

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.142 of 2021

Arising Out of PS. Case No.-43 Year-2018 Thana- BELDOUR District- Khagaria

1. TIPU YADAV @ TIPU KUMAR YADAV S/o Bilo Yadav @ Bilo Prasad Yadav R/o village- Pernagra, P.S.- Beldaur, District- Khagaria
2. Anil Yadav S/o Bilo Yadav @ Bilo Prasad Yadav R/o village- Pernagra, P.S.- Beldaur, District- Khagaria

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 174 of 2021

Arising Out of PS. Case No.-43 Year-2018 Thana- BELDOUR District- Khagaria

MINTU YADAV @ MINTU KUMAR SON OF LATE BINDESHWARI
YADAV R/O VILLAGE- PIRNAGRA, P.S.- BELDAUR, DISTRICT-
KHAGARIA.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 142 of 2021)

For the Appellants	:	Mr. S.D.Sanjay, Senior Advocate Mr. Praveen Kumar Agrawal, Advocate Mrs. Priya Gupta, Advocate Mr. Santosh Kumar Singh, Advocate Mrs. Sushmita Mishra, Advocate Mr. Lokesh Kumar, Advocate
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For the Respondent	:	Mr. Sujit Kumar Singh, APP
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For the Informant	:	Mr. Sanjeev Kumar Singh, Advocate
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(In CRIMINAL APPEAL (DB) No. 174 of 2021)

For the Appellant	:	Mr. Viveka Nand Singh, Advocate
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		Mr. Hira Jha, Advocate
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For the Respondent	:	Mr. Dilip Kumar Sinha, APP
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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 01-05-2023



Both these appeals have been preferred under Section 374(2) of the CrPC against the same judgment of conviction dated 07.01.2021 and order of sentence dated 12.01.2021 passed by the learned Exclusive Special Judge POCSO (Act), Khagaria, in Special POCSO Case. No. 08 of 2018, arising out of the same Beldaur P.S. Case No. 43 of 2018 and accordingly they have been heard together and are being disposed of by the present common judgment and order.

2. By the impugned judgment and order, the appellants have been convicted and sentenced as under: -

Cr. Appeal (D.B.) No. 142 of 2021				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Appellant No. 1 (Tipu Yadav @ Tipu Kumar Yadav)	6 of the Protection of Children from Sexual Offences Act	Life	-	-
	302/34 of the Indian Penal Code	Life	-	-
	376D of the Indian Penal Code	Life		-
Appellant No. 2 (Anil Yadav)	6 of the Protection of Children from Sexual Offences Act	Life	-	-
	302/34 of the Indian Penal Code	Life	-	-
	376D of the Indian Penal Code	Life		-
Cr. Appeal (D.B.) No. 174 of 2021				
Sole appellant (Mintu Yadav @ Mintu Kumar)	6 of the Protection of Children from Sexual Offences Act	Life	-	-
	302/34 of the Indian Penal Code	Life	-	-
	376D of the Indian Penal Code	Life		-



	Code			
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3. Heard Mr. S.D. Sanjay, learned Senior Counsel appearing on behalf of the appellants, Mr. Sujit Kumar Singh, learned Additional Public Prosecutor representing the State and Mr. Sanjeev Kumar Singh, learned counsel for the informant in Cr. Appeal (D.B.) No. 142 of 2021. We have also heard Mr. Viveka Nand Singh, learned counsel appearing on behalf of the appellant and Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor representing the State in Cr. Appeal (D.B.) No. 174 of 2021.

4. Before advertng to the prosecution's case, as disclosed in the written report of the informant, which is the basis for the registration of FIR, we deem it proper to refer to certain dates with time, which go to the root of the matter.

5. Briefly narrated, it is the prosecution's case that the informant's daughter had gone to the fields for cutting grass at 03:00 PM on 17.03.2018 with one Rekha Devi (PW.9, declared hostile). They were cutting grass in a maize field belonging to one Mahanth Bihari Das (not examined). The victim did not return till 05:00 PM, which made her mother start searching for her. The informant (PW.13) went towards the said maize field in search of the victim and at about 06:00 PM, they found a bag of grass, but the victim could not be found.



