

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.319 of 2022

Arising Out of PS. Case No.-74 Year-2018 Thana- MAHILA P.S. District- Siwan

ARUN TIWARI, Son of Late Chandra Shekhar Tiwari, Resident of Village -
Bharatpura, P.S.- G.B. Nagar (Tarwara), Dist.- Siwan

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	M/s Ajay Kumar Thakur, Vashnavi Singh Ritwik Thakur, Kiran Kumari,
For the Respondent/s	:	Ms. Usha Kumari, Spl.P.P.
For the Informant/s	:	Ms. Kumari Anupma, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

CAV JUDGMENT

(Per: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY)

Date : 25-01-2024

This criminal appeal has been preferred against judgment of conviction dated 28.03.2022 and order of sentence dated 30.03.2022 passed by the learned Special Judge POCSO, Siwan, in Special POCSO Case No. 120 of 2019, arising out of Siwan Mahila P.S. Case No. 74 of 2018. By the judgment and order aforesaid, the appellant has been convicted and sentenced as under: -



Cr. Appeal (D.B.) No. 319 of 2022				
Appellant's Name	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Arun Tiwari	Convicted under Section 376(D) of the IPC	R.I. for 20 years	10,000/-	R.I. for one year

2. As the matter relates to Section 376(D) of the Indian Penal Code, we are of the considered view that the names of the victims and their parents shall not be disclosed in the judgment in order to safeguard the identity of the victim girls as per the directions of the Hon’ble Supreme Court.

3. We have heard Mr. Ajay Kumar Thakur, learned counsel for the appellant and Ms. Usha Kumari, learned Spl.P.P. for the State and learned counsel for the victims. For the purpose of appreciation, victims i.e., P.W. 1 and P.W. 2 can be referred as ‘X and ‘Y, wherever they are to be referred.

4. The criminal case was set into motion, basing on the written information given by one of the victim, who is the informant (P.W.1/X), (undated) to the S.H.O., Mahila P.S., Siwan, wherein the informant has stated that she along with her friend P.W.2/Y was going to Tarwara to see the fair. On the way to Tarwara at lonely place, the appellant with other four accused namely, Guddu Tiwari, Ranjeet Tiwari and two other people assaulted and committed rape on both of them, one after another



and also threatened them not to disclose the incident otherwise, whole of their family would be killed. She also disclosed the age and name of three of the accused including the appellant, who are aged between 24 to 30 years.

5. Basing on the report, the SHO, Mahila P.S., Siwan registered the case against the appellant/Arun Tiwari along with four others vide FIR bearing Siwan Mahila P.S. Case No. 74 of 2018 dated 19.10.2018 for the alleged offence punishable under sections 376D, Sections 4, 6, 8 and 10 of the POCSO Act and also under Sections 3(2)(va) of the SC & ST (Prevention of Atrocities) Act.

6. During the course of investigation, the Investigating Officer has recorded the statement of witnesses under Section 161 of the Cr.P.C., who also got examined the victims under Section 164 of the Cr.P.C.. He also referred the victim girls for medical examination. On completion of the investigation and after receiving of the documents, laid charge-sheet against the appellant and two others for the aforesaid offences. It is pertinent to mention that as two of the accused were juveniles, they were referred to Juvenile Justice Board.

7. The trial court took cognizance against the appellant and two others for the aforesaid Sections and later charges were



framed under sections 376(D) of IPC, Sections 4, 6, 8 and 10 of the POCSO Act and under Sections 3(2)(va) of the SC & ST (Prevention of Atrocities) Act on 28.02.2019, against the appellant, read over and explained to him.

The appellant pleaded not guilty and claimed to be tried.

8. In order to prove the case against the appellant beyond the reasonable doubt, the prosecution has examined seven witnesses which are as follows:

<u>Rank</u>	<u>Name</u>
P.W. 1	The victim (X)
P.W. 2	The Victim (Y)
P.W. 3	The sister of victim Y
P.W. 4	Manju Singh (I.O.)
P.W. 5	Dr. Rabina Khatoon (Medical Officer)
P.W. 6	The father of the victim (Y)
P.W. 7	Anand Kumar Tripathi, (Judicial Officer)

9. In addition to the oral evidence of the prosecution’s witnesses, the prosecution also brought on record several documentary evidence which are as follows:



