

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.1230 of 2019

Arising Out of PS. Case No.-10 Year-2015 Thana- KAHALGAON District- Bhagalpur

Sudhakar Jha, Son of Divakar Jha, Resident of Village - Buddhuchack, P.S.-
Kahalgaon (Buddhuchack), District - Bhagalpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Bharat Bhushan, Advocate

For the Respondent/s : Mr.Abhimanyu Sharma, APP

**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH

SINGH

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date : 15-11-2022

Heard Mr. Bharat Bhushan, learned counsel for the
appellant and Mr. Abhimanyu Sharma, learned Additional Public
Prosecutor for the State.

2. By the impugned judgment and order dated
29.08.2019/ 05.09.2019, passed by learned 1st Additional Sessions
Judge-cum-Special Judge, POCSO, Bhagalpur in Sessions Trial
Case No. 645 of 2015, arising out of Kahalgaon (Buddhuchak)
P.S. Case No. 10/2015, the appellant has been convicted and
sentenced as under :-



Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376 of the IPC	R.I. for 12 years	50,000/-	Imprisonment for 6 months
4 of the POCSO Act	R.I. for 10 years	50,000/-	Imprisonment for 6 months

3. The victim's name is not being disclosed in the present judgment and order and is being referred to as PW-7/the victim.

4. It is the case of the prosecution itself that the victim is of unsound mind and below 12 years as on the date of occurrence. Father of the victim (PW-3) is the informant based on whose written statement the concerned Kahalgaon (Buddhuchak) P.S. Case No. 10/2015 came to registered on 02.04.2015 for the occurrence said to have taken place on the same day.

5. The prosecution's case, as disclosed in the written report of the informant, is that the victim being mentally unsound was bound with chains by her parents to restrict her movements when she was playing near her house on the date of occurrence. At about 10:30 a.m. in the morning, when the informant returned from a place 'Buddhuchak crossing', he noticed that the victim was not available near the house where she was playing, whereafter, he started searching out for her. At about quarter to twelve he saw that the victim was coming from the direction of Madhya Vidyalaya, Buddhuchak. The informant enquired from



the victim about the chain upon which she disclosed that the same was there with the appellant. She took the informant to the appellant's place and told him that the chain was there in the house of the appellant. Thereafter, the informant, keeping in mind the antecedent of the appellant, suspected that the appellant might have sexually assaulted the victim. When the informant reached the house of the appellant, it was found locked. Upon queries made by the informant, the victim disclosed that she had been raped. Thereafter, the informant's wife (victim's mother) also made inquiries and found truth in the disclosure made by the victim that she was raped.

6. From the evidence of the first Investigating Officer (PW-4) it appears that it has been the prosecution's case at the trial that the clothes, which the victim was wearing, were seized by the police. The victim was subjected to medical examination on 03.04.2015. The Medical Board found the age of the victim to be below 12 years though the informant had disclosed the age of the victim to be about 14 years. In the opinion of the Doctor (PW-1) there was no evidence of sexual intercourse/assault.

7. The police upon completion of investigation submitted charge-sheet against the appellant for commission of the offences punishable under Section 376 of the Indian Penal



Code and Section 4 of the POCSO Act. Cognizance was accordingly taken by the court below of the aforesaid offences. Subsequently, charges were framed on 01.02.2016 for the commission of offences punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act.

8. At the trial, the prosecution got examined altogether seven witnesses including father of the victim (PW-3), mother of the victim (PW-2), the victim (PW-7), the Doctor (PW-1) and two Investigating Officers i.e. PW-4 and PW-5. One Manoj Kumar Choudhary was examined as PW-6, possibly, to prove the prosecution's case that the chain, which was used by the parents for tying the victim, was recovered from the house of the appellant. PW-6, since according to the prosecution's case, he was a witness to the seizure of the chain by the police. However, the seizure-list in support of seizure of chain from the house of the appellant has not been proved at the trial. At the trial, the informant and his wife (PW-2) supported the prosecution's case. PW-7, the victim used explicit language and words in her deposition at the trial that the appellant had sexually assaulted her.

9. After examination of the prosecution's witnesses, the trial court, complying with the requirement under Section 313 of



the Cr.P.C. asked the appellant to explain the circumstances emerging against him based on the evidence of the prosecution's witnesses by putting questions. The appellant completely denied the circumstances appearing from the evidence of the prosecution's witnesses.

10. The trial court, upon analysis and scrutiny of the evidence adduced at the trial, held the appellant guilty of the offences punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act.

11. Mr. Bharat Bhushan, learned counsel appearing on behalf of the appellant has submitted that the finding recorded by the trial court holding the appellant guilty of the offences is patently erroneous and unsustainable. He submits that though the prosecution failed to establish commission of offence by the appellant punishable under Section 4 of the POCSO Act and Section 376 of the I.P.C., the trial court, based on the evidence of the victim, who was admittedly of unsound mind, has held the appellant guilty. He has further submitted that the occurrence of rape according to the prosecution had taken place on 02.04.2015. The victim, who was a minor, was subjected to medical examination on the very next day. Her age has been found, upon medical examination, to be less than 12 years. The Doctor,



however, upon examination held on 03.04.2015 found no sign of rape upon the victim. He has further submitted that though the clothes, which the victim was wearing on the date of occurrence, were seized by the police, the same were not sent for forensic examination which is a major lacuna in the prosecution's case as set out at the trial. He has referred to the evidence of the victim to submit that from her evidence itself it appears that she was not able to understand what she was stating before the court at the trial and her sole evidence ought not to have been the basis for the trial court to have held the appellant guilty of the offence. In support of his contention that failure on the part of the Investigating Agency to send the clothes of the victim for forensic examination was fatal to the prosecution's case, he has placed reliance on the Supreme Court's decision in case of ***Krishan Kumar Malik vs. State of Haryana*** reported in ***2011(7) SCC 130***.

