

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.945 of 2023**

Arising Out of PS. Case No.-83 Year-2022 Thana- SAHEBPUR KAMAL District- Begusarai

Ajeet Kumar, Son of Sri Arvind Das, Resident of Village- Sanaha Paraura,
P.S.- Sahebpur Kamal, Dist- Begusarai

... .. Appellant/s

Versus

1. The State of Bihar
2. PW- 4 / Victim

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mrs. Vaishnavi Singh, Advocate Mr. Ritwik Thakur, Advocate Ms. Kiran Kumari, Advocate
For the State	:	Mr. Binod Bihari Singh, APP
For the Informant	:	Mr. Binod Kumar, Advocate

**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)**

Date : 02-07-2024

We have heard Mr. Ajay Kumar Thakur assisted by Mrs. Vaishnavi Singh, learned Advocates for the appellant and Mr. Binod Kumar for the informant. The State has been represented by Mr. Binod Bihari Singh, learned Additional Public Prosecutor.

2. The appellant has been convicted under Section 376 of the Indian Penal Code and Section 3/4 of the POCSO Act *vide* judgment dated 20.07.2023 passed



by learned Exclusive Special Judge (POCSO Act)-cum-Additional Sessions Judge-VI, Begusarai in POCSO Case No. 09 of 2022. By order dated 22.07.2023, he has been sentenced to undergo RI for 20 years, to pay a fine of Rs. 50,000/- and in default of payment of fine to further suffer SI for three months under Section 3/4(2) of the POCSO Act. No separate sentence has been awarded to the appellant under Section 376 of the IPC.

3. The victim, a 16 year old girl, is alleged to have been raped by the appellant in the night of 12.04.2022. She had lodged a written report on 13.04.2022 alleging that at about 9:15 PM, when she had gone to the washroom behind the house of her maternal grandmother, with whom she had been residing for a long time, the appellant, a 22 year old man came; gagged her; disrobed her and then committed rape on her. When she did not get back home for some time, her grandmother came out of the house looking for her. She saw that the appellant had



mounted himself on her. The grandmother shouted which awakened other family members. By that time, the appellant had run away. The victim has further stated that she went in the night to the Police Station and informed about the occurrence. The written report, however, is dated 13.04.2022 on the basis of which, the subject FIR, viz., Sahebpur Kamal P.S. Case No. 83 of 2022 dated 13.04.2022 was registered for investigation against the appellant. The Police submitted charge-sheet against him whereupon he was put on trial.

4. The Trial Court after having heard six witnesses on behalf of the prosecution and on going through the records of the case, convicted and sentenced the appellant as aforesaid.

5. Mr. Thakur has assailed the judgment and order of conviction on several counts but primarily on the ground of the victim being a major and the accusation against the appellant being motivated and false and brought up by the victim because of the



existing land dispute between the appellant and the grandmother of the victim. He has further argued that looking at the medical report as also the deposition of the witnesses, it would be very evident that a completely false case was lodged by the victim. By no stretch of imagination can the victim be called a sterling witness and her statements cannot be believed without serious caveats.

6. As opposed to the aforementioned contention, Mr. Binod Kumar, learned Advocate for the informant has submitted that the victim was 14 years of age according to the school certificate which forms part of the exhibited documents on behalf of the prosecution and the victim has supported the prosecution case in totality. Minor discrepancies are bound to occur in the deposition of a victim of sexual crime as also of other witnesses. He further submits that no person can claim to have an eidetic memory and some lapses ought not to be magnified for discarding the prosecution case. He has



further argued that this Court shall not treat the victim as an accomplice and shall look at the case of the prosecution in correct perspective.

7. Similar arguments have been advanced by Mr. Binod Bihari Singh, learned Additional Public Prosecutor.

8. We have given anxious consideration to the facts of this case and the materials brought on record on behalf of the prosecution.

9. We have found that the prosecution has failed to prove the case beyond reasonable doubts. There have been many a lapses on behalf of the prosecution which go to the root of the matter and we have also not found the victim to be making correct statement during the Trial.

10. It would be appropriate to first discuss the evidence of the victim and how different it is from what she had to state in her written report. The victim had come to the Court to depose along with her



grandmother and father.

