

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.335 of 2019

Arising Out of PS. Case No.-241 Year-2017 Thana- JAGDISHPUR District- Bhojpur

Bir Bahadur Kushwaha S/o Ashanand Kushwaha Resident of Village- Pilapur,
P.S.- Jagdishpur, District- Bhojpur (Arra)

... .. Appellant

Versus

The State of Bihar.

... .. Respondent

Appearance :

For the Appellant	:	Mr. Krishna Prasad Singh, Senior Advocate Mr. Lakshman Lal Pandey, Advocate Mr. Rajendra Kumar Dubey, Advocate
For the State	:	Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 25-04-2024

The instant appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') wherein the sole appellant-convict has assailed the judgment of conviction dated 10.01.2019 and order of sentence dated 21.01.2019, rendered by learned 1st Additional Sessions Judge, Bhojpur, Ara in POCSO Case No.16/2017, arising out of Jagdishpur P.S. Case No.241/2017, whereby appellant Bir Bahadur Kushwaha has been convicted for the offences punishable under Section 376 of the Indian Penal Code as well as Section 4 of the POCSO Act and sentenced to undergo imprisonment for life under Section 4 of the POCSO



Act and to pay a fine of Rs.25,000/- and in default of payment of fine, appellant Bir Bahadur Kushwaha has to undergo SI for six months. The appellant is not sentenced separately for the offence of Section 376 of the Indian Penal Code.

2. Brief facts, leading to filing of the present appeals, are as under:-

Urmila Devi, wife of Birendra Yadav, Resident of Village Pilapur, P.S. Jagdishpur, District Bhojpur gave a written complaint to the S.H.O., Jagdishpur on 20.08.2017 alleging therein that on 15.08.2017 at about 02:30 P.M., her daughter, aged about 10 years had gone in *Badhar* (agricultural farm) to cut fodder for animal. At about 02:30 P.M., appellant, namely, Bir Bahadur Kushwaha after finding her daughter alone and for fulfilling his sexual desire tried to commit rape on her. Then, her daughter raised alarm. Villagers came there. The informant also went there and saw that some villagers are assaulting the appellant. The informant saw that the clothes of her daughter were torn. Thereafter Ashanand Kushwaha, father of the appellant, Sadanand Kushwaha, Kamta Kushwaha, Dinesh Kushwaha and Lallan Kushwaha assembled and were trying to settle the matter and due to this fact, the informant had not gone police station, but after 2-3 days, Ashanand Kushwaha,



father of the appellant, Sadanand Kushwaha, Kamta Kushwaha, Dinesh Kushwaha and Lallan Kushwaha started giving threatening to the informant and her family members, hence gave the written complaint to the S.H.O., Jagdishpur.

2.1. On the basis of the written complaint, Jagdishpur P.S. Case No.241/2017 was registered and thereafter the Investigating Officer commenced investigation. After investigation, the Investigating Officer submitted charge-sheet against the present appellant.

3. During course of trial, the prosecution had examined 7 witnesses, namely, P.W.-1, Puja Kumari, P.W.-2, Birendra Singh, P.W.-3, Urmila Devi, P.W.-4, Noor Sultana, P.W.-5, Dr. Shazia Badar, P.W.-6, Guddu Kumar and P.W.-7, Krishna Yadav. Documentary evidence was also produced before the Trial Court. Thereafter further statement of the accused under Section 313 of the Code came to be recorded. After conclusion of the trial, the Trial Court convicted the present appellant for the aforesaid offences as stated hereinabove.

4. Heard Mr. Krishna Prasad Singh, learned Senior Counsel assisted by Mr. Lakshman Lal Pandey for the appellant and Mr. Bipin Kumar, learned Additional Public Prosecutor for



the State.

5. Learned Senior Counsel appearing for the appellant submits that in the present case appellant has falsely been implicated. It is submitted that for the alleged occurrence which took place on 15.08.2017, written complaint was given on 20.08.2017 by the mother of the victim. Learned counsel has referred the written complaint given by the informant and thereafter submitted that in the said written complaint, which was given after a period of five days with regard to attempt to commit rape on the daughter of the informant, it is not alleged that the appellant has committed rape on the daughter of the informant.

