

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.645 of 2018

Arising Out of PS. Case No.-113 Year-2014 Thana- WAJIRGANJ District- Gaya

Vikash Mistry @ Vikash Kumar, S/o Shivan Mistry, Resident of Village- Kari,
P.S.- Wazirganj, District- Gaya. Appellant

Versus

1. The State of Bihar
2. Shakal Deo Choudhary, Son of Late Hulas Chaudhary, Resident of Village-
Kashi Tola Ambedkar Nagar, P.S.- Wazirganj, District- Gaya
... .. Respondents

with

CRIMINAL APPEAL (DB) No. 528 of 2018

Arising Out of PS. Case No.-113 Year-2014 Thana- WAJIRGANJ District- Gaya

Darogi Mistry, Son of Late Munshi Mistry, Resident of Village- Kari Tola
Ambedkar Nagar, P.S.- Wazirganj, District- Gaya. Appellant

Versus

The State of Bihar Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 645 of 2018)

For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate
Ms. Kiran Kumari, Advocate
Md. Imteyaz Ahmad, Advocate
Mr. Ritwik Thakur, Advocate
Mr. Pranshu, Advocate

For the State : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 528 of 2018)

For the Appellant : Mr. Niranjana Kumar, Advocate
Mr. Subham Singh, Advocate
Mr. Bipin Yadav, Advocate

For the State : Mr. Ajay Mishra, APP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and

HONOURABLE MR. JUSTICE ASHOK KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 21-10-2024

Heard Mr. Ajay Kumar Thakur and Mr. Niranjana Kumar,
learned Advocate(s) for the appellants in Criminal Appeal (DB)
No. 645 of 2018 and Criminal Appeal (DB) No. 528 of 2018

respectively. Mr. Ajay Mishra and Ms. Shashi Bala Verma, learned Additional Public Prosecutors have appeared on behalf of the State in both the appeals.

2. This Court had issued notice to the victim and the notice was received by her mother, however, no one has entered appearance on behalf of the victim.

3. We have heard learned counsel at length and perused the learned trial court's records.

4. These two appeals are arising out of the judgment of conviction dated 12.03.2018 (hereinafter referred to as the 'impugned judgment') and the order of sentence dated 21.03.2018 (hereinafter referred to as the 'impugned order') respectively passed by learned A.D.J.-1st-cum-Special Judge (POCSO Act), Gaya (hereinafter referred to as the 'learned trial court') in POCSO Case No. 5 of 2014 arising out of Wazirganj P.S. Case No. 113 of 2014 registered under Section 376 of the Indian Penal Code (in short 'IPC') and Section 3(i)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (in short 'SC/ST Act').

5. By the impugned judgment, the appellant Darogi Mistry has been held guilty under Section 376/34 IPC and Section 17 of the Protection of Children from Sexual Offences Act, 2012

(in short 'POCSO Act'). The appellant Vikash Mistry in Criminal Appeal (DB) No. 645 of 2018 has been held guilty for the offence under Section 4 of the POCSO Act. So far as the charge under Section 3(2)(v) of the SC/ST Act is concerned, the same has not been established against the accused persons. The learned trial court has imposed a sentence of rigorous imprisonment for life with a fine of Rs.25,000/- upon the appellant Vikash Mistry for the offence committed under Section 4 of the POCSO Act. In default of payment of fine, he has been ordered to undergo rigorous imprisonment for two years. The appellant Darogi Mistry has been sentenced to undergo rigorous imprisonment for 12 years with fine of Rs.10,000/- under Section 376/34 IPC or Section 17 of the POCSO Act and in case of default in payment of fine, he shall further undergo rigorous imprisonment for one year. The period of detention, if any, already undergone by the convicts shall stand set off against the period of sentence of imprisonment.

6. The prosecution case is based on the written application dated 15.03.2014 submitted by the father of the victim girl with the Officer-in-Charge of Wazirganj Police Station giving rise to Wazirganj P.S. Case No. 113 of 2014 registered under Section 376 IPC and Section 3(i)(xii) of the SC/ST Act. The informant alleged that on 15.03.2014 at about 03:00 PM when

his daughter aged about 10 years went to Western *Badh* for cutting grass, Vikash Mistry aged about 20 years lifted his daughter and took her to *Rahar* field where after taking off her undergarment, put it in her mouth and committed rape on her. Thereafter, when she shouted, Jitender Singh and Ramdev Manjhi who were working in the nearby field ran there then Vikash Mistry fled away. When he got information, he took his daughter to the police station.

