

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.863 of 2018**

Arising Out of PS. Case No.-50 Year-2017 Thana- MAHILA P.S. District- Kaimur (Bhabua)

Madan Rai S/o Musan Ray, Resident of Village- Diwane P.S. Chand, District- Kaimur Bhabua.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 924 of 2018

Arising Out of PS. Case No.-50 Year-2017 Thana- MAHILA P.S. District- Kaimur (Bhabua)

Satendra Ray, Son of Mithilesh Ray, resident of Village- Diwane, P.S.- Chand, District- Kaimur at Bhabua.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 863 of 2018)

For the Appellant/s : Mr. Vikram Deo Singh, Advocate

: Mr. Uday Pratap Singh, Advocate

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

(In CRIMINAL APPEAL (DB) No. 924 of 2018)

For the Appellant/s : Mr. Binod Kumar, Advocate

For the Respondent/s : Mr. Satya Narayan Prasad, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SHAILENDRA SINGH)

Date : 15-09-2023

Heard the learned counsel for the parties.

2. Since these two appeals are interlinked and common judgment of the Court of Additional Sessions Judge, 1st-cum-Special Judge, Kaimur at Bhabhua is the subject matter of



challenge, hence they are being decided together by this common judgment.

3. Both the appeals have been directed against the judgment of conviction and order of sentence dated 08.06.2018 and 18.06.2018 respectively passed in POCSO Trial No.26/2017, Reg. No.26/2017 arising out of Bhabhua Mahila P.S. Case No.50 of 2017 registered under Sections 366(A), 376 and 120(B) of the Indian Penal Code (in short IPC) and Section 4 of the POCSO Act, 2012 passed by the 1st Additional Sessions Judge-cum-Special Judge, Kaimur at Bhabhua.

4. The appellant/Madan Ray (hereinafter referred to as A1) has been convicted of the offences under Sections 366 & 376(2)(i)and (n) of IPC and Section 6 of the POCSO Act, 2012 and he has been sentenced to undergo imprisonment for life, to pay a fine of Rs.50,000/- under Section 376(2)(i)(n) of IPC and further sentenced to undergo rigorous imprisonment for ten years and fine of Rs.20,000/- under Section 366 of IPC and in default of payment of fine, to further suffer RI for a period of six months, whereas appellant/Satendra Rai (hereinafter referred to as A2) has been convicted of the offences under Sections 366 & 376/109 of IPC and Sections 6/17 of the POCSO Act, 2012 and he has been sentenced to undergo imprisonment for life and



fine of Rs.50,000/- under Section 376/109 of IPC and to further undergo RI for ten years and a fine of Rs.20,000/- under Section 366 of IPC and in default of payment of fine, further suffer RI for six months. The sentences of both the appellants have been directed to run concurrently.

5. The gravamen of the prosecution case is as follows:

6. On 13.08.2017 at about 7:00 P.M., the informant (PW-4) who is the victim (hereinafter referred to as victim) proceeded to attend to the call of nature towards the village school after serving food to her *Mausi* (aunt). Her co-villagers appellant/A1 and appellant/A2 came near her and made her sit on their motorcycle. They also gagged her. Thereafter she was taken to the Badhar (agricultural field) of village Bheladih where appellant/A1 raped her and the appellant/A2 held her by her both shoulders. They forcefully fed her bread with stupefying drugs and thereafter locked her in the toilet of the village. She had further alleged that she became unconscious and on 15.08.2017 in the morning, both the appellants took her to an abandoned house of one Ravindra Gond, where they made her sleep. The appellants then fled away. The victim has further alleged that after regaining consciousness, she started crying. Her co-villager, namely, Mantosh arrived at that place who



informed and called her uncles, namely, Bhupendra and Pintu telephonically and thereafter, her uncle/Pintu came and took her to her home when she narrated about the incident to her parents and her aunt.

7. With the above allegations, the victim filed a written complaint at Mahila Police Station, Bhabhua on 16.08.2017 which set the criminal law in motion and consequently a formal FIR bearing Mahila P.S. Case No.50/2017 was registered under Sections 366(A), 376 and 120(B) of the Indian Penal Code and Section 4 of the POCSO Act, 2012 and the investigation was started.

8. After the completion of investigation, the police submitted charge-sheet against both the appellants under Section 376D of IPC and Section 6 of the POCSO Act, 2012.

9. The appellants were charged for the offences punishable under Sections 366, 120B, 376(2)(i)(N) and 109 of IPC and also for the offence punishable under Section 6/17 of POCSO Act, 2012 by the Trial Court.

10. During the trial, six prosecution witnesses including the victim, doctor and investigating officer (IO) were examined. So far as documentary evidence is concerned, the written report filed by the victim at the police station concerned, formal FIR,



statement of the victim Section 164 Cr.P.C., victim's birth certificate, victim's age determination report as well as her medical examination report were proved and marked as exhibits 1 to 7 respectively. After the completion of prosecution evidence, the statements of the appellants were recorded by the Trial Court in which they denied the allegation of rape. The appellants did not give any evidence in their defence before the Trial Court.

11. While convicting the appellants, the learned Trial Court mainly relied upon the victim's statement recorded under Section 164 Cr.P.C. and her evidence during the trial to be reliable. In the light of the provision contained in Section 29 of the POCSO Act, 2012 it was presumed by the Trial Court that the appellants had committed the alleged offence of rape and observed that the appellants failed to prove their innocence.