11. Incidentally, neither of the parents of the victim have been examined at the trial.

12. She has reiterated that she had been residing with her grandmother since her childhood. In the night of the occurrence, she had been sleeping with her grandmother. On feeling the urge for going to the washroom, she went to the bathroom located behind the house and was about to relieve herself, when the appellant came from behind and gagged her. He also subjected her to sexual assault. When she shouted, then her grandmother, maternal uncle and the entire *mohalla* arrived. The appellant, thereafter, ran away. She identified the appellant to be Ajit Kumar. She knew that the appellant was resident of the same village. She was taken to the Police Station by her grandmother and maternal uncle, where a written report was prepared by somebody else and the case was filed (Ext. P-3/PW-4). At the time of occurrence, she was wearing a pair of



leggings and an underwear, both of which apparels were taken by the Police for the needful and a copy of the seizure-list was given to her (Ext. P-1/2/PW-4). She was medically examined. In her cross-examination, she has admitted that there is no bathroom in the house of her grandmother. It is a makeshift place for the members of the house to relieve themselves. The floor of such covered space which is used for washroom is of soil. She had not suffered any injury of any kind. In her cross-examination, she has further stated that she did not know the appellant nor was aware of his age. However, she knew that he had been litigating with the family of her grandmother. The appellant had been wearing a pair of shorts and a vest. She denied that she is more than 18 years of age. She also repeated before the Trial Court that she was gagged and was not allowed to speak out. Precisely, for this reason, she could not retaliate. She also denied that she had filed any false case.



13. When the aforementioned deposition of the victim is juxtaposed against the written report, it would appear that there has been a total shift in her stand. According to her initial version, she was gagged by the appellant and then raped. She had no occasion to shout. Her grandmother had come only when she did not get back to the residential quarters for a long time. The grandmother had seen the appellant in *flagrante delicto*. The grandmother then shouted when all the family members got up and she was taken to the Police Station.

14. During trial, a totally different story has been narrated by her which has been referred to above.

15. What appears to be, however, correct is the fact that the victim knew for certain that the appellant had been residing in the same village and that he was on litigating terms with her grandmother's family. The other disclosure by the victim was also proved to be medically correct, viz., she not having received any



injury of any kind on her person.

16. In this context, we would like to refer to the deposition of Dr. Arun Kumar(PW-3), who was part of the Medical Board which had examined the victim. He has stated that the Medical Board was constituted by the Superintendent of Sadar Hospital, Begusarai for examination of the victim on 13.04.2022. He along with Dr. Prachi, Dr. Raju and Dr. Divya Gupta conducted the examination of the victim on 15.04.2022 at Sadar Hospital, Begusarai and found no injuries, either abrasion or bruise on any part of her body, either front or back. So far for the external findings. In the internal findings, the Board did not find any seminal stain over genitalia or inner side of the thigh. No injury on genitalia was found. The hymen was found to be old and torn but healed and lax. The vaginal swab which was collected for testing the presence of spermatozoa also proved negative.

17. However, surprisingly, we find that in her



pregnancy test, the victim was found to be positive.

18. The age of the victim was assessed to be in between 17-19 years. In the opinion of the Medical Board, there was no evidence of recent sexual assault on her person.

19. It further appears that the Investigator of this case, viz., Dinesh Kumar (PW-6) had seized the clothes/wearing apparels of the victim on 13.04.2022 at 4:30 PM (Ext. P-1/3/PW-6). He had arrested the appellant on the same day from his house and had seized a blue coloured shorts with red stripes of "Shiv Naresh" brand. Before him, the appellant had disclosed that he had been wearing the same shorts at the time of the occurrence. That piece of wearing apparel was also seized on 13.04.2022 at 6:30 PM (Ext P-1/4/PW-6). The house of the grandmother of the victim was found to be made of straw. There was no washroom behind the hut but only a small space was covered with plastic; perhaps for the purposes of bathing as also for cleaning



utensils and clothes. All the seized apparels were sent to FSL for forensic examination. He, on inspecting the P.O., found nothing noticeable at that place to deduce that the occurrence must have taken place there. However, he has been candid before the Trial Court in stating that he did not enquire about any land dispute between the appellant and the family of the grandmother of the victim. He was also not aware whether any 144 or 107 Cr.P.C. proceedings had been initiated against the parties. He has also deposed that the victim had not told him that when she shouted, her grandmother and uncle and the residents of the locality had come. In fact, the investigator was told by the grandmother of the victim that when the victim had shouted, she had gone to look for her and found the appellant running away. Though the apparels seized by the investigator were dispatched to the Forensic Science Laboratory, Patna on 14.04.2022 only, but those were received in the laboratory on 25.04.2022.



