

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (DB) No.5 of 2019**

Arising Out of PS. Case No.-227 Year-2014 Thana- MAJORGANJ District- Sitamarhi

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Kunal Singh Son of Sanjit Singh Resident of Village- Barharwa Gote, Police  
Station- Majorganj, District- Sitamarhi.

... .. Appellant/s

Versus

1. The State of Bihar
2. Raju Paswan Son of not Known R/V- Barharwa, Po and Ps- Majorganj, Dist-  
Sitamarhi

... .. Respondent/s

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**Appearance :**

|                     |   |                                   |
|---------------------|---|-----------------------------------|
| For the Appellant/s | : | Mr. Saghir Ahmad, Advocate        |
| For the informant   | : | Mr. Sanjay Kr. Sinha, Advocate    |
| For the State       | : | Mr.Sri Sadanand Paswan, Spl. P.P. |

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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 : 18-04-2023**

By the impugned judgment and order dated 29.10.2018/ 31.10.2018 passed by the learned 1<sup>st</sup> Additional Session Judge-cum-Special Judge (S.C./S.T. Act), Sitamarhi, in Sessions Trial No. 8 of 2014, arising out of Majorganj P.S. Case No. 227 of 2014, the appellant has been convicted and sentenced as under:

| Conviction under Section | Sentence     |            |                    |
|--------------------------|--------------|------------|--------------------|
|                          | Imprisonment | Fine (Rs.) | In default of fine |
| 376 of the IPC           | For Life     | 25,000/-   | RI for one year    |



|                    |          |          |                 |
|--------------------|----------|----------|-----------------|
| 4 of the POCSO Act | For life | 25,000/- | RI for one year |
|--------------------|----------|----------|-----------------|

2. The victim, a minor girl, belonging to Scheduled Caste is the informant of the concerned Majorganj P.S. Case No. 227 of 2014 which gave rise to the aforementioned Trial No. 8 of 2014.

3. We are not disclosing the name of the victim nor her identity in conformity with the legal requirements in order to protect her dignity. We have rather described her as a victim in the present judgment who came to be examined at the trial as P.W.-2. She alleged in her *fardbeyan* recorded by an Assistant Sub-Inspector of Police of Suppi out post (O.P) under Majorganj police station that on 03.07.2014, on the same evening at 7:30 P.M., the appellant had forcibly taken her to a desolate place and committed rape upon her. The appellant is said to have told the victim that her father had taken money from him as loan and therefore, he was committing the said misdeed.

4. The moment the appellant escaped from the place and the victim raised outcry, her mother (P.W.3) and Murari Paswan (P.W.4) rushed towards her and took her to her house. She also disclosed that when the occurrence had taken place,



in the neighbourhood, there was '*Shradh*' ceremony in which so many persons were participating and they had also came to see her after hearing about the occurrence.

5. The police, after completion of investigation, submitted charge-sheet for the offences punishable under Section 376 of the IPC, Section 3(ii) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act ('SC/ST Act' in short) and Sections 4, 6, 8 and 10 of the Protection of Children from Sexual Offences Act ('POCSO Act' in short). The cognizance was taken subsequently of the aforesaid offences. As the appellant pleaded not guilty and claimed to be tried, he was put on trial.

6. At the trial, altogether ten witnesses were examined including the Doctor who had examined the victim (P.W.-1), the informant/victim (P.W.-2), the mother of the victim (P.W.-3) uncle of the victim, Murari Kumar Paswan (P.W.4), Ravi Paswan, a co-villager (P.W.-5) and Amarendra Paswan (P.W.-6). P.Ws. 7, 8 and 9 were declared hostile at the instance of the prosecution. The Investigating Officer was examined as P.W.-10.

7. It is pertinent to mention that the statement of the victim was recorded under Section 164 of the CrPC on



04.07.2014 before a learned Magistrate which was, however, not duly proved at the trial. Age of the victim, as mentioned in the *fardbeyan*, was 12 years. The Doctor also opined her age to be nearly 13 years.

