

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.112 of 2020

Arising Out of PS. Case No.-68 Year-2018 Thana- MAHILA P.S. District- Araria

Sakir @ Sakir Khan @ Jhunnu S/o Kabir @ Kabir Khan Resident of Village-
Gachi Tola, Ward No.24, P.S.- Araria, Distt- Araria.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 24 of 2020

Arising Out of PS. Case No.-68 Year-2018 Thana- MAHILA P.S. District- Araria

Md. Samsher Khan @ Shera @ Md. Shamsheer Son of Salim Resident of -
Gachi Tola Ward No. 24, P.S.- Araria, Distt - Araria.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 112 of 2020)

For the Appellant/s : Mr. Baleshwar Kamat, Advocate
Mr. Kumar Uday Bhanu Ray, Advocate
For the Respondent/s : Mr. Satya Narayan Prasad, APP
Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 24 of 2020)

For the Appellant/s : Mr. Anupa Nand Jha, Advocate
Mr. Anil Kumar Tiwari, Advocate
Mr. Alok Kumar, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 11-07-2023

Heard learned counsel for the appellants and learned

A.P.P. for the State.



2. Both the criminal appeals arise out of common judgment of conviction dated 21.11.2019 and order of sentence dated 27.11.2019 and hence after being heard together, they are being disposed of by a common judgment.

3. By the judgment of conviction dated 21.11.2019 and order of sentence dated 27.11.2019 passed by Sri Sanjay Kumar-I, 1st Addl. Sessions Judge-cum- Special Judge, Araria in Spl. (POCSO) No. 32/18/ CIS No. 32/18 arising out of Araria Mahila P.S. case No. 68/18, the appellants, namely, Sakir @ Sakir Khan @ Jhunnu (appellant in Cr. Appeal (DB) No. 112 of 2020) and Md. Samsher Khan @ Shera @ Md. Shamsher (appellant in Cr. Appeal (DB) No. 24 of 2020) have been convicted for the offences under section 376 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 4 of the POCSO Act, 2012 and have been sentenced to undergo rigorous imprisonment for 20 years and fine of Rs. 50,000/- each under Section 376 IPC has been imposed and in case of default of payment of fine they have been directed to further undergo simple imprisonment of six months. The appellants have further been sentenced to undergo rigorous imprisonment for 10 years and fine of Rs. 50,000/- each under Section 4 of the POCSO Act has been imposed and in case of default of payment of fine they have been directed to undergo



simple imprisonment of six months. But in view of Section 42 of the POCSO Act, the appellants have been sentenced to undergo rigorous imprisonment for 20 years and fine of Rs. 50,000/- each under Section 376 IPC and in case of default of payment of fine to further undergo simple imprisonment of six months. It was further directed that the period undergone in jail custody during the trial of the convicts will be adjusted in their sentences.

4. The prosecution case, as per the fardbeyan of informant-victim recorded by A.S.I. Seema Kumari of Mahila Police Station, Araria dated 11.07.2018 at 11.45 P.M. at Sadar Hospital, Araria is that on 11.07.2018 at about 02:00 p.m., she went to her maternal grandmother's house for taking books from his younger brother and while she was returning from Azad Nagar to her house, on the way when she reached near the clinic of Dr. Satyabardhan, one boy namely Md. Jhunnu @ Sakir met her and asked from where and for what purpose she was going. Thereupon, at the iron shop near the clinic of Dr. Satyabardhan, she felt dizziness and sat there. Thereafter Jhunnu @ Sakir gave her water to drink and after taking water, she became senseless and when she regained her sense, she found herself in Sadar hospital, Araria and got knowledge that rape has been committed upon her. On the basis of fardbeyan of the informant, Araria



Mahila P.S. case No. 68/18 dated 12.07.2018 was registered against Jhunnu @ Sakir.

5. The police after investigation submitted charge-sheet against the appellants Jhunnu @ Sakir and Samsheer @ Shera. Cognizance was taken by the Court under Section 376 of the IPC and 3/4 of the POCSO Act. Charges were framed against the appellants on which they pleaded not guilty and claimed to be tried.

