

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.813 of 2019

Arising Out of PS. Case No.-11 Year-2018 Thana- MAHILA P.S. District- Saharsa

1. AKHILESH KUMAR Son of Sikandra Mahto Resident of Village - Chanan Siswa, Ward No. -9, P.S.- Salkhua, District- Saharsa
2. Nitish Kumar @ Nitish Kumar Yadav Son of Siko Yadav Resident of Village - Chanan Siswa, Ward No. -9, P.S.- Salkhua, District- Saharsa

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 2121 of 2019

Arising Out of PS. Case No.-11 Year-2018 Thana- MAHILA P.S. District- Saharsa

1. SIKO YADAV @ SUKO YADAV Son of Chhotelal Yadav @ Chhoti Yadav Resident of Village - Chanan Siswa, P.S.- Salkhua, Dist.- Saharsa.
2. Vijay Mahto Son of Pasindra Mahto Resident of Village - Chanan Siswa, P.S.- Salkhua, Dist.- Saharsa.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 813 of 2019)

For the Appellant/s : Mr. Diwakar Prasad Singh, Advocate
Mr. Om Prakash Singh, Advocate
Mr. Amardeep Lokpriya, Advocate
Mr. Hemant Kumar Sharan, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (SJ) No. 2121 of 2019)

For the Appellant/s : Mr. Diwakar Prasad Singh, Advocate
Mr. Om Prakash Singh, Advocate
Mr. Amardeep Lokpriya, Advocate
Mr. Hemant Kumar Sharan, Advocate

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

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT



(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 09-01-2023

As both these appeals arise out of the same judgment and order of the trial court which are impugned, they have been heard together and are being disposed of by the present common judgment and order

2. By the impugned judgment and order dated 29.04.2019/ 30.04.2019 passed by the learned Additional Sessions Judge-I-cum- Special Judge, Saharsa in POCSO 12 of 2018, corresponding to Mahila P.S. Case No. 11 of 2018, the appellants have been convicted and sentenced as under:

Criminal Appeal DB No. 813 of 2019				
Akhilesh Kumar	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
	323 of the IPC	RI for one year	1,000/-	RI for one month
	504 of the IPC	RI for two years	2,000/-	RI for 2 months
	506 of the IPC	RI for three years	3,000	RI for 3 months
	376(D) of the IPC	RI for 20 years	20,000/-	RI for 20 months
	448 of the IPC	RI for one year	1,000/-	RI for one month
	6 of the POCSO Act	RI for ten years	10,000/-	RI for 10 months
Nitish Kumar	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
	323 of the IPC	RI for one year	1,000/-	RI for one



				month
	504 of the IPC	RI for two years	2,000/-	RI for 2 months
	506 of the IPC	RI for three years	3,000	RI for 3 months
	376(D) of the IPC	RI for 20 years	20,000/-	RI for 20 months
	448 of the IPC	RI for one year	1,000/-	RI for one month
	6 of the POCSO Act	RI for ten years	10,000/-	RI for 10 months
Criminal Appeal (SJ) No. 2121 of 2019				
Siko Yadav @ Suko Yadav	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
	323 of the IPC	RI for one year	1,000/-	RI for one month
	504 of the IPC	RI for two years	2,000/-	RI for 2 months
	506 of the IPC	RI for three years	3,000	RI for 3 months
Vijay Mahto	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
	323 of the IPC	RI for one year	1,000/-	RI for one month
	504 of the IPC	RI for two years	2,000/-	RI for 2 months
	506 of the IPC	RI for three years	3,000	RI for 3 months

3. The victim's name is not being disclosed in the present judgment and order so as to conceal her identity.

4. The sister-in-law (elder brother's wife) of the victim(PW-4) is the informant on whose written report dated 09.02.2018 in relation to an occurrence which had taken place on 04.02.2018, the concerned Bakhtiarpur Mahila P.S. Case No.



11 of 2018 came to be registered levelling offences punishable under Sections 448, 376, 323, 504, 506 of the Indian Penal Code read with 34 thereof and Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act for short), on 10.02.2018. The prosecution's case as unfolded in the said written report of the informant (PW-4) is that in the night of 04.02.2018, she and the victim were sleeping in the same house but in different rooms. Other members of the family had gone to witness a fair, namely, *Kamla Mela*. Age of the victim has been described in the First Information Report as 14 years. At about 10:00 p.m., the appellants, Akhilesh Kumar and Nitish Kumar (Appellants No. 1 and 2 of Criminal Appeal (DB) No. 813 of 2019) entered into her house and at the point of gun, they took the victim to their house and committed rape on her one by one. When the informant woke up, she did not find the victim present in the house whereafter, she started searching for her. In the meanwhile, the informant's husband and other family members returned and they too started searching the victim. In that course, they heard someone screaming in the house of appellant Akhilesh Kumar whereupon they went to his (appellant Akhilesh Kumar's) house where they found the victim in dishevelled condition. When the family members of the