8. Upon closure of the evidence of the prosecution's witnesses, the learned Trial Court, for the purpose of enabling the appellant to explain the circumstances appearing in the evidence against him, questioned him generally on the case. The appellant, however, denied the circumstances against him. The Trial Court having evaluated and appreciated the evidence adduced at the trial has held the appellant guilty of the offences punishable under Section 376 of the IPC, Section 3(i) (xii) of the SC/ST Act and Sections 4 and 8 of the POCSO Act.

9. Learned counsel appearing on behalf of the appellant has submitted that the appellant has been maliciously implicated in the present case and the accusation of commission of rape stands completely belied by the evidence of the Doctor. He has submitted that the Doctor had examined the victim on 04.07.2014 i.e. the very next day after the alleged occurrence had taken place. He submits that there is absolutely no injury found on any part of the body of the victim to indicate commission of rape. Further, certain injuries



were found in the nature of "bluish black bruises on the back of the right wrist caused by hard and blunt object" which was found to be about three days old and was thus not at all connected with the occurrence in question, he contends.

10. Learned counsel for the appellant has further submitted that it is highly improbable that such occurrence can be committed at a place and in a situation where a '*Shradh*' ceremony was being held in the neighbourhood which was attended by a number of persons. He has argued that no person other than the members of the family of the victim came forward to support the prosecution's case. He has further argued that P.W.-2 (the victim) cannot be said to be a truthful witness of sterling character on whose evidence only the conviction can be sustained, even in the absence of corroborating medical evidence. He has submitted that there is material difference between what the victim had mentioned in the *fardbeyan* and in her deposition at the trial.

11. He has also argued that the present case was investigated by an officer of the rank of Assistant Sub-Inspector of Police, whereas Section 7 of the 'SC/ST Act' mandates that an offence committed under the Act shall be investigated by a Police Officer not below the rank of Deputy



Superintendent of Police.

12. Mr. Sadanand Paswan, learned Special Public Prosecutor for the State has submitted that the trial cannot be said to have vitiated only because the investigation was conducted by an officer below the rank of Deputy Superintendent of Police. He has argued that the victim has fully supported the prosecution's case in her evidence at the trial. From her evidence at the trial, it can be seen that she is consistent in her deposition and minor difference between what she had disclosed in the F.I.R. and the deposition at the trial, may not be a basis for this Court to interfere with the finding recorded by the learned Trial Court.

13. He has argued that the victim at the trial has explained in detail the manner in which the occurrence had taken place, whereas the *fardbeyan* is only precise statement of the occurrence. He has accordingly submitted that there is no reason why the evidence of the victim should not be accepted and there is no legal infirmity in the judgment recorded by the learned Trial Court while recording conviction of the appellant, based on the evidence of the victim and other materials available on record.

14. Learned counsel appearing on behalf of the



informant, while adopting the submissions advanced on behalf of the State, has argued that there is no legal infirmity in the judgment of the Trial Court.

15. We have perused the impugned judgment and order passed by the learned Trial Court as well as the lower court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted above.

16. It is manifest from the evidence on record that the three prosecution's witnesses i.e. P.W.-7, P.W.-8 and P.W.-9 did not support the prosecution's case and, therefore, they came to be declared hostile at the instance of the prosecution. We have already noticed hereinabove the fact that the Doctor (P.W.-1) did not find any sign of rape upon medical examination. In response to a question during the course of cross-examination, she deposed that it was very difficult to say whether rape had occurred or not.

17. The appellant was arrested on 05.07.2014 i.e. two days after the occurrence. It appears from the record that he was not subjected to any medical examination in consonance with the provision under Section 53A of the CrPC. Apart from P.W.-2 (the informant), her mother, her uncle, one



of her cousins and a co-villager supported the prosecution's case.

