

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.356 of 2020

Arising Out of PS. Case No.-312 Year-2016 Thana- TAJPUR District- Samastipur

Md. Shamsad @ Md. Nazim Son of Md. Mokim Resident of Village -
Murgiya Chak, P.S.- Bangara, Dist.- Samastipur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 38 of 2020

Arising Out of PS. Case No.-312 Year-2016 Thana- TAJPUR District- Samastipur

1. Nutan Devi W/o Subodh Kumar @ Subodh Mahto R/o village-
Mohammedpur Koari, P.S.- Tajpur (Waini O.P.), District- Samastipur
2. Gita Devi W/o Sujeet Mahto R/o village- Mohammedpur Koari, P.S.- Tajpur
(Waini O.P.), District- Samastipur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 41 of 2020

Arising Out of PS. Case No.-312 Year-2016 Thana- TAJPUR District- Samastipur

Arun Kumar Son of Late Ram Bilas Sah Resident of Village - Sahrpur
Baghauni, Teli Toli, P.S.- Tajpur Waini (O.P.), Distt - Samastipur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 356 of 2020)

For the Appellant/s : Mr. Niraj Lochan Jha, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 38 of 2020)

For the Appellant/s : Mr. Sunil Kumar Thakur, Advocate

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

(In CRIMINAL APPEAL (DB) No. 41 of 2020)

For the Appellant/s : Mr. Niraj Lochan Jha, Advocate

For the Respondent/s : Mr. Ajay Mishra, APP

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

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA



ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 24-01-2023

These appeals have been preferred by the appellants, putting to challenge the impugned judgment of conviction dated 18.12.2019 and order of sentence dated 23.12.2019, passed by learned 1st Additional Sessions Judge, Samastipur, in Trial No. 03 of 2019, arising out of Tajpur (Waini) P.S. Case No. 312 of 2016, G.R. No. 2638 of 2016, whereby the appellants have been convicted and sentenced as under:

Appellant Number	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
CRIMINAL APPEAL (DB) No. 356 of 2020				
Md. Shamsad @ Md. Nazim	376(D) of the IPC	R.I. for 20 years	1,00,000/-	S.I. for 6 months
	354 of the IPC	R.I. for 5 years	10,000/-	S.I. for 3 months
	448 of the IPC	R.I. for 1 year	1,000/-	S.I. for 1 month
CRIMINAL APPEAL (DB) No. 38 of 2020				
Nutan Devi	323 of the IPC	R.I. for 1 year	1,000/-	S.I. for 1 month
	354 of the IPC	R.I. for 5 years	10,000/-	S.I. for 3 months
	341 of the IPC	S.I. for 1 month	-	-
	448 of the IPC	R.I. for 1 year	1,000/-	S.I. for 1 month
	506 of the IPC	R.I. for 1 year	1,000/-	S.I. for 1 month
Gita Devi	323 of the IPC	R.I. for 1 year	1,000/-	S.I. for 1 month
	354 of the IPC	R.I. for 5 years	10,000/-	S.I. for 3 months
	341 of the IPC	S.I. for 1 month	-	-
	448 of the IPC	R.I. for 1 year	1,000/-	S.I. for 1 month
	506 of the IPC	R.I. for 1 year	1,000/-	S.I. for 1 month
CRIMINAL APPEAL (DB) No. 41 of 2020				
Arun Kumar	376(D) of the IPC	R.I. for 20 years	1,00,000/-	S.I. for 6 months
	354 of the IPC	R.I. for 5 years	10,000/-	S.I. for 3 months
	448 of the IPC	R.I. for 1 year	1,000/-	S.I. for 1 month



