

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.68 of 2023

Arising Out of PS. Case No.-91 Year-2021 Thana- MAHILA PS District- Buxar

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Bhola Kumar S/O Binod Kumar @ Binod Kumar Gupta R/o- Gola Bazar
Buxar, P.S.- Buxar Nagar, District- Buxar

... .. Appellant/s

Versus

1. The State of Bihar
2. Manjit Gond Na Resident Of Village- Kharhatand, Ps- Simari, Dist- Buxar
At Present Residing At Maruti Colony C/O House Of Banshidhar Yadav Ps-
Industrial Area, Dist- Buxar

... .. Respondent/s

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with
CRIMINAL APPEAL (DB) No. 125 of 2023

Arising Out of PS. Case No.-91 Year-2021 Thana- MAHILA PS District- Buxar

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Nepali Yadav @ Neeraj Yadav S/o Binod Yadav @ Vinod Singh R/o Mohalla-
Vishwamitra Colony Niranjapur (Barki Sarimpur), P.S.- Buxar (Town),
Distt- Buxar.

... .. Appellant/s

Versus

1. The State of Bihar
2. Manjit Gond R/O Village- Kharahatand, P.S- Simri, Distt.- Buxar, At
Present- Residing At Maruticolony, C/O House Of Banshidhar Yadav, P.S-
Industrial Area, Distt.- Buxar, Pin- 802101.

... .. Respondent/s

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with
CRIMINAL APPEAL (DB) No. 142 of 2023

Arising Out of PS. Case No.-91 Year-2021 Thana- MAHILA PS District- Buxar

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Bablu @ Bablu Yadav Son of Sri Bhim Yadav R/v- Badki Sarimpur, P.S.-
Buxar (Ind.), District- Buxar



... .. Appellant/s

Versus

1. The State of Bihar
2. Manjit Gond Resident of Village - Kharahatand, P.S. - Simri, District - Buxar at present residing at Maruti Colony, C/o. House of Banshidhar Yadav, P.S. - Industrial Area, District - Buxar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 68 of 2023)

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

For the Respondent/s : Mr. Abhimanyu sharma, APP.

(In CRIMINAL APPEAL (DB) No. 125 of 2023)

For the Appellant/s : Mr. Sanjay Singh, Sr. Advocate.

Mr. Praveen Kumar, Advocate.

Mr. Rudrank Shivam Singh, Advocate.

For the Respondent/s : Mr. Abhimanyu sharma, APP.

(In CRIMINAL APPEAL (DB) No. 142 of 2023)

For the Appellant/s : Mr. Raghav Prasad, Advocate.

Mr. Chandra Mohan Singh, Advocate.

For the Respondent/s : Mr. Abhimanyu sharma, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE NANI TAGIA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 13-02-2024

All the three appeals (three appellants in all)

have been heard together and are being disposed off

by this common judgment.

2. We have heard Mr. Anil Kumar singh,



the learned Advocate for the appellant/Bhola Kumar in Cr. APP. (DB) No. 68 of 2023; Mr. Sanjay Singh, learned Senior Advocate for the appellant/Nepali Yadav @ Neeraj Yadav in Cr. APP. (DB) No. 125 of 2023 and Mr. Raghav Prasad, assisted by Mr. Chandra Mohan Singh, the learned Advocates for the appellant/ Bablu @ Bablu Yadav in Cr. APP. (DB) No. 142 of 2023.

3. The State is represented by Mr. Abhimanyu Sharma in all the three appeals.

4. The appellant/Bhola Kumar has been convicted under Section 376 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012; whereas appellants/Nepali Yadav @ Neeraj Yadav and Bablu @ Bablu Yadav have been convicted under Section 376(DB)/34 of the IPC and Section 6 of the POCSO Act, 2012, *vide* judgment dated 17.12.2022 passed by the learned Additional District & Sessions Judge-VI-cum-Special Judge POCSO Act, Buxar in POCSO Case No. 15 of 2022



arising out of Buxar Mahila P.S. Case No. 91 of 2021. By order dated 20.12.2022, appellant/Bhola Kumar has been sentenced to undergo R.I. for twenty years, to pay a fine of Rs.10,000/- and in default of payment of fine, to further suffer S.I for three months for the offence under Section 6 of the POCSO Act, 2012; whereas appellants/Nepali Yadav @ Neeraj Yadav and Bablu @ Bablu Yadav have been sentence to undergo R.I. for remainder of their natural lives, to pay a fine of Rs.20,000/- each and in default of payment of fine, to further suffer S.I for six months each for the offence under Section 376 (DB)/34 of IPC.

5. A twelve years old girl has lodged the FIR alleging that she was raped by two of the appellants viz. Nepali Yadav @ Neeraj Yadav and Bablu @ Bablu Yadav in the night of 30.11.2021 and 01.12.2021.

