

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.283 of 2024

Arising Out of PS. Case No.-51 Year-2022 Thana- MAHILA P.S. District- Samastipur

The victim

... .. Appellant/s

Versus

1. The State of Bihar
2. Md. Javed son of Md. Osaid R/o- Shahpur Bhagauni PS- Waini OP Dist- Samastipur
3. Md. Taukir son of Md. Haqur R/o- Shahpur Bhagauni PS- Waini OP Dist- Samastipur
4. Md. Salamat son of Md. Soaeb R/o- Shahpur Bhagauni PS- Waini OP Dist- Samastipur
5. Md. Saddam son of Md. Murtaza R/o- Shahpur Bhagauni PS- Waini OP Dist- Samastipur

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Neeraj Kumar @ Sanidh, Advocate Mr. Ashwani Raj Narayan, Advocate
For the Respondent/s	:	Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA)

Date : 21-03-2024

Heard Mr. Neeraj Kumar @ Sanidh, learned counsel for the appellant/informant duly assisted by Mr. Ashwani Raj Narayan, learned counsel and Mr. Dilip Kumar Sinha, learned A.P.P. for the State.

2. The victim's name has been concealed in the present judgment and she has been referred as victim for maintaining privacy of her identity to protect her dignity.



3. The present appeal has been filed by the appellant/informant under Section 372 of the Code of Criminal Procedure, 1973 against the judgment and order of acquittal dated 15.01.2024 passed by learned Additional District and Sessions Judge VI-cum-Special Judge, POCSO Act, Samastipur in Trial No.131 of 2024/R.N.1405 of 2023 arising out of Mahila P.S. Case No.51 of 2022 whereby the concerned Trial Court has acquitted the private respondents/accused persons of the charges for the offences punishable under Sections 342 and 376D of the Indian Penal Code and Section 6 of the POCSO Act.

4. Learned counsel for the appellant/informant has supplied the copy of deposition of the prosecution witnesses and other documentary evidence. Learned counsel for the appellant has referred the same and thereafter submitted that in the present case the prosecution has proved the charges against private respondents/accused persons, despite which, the Trial Court has passed the impugned order, whereby the private respondents/accused persons have been acquitted. It is submitted that the prosecution has examined twelve witnesses including the Investigating Officer (PW-8) and the doctors (PWs-9, 10, 11 and 12), who have examined victim no.1 (appellant) and victim no.2. There is presumption under Section



29 of the POCSO Act against the accused but the burden has not been discharged by the accused persons. It is further submitted that despite the fact that it is a case of gang rape of minor girls, the Trial Court merely taking into account the land dispute and minor variations and contradictions in the statements of victims held that evidence of both the victims is not trustworthy and inspiring confidence, acquitted the private respondents of the charges punishable under Sections 342 and 376D of the I.P.C. and Section 6 of the POCSO Act. Learned counsel for the appellant, therefore, urged that the present appeal requires consideration and, therefore, this appeal be admitted and thereafter the impugned order of acquittal be quashed and set aside.

5. On the other hand, learned A.P.P. submits that the ground for acquittal by the Trial Court is based on evidence and the reasons given are cogent for holding that the prosecution had failed to prove its case against the private respondents/accused. He further submits that the Trial Court has passed the impugned judgment and order by considering the material on record and is a reasoned order. Learned A.P.P. thereafter submits that the State has not preferred acquittal appeal against the impugned judgment rendered by the Trial Court. However, it has been



submitted by learned A.P.P. that this Court may pass appropriate order looking to the facts of the present case.