2. All the sentences have been ordered to run concurrently.

3. The informant's name has been concealed in the present judgment in order to protect her prestige and dignity.

4. A *fardbeyan* of the informant, recorded by the Sub Inspector of Police of Mahila Police Station, Samastipur, on 13.10.2016, is the basis for registration of the FIR. The informant alleged that on the day of occurrence, i.e., 12.10.2016, at 10:00 p.m., the appellants, namely, Arun Kumar and Md. Shamsad @ Md. Nazim, came to her house on a motorcycle, entered into her house, they pressed her mouth using handkerchief and thereafter both of them committed rape on her. The moment they came out of her house, the local inhabitants captured Md. Shamsad @ Md. Nazim; however, the appellant Arun Kumar, managed to escape. She further alleged that her (informant's) uncle, upon taking a sum of Rs. 30,000/- from the family members of Md. Shamsad @ Md. Nazim, released him with his motorcycle. On the next day, her mother (PW-5) came and inquired about the persons, who had visited her house the previous night. She alleged that thereafter her neighbour Hari Om (uncle), her aunt and sisters-in-law, namely, Nutan Devi and Gita Devi, came and assaulted the informant and her mother with *lathi*. She further alleged that thereafter they, using scissors, shortened her hair and her mother's hair apparently



by way of social sanction and in order to ridicule them in the background of the occurrence. The accusation to the aforesaid effect gave rise to registration of the FIR, disclosing the commission of the offences punishable under Sections 376(D), 354, 448, 341, 323, 504, 506 and 509 of the IPC and Sections 4 and 8 of the POCSO Act, 2012 on 13.10.2016. As the informant had claimed to be below 18 years in her *fardbeyan*, the provisions under the POCSO Act were incorporated in the FIR.

5. The police, upon completion of investigation, submitted its chargesheet, whereupon cognizance was taken by the learned Magistrate by an order dated 18.01.2017 of the offences punishable under Sections 376(D), 354(B), 448, 341, 323, 504, 506 and 509/34 of the IPC and Sections 4 and 8 of the POCSO Act. The case was committed to the Court of Sessions. Thereafter, charges were framed against the appellants of Cr. Appeal (DB) No. 41 of 2020 (Arun Kumar) and Cr. Appeal (DB) No. 356 of 2020 (Md. Shamsad @ Md. Nazim) for commission of the offences punishable under Sections 376(D), 504, 506, 323, 341 and 448 of the IPC and Section 4 of the POCSO Act. The appellants, Nutan Devi and Gita Devi, were charged of commission of the offences punishable under Sections 323, 448, 341, 506, 504 and 354 and Section 120B of the IPC. As the appellants denied the charges



framed against them, they were put on trial. At the trial, the prosecution examined nine witnesses including the victim as PW-1 and her mother (PW-5). The doctors (PW-2, PW-3 and PW-4), who had examined the victim on 13.10.2016 itself, proved the medical report as regards the determination of her age, which was found to be 17 ½ years – 18 ½ years. On the point of rape, the medical board had found that there was no sign of recent rape found. She was habitual to sex and sexual contact had been established in past.

6. It further transpires that *salwar* of the victim was sent for forensic examination. The FSL report (exhibit-6), disclosed finding of semen on the victim's *salwar*.

7. After closure of the examination of the prosecution's witnesses, the appellants were examined in accordance with the provisions under Section 313 of the Cr.P.C.. The appellants denied the circumstances emerging from the evidence adduced at the trial.

8. Be it noted that the statement of the victim was recorded under Section 164 of the Cr.P.C. on 14.10.2016, which is there on record by way of exhibit-7.

9. Learned counsel appearing on behalf of the appellants in Criminal Appeal (DB) No. 41 of 2020 (Arun Kumar) and Criminal Appeal (DB) No. 356 of 2020 (Md. Shamsad @ Md.



Nazim) has submitted that in the absence of any legal evidence to the effect that the victim was a child as on the alleged date of occurrence within the meaning of Section 2(d) of the POCSO Act, their convictions for the offences punishable under Section 4 of the POCSO Act by the trial court is manifestly erroneous. He has submitted that no evidence at all was adduced at the trial other than the report of the medical board proved by the evidence of the doctors (PWs- 2, 3 and 4). There is thus no evidence as regards age of the victim to establish her to be child on the date of occurrence. The report of the medical board also does not suggest conclusively that the victim was a child as on the date of occurrence. He has accordingly submitted that Section 29 of the POCSO Act shall have no application in the present case. He has argued that conviction of the appellants, Arun Kumar and Md. Shamsad @ Md. Nazim, is based mainly on the evidence of the informant/victim (PW-1). She is not at all a trustworthy witness considering patent contradictions in her own statements at various stages, i.e., at the stage of recording of the *fardbeyan*, recording of the statement under Section 164 of the Cr.P.C. and her deposition at the trial. According to him, the depositions of the victim, at the trial, are self contradictory. He accordingly contends that though the prosecution failed to establish its case against these appellants,



the trial court has committed grave error by recording conviction of these appellants.