7. After investigation of the case, the police submitted a chargesheet against both the accused persons for the offences under Sections 376/34 IPC and Section 3(2)(v) of the SC/ST Act. The learned Special Judge, POCSO Act took cognizance of the offences under Sections 376 IPC, Section 4 of the POCSO Act and Section 3(2)(v) of the SC/ST Act and after supply of police papers, the charges were explained to the accused which they denied and claimed to be tried. Thereafter, the charges were framed on 08.07.2015 for the offence under Section 376/34 IPC, Section 4 of the POCSO Act and Section 3(2)(v) of the SC/ST Act.

8. During trial, the prosecution produced as many as 10 witnesses and proved some documentary evidences. The full description of the witnesses and the documents proved on behalf

of the prosecution are being provided hereunder for a ready reference:-

List of Prosecution Witnesses

PW-1	Jitendra Singh
PW-2	Shakal Dev Chaudhary
PW-3	Victim
PW-4	Priti Kumari
PW-5	Parvati Devi
PW-6	Munni Kumari
PW-7	Awadh Bihari Singh
PW-8	Dr. Sushma Varma
PW-9	Smt. Kumari Vijaya
PW-10	Ramdeo Manjhi

List of Exhibits produced on behalf of the Prosecution

Exhibit 1	Written report of the informant
Exhibit 2	Signature of victim on her statement u/s 164 CrPC
Exhibit 3	Endorsement on written report by SHO Wazirganj P.S.
Exhibit 4	Formal FIR
Exhibit 5	Statement of victim u/s 164 CrPC

9. The accused persons were examined under Section 313 of the Code of Criminal Procedure (in short ‘CrPC’), they claimed themselves innocent. The defence got exhibited two documents, namely, Exhibit ‘A’ which is the chargesheet of the Wazirganj P.S. Case No. 307 of 2012 and Chargesheet No. 24 of 2013 dated 31.03.2013 to show that the informant is a

chargesheeted accused and the informant of Wazirganj P.S. Case No. 307 of 2012 is the wife of the appellant Darogi Mistry. Exhibit 'B' has been proved which is the format of the charge in Sessions Trial No. 239 of 2016 in which charge has been framed against the informant of this case, Parvati Devi wife of the informant (PW-5) and Binod Chaudhary under Sections 307/34, 452/34, 380/34 IPC and Section 3/4 of the Prevention of Witches Act.

Findings of the Learned Trial Court

10. The learned trial court having analyzed the prosecution evidences in form of oral testimony of the witnesses as well as the documentary evidences held that out of ten prosecution witnesses, PW-1 and PW-10 are the hostile witnesses but PW-2 who is the informant of the case, PW-3 the victim herself aged about 10 years, PW-4 and PW-6 who are the friends of the victim and PW-5 who is the mother of the victim have fully supported the prosecution case and their testimonies corroborate the prosecution story as disclosed in the first information report. The learned trial court held that PW-4 and PW-6 are the eye witnesses of the occurrence, both are minor aged about 10-11 years old girls and they have supported the prosecution case. The learned trial court though observed that no doubt, some contradiction cited by the defence in the cross-examination are there but these contradictions

are natural and have come in course of cross-examination by clever lawyers. The learned trial court held that these contradictions do not demolish the prosecution case.

11. The learned trial court held that from the prosecution evidence, it has been established that there was an inimical relationship between Darogi Mistry and the informant. Darogi Mistry facilitated and introduced the victim with the accused Vikash Mistry for raping her and that way, he satisfied his earlier inimical term. On the basis of these discussions, the learned trial court held that the prosecution had been able to establish its case. The learned trial court rejected the defence submission that the two independent witnesses, namely, PW-1 Jitendra Singh and PW-10 Ramdev Manjhi who firstly reached the place of occurrence have been declared hostile by the prosecution and in this case, there is no independent witness. The defence argued that the other prosecution witnesses have not supported the manner of the prosecution case and the Doctor (PW-8) had not found any external injury on the body of the victim whereas the alleged forcible rape is said to have been committed on a hard surface by a 20 years young boy. The defence had argued that Darogi Mistry and Vikash were close friends, hence, in order to settle the score,

the informant side had made false and fabricated case against both of them.