<u>S. No.</u>	<u>Exhibit No.</u>	<u>Description</u>
1.	Exhibit -1	Signature of the victim(X) Informant on her written application
2.	Exhibit-1/1	Signature of the victim(X) Informant on the statement u/s 164 Cr.P.C.
3.	Exhibit-2	Signature of the victim (Y) on written application
4.	Exhibit-2/1	Signature of the victim(Y) Informant on the statement u/s 164 Cr.P.C.
5.	Exhibit-3	Endorsement of the SHO on the written application
6.	Exhibit-4	Signature of I.O. on formal FIR
7.	Exhibit-5	Medical report of victim(X)
8.	Exhibit-6	Age test report of victim (X)
9.	Exhibit-7	Medical report of victim(Y)
10	Exhibit -8	Age test report of victim (Y)
11.	Exhibit-9	Statement of victim(X) under Section 164 Cr.P.C.
12.	Exhibit-10	Statement of victim(Y) under Section 164 Cr.P.C.

10. Further the appellant was examined under Section 313 Cr.P.C bringing to his notice incriminating evidence found against him from the evidence of the prosecution witnesses for which he denied and reported no defence evidence. The trial court after considering the oral and documentary evidence convicted the appellant for the offence punishable under Section 376(D) of the IPC and appellant was acquitted for offences under POCSO Act and under SC/ST Act.

11. P.W. 1 is the informant (victim/X). Her evidence disclose that the appellant and four others, namely, Ranjeet Tiwari, Guddu Tiwari, Shiv Kumar Tiwari and Krishna Mahto came in Auto and stopped them and forcibly took her and



victim Y 100 yards to the south of the road, near a Mahua tree and assaulted and committed rape on both of them, one after another and also threatened them not to disclose the incident otherwise, whole of their family would be killed. She further testified that they arrived their house at 12:00 in the night and informed her Sister PW3 about the incident, but as it was late in the night, they preferred a case at the Mahila P.S., Siwan on the next day.

12. PW 1 further stated that medical test was done at Sadar Hospital, Siwan and also admitted about giving the statement under Section 164 of the Cr.P.C. to the Magistrate. It is specifically stated by PW 1 that she belongs to *Harijan* caste and identified all the five accused.

In the cross-examination she admitted that Ashok Sharma is Mukhiya of her Panchayat and her family was in support of Ashok Sharma. She further admits that the accused persons are not on visiting term with them and she did not know them from before and she identified them during the occurrence. It was moonlight at the time of occurrence. PW 1 further admits that they tried their best to defend themselves from the accused persons but they threatened them and also assaulted her on the face and mouth, due to which she sustained injuries on face,



hands and eyes and that she has shown these injuries to the doctor.

13. PW 2 is the victim Y. Her evidence discloses that she alongwith victim X Aunty(*Bua*) was going to see Tarwara Durga Puja Fair, on the way, five accused including appellant beat and dragged them and took them to the field and committed rape upon them one after another. PW 2 further testified that Ranjit Tiwari committed rape on her *Bua* and on the next day of the incident they went to the police station and an FIR was lodged. PW 2 also stated as of the same of PW 1 with respect to her medical examination, recording of 161 and 164 Cr.P.C. statements. It is specifically testified by PW 2 that in the said incident, her mouth was injured and her aunt's eyes were injured, but we did not consult with doctor for the eye and facial injuries.

14. PW 3 is sister of victim Y. She is not the eye witness to the incident. Her evidence is a hearsay evidence. She also testified as that of the same of PWs 1 & 2 as to the manner and mode of occurrence, which was stated to her by PWs 1 and 2.

15. Further PW 6 who is the father of PW 2, also testified as of the same of PW 3. It is specifically stated by him



that he was present at the house, when PWs 1 and 2 returned home at 12.00 am (midnight) and heard from them about the occurrence of the incident.

In the cross-examination, he admitted that he stated before the Court as taught by the lawyer and that PW 3 has not told anything. He admits that he does not know the name of fathers of Guddu Tiwari, Arun Tiwari (appellant) and Ranjit Tiwari and that his wife cannot hear.

16. Learned counsel appearing on behalf of the appellant contended that the trial court had convicted the appellant for the offence punishable under Section 376D which is erroneous and perverse. Further, the prosecution has miserably failed to prove that the appellant has committed rape upon the victim girls.