6. Having heard learned counsel appearing for the parties and having gone through the materials placed on record, it would emerge that PW-4, victim no.1 is the informant/appellant, who on a typed application, had stated that on 14.07.2022 on the day of *zumma* at 8:30 P.M. no male member was present in her house then she along with her younger sister (victim no.2) was going for taking medicine from *Madarsa Chowk* and when she reached at *pethia* orchard where four accused persons, namely, Md. Jishan @ Md. Zeshan, Md. Ajmat, Md. Naseem and Md. Javed (respondent no.2) were there on two motorcycles, they stopped both the victims and they were seated on motorcycle forcefully and they were brought in a hut of *Mukhiya Sabeer* where Md. Taukir (respondent no.3) and Salamat Ali (respondent no.4) were already present. They committed rape. Md. Naseem, Md. Ajmat and Md. Taukir committed rape with victim no.1 one by one. While Md. Jishan @ Md. Zeshan, Md. Javed, Md. Salamat Ali and Md. Saddam (respondent no. 5) committed rape upon victim No.2 one by one and they made video of the incident and threatened not to disclose the occurrence to anyone. On the



basis of which, F.I.R. was registered as Mahila P.S. Case No.51 of 2022.

7. After investigation, charge sheet was submitted against the accused persons/private respondents; learned Magistrate took cognizance and after compliance of Section 207 Cr. P.C. the case was committed to the Court of Sessions under Section 209 Cr.P.C. The charges against accused persons/private respondents, namely, Md. Javed, Md. Taukir, Md. Salamat and Md. Saddam were framed under Sections 376D, 342 of I.P.C. and Section 6 of the POCSO Act and trial was held.

8. The learned Trial Court finding that there are variations in the date of occurrence, the evidence of both the victims is contradictory and not trustworthy and inspiring confidence of the Court, and it is a case of false implication at the instance of PW-7, concluded that the prosecution has not succeeded to prove the offences charged against the accused persons beyond all reasonable doubts and accordingly they were acquitted. Being not satisfied with the impugned judgment of acquittal, the present appeal has been filed by the appellant/informant.

9. In the present case, out of 12 prosecution witnesses, PW-4 and PW-6 (informant/appellant) are victims, PW-1 is



mother of the victims, PW-7 is co-villager and friend of brother of victims, PW-9, PW-10, PW-11 and PW-12 are doctors who had examined the victims, PW-8 is Investigating Officer of the case and PW-2 and PW-5 are formal witnesses (who proved the date of birth of victim nos.1 and 2).

10. PW-6 victim no.1, who is informant, has supported the case that she along with victim no.2 was going to bring medicine from *Madarsa Chowk*, then in the way on two motorcycles Md. Zeshan, Naseem, Salamat Ali and Javed came there and on their insistence, the victims had seated on motorcycle and were taken into a hut at *pethia* orchard where Naseem, Ajmat and Salamat raped her whereas Md. Zeshan, Saddam, Javed and Taukir raped her sister (victim no.2). In her cross-examination, she has admitted that the written application was typed by *vakil sahib* of her village and she had signed on it without reading the same. She further stated that she had no previous acquaintance with the boys whose names had been given in written application. She has admitted that there are houses of many people in the way but she or her sister had not made any *hulla*. In para 15, she had admitted that she had not made the occurrence possible, only her *salwar* was untied. She has admitted that her marriage was solemnized on 05.06.2017



but divorce was taken place on 19.06.2021 but she had not resided with her husband in her matrimonial home. PW-4 (victim no.2) who is younger sister of PW-6 also deposed the manner of occurrence in similar way as deposed by PW-6.

11. In the present case, PW-10 and PW-11 who had examined victim no. 1 and PW-9 and PW-12 who had examined victim no.2 on 15-07-2022 found hymen old healed ruptured; no evidence of foreign body/injury over private parts; microscopic examination of vaginal swab shows spermatozoa not found. The doctors have given opinion that there is no sign of sexual assault at the time of examination.

12. On the basis of physical and radiological finding, the age of victim no. 1 was opined more than 18 years whereas age of victim no.2 was between 14-15 years.

13. It appears from the evidence of victim no.1 (PW-6) and victim no. 2 (PW-4) that for one hour they had been gang raped by 7 accused persons (i.e. 4 accused raped with victim No. 2 and 3 accused persons raped with victim No.1) but from their medical evidence no injury was found on their private parts and there was no sign of sexual assault which contradicts the prosecution case with respect to rape.

14. The following circumstances also as noted by the



learned Trial Court create doubt in the prosecution story:

(a) The date of occurrence stated by victims, PW-4 and PW-6 in their statement is 14.07.2022 but in their statement u/s 164 Cr.P.C. they stated the date of occurrence as 15-07-2022.