Submissions on behalf of the Appellants

12. Mr. Ajay Kumar Thakur, learned counsel for the appellant Vikash Mistry has led the arguments. Learned counsel submits that on perusal of the evidences available on the record, it would appear that after the alleged occurrence, the victim girl had gone to the police station and she had made her statement before police and her signature was also obtained on the said statement but this first version of the prosecutrix has been suppressed. Attention of this Court has been drawn towards paragraph '14' of the deposition of the mother of the victim girl who has been examined as PW-5. Learned counsel has also drawn the attention of this Court towards paragraphs '17' and '18' of the deposition of the victim girl (PW-3) wherein she has stated that she had reached the police station at about 04:00 PM but she has stated that at the police station, the case was lodged by her father and not by her. Her statement was recorded by police after four days. She has further stated that in her statement made before the Darogaji, she had not taken name of Darogi Mistry. Learned counsel submits that from the evidence of PW-3 and PW-5, it is crystal clear that the victim had gone to the police station on the date of occurrence

and though PW-5 says that she had made her statement and had signed on the same but in order to support the prosecution case, the victim girl has made a statement that her father had lodged the case. Her statement that she was examined by police after four days creates a lot of doubt as to whether the first version of the prosecutrix is being suppressed, there is no reason as to why the police will not record her statement on the same day of the occurrence when she had gone to the police station.

13. Learned counsel submits that the first information report is based on the written application of the father of the victim who has been examined as PW-2. In his application, PW-2 discloses that her daughter aged about 10 years had gone to western '*badh*' for cutting grass. He has stated that the appellant Vikash Mistry lifted his daughter in his hand and took her to a *rahar* field where he forcibly put the undergarment of the girl in her mouth and committed rape on her but at the same time, he has alleged that when his daughter shouted, then two persons, namely, Jitendra Singh (PW-1) and Ramdev Manjhi (PW-10) who were working in the nearby field ran and then Vikash Mistry fled away. Both PW-1 and PW-10 have not supported the prosecution case and they have been declared hostile.

14. Learned counsel submits that what is required to be taken notice of is that in the written application, the informant has not disclosed the name of PW-4 and PW-6 as the other two children who were present with the victim at the time of occurrence. One of them (PW-4) is the cousin sister of the victim whereas the another one (PW-6) is a close-door neighbour. Further, the allegation that the appellant had forcibly put the undergarment of the victim in her mouth would lead to a conclusion that after the undergarment was forcibly put in her mouth, she could not have shouted but before that only, she could have been in a position to raise her voice. In this regard, attention of this Court has been drawn towards the testimony of the victim girl (PW-3) who has stated in paragraph '13' of her deposition that when Vikash lifted her, she had shouted then both the girls and two persons came there whereafter Vikash fled away. It is, thus, submitted that a conjoint reading of the allegation in the FIR and the deposition of PW-3 would disclose that she was in a position to shout when she was lifted by the appellant Vikash and when she shouted then the two girls and two persons whose names have not been disclosed by PW-3 in her deposition came there and then Vikash fled away.

15. Learned counsel submits that in this case, according to PW-3, the place of occurrence is at a distance of

approximately one kilometer west to the village. Contrary to this, PW-5 who is mother of the victim has stated in her deposition that the place of occurrence is situated at a distance of 10 '*bans*' (bamboos). The victim has stated in her deposition that after the occurrence, one '*Muia*' who was her maternal grandmother had come and she had brought her back to home. This grandmother of the victim who is said to have arrived at the place of occurrence by chance has not been examined by police. Contrary to this, the informant claimed that after getting information from PW-1 and PW-10, he had gone to the place of occurrence and found that his daughter was in pool of blood and was unconscious. He lifted his daughter by hand and brought her to Wazirganj Police Station.

16. It is submitted that on the point of identification of the accused, the victim girl has stated in paragraph '15' of her deposition that prior to the occurrence, she had not seen Vikash Mistry and she did not know him by face or by name. She was told by a '*Brahmin*' of Kari Tola Village that he was Vikash Mistry. She did not know the name of the '*Brahmin*' but states that she was told this at the time of occurrence itself and out of those two persons one was the '*Brahmin*'. It is submitted that the victim girl is herself from village-Kari Tola. Neither in

course of investigation nor in course of trial, the said Brahmin who is said to have disclosed the name of Vikash Mistry could be identified. It is, however, evident that when the first information report was lodged by PW-2, the name of Vikash Mistry was mentioned at the instance of someone else who was the so-called Brahmin. Even PW-2 has not disclosed the name of the said person who disclosed the name of Vikash Mistry.

17. It is submitted that the occurrence took place in March 2014 whereas the deposition of the victim girl took place in May 2017. During this period, no TIP was conducted by Police to establish the identity of the accused Vikash Mistry. It is submitted that in case of **Kunjumon @ Unni v. State of Kerala** reported in **(2012) 13 SCC 750**, the Hon'ble Supreme Court has observed that in case where the accused is stranger to witness and there has been no Test Identification Parade (in short 'TIP'), the trial court should be very cautious while accepting the dock identification by such a witness. It is submitted that only when the evidence of the prosecution witness who identified the accused in the court is of a sterling nature, TIP may not be necessary. It is, however, submitted that in the present case, not conducting TIP would prove fatal to the prosecution case.