17. It is also the specific contention of the learned counsel for the appellant that the oral evidence of the victims X & Y contradicts with their medical reports i.e., Exhibits-5 & 7 and also with the oral evidence of PW-5, Dr. Rabina Khatoon. In a case of sexual assault/ rape, it is for the prosecution to prove that the victims are sexually assaulted by the appellant for which the medical evidence plays an important and crucial role. It is also contended that the written application of PW-1 was undated and it only reveals the names of appellant and two other, though, it



disclose that five of the accused have committed assault and rape on victims X & Y. It is also contended by learned counsel for the appellant that for the first time, the names of the other accused were revealed by the victims X & Y, before the Judicial Magistrate 1st Class, i.e., PW-7 on 25.10.2018 i.e., after seven days of alleged commission of offence, therefore, it can be understood that a false case has been instituted against the appellant and others. It is further contended by the learned counsel for the appellant that initially a case was registered against the appellant and others for the offences punishable under special enactment under Section 4/8 of POCSO Act as well as under special enactment under Section 3(2)(va) of SC/ST Act, along with Section 376D of the IPC, whereas the trial court has acquitted the appellant for the offences punishable under Sections 4, 6, 8 and 10 of POCSO Act as well as Section 3(2)(va) of the SC/ST Act, as the age of the victims have been considered as above 18 years and further there is no specific allegation against the appellant for the offence punishable under Section 3(2)(va) of the SC/ST Act and, therefore, prayed to set aside the judgment and order dated 28.03.2022 & 30.03.2022.

18. On behalf of the prosecution, the learned Spl. Public Prosecutor contended that the material evidence of the prosecutrix



witnesses i.e., X & Y cannot be discarded, which corroborates with the evidence of PWs-3 & 6, who have learnt from the victim girls about the incident immediately after commission of the offence. It is further contended that there is no error or irregularity in the order of the trial court, so as to interfere the same and, therefore, prayed to confirm the judgment and order of the trial court.

19. On the other hand, the learned counsel who appears on behalf of the victims deposed that there is a delay of two days in referring the victims to medical examination, therefore, the medical evidence could not be corroborated with that of the version stated by the victims and further contended that there is no necessity for the victims to unnecessarily allege against the appellant herein, and the 164 Cr.P.C. statement of the victims disclose that the appellant along with 4 others committed sexual assault / rape against the victim girls and, therefore, the judgment passed in Special POCSO Case No. 120 of 2019, arising out of Siwan Mahila P.S. Case No. 74 of 2018 deserves no interference and prayed to confirm the judgment of trial court.

20. We have perused the impugned judgment of the Trial Court and also perused the records. On consideration of rival contentions of both the parties, the point for determination which arose for determination in the appeal is that:-



(i) “whether the prosecution has proved the guilt of the appellant beyond reasonable doubt for the alleged offence punishable under Section 376D of the Indian Penal Code?

(ii) whether the Trial Court have rightly convicted the accused for the aforesaid offences?

21. It is relevant to mention that the FIR neither disclose the date of the offence nor the names of the other accused, who alleged to have committed rape against the victims X & Y one after the other. Further, the written report also do not disclose that PW 1 informed about the incident to her father and sister or the reasons for delay in preferring the report. The signature of Investigating Officer on formal FIR is marked as Exhibit-4.

22. On perusal of the formal FIR, on which the signature of the Investigating Officer was present, it is evident that the Investigating Officer received the written report on 19.10.2018, at 23:00 hrs i.e., at 11:00 PM.

23. It is relevant to refer the 164 Cr.P.C. statement of the victims i.e., Exhibits 1/1 & 2/1. On perusal of the statements, it is evident that both the victims have mentioned the names of five accused who had committed rape on them, one after the other, and that they reached the home at 12:00 PM and informed the elder



sister of PW-2/Y about the incident. It is specifically stated in the 164 Cr.P.C. statement that as there was no male member in the house at that particular point of time, they have preferred the case on the next day in the police station. If the contents of 164 Cr.P.C. statement dated 25.10.2018 was taken into consideration, then the presence of PW-6 at the house is to be unbelievable and his evidence has to be discarded. But the evidence of PW-6 clearly discloses that he was present at the house and the victims came home crying and informed about the incident. If at all the version of PW-6 is to be taken into consideration then the statements of the victims under Section 164 of the Cr.P.C. have to be discarded, as they are contradicting the evidence of PW-6.

24. Furthermore, the 164 Cr.P.C. statements have to be considered as a weak piece of evidence and it can be used only for corroboration and cannot be treated as the evidence of the victims. It is relevant to mention that the said 164 Cr.P.C. statements were recorded after 7 days of the date of occurrence.

25. Though, the written report was undated, victims i.e., PWs-1 and 2 and PW 3 categorically testified that the incident occurred on 18.10.2018. It is also relevant to mention that the 164 Cr.P.C. statements of the victims clearly disclose that they did not approach the police station on the date of incident, as it was night



and there was no male member in their house. Surprisingly, the victims approached the police station at 11:00 PM on 19.10.2018 for registering the case against the accused and no male member accompanied them.