5.1. At this stage, it is also contended that though the written complaint was given on 20.08.2017, i.e., after a period of five days from the alleged date of occurrence, statement of the victim under Section 164 of the Code came to be recorded on 30.08.2017, i.e., after a period of ten days from the date of registration of the FIR wherein the victim has alleged that the appellant-accused has committed rape on her. Learned counsel, therefore, urged that the victim and her mother have falsely implicated the appellant in the occurrence in question.



5.2. Learned Senior Advocate thereafter submits that there are major contradictions in the deposition of the prosecution witnesses and in fact the medical evidence does not support the allegation levelled by the victim and her family members against the present appellant.

5.3. Learned Senior Advocate further submits that prior to the written complaint given by the victim on 20.08.2017 against the appellant, an FIR was lodged by the father of the appellant herein against the parents of the victim and others. The said aspect is admitted by the Investigating Officer in his cross-examination. In the said case, the present appellant sustained injuries. Learned Senior Counsel, therefore, urged that the present is a case of false implication.

5.4. Learned Senior Counsel, at this stage, also contended that the Investigating Officer has admitted during cross-examination that he did not find any blood at the place of occurrence nor he had seized the clothes of the victim. Learned Senior Counsel submits that though the prosecution has failed to prove the case against the appellant-accused beyond reasonable doubt, the Trial Court has passed the impugned judgment of conviction and order of sentence against the appellant and, therefore, the same be quashed and set aside.



6. On the other hand, the learned APP has vehemently opposed the present appeal. The learned APP submits that merely because there is delay in lodging the FIR, benefit of the same may not be given to the appellant-accused. It is submitted that statement of the victim under Section 164 of the Code came to be recorded by the Magistrate wherein she has specifically levelled the allegation against the appellant and the manner in which the occurrence took place. It is further submitted that the victim as well as her parents have deposed before the Court against the present appellant and, therefore, when the prosecution has proved the case against the appellant beyond reasonable doubt, no error is committed by the Trial Court while passing the impugned judgment of conviction and order of sentence. The learned APP, therefore, urged that the present appeal be dismissed.

7. Having heard the learned counsel for the parties and having gone through the materials placed on record, it would emerge that the prosecution had examined 7 witnesses with a view to prove the case against the appellant.

8. P.W.-1 is the victim girl who deposed in her examination-in-chief that the occurrence took place on 15th of August last year. It was 02:00-02:30 P.M. She was in *Badhar*



(agricultural farm). She had gone to *Badhar* to cut fodder for animal. The appellant was standing in his orchard. The appellant threw her in his orchard and started to commit rape upon her. It is further deposed that the appellant was biting on her hand and ear. When she was trying to raise alarm, the appellant pressed her mouth. It is also deposed by this witness that when she raised alarm, Bhikham, Guddu, her aunt, mother and father came. The villagers also assembled there. The villagers started assaulting the appellant. Thereafter, the villagers brought the victim girl to her house. The victim girl further deposed that the accused persons were not allowing her family members to leave the house, therefore, delay was caused in reporting the matter to the police. They went to the police station five days after the occurrence. She went to the police station alongwith her father and mother. The police registered the case. Thereafter the victim was examined by the doctor. It is also deposed that P.W.-1 also gave statement before the Magistrate.

8.1. P.W.-1 has stated in her cross-examination that she could not tell the distance between Badhar and her house. She had gone to her field to cut *Masuri*. Others also cut the grass, but she does not know their names. The garden is at a



little distance where she was cutting grass. She could not tell the exact numbers of trees in the garden. The appellant had not dashed her down but made her lie due to which she could not sustain injury. She wore a suit at that time. The suit was stained with blood completely. The mark of bite occurred on the body. This witness further stated in her examination-in-chief that the appellant pulled her hair. The appellant had not put clothes in her mouth but pressed her mouth with hand. When the accused started to run away, he was caught. She cannot tell that at how much distance, he was caught. She was not in an unconscious state. She was brought by her aunt. She was not treated on the date of occurrence. Five days after the occurrence, she went to the police station alongwith her father and mother. She had shown the clothes to *Daroga Ji* (Sub-Inspector) and handed over the same to him. She had shown the place of occurrence and orchard to *Daroga Ji*. It is lastly stated by this witness in her cross-examination that Ashanand Singh has also lodged a case against her family.