18. Learned counsel submits that PW-4 and PW-6 both have been introduced in this case as a witness at a much belated

stage. The informant did not disclose in his fardbeyan their names or said about the presence of PW-4 and PW-6 at the time of occurrence with the victim. The victim was taken to the learned Judicial Magistrate for her statement under Section 164 CrPC after five days. In her statement under Section 164 CrPC for the first time, she has stated that three other girls were with her. She did not disclose the name of those three girls. In her deposition, in course of trial, however, she talks of only two girls who had come on hearing her shouts. The victim was 10 years old at the time of her statement under Section 164 CrPC but the learned Magistrate while recording her statement did not put any preliminary question to her with a view to ascertain whether the child can understand question put to her and she is in a position to give rational answers. The Magistrate did not satisfy herself that the child is able to understand the questions and respond to that. It is pointed out with reference to the evidence of the learned Magistrate who has been examined as PW-9 that she has stated that she did not give any certificate that she had read over the statement to the victim girl and only after understanding the same she had put her signature.

19. It is submitted that the enmity with the Darogi Mistry has been admitted by PW-3 as well as PW-5 in their depositions and the fact that PW-3 did not take the name of Darogi Mistry when she was examined by police after four days but on the fifth day in her

statement under Section 164 CrPC before the Magistrate, she came out with a statement against Darogi Mistry also only shows that this child witness was tutored in the meantime to falsely implicate the accused persons. She would, therefore, not be a sterling witness and any conviction based on her sole testimony would be fatal to the accused.

20. Learned counsel for the appellants would submit that in this case, the appellants were not subjected to medical examination as required under Section 53A Cr.PC. Referring to paragraphs '79', '80' and '81' of the judgment of the Hon'ble Supreme Court in the case of **Chotkau Vs. State of Uttar Pradesh** reported in **(2023) 6 SCC 742: AIR 2022 SC 4688**, learned counsel submits that there is a distinction between Section 164A Cr.PC and Section 53A Cr.PC which were inserted in the statute book vide Amendment Act No. 25 of 2005. It is submitted that failure to obtain the report of the Forensic Science Laboratory (in short 'FSL') would prove fatal to the prosecution.

Submissions on behalf of the State

21. Mr. Ajay Mishra and Ms. Shashi Bala Verma, learned Additional Public Prosecutors for the State have contested the appeals. It is submitted that the learned trial court has duly examined and analyzed the evidences available on the record. The prosecution witnesses have supported their case and the victim's

testimony in this case may be relied upon to convict the appellants. Learned Additional Public Prosecutors have relied upon the judgment of the Hon'ble Supreme Court in the case of **Ganga Singh Vs. State of Madhya Pradesh** reported in (2013) 7 SCC 278.

Consideration

22. We have heard learned counsel for the appellants and learned Additional Public Prosecutor for the State as also perused the learned trial court's records. The prosecution case started with a written application submitted by the father of the victim who has been examined as PW-2 in this case. In his written application dated 15.03.2024 submitted to the Officer-in-Charge of the Wazirganj Police Station, he has stated that the occurrence took place on 15.03.2014 at 03:00 PM when his daughter (X) aged about 10 years had gone towards west side of the house, in the '*badh*' for cutting grass. In his deposition, PW-2 has stated that he had given information about the occurrence at his home whereafter he had gone to the place of occurrence. He has admitted in paragraph '17' of his deposition that neither in his written application nor in his re-statement before police stated that PW-4 and PW-6 had seen the occurrence and they had come at his home to inform. PW-2 has also admitted in his deposition that neither in

his written application nor in his re-statement, he had stated that his daughter was in pool of blood and was unconscious. Therefore, this Court finds that PW-2 had introduced PW-4 and PW-6 in course of his deposition and made exaggerated statements about the condition of victim after the alleged occurrence. He is an inimical witness, therefore, his testimony is required to be examined with much circumspection and care.

23. PW-2 has stated that Vikash Mistry who is a resident of the same village lifted his daughter by his hand and took her to '*rahar*' field ('*rahar*' is a kind of pulses). The informant (PW-2) alleged that Vikash Mistry took out the '*janghiya*' (undergarment) of the victim girl, put the same in her mouth and committed rape on her. Thereafter, when his daughter shouted, Jitendra Sah (PW-1) and Ramdeo Manjhi (PW-10) who were working in the adjacent fields came running, then Vikash Mistry fled away. The informant claimed that he got information whereafter he had come to police station with the victim. The informant has stated that Vikash Mistry is a regular visitor of the house of Darogi Mistry in his village and he had prior enmity with him. The informant alleged that it was Darogi Mistry who had got identified his daughter to Vikash Mistry.