26. PW-4 is the Investigating Officer, who investigated the case. Her evidence clearly discloses that the victims gave a written application to her on 19.10.2018 and basing on it, she registered a case No. 74 of 2018 and took up investigation in the midnight. Again recorded the statements of the victims, inspected the body of both the victims and referred them to District Hospital Siwan along with a lady constable for medical examination. Her evidence further disclose that on the same night she inspected the place of occurrence i.e., at 12:30 AM (midnight) in the light of a torch but did not find any trampling of Maize plants. As per the Investigating Officer and the victims, the place of occurrence was nearby a Maize field. There were no trampling of maize plants at the place of occurrence. Both the victims have testified that five of the male persons including the appellant have forcefully raped them one after the other, if at all the said incident had occurred there should be some marks available at the place of occurrence. Furthermore, there should be injuries found on the body of the victims.



27. The appellant has been convicted for offence punishable under Section 376D of the Indian Penal Code. The medical evidence plays crucial role to prove the offence under Section 376D of the Indian Penal Code. The evidence of Dr. Rabina Khatun, P.W. 5, who is the female doctor, has to be scrutinized. P.W. 5 Dr. Rabina Khatun, Dr. Rashmi and Dr. Rita Sinha Dr. Mitali are the members of the Medical Board constituted by the order of Dy. Superintendent Dr. M.K.Alam in order to examine the victims. The victims were examined by the Board of Doctors. The following findings have been given by the doctors :-

Examination of victim X

“On Examination: - There was no any fresh injury on her whole external body and private part.

Finding:-

Hymen not intact. Breast well developed. Auxiliary and pubic hair present.

Investigation:- Vaginal swab taken and send to the Histopathological medical examination. No spermatozoa present dead or alive seen.

Plain X-ray : Pelvic AP view – Complete fusion on the illiac creast.



Plain x-ray o both wrists – AP view – complete fusion of the lower radial epiphyses. On the basis of Radiological examination the age of victim X is 18-19 years.

Opinion: Age of victim X 18-19 years.

No evidence of recent sexual contact.”

Examination of victim Y

“On Examination: - There was no any fresh injury on her whole external body and private part.

Finding:

Hymen not intact. Breast well developed. Auxiliary and pubic hair present.

Investigation:- Took Vaginal swab taken and send to the Histopathological medical examination.

No spermatozoa present dead or alive seen. Epithelial cell 6-8 HPF. RBC seen a few.

Plain X-ray : Pelvic AP view – Partial fusion of the illiac crest.

Plain x-ray both wrists – AP view – complete fusion of the lower radial epiphysis.

On the basis of Radiological examination the age of victim Y is 17-18 years.



Opinion: On the basis of radiological examination age of victim Y 17-18 years.

No evidence of recent sexual contact.”

28. PW-5 is the Medical Officer. Her evidence discloses that they examined both the victims and no fresh injury or scratch was found on any part of their bodies. She opined that there are no evidence of recent sexual contact on both of the victims. If at all five of the male persons have committed rape on the victim girls, there should be sufficient/adequate medical evidence to corroborate the oral and evidence of the victims.

29. On the basis of the above findings, it can be construed that the evidence of the prosecutrix are not reliable, therefore, conviction is liable to be set aside.

30. As per the aforesaid discussion, we are of the considered view that the evidence of the prosecution witnesses do not appear to be trustworthy and the manner of occurrence is itself doubtful. There is no iota of evidence and prosecution has miserably failed to establish that the appellant has committed rape on the victims. Hence, it is not safe to confirm the judgment of the Trial Court and the appellant deserves for benefit of doubt. Therefore, the conviction and sentence of the Trial Court are liable to be set aside.



31. In view of the above discussion, the appellant is acquitted for the charges punishable under Section 376D of the Indian Penal Code.

32. Accordingly, the impugned judgment of conviction dated 28.03.2022 and order of sentence dated 30.03.2022 passed by the learned Special Judge POCSO, Siwan, in Special POCSO Case No. 120 of 2019, arising out of Siwan Mahila P.S. Case No. 74 of 2018 is hereby set aside.

33. Accordingly, the appeal is allowed.

34. The appellant, namely, Arun Tiwari is in custody. Let him be released forthwith, if not required in any other matter.

(G. Anupama Chakravarthy, J)

**I agree
(Chakradhari Sharan Singh, J):-**

(Chakradhari Sharan Singh, J)

Spd/-

AFR/NAFR	
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