

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.720 of 2021

Arising Out of PS. Case No.-260 Year-2018 Thana- KUSHESHWARASTHAN District-
Darbhanga

=====

SANDEEP RAI @ ALOK KUMAR @ ALOK KUMAR RAY, Son of Jivachh
Rai @ Jibachrai Resident of Village- Hathauri Tole Basaul, P.S.- Kusheshwar
Asthana, District- Darbhanga.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mrs. Shama Sinha, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 23-10-2024

We have heard Mrs. Shama Sinha, the learned
Advocate for the appellant and Mr. Abhimanyu Sharma,
the learned APP for the State.

2. The appellant has been convicted under
Section 376(3) of the Indian Penal Code, Section 6
read with 5(k) of the POCSO Act, 2012 and Section
3(2)(v) of the SC/ST (Prevention of Atrocities) Act,
1989 *vide* judgment dated 23.09.2021 passed by
learned Special Judge (POCSO Act), Darbhanga in



POCSO G.R. Case No. 51 of 2018. By order dated 30.09.2021, he has been sentenced to undergo RI for 25 years, to pay a fine of Rs. 50,000/- and in default of payment of fine to further suffer SI for six months under Section 376(3) of the IPC; RI for life, to pay a fine of Rs. 25,000/- and in default of payment of fine to further suffer SI for three months under Section 3(2)(v) of the SC/ST Act.

3. The sentences have been ordered to run concurrently.

4. A special child of less than 14 years is alleged to have been raped by the appellant. While the appellant was on the act, the occurrence was witnessed by the mother of the victim who has been examined as PW-2 in this case. She has lodged the FIR. The other witness to the occurrence is the sister-in-law of the victim who has been examined as PW-1. We have deliberately avoided naming the aforementioned witnesses.

5. The mother of the victim (PW-2) has alleged



in the written report dated 30.10.2018 that on 18.10.2018, her daughter (victim) had come out of her house to attend to the call of nature but she did not return even after a long time. Sensing some trouble, PW-2 along with her daughter-in-law (PW-1) came out of the house and started looking for the victim in the field where wild grass grew. She saw that the appellant had mounted himself over the victim and the victim was trying to dislodge him. When she flashed torch light at the face of the maelfactor, she identified her to be the appellant, a resident of the same village. On shrieks of the mother and sister-in-law, the appellant ran away. PW-2 found the body and clothes of the victim totally soiled. She was in great pain. Since the victim was dumb, she gestured towards her mother and sister-in-law, indicating that she had been physically violated and perhaps raped. The victim was brought back home. PW-2 informed about this occurrence to her relatives. A *panchayati* was convened but the appellant and his



mother refused to abide by the decision in the *panchayat*. It was only thereafter that a written report was lodged after 12 days on 30.10.2018.

6. Based on the aforementioned written report addressed to the Officer-in-Charge of Kusheshwar Asthan Police Station, a case *vide* Kusheshwar Asthan P.S. Case No. 260 of 2018 dated 30.10.2018 was registered for investigation under Sections 147, 341, 342, 376, 504 and 506 of the IPC, Section 4 of the POCSO Act, 2012 and Section 3(i)(r)(s) of the SC/ST (Prevention of Atrocities) Act, 1989.

7. The police after investigation submitted charge-sheet against the appellant whereupon he was tried.

8. The Trial Court, after having examined eight witnesses on behalf of the prosecution, out of whom two witnesses, viz., Sri Chand Sada (PW-3) and Rambabu Sharma (PW-4) had turned hostile, convicted and sentenced the appellant as aforesaid.



9. While assailing the judgment of the Trial Court, Mrs. Shama Sinha, the learned Advocate submitted that the facts of the case present a very gory picture where a special child was raped by the appellant; but if the evidence at the trial is analysed, it would clearly appear that an absolutely false case has been lodged by the mother of the victim.

10. PW-2 at the trial supported the accusation against the appellant. However, she did not remember the name of the person who had drafted the written report for her. She admitted before the Trial Court that the appellant stayed across the road. According to her, the police officer had come to the PO, which is a field nearby after about 2 to 4 days of the occurrence. She had given her statement to the police officer at the PO which she had signed. At the time of handing over her written statement, the victim and PW-1 were not present.