24. It appears on perusal of the evidences available on the record that in his written application (Exhibit '1'), PW-2 has not stated that he had visited the place of occurrence and had found his daughter lying in pool of blood and unconscious but in his examination-in-chief, PW-2 has stated that on getting information about the occurrence, he had gone to the place of occurrence and found that his daughter was in pool of blood and lying unconscious whereafter he had brought his daughter to Wazirganj Police Station lifting her by his hand and submitted his application in the police station. This is not wholly correct. He proved his application as Exhibit '1'. This Court further finds that in his application, the informant has stated that it was Jitendra (PW-1) and Ramdeo Manjhi (PW-10) who were working in the adjacent fields and they had reached the place of occurrence after hearing the shouts of the victim girl but PW-1 and PW-10 both have not supported the prosecution case. They were declared hostile and cross-examined by the prosecution but nothing significant could be elicited from them.

25. As admitted by PW-2, in his fardebyan and re-statement before police, the informant (PW-2) has not mentioned about presence of PW-4 and PW-6 but in course of trial, he has stated that he got information about the occurrence from PW-2

who had come to his house and told her that rape has been committed upon his daughter. This statement of PW-2 is an after-thought, hence, not believable. PW-2 is his niece. In his deposition, PW-2 has stated that his daughter had gone for cutting grass with 2-3 girls from the neighbour. This Court finds that the presence of 2-3 girls has been introduced by PW-2 in course of trial. He has, however, stated that regarding the occurrence, he had not given any information in the village. In his cross-examination on behalf of Vikash Mistry, PW-2 has stated that he had gone to the place of occurrence from his house on foot, he had left his daughter at the place of occurrence and had come to his home by foot. If the evidence of PW-2 on the point of his reaching to the place of occurrence is considered along with the evidence of the victim girl (PW-3), it would appear that she has stated in her examination-in-chief that when Vikash Mistry took her in his hands and committed rape upon her after putting her clothes in her mouth, in the meantime, PW-4 and PW-6 had shouted then two persons whose names are not known to her came there whereafter Vikash Mistry fled away. She has stated that PW-4 and PW-6 lifted her and took her to the '*masur*' field whereafter, her mother and father came and took her to police station. Here, it is important to note that according to the victim girl, prior to arrival of her mother

and father, she had already been shifted from '*rahar*' field to '*masur*' field by PW-4 and PW-6. She has not stated in her cross-examination that either she was bleeding or had become unconscious at the time of occurrence. She has stated in paragraph '17' of her deposition that she had reached the police station at 04:00 PM. Her attention was drawn towards her statement made before the learned Magistrate under Section 164 Cr.PC in which she had stated that one '*Muia*' had come in the field who had taken her to her home. She had stated that the said '*Muia*' was her grandmother. She had also stated that her mother and father had taken her to Hospital from home. From the deposition of the victim girl, it is also evident that while at some place, she has stated about presence of three girls, at some other place, she has stated about two girls. She has admitted that litigation is going on between her family and the family of Darogi and they were not on talking terms. She has stated that *Daroga Ji* had recorded her statement after four days. She has further stated that in her statement before *Daroga Ji*, she had not taken name of Darogi Mistry. It is for this reason the defence suggested that no occurrence as alleged had taken place and because of the enmity, both the appellants have been falsely implicated.

26. The I.O. (PW-7) has stated in his deposition that he had recorded the FIR at the police station at 17:30 Hours, recorded restatement there itself and at the same time, he had recorded the statement of the victim girl and her mother. He had visited the place of occurrence on 16.03.2014 but he had not found any blood at the place of occurrence. He had not mentioned in the case diary that crops were in trampled condition. He had not found any suspicious article at the place of occurrence. He has also stated that the victim had not taken name of Darogi Mistry and in her statement recorded in paragraph '4', the name of Darogi Mistry is not there. The I.O. has further stated that in paragraphs '27' and '28' of the case diary, the statement of PW-4 and PW-6 respectively are mentioned, both of them had not taken name of Darogi Mistry in their statements.

27. It also appears from the deposition of the I.O. that he has stated in paragraph '14' that in her statement under Section 164 Cr.PC, the victim girl had stated that in the field, one '*Muia*' came who brought her home. The said '*Muia*' was her grandmother.

