

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1058 of 2016**

Arising Out of PS. Case No.-15 Year-2014 Thana- DAGARUA District- Purnia

Md. Rehan S/o Md. Nazir resident of Village- Sakrail, P.S.- Dagarua, Dist-
Purnea.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 482 of 2016

Arising Out of PS. Case No.-15 Year-2014 Thana- DAGARUA District- Purnia

Md. Azaz @ Babo S/o Abbas Resident of village- Sakrail, P.S.- Dagarua,
District- Purnea.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 1058 of 2016)

For the Appellant : Mr. B.D. Singh, Advocate

Mr. Kumar Parveen, Advocate

For the Respondent : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 482 of 2016)

For the Appellant : Mr. B.D. Singh, Advocate

Mr. Kumar Parveen, Advocate

For the Respondent : Mr. Abhimanyu Sharma, 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 : 22-06-2023

Both the criminal appeals arise out of common judgment
of conviction dated 31.03.2016 and order of sentence dated



04.04.2016, hence after being heard together, they are being disposed of by a common judgment.

2. By the judgment of conviction dated 31.03.2016 and order of sentence dated 04.04.2016 passed by Sri Satyendra Rajak, 1st Addl. Sessions Judge-cum-Special Judge, Purnea in Session Trial No. 03 of 2014, CIS No. 08/2014 arising out of Dagarua P.S. case No. 15/2014, the appellants namely Md. Rehan (appellant in Cr. Appeal (DB) No. 1058 of 2016) and Md. Azaz @ Babo (appellant in Cr. Appeal (DB) No. 482 of 2016) have been convicted for offence punishable under sections 376D, 302, 201 of Indian Penal Code (hereinafter referred to as 'I.P.C.') and Sections 4 and 6 of POCSO Act, 2012 and have been sentenced to undergo rigorous imprisonment for life under Sections 376D, 302 and 201 of I.P.C. and a fine of Rs. one lakh, one lakh and Rs. 10,000/- each respectively. The appellants have further been sentenced to undergo rigorous imprisonment for life under sections 4 and 6 of the POCSO Act and a fine of Rs. 10,000/- and 30,000/- each respectively with further direction that all the sentences awarded to both the appellants have been directed to run concurrently.

3. The prosecution case, as per the fardbeyan of informant Md. Wasik recorded by S.I. Rakesh Prasad of Dagarua Police



Station on 27.01.2014 at 09.45 a.m. at his house is that on 26.01.2014 at 06.00 p.m., when the informant did not find his daughter namely Sufiyana @ Sofa Pravin at his house then he and his family members started searching her in the nearby areas and also inquired about her from the relatives, but he has not been able to find her and as such, they returned home. In the morning of 27.01.2014 (wrongly written in F.I.R. as 27.01.2013), when the informant and family members again went in search of the victim, a fisherman namely Sahdeo Mahaldar came near the Sakrail Primary School and told informant's mother that the dead body of a girl is lying in Purpuria ditch of Manen river. Upon reaching at the spot, the informant's mother saw that the dead body of informant's daughter Sufiyana Pravin @ Sofa was lying and blood was found in her pajama. Thereafter, the dead body of the informant's daughter was brought to the house by the mother with the help of informant's uncle and nephew. The informant also joined them on the way. It has further been stated that upon reaching home, mother of the informant saw that blood was coming from private part of the deceased girl in which a piece of lungi measuring 6 inch was tied. Thereafter, information was given to the police and the police reached there. The informant suspected that some unknown persons murdered her



daughter after committing rape and threw the dead body near the Purpuria ditch. On the basis of fardbeyan of the informant, Dagarua P.S. case No. 15/2014 dated 27.01.2014 was registered under Sections 376, 302, 201/34 of the I.P.C. and Section 4 of the POCSO Act.

4. After registration of F.I.R., investigation was conducted by the police and upon completion of investigation, charge-sheet was submitted against both the appellants under Sections 376, 302, 201/34 of I.P.C. and Section 4 of POCSO Act. The cognizance of the offence was taken by the learned jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions. Charges were framed against the accused persons who pleaded not guilty and claimed to be tried.

