

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.338 of 2022

Arising Out of PS. Case No.-11 Year-2020 Thana- MAHILA PS District- Aurangabad

Md. Salamattullah, Son of Late Hakimuddin @ Abdul Hakimuddin, Village -
Balapokhar, P.S.- Dev, Dist.- Aurangabad (Bihar)

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Surendra Kumar, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 18-11-2024

We have heard Mr. Surendra Kumar, the learned
Advocate for the appellant and Mr. Abhimanyu Sharma,
the learned APP for the State.

2. The appellant has been convicted under
Section 376 of the Indian Penal Code and Section 4 of the
POCSO Act, 2012 vide judgment dated 07.03.2022
passed by learned Additional Sessions Judge-VI-cum-
Special Judge, POCSO Act, Aurangabad in POCSO Case
No. 33 of 2020. By order of the same date, he has been
sentenced to undergo RI for 20 years, to pay a fine of Rs.



20,000/- and in default of payment of fine to further suffer RI for one year for the offence under Section 4 of the POCSO Act, 2012, keeping in mind the provisions contained in Section 42 of the Act.

3. The Trial Court has also directed for payment of Rs. 3 lakhs compensation to the victim.

4. The victim is eight years old and is alleged to have been raped by the appellant who claims himself to be 70 years of age. The appellant is a neighbour of the victim. According to the prosecution case, the victim was raped by the appellant while she was playing in front of his house on 07.06.2020. The victim came back home and narrated about the incident to her mother (PW-2), who lodged the written report on 09.06.2020. In her written report, PW-2 has narrated about the occurrence as was told to her by the victim.

5. At the trial, she supported the accusation but admitted that the written report was written by her brother/ Mumtaz Alam (PW-5). The occurrence had taken



place, according to her, when the victim was playing along with Habiba and Noori, the two other children of the locality, who incidentally have not been examined. In fact, Habiba and Noori also had told PW-2 that the appellant had taken the victim inside his house. She had seen blood in the private parts of the victim. According to her, the appellant is a married person with many children living under the same roof. One of the sons of the appellant, viz., Aftab, at the relevant time, was a Ward Member. The suggestion given to PW-2 that the appellant has been made accused in this case because Aftab had some dispute with PW-2 or her husband regarding construction of public drain in front of her house, was vehemently denied by her. She had taken the victim to Aurangabad hospital for treatment even though there is a Government Hospital and police station in Deo. The treatment to the victim was given on the next day of the occurrence at Aurangabad.

6. The appellant was arrested from his house.



He had not run away.

7. From her deposition, there is one disclosure of fact which is different from what was narrated by the victim. The appellant is a married man with several children, many of whom are majors, who all reside in the same house. However, the victim in her cross-examination has referred to the appellant as the lone person residing in that house. However, such statement of the victim has to be appreciated in the context of the victim being only eight years of age.

8. We have also found from the records that there was no sincere effort at disputing the minority of the victim.

9. Before we refer to the medical opinion of Dr. Kusum Kumari (PW-4), it would be more appropriate to refer to the evidence of the victim herself (PW-1). After the Trial Court was satisfied on *voir dire* about her capabilities of answering questions, her statement was recorded. According to her, the occurrence had taken



place at bout 12 O'clock in the day while she was playing outside the house of the appellant. The appellant is said to have called her inside the house, dashed her to the ground, undressed her and thereafter put his finger in her private part and also tried to perform penetrative sex. She went back home and narrated about the occurrence to her mother who informed about that to her father as well. However, when she narrated about the occurrence to her mother, her mother did not call persons of the locality. According to her, she was medically examined after four days of the occurrence.

10. This statement does not appear to be correct.

11. At the time of the sexual assault, her clothes were smeared with blood. She has also denied all suggestions of the case being a false one after tutoring by her parents.

12. The father of the victim (PW-3) claims to have learnt about the occurrence from his wife (PW-2).



He also was made an accused in a rape case at the instance of his own sister-in-law. He denied the suggestion of the appellant having been framed because of dispute with his son, viz., Aftab, a serving Ward Member, over the issue of construction of drain in front of his house as also because Aftab, in the past, had made fun of the appellant for having been made accused at the hands of his own sister-in-law. Even otherwise, these two reasons would not constitute any motive strong enough to stoop to the level of falsely implicating the father of Aftab and that also with an accusation as wild as this. Even if this had irritated PW-3, his idea of avenging such mockery would have remained a velleity.

13. The victim was examined on 10.06.2020. Her age was assessed to be, on the basis of radiological and dental examination, 6 to 7 years. Dr. Kusum Kumari (PW- 4), however, has disclosed that the parents of the victim had brought blood-stained clothes of their daughter during the examination. On an overall analysis of the



reports and physical examination, PW-4 concluded that there was an old hymen rupture and it admitted one finger easily. PW-4, therefore, concluded that rape cannot be denied.

