

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.238 of 2017

Arising Out of PS. Case No.-54 Year-2016 Thana- JHAJHA District- Jamui

Md. Mumtaz, Son of Jainul Miya, Resident of Village- Borwa Tola Borwa,
P.S. Jhajha, District Jamui.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Abdul Mannan Khan, Advocate Mr. Allama Abdul Quadit Jamal Faridi, Advocate Mr. Hafiz Shahbaz Arif, Advocate Mr. Shiv Kumar, Advocate
For the Respondent/s	:	Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE JITENDRA KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 15-05-2024

We have heard Mr. Abdul Mannan Khan, the learned Advocate for the appellant and Mr. Abhimanyu Sharma, the learned APP for the State.

2. Convicted for the offences under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012, *vide* judgment dated 30.01.2017 passed by the learned Additional District and Sessions Judge 1st, Jamui and on the same date sentenced to imprisonment for life, to pay a fine of Rs. 30,000/- and in default of



payment of fine, to further suffer imprisonment for one year, the appellant has approached this Court assailing the judgment of the Trial Court.

3. A plain reading of the FIR lodged by the father of the victim, viz., Md. Kalam (PW-4) initially gave an impression that a ghastly crime has been committed by the appellant on a seven year old girl, who is not even in a position to state basic facts correctly before the Court, but the evidence revealed otherwise.

4. To put the fact scenario in sequence, we would first refer to the FIR and then the deposition of the witnesses for a correct appreciation of the materials on record.

5. A written report was lodged by PW-4 (Exhibit-1) alleging that on 31.03.2016 at about 7:30 A.M., his seven year old daughter was raped by the appellant in the school where she had gone to study. As a result of such sexual assault on her, she had become unconscious. Because of her unconsciousness, nothing



could be known about the occurrence till about 3 O'clock in the day, when the victim came back home and narrated that her teacher (*Imam Sahab*) had committed rape on her. This was told to the neighbours of PW-4 and, therefore, there was delay in lodging the written report.

6. The written report as noted above was lodged on 01.04.2016.

7. On the basis of afore-noted written report, Jhajha P.S. Case No. 54 of 2016 dated 01.04.2016 was instituted against the appellant for offences under Section 376 of the Indian Penal Code and Section 3/4 of POCSO Act, 2012. Since the accusation was only against the Appellant, the police took no time in jumping to the conclusion that the appellant had committed the crime and charge-sheeted him.

8. At the trial, six witnesses were examined on behalf of the Prosecution, on the basis of which the Trial Court convicted and sentenced the appellant as



aforesaid.

9. It would be extremely relevant to first look at the evidence of the mother of the victim who has been examined as PW-1. Her deposition would clearly depict that the written report was prepared by someone else of the village with an oblique motive to avenge enmity with the appellant, who had been appointed as Imam of the local *Masjid* of which Md. Kalam (Informant) was the Imam earlier. This replacement of the position of Imam by the appellant had angered the family of Md. Kalam. At the trial, PW-1 stated that the victim had gone to the school on 31.03.2016 early in the morning but she did not come back till about 8:30 AM. She went to the school to look for her daughter. When she opened the door of the room of the school, she found her daughter lying unconscious on the floor. She picked her in her lap and noticed that her undergarment was wet and had blood spots on it. There was nobody present in the room. She brought the victim



home and informed her husband. The victim was taken to Sono to a local doctor who told PW-1 and her husband that the victim has been raped and that they should immediately go to the police station. From there, the husband of PW-1 went to the police station to lodge the case. At the instance of the police, the victim was first taken to Jhajha hospital from where she was referred to Jamui hospital where she was treated. After the treatment, when the victim was brought back home, she narrated about the occurrence and told her mother that Mumtaz Imam had committed rape on her.

10. In her cross-examination, she has admitted that there are four mosques in the village. Her husband (PW-4) was the *Imam* of the old *Masjid* which falls in village Baliadih. Removing PW-4 from the position of Imam, the appellant was made the *Imam*, which had caused lot of annoyance to her and her family members. With respect to the occurrence, PW-1 has further stated before the Trial Court that the victim had been going to



school only for the last 2 to 4 days. All the classrooms in the school were fitted with doors and windows. Only one of the rooms in the school did not have a door. She had no idea about the name of the Headmaster of the School. The school is situated in the village. In the room without a door, the villagers played cards.