10. Learned counsel for the appellants in Criminal Appeal (DB) No. 38 of 2020 (Nutan Devi and Gita Devi) has submitted that even if the evidence adduced at the trial against them are treated to be correct, no offence is made out punishable under Sections 354, 341, 448 and 506 of the IPC. He has further submitted that conviction of these appellants for the offence punishable under Section 323 of the IPC is also not sustainable on close scrutiny of the evidence on record.

11. Learned Additional Public Prosecutors appearing for the State have, on the other hand, contended that to establish the offence of commission of rape, the evidence of the victim alone is sufficient, if the same is found to be reliable and trustworthy, even without any corroboration either by medical evidence or any other scientific evidence. It has been argued that the victim has withstood the test of cross examination and minor contradictions in her evidence are natural and not material for this Court to take a different view on the point of conviction than what has been taken by the trial court. In relation to the conviction of the appellants in Cr. Appeal (DB) No. 385 of 2020, it has been submitted that the prosecution's witnesses have proved beyond all reasonable doubt,



causation of violence causing hurt on the persons of the informant and her mother. It has been argued that the finding of conviction recorded by the trial court of the appellants Nutan Devi and Gita Devi does not warrant interference by this Court.

12. We have perused the judgment and order of the trial court and the lower court records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted above.

13. Before adverting to the various grounds taken on behalf of the appellants, Arun Kumar and Md. Shamsad @ Md. Nazim, to assail the finding of conviction recorded by the trial court against them, we consider it apt to first take up the point as to whether the trial court was right in convicting them for commission of offence punishable under Section 4 of the POCSO Act. The foremost aspect, which the prosecution is required to establish for prosecuting a person of commission of an offence under the POCSO Act, is that the victim was a child within the meaning of Section 2(d) of the Act as on the date of occurrence.

14. Learned counsel for the appellants, in our opinion, is correct in his submission that the prosecution did not establish beyond all reasonable doubts that the victim was a child within the meaning of Section 2(d) of the Act. The report of the medical



board does not go to conclusively suggest that the victim was less than 18 years as on the date of occurrence. Her age has been found to be between 17 ½ years – 18 ½ years in the opinion of the medical board. The prosecution adduced no documentary evidence in the nature of school register/certificate of educational qualification to establish that the victim was a child.

15. In such view of the matter, we are of the considered opinion that the conviction of the appellants, Arun Kumar and Md. Shamsad @ Md. Nazim, for the offence punishable under Section 4 of the POCSO Act cannot be sustained.

16. We are, thus, left to examine as to whether the prosecution can be said to have established commission of the offences by these appellants punishable under Sections 376(D), 354 and 448 of the Indian Penal Code. In view of the nature of evidence of the prosecution's witnesses adduced at the trial, in our opinion, we need to address the evidence of the victim herself (P.W. 1) at the trial, keeping in mind her statement, in her *fardbeyan* and that under Section 164 of the Cr.P.C. It is worthwhile mentioning that, according to the Fardbeyan, the occurrence had taken place on 12.10.2016 and the FIR was registered on the next day, i.e., 13.10.2016. On 14.10.2016, the statement of the victim was recorded under Section 164 of the



CrPC. It is also to be noted that in the *fardbeyan*, the informant named the appellants, Arun Kumar and Md. Shamsad @ Md. Nazim, giving the details of their residential addresses. In her statement under Section 164 of the CrPC, she had stated that at the time of occurrence she was sleeping in her house with her brother in the same bed when the appellants had entered into her house and committed rape on her. Because her mouth was completely and tightly pressed by them, she could not squall. She reiterated that subsequently the villagers had captured the appellant Md. Shamsad @ Md. Nazim while he was attempting to flee away, whereas the appellant Arun Kumar managed to escape. Md. Shamsad @ Md. Nazim was later released by the villagers after taking from him a sum of Rs. 30,000/-. The mother of the victim (P.W.-5) was also examined under Section 164 of the CrPC. It is the consistent case of the prosecution that the mother of the victim (P.W.-5) was not there in her residence when the occurrence had taken place.