informant attempted to take the victim back to their house from the house of the appellants, the appellants Siko Yadav and Vijay Mahto (appellants of Criminal Appeal (SJ) No. 2121 of 2019) obstructed and restrained them from doing so and attempted to snatch the victim from the custody of the informant's family members. Thereafter, somehow or the other, the victim was brought back to her house. On the next day in the morning the co-villagers dissuaded the informant and his family members from lodging an F.I.R and suggested them to get the dispute resolved through *panchayat*. A *panchayat* was thereafter held in which the appellants Vijay Mahto and Siko Yadav agreed to pay a fine of Rs. 35,000/-. She also stated in her written report that the persons named in the F.I.R. had prevented the informant from going to the nearest police station. On the date of submission of written report, she (the informant) had surreptitiously managed to come to the Mahila police station at Saharsa with the victim, the informant's husband, the brother of the informant's husband, her father-in-law and other villagers.

5. The victim was subjected to medical examination on 10.02.2018 at 04:00 p.m. Based on radiological examination the doctor opined the age of the victim to be below 18 years. It came to be recorded in the medical report (Exhibit -2) that the



victim was not co-operative. The doctor, however, found signs of forced sexual intercourse within seven days of the date of medical examination. It also transpires that the statement of the victim was recorded under Section 164 of the Cr.P.C. before the Magistrate on 19.02.2018, which is available on record. In the said statement under Section 164 of the Cr.P.C. she disclosed that two boys who had masked their face had taken the victim away from her house to their room on the point of gun where they raped her. Her mouth was tightly shut with clothes by the miscreants. She further stated in her statement under Section 164 of the Cr.P.C. that when the cloth tied on her mouth was removed, she had screamed whereafter her brother had reached the place of occurrence. Her clothes were soaked with blood. Her apparels were not, however, seized by the police. She further disclosed that a *panchayat* was held after the occurrence whereafter a fine of Rs. 35,000/- was imposed upon them but they did not agree to it. She, at the end of her statement mentioned the names of these appellants as the persons who had committed rape on her.

6. The police upon completion of investigation submitted charge-sheet, whereafter cognizance was taken of the offences punishable under Sections 448, 376, 376(D), 323, 504,



506 read with 34 of the Indian Penal Code and Section 4 of the POCSO Act.

7. Against appellants Akhilesh Kumar and Nitish Kumar charges under Sections 323, 504, 506 all read with 34 of the Indian Penal Code, Sections 448 and 376(D) thereof and Section 6 of the POCSO Act were framed. As regards the appellants Siko Yadav and Vijay Mahto, charges under Sections 323, 504 and 506 read with 34 of the Indian Penal Code were framed against them.

8. It is noted at this juncture that all these appellants are co-villagers of the informant and the victim. Appellant Siko Yadav is the father of appellant Nitish Kumar of Criminal Appeal (DB) No. 813 of 2019 whereas appellant Vijay Mahto of Criminal Appeal (SJ) No. 2121 of 2019 is the brother of appellant Akhilesh Kumar of Criminal Appeal (DB) No. 813 of 2019.

9. At the trial, altogether seven witnesses came to be examined including the doctor as PW-6 and Investigating Officer as PW-7. The father of the victim (PW-1), one of the brothers of the victim (PW-2) came to be declared hostile at the instance of the prosecution as they did not support the prosecution's case. PW-3, the brother of the victim and husband



of the informant in his deposition stated that he did not know as to who had entered into his house. As the appellants had declined to accept the decision of the *panchayat*, he had gone to the police station for lodging the case. In his cross-examination, he deposed that his wife i.e. the informant(PW-4) had not disclosed anyone's name who had committed the offence. Further, he was not able to say as to who had written the written report at the police station. Furthermore, the written report was not read over to him, though he had signed over the written report. The informant (PW-4) in her deposition narrated that at the time of occurrence she was sleeping in her room and the victim was sleeping in the same house in another room. Suddenly, she heard her screaming whereafter she had gone to the room of the victim and found that she was not there in her room. Subsequently, the victim was found outside the doorway of the appellants Akhilesh Kumar and Nitish Kumar. The victim had, thereafter, told her that she had been raped. It is significant to note that in her deposition, PW-4 clearly stated that the victim had not disclosed anyone's name who had committed the rape. In her cross-examination, she testified that the accused persons present in the court had not committed any crime with the victim. She did not identify the appellants Akhilesh Kumar and



Nitish Kumar. After the occurrence, she was told by the persons who had gathered there that the *Darwaja* in front of which, the victim was found belonged to the appellants Akhilesh Kumar and Nitish Kumar and otherwise, she would not have known their names. It is manifest from the evidence of PW-4, the informant, in paragraph 5 that she did not support the prosecution's case that the appellants Akhilesh Kumar and Nitish Kumar had committed the offences. PW-5, the victim in her deposition testified that two boys had taken her away from her house and thereafter they had committed rape on her. She subsequently learnt that the said boys were the appellants Akhilesh Kumar and Nitish Kumar. She had explained the entire occurrence to her sister-in-law (PW-4) whereafter she lodged the case. She declined to identify these appellants in the course of trial. She clarified in her cross-examination that the appellants Akhilesh Kumar and Nitish Kumar who were present in the course had not committed any wrong with her. In paragraph 5 of her deposition, she evidenced that she had taken names of such persons whose names were mentioned to her by others. In paragraph 6 of her deposition she stated that the accused persons present in the court room were innocent.