11. With respect to the occurrence and the PO,



PW-2 stated that the field where the occurrence took place was found by her to be completely trampled. There were blood droplets on the ground. She had no idea whether those blood spots were collected by the Investigator.

12. The clothes of the victim were smeared with blood. The victim had become unconscious. She regained her consciousness only after four days. She had but not shown the victim to the police officer who had come to the PO. She could not provide the details of the source of light. She, however, admitted that her family always reaped the ripe crops standing in the field of the appellant. The suggestion that the case has been lodged because of the objection of the appellant at pilfering of crops by PW-2, has been denied by her.

13. Juxtaposed with this deposition, Mrs. Sinha has drawn the attention of this Court to the statement of the sister-in-law of the victim, viz., PW-1 who had accompanied her mother-in-law (PW-2) to the field in



search of the victim and she had also seen the appellant raping the victim.

14. In her cross-examination, she has categorically stated that the information about the occurrence was given to the police on the same day at about 8 to 10 PM. First statement was made by her mother-in-law and thereafter she gave her statement. After those statements were given to the police officer, the statement of the victim also was recorded. This, Mrs. Sinha argues, completely demolishes the prosecution case.

15. On a deeper analysis of the facts of the case, what comes out clearly is that the written report was lodged after about 12 days of the occurrence. There is nothing on record to indicate as to the outcome of the decision in the *panchayat*. Even otherwise, if the police had come to know about the occurrence of rape and the act of the appellant, who stayed across the road, there was no reason for the case not being



registered in the night of the occurrence or on the next day. Once the factum of such occurrence came to the knowledge of the police, there was no way in which the case would not be lodged immediately.

16. This, therefore, as has rightly been argued, completely busted the prosecution case.

17. The delay, therefore, remains unexplained.

18. The only inference which could be drawn is that because there was some dispute with respect to reaping of the standing crops over the field belonging to the appellant, this case has been lodged, implicating the appellant.

19. Apart from this, we have found certain other anomalies in the prosecution case which makes the entire version absolutely doubtful.

20. As noted above, Sri Chand Sada and Rambabu Sharma (PWs. 3 and 4), both co-villagers and neighbours of the victim have expressed their complete ignorance about the occurrence and,



therefore, have been declared hostile.

21. The statement of the victim was recorded under Section 164 of the Cr.P.C. On a perusal of such statement, it appears that it is basically a transliteration of what was suggested by the victim by her gesticulations.

22. The judicial officer/interpreter who recorded her statement has not been examined at the trial.

23. Normally, subjecting a physically incapacitated child to rape would be unpardonable, but the accusation must be sure and worth accepting as the true version of the occurrence.

24. The scribe of the written report remains unknown. The investigator, viz., Shiv Kumar Paswan (PW-8) took up the investigation only after the case was handed over to him. He had nothing to offer to the Court except for the fact that he had visited the PO and had recorded the statements of witnesses. The blood



smearred clothes, which were handed over to him, were sent for FSL examination, the report of which has been exhibited as Exhibit-5. The FSL report confirmed that the spots on the clothes were not of blood or semen. Even otherwise, the report could have been of no value as the provisions contained in Section 53-A of Code of Criminal Procedure was completely forgotten by the Investigator.

25. Section 53-A of the Cr.P.C. was inserted in the Code mandating that when a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within a radius of 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.

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

27. In ***Krishan Kumar Malik Vs. State of Haryana (2011) 7 SCC 130***, the failure to obtain the report of the FSL was found to be fatal. In that case, the appellant was examined by a Doctor who had found him incapable of performing sexual intercourse. In the



undergarments of the prosecutrix, male semen were found which were not sent for analysis in the FSL which could have conclusively proved beyond any shadow of doubt the commission of offence by the appellant therein.

28. This lacuna on the part of the prosecution in that case proved to be fatal and the evidence was read in favour of the appellant.

29. With respect to the scope of Section 53-A, the Supreme Court in **Krishan Kumar Malik** (supra) has said that after the incorporation of the said Section in the Code with effect from 23.06.2006, it has become necessary for the prosecution to go on for a DNA test in such type of cases, facilitating the prosecution to prove its case against he accused.

