

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.96 of 2022

Arising Out of PS. Case No.-72 Year-2020 Thana- DIGHWARA District- Saran

Dilip Rai Son of Prayag Rai Resident of Village- Manupur, P.S.- Dighwara,
District- Saran

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 101 of 2022

Arising Out of PS. Case No.-72 Year-2020 Thana- DIGHWARA District- Saran

Vinay Rai Son of Sudish Rai Resident of Mauza- Manepur, P.S.- Dighwara,
District- Saran

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 96 of 2022)

For the Appellant/s : Mr.Bindhyachal Singh, Sr.Advocate
Mr.Vipin Kumar Singh, Advocate
Mr.RamBinod Singh, Advocate
Mr.A.Manikant Advocate

For the Informant : Mr.Ajay Kumar Sharma, Advocate

For the Respondent/s : Ms.Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 101 of 2022)

For the Appellant/s : Mr.Basant Kumar Singh, Advocate
Mr.Vishesh Kumar Singh, Advocate

For the Informant : Mr.Ajay Kumar Sharma, Advocate

For the Respondent/s : Ms.Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

CAV JUDGMENT



(Per: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY)

Date : 14-12-2023

Both the above stated criminal appeals have arisen out of common judgment dated 07.12.2021 and sentence order dated 14.12.2021 passed by learned Additional Sessions Judge VI-cum-Exclusive Special Judge (POCSO), Saran at Chapra. In all, two accused were prosecuted for the commission of alleged offences under Section 6 of the POCSO Act and section 323/34, 341/34 and 376(D) of the Indian Penal Code for wrongfully restraining the prosecutrix and then committing rape on her. The trial court after appreciation of the evidence on record found both the accused guilty for commission of the above-said offences and convicted them as under:-

Cr. Appeal (DB) No. 96 of 2022				
Convicted under Section			Sentence	
		Imprisonment	Fine (Rs.)	In default of fine
Dilip Rai and Vinay Rai	U/s 6 of the POCSO Act	RI for 25 years	1,00,000/-	SI for one year
	Section 323/34 IPC	RI for 06 months		
	Section 342/34 IPC	RI for 06 months		

All the sentences shall run concurrently.



2. Being aggrieved by the judgment and order of conviction recorded by the Additional Sessions Judge VI-cum-Exclusive Special Judge (POCSO), Saran at Chapra dated 07.12.2021 and 14.12.2021 respectively, the present appeals are filed by the appellants who are the accused in S.T. POCSO No. 28 of 2020 which arose out of Dighwara PS Case No. 72 of 2020.

3. A thumbnail sketch of the instant case is as follows:-

The prosecutrix i.e. PW-5 was the resident of Manopur Dighwara District-Saran. As per the written application the prosecutrix's age was not mentioned. On 13.03.2020 at about 1.00 'O' clock (midnight) the appellants i.e. Dilip Rai and Vinay Rai came to her, caught both her hands and when she started shouting Dilip Rai tied her mouth with his towel, took out a knife from his pocket and placed it on the throat of the victim and threatened her stating that if she shouts he would kill her and later he would also kill her father who was at home. The written application further discloses that Dilip Rai having caught hold of the hand of the victim, took her to *Gachhi*



in his lap for which the victim defended by hitting him with punches and also slapped him. Further, Dilip Rai torn her clothes due to which, she became naked and he started raping her while the other appellant hold both of her hands. Later Vinay Rai raped her then Dilip Rai caught hold of her hands and the entire incident took place for more than an hour. Later, the prosecutrix/victim reached home and informed the incident to her family members. The written application also discloses that both the accused threatened her not to inform about the incident to anyone or else they would kill her and her father.