5. During the trial, in order to substantiate the charges against the accused persons, the prosecution examined as many as eighteen witnesses, namely, P.W.-1 Md. Zakir, P.W.2 Noorjahan (grandmother of the victim), P.W.3 Md. Wasik, P.W. 4 Md. Yunus, P.W. 5 Ansari Khatoon (mother of the victim), P.W. 6 Sheikh Manglu @ Akimuddin, P.W. 7 Ashok Sharma, P.W. 8 Chand Ali @ Chano, P.W. 9 Anil Sah @ Chunna P.W. 10 Dr. Vinay Mohan (doctor who conducted post mortem), P.W. 11Md. Rakib, P.W. 12 Md. Rizwan Alam, P.W. 13 Md. Wasik, P.W. 14



Dr. Sudhanshu Kumar, P.W. 15 Dr. Sushila Das, P.W. 16 Zubair Ahmad Khan(I.O.), P.W. 17. Md. Tahir, P.W. 18 Zakir @ Zakiruddin. The prosecution has also produced exhibits namely Ext. 1 Post Mortem report, Ext. 1/1 signature of Dr. Sushila Das on post mortem report by Dr. Binay Mohan., Ext. ½ signature of Dr. Sudhanshu Kumar on post mortem report by Dr. Binay Mohan, Ext. 2 signature of witness Md. Rakib on the seizure list dated 27.1.2014, Ext. 2/1 and 2/2 signatures of witnesses Tahir Hussain and Jahiruddin on the seizure list dated 31.1.2014, Ext. 3 signature of informant Md. Wasik on the fardbeyan, Ext. 4 seizure of piece of blood stained lungi on 31.1.2014 from the house of Md. Rehan, Ext. 4/1 seizure of blood stained pajama of the deceased and piece of lungi which was covered on the private part of the deceased on 31.1.2014, Ext. 5 and 5/1 Memo of arrest, Ext. 6 Charge-sheet of Dagarua P.S. case No. 15/2014, Ext. 7 formal F.I.R. of Dagarua P.S. case No. 15/2014, Ext. 8 fardbeyan of informant Md. Wasik in the writing of S.I. Rakesh Kumar. Ext. 9 pagination on fardbeyan, Ext. 10 inquest report of victim-cum-deceased Sofa Pravin, Ext. 11 F.S.L. report of Forensic Science Laboratory, Patna. The defence has not produced any witness in support of its defence. However, the defence has produced exhibits such as Ext. A document of



original sale deed dated 9.3.1977, Ext. A/1 certified copy of sale deed dated 26.2.2013 and Ext. B death certificate of Jahiruddin. Thereafter, the statements of the appellants were recorded under section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') and after conclusion of the trial, the learned trial Court convicted the appellants.

6. 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 there is sharp inconsistency in the testimony of the prosecution witnesses as regards the time from when the victim had been missing. In order to buttress this contention, the attention of this Court has been drawn towards the deposition of P.W. 2 and P.W. 5. It has further been contended that the time gap since the victim went missing and the recovery of her dead body is too long to apply the 'last seen theory'. It has been pointed out that the P.W. 12 has specifically deposed during the course of trial that that he along with the appellants and others were playing cricket till 05:00 pm and thereafter, they played carom for around one hour. The learned counsel for the appellants has further contended that the description of articles



mentioned in the seizure list do not tally with the description of articles contained in the FSL report (Ext. 11) and hence, the FSL report becomes doubtful and it cannot be relied upon. It has also been pointed out that the seizure witnesses have denied any search or seizure being made in their presence and they have still not been declared hostile. Furthermore, no independent witness has supported the case of the prosecution. Also, there is severe doubt as to the place of occurrence and even the Investigating Officer has not recorded the statement of one Sahdeo Mahaldar , i.e. the person who first saw the dead body of the victim lying near the ditch. The said Sahdeo Mahaldar would have been the most competent witness to testify regarding the circumstances in which the victim's dead body was found. It has been asserted that the P.W. 13 (informant) had made no such statement in the F.I.R. that the victim along with P.W. 2 and P.W. 5 visited the house of the appellants. Rather the appellants have been implicated in this case at a subsequent stage after deliberations and planning. Furthermore, there is non-compliance of Section 53A of the Cr.P.C. As such, it has been contended that there are severe lacuna in case of the prosecution and the chain of circumstances do not unerringly point towards the guilt of the appellants. Therefore, it is argued that 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.