28. On an analysis of the evidences on the record, it is evident that the whole story looks mysterious. Initially, the informant (PW-2) mentioned Jitendra Sah (PW-1) and Ramdeo

Manjhi (PW-10) as the two witnesses who had come running at the place of occurrence whereafter Vikash Mistry fled away and then he got the information. When PW-1 and PW-10 did not support the prosecution case, after about five days, for the first time the victim girl, in her statement under Section 164 Cr.PC recorded on 20th March, 2014 made a statement that she had gone for cutting grass with three other girls but she did not disclose the name of those girls. In her Section 164 Cr.PC statement for the first time, she also introduced allegations against Darogi Mistry with whom she had enmity. The informant had not mentioned the name of Darogi Mistry and even the victim had not mentioned his name before the I.O. in course of investigation. From all these materials, one thing is evident to this Court that the victim in this case was a tutored witness and she cannot be put in the category of a sterling witness.

29. On the point of implication of Vikash Mistry, there is a peculiar statement of the victim in paragraph '15' of her deposition. She has categorically stated that prior to the occurrence, she had never seen Vikash Mistry and she did not know him earlier either by his face or by his name. Contrary to this, her father (PW-2) has stated in his written application (Exhibit '1') that Vikash Mistry was a regular visitor of the house of Darogi Mistry with whom he had prior enmity. It is not known

as to how PW-2 could mention the name of Vikash Mistry in his written application. Who disclosed the name? The victim, PW-4 and PW-6 did not know Vikash either by name or face. From the evidence of the informant (PW-2), it would appear that according to him, the house of Darogi Mistry is just adjacent to the house of the informant. She is trying to be unknown but then she has stated in the same paragraph that one Brahmin of Kari Tola village had told her that he is Vikash Mistry. She did not know the name of the said Brahmin but she has stated that he had told her at the time of occurrence itself. Out of two persons, one was the Brahmin. Who was the said Brahmin remains a mystery in course of investigation of this case and this Court finds that the name of the said Brahmin could not surface in course of investigation, hence, he has not been examined in this case. It is found that no TIP of accused Vikash Mistry was conducted. The victim girl identified him for the first time in the doc in course of trial. At this stage, this Court finds that on the point of doc identification and relevancy of TIP, the Hon'ble Supreme Court has observed in paragraphs '24' to '28' of the judgment of the case of **P. Sasikumar Vs. The State Represented by the Inspector of Police reported in (2024) 8 SCC 600** as under:-

“24. After considering the peculiar facts of the present case, we are of the opinion that not conducting a TIP in this case was a fatal flaw in

the police investigation and in the absence of TIP in the present case the dock identification of the present appellant will always remain doubtful. Doubt always belongs to the accused. The prosecution has not been able to prove the identity of the present appellant i.e. A-2 beyond a reasonable doubt.

25. The relevance of a TIP, is well-settled. It depends on the facts of a case. In a given case, TIP may not be necessary. The non conduct of a TIP may not prejudice the case of the prosecution or affect the identification of the accused. It would all depend upon the facts of the case. It is possible that the evidence of prosecution witness who has identified the accused in a court is of a sterling nature, as held by this Court in *Rajesh v. State of Haryana*³ and therefore TIP may not be necessary. It is the task of the investigating team to see the relevance of a TIP in a given case. Not conducting TIP in a given case may prove fatal for the prosecution as we are afraid it will be in the present case.

26. The relevance of TIP has been explained by this Court in a number of cases (see : *Ravi Kapur v. State of Rajasthan*⁴, *Malkhansingh v. State of M.P.*⁵)

27. In the facts of the present case, the identification of the accused before the court ought to have been corroborated by the previous TIP which has not been done. The emphasis of TIP in a given case is of vital importance as has been shown by this Court in recent two cases of *Jayan v. State of Kerala*⁶ and *Amrik Singh v. State of Punjab*⁷.

28. In *Jayan*⁶, this Court disbelieved the dock identification of the accused therein by a witness and while doing so, this Court discussed the aspect of TIP in the following words : (*Jayan case*⁶, SCC p. 44, para 18)

3. (2021) 1 SCC 118 : (2021) 1 SCC (Cri) 327

4. (2012) 9 SCC 284, para 35 : (2012) 4 SCC (Civ) 660 : (2012) 3 SCC (Cri) 1107

5. (2003) 5 SCC 746, para 16 : 2003 SCC (Cri) 1247

6. (2021) 20 SCC 38

7. (2022) 9 SCC 402 : (2023) 2 SCC (Cri) 404

“18. It is well settled that TI parade is a part of investigation and it is not a substantive evidence. The question of holding TI parade arises when the accused is not known to the witness earlier. The identification by a witness of the accused in the Court who has for the first time seen the accused in the incident of offence is a weak piece of evidence especially when there is a large time-gap between the date of the incident and the date of recording of his evidence. In such a case, TI parade may make the identification of the accused by the witness before the Court trustworthy.”