(b) As per the FIR from place of occurrence both the victims returned at their own and in the morning on next day on enquiry by their mother they narrated the occurrence but the same was reported to the police station in typed form in the night at 20:45 hours on 15-07-2022 without explaining reason of delay.

(c) As per the prosecution case, both the victims have been gang-raped and video has also been recorded of the incident by the accused persons but neither the video was seized nor it has been obtained from the mobile of accused.

(d) No cloth of victims wearing at the time of occurrence was handed over to I.O. without any reason. PW-7 admitted that on hearing rumor of rape in *pethia* orchard, he reached at the house of victims in the morning, talked with their parents and along with them he went to police station.

15. Section 29 of the POCSO Act, would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. The foundational facts in POCSO case includes the proof that the victim is a child, that the alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, to establish it with medical evidence. If the basic and



foundational facts of prosecution case is laid by adducing legally admissible evidence then burden gets shifted to the accused to rebut it by establishing from the evidence on record that he has committed the offence or that no such incident was occurred or that victim is not a child.

16. The evidence of a prosecutrix in a case of rape is of the same value as that of injured witness. If evidence of prosecutrix inspires confidence, it must be relied upon. There is clearly no medical evidence to demonstrate that victim had suffered any such sexual assault alleged to be committed by the private respondents.

17. A proper analysis of prosecution witnesses and medical evidence brought on record by the prosecution shows that the foundational facts, necessary in the present case to raise presumption under Section 29 of the POCSO Act, have not been established beyond reasonable doubt by the prosecution. The defence has been able to demonstrate that prosecution story cannot be believed and that, therefore, the presumption would not operate. Accordingly, it would be unsafe to hold that the prosecution has proved its case against the accused persons under the provision of POCSO Act or under Section 376 of I.P.C.



18. It is well established position of law that if the Trial Court has taken a view which is a possible view in a reasonable manner, then the same shall not be interfered. Only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be totally perverse or wholly unsustainable, the appellate Court can interfere with the order of acquittal. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the Trial Court. The appellate Court cannot overturn acquittal only on the ground that after reappreciating evidence, it is of the view that the guilt of the accused was established beyond reasonable doubt. Only by recording such a conclusion, an order of acquittal cannot be reversed unless the appellate Court also concludes that it was the only possible conclusion.

19. Recently, the Hon'ble Supreme Court in **H.D. Sundara and Others vs. State of Karnataka**, reported in **(2023) 9 SCC 581** has summarised the principles, which govern the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 Cr.P.C. in paragraph 8 as under:

“8.1. The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to reappreciate the



oral and documentary evidence;

- 8.3. *The appellate court, while deciding an appeal against acquittal, after reappreciating the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;*
- 8.4. *If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and*
- 8.5. *The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible.”*

20. The Hon’ble Supreme Court in **Nikhil Chandra Mondal vs. State of West Bengal**, reported in **(2023) 6 SCC 605** has observed in paragraph 22 as under:

“22. Recently, a three-Judges Bench of this Court in the case of Rajesh Prasad v. State of Bihar has considered various earlier judgments on the scope of interference in a case of acquittal. It held that there is double presumption in favour of the accused. Firstly, the presumption of innocence that is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the court. It has been further held that if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial court.”



21. We have also gone through the reasoning recorded by the learned Trial Court while passing the impugned judgment and order and we are of the view that the Trial Court has not committed any error while passing the same. The view taken by the Trial Court could not be said to be either perverse, illegal or impossible to warrant interference. We are of the view that the prosecution has failed to prove the charges against the private respondents/accused persons beyond reasonable doubt and, therefore, the Trial Court has rightly given the benefit of doubt to the private respondents/accused and thereby not committed any illegality as contended by the learned counsel for the appellant. No interference with the impugned judgment and order of acquittal is warranted.

22. In view of the aforesaid discussions, the present Appeal fails. Accordingly, the same is dismissed.

(Vipul M. Pancholi, J)

(Sunil Dutta Mishra, J)

Harish/-

AFR/NAFR	NAFR
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