6. During the trial, in order to substantiate the charges against the accused persons, the prosecution examined as many as seven witnesses, namely, PW1 Mansoor Alam, PW2 Samina Khatoon @ Samima, PW3 victim (informant), PW4 Dr. Reshma Raja, PW5 Meera Kumari (S.H.O.), PW6 Seema Kumari (investigating officer) and PW7 Md. Imityaz. The prosecution has also produced exhibits namely Ext. 1 -signature of PW2 on the fardbeyan, Ext.1/1 -signature of victim on the fardbeyan, Ext. 2- signature of witness victim on Section 164 CR.P.C. statement, Ext. 3 -injury report, Ext. 4 -registration slip, Ext. 5 -discharge summary of hospital, Ext. 6 -registration of the case, Ext. 7 -formal F.I.R., Ext. 8 -fardbeyan of victim recorded by A.S.I. Seema Kumari, Ext. 9 - confessional statement of Sakir @ Jhunnu, Ext. 9/1 -confessional statement of appellant Samsheer @



Shera, Ext. 10 - requisition for fitness of appellant Samsheer @ Shera, Ext. 11 - writing and signature of Seema Kumar (PW6) on certified copy of Sanha. The defence has not produced any witness in support of its defence. Thereafter, the statements of the appellants were recorded under section 313 of the Cr.P.C. and after conclusion of the trial, the learned trial Court convicted the appellants in the manner stated above.

7. Learned counsel for the appellants has submitted that the judgment of conviction suffers from several infirmities that have been overlooked by the learned trial Court and therefore, the impugned judgment is not sustainable in the eyes of law. It has been contended that the PW 1 (father of the victim) and PW 2 (mother) are not eye witnesses to the alleged occurrence. Rather, the said witnesses are hearsay witnesses. It has been further pointed out that the victim of the case has turned hostile and has not supported the case of the prosecution. Moreover, the Doctor (PW 4) in his medical opinion has not given any conclusive opinion regarding sexual assault. The learned counsel for the appellant has further contended that there is no compliance of section 34 (2) of POCSO and section 53A of Cr.P.C. and thus, the benefit ultimately goes in favour of the appellant. Therefore, it has been argued that there are severe lacunae in case of the



prosecution and the chain of circumstances do not unerringly point towards the guilt of the appellants. Hence, the findings of the learned trial Court are bad in law, wrong on facts, bereft of legal reasoning, devoid of merit and the judgment of conviction is fit to be set aside.

8. Learned APP for the State, on the other hand, has submitted that the judgment of conviction and order of sentence under challenge require no interference as the prosecution proved the case beyond all reasonable doubts. It has been asserted that the victim has specifically named the appellants in her statement under section 164 of Cr.P.C. Therefore, there does not remain any hiatus in the chain of circumstances and the guilt of the appellants has been satisfactorily proved by the evidences adduced during the course of trial and hence, there is no infirmity in the judgment of conviction of the learned trial Court.

9. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire material available on the record, the following issues arise for consideration in the present appeal:

- (I) Whether the material witnesses in their ocular evidence have supported the case of the prosecution?



(II) Whether there is any positive medical finding to hold that the victim has been subjected to rape?

(III) Whether there is any other evidence to hold the appellants guilty?

(IV) Whether non-compliance of section 34(2) of POCSO Act causes a dent in the case of the prosecution?

(V) Whether the failure of the prosecution to conduct medical examination of the appellants under section 53A of Cr.P.C. is fatal for the case?

10. With reference to issue no. I, it is found upon thorough examination of the entire material available on the record that the PW 1 (i.e. father of the victim) and PW 2 (mother of the victim) are not eye witnesses to the incidence. The PW 1 has specifically deposed that he came to know about the incident from others and that the present case was lodged under the influence of co-villagers due to suspicion. Furthermore, the PW 2 has deposed that no rape was committed upon her daughter and upon knowing the truth, they had retracted from the case. The PW 3, who is the victim of this case, has turned hostile and has not supported the case of the prosecution. She has specifically deposed during the course of trial that on account of scorching heat of the sun, she



had fainted while coming to her house and the by-standers present on the road had taken her to the hospital. Furthermore, the PW 7 has also turned hostile. The remaining witnesses, viz, PW 4, PW 5, PW 6 are formal witnesses and they have also not made any statement about their presence at the place of occurrence at the time of the incident.

Accordingly, the issue no. I is decided in the negative.

11. With reference to issue no. II, it is worthy to reproduce the medical report of the victim (Ext.3) which reads as follows:

“i. Auxiliary and pubic hairs developed, breast developed.