6. According to her allegation, her mother Sangita Devi (P.W. 6) got enraged at seeing her talk



on telephone with appellant/Bhola Kumar, with whom she had developed friendship recently. She was also slapped by her mother. Feeling aggrieved, she came out of her house and went to the sweet-shop where appellant/Bhola Kumar worked. While she was talking to appellant/Bhola Kumar, two persons came on motorcycle and shooed away Bhola Kumar. She was asked by both of them to accompany them to her house. She was reluctant in the beginning but later agreed to go with them. She was taken to a desolate place and was confined in an uninhabited house where she was raped a multiple times.

7. She has further alleged that thereafter she was taken on motorcycle by the aforementioned two persons to Buxar and from there to the Bus-stand and was left there. She met a policeman and narrated her woes to him. The aforementioned policeman, who has not been examined at the Trial, got her seated on a rickshaw and brought her back home.



8. Thereafter, the case.

9. She could learn from the talk of the accused persons that they were appellants/Nepali Yadav @ Neeraj Yadav and Bablu @ Bablu Yadav.

10. On the basis of the aforementioned written report by the victim, a case *vide* Buxar Mahila P.S. Case No. 91 of 2021, dated 01.12.2021 was registered for investigation for the offences under Section 376(D) of the IPC; Sections 4 and 6 of the POCSO Act, 2012 and Section 3 (i) (w) (i) (ii) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

11. The police after, investigation, submitted charge-sheet against all the appellants and they were put on Trial.

12. The Trial Court, after having examined thirteen witnesses on behalf of the prosecution, convicted and sentenced the appellants as aforementioned.



13. The learned advocates appearing for the appellants have submitted that in the event of the victim not having identified anyone of the appellants in the Court, the basic fabric of the prosecution case got destroyed. Even otherwise, it has been argued that none of the witnesses, including the victim and her mother *viz.* Sangita Devi (P.W. 6) have supported the prosecution case in any manner whatsoever. The other argument advanced on behalf of the appellants is that even though the appellants were arrested shortly after the reported incident, they were never subjected to any medical examination as mandated under Section 53A of the Cr.P.C. Even with respect to the minority of the victim, there was no determination of age for the Trial Court to have assumed the jurisdiction as a Special Court to try the appellants/offenders. Lastly, it has been submitted that with such prevaricating stand of the victim and her mother and absolute ignorance of the other witnesses about the occurrence, the



conviction and sentence of the appellants is highly unwarranted and not based on any evidence whatsoever.

14. We have examined the evidence on record in some detail.

15. Jitendra Kumar Thakur, Pappu Gupta and Laxman Yadav (P.Ws. 1 to 3) have shown their complete ignorance about the occurrence. They did not identify anyone of the appellants. All of them have been declared hostile.

16. The employer of appellant/Bhola Kumar viz. Vishnu Ji Gupta has been examined as P.W. 4. Though he has been declared hostile but he has stated in his examination-in-chief that he saw appellants/Nepali Yadav @ Neeraj Yadav and Bablu @ Bablu Yadav fighting with Bhola Kumar. However, he did not know the reason for such fight. They had fought earlier also. It was for this reason that he did not inquire any further about the cause of dispute



between them. It was only on 01.12.2021 that he learnt that the appellants had fought over a girl. However, since he did not support the prosecution case of the victim having been taken to a desolate place and subjected to rape a multiple times, he was declared hostile.

17. The mother of the victim (P.W. 6) asserted before the Trial Court that her daughter had not named any one of the appellants but she had expressed that she might identify the offenders. She came back within twenty-four hours. She did not even know that the victim had been talking to appellant/Bhola when she had slapped her. She has denied to have made any statement before the police and claims that she was made to sign on a blank piece of paper.

18. The victim herself (P.W. 5) was not very sure whether she would be able to identify the appellants, if shown to her and in fact she did not



identify any one of the appellants; not even appellant/Bhola, about whom she had disclosed in the FIR that she had become friendly with him over a period of time and that she had gone to him only after she was assaulted by her mother. On being shown, the victim did not identify any one of the appellants. In cross-examination also, she repeated that she was not subjected to rape by any one of the appellants.

19. Dr. Bharti Diwedi (P.W. 8) had examined the victim on 01.12.2021 only i.e. the day when she had resurfaced. The private part examination revealed that the rupture in the hymen was an old one and not of any recent past. No other abrasion or contusion was found on any part of the body of the victim. The vaginal swab examination further revealed that there was no presence of spermatozoa, either alive or dead. This was, however, on low and high power of microscopic examination. Nonetheless, a few epithelial cells and pus-cells were discerned. She also



explained that it would normally be difficult to assess the offence in cases of old rupture. Absence of spermatozoa, dead or alive, on immediate examination of the victim would lead to an inference of no sexual assault.

20. The police officer viz. Karuna Devi (P.W. 9) had investigated the case, who had taken the victim to the hospital for her medical examination and has also ensured her recording of statement under Section 164 of Cr.P.C. She had recorded the statements of other witnesses and had arrested the appellants.

21. There is but nothing in her evidence which would suggest that she had got the appellants examined medically even though there was allegation of rape against them as mandated under Section 53A of the Cr.P.C.