14. We must say that this is a very vague statement with respect to the accusation made against the appellant.

15. However, the vaginal swab did not test positive for spermatozoa and there was no mark of violence found on the body of the victim. The general assessment of PW-4 also about the victim was that she was a child. She could not, however, state with certainty whether the ruptured hymen was of recent or past antiquity. There was no mark of injury found on labia majora. PW-4 had concluded that because the medical examination had taken place after three days of the occurrence, therefore, the absence of any mark or injury on her private parts would not be of any importance.

16. The reason for delay, as explained by the



mother of the victim, is that by the time the family realized that the victim has been subjected to sexual violence, it had already become very late in night. On the next day, when PW-2 went to Deo Police Station, she was asked to go to Mahila Police Station. This actually consumed time and, therefore, there was a delay of two days in registering the FIR.

17. This takes us to the evidence of the Investigator.

18. We regret to state that the investigation had been very shoddy.

19. Radha Kumari (PW-6) recorded the statement of the victim and other witnesses including Mumtaz Alam (PW-5) who is the maternal uncle of the victim. She arrested the appellant from his house and also recorded his statement in defence. Soon thereafter, at her instance, the victim was made to get her statement recorded under Section 164 Cr.P.C. before a Magistrate. At the P.O., she had not found any droplets of blood or



any trace of semen. She did not send the stained wearing apparel, either of the victim or of the appellant, for any forensic examination. In fact, nothing was seized by her and precisely for that reason, nothing was produced before the Trial Court as well. She did not carry out the obligation under the Code of getting the accused/appellant physically examined as mandated under Section 53A of the Cr.P.C. She was also not made to understand as to why there was delay in lodging the FIR. However, before the victim was medically examined, she had seen the victim and had not noticed any kind of injury on her body. She did not even ask the victim to show the injury on her body parts. She has also denied that Mumtaz (PW-5) had disclosed before her that the victim had told him (Mumtaz) that the appellant had undressed her and thereafter had committed rape with her. He also had not spoken about any *Panchayati* having been held in the village. Mumtaz (PW-5), however, admitted that his statement was recorded by the police



only after 6 to 7 days of the registration of the FIR.

20. On an analysis of the evidence at the trial, we find that the delay of two days in lodging the FIR has been well explained.

21. True it is that there has been no compliance of Section 53A of the Code of Criminal Procedure.

22. Section 53A of the Cr.P.C. was inserted in the Code, mandating that when a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within a radius of 16 kilometers from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer, not below the rank of a Sub-Inspector, and for any person



acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

23. The further requirement under the newly inserted section is that the registered medical practitioner shall examine such person without delay and prepare a report of his examination, giving all details and his reasons for conclusion for every such finding. Such a report has to be forwarded to the Magistrate.

24. With respect to the scope of Section 53A, the Supreme Court in ***Krishan Kumar Malik vs. State of Haryana (2011) 7 SCC 130*** has held that after the incorporation of Section 53A in the Code with effect from 23.06.2006, it would be necessary for the prosecution to go for a DNA test in such type of cases, facilitating the prosecution to prove its case against the accused.

25. However, in ***Sunil vs State of Madhya Pradesh (2017) 4 SCC 393*** where **Krishan Kumar**



Malik (supra) was considered, it was held that such lapses cannot be permitted to decide the fate of a trial for the offence of rape. Even if such a flaw had occurred in the investigation, the Court still has a duty to consider whether the materials and evidence available on record before it are enough and cogent to prove the case of the prosecution [also refer to ***Veerendra vs. State of Madhya Pradesh (2022) 8 SCC 668***].

26. In ***Chotkau vs. State of Uttar Pradesh (2023) 6 SCC 742***, the Supreme Court considered the importance of Section 53A of the Cr.P.C. in **Krishan Kumar Malik** (supra) but also noted that a three judges bench of the Supreme Court had indicated in ***Rajendra Pralhadrao Wasnik vs. State of Maharashtra (2019) 12 SCC 460*** that Section 53-A is not mandatory. After having said that, the Supreme Court also opined in the same decision that failure of the prosecution to apply Section 53A would warrant an adverse inference to be drawn.



27. In the present case, the victim has supported the prosecution case in its entirety. Though the medical evidence is not couched with any exactitude but there does not appear to be any doubt regarding the minority of the victim. There has not been any objection with respect to the age of the victim as well by the defence.

28. The only mitigating feature of this case as it appears to us is the age of the appellant which is claimed to be 70 years on the date of the occurrence and his staying in a house with his grown up children. However, in the background of there being nothing on record except two-pronged suggestions (dispute with Aftab and Aftab making fun of the father of the victim regarding his having been made an accused in case of rape by his own sister-in-law), it is difficult to keep aside the evidence of the eight years old victim. That Habiba and Noori, the children who were playing along with the victim before the occurrence took place having not been examined is, in



our estimation, no ground to disbelieve the prosecution case.

29. Thus, we do not find any perversity in the judgment or the Trial Court having gone wrong anywhere while convicting and sentencing the appellant.

30. The appeal is thus dismissed.

31. The records of this case shall also be transmitted to the Trial Court forthwith.

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

(Ashutosh Kumar, J)

(Rajesh Kumar Verma, J)

Rajesh/Vanish

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	20.11.2024
Transmission Date	20.11.2024