11. She has repeated in her cross-examination that when she had gone to the school to look for her daughter, nobody was present in her house. She had brought back her daughter to home and had first taken her to Sono for getting her treated by the local doctor. She had no knowledge about the name of the Doctor at Sono. Thereafter, the written report was filed. She along with Sarpanch/ Manzoor (not examined) and Md. Shabbir (again not examined) and her mother-in-law, viz., Ajmun Nisha (PW-3) had gone to police station. The blood-smeared clothes of the victim was given to the Investigator. The victim had regained her consciousness at about 3 O'clock in the afternoon of 31.03.2016.



12. This narration of PW-1 is in complete contrast to the statement made by PW-4, her husband, in his written report. In the written report, the specific averment is that the victim had become unconscious because of rape perpetrated upon her and only when she regained consciousness at about 3 O'clock in the day, she came back home and narrated about the incident.

13. This is no minor variation in the sequence of events.

14. The father of the victim/informant (PW-4) has repeated in his examination-in-chief what his wife had told the Court. According to him, his wife (PW-1) had gone to the school where she saw his daughter unconscious and her clothes wet with blood. He was immediately informed by his wife on telephone. When he arrived at home, he saw his daughter unconscious. She was taken to Sono to a private doctor who, on seeing the patient, observed that she had been raped. Thereafter, the victim was brought to Jhajha Police



Station.

15. All this is not part of the prosecution case and it has not been confirmed by the Investigator as well.

16. The Officer-in-Charge took the victim to Jhajha hospital. The victim regained her consciousness at about 3 O'clock. It was then that she was asked about the cause of the unconsciousness. She had told that the appellant had taken her in a room and had committed rape on her.

17. We have completely discounted the cross-examination of PW-4 with respect to the evidence of the victim having been admitted to school. It was a local school where procedural formalities would not have been followed. However, what comes out from the cross-examination of PW-4 is that there is only one teacher in that school in which there are 25 enlisted students. Whether the appellant taught in that school was never specifically stated by PW-4. He appears to have evaded



the specific question by saying that only the villagers will certify whether the appellant ever taught in the school. With respect to the appellant having removed him from the post of Imam and himself becoming the Imam of the mosque, PW-4 was absolutely careful in only stating that he is not the Imam of the mosque falling in village Baliadih.

18. In his cross-examination, however, he has denied that he had taken his daughter in an unconscious condition to the police station from where she was referred to Jhajha. He had got the written application drafted by one Manzoor who was the *Sarpanch* of the village. After the written report was signed by him, the same was filed with the Police but he was not told by Manzoor as to what were the contents of the written report. There was no referral on paper by the private doctor at Sono. He had also not told the Investigator that his daughter had gone to school for studies.

19. In this context, we have examined the



deposition of the Investigator/Arun Kumar (PW-6) as well. He was posted as the Officer-In-Charge of the concerned police station on 01.04.2016. He had registered the FIR and had taken up the investigation. He had also got the statement of the victim recorded under Section 164 Cr.P.C. by one Sanjay Kumar, learned Judicial Magistrate, 1st Class. He was candid enough but to disclose before the Trial Court that he did not interrogate any teacher of the Institution or the *Mukhiya* or the *Sarpanch* of the village. He did not even enquire from the other students of the school as to whether this occurrence had taken place in the morning of 31.03.2016. However, when he had visited the school, he could find no trace of such an occurrence. He had also not seen any blood on the wearing apparel/undergarment of the victim when the same was offered to him. He also did not find the victim injured in any manner whatsoever.

20. We have noted that according to the



deposition of PW-4, the victim was first taken to a Private Doctor at Sono and from there to Jhajha Police Station and on the asking of the Investigator, to Jamui for further treatment. The victim had remained unconscious all this while, if the deposition of PW-1 and PW-4 are to be believed. If this were the case, the Investigator would surely have stated in his deposition that he had seen the victim unconscious or semi-conscious.