18. We consider it apposite to take up first the evidence of P.W.-2, the informant/victim. The victim in her deposition testified that on the date of occurrence on her way to attend *Shraddha* in the neighbourhood, the appellant had met her and had told her that his (appellant's) wife had called her (the informant). When the informant/victim went to the house of the appellant to meet his wife, she, whom (the informant) described as *Chachi*, denied to have called her. Thereafter, when the informant was coming back from the house of the appellant, the moment she reached near the house of one Chandeshwar Singh, the appellant was hiding there and suddenly caught her and took her towards the house of Chandeshwar Singh and committed rape upon her. The appellant had pressed the informant's mouth with his palm and the moment the informant got an opportunity, she raised an outcry upon which her mother and other villagers arrived there. Thereafter the appellant fled away. She also deposed that the police officer declined to seize her clothes. In response to a query during the cross-examination she deposed that there were several persons who had come to attend the *Shraddha* in



the house of Umesh Paswan.

19. The mother of the informant (P.W.-3) supported the prosecution's case to the extent that she had rushed to the place of occurrence with her nephew, Murari Kumar Paswan after the informant had shouted for help. She also deposed that the victim was there where about 50-100 persons were taking meal in the *Shraddha*.

20. P.W.- 4, Murari Kumar Paswan, a cousin of the victim also deposed to the extent that he had rushed to the place of occurrence with P.W.-3 after hearing the outcry raised by the victim.

21. P.W.-5, Ravi Paswan also supported the prosecution's case to the effect that he had reached the place of occurrence after hearing noise. Similarly is the evidence of P.W.-6.

22. The I.O. (P.W.-10) in his evidence deposed that he had not recorded the statement of Umesh Paswan in whose house the people had assembled to attend the *Shraddha*. He had not investigated as to whether there was any *Shraddha* ceremony in his house or not. He did not notice any sign of commission of offence at the place of occurrence.

23. It is true that if the evidence of victim of rape, in



the Court's opinion, is trustworthy and of sterling character, even in the absence of corroborating medical evidence, the person charged of offence can be held to be guilty offence of rape. If a person is charged of commission of offence defined under Sections 3, 5, 7 and 9 of the POCSO Act, Section 29 thereof creates a presumption of commission of offence by the person who is prosecuted for such offence. The Court, however, cannot loose sight of the fact that in order to attract Section 29 of the Act, it is the foremost obligation of the prosecution to establish the primary facts constituting the aforesaid offence. What would constitute commission of offence punishable, offences defines under Sections 3, 5, 7 and 9 of the POCSO Act are well defined under the said provisions. Penetrative sexual assault is the most essential ingredients to constitute an offence punishable under Sections 4, 6 and 8 of the POCSO Act.

24. In our considered view, taking a holistic approach, the prosecution in the present case has miserably failed to establish the commission of offences defined under Section 3, 5 and 7 of the POCSO Act. The appellant was arrested on 05.07.2014 itself. The date of occurrence being 03.07.2014, there is no clue why the appellant was not



subjected to medical examination despite there being provision therefor, under Section 53A of the CrPC. There is no justification for such failure on the part of the prosecution.

25. We are conscious of the fact considering the language of Section 53A of the CrPC, that the same cannot be said to be mandatory in nature. However, it is in the interest of the prosecution and to reach the truth and that medical examination of an accused is conducted in accordance with the provision under Section 53A of the CrPC.

26. In our view, Section 29 of the POCSO Act is not attracted in the facts and circumstances of the present case, the prosecution having miserably failed to prove the essential requirements to constitute the offence defined under Sections 3, 5 and 7 of the POCSO Act.

27. Situated thus, in our opinion, the finding of conviction recorded by the Trial Court in its judgment calls for interference. Accordingly, the impugned judgment and order dated 29.10.2018 and 31.10.2018, passed by the 1<sup>st</sup> Additional Sessions Judge-cum-Special Judge (S.C./S.T. Act), Sitamarhi, in Trial No. 8 of 2014, arising out of Majorganj P.S. Case No. 227 of 2014 are hereby set aside.

28. The appellant stands acquitted of the charge of



offences punishable under Section 376 of the Indian Penal Code, Section 3(i)(xii) of the SC/ST (Prevention of Atrocities) Act and Sections 4 and 8 of the POCSO Act.

29. This appeal is accordingly allowed.

30. The appellant is in jail custody. Let him be released forthwith, if he is not required in any other case.

**(Chakradhari Sharan Singh, J)**

**( Rajiv Roy, J)**

Rajesh/Ravi-

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| AFR/NAFR          | NAFR        |
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