

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1246 of 2016

Arising Out of PS. Case No.-796 Year-2015 Thana- SASARAM MUFFSIL District- Rohtas

1. Rocky Sonkar @ Musa, Son of Dhurfekan Sonker, resident of Mohalla – Rameshwarganj Chalanania, Police Station – Sasaram (M), District – Rohtas.
2. Babloo Khatik, Son of Mithai Khatik, resident of Mohalla – Rameshwarganj Chalanania, Police Station – Sasaram (M), District – Rohtas

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Krishna Prasad Singh, Sr. Adv.
		Mr. Mithilesh Kumar Singh, Adv.
For the Respondent/s	:	Mr.Binay Krishna, Spl. PP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE A. ABHISHEK REDDY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 29-02-2024

1. Four persons including two appellants before this Court were put on Trial for the offences reported in Sasaram (Muffasil) P.S. Case No. 796/2015 for having raped two minor girls. Two out of them were acquitted of the charges for paucity of evidence against them.
2. The appellants have been convicted under Section 4 of the POCSO Act, 2012 and 376 (D) of the Indian Penal Code vide judgment dated 28.09.2016



passed by the learned 1st Additional District & Sessions Judge, Rohtas at Sasaram in Sasaram (M) P.S. Case No. 796/2015. By order dated 30.09.2016, they have been sentenced to undergo R.I. for ten years for the offence under Section 4 of the POCSO Act, 2012 and R.I. for twenty years for the offence under Section 376 (D) IPC. Both the appellants have been saddled with a fine of Rs. 25,000/- each and in default of payment of fine, to further suffer R.I. for one year.

3. Vide the judgment referred to above, the matter was also referred to District Legal Services Authority, Rohtas at Sasaram for awarding compensation to both the victims.

4. The F.I.R was lodged by one of the older victims out of the two, who was fourteen years of age at the time of occurrence. The fardbeyan was recorded by Shweta Swaraj (PW6), who at the relevant time was the S.H.O. of Mahila Police Station, Dehri, Rohtas. It was alleged that the victim (PW5) had gone to Tara Chandi Temple along with her cousin (PW4) aged



about 7 years, a son of her sister, namely, Krishna Kumar aged about 4 years and another cousin, namely, Ankit Raj (PW3). She was accompanied by another minor sister aged about 7 years. After offering prayers, at Tara Chandi temple, she along with her companions went to a nearby mausoleum (*majar*). While returning, five unknown persons stopped her and others on gun-point and took all of them in their custody. Her companions were taken at some place and were threatened to remain quiet. She was however taken behind the mausoleum, where three miscreants successively raped her. She kept on shouting and imploring with them but to no avail. She was also threatened of dire consequences if she reported about the matter to anybody. She was then brought to the place where her other cousins were kept captive. Thereafter, the victim (PW5) came down the hill-lock. On way, she had become unconscious. When she regained her consciousness, she found herself in a hospital. While getting her fardbeyan



recorded, she had asserted that she could identify all the miscreants, if shown to her. All were young persons. In fact, the other cousins of the victim also could identify the accused persons. While she was being subjected to rape, the miscreants were talking amongst themselves and were referring to each other as Rocky and Patwa. The persons who was referred as Rocky had worn ear-studs.

5. On the basis of the afore-noted fardbeyan statement, a case vide Sasaram (Muffasil) P.S. Case No. 796/2015 was registered on 15.07.2015 for investigation for the offences under Sections 4/6 of the POCSO Act. 2012 and Sections 3(2)(V), 3(xi, xii) of SC/ST (Prevention of Atrocities), Act, 1989 and Section 376 (D) of the IPC.
6. The police could arrest only four persons though five to six persons were said to have taken part in the crime and those persons, including the appellants were put on trial.
7. The Trial Court, after having examined seven



witnesses on behalf of the prosecution and one on behalf of the defense, acquitted the two other accused persons but convicted and sentenced the appellants as aforesaid.