6. In the meanwhile, they saw four persons, namely, Tipu Yadav @ Tipu Kumar Yadav (appellant), Anil Yadav (appellant), Angad Yadav (juvenile) and Mintu Yadav @ Mintu Kumar (appellant) fleeing from near the field. Appellants Tipu Yadav @ Tipu Kumar Yadav and Anil Yadav are full brothers. All of them were named in the FIR as accused, who belonged to the same family. The informant and persons named in the FIR also have common ancestors. According to the informant as the abovementioned four persons were seen escaping from the place of occurrence, it raised some suspicion in the minds of the informant and his brothers, Manohar Yadav (PW 12) and Ravindra Yadav (PW 5), and therefore, they surrounded the maize field from all the sides. At 01:00 AM in the dead night, they noticed four persons, one riding a horse and three on foot roaming around.

7. At 06:00 AM in the morning, the dead body of the victim was found by the persons, who were searching her. The police were thereafter informed about the occurrence. On the suspicion that the accused persons might have committed the offence of rape on the victim, a minor and killed her, the FIR came to be registered. A lady police officer from Mahila Police Station, Khagaria, the district headquarter, arrived at the place of occurrence and said to have prepared an inquest report (Exhibit-4)



on 18.03.2018 at 08:15 AM. She found a bleeding wound in the private part of the victim, a sickle lying near the dead body and an empty sachet of '*Madhu Gutka*'. Neither the sickle nor the sachet was seized at any point of time. The postmortem examination on the dead body of the deceased was conducted at Sadar Hospital, Khagaria. The postmortem report (Exhibit-5) shows that the dead body of the deceased was received in the hospital at 08:15 AM, which was seen for the first time by the doctor at 11:10 AM and the postmortem examination had commenced at 02:05 PM on 18.03.2018.

8. During the postmortem examination, the doctor did not find any sign of injury around vulva, vagina and upper and middle part of both thighs. The vaginal swab was taken and sent for examination to JLN College, Bhagalpur, in Forensic Laboratory. The report of the Forensic Science Laboratory did not corroborate the suspicion that a rape was committed on the victim.

9. The brother of the informant, Manohar Yadav (PW 12), deposed at the trial that the dead body was first cremated and thereafter the case was registered.

10. The aforesaid brief background of the case has been given in the light of the fact that for an occurrence said to have come to the notice of the informant at 06:00 in the morning,



whereafter the police had reached at the place of occurrence at 07:30 in the morning and inquest report was prepared at 08:15, the postmortem examination was completed by 02:15, the FIR came to be registered at 04:00 PM on 18.03.2018. Apparently the occurrence was within the knowledge of the police and even the Superintendent of Police. If the deposition of the lady Medical Officer is to be taken into account, there is no explanation forthcoming as to why, soon after receiving of the information about the occurrence, the FIR was not registered.

11. We have already given brief description of the accusation in the written report said to have been made by the informant (PW 13). The said written report is, admittedly, not in the handwriting of the informant. There is no witness to the said written statement. It has not emerged at the trial as to who was the author of the written report. The investigating officer/SHO, in his deposition, testified that he did not know as to who had drawn the written report.

12. Be that as it may, the appellant Mintu Yadav @ Mintu Kumar was apprehended by the informant (PW 13) and his brother Manohar Yadav (PW 12) and was handed over to the police.



13. The police, upon completion of investigation, submitted charge sheet against the appellant Mintu Yadav @ Mintu Kumar and a supplementary charge sheet was subsequently submitted against all accused persons for commission of the offence punishable under Sections 376, 302/34 of the IPC and Section 3/4 of the POCSO Act. The accused Angad Yadav came to be declared a juvenile in conflict with law and accordingly his case was transferred to the Juvenile Justice Board for inquiry. The cognizance was taken for the offences punishable under Section 376A/302/34 of the Indian Penal Code and Section 4 of the POCSO Act in both the cases, which were subsequently amalgamated with the original file of POCSO Case No.8 of 2018. The appellants were charged of commission of the offences punishable under Section 376D, 376A read with 34, Section 302 read with 34 of the IPC and Section 4 of the POCSO Act.

14. We clarify here that no dispute has been raised at any stage that the victim was not a child as on the date of occurrence within the meaning of the provisions of the POCSO Act. The appellants denied the charges framed against them and claimed to be tried. They were accordingly put on trial.

15. At the trial, the prosecution examined 16 witnesses to prove the charges framed against these appellants. The



prosecution adduced documentary evidence at the trial including the formal FIR (Exhibit-2), endorsement over the written application (Exhibit-3), signature of the informant over written information (Exhibit-1), inquest report (Exhibit-4), postmortem report of the deceased (Exhibit-5) and the supplementary medical report of the deceased (Exhibit-5/1).