17. We now proceed to scrutinize the evidence of the victim (P.W-1) at the trial. In her examination-in-chief, she deposed that she was sleeping with her younger brother and younger sister in the house in the same bed. In the meanwhile, she felt that someone had pressed her mouth. She then saw two



persons who had gagged her mouth. Her hands were locked by someone in sleeping condition and her mouth was wrapped with *gamcha* (towel). In the meanwhile, the victim's sister who was sleeping with her, woke up and inquired about two persons who were there, whereupon the said two persons, asked her sister to keep sleeping else they would kill her. Out of fear, her younger sister slept and thereafter both of them committed rape on her one by one. In the meanwhile, one of the miscreants received a call on his mobile from a person whose name was later on ascertained by her as Arun Kumar. They thereafter hurriedly rushed out from the backyard exit of the house. The other person had ignited the motorcycle parked on the gate of the house. It was then that her sister had started screaming. The local inhabitants thereafter gathered there and nabbed the appellant Md. Shamsad @ Md. Nazim. The Mukhiya of the Village thereafter arrived that very night and convened a meeting. The towel, which was wrapped on her mouth by the accused persons, was unleashed by her younger sister. The Mukhiya of the Village had taken a decision in the Panchayat that the locks of hair of the victim's mother and the victim would be cut, apparently as a measure of social sanction and by way of punishment. In her cross-examination, she deposed that at the time when rape was being committed upon her by the



appellants, namely, Arun Kumar and Md. Shamsad @ Md. Nazim, bother, her younger brother and younger sister were sleeping on the same *chawki* (wooden cot). She further deposed that she was sleeping at the doorway of her house when the occurrence had taken place. The place where she was sleeping was not bolted/latched from inside. The door was open. It is significant to note that in her cross-examination, in paragraph-45, she deposed that she did not know these appellants, namely, Arun kumar and Md. Shamsad @ Md. Nazim, from before. These two accused persons had disclosed their names to her during course of commission of rape. Both were disclosing their names while sexually assaulting her. Evidently thus, for the first time at the trial, she disclosed in her evidence that she was not knowing the names of the appellants, Arun Kumar and Md. Shamsad @ Md. Nazim, from before. It must be recalled that, in her *fardbeyan*, she had described not only the names of the appellants, Arun Kumar and Md. Shamsad @ Md. Nazim. but their residential addresses as well. From the statement of the victim recorded under Section 164 of the CrPC, it is evident that it was not her case that she was not knowing the names of these appellants. In her statement under Section 164 of the CrPC. also she disclosed the different village to which these appellants belonged. In paragraph- 43 to 46 of her



evidence, in cross-examination, she described vividly the manner in which the rape was committed on her. In paragraph-47 of her deposition, she disclosed the distance of the house of the appellant, namely, Arun Kumar, from her house. In paragraph-48 of her evidence, she disclosed the distance of the house of the appellant, namely, Md. Shamsad @ Md. Nazim, from her house. In view of such evidence of victim, it is evident that the appellants were known to her from before the occurrence. She thus does not appear to be truthful while deposing at the trial that she had learnt their names only during course of commission of rape by them as they themselves were disclosing their names and identity. It is highly improbable, in our opinion, that persons not known to the informant while committing rape upon her would disclose their identity. There is yet another serious contradiction in the evidence of P.W-1. At one point of time, she has deposed that she learnt the name of the appellant, Arun Kumar, after the appellant, Md. Shamsad @ Md. Nazim, was captured by the villagers and a disclosure made by him to the villager. Her depositions are evidently self contradictory and the circumstance in which she has claimed that rape was committed upon her appears to be highly improbable, unlikely and, therefore, doubtful. We cannot lose sight of the fact that, according to her deposition, her younger



brother and younger sister were sleeping in the same *chowki* when these appellants were committing rape on her. None of them came to be examined during the course of the investigation or at the trial. According to her deposition, her sister had woken up when the accused persons had entered into her house and she had questioned about their presence in the house.