12. He has also placed reliance on a Division Bench decision of this Court rendered on 10.10.2022 in Criminal Appeal (DB) No. 1031 of 2019 (***Md. Islam vs. The State of Bihar***) to submit that failure on the part of the police to send the clothes of the victim, which she was wearing at the time of occurrence and were seized by the police, to forensic science laboratory for scientific examination weakens the prosecution's case of sexual



assault by the appellant on the victim. He has also argued that the place of occurrence, which is the house of the appellant, has not been proved at the trial and it cannot be conclusively held that the chain used for tying the victim by her parents was recovered from the house of the appellant or from his conscious possession. He has referred to the evidence of PW-6 who deposed at the trial that he had seen the said chain lying on a table at the police station.

13. Learned Additional Public Prosecutor appearing for the State has defended the finding recorded by the trial court and has submitted that the evidence of the victim, who was though of unsound mind, cannot be brushed aside in the background of nature of charge against the appellant.

14. We have carefully perused the impugned judgment and order of the trial court. We have also carefully examined the lower court records. There is no gainsaying that the conviction of the appellant as recorded by the learned court in this case is primarily based on the evidence of the victim who was admittedly of unsound mind, so much so that the informant used to keep her in chains. From the demeanor of the victim as noted by the trial court while examining her (PW-7) it is evident that her behaviour in the court room was weird and erratic. Considering her behaviour as noted by the trial court, during the course of trial



and her responses to queries made during the trial, it is difficult to hold that she was capable of understanding the questions and her own answers.

15. The Doctor (PW-1), in her evidence, has categorically deposed that there was no evidence of any sexual assault/intercourse. The victim's hymen was found to be intact. The evidence of the Doctor does not indicate any injury on any part of the victim's body, including private parts.

16. It is true that in cases of sexual assault conviction can be recorded based on the evidence of the victim without corroboration by any other evidence including medical evidence, which principle has been laid down and reiterated by the Supreme Court in a series of decisions. It is, however, trite, at the same time, that if accusation of rape is not corroborated by medical evidence, evidence of victim must be weighed and scrutinised with utmost care and caution. Here is a case where the victim is not only a child but a child of unsound mind. From the evidence of PW-7 (the victim) at the trial, it appears that she was not able to understand the questions and the answers.

17. Section 118 of the Evidence Act stipulates that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to



them, or from giving rational answers to those questions;

(i) by tender years

(ii) extreme old age

(iii) disease, whether of body or mind, or any other cause of the same kind.

18. The Explanation to Section 118 of the Evidence Act states that a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

19. We have perused the evidence of the victim. On due analysis and scrutiny of her evidence, we are of the view that because of her unsoundness of mind she was not able to understand the questions put to her and her answers were not rational rather weird.

20. Further, we find substance in submission made on behalf of the appellant that failure on the part of the prosecution to send the clothes of the victim seized by the police for forensic examination was a major lapse on the part of the prosecution. The result of forensic examination could have divulged the true state of affairs. Learned counsel for the appellant has rightly placed reliance on the Supreme Court's decision in case of **Krishan Kumar Malik** (supra), paragraph 40 of which reads as under :-

"40. The appellant was also examined



by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the appellant."

21. The said decision in case of **Krishan Kumar Malik** (supra) has been relied upon by a Division Bench of this Court in case of **Md. Islam** (supra).

22. Absence of any sign of sexual assault as per the evidence of the Doctor, unsoundness of mind of the victim examined as PW-7 and failure on the part of the prosecution to send the victim's clothes for forensic examination cast serious doubt on the prosecution's case of commission of sexual assault by the appellant on the victim. We are mindful of the fact that the appellant was implicated in the First Information Report based on suspicion only.

23. Considering the facts and circumstances and discussions as noted above, we are of the view that it would be unsafe for this Court to affirm the finding of guilt of the appellant recorded by the trial court convicting him of the offences



punishable under Section 376 of the IPC and Section 4 of the POCSO Act.

24. We are of the view that the prosecution failed to discharge its primary obligation to establish a case of commission of sexual assault on the victim. In such circumstance, Section 29 of the POCSO Act cannot be invoked.

25. Resultantly, the impugned judgment and order dated 29.08.2019/ 05.09.2019, passed by learned 1st Additional Sessions Judge-cum-Special Judge, POCSO, Bhagalpur in Sessions Trial Case No. 645 of 2015, arising out of Kahalgaon (Buddhuchak) P.S. Case No. 10/2015 is hereby set aside. The appellant is acquitted of the charges levelled against him.

26. This appeal is accordingly allowed.

27. 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)

Rajesh/-

AFR/NAFR	NA
CAV DATE	NA
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