Injury:- vaginal wall tear with laceration and bleeding per vagina foul smelling discharge. Hymen ruptured.

Microscopic Examination:- No spermatozoa either dead or alive seen in any of the micro field. Slide reported by Dr. Rajeev Basak, M.O. S.D.H.. Forbesganj.

Pregnancy test negative, Ultrasound report- thick endometrium and cervicitis reported on 27-07-2018 after treatment at JNMCH Bhagalpur.

X-ray:- X-ray pelvis shows fused epiphysis of iliac crest.

X-ray wrist shows fused digital radial epiphysis.

Discharge summary from JNMCH Bhagalpur:- As per the certified photocopy of D.T. presented by Seema Kumari, Incharge Officer, Mahila Thana, Araria- Hymen ruptured with posterior vaginal wall tear.

In my opinion about sexual assault:- As per above finding it may be a case of sexual assault.



In our opinion about age:- As per above finding, she is about 19-20 years of age.”

From perusal of the said medical report of the victim, it is found that the medical examination of the victim was conducted within 24 hours of the incident, still no spermatozoa, dead or alive was found. The pregnancy test is found to be negative. Though the Doctor has found vaginal wall tear with laceration, nonetheless, it has been opined that such vaginal tear may be possible by fall from a cycle on a hard surface. As such, we find that there is no positive medical finding to support the contention of the prosecution that the victim was subjected to the commission of rape.

Accordingly the issue no. II is decided in the negative.

12. With reference to issue no. III, it is found that there are severe lacunae in the case of the prosecution. It has been stated in the fardbeyan by the informant-cum-victim that she fell unconscious near the clinic of Dr. Satyavardhan at a place where the clothes ironing shop was present. However, the PW 6, while giving description about the place of occurrence, has stated that the victim's mother had said that the incident took place near the house of one Akhtar Rahmani. Also, there is no mention of any clinic or any shop in the description of place of occurrence by the PW 6. In light of the facts stated above, the place of occurrence



becomes doubtful. It has been held by the Supreme Court in the case of *Syed Ibrahim versus State of Andhra Pradesh*, reported in *(2008) 10 SCC 601*, that when the place of occurrence itself has not been established, it would not be proper to accept the version of the prosecution. It is furthermore found, that the victim in her statement under section 164 of Cr.P.C. has narrated a different story about the occurrence. However, during the course of trial, the victim has deposed that she was not fully conscious when her statement was recorded under section 164 of Cr.P.C. and she does not remember what had been written therein. As such, there exists severe doubts on the genuineness, truthfulness and veracity of the statement made under Section 164 Cr.P.C. and the same cannot be relied upon as a cogent piece of evidence. We also taken note of the fact that the time of occurrence as stated in the fardbeyan is on 12.07.2018 at 14:00 hours, and the presence of other people on the road has also been admitted by the victim. Thus, the contention of the prosecution that the appellants were last with the victim is found to be erroneous and does not inspire the confidence of this Court. It is well settled legal position that in order to bring home the charges on ground of 'last seen theory', the prosecution has the onus to prove that the time gap since the victim was last seen together with the accused and the subsequent



recovery of the victim is so less that there is no possibility of intervention by any third person. Though no straight jacket formula can be devised in such cases to determine as to what will be considered a reasonable time, but it should be established in light of the facts and circumstances of the case, that the chain of circumstances is so proximately connected that the possibility of intervention by any other individual within the time frame is ruled out in entirety. In this regard, it would be relevant to refer to the decision of ***Bodhraj vs. State of J&K*** reported in ***(2002) 8 SCC 45*** wherein it was held that:

“The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

Accordingly, the issue no. III is decided in the negative.



13. With reference to issue no. IV, it is evident from thorough examination of the entire material available on the record that there is omission to comply with the statutory mandate, as stipulated in section 34(2) of the POCSO Act. Section 34(2) states:

“If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.”