8. Mr. Krishna Prasad Singh, the learned Sr. Advocate assisted by Mithilesh Kumar Singh, Advocate has argued on behalf of the appellants that the evidence was too bleak for the appellants to have been convicted and sentenced for the offences. He has further submitted that the medical evidence does not at all support the accusation of gang rape of two minor girls. The appellants, it has been argued, were identified by three witnesses including two of the victims only in the court for the first time. They had deposed before the Trial Court after approximately two months of the occurrence. Hence, their identification of the appellants is very doubtful.

9. The other arguments raised on behalf of the appellants is that the place of occurrence could not be proved and some of the important witnesses, who



could have spoken about the occurrence, which could have thrown light on the prosecution case, have very conveniently been left out.

10. It would only be appropriate for us to refer to the deposition of Ankit Raj (PW3) and two of the victims, who have been examined as PWs 4 and 5 before delving into the case any further.

11. Ankit Raj (PW3) reiterated the prosecution version and stated that the occurrence took place at around 4.00 P.M. of 15.07.2015. Five to seven accused persons had surrounded him and his sisters. One of his sisters (PW5) was taken behind the traveller's shed and rest of them were made to stay at the same place. The other sister (PW4) was also taken away. After about half an hour, the two sisters of PW3 were released. Thereafter all of them clobbered down from the hill-lock. On way, PWs 4 and 5 disclosed before him that the accused persons had committed rape on them. PW5 was raped by three persons whereas one of the miscreants had raped



PW4. None of them disclosed the names of any one of the miscreants. As soon as all of them reached near the residential colony, PWs 4 and 5 became unconscious. Many persons present there gravitated towards them, who were told about the occurrence. He thereafter, called his neighbour, namely, Pankaj Kumar, who has not been examined at the Trial, who came with his motorcycle. The two victims were taken to Sadar Hospital, Sasaram on a rickshaw. The fardbeyan of PW5 was recorded in the hospital.

12. During the Trial, PW3 identified the appellants but could not tell their names. The victims were also treated at PMCH regarding which, there is no record. During the cross-examination, he has admitted that at the foothills of the hill-lock, where the *majar* is situated, children of the locality play. Many people visit *majar* for offering prayers. The victims (PWs 4 and 5) had first reached the *majar*. After about half a minute, PW3 could also climb up to the *majar*. When they had reached, there was nobody around. A



shed measuring about 15 x 6 ft. was used for committing the crime. The afore-noted shed was open from all sides. While the miscreants were at the act, PW3 and his 5 year old brother and 7 to 8 years old another sister remained there for half an hour. During this time also, no visitor came near the *majar*. The older of the sisters was aged about 14 years whereas the younger was only 12 years of age. Miscreants had asked for his identity thereafter they talked on mobile telephone with somebody. PW3 had also grappled with the miscreants for about a minute or two. He was assaulted by them. After he was assaulted, the victims were taken away and raped. His mobile telephone had also been snatched away which was later returned to him. He had shown the mobile telephone to the police at the time of the lodging of the FIR. The clothes of the victims were not torn.

13. He has claimed to have seen the appellants only in the court for the first time after the occurrence. Both the victims had become unconscious and



thereafter they had been taken to Sadar Hospital, Sasaram. By the time they reached hospital, the police had already arrived at 8.30 in the evening. The victims regained their consciousness by around 8.45 P.M. Before that, no F.I.R was registered. After the occurrence, PW3 had met the father of PW5, who had chastised him and had said that it was not proper for him to have taken the girls to *majar*.

14. The younger of the victims (PW4) narrated the same story but with minor difference in the sequence of events. She has alleged that three of the accused persons committed rape with her sister (PW5) and only one person committed rape on her. Both the victims were then released and all the family members thereafter came to the residential colony. At that place, both the sisters had become unconscious. Before the Trial Court, she identified the appellants. She asserted that the miscreants had talked to the mother of PW3, who had told one of the miscreants about the names of the victims, namely, PW4 and 5



and another minor sister.

15. Similar statement has been made by another victim (PW5), who is said to have been raped by three of the miscreants. However, she has stated that at the *majar* where the occurrence had taken place, she and her associates had stayed there for about one and half hours. She had tried her best to avert the sexual attack but to no avail.