9. P.W.-2, Birendra Singh deposed in his examination-in-chief that the victim girl is his daughter. She was 10 years old at the time of occurrence. The occurrence took place on 15.08.2017 at 02.30 P.M. He was going to the



field from his house. It is further deposed that when he came out of the village, he heard a sound. Two boys and a girl were shouting. After hearing the sound, he alongwith his wife went near the orchard, he saw that the appellant was committing rape upon his daughter and his daughter was smeared with blood. 10-20 people assembled there. When the appellant started fleeing away, he was caught. The appellant was being beaten by the people with fists and slaps. The cause for delay in lodging the case is that Ashanand Mahto, Sadanand Mahto, Kamta Mahto, Lalan and Dinesh were putting pressure on them and were not allowing them to go outside. It is further deposed by this witness that five days after the occurrence with the help of his relatives, he went to the police station and lodged the case. He also got his daughter medically examined. He identifies Bir Bahadur Kushwaha.

9.1. P.W.-2 has stated in his cross-examination that the field where he was going is about $\frac{1}{2}$ km away from his house. The orchard was situated at a distance of 100-150 steps from his field. There were *Shisham* and palm trees in the orchard. The shouting was of his daughter besides Bhikham and Guddu. When the sound of alarm came from the garden, he was at a distance of 100-150 steps. He was alone in the *Badhar*



on that day. He saw Ramnath, Baban, Manoj and Jitendra coming out from the village. This witness further stated in his cross-examination that Bhikham and Guddu did not pull the appellant but he pulled. Guddu was aged about 10 years and Bhikham was aged about 15 years. When he pulled the appellant, 10-20 persons assembled there. His daughter was conscious and she was shouting. When his daughter went to cut *Masuria*, she wore pant and suit. The colour of the pant was green but he cannot remember colour of suit. The pant was put on the ground near his daughter. The upper cloth was torn up to one meter long and wide but not completely. He cannot remember the names of those people who assembled there. His daughter was completely smeared with blood. His daughter was shouting and she did not try to cover her body. There were marks of bite on her body, arm and ear. The pant was soaked with blood. He did not see whether his daughter sustained injuries in her private part or not but blood was oozing out. There was blood where she was lying. Thereafter the mother and the aunt of the victim came. Many people met on way to the house, but he could not remember their names. He did not inform the *Chowkidar* of the village. The victim was not given medicine for four days. On the fifth day of the occurrence, he



went to Jagdishpur P.S. at 08:00 A.M. He and his wife gave statement to the police. It is further stated that *Daroga Ji* did not send them to nearby Jagdishpur Government Hospital. When *Daroga Ji* told that he is going to Ara Hospital with the victim girl, he came to his house. His daughter came to her house at 05:00 P.M. He and his wife showed the place of occurrence to *Daroga Ji*. He showed the blood near Shisham tree to *Daroga Ji*. *Daroga Ji* recorded statement of others at the place of occurrence before me. They had also shown the blood stained pant and torn clothes to *Daroga Ji*. He did not tell *Daroga Ji* that he was going to his field from his house at 02:30 P.M. It is not the fact that he had not said in his statement to the police that the sound of the girl was coming from the orchard. It is not the fact that he had not said in his statement that he and his wife went near the orchard after hearing the sound. It is not the fact that he had not stated in her statement that 10-20 people caught Bir Bahadur while he was running away. It is also stated by this witness in his cross-examination that the accused persons have also lodged a case against him. It is not the fact that he has lodged false case after filing of a case by Bir Bahadur against us.

10. P.W.-3, Urmila Devi is the mother of the victim



girl who has stated in her examination-in-chief that the victim girl is 11 years old. The occurrence took place eight months before from today. It was 02:30 P.M. Her daughter was bringing *Masuria* from Badhar. Bir Bahadur committed rape upon her daughter. When her daughter raised alarm, she went there and saw blood on the ground. Thereafter the victim girl was brought to her house. The villagers also assembled in the field. After three days, she alongwith her husband and daughter went to the police station and lodged the case. She identifies Bir Bahadur.