4. Basing on the written application, Dighwara PS of Sone Sub-Division, Saran District has registered the FIR on the file of Dighwara PS Case No. 72 of 2020 dated 13.03.2020 at 8.30 am. In the said FIR, the same content was mentioned that both the accused had participated in the commission of the said offence. On the strength of the said FIR investigating machinery was set into motion and the prosecutrix was sent to medical examination. On the same date ie. 13.03.2020 at about 3.40 pm, the prosecutrix was examined by PW-6 Doctor Kiran Ojha of Sadar Hospital, Chapra. Her medical report and the evidence



would be discussed at a later stage. The statement of the prosecutrix was recorded under Section 164 of Cr.P.C by Judicial Magistrate First Class, Saran at Chapra on 13.03.2020. Thereafter, the statement of the victim was also recorded under Section 161 of Cr.P.C. A perusal of both the aforesaid statements clearly indicates that she had given the names of present appellants describing as perpetrators of the offence.

5. The record also reveals that FIR lodged by the prosecution was also sent to the Judicial Magistrate on the same date. During course of investigation both the accused were arrested.

6. After completion of the investigation chargesheet was submitted by the police. The accused were put on trial for commission of the said offence before the Additional District & Sessions Judge VI-cum-Exclusive Special Judge (POCSO) Saran at Chapra. Both the accused pleaded not guilty and requested for judicial trial.

7. In order to bring home the charges levelled against the accused, the prosecution has examined altogether eight witnesses on its behalf. No witnesses were examined on behalf



of the defence.

During the course of trial, the prosecution has examined total eight witnesses i.e., PWs-1 to PW-08 and got marked Exhibits P-1 to 5 and Exhibit D-1 and Exhibit D-2.

PW-1	Cousin brother
PW-2	Uncle of victim
PW-3	Cousin brother
PW-4	Aunt of victim
PW-5	Victim
PW-6	Doctor
PW-7	Investigating Officer
PW-8	Father of victim

Exhibit P-1	Signature of PW-4 on fardbeyan
Exhibit P1/1	Identification of signature and handwriting of the SHO, Dighwara PS below the endorsement made on fardbeyan
Exhibit P-2	Signature of the victim on the statement recorded under Section 164 Cr.P.C
Exhibit P-3	Injury report in the handwriting of and signed by PW-6
Exhibit P-4	Identification of handwriting and signature of the SHO, Dighwara PS by PW-7 on formal FIR
Exhibit P-5	Contents of the statement recorded u/s 164 Cr.P.C
Exhibit D-1	Three sets of photo of the victim with a boy namely, Rahul Kumar, as alleged with objection by the prosecution.
Exhibit D-2	A photocopy of the application dated 16.03.2019 made to SP, Saran with objection by the prosecution

8. On appreciation of the evidence available on



record, the trial court convicted the appellants as above-mentioned and awarded sentences to both the accused.

9. We have accordingly heard Mr. Bindhyachal Singh learned senior counsel and Mr. Basant Kumar Singh, learned counsel appearing on behalf of the appellants, Mr. Ajay Kumar Sharma learned counsel for the informant and learned APP Ms. Shashi Bala Verma representing the State and have perused the material available on record.

10. It is the specific contention of the learned counsel for the appellants that the alleged incident did not happen and the medical evidence did not corroborate the oral evidence of the prosecutrix. Therefore, the conviction itself is bad and is liable to be set aside. It is further contended that the trial court ought not to have convicted the appellants as the defence evidence clearly disclose that the prosecutrix is having love affairs with one Rahul Kumar and when they were caught red-handed by the appellants herein a false complaint was foisted against them in order to overcome the situation.

11. On the other hand, learned APP contended that there is no error or irregularity in the orders of the trial court and



therefore, prayed to confirm the judgment of the trial court.

12. The basic and foremost question that arose for consideration in this appeal is that whether the appellants have committed the offence under Section 6 of the POCSO Act and under Indian Penal Code or whether they have been falsely implicated.

13. According to the prosecutrix, both the accused have wrongfully restrained her, lifted her to *Gachhi* and committed rape against her one after the other. Admittedly, the alleged incident took place in the midnight at about 1.00 am and as per her testimony it took place for more than one hour. PW-5 ie. the prosecutrix in her cross-examination stated that she had come out from house at 1.00 clock in the night to defecate and both the accused caught hold of her and committed the offence and also admitted that she was injured in the said incident and received scratches on her back, hand and in cheek. However, injuries are not found on the body as per the medical examination report.