16. After closure of the evidence of the prosecution's witnesses, the trial court questioned the appellants in respect of the circumstances emerging against them based on the evidence of the prosecution's witnesses at the trial in compliance of Section 313 of the CrPC.

17. We have noticed from the records that the appellant Mintu Yadav @ Mintu Kumar, in his defence, while answering the questions put to him under Section 313 of the CrPC, attempted to explain in detail why because of personal animosity arising out of land dispute and parties being on litigating terms, he had been falsely implicated in the case. The defence examined at the trial two witnesses in support of its defence.

18. The trial court, based on analysis and appreciation of the evidence adduced at the trial reached a conclusion that the appellants were guilty of committing aggravated penetrative sexual assault in furtherance of common intention of all and



murder of the victim in furtherance of common intention of all and accordingly convicted all the accused persons for the offence punishable under Section 4 of the POCSO Act, 302/34 and 376D of the IPC. The trial court, however, held that the charge of commission of the offence punishable under Section 376A/34 of the IPC could not be established at the trial. As has been noticed hereinabove, consequent upon the conviction of these appellants, the learned trial court has sentenced them to imprisonment for commission of offence, which stood proved against them. These appeals have been filed in the aforesaid circumstance questioning the finding of conviction recorded by the trial court.

19. It has been argued on behalf of the appellants that finding of conviction recorded by the trial court for the offence punishable under Section 6 of the POCSO Act is perverse for the reason that there is no iota of evidence adduced at the trial to attract essential ingredients of Section 5 of the Act, which is punishable under Section 6 thereof. It is the common submission on behalf of the appellants that there is absolutely no evidence of any sexual assault committed by anyone on the victim, let alone penetrative sexual assault or aggravated penetrative sexual assault within the meaning of Section 7, Section 3 and Section 5 of the POCSO Act.



20. It has further been argued that the appellants have been held guilty of commission of the offence merely on circumstantial evidence that too to the effect that they were seen by the informant, his brothers Manohar Yadav (PW 12) and Ravindra Yadav (PW 5). Over and above the aforesaid circumstance, there is no evidence adduced at the trial by the prosecution to support the charge. Apart from the fact that the said evidence is inadequate to establish the prosecution's case against these appellants, the conflicting depositions of the witnesses would demonstrate that even on this point they are not trustworthy and reliable and, therefore, no credence should be given to their evidence.

21. Mr. S.D.Sanjay, learned Senior Counsel appearing on behalf of the appellants has submitted that the chain of circumstances could not be proved at the trial based on which it could be conclusively inferred that no other hypothesis than the hypothesis of guilt of these appellants was possible. In support of this submission, he has relied on Supreme Court's decisions in case of *Usman Mian v. State of Bihar*, reported in (2004) 10 SCC 786, *Javed Abdul Rajjaq Shaikh v. State of Maharashtra*, reported in (2019) 10 SCC 778, *Ramanand alias Nandlal Bharti v. State of Uttar Pradesh* reported in 2022 SCC OnLine SC 1396,



Guna Mahto v. State of Jharkhand reported in **2023 SCC OnLine SC 285** and ***Dakkata Balaram Reddy and Another v. State of Andhra Pradesh and Another*** reported in **2023 SCC OnLine SC 474**.

22. Mr. Viveka Nand Singh, learned counsel for the appellant Mintu Yadav @ Mintu Kumar has argued that the prosecution's case, as disclosed in the *fardbeyan*, is full of absurdities inasmuch as it is absurd to say that after having identified the tentative place from where the appellants were seen escaping, they would have surrounded the maize field whole night and recovered the dead body of the deceased in the next morning, which, according to them, was found lying nearly two *laggas* (one *lagga* is equal to approximately 99 inches). Pointing towards the existing animosity between the informant and these appellants, he has drawn the court's attention to the evidence of PW 12, wherein he has deposed in paragraph 6 that the appellant Mintu Yadav @ Mintu Kumar had lodged a case of theft against him and the informant and the stolen article was recovered by the police from the courtyard of their house in which they had gone to jail on 22.03.2018 and were released on bail on 15.03.2018. This FIR came to be registered on 18.03.2018. He has also argued that the



prosecution's witnesses do not appear to be trustworthy in the wake of their patent conflicting depositions.