7. 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 has proved the case beyond all reasonable doubts. It has been asserted that minor inconsistencies in the testimony of the witnesses cannot be a ground to reject their evidence as a whole. It has been further pointed out that the blood stains found on the piece of lungi wrapped around the private part of the victim match with the blood stains found on the lungi seized from the house of the appellants. Furthermore, it were the appellants who were last seen together with the appellants and as such, the circumstances unerringly point towards the guilt of the appellants. 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.

8. 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 prosecution has been able to establish the 'last seen theory' so as to sustain conviction of the appellants?

(II) Whether the description of articles seized from the house of the appellants tally with the description of articles given in the F.S.L. report so as to establish the missing causative link?

(III) Whether the additional facts and subsequent statements made during the course of trial by the informant (P.W.13), the victim's grandmother (P.W. 2) and victim's mother (P.W. 5) can be relied upon in light of the statement made in the First Information Report?

(IV) Whether non-compliance of Section 53A of Cr.P.C. is fatal for the case of the prosecution?

9. With reference to issue no. I, upon perusal of the entire material available on the record, it is found that there are severe inconsistencies and contradictions in the testimony of the prosecution witnesses regarding the time from which the victim is alleged to have been missing. It is found that P.W. 5 had specifically deposed that she, along with the victim and her mother-in-law (P.W.



2), had gone to the house of the appellants on 26.01.2014 at around 04:00 pm in order to meet the appellants' grandfather, who was not keeping well with his health. There, the P.W. 5 saw the appellants giving chocolates and biscuits to the victim at the verandah of the said house. However, when the P.W. 2 and P.W. 5 came outside the house, they found the victim and the appellants missing from the verandah. In sharp contradiction to such testimony of P.W. 5, it has been deposed by P.W. 2 that the victim has been missing since 26.01.2014 from 6 o'clock in the morning. Thus, it is found that there is severe inconsistency in the testimony of the P.W. 2 and P.W. 5 as to the timings from when the victim girl was missing. Furthermore, it has been found that the dead body of the victim was discovered from a public place on 27.01.2014 in the morning near Pudpudiya ditch alongside the river by one Sahdeo Mahaldar. As such, even considering the testimony of P.W. 5 to be true on its face value, the shortest time gap since the victim went missing (since 26.01.2014 at about 04:00 pm) and the consequent recovery of her dead body from a public place (in the morning of 27.01.2014) is too wide to apply the last seen theory in the present case. Moreover, the prosecution's contention of the last seen theory gets further hammered in light of the testimony of P.W. 12, who deposed in para no. 2 that the appellants were playing cricket along with him and



others till 05:00 p.m. on 26.01.2014 and thereafter, they went to play carom for about one hour. As such, the prosecution's contention about the victim being last seen together with the appellants on 26.01.2014 at 04:00 p.m. becomes doubtful and does not inspire 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 her dead body 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 in paragraph 31, it was held as under:

“31. 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.”

In light of the factual matrix of the case and considering the legal position as indicated above, we are of the considered opinion that there is absence of sufficient material to apply the ‘last seen theory’ in the present case.

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

10. With reference to issue no. II, the attention of this Court has been drawn towards the mismatch between the FSL report (Ext. 11) and the seizure lists (Ext. 4/1 & Ext. 4). It is found upon perusal of the Ext. 11 that the F.S.L. report contains findings about two different pieces of *lungis*, one being a piece of blue checked lungi and the other being a piece of green checked lungi. The blood stains found on both the lungis are of the same blood group. However, in sharp contrast, it is found upon perusal of the Ext.- 4/1 & Ext. 4 that the police had made seizure of only ‘blue lungis’. As such, it is evident that the description of articles seized by the Investigating Officer during the course of trial do not tally with the description of



articles mentioned in the F.S.L. report. Rather, the F.S.L. report contains findings with regard to articles which were neither seized nor sent for examination in this case. We have also taken into consideration that the P.W. 17 and P.W. 18, who are the seizure witnesses in the case have denied any search or seizure being made in their presence and have contended that their signatures were taken on plain papers. Nonetheless, these prosecution witnesses have not been declared hostile.

In light of the facts and circumstances of the case as discussed above, we are of the firm view that the mismatch between the F.S.L. report and the seizure lists causes a major dent on the story of the prosecution. Placing reliance on such document to uphold conviction of the appellants would amount constructing an edifice resting on pillars supporting other structures.