In view of the authoritative pronouncement of the Hon’ble Supreme Court in the case of ***Jarnail Singh versus State of Haryana*** reported in (2013) 7 SCC 263, it is amply clear that the word ‘person’ in section 34 (2) of the POCSO Act, will include not only a child who is accused of committing offence, but also a child who is victim of the offence. The legislative intent behind making cautious use of the word ‘person’ has to be paid proper homage by interpreting the word ‘child’ in a broader manner to include even a ‘child victim’. Thus, section 34 (2) of the POCSO Act casts a positive duty on the Special Court to satisfy itself with recorded reasons as to whether the ‘person’ is a child or not. Establishing minority of the victim child is a condition precedent to proceeding with a case under the POCSO Act. However, in the present case, there is no such finding of the learned trial court as



to whether the victim was a child at the time of alleged occurrence. Non-compliance of such procedural requirements per se amounts to failure of justice and the benefit would certainly go in favour of the accused.

Accordingly, the issue no. IV is decided in the affirmative.

14. With reference to issue no. V, it is found upon thorough examination of the entire material available on the record that there is failure on part of the prosecution to subject the appellants to medical examination, as stipulated under section 53A of Cr.P.C. In this context, it is pertinent to refer to decision of the Hon'ble Supreme Court, passed in the case of ***Rajendra Pralhadreo Wasnik versus State of Maharashtra*** reported in ***(2019) 12 SC 460***, wherein it has been observed that the prosecution would be well advised to take advantage of section 53A of Cr.P.C. where reasonable grounds exist to believe that medical examination will afford sufficient evidence. It has also been observed in the case of ***Krishna Kumar Mallick versus State of Haryana*** reported in ***(2011) 7 SCC 130*** that after the incorporation of section 53A of Cr.P.C, it becomes necessary for the prosecution to conduct medical examination as it would facilitate the prosecution to prove its case against the accused. Furthermore, three judge bench of the Supreme Court in the case



Chotkau versus State of Uttar Pradesh reported in **2022 SCC OnLine SCC 1313** in para no. 80 has observed that failure of the prosecution to subject the appellant to medical examination under Section 53A of Cr.P.C is certainly fatal for the prosecution's case especially when the ocular evidence is found to be not trustworthy. We have also taken note of the recent judgment of the Hon'ble Supreme Court passed in the case of *Prakash Nishad @ Kewat Zinak Nishad versus State of Maharashtra* in **Criminal Appeal no. 1636-1637 of 2023** vide judgment dated 19.05.2023 wherein it was observed that medical examination of the appellant under Section 53A of Cr.P.C would enable the Court to ascertain the involvement of appellant and where there is failure to subject the appellants to medical examination, it would create a gap in the chain of circumstances. Accordingly, the issue no. IV is decided in the affirmative.

15. Every trial is a voyage of discovery in which truth is the ultimate quest. In the present case, on the basis of the discussions made above, we are of the considered opinion that the prosecution has utterly failed to prove any cogent evidence to substantiate the allegations raised against the appellants. Furthermore, there is failure on part of the prosecution in complying with the statutory mandate as provided under section



53A of Cr.P.C. and section 34 (2) of POCSO Act. We find it pertinent to emphasize at this juncture that the procedural requirements cannot be taken to be mere procedural formalities. Rather, they are the procedural safeguards provided in the justice delivery mechanism in order to prevent excesses by the State machinery. Non-compliance of such procedural requirements per se amounts to failure of justice. Holding the appellants hostage to the uncorroborated allegations and latches on part of the prosecution is against justice, fairness and reasonableness. As such, we are of the firm view that the dark clouds of suspicion looming large on the story of the prosecution have poured down heavily to wash away the entire dust ridden allegations. The conviction of the appellants in the present case is not sustainable in the eyes of law.

16. Hence, both the appeals stand allowed and the judgment of conviction dated 21.11.2019 and order of sentence dated 27.11.2019 passed by Sri Sanjay Kumar- I, 1st Addl. Sessions Judge-cum- Special Judge, Araria in Spl. (POCSO) No. 32/18/ CIS No. 32/18, arising out of Araria Mahila P.S. case No. 68/18, are set aside.

17. Appellant Sakir @ Sakir Khan @ Jhunnu of Cr. Appeal (DB) No. 112 of 2020 is in jail custody, he is directed to be



released from custody forthwith, if not wanted in any other case.

Since, appellant Md. Samsheer Khan @ Shera @ Md. Shamsheer of Cr. Appeal (DB) No. 24 of 2020 is on bail, he is discharged from the liability of his bail bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

AFR/NAFR	AFR
CAV DATE	03.07.2023
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