23. We have perused the impugned judgment and order of the trial court. We have examined the evidence adduced at the trial by the prosecution's and the defense's witnesses. We have also gone through the documentary evidence adduced at the trial and have given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

24. It is evident from what has been mentioned hereinabove that it is a case of circumstantial evidence with the only circumstance that these appellants were seen escaping, by some of the witnesses, from the place near which the dead body of the victim was recovered. It is well settled legal position that in a case of circumstantial evidence, the case of the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and, secondly, all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Further, the circumstances must be of such conclusive nature and tendency and they should be such as to exclude every hypothesis, but the one proposed to be proved. The chain of evidence should be so complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of



the accused. The circumstances much be such as to show that within all human probability the act must have been done by the accused.

25. The Supreme Court has, in a series of decisions, enunciated the principles relating to appreciation of circumstantial evidence, illustratively, ***Shivaji Sahebrao Bobade & Anr v. State Of Maharashtra***, reported in (1973) 2 SCC 793 and ***Sharad Birdhichand Sarda v. State of Maharashtra***, reported in (1984) 4 SCC 116. The principles propounded by the Supreme Court in case of ***Sharad Birdhichand Sarda*** (supra) have been consistently followed by the courts with particular reference to paragraph 153 thereof, which has laid down five golden principles to constitute “panchsheel of the proof of a case based on circumstantial evidence”. We consider it useful to reproduce paragraph 153 of the Supreme Court decision in case of ***Sharad Birdhichand Sarda*** (supra), which reads as under.

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.



It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human



probability the act must have been done by the accused.”

26. The said decision has been followed recently in case of ***Ramanand alias Nandlal Bharti*** (supra) and ***Guna Mahto*** (supra).

27. In the present case, we notice that there is no other circumstance than as alleged by the prosecution, the appellants having been seen by some of the witnesses running away from the place of occurrence at 06:00 PM from near the maize field from where the dead body of the victim was recovered. There is no other circumstance, much less complete chain of circumstances, pointing towards the guilt of these appellants as the only hypothesis.

28. Altogether sixteen witnesses were examined during the trial including three were official witnesses. Out of the rest prosecution witnesses, eight came to be declared hostile at the instance of the prosecution and the informant and the father of the victim was examined as PW 13, whereas uncle of the victim as PW 12. Mother of the victim was examined as PW 3.

29. PW 5, a cousin of the informant, deposed, *inter alia*, in paragraph 17 of her evidence that he did not have any knowledge about the dead body of the deceased having been found till 07:00 AM in the morning. We have noticed conflicting depositions of the informant, father of the victim (PW 13), and the mother of the victim (PW 3). PW 3 deposed that after having made a search for the victim in the evening, she had returned to her house and told her husband,



i.e., the informant, her brother-in-law and others about missing of the victim, whereafter the husband (PW 3) had proceeded to search for the victim. She learnt in the morning that the dead body of the deceased was found lying in the field. She deposed that when she had gone to the place where the dead body was lying, the police had not come.

30. We need to notice, at this juncture itself, the evidence of PW 15, a lady police officer, who was the first police personnel to visit place of occurrence. She deposed that she had found one sickle lying near the dead body of the deceased, but she did not seize the same nor did she prepare any seizure memo. Curiously enough, PW 15 was not examined by the IO during the course of investigation and, for the first time, she came before the court to depose as a prosecution witnesses at the trial.

31. It is noteworthy that it is mentioned in the FIR that four unknown persons were seen by the informant and others, who had surrounded the suspected place, where the victim could be found, who were making attempts to get the dead body disappeared. This was witnessed, according to informant, by Suresh Yadav (not examined), Subodh Yadav (not examined) and Ravindra Yadav (PW.5). Except PW 12, none of the witnesses, at the trial, testified presence of the said four persons, as was alleged in the FIR making any attempt to get the dead body disappeared. This part of the



prosecution's case appears to be an outcome of fanciful imagination. In any view of the matter, it is not the prosecution's case that those four persons included these three appellants, who were making attempts to get the dead body disappeared. Further, PW 12 does not appear to be trustworthy witness and in no manner his evidence improves the prosecution's case based on circumstantial evidence. We have noticed hereinabove the evidence of PW 12 to the effect that the FIR was registered after the cremation of the dead body of the deceased and that the case was lodged merely on the basis of suspicion.

32. It is noteworthy that Baunu Sada, admittedly, the owner of the land, from where the dead body of the deceased was recovered, was not examined either by the police or at the trial. In our considered view, he was an important witness, who ought to have been examined. Further, according to the prosecution's case, the victim was accompanying PW 9 when she had gone for cutting grass. PW 9 has not supported the prosecution's case and she has been declared hostile at the instance of the prosecution.