10.1. P.W.-3 has stated in his cross-examination that she cannot remember the names of her neighbours. When her daughter was in *Badhar*, she was also going there. Guddu and Bhikham raised alarm that Bir Bahadur committed rape. Thereafter she alongwith her husband went there. Her daughter told everything to her. She met her daughter at a distance of half mile away. When she saw her daughter, she was naked. Her daughter was wearing a suit at that time. There were no house nearby. The blood was oozing out from the private part of her daughter. Her daughter wore a pink suit at the time of occurrence. There was blood on the pant. The cloth was not torn. Her husband was also going with her. Her daughter was



pickup up from the farm and brought home and was consulted by the doctor on the same day. She consulted the doctor in Ara. The case was lodged on the same day. They lodged the case in Jagdishpur P.S. Her daughter remained hospitalized for one night. The police came after four days. She had handed over the blood stained clothes to *Daroga Ji*, and he prepared a paper in this regard and she put her thumb impression on the paper. Statement of any person was not recorded before her. It is not the fact that she told the police that the girl had gone somewhere with her father. She did not tell the police that Bir Bahadur made her daughter lay down on ground. Bir Bahadur was beaten by the people. The family of Bir Bahadur has also lodged a case against them.

11. P.W.-4, Noor Sultana is a formal witness who has proved statement of the victim girl under Section 164 of the Code as Ext.2.

12. P.W.-5 is Dr. Shazia Badar who has deposed that on 24.08.2017 she was posted as the Medical Officer at Sadar Hospital, Ara and had examined the victim girl on that day. She had not found any spermatozoa either alive or dead in her vaginal swab. She proved her written report as Ext.3.

12.1. P.W.-5, the doctor has stated in her cross-



examination that the police officer asked her whether the victim was raped or not. She has not mentioned in her injury report that the victim was raped. She did not find sign of sexual assault of any fracture or injury on the private part of the body of the victim. She has given her opinion only on the age of the victim. There was no sign of bleeding from the private part of the body of the victim girl.

13. P.W.-6, Guddu Kumar has deposed in his examination-in-chief that he knows the victim girl and appellant Bir Bahadur Singh. He saw the incident. He was going for nature's call and heard the sound. Thereafter he went there and saw that Bir Bahadur was committing rape upon the victim girl. Bhikham and he raised alarm then father and mother of the victim girl came. Thereafter the villagers also assembled.

13.1. P.W.-6 in his cross-examination has stated that the victim girl is his *Fua* (aunt) in relationship. At 02:00 P.M., he was going to ease himself. Bhikham came in the *Badhar*. The victim girl wore a suit. He could not tell the colour. The victim was naked. He could not see whether the victim sustained injury on her private part. Father, mother and villagers assembled there. He could not see that who brought



the victim girl to house. The police had recorded his statement. His statement was recorded 3-4 days after the occurrence.

14. P.W.-7, Krishna Yadav is the Investigating Officer of the case who had carried out the investigation. This witness has deposed in his examination-in-chief that on 20.08.2017, he was posted as ASI of Police. On that day, Urmila Devi gave a written complaint and on the basis thereof Jagdishpur P.S. Case No.241/17 was registered under Sections 376 and 511 of the Indian Penal Code as well as under Section 8 of the POCSO Act. He went to the place of occurrence. He recorded the statement of mother of the victim at the place of occurrence. Statement of the victim girl was also recorded. He also recorded the statement of witnesses, namely, Birendra Singh, Manoj Singh, Jitendra Kumar, Ramnath Singh and Baban Singh. He submitted charge-sheet against the appellant-convict.

14.1. P.W.-7, the Investigating Officer has stated in his cross-examination that before the instant case, i.e., Jagdishpur P.S. Case No.241/17, a case was lodged being Jagdishpur P.S. Case No.237/17 on 19.08.2017 by Ashanand Singh who is father of the appellant. He has also submitted charge-sheet in that case. Bir Bahadur, who is accused in the



instant case, was injured in that case. It is further stated by this witness in his cross-examination that he has not written the time of recording of statement of the victim girl in the case diary. He has produced the victim girl before the Court on 30.08.2017 for recording her statement under Section 164 of the Code. The blood stained clothes of the victim girl was not produced before him by father and mother of the victim girl.