16. In this context, it would be relevant to refer to the deposition of the doctor (PW7), who had medially examined the two victims (PW4 and 5) at 8.00 P.M. and 8.25 P.M. respectively in the night of 15.07.2015. With respect to PW4, the doctor, after examining the entire body and the private parts, found that it was too difficult for her to declaim that there was any recent sexual intercourse. PW4 was assessed to be between age group of 14 to 15 years. With respect to PW5 also, similar observations were made by the doctor about the difficulty in coming to any conclusive finding about any recent sexual intercourse.



The age of PW5 was assessed to be between 15 to 16 years.

17. The Investigator, who had recorded the fardbeyan of PW5, has been examined as PW6. Before taking over the investigation of the case, she had recorded the fardbeyan statement of PW5 (Ext. 1/3). She had visited the place of occurrence in the night. At the suggested place of occurrence, she could get hold of one Vinod Kumar Sonwar (PW1) whose statement was recorded. Vinod Kumar Sonwar (PW1) has expressed his ignorance about the occurrence and he has been declared hostile. Thereafter Dilip and Shankar, other accused persons of the case, were arrested, both of whom have been acquitted by the Trial Court.

18. The Investigator got the statement of PWs 4 and 5 recorded under Section 164 Cr.P.C. The medical report of PWs 4 and 5 was obtained by her. The clothes of the victim were sent for forensic examination at Patna after obtaining the permission of



the Court. The mobile telephone of P.W. 3 and the call details were also obtained for proper analysis and tracking down the miscreants. She had come to learn during the course of investigation that the appellant No. 1 had surrendered before the Trial Court, whereafter, he was taken on police remand, during which period he is said to have made his confession which was recorded by her. Appellant No. 2 was also arrested thereafter, who in presence of the Investigator had confessed his guilt as well. The Forensic Report also was obtained by her during the course of investigation. She had not made any map of the place of occurrence. She has also admitted in her cross-examination that the starting point of investigation was the names of the accused persons which PWs 4 and 5 had heard while the miscreants were talking amongst themselves. While she had been recording the *fardbeyan* of P.W. 5, her medical condition was not good. She had but not taken any opinion of the doctor whether the victims were



unconscious when they were admitted in the hospital. The details of the place of occurrence was also not recorded by her in the case diary. She had visited the suggested place of occurrence at about 11:45 in the night. She had not indicated the source of light at that time over the hill-lock. No person apart from PWs. 1 and 2 from around the place of occurrence was interrogated by her.

19. In paragraph 15 of her cross examination, she has clearly admitted that she did not make any attempt to have a test identification parade conducted for identifying the miscreants by the victims.

20. From the conspectus of the evidence collected against the appellants, few things appear to be very stark. The first and foremost appears to be the lapse on the part of Investigator to have the test identification parade conducted on the arrest of the accused persons including the appellants. That would have been the surest test for the identification of the appellants. There was no reason whatsoever for not



putting those persons, arrested on suspicion, before PWs 4 and 5 or perhaps before P.W. 3 for their identification. Two persons were arrested shortly after P.W. 1 was interrogated.

21. In order to douse our curiosity as to the starting point of investigation for reaching out to the culprits, we also perused the initial investigation reports. It appears that P.W. 1 had identified some persons with the name of Rocky and Patwa, which names were heard by PWs 4 and 5 while those miscreants were talking amongst themselves and on some information provided by P.W. 1, two arrests were made.

22. Under such circumstances, in the absence of those arrested persons having been put on identification parade, the prosecution lost out on one of the most important evidence in the process of the investigation or for taking the investigation any further. It, therefore, appears that on suspicion and some vague reference of names by the victims, two arrests were made and the afore-noted two arrestees



who have since been acquitted had made certain disclosures in which the appellants perhaps may also have been named. Precisely for this reason, it appears that appellant No. 1 surrendered to the process of law. Shortly, thereafter, appellant No. 2 also was arrested. Even if appellant no. 1 had surrendered to the process of law, according to the evidence of the Investigator, he was taken on police remand. It was at that time, it was the bounden duty of the Investigator to have asked PWs 3, 4 and 5 to have identified the arrested persons. That not having been done, their identification by PWs 3, 4 and 5 at the trial, when they were deposing after about two months of the occurrence, lost its probative value.