33. There is no iota of evidence adduced at the trial to prove commission of an offence punishable under the provisions of POCSO Act or Section 376D of the IPC inasmuch as the basic ingredient of penetrative sexual assault before the death of the victim has not been established. It is the further case of the prosecution that



near the place, where the dead body of the victim was found, sachets of "*Madhu Gutaka*" and blood oozing out from the private part of the victim were found. The IO, in his evidence, on the other hand, deposed that he had not found any incriminating material at the place of occurrence.

34. We cannot lose sight of the fact that the person, who had drawn the written statement, which was signed by the informant and, thus, became basis for registration of FIR remained unidentified. Though the IO deposed that the formal FIR was in the handwriting of the Munshi of the police station, the person who had written the written statement, remained clueless.

35. On careful scrutiny of the trial court records, we do not find any justification for writing the written statement at 03:00 PM by the informant leading to registration of the FIR at 04:00 PM when a lady Police Officer had reached the place of occurrence in the morning itself at 07:30 AM and is said to have prepared the inquest report soon thereafter at 08:15 AM. Why an FIR was not registered soon thereafter is a question, which has remained unanswered. The findings, recorded by the lady police officer, relating to blood oozing out from the private part of the victim stands contradicted by the postmortem report wherein no injury in the private part of the victim was found. When attention of IO was drawn to deposition of PW 5, he deposed at the trial that PW 5 had not told him that when the dead



body was recovered, he had seen blood oozing out from the private parts of the victim.

36. It emerges from the postmortem report that the dead body of the victim was received at the hospital at 08:15 AM. There would have been, thus, no question of PW 15 preparing an inquest report at the place of occurrence at 08:15 AM. Presence of PW.15 at the place of occurrence, when the dead body of the deceased was lying and preparation of inquest report by her of the nature, as noted above, itself becomes doubtful in view of the evidence of the doctor with reference to the postmortem report. There is yet another curious aspect of the matter, i.e., as to why the FIR was not registered when the dead body of the deceased was sent to the hospital for the postmortem examination. The postmortem examination had begun, according to the postmortem report, as has been noticed above, at 02:05 PM. The postmortem report does not bear the FIR number, *inter alia*, because till the preparation of the postmortem report, the FIR was not registered and the same was registered after cremation of the dead body.

37. The implication of these appellants need also to be seen from the background of admitted animosity between the parties. Appellant Mintu Yadav @ Mintu Kumar Yadav had lodged a case against the informant (PW 13) and his brother (PW 12) Manohar Yadav, in connection with theft of his articles giving rise to Beldaur



P.S. Case No. 39 of 2018, in connection whereof, they were taken into custody on 11.03.2018. They were released on bail on 15.03.2018 and two day's thereafter, the occurrence is said to have taken place, leading to registration of the present FIR on 18.03.2018.

38. The appellant, Mintu Yadav @ Mintu Kumar Yadav, in his statement under Section 313 of the Cr.P.C. at the trial explained before the court the circumstance in which he was falsely implicated. We find from the impugned judgment of the trial court that the defense developed by appellant Mintu Yadav @ Mintu Kumar Yadav, in his statement under Section 313 of the Cr.P.C., has not been dealt with at all.

39. For the discussions hereinabove, we are of the considered view that it cannot be said that the prosecution was able to establish its case based on circumstantial evidence of commission of the offences punishable under Sections 376, 302/34 of the IPC and Section 3/4 of the POCSO Act against these appellants. According to the witnesses themselves, these appellants were implicated based on suspicion only. Secondly, the entire case of the prosecution becomes suspicious in view of the circumstance in which a belated FIR came to be registered much after preparation of inquest report, the postmortem examination and cremation of the dead body of the deceased.



40. For the aforesaid reasons, the impugned finding of conviction recorded by the trial court requires interference and the appellants deserve acquittal by giving them benefit of doubt. Accordingly, the judgment of conviction dated 07.01.2021 and order of sentence dated 12.01.2021 passed by the learned Exclusive Special Judge POCSO (Act), Khagaria, in Special POCSO Case. No. 08 of 2018, arising out of the Beldaur P.S. Case No. 43 of 2018, are set aside.

41. The appellants are in custody. Consequent upon their acquittal by the present judgment, let them be released forthwith, if they are not required in any other case.

42. These appeals are accordingly allowed.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

Pawan-Prakash

AFR/NAFR	NAFR
CAV DATE	N/A
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