15. We have re-appreciated the entire evidence led by the prosecution before the Trial Court. We have also consider the submissions canvassed by learned counsels appearing for the parties. It would emerge from the record that for the alleged occurrence which took place on 15.08.2017, admittedly written complaint was given by the informant, i.e., the mother of the victim on 20.08.2017, after a period of five days. On the basis of the allegations levelled in the said written complaint, initially the FIR was registered for the offence punishable under Section 376 read with Section 511 of the Indian Penal Code as well as under Section 8 of the POCSO Act. Thus, from the allegation levelled against the appellant in the FIR, it is alleged that it was an attempt on the part of the appellant-accused to commit rape on the daughter of the informant and allegation of rape was not levelled against him in the written



complaint. It would further emerge from the evidence that though the written complaint was given on 20.08.2017, i.e., after a period of five days from the date of alleged occurrence, allegation of rape and penetration were not made in the said written complaint. There was no reference with regard to the blood oozing out of from the private part of the victim in the written complaint. It would further reveal from the record that though the Investigating Officer asked the informant to bring her daughter, i.e., the victim for recording her statement under Section 164 of the Code before the Magistrate, the victim was brought before the Magistrate after a period of ten days from the date of registration of the FIR. In the said statement given under Section 164 of the Code, the victim has improved the version which was given in the written complaint by her mother. In the said statement, specific allegation with regard to rape was levelled against the appellant and certain injuries sustained by the victim was also described by her to the learned Magistrate. However, at this stage, if the deposition given by the doctor, who had examined the victim on 24.08.2017, is carefully examined, it is revealed that the doctor has specifically stated that vaginal swab examination show no evidence of spermatozoa either alive or dead. During cross-



examination, the said witness has specifically stated that the police officer asked her whether the victim was raped or not. She has not mentioned in the injury report given by her that the victim was raped. She did not find sign of sexual assault of any fracture or injury on the private part of the body of the victim. She has further stated that there was no sign of bleeding from the private part of the body of the victim. She has further clarified that had she found sign of rape, she would have mentioned that rape was committed. Thus, we are of the view that the medical evidence does not support the allegation of rape levelled by the prosecution against the appellant.

16. It is not in dispute that the written complaint was given by the informant, who is mother of the victim, after a period of five days from the date of alleged incident, in the meantime, on 19.08.2017, father of the present appellant lodged an FIR against the parents of the victim and others wherein it is alleged that the concerned accused made assault on the son of the informant, i.e., the present appellant and on the very next day, the written complaint was filed by the mother of the victim against the present appellant. Thus, the case of false implication of the appellant in the incident in question cannot be ruled out.



17. From the deposition given by P.W.-7, the Investigating Officer, it is further revealed that during cross-examination, the said witness has admitted that the father of the present appellant has lodged FIR on 19.08.2017 and in the said case, the present appellant was injured. He further stated that he did not find any blood or sign of dragging at the place of occurrence. There is no garden near the place of occurrence. He has further stated that when he asked the informant to bring her daughter for recording her statement, she informed the Investigating Officer that the victim had gone with her father and as and when she comes to the house, she will inform her. Further, the Investigating Officer has specifically stated that the parents of the victim did not produce the blood stained clothes of the victim.

18. Thus, in view of the aforesaid facts and circumstances of the present case, we are of the view that the prosecution has failed to prove the case against the appellant beyond reasonable doubt and, therefore, the impugned judgment of conviction and order of sentence is required to be set aside.

19. Accordingly, The appeal stands allowed. The impugned judgment of conviction dated 10.01.2019 and order



of sentence dated 21.01.2019 passed by learned 1st Additional Sessions Judge, Bhojpur, Ara in connection with POCSO Case No.16/2017, arising out of Jagdishpur P.S. Case No.241/2017 is quashed and set aside. The appellant, namely, Bir Bahadur Kushwaha is acquitted of the charges levelled against him by the learned trial court. Since appellant, above-named is in jail, he is directed to be released forthwith, if his presence is not required in any other case.

(Vipul M. Pancholi, J.)

(Sunil Dutta Mishra, J.)

Sanjay/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	01.05.2024
Transmission Date	01.05.2024