14. PW-6 who is the medical officer also testified that no injury was found on the body of the prosecutrix. If that be so,



why did she said that she received injury during the course of rape? The narration or improvement in her evidence speaks volumes against her and her credibility stands shaken.

15. It is also to be noted that initially she reported in the written application about the commission of offence, but did not say about any injuries sustained by her and further nothing was stated by the prosecutrix as to how she has identified these persons when the incident occurred at midnight. These acts or omissions of the prosecutrix cannot be said to be minor contradictions as these are very relevant basis of evidence. Further the entire case rests upon the evidence of the prosecutrix. It is also relevant to mention that the written application also do not contain the age of the victim/prosecutrix. Furthermore, the evidence of PW-4 who is Aunt and PW-8 who is father of the prosecutrix testified that the victim was aged about 13 years on the date of occurrence. Contrary to it, PW-6 has testified that the age of the victim was about 18 years. Because of such contradictions, an agile and active court can differentiate between the genuine case from frivolous and concocted one. The role of the courts in such cases is to see,



whether the evidence available before the court is enough and cogent to prove the accused guilty.

16. In order to prove the offence under Section 376 and Section 6 of the POCSO Act, the medical evidence plays crucial and important role. The medical officer i.e. P.W. 6 examined the victim on 13.03.2020 at about 3:40 pm and found 2 cm diameter abrasion on the right cheek. Except that no injuries were found on the body and private parts. Further, noticed old rupture on the hymen and the Vagina of the prosecutrix. P.W. 6 further testified that vagina swabs were collected and were sent to Histopathological Examination in Sadar Hospital, Chapra and urine of victim was collected for the purpose of pregnancy test. The witness i.e., P.W. 6, on perusal of Histopathological Report testified that dead spermatozoa were found and the victim was aged about 18 to 19 years. She opined that there is a strong evidence of recent sexual inter-course with the victim and that the age of the victim was above 19 years. In the medical examination, the medical officer/P.W.6 admitted that there were no injuries found on the victim's hands and back and further basing on the dental examination, pelvic test and



other tests the prosecutrix was found adult. It is also admitted by P.W. 6 that if live spermatozoa was found, the accused can be examined and matched to ascertain whether he had committed the offence or not, and even through investigation of DNA on the dead spermatozoa the accused can be traced. On appreciation of the evidence of the medical officer, we are of the considerable view that the victim did not sustain any injury on 13.03.2020 on her private parts or on her body. The prosecution has miserably failed to prove that sexual assault was committed against the victim on 13.03.2020 as the prosecutrix evidence is not corroborated with the medical evidence.

17. The object of the act for POCSO cases is that children have to be protected from the offences of sexual assault and sexual harassment etc. P.W. 5 is aged above 18 years. Section 2(1)(d) defines “Child” means a person below the age of 18 years. As per the evidence of P.W. 6, the victim was aged above 18 years or between 18 to 19 years and, therefore, the trial court cannot punish the accused under Section 6 of the POCSO Act. The trial court ought to have considered the evidence of the doctor, in the absence of any documentary



evidence i.e., school certificate, study certificate etc., Therefore, the conviction under Section 6 of the POCSO Act is liable to be set aside.

18. In this case, P.Ws. 1, 2, 3, 4 and 8 are not at all the eye witnesses. P.W. 5 is the victim. PW-6 is the Medical Officer. P.W.7 is the Investigating Officer. The evidence of Pws 1, 2, 4 and 8 are hearsay evidences. We would reiterate once again that the entire case rests on the sole testimony of the prosecutrix. One of the appellants i.e., Dilip Rai had taken a plea before the trial court, while examined under Section 313 of the Cr.P.C. that one boy named, Rahul Kumar was having love-affair with the victim/prosecutrix and they found the boy crossing them with the towel over his mouth and talking on phone for which both the appellants followed him to *Gachhi* and they also saw the victim/prosecutrix going behind the bushes. As they caught hold of the said Rahul Kumar beat him and when confronted Rahul Kumar punched on the face of Vinay Rai and fled away, for which they also went to the police station. The story of the victim/prosecutrix appears to be unreliable. The evidence of P.W. 5 has not been corroborated by any other evidences.