30. This Court finds that in this case, not conducting the TIP of Vikash Mistry and by relying upon the evidence of the victim (PW-3) that one Brahmin had told her that he is Vikash Mistry, the learned trial court has committed gross error in appreciation of the prosecution evidence.

31. As regards the place of occurrence, the victim has stated that she had gone to a distance of one kilometer towards western side of the village for cutting the grass but her cousin sister who has deposed as PW-4 has stated that the field where she had gone to cut the grass is situated in the northern side of the village. She has stated that all the three girls were cutting grass in the same and one field. She has also claimed that she understands north, south, east and west. She has stated that the field in which Vikash Mistry had taken them to cut the grass belonged to him but she was suggested that there is no land of Vikash Mistry there and

the I.O. (PW-7) has stated that the house of Vikash Mistry is situated at a distance of about half kilometer. PW-4 has stated that in the vicinity, there was one person, namely, Jhothan Manjhi in the '*masur*' field. The said Jhothan Manjhi has not been examined in this case. PW-4 has also stated that she did not know Vikash Mistry prior to the occurrence and she heard from someone else that he was Vikash Mistry. PW-4 could not say that from whom she heard the name but she has stated that after recording her statement before *Daroga Ji*, she had heard the name that he was Vikash Mistry. PW-4 has stated in paragraph '4' that she had not stated before *Daroga Ji* that Vikash Mistry had disrobed the victim girl. It is evident from her deposition that PW-4 had not identified Vikash Mistry at the time of occurrence and she did not know him, she had not made her statement implicating him before the I.O. and only in course of trial, she made a statement that Vikash had disrobed the victim girl. The evidence of PW-4 would, therefore, not inspire confidence.

32. PW-5 is the mother of the victim girl, she has stated that Darogi Mistry is her neighbour and both the parties are indulged in cases. She has given the distance of the field from her house as 10 '*baans*' (bamboos) which is not compatible with one kilometer distance as stated by the victim. She had not heard any

hulla. While the victim has claimed that Vikash had fled away from the place of occurrence, this witness claims that she had seen Darogi and Vikash there. In her cross-examination, she has stated that she had made statement about the occurrence as she was told by her daughter. In paragraph '14' of her deposition, PW-5 has stated that after reaching the police station, her daughter had told police about the occurrence which was recorded by police and her daughter had put her signature thereon. From the evidence of PW-5 who is the mother of the victim, it would appear that the victim girl had given her fardebyan before police on the same day at the police station which was also signed by the victim, therefore, the statement of the informant (PW-2) that his daughter was in pool of blood and she was unconscious and he had lifted her in his hands and took her to the police station are false statements. In fact, the I.O. has also stated about recording of statement of the victim at the police station but the statement of the victim has not been made basis of the FIR. The deposition of PW-5 confirms that the statement of victim was recorded in the police station and she had put her signature, therefore, this Court would accept the submissions on behalf of the appellants that the prosecution has suppressed the first version of the prosecution story. This would create doubt on the authenticity of the prosecution case,

particularly, when it is an admitted position that the parties were on serious inimical terms. Only in order to suppress this, the victim girl was tutored to say that her statement was recorded by police after four days.

33. PW-6 is the another girl who has been introduced in this case at a belated stage. She has stated in her examination-in-chief that when she, victim and PW-2 were going to cut the grass, Vikash told them to come to his plot where there were plenty of grass. She has stated that Vikash asked the father's name of all the three girls, they disclosed their fathers' name and when the victim told her father's name then Vikash lifted her by his hands and took her to '*rahar*' field and told her that her father would not do anything. Her attention was drawn towards her previous statement made before police in course of investigation in which she had not stated that Vikash had asked the father's name of all the three girls and they had disclosed their fathers' name. PW-6 denied this but the I.O. (PW-7) has contradicted her in paragraph '12' of his deposition. The I.O. has stated that PW-6 had not told him that Vikash had asked the father's name of the three girls and that he had asked them to come to the plot for cutting the grass. Thus, the I.O. has contradicted PW-6 on this point. PW-6 has also stated in paragraph '5' of her deposition that she had not seen Vikash prior

to the occurrence. Jitendra Singh (Brahmin) had told her after the occurrence that he was Vikash. She was told prior to recording of her statement before police that he was Jitendra. It is evident from the deposition of PW-6 that she has tried to introduce a story in her examination-in-chief which has been thoroughly contradicted by the I.O. This witness has stated that after the occurrence, she was told that he was Vikash, she has further stated that prior to recording of her statement, she was told that he was Jitendra. Apparently, she is a tutored witness.