30. It would also be relevant in this context to state that at around the same time when Section 53-A was inserted in the Code, Section 164-A was also added in the Code. While 53-A enables the medical



examination of the person accused of rape, Section 164-A enables medical examination of the victim of rape. Both the provisions are somewhat similar and can be said to be approximately a mirror image of each other.

31. However, in ***Sunil vs. State of Madhya Pradesh (2017) 4 SCC 393*** where **Krishan Kumar Malik** (supra) was considered, it was held that such lapses cannot be permitted to decide the fate of a trial for the offence of rape. Even if such a flaw had occurred in the investigation, the Court has still a duty to consider whether the materials and evidence available on record before it are enough and cogent to prove the case of the prosecution. [also refer to ***Veerendra vs. State of Madhya Pradesh (2022) 8 SCC 668***]

32. In ***Chotkau vs. State of Uttar Pradesh (2023) 6 SCC 742***, the Supreme Court considered the importance of Section 53-A of the Cr.P.C. in



Krishan Kumar Malik (supra) but also noted that in a three Judges Bench of the Supreme Court had indicated in ***Rajendra Pralhadrao Wasnik vs. State of Maharashtra (2019) 12 SCC 460*** that Section 53-A is not mandatory.

33. To quote the Supreme Court in the aforementioned case: "While Section 53-A is not mandatory, it certainly requires a positive decision to be taken. There must be reasonable grounds for believing that the examination of a person will afford evidence as to the commission of an offence of rape or an attempt to commit rape."

34. After saying that Section 53-A is not mandatory, the Supreme Court in the same decision ruled that failure of the prosecution to apply Section 53-A would warrant an adverse inference to be drawn.

35. In the case at hand, it is only the gesticulations of the victim regarding the factum of rape. As we have already noted, the officer who



recorded the statement under Section 164 of the Cr. P.C. has not been examined, for us to test whether he correctly understood those gestures of the victim.

36. The non-adherence to Section 53-A of the Cr.P.C. further confounds the trouble.

37. The delayed lodging of the FIR makes the case absolutely suspect, especially in view of the fact that the police had visited the PO and had met PWs.-1 and 2 in the night of the occurrence only.

38. Every fact of this case now requires to be looked at with this background in mind.

39. Usha Devi (PW-7) claims to have recorded the 161 Cr.P.C. statement of the victim. She denied the suggestion that she had not recorded any statement. This leaves us nowhere specially when admittedly the victim could not have spoken.

40. We have also turned our eyes to the medical examination of the victim by Dr. Suchandra (PW-6). The victim was medically examined on 1st of



November, 2018. The general observation of the doctor was that the patient/victim was deaf and dumb since birth. No sign of injury or stains were present on her body. There was old but healed hymenal tear suggesting nothing. The pregnancy test was in the negative. The vaginal swab and smear under microscopic examination showed diffused epithelial cells but no spermatozoa or its pregments were visible; dead or alive. The age of the victim was assessed to be between 14 to 15 years.

41. In cross-examination, PW-7 admitted that the tear of hymen could be possible due to running, jumping or cycling. No opinion with respect to commission of sexual intercourse was made by PW-7, perhaps for the reason that there were no available signs except for an old but healed hymenal tear.

42. What does this all lead to?

43. The entire case, therefore, is redolent with doubt and suspicion.



44. We have examined the 313 Cr.P.C. statement of the appellant also where he denies the accusation and attributes such accusation to the dispute regarding reaping of crops on his field.

45. We have not adverted to the age of the victim as no effective challenge was made by the appellant regarding the minority of the victim.

46. Thus, having found the accusation to be doubtful, we are left with no alternative but to give benefit of doubt to the appellant.

47. The appellant is thus acquitted of all the charges.

48. The appeal succeeds.

49. The appellant is in jail since 15.04.2019. He is directed to be released from jail forthwith, if not wanted or detained in any other case.

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



51. The records of this case shall also be transmitted to the Trial court forthwith.

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

(Ashutosh Kumar, J)

(Rajesh Kumar Verma, J)

Rajesh/Ibrar

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	24.10.2024
Transmission Date	24.10.2024