22. The undergarments of the victim was seized and sent for forensic examination. The forensic



examination report (Ext. P-12), however, reflects that the undergarment bore reddish brown stains at places. There were some greyish-white stains which had made the undergarment stiff on feel and also produced characteristic bluish white fluorescence in ultraviolet light. Blood was also detected at places. Blood mixed semen also was detected in the undergarment. The serological report on the origin and group of blood and semen (Ext. P-13), however, did not say anything to warrant any accusing finger towards the appellants.

23. The victim, for sure, was about twelve years of age, which stood established before the Trial Court by the date of birth certificate of the victim, which is 01.01.2010. The occurrence had taken place sometimes between 30.11.2021 and 01.12.2021.

24. We, therefore, find that the Trial Court was not required to go further into the issue of age of the victim for assuming the jurisdiction to try the appellant as a Special POCSO Court.



25. Section 34(2) of the POCSO Act, 2012 clearly postulates that if any question arises in any proceeding before the Special Court whether a "*person*" is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such "*person*" and it shall record in writing its reasons for such determination.

26. Section 34(1) of the POCSO Act, 2012 provides for the procedure in case of commission of offence by child and determination of age by the Special Court. There is a special reason for using the word "*person*" in Section 34(2) of the POCSO Act in place of "child".

27. If the Special Court is required to determine the age of the victim, the provisions of the *Juvenile Justice (Care and Protection of Children) Act, 2015* would apply.

28. The mandate of the Section 34 cannot be extended and be read to mean that such



determination by the Trial Court is always to be the starting point for of the Special Court to assume jurisdiction to proceed with the Trial.

29. The victim was medically assessed to be a child. True it is that the Doctor who had first examined the victim immediately after her coming back gave a wide range of suggestive age; however, no objection was raised by anyone of the appellants with respect to the jurisdiction of the POCSO Court to hold their Trial. Even during the course of Trial, the date of birth certificate produced by the prosecution was not objected to.

30. Under Such circumstances, the argument of the appellants that the judgment would be a nullity in the event of specific non-determination of the age of the victim is not merited and the same has to be rejected.

31. The non-compliance of the provisions contained in Section 53A of the Cr.P.C., namely, of



subjecting the offenders to medical examination in cases of rape, would not render the prosecution to be rejected forthright but it would definitely weaken the prosecution case (refer to ***Chotkau vs. State of Uttar Pradesh, 2023 (6) SCC 742*** and ***Rajendra Pralhadrao Wasnik vs. State of Maharashtra, 2019 (12) SCC 460***).

32. After having said that, we find the prosecution version to be tottering at the seams. Firstly, for the victim not identifying the appellants and secondly for the victim even expressing complete denial about her being known to appellant/Bhola Kumar with whom she had developed friendly relation in the past and about which she had spoken in her written report; and all the witnesses including the mother of the victim having not supported the prosecution case in its entirety.

33. Even though P.W. 4, as noted above, was declared hostile, but from his evidence the only



thing which can be inferred is that the appellants had some dispute with respect to a girl and perhaps she was the victim.

34. This weak evidence, however, would lead the prosecution to nowhere.

35. That apart, even Exts. P-12 and P-13 would not offer any link to forge the chain of accusation against the appellants. Even otherwise, the FSL report is diametrically opposite of the clinical examination of the victim by Dr. Bharti Dwivedi (P.W. 8) on 01.12.2021.

36. Assuming but not admitting that the undergarment of the victim had blood mixed semen stains over it, in the absence of any matching of semen or blood of the appellants, Exts. P-12 and P-13 would be of no relevance at all.

37. Thus, testing the case from all corners, we do not find any reason to uphold the opinion



rendered by the Trial Court regarding the guilt of the appellants.

38. The victim had only found solace in appellant/Bhola Kumar, when she was taken away by the two other appellants. On reading the written report, it would have appeared that the two other appellants viz. Nepali Yadav @ Neeraj Yadav and Bablu @ Bablu Yadav had raped the victim but on the assessment of the entire records in its totality, the prosecution against the appellants appear to be very shaky.

39. There is no evidence so far as appellant/Bhola Kumar is concerned and we are of the view that even his prosecution in this case was unwarranted.

40. Appellants/Nepali Yadav @ Neeraj Yadav and Bablu @ Bablu Yadav have to be given benefit of doubt for the reason of the laxity on the part of the prosecution to take the prosecution case to any



logical conclusion.

41. For the aforementioned reasons, we set aside the judgment of conviction and order of sentence and acquit the appellants, giving benefit of doubt to appellants/ Nepali Yadav @ Neeraj Yadav and Bablu @ Bablu Yadav and there being no evidence against the appellant/Bhola Kumar.

42. All the appellants are in jail.

43. They are directed to be released forthwith from jail, if not required or detained in any other case.

44. Accordingly, all the appeals stand allowed.

45. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

46. The records of this case be returned to the Trial Court forthwith.



47. Interlocutory application/s, if any, also
stand disposed off accordingly.

(Ashutosh Kumar, J)

(Nani Tagia, J)

manoj/krishna-

AFR/NAFR	AFR
CAV DATE	NA
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