20. A look at the description of the articles contained in the parcels which were received in the laboratory would further indicate that the dispatched delivery was of some other clothes and not of the ones which were seized by the investigator. One old, dirty brown underwear was marked 'A' which wore reddish brown stains over small areas. The other article was an old, dirty yellow *pyjama* marked 'B' which also had brownish stains. The third of the articles was an old, dirty torn blue half pant marked 'C' bearing reddish brown stains at places. The result of the examination is as follows:

Blood was detected in both A and C; blood mixed semen has been detected in Ext.-C; blood could not be detected in Ext. B; semen could not be detected in anyone of the exhibits marked 'A' and 'B'.

21. The serological report on the original group of blood and semen revealed that on the underwear and leggings, the blood group was 'A' whereas the blood



mixed semen on the half pant/shorts was of group 'C'.

22. All this does not inspire confidence for two reasons.

23. There is nothing on record to indicate that the wearing apparels of the victim and of the appellant were conserved properly. Though, there is no great delay in dispatching it to the laboratory but it was received in the laboratory on 25.04.2022. The other reason for doubting it is that those wearing apparels which were delivered do not match with what was seized.

24. There is yet another reason to render this report absolutely useless for the prosecution.

25. The requirement under the Code of Criminal Procedure of examination of persons accused of rape by medical practitioner is ordained in Section 53-A of the Code. This provision was inserted later in the Code and it mandates 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. 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.

26. In ***Krishan Kumar Malik Vs. State of Haryana (2011) 7 SCC 130***, the failure to obtain the report of the Forensic Science Laboratory 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 Forensic Science Laboratory which could have conclusively proved beyond any shadow of doubt with regard to the commission of offence by the appellant therein.

27. 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.

28. 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 DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in Cr.P.C., the prosecution could have still resort to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a full-proof case. But if it is not done, the prosecution must face the consequences.

29. 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.

30. However, in **Krishna Kumar Malik** (supra) in the aforementioned two requirements, three distinctions



were noted. Section 164-A required prior consent of the victim of rape. Alternatively, the consent of the person competent to give such a consent on her behalf is to be obtained before subjecting the victim to medical examination. Section 53-A does not speak about any such consent.

31. Section 164-A requires the report of the medical practitioner to contain among other things, the general mental condition of the women which requirement is not there under Section 53-A. Under Section 164-A(1), the medical examination of the victim is mandatory when it is proposed to get the person of the women examined by a medical expert during the course of investigation.

32. In contrast, Section 53-A(1) merely makes it lawful for a medical practitioner to make an examination of the arrested person, if there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of



such offence.

33. 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***]

34. In the present case, the appellant was arrested immediately after the occurrence. His wearing apparel was also seized. There was no reason whatsoever for not medically examining him which would have only added weight to the evidence in favour of the prosecution. That not having been done, we agree, the prosecution would not be thrown out on that score alone, but it definitely casts a serious doubt on



the investigation having been carried out in a proper manner.

35. Seen in this context, we find the deposition of the grandmother of the victim to be very damaging. She has categorically expressed before the Trial Court that there had been long pending litigation with the appellant. The appellant is the resident of the same village. This fact was known to the victim as well as would appear from her deposition.

36. The different sequence of events narrated by the victim, which is definitely not in sync with what she had stated in her written report and the statement of the grandmother of the victim makes the prosecution case absolutely doubtful.

37. The IO did not find any mark of violence or trampling at the PO which had an earthen floor. In fact, it was not even a washroom but a closed space for bathing. The victim has not suffered any injury. Even her private parts were completely unaffected. The old



torn hymen had already healed. The Medical Board was absolutely specific that there was no sign of any recent sexual intercourse with the victim.

38. We have also found that the FSL report has not been exhibited.

39. In this factual background, with the investigator not offering anything substantial and not having found out about any dispute between the appellant and the family of the grandmother of the victim, the evidences are all against the prosecution.

40. The prosecution has miserably failed to bring out a situation where the presumption under Sections 29 and 30 of the POCSO Act, 2012 could be invoked.

41. The appellant is thus given the benefit of doubt.

42. The judgment and order of conviction and sentence is set aside.

43. The appellant is acquitted of all the charges



against him.

44. Since he is in jail, he is directed to be released forthwith from jail, if not wanted or detained in any other case.

45. The appeal stands allowed.

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

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

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

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

Rajesh/Soaib

AFR/NAFR	NAFR
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