10. We have already noticed the medical evidence in



the nature of injury report which came to be proved by PW-6, the doctor. Based on the injury report, she deposed that sign of forced intercourse within seven days was present, when the victim was examined. On perusal of the evidence of the I.O. It transpires that no sketch map or *Najari Naxa* was prepared of the place of occurrence. Further, despite the specific case asserted in the FIR regarding a *panchayat* having been held, the I.O. had not conducted any investigation on the point of the said *panchayat*.

11. Learned trial court, based on the evidence of the witnesses as noted above has concluded in the impugned judgment that the denial by the prosecution's witnesses subsequently at the stage of the trial, appeared to be because of some kind of compromise having been arrived at between the prosecution's witnesses and the appellants. According to him, the prosecution's case was based on credible evidence. The trial court held that there were abundant materials on record to establish the fact that the occurrence was committed at the time of occurrence by no one else than the persons put to trial.

12. Learned counsel appearing on behalf of the appellants has submitted that the finding of conviction recorded by the trial court is perverse, the same being based on no



evidence. He has submitted that none of the prosecution's witnesses has supported the prosecution's case that the appellants Akhilesh Kumar and Nitish Kumar had committed the rape upon the victim. Even the victim has, in her deposition, stated that the offence was not committed by these appellants. He has further submitted that the prosecution did not adopt a fair, just and the prescribed procedure to correctly determine the age of the victim, which has been found by the doctor to be below 18 years. As the said determination of age made by the doctor cannot be said to be accurate for the purpose of prosecuting the appellants for the offences punishable under the provisions of the POCSO Act, the conviction of the appellants of Criminal Appeal (DB) No. 813 of 2019 is manifestly erroneous.

13. Learned Additional Public Prosecutor representing the State has though attempted to defend the findings recorded by the trial court in its impugned judgment, she has not been able to point out any evidence adduced at the trial which could have resulted into finding of guilt of these appellants.

14. We have carefully perused the impugned judgment and order of the trial court as well as the lower court's records. We find force in the submission made on behalf of the



appellants that the finding recorded by the trial court of conviction of all these appellants under various sections of the Indian Penal Code and POCSO Act verges on perversity. It is evident that none of the prosecution's witnesses has supported the prosecution's case that the rape upon the victim was committed by these appellants. These appellants are co-villagers of the informant and the victim. Though the victim had not denied that rape was committed on her, she has not supported the prosecution's case that the appellants Akhilesh Kumar and Nitish Kumar had committed the rape. Father of the victim (PW-1) and one of the brothers (PW-2) have been declared hostile as they did not support the prosecution's case. Neither the victim nor the informant nor the informant's husband who happens to be the brother of the victim has supported the commission of any sexual assault by the appellants Akhilesh Kumar and Nitish Kumar.

15. The evidence of the doctor may suggest that the victim had suffered sexual assault within seven days from the date of medical examination. The victim had not denied in her evidence that sexual assault was not committed on her. Based on the said evidence it could though be concluded that the victim was sexually assaulted, there is absolutely no evidence to



indicate that the appellants Akhilesh Kumar and Nitish Kumar had committed such assault.

16. As regards the conviction of the appellants Siko Yadav @ Suko Yadav and Vijay Mahto of Criminal Appeal (SJ) No. 2121 of 2019 is concerned, there is no iota of evidence to justify their conviction for the offences punishable under Sections 323, 504 and 506 read with 34 of the Indian Penal Code.

17. For the foregoing reasons, the findings recorded by the trial court are not at all sustainable. Accordingly, the impugned judgment and order dated 29.04.2019/30.04.2019 passed by the learned Additional Sessions Judge-I-cum- Special Judge, Saharsa in POCSO 12 of 2018, corresponding to Mahila P.S. Case No. 11 of 2018 is set aside. The appellants Akhilesh Kumar and Nitish Kumar of Criminal Appeal (DB) No. 813 of 2019 stand acquitted of the charge of the offences punishable under Sections 323/34, 504/34, 506/34, 376(D) and 448 of the IPC and Section 6 of the POCSO Act, and appellants Siko Yadav @ Suko Yadav and Vijay Mahto of Criminal Appeal (SJ) No. 2121 of 2019 are acquitted of the charge of the offences punishable under Sections 323/34, 504/34, 506/34 of the IPC.

18. These appeals are accordingly allowed.



19. The appellants Akhilesh Kumar and Nitish Kumar of Criminal Appeal (DB) No. 813 of 2019 are in custody. Let them be released forthwith, if not required in any other case. Appellants Siko Yadav @ Suko Yadav and Vijay Mahto of Criminal Appeal (SJ) No. 2121 of 2019 are on bail. Consequent upon their acquittal by the present judgment and order they stand discharged of the liabilities of their respective bail bonds and sureties if any.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

Rajesh/Sankalp

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