23. A question then arises as to why the victims and P.W. 3 would identify the two appellants and not others who too were arrested under the same process. This, however, does not become explicable on any account but that fact itself would not render the identification of the appellants by three of the



prosecution witnesses to be beyond doubt. The Trial Court perhaps was swayed by the fact that PWs 3, 4 and 5 did not commit any mistake in identifying the two appellants. The Trial Court, therefore, presumed that PWs 3, 4 and 5 were possessed with eidetic memory.

24. We find force in the submission of the learned counsel for the appellants that such identification, even if it is consistent with all the three witnesses including the two victims, ought not to have been taken by the Trial Court to be the surest proof of the participation of the two appellants in the offence.

25. Seen in this context, we further find force in the submission of the appellants that the reason for not examining Pankaj kumar, a friend and neighbour of P.W. 3, who had arrived at the foot-hills on the call of P.W. 3 to be very conspicuous. It was with the help of afore-noted Pankaj that the victims were brought to Sasaram Sadar Hospital for treatment. His examination before the court would have thrown light



on the assertion of the prosecution that the victims had become unconscious after having reached the residential colony at the base of the hill-lock. This assumes even more importance when there is no statement by the Doctor (P.W. 7) that the victims (P.Ws 4 and 5) were unconscious when they were admitted in the hospital.

26. No injuries were found on the person of both the victims.

27. True it is that the statement of the victims about rape does not get diluted by non-conforming medical testimony but in the present case, when P.W. 5 claims to have been raped by three persons one after the other, the medical report showing no injury on any part of her body including the private parts and the doctor not coming to any conclusive finding with respect to any recent sexual intercourse, makes the story of rape doubtful.

28. Both the victims were of minor age, the older one being only 14-15 years of age.



29. The clothes of the victims were sent for forensic examination at the instance of the doctor and not the Investigator. In one of the undergarments, traces of semen were found. Even this forensic report could not have been put to any use in the absence of any medical examination of the appellants. Even otherwise, in cases of gang rape, it is the obligation of the Investigator to have the accused persons examined medically (refer to Section 53 A of the Code of Criminal Procedure).

30. Section 53 (1) of the CrPC enables a police officer not below the rank of sub-inspector to request a registered medical practitioner, to make such an examination of the person arrested, as is reasonably necessary to ascertain the facts which may afford such evidence, whenever a person is arrested on a charge of committing an offence of such a nature that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence. Section 53(1) reads as follows:-

***"Section 53. Examination of accused by
medical practitioner at the request of police***



officer.—(1) 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 the 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.”

31. By Act 25 of 2005, a new explanation was substituted under Section 53, in the place of the original explanation. The explanation so substituted under Section 53 by Act 25 of 2005 reads as follows:-

“Explanation.-In this section and in Sections 53A and 54-

(a) “examination” shall include the examination of



blood, blood stains, semen, swabs in case of sexual offences, 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;

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

32. Simultaneously with the substitution of a new Explanation under Section 53, Act 25 of 2005 also inserted a new provision i.e. Section 53A. Section 53A reads as follows:-

"Section 53A. Examination of person accused of rape by medical practitioner.—(1)

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 the radius of sixteen 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.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely—

- (i) the name and address of the accused and of the person by whom he was brought,
- (ii) the age of the accused,
- (iii) marks of injury, if any, on the person of the accused,
- (iv) the description of material taken from the person of the accused for DNA profiling, and



(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section." (refer to ***Chotkau v. State of Uttar Pradesh, (2023) 6 SCC 742; Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2019) 12 SCC 460; and Munna Pandey v. State of Bihar, 2023 SCC Online SC 1103***).