18. Further, the presence of semen found on the *Salwar* of the victim in the FSL report, in the absence of any scientific examination of these appellants for the purpose of connecting them with the said semen, is of no avail to the case of the prosecution. There is no evidence to connect these appellants with the semen found on the informant's *Salwar*. There is no evidence on record as to how the informant's *Salwar* was seized by the police and sent for forensic examination. Since we do not find the informant to be fully trustworthy based on whose evidence only the conviction for commission of offence punishable under Section 376 could be safely recorded, in our opinion, corroborative evidence was required to be adduce to conclusively establish the prosecution's case beyond all reasonable doubt. In the present case, we find that there is no evidence to corroborate the evidence of the informant (P.W-1). In order to establish the prosecution's case, it was incumbent upon



the prosecution to establish some connection between the appellants and the semen found on the *Salwar* of the victim. It is significant to note that no material exhibit was produced at the trial.

19. In our opinion, thus, the conviction of the appellants, Arun Kumar and Md. Shamsad @ Md. Nazim, as recorded by the trial court for the commission of the offence punishable under Section 376(D) of the Indian Penal Code cannot be upheld, by giving them benefit of doubt. The entire case of the prosecution, as against these appellants, considering apparent contradictions in the evidence of PW-1, becomes doubtful. They are, therefore, acquitted of the charges punishable under Sections 376(D), 448, 504, 506, 506 of the IPC and Section 4 of the POCSO Act. Resultantly, Criminal Appeal (DB) Nos. 41 of 2020 and 356 of 2020 are allowed.

20. Consequently, the appellants, namely, Arun Kumar (appellant in Criminal Appeal (DB) No. 41 of 2020) and Md. Shamsad @ Md. Nazim (appellant in Criminal Appeal (DB) No. 356 of 2020) stand acquitted of the charges punishable under Sections 376(D), 448, 504, 506, 506 of the IPC and Section 4 of the POCSO Act. The appellant, namely, Md. Nazim @ Shamshad, is in custody. Let him be released forthwith, if not



required in any other case. Appellant Arun Kumar is on bail. He stands discharged from the liabilities of his bail bonds and sureties, if any.

21. Learned counsel for the appellants in Cr. Appeal (DB) No. 38 of 2020, namely, Gita Devi and Nutan Devi, has submitted that in peculiar facts and circumstances of the case, he does not intend to enter into the legality of their conviction recorded by the trial court. He submits that this Court may consider granting them benefits of the provisions under Section 4 of the Probation of Offenders Act, 1958.

22. Taking into account a holistic view of the entire facts and circumstances and the background in which they came to be implicated in the criminal case, which has finally resulted into their conviction by the impugned judgment, we deem it proper, in the interest of justice, to give them benefit of Section 4 of the Probation of Offenders Act. We find it expedient in the interest of justice to modify the impugned order of sentence as regards the appellants Nutan Devi and Gita Devi by directing their release on probation of good conduct. They are accordingly directed to be released by entering into a bond of good conduct without sureties before the learned trial court, to appear and receive sentence as and when called upon during the period of one year. It is directed



that in the meantime they shall keep good behaviour. We are satisfied, based on submissions made on behalf of these appellants, namely, Nutan Devi and Gita Devi, that they have fixed place of abode, which is evident also from the materials on record including the evidence of the prosecution's witnesses.

23. Cr. Appeal (DB) No. 41 of 2020 stands disposed of accordingly.

(Chakradhari Sharan Singh, J)

(Rajesh Kumar Verma, J)

Ibrar-nishant/-

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