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

11. With reference to issue no. III, it is found that the F.I.R. in the present case has been lodged by P.W. 13 (father of the victim), who on 26.01.2014 itself was well aware about his daughter being missing. It is also found that the P.W. 13 has specifically deposed in para no. 4 that P.W. 2 and P.W. 5 had informed him that they along with the victim went to house of the appellant Rehan to visit his ailing grandfather and over there, the appellants offered chocolates



and biscuits to the victim and played with the victim. However, the informant has not made any statement about such course of events in the F.I.R. It is found that neither did the informant raised any iota of doubt against the appellants in the F.I.R. nor did he make any whisper against them even in any far-fetched manner. In light of the prevailing circumstances, we find that there was no reason for the informant to remain silent regarding such material particulars at the time of lodging of F.I.R., which is the very basis of the entire case. As such, in light of the facts hereinbefore indicated, the subsequent statements made by the informant (P.W. 13), P.W. 2 and P.W. 5 tantamount to material improvements and vital contradictions. At this juncture, it would be pertinent to take note of the decision of the Hon'ble Supreme Court passed in the case of ***Sunil Kumar Sambhudayal Gupta and Ors. versus State of Maharashtra reported in (2010) 13 SCC 657***, wherein para nos. 31 and 37, it has been observed that:

“Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the Court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence The omissions which amount to contradictions in material particulars i.e. go the



roots of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.”

In light of the facts and circumstances of the case and considering the legal position as discussed above, the issue no. III is decided in the negative.

12. With reference to issue no. IV, 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 provided under section 53A of Cr.P.C. It is also found that the Investigating Officer of the case (P.W. 16) has categorically stated in para no. 31 of his deposition that he did not subject the appellants to medical examination. At this juncture, it would be relevant to take note of the case of ***Rajendra Pralhadreo Wasnik versus State of Maharashtra*** reported in ***(2019) 12 SC 460***, wherein it has been observed by the Hon'ble Apex Court 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 judges Bench of the Hon'ble Supreme Court in the case *of Chotkau versus State of Uttar Pradesh* reported in *2022 SCC OnLine SC 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* passed 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 appellants 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.

13. 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 there are severe discrepancies and material contradictions in the testimony of the prosecution witnesses and their testimony cannot be relied upon to



form the sole basis of conviction. Moreover, the time gap since the victim went missing and recovery of her dead body from a public place is too long and hence, the last seen together theory is not applicable in this case. It has also been found that there is a mismatch between the articles seized by the Investigating Officer and the articles sent for examination by the Forensic Science Laboratory. Additionally, the seizure witnesses denying any search and seizure having been made in their presence gives another blow to the case of the prosecution. We have also taken note that the Investigating Officer has not stated as to whether he found any footprints or any blood mark at the spot from where the dead body was recovered and as such, the place of occurrence is also doubtful. The prosecution has also failed in complying with the mandate of Section 53A of Cr.P.C. We find it pertinent to emphasize at this juncture that the procedural requirements of Cr.P.C. 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. As such, there is complete absence of any material to establish the missing causative link to hold the appellants guilty. There are yawning gaps in the chain of circumstances and the prosecution has



failed to elevate the case from the realm of ‘may be true’ to ‘must be true’ as is the requirement set out by the Hon’ble Supreme Court in the case of *Santosh @ Bhure versus State (G.N.C.T) of Delhi*, reported in *Criminal Appeal No. 575 of 2011*. The prosecution has miserably failed to adduce sufficient evidences to prove the connecting chain of circumstances as to unerringly point towards the guilt of the appellants. Conviction on the basis of conjectures and surmises is unreasonable, unwanted, undesirable, not sought for, arbitrary, whimsical and alien to the concept of our criminal jurisprudence. 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. Hence, the conviction of the appellants in the present case is not sustainable in the eyes of law.

14. In the result, both the appeals stand allowed and the judgment of conviction dated 31.03.2016 and order of sentence dated 04.04.2016 passed by Sri Satyendra Rajak, 1st Addl. Sessions Judge-cum-Special Judge, Purnea in Session Trial No. 03 of 2014, CIS No. 08/2014 arising out of Dagarua P.S. case No. 15/2014, are set aside. Since the appellants, namely, Md. Rehan (appellant in Cr.



Appeal (DB) No. 1058 of 2016) and Mr. Azaz @ Babo (appellant in Cr. Appeal (DB) No. 482 of 2016) are in jail custody, they are directed to be released from custody forthwith, if not wanted in any other case.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

AFR/NAFR	AFR
CAV DATE	19.05.2023
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