34. In paragraph '6' of her deposition, PW-6 has stated that when Vikash had lifted the victim (X) and was taking her away, they had raised hulla and people who were working in the neighbouring field came running, thereafter, Vikash became afraid and fled away. If this statement of PW-6 is taken into consideration, the only conclusion would be that near the place of occurrence several people were working in the field and they had run towards the place of occurrence immediately when Vikash had lifted the victim girl and was taking her away. In such circumstance, there was no opportunity for Vikash to commit rape upon the victim girl.

35. This Court further finds that the I.O. claims to have seized the undergarment of the victim at the police station and

prepared a seizure list but the said seizure list has not been proved. He claimed that he had sent the undergarment to FSL and there was blood mark on the same but no evidence has been brought on record either by way of the FSL report or even by way of an acknowledgment of the FSL report that the '*janghiya*' was sent to the FSL for examination.

36. The evidence of the Doctor (PW-8) would show that she claims to have examined the victim and had found blood oozing out of vagina, laceration of right side of hymen and hymen ruptured, a tear on the posterior margin of the hymen. She has stated that rape had been done. In her cross-examination, she has stated that the pathological report and the radiological report are the basis of her report, the report is not available before her at present. She has also stated that no external injury was found on the body of the victim.

37. As stated above, PW-1 and PW-10 who were introduced as witnesses in the written application (Exhibit '1') have not supported the prosecution case.

38. From the entire discussions hereinabove, this Court finds that even though the Doctor (PW-8) has stated that rape has been committed upon the victim, the prosecution is unable to establish the alleged act of rape with Vikash Mistry. In the case of

Jaharlal Das Vs. State of Orissa reported in (1991) 3 SCC 27, the Hon'ble Supreme Court was dealing with an appeal in the matter of rape and murder of a minor girl. The Doctor had opined that there was a forcible sexual intercourse as a result whereof abrasion could be possible. The Hon'ble Supreme Court observed thus:-

“4. No doubt the offence is a shocking one but the gravity of the offence cannot by itself overweigh as far as legal proof is concerned. Invariably in such cases a person last seen with the victim, unless otherwise there are circumstances prima facie exonerating him, would be the prime suspect but in the ultimate judicial adjudication suspicion, howsoever strong, cannot be allowed to take the place of proof.”

39. Keeping in view the aforesaid principles, when this Court examines the entire evidence, it is found that in this case, not only the first version of the prosecution story has been suppressed, the victim has also been tutored from time to time, father of the victim (PW-2) has at various places not only improved upon his previous statement but has also made false statements to the extent that he visited the place of occurrence and found his daughter lying in pool of blood and was unconscious whereas the victim has not stated so. On the point of identity of the accused also, it is evident that neither the victim nor PW-4 and PW-6 who have been introduced later on as witnesses to the occurrence identified Vikash Mistry and they have deposed only on the basis of what

they were told by others. Those who told them have not been examined and their names have not surfaced in course of investigation and trial. Regarding the place of occurrence also, while the victim has stated that she had gone towards the western side of the village at one kilometer, PW-4 has stated that they had gone to the northern side of the village, PW-5 has stated that the field was situated at a distance of 10 '*baans*' (bamboos) and the I.O. who visited the place of occurrence did not find either any blood or any other incriminating article at the place of occurrence. He had not even noted about the condition of crops at the place of occurrence. Moreover, the victim herself has stated that she was moved from the place of occurrence to the '*masur*' field. The different witnesses have given name of different persons trying to introduce them as eye witnesses but no one of them has been examined. In an admitted case of enmity with Darogi Mistry, his false implication is evident from a bare reading of oral testimonies of prosecution witnesses. Vikash was a regular visitor of the house of Darogi Mistry, hence, because of his connection with Darogi Mistry, he has been implicated in this case. The victim in this case is not a sterling witness.

40. In these circumstances, this Court is of the opinion that it would not be safe to sustain the conviction of the appellants in the present case. Accordingly, the impugned judgment and order

are set aside. The appellants are acquitted of the charges giving them benefit of doubt.

41. The appellant Vikash Mistry in Criminal Appeal (DB) No. 645 of 2018 is in jail, he would be released forthwith, if not wanted in any other case. The another appellant Darogi Mistry in Criminal Appeal (DB) No. 528 of 2018 is on bail, hence, he and his sureties are discharged from the liability of the bail bonds.

42. Both the appeals are allowed.

43. A copy of this judgment and the learned trial court’s records are sent back to the learned trial court.

(Rajeev Ranjan Prasad, J)

(Ashok Kumar Pandey, J)

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