21. This fact would also have been entered in the police papers if were true.

22. No inquiry was made by the Investigator (PW-6) about the factum of the victim having taken admission in the school or of her being regular in the school. He did not even find out whether there was a dispute with respect to the position of *Imam* in Baliadih Mosque. However, he had found no criminal antecedent of the appellant from local investigation. He did not even go to Sono or Jhajha to find out whether the statement



of PWs-1 and 4 about the victim having been taken to these doctors, were true.

23. The victim was brought to the police station in the lap of her father on 01.04.2016. The grandmother of the victim had not told the Investigator that the victim had gone to school and when she did not return till 8:30, her mother went in search of her and then later found her unconscious in the school.

24. All this would suggest that the investigation was not at all done with respect to any aspect of the case.

25. The appellant was arrested on 01.04.2016 but was never put to any medical examination as mandated under Section 53A of the Code of Criminal Procedure. We will get back to this issue later, after examining the deposition of the victim herself and the doctor who had treated her.

26. The victim, who has been examined as PW-2, in her examination-in-chief has supported the



prosecution case of the appellant having raped her by taking her inside a room of the school in the morning of 31.03.2016. The victim definitely was not a *non compos mentis* as would appear from her answer in the voir-dire by the Trial Court. Nonetheless, from the latter part of her cross-examination, it would become very obvious that she did not know the appellant.

27. What we have taken serious note of is that even with her limited vocabulary, the victim has stated that her father did not tell her as to against whom the case was lodged. Who is the accused of the case was not known to her. She also did not know that this case was lodged against the appellant. When was the case lodged was also not known to her. She could not even name or state about the teachers of the school. When she had gone to school on 31.03.2016, children were playing there. Elder persons were also playing cards. She, however, resiled from that statement in the next breath and said that no elder was present there. After she was



raped, the victim claims to have come back home on her own and fell unconscious. She remained unconscious for 3 to 4 days. It was only after she regained consciousness after 3 to 4 days that she told her parents and others as to what had befallen to her.

28. According to the victim, there is only one teacher in the school and who is he was not known to her. The distance between her home and school is of 10 minutes. It, therefore, becomes very clear that the victim had no idea that she was made to depose against the appellant with the charge against him of raping her. Though in her examination-in-chief, she had taken the name of the appellant but the latter part of the cross-examination makes it very clear that she had no idea that the appellant was responsible for what had happened to her.

29. Whether she was raped at all, is a question which has engaged our attention for quite sometime. With great regret, we must say so that in the



compilation of the records, we have not found the medical report of Dr. Kavita Singh(PW-5). However, from the deposition of PW-5, we have been able to gather that the victim was medically examined on 01.04.2016. The pelvic examination on victim was done by making her sit in a frog position. It is really surprising to note that PW-5 had found sutures at 6 O'clock position. The hymen was not found to have been ruptured and the vagina could barely admit of little finger. The swab smear examination revealed presence of a few red blood cells and a few epithelial cells, which are by no means any evidence of any sexual attack on a girl child. Still, the opinion was given by PW-5 that the child appeared to have been sexually abused.

30. On the basis of such a report by PW-5, she was cross-examined on behalf of the defence where she disclosed that she had not mentioned about the type of garments worn by the victim. She was told by the grandmother of the victim that the patient was treated



by a private practitioner. She did not find the victim to be unconscious. She had examined the private parts of the victim very carefully and had not found any bruise, laceration or any mark over the vulva. The labia was also intact.

31. On being further questioned, she expressed that with a girl of seven years, in the event of sexual intercourse, there are every chances of the hymen being ruptured even if it is placed in the posterior part of the vagina in young girls. Nothing consequential was found in the medical examination by PW-5. However surprisingly, based on the case report which must have been known to her, she gave her opinion about the possibility of the sexual attack on the victim. The victim may have been put to some sexual misdemeanor, but by whom is not known.

32. We have seen the evidence of the victim as also of the mother of the victim. It is not clear whether the mosque served as a school or whether the school is



being run in any different building. There is nothing on record to even indicate that the appellant was the Imam of the mosque and also the teacher in the school.