33. The Investigator lost it on this count also

34. With respect to the place of occurrence, it is appreciable that the Investigator took the pains of going to the suggested place of occurrence in the night only but has forgotten to record the source of light for her to see any incriminating materials at that place. In that event, non-spotting anything incriminating by the



I.O. only makes the case further doubtful.

35. The versions of the victims are also different with respect to the place of occurrence. One of the victims claimed to have been raped in the traveller's shade which is open from all sides while the other claims to have been taken to a room behind the *majar*

36. What is most intriguing to us is and which does not appear to have been noticed by the Trial Court, that while the two victims were taken away by the miscreants for satisfying their lust, P.W. 3 and two others, though minors, waited near the *majar* There is nothing on record either by way of the statement of any one of the witnesses and P.W. 3, in particular, that they were held back or they were put under any kind of vigil by the miscreants. In fact, most of the miscreants had gone out of their sight along with the two victims for committing the crime. This was the time when P.W. 3 could have shouted for help or could have run to anyone of the visitors to the shrine. The manner and sequence in which the occurrence is said



to have taken place, it gives an impression that perhaps P.W. 3 was totally unaware that his two sisters (P.Ws 4 and 5) were being subjected to rape. If the miscreants had raped the two victims, where did the goodness in them to bring those victims back to their other companions come about. They could have had an easy escape after the act of rape was committed.

37. P.W. 3 has further claimed that his telephone which was snatched by the miscreants was returned to him.

38. There is yet another strand in the story of the prosecution. P.W. 4, in her cross-examination has said that after a brief scuffle with P.W. 3, the miscreants talked to somebody on telephone. The mother of P.W. 3 also was talked to by one of the miscreants who is said to have disclosed the names of P.Ws 4 and 5 and another minor sister of theirs. What could have been the reason for knowing the identity of the companions of the victim. Though a suggestion has been given to



the P.W. 3 that perhaps he was also complicit in the crime but such suggestion has been vehemently denied by him and there is no other material to take that strand of prosecution version to any logical conclusion. However, what appears to be rather strange with about 3 people having subjected P.W. 5 to rape, she had suffered no injury. There was not even any sign of recent sexual act.

39. We are in a quandary as to why at all, then, such an accusation would be made by the two victims.

40. It does not appear from the evidence of the doctor that the victims were unconscious and they regained consciousness only at 8.45 P.M. as claimed by P.W. 3.

41. In the absence of any reason for any false story of rape being projected, we may believe the charge of the victims of their having been raped, but the accusation against the appellants remain completely unproved. The sheet-anchor of the prosecution case before the Trial Court was the identification of the



appellants by PWs. 3, 4 and 5 and their not mistaking and pointing to the same very persons, namely, the appellants as the perpetrators of the crime and not identifying two others who were arrested before the appellants and perhaps on whose confession, further arrests were made.

42. What has further made us rethink about the prosecution case and the accusation against the appellants is that the father of the P.W. 5 had visited the hospital and had met P.W. 3. He had expressed his displeasure at P.W. 3 for his having taken the girls to the *majar* late in the evening. It was all the more necessary for the prosecution to have brought him to the witness-stand. At least, he could have stated with conviction that he had visited the hospital when PWs. 4 and 5 were being medically examined.

43. Taking all these facts cumulatively, we find that the prosecution has not been able to prove the case against the appellants beyond all reasonable doubts.

44. We have to, *perforce*, give benefit of doubt to



the appellants.

45. For the reasons stated above, we set aside the judgment and order of conviction and acquit the appellants of the charges.
46. Both the appellants are in jail since 25.07.2015 and 27.07.2015 respectively. They are directed to be released from jail forthwith, if not wanted in any other case.
47. The appeal stands allowed.
48. Let a copy of this judgment be dispatched to the Superintendent of concerned Jail for record and compliance.
49. Let the records of this case be also returned to the concerned Trial Court forthwith.

(Ashutosh Kumar, J)

(A. Abhishek Reddy , J)

sunilkumar/-

AFR/NAFR	AFR
CAV DATE	N/A
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