

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.280 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. Jishan @ Md. Zeshan son of Md. Mojib Moh- 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.109 of 2024/R.N.282 of 2022 arising out of Mahila P.S. Case No.51 of 2022 whereby the concerned Trial Court has acquitted the private respondent/accused person of the charges for the offences punishable under Sections 342 and 376D of the Indian Penal Code and Sections 4 and 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 respondent/accused person, despite which, the Trial Court has passed the impugned order, whereby the private respondent/accused person has been acquitted. It is submitted that the prosecution has examined ten witnesses including the Investigating Officer (PW-7) and the doctors (PWs-5 and 6), who have examined victim no.2 and victim no.1 (appellant) respectively. There is presumption under Section 29 of the POCSO Act against the accused but the burden has not been discharged by the accused. 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 the evidence of both the victims is not trustworthy and inspiring confidence, acquitted the private respondent of the charges punishable under Sections 342 and 376D of the I.P.C. and Sections 4 and 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 respondent/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 there 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 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 and Salamat Ali were already present. They committed rape. Md. Naseem, Md. Ajmat, Md. Taukir committed rape with victim no.1 one by one. While Md. Jishan @ Zeshan (respondent no.2), Md. Javed, Md. Salamat Ali and Md. Saddam committed rape upon the 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 person/private respondent; 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 charge against accused person was framed on 20.12.2022 under Sections 376D, 342 of I.P.C. and Sections 4 and 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, the medical of accused in compliance of Section 53(A) Cr.P.C. has not been done, the prosecution failed to prove foundational facts which are required to prove the guilt of the accused, concluded that the prosecution has miserably failed to prove the offences charged against the accused person and accordingly private respondent/accused was 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, it would reveal from the record that out of ten prosecution witnesses, PW-3 is victim no.2 and PW-4 is victim no.1. PW-1 is the mother of the victims, PW-2 is Md. Ahmad, who is co-villager and friend of brother of victims, PW-5 and PW-6 are doctors, who had examined victim nos.2 and 1 respectively. PW-7 is Investigating Officer of the case and PW-8, PW-9 and PW-10 are formal witnesses who proved the date of birth of the victims. The video, which is claimed to be made during the incident, was not recovered by the I.O. despite the fact that the accused Md. Zeshan was arrested on the very next day of the occurrence when the F.I.R. was registered. The statement of the victims and their conduct not to inform their mother on the date of occurrence is not usual conduct when any



girl was gang raped. The doctors (PWs-5 and 6), who examined the victims, have not found any injury on their private parts.

10. PW-4, victim no.1, who is informant, has supported the case that on 14.07.2022 she along with her sister (victim no.2) was going to bring medicine for her mother. In the meantime, near *pethia* orchard in the way on two bikes, Md. Jishan @ Zeshan, Naseem, Salamat Ali and Javed came there and on their insistence, she and her sister had seated on the bike and were taken into a hut in *pethia* orchard. She further deposed that Naseem, Ajmat and Salamat committed rape on her and Zeshan, Saddam, Javed and Taukir committed rape on her sister. The Court recorded in her deposition that sometime the victim is telling the name of someone else who committed rape on her. 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 named 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-3 (victim no.2) who is younger sister of PW-4 (victim no.1) also deposed the manner of occurrence in similar way as deposed by PW-4.

11. In the present case, PW-5 and PW-6, who had examined victim nos.2 and 1 respectively 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-4) and victim no. 2 (PW-3) 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-3 and PW-4 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 person 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-2 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. The learned Trial Court further observed in the impugned judgment that:

(i) The medical of the accused in compliance of section 53A Cr.P.C has not been done in spite of the fact that on the same date of the occurrence he has been arrested.

(ii) The prosecution could not prove the foundational facts which are required to prove the guilt of the accused, accordingly, the mandatory provision of Section 29 of the POCSO Act has not been activated and there is no burden upon the accused to discharge this burden.

16. Section 53A of the Cr.P.C. provides for examination of person accused of rape by medical practitioner. The Hon'ble Supreme Court in case of **Chotkau vs. State of Uttar Pradesh**



reported in **AIR 2022 SC 4688** observed that failure of the prosecution to subject the appellant to medical examination was certainly fatal to the prosecution's case especially when the ocular evidence was found to be not trustworthy.

17. 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 respondent.

18. 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 person under the provision of POCSO Act or under Section 376 of I.P.C.

19. 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.

20. 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.”*

21. 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.”

22. 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 respondent/accused person beyond reasonable doubt and, therefore, the Trial Court has rightly given the benefit of doubt to the private respondent/accused person 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.

23. 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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