33. The father of the victim could not answer this directly but only suggested that the villagers would be in a better position to state whether the appellant being an Imam also taught in the school. The school, as it appears from the surrounding circumstances gathered from the evidence, was not in the mosque. There may have been several rooms in the school but one of such rooms was used by the children and the elders for playing cards. May be someone from them had attempted raping the victim and had run away. When the mother had gone to the school, she did not find anybody in the campus. Even with respect to the victim having been spotted senseless in the school by her mother, the evidence is rendered doubtful. The victim claims to have come back home on her own and became unconscious for four days.



34. All these facts do not collocate with the prosecution case. On top of it, the father of the victim (PW-4) had not scribed the written report himself but had got it written by one Manzoor, who was not examined and Manzoor, according to PW-4, did not tell him the contents of the written report.

35. The doctors at Sono or in Jhajha have not been examined nor any document has been provided by the prosecution to certify that the victim was first taken to a private practitioner. It appears that the victim had received some injuries somewhere near her private parts and, therefore, the doctor while examining her on 01.04.2016 had found sutures. The victim must have been examined or treated for something else.

36. Did she fall on some pointed object?

37. Did anyone of the child, older in age, playing in the school, committed this act?

38. Who was that person who put her to sexual misdemeanor?



39. As the law stands, the evidence of the victim is good enough to record conviction, provided it instills trust in the mind of the Court. We are not for a moment saying that the victim, a seven year old girl, was speaking on the dictates of her parents. If she was, the accusation is false. If she weren't, then perhaps she did not know who the perpetrator of the crime was.

40. With the absence of any evidence of the appellant being the sole teacher in the school and the school being run from the mosque being completely absent, there is no way in which reliance could be placed on the deposition of PWs. 1 and 4 and of the victim herself.

41. The prosecution has failed at one more place in a very glaring manner. We say so for the reason that if a serious offence is charged against an accused which by any standard is heinous in nature, the Court is required to put all the material evidence under the highest scrutiny.



42. Section 53 of the Code of Criminal Procedure provides for examination of accused by medical practitioner at the request of the police officer. When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

43. In 2005, a new explanation was substituted in place of the original explanation, viz., that the examination of the accused would include the



examination of blood, blood stains, semen, swabs in case of sexual offence, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case.

44. Simultaneously, with the same amendment, Section 53A was also added which puts an obligation on the police to get the person accused of rape examined by a medical practitioner.

45. In ***Krishan Kumar Malik vs. State of Haryana*** reported in ***(2011) 7 SCC 130***, even when the victim of rape was alive and had testified before the Court and the accused was also examined by a doctor, for the failure to obtain a report of the Forensic Science Laboratory, the fault of the prosecution was declared to be fatal.

46. In ***Rajendra Pralhadrao Wasnik vs. State of Maharashtra*** reported in ***(2019) 12 SCC***



460, though it was held that the requirement under Section 53A was not mandatory but it was postulated that a medical examination under Section 53A is a must and not doing so would justify the Court drawing an adverse inference about the investigation having been conducted properly. [Also refer to ***Chotkau vs. State of Uttar Pradesh; (2023)6 SCC 742***].

47. The appellant was arrested on 01.04.2016 only. His not being subjected to medical examination assumes significance.

48. In the totality of the circumstances, we find that there could be a possibility of the appellant being falsely framed at the hands of PW- 4 and PW-1 for his having ascended the post of Imam of the mosque of which PW-4 was the Imam earlier.

49. That apart, the deposition of PWs. 1 and 4 juxtaposed with the statement of the Investigator has rendered the witnesses to be not wholly reliable.

50. We have found the reasoning given by the



Trial Court for believing the deposition of the witnesses notwithstanding the medical opinion suggesting no sign of rape, that the appellant was seven times bigger than the victim and, therefore, the victim in the stranglehold and full nelson of the appellant, would not have been in a position to offer any resistance. This logic may be correct in other circumstances but here when the evidence of rape itself is doubtful, such logic appears to be warped.

51. Thus, giving benefit of doubt to the appellant that he had committed the offence, he is acquitted of the charge of rape.

52. The appeal stands allowed.

53. The appellant is in jail. He is directed to be released forthwith from jail, if not required or detained in any other case.

54. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.



55. The records of this case be returned to the
Trial Court forthwith.

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

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

Rajesh/Sarwar

AFR/NAFR	NAFR
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