went to the police station to get the case registered.

26. P.W.-6, another brother of the informant, while supporting the prosecution's case, deposed that *Panchayati* was held.

27. P.W.-7 is the married sister of the informant. Her deposition is based on the information furnished to her by her parents.

28. P.W.-8 is a cousin of the informant and has his house near the house of the informant. He learnt about the occurrence after the FIR was already registered, whereafter he met the informant. He also deposed that he learnt about the occurrence one day after the registration of the FIR..

29. P.W.-12, learned Judicial Magistrate-I-Class, who was posted at Madhepura and who had recorded the statement of P.W.-5, proved that the informant's statements were recorded in accordance with the provision under Section 164 of the Cr.P.C. (Exhibit-2).



30. The Investigating Officer, examined as P.W.-12, proved the First Information Report (Exhibit-1). According to him, there were two places of occurrence.

31. Mr Rajesh Kumar Singh learned Senior Counsel appearing on behalf of the appellant has contended that there are palpable contradictions in the prosecution's case as disclosed in the FIR by the informant, her statement recorded under section 164 of the Cr.P.C. and her evidence adduced at the trial. He has submitted that the First Information Report makes out a case that the informant had left her house on the evening of 21.10.2015 at 7 pm, whereafter she was raped, and after having been raped, she had returned; thereafter, the FIR was registered on 22.10.2015. Based on the evidence of the prosecution's witnesses, a different picture emerges altogether to the effect that the informant was missing from her house for two nights and one day, which fact was not mentioned in the FIR. She had not disclosed in the FIR that the appellant and the other two accused persons had taken the informant to their house and had confined her in the house for two nights and one day, whereafter she was left by them. This aspect, coupled with the fact that the medical evidence suggests no sign of rape, puts the prosecution's case of commission of multiple rapes with the victim in the category of a highly improbable story.



He has further argued that the informant's brother (PW -4) demolished the entire prosecution's story inasmuch as he deposed that the occurrence had taken place on 21.10.2015 at 7 pm when the informant had gone out of the house to ease herself and returned home on 23.10.2015. The records clearly show that the FIR was registered on 22.10.2015, and the informant was medically examined on 23.10.2015. He has further argued that the prosecution's witnesses have also deposed that a *Panchayati* was held, which was attended by many persons of the village after the return of the informant. No person who was part of the said *Panchayati* has been examined by the prosecution at the trial. He has accordingly submitted that the finding of conviction recorded by the trial court deserves interference, and the appellant deserves to be acquitted. He has emphasized that the other two persons made accused in the criminal case have been acquitted in a separate trial.

32. Learned Special Public Prosecutor representing the State has submitted that the trial court, after having appreciated the entire cumulative effect of the entire evidence on record, including the evidence of the prosecutrix, has rightly recorded the finding of conviction. She contends that corroboration by the medical evidence of an accusation of rape is



not a *sine qua non* for recording the conviction of an accused. She has further argued that based on the evidence adduced at the trial, the prosecution was able to make out a case of commission of an offence under the provisions of sections 4 and 6 of the POCSO Act. She contends that Section 29 of the POCSO Act casts a reverse burden of proof of innocence on the accused. The said provision, she has contended, requires the special Court to presume that a person has committed an offence when he is prosecuted for committing an offence under Sections 3, 5, 7 and 9 of the Act. She has submitted that Sections 4 and 6 of the Act are penal provisions for the offences defined under Sections 3 and 5 of the POCSO Act. She has accordingly submitted that the impugned judgment of conviction does not warrant any interference by this Court.

33. We have perused the impugned judgment and order of the trial court and have carefully examined the evidence of the prosecution's witnesses and other relevant materials on record. We have given our anxious consideration to the rival submissions made on behalf of the appellant and the State.

34. We find substance in the submission made on behalf of the appellant that there are patent contradictions in the prosecution's case as disclosed by the informant herself in the



FIR, her statement recorded under Section 164 of the Cr.P.C. and further, her evidence recorded at the trial. The FIR, which is the first version of the prosecution, gives the impression that the victim had gone out of her house on the evening of 21.10.2015. The FIR does not disclose the time when she returned home. The fact remains that on 22.10.2015, the FIR was registered. The FIR does not in any manner disclose that she was missing from her house for two nights. Further, the accusation against all three full brothers, including this appellant, is of the commission of rape multiple times on 21.10.2015. The medical evidence does not support the allegation of the commission of rape on the informant multiple times in one day. It is true that even without corroboration by medical evidence, based on the sole testimony of a victim of a rape conviction can be recorded by a court. However, based solely on the oral evidence of a rape survivor, a conviction can be recorded only if her evidence is found to be unblemished and fully trustworthy by the Court. On perusal of the materials on record, we find that the informant narrated substantially different stories at different stages of investigation and trial while describing the occurrence. The fact that the informant was taken to the house of the appellant and was confined there for two nights and one day was not disclosed in the



FIR. No witness other than family members of the victim has supported any aspect of the prosecution's case, including the fact that a *Panchayat* was convened on 22.10.2015. The evidence adduced at the trial also suggests that there was a dispute between the appellant's family and the informant's family in respect of a piece of land which was allowed by the appellant's family to be used by the informant's family for agricultural purposes under a certain agreement.

35. So far as the submission advanced on behalf of the State with reference to Section 29 of the POCSO Act is concerned, we are of the view that the said provision can be applied only when the prosecution is able to establish the primary facts to prove the act(s) constituting offences under various provisions of the POCSO Act. In the present facts and circumstances of the case, considering patent material contradictions in the evidence of the prosecution's witnesses and the contradiction in the prosecution story as narrated by the informant herself at various stages as noted above, which are of glaring nature, we are of the view that it will be unsafe to uphold the conviction recorded by the trial court of the offence punishable under Section 376D and Sections 4 and 6 of the POCSO Act. As the appellant's conviction for the offence



punishable under Section 376D and Sections 4 and 6 of the POCSO Act cannot be upheld, a conviction for the offences punishable under Section 3(1)(w)(i) of the SC/ST Act also cannot be sustained.

36. Accordingly, the impugned judgment of conviction dated 31.08.2017 and order of sentence dated 11.09.2017 passed by the learned Additional Sessions Judge-I-cum-Special Judge, Madhepura in POCSO No. 01/2017/CIS No. 01 of 2017 requires interference and are hereby set aside.

37. The appeal is allowed.

38. Consequently, the appellant stands acquitted of the charges for the commission of offences punishable under Section 376D of the IPC, Sections 4 and 6 of the POCSO Act and Section 3(1)(w)(i) of SC/ST Act.

39. The appellant is in custody. Let him be released forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Chandra Prakash Singh, J)

K.K.RAO/-

AFR/NAFR	NAFR
CAV DATE	NA
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