Furthermore, the evidence of the other witnesses is hearsay evidence except the evidence of doctor and investigating officer. There are various contradictions in the statements of each of the witnesses. Further, the statement of the prosecutrix and the improvements made by her in the testimony can be safely concluded, that she was certainly not telling a gospel truth.

19. In order to support the contention, learned counsel for the appellants relied on a judgment of the Apex Court wherein their lordships have held that no DNA test was being conducted to prove that the appellants have sexually assaulted the prosecutrix.

It is further contended by the learned counsel for the appellants that dead spermatozoa was found which was sent to chemical analysis, but the prosecution failed to send it to DNA test, to prove that the appellants have committed rape on the prosecutrix. In **Nandlal Wasudeo Badwik Vs. Lata Nandlal Badwik And Anr.**¹ the Apex Court have held:

“that the result of the genuine DNA test is scientifically accurate. It is nobody’s case that the result of the DNA test is not genuine and, therefore, the Court has to proceed on an assumption that the

¹ 2014(2) SCC 576



result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl child.”

Learned counsel for the appellants further relied upon a judgment reported in **Rajendra Pralhadrao Wasnik v. State of Maharashtra**² wherein their lordships have held as under:

“DNA evidence

There have been remarkable technological advancements in forensic science and in scientific investigations. These must be made full use of and the somewhat archaic methods of investigations must be given up. For the prosecution to decline to produce DNA profiling is available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions of Section 53-A and Section 164-A Cr.P.C.

DNA profiling is an extremely accurate way to compare a suspect’s DNA with crime scene specimens, victim’s DNA on the bloodstained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match.”

20. All the aforesaid citations are squarely applicable to the facts and circumstances of the case. On incorporation of section 53A of the Cr.P.C it has become necessary for the

2 (2019) 12 SCC 460



prosecution to go in for the DNA test, in order to connect crime with that of the accused. In spite of having sufficient materials to prove the guilt of the accused, the prosecutrix has failed to send the dead spermatozoa for DNA test to prove that the appellants have committed the offence against the prosecutrix.

21. Needless to say the solitary evidence of the prosecutrix to bring home the charge of the offences under Indian Penal Code and POCSO Act by the appellants do not inspire the confidence and is not of sterling quality. In our opinion, it is neither prudent nor safe to hold that the appellants are guilty of commission of the said offence.

22. We have gone through the entire evidence on record and on perusal of the records, it is evident that the medical evidence is not corroborating with the oral evidence of the witnesses. It is relevant to mention the judgment of the Apex Court in **Lallu Manjhi v. State of Jharkhand** ³.

“Single eyewitness testimony can be classified as (a) wholly reliable (b) wholly unreliable, and (c) neither of the two. In the first two cases, there may be no difficulty in accepting or rejecting the testimony as the case may be. In the third case, court has to be circumspect and look for corroboration by reliable evidence; direct or circumstantial.”

³ AIR 2003 SC 854



In the present case the testimony of prosecutrix falls under the third category i.e. neither of the two (wholly reliable or wholly unreliable).

23. Therefore, benefit of doubt has to be extended to the appellants. Thus, looking into the materials from all angles we are of the considerate opinion that the conviction of the appellants cannot be upheld, thus, these appeals are allowed.

24. The appellants are acquitted from all the charges, let them be released forthwith, if they are not required in any other case.

(G. Anupama Chakravarthy, J)

I agree
(Chakradhari Sharan Singh, J) :

(Chakradhari Sharan Singh, J)

vinita/aditi-

AFR/NAFR	NAFR
CAV DATE	12.12.2023
Uploading Date	18.12.2023
Transmission Date	18.12.2023