12. Mr. Vikram Deo Singh, the learned counsel for the appellants has argued that the evidence adduced by the prosecution have not been appreciated in correct perspective and the conclusion of guilt arrived at by the learned Trial Court is against the evidence. The Trial Court has erred in placing reliance upon the witnesses who have not supported the prosecution version. All the material witnesses have turned



hostile. Though the victim has not been declared hostile but her evidence does not help the prosecution in any manner and while holding the appellants guilty of the alleged offences, the evidence of the victim was wrongly appreciated by the Trial Court. It has further been argued that at the place of occurrence, there was no incriminating material to support the allegations. There was no sign of the commission of rape or any other offence at the P.O. The evidence of the Investigating Officer (PW 5) was ignored by the Trial Court. Mr. Singh further contended that the medical evidence also is not in consonance with the prosecution version and the opinion of the medical expert (Ext.7) clearly indicated that the victim was never subjected to any sexual harassment.

13. Per contra, Mr. Abhimanyu Sharma and Mr. Satya Narayan Prasad, learned APPs. for the State have submitted that the Trial Court has correctly analyzed the prosecution evidence and has come to the conclusion that the appellants were guilty as the victim, who is the most important witness, had fully supported the prosecution version. It has clearly been established that the victim was subjected to sexual harassment. She was a minor at the time of commission of the offence. The circumstances appearing from the evidence of other witnesses



clearly indicate that the appellants were guilty. It has been further argued that the Trial Court rightly convicted the appellants for the offences and the judgment impugned does not suffer from any infirmity to warrant any interference.

14. Heard both the sides and perused the evidence.

15. The main question for consideration before the Court is whether the evidence of the prosecution witnesses including the victim are sufficient to presume that the appellants firstly kidnapped the victim and thereafter committed penetrative sexual assault more than once and whether the evidence adduced by the prosecution are sufficient to justify the conclusion of guilt of the appellants.

16. The most important witness is the victim herself as according to the allegations levelled by her in the FIR, she was only the person who witnessed the commission of the offence of kidnapping and rape and sexual assault committed with her by the appellants, hence the prosecution's case is completely based on her evidence. The victim was examined as PW-4 before the trial Court. Though, she supported all the allegations of the FIR in her chief examination but in the cross examination, she stated that she went to toilet after feeling the call of nature where she fell down due to dizziness and fainted but when she



regained her consciousness she found herself in her house. She further stated that the appellants did not commit any wrong with her and they did not feed her *roti* (bread) laced with drug, she signed on a blank paper at the direction of police officer concerned, she did not know the facts written in that paper on which she signed before the Magistrate in the Court. She further stated that an incident of verbal altercation had taken place in between her and the appellants because of that she revealed their names and they did not commit any wrong with her and they did not take her with them. In this way, the statements made by the victim in her cross-examination are completely against the allegations levelled by her in her written report which is the basis of the prosecution's case and also against the statements made by her in the chief examination and it is established principle of Evidence Act that the purpose of cross-examination is to check and test the credibility of a witness. In the light of the statements made by the victim in her cross-examination, the allegations levelled by her in her chief-examination do not appear to be credible and it will not be proper to place reliance upon her statements made by her in chief-examination and in this regard the trial Court wrongly appreciated the evidence of the victim.



17. So far as the evidence of other witnesses PW-1, PW-2 and PW-3 is concerned, though these witnesses are not material witnesses of the prosecution to prove the alleged offences, but in respect of other relevant facts, their evidence may be relevant but these witnesses also do not help the prosecution as all of them went hostile and they did not depose any fact to show that the victim was subjected to sexual assault at the relevant time on the alleged days of the occurrence. These witnesses were cross-examined at length by the prosecution in respect of their statements recorded by them before the Investigating Officer but they flatly denied all those statements which are stated to have been recorded by them before the Investigating Officer. Here it is important to mention that these witnesses stated before the Trial Court that the accused and victim's family compromised the case. Accordingly, the evidence of these witnesses also does not help the prosecution and the same is not sufficient to justify the conclusion of the trial Court.

18. So far as the evidence of investigating officer (PW-5), who investigated the present matter, is concerned during evidence, he stated that he visited all the places of occurrences which had been revealed by the victim in her written FIR but



from his evidence, it does not appear that he found any incriminating material at the places where the victim was sexually assaulted by the appellants. As per the allegation levelled in the FIR, the victim was fed Roti (bread) laced with drug by the appellants but in this regard there is no any medical evidence and the I.O. accepted in his cross-examination that there is no any forensic report to prove the feeding of drug to the victim and he further stated in the cross-examination that he did not find any sign of the offences at the abandoned house of one namely Ravindra Gond and also did not find any mark of injury on the person of the victim. Accordingly, the evidence of IO goes against the allegations made by the victim in her written complaint.

19. So far as the medical evidence of the victim is concerned, it also does not help the prosecution and in this regard the Ext. 7 is relevant. Though, any doctor of the Medical Board, who conducted medical examination on the victim was not produced and examined by the prosecution but however the medical examination report was exhibited by PW-6, who claimed to recognize the signature of one of the doctors of the Medical Board. But in the said medical examination report (Ext.7) of the victim it was opined by the Medical Board that



there was no injury on the private part or body of the victim and there was no evidence of recent sexual intercourse. The medical experts' opinion also goes against the prosecution and does not support its case in any way. Here, it is important to mention that till 15.08.2017, the victim remained in the custody of the appellants and next day after becoming free from their clutches, she lodged the FIR on 16.08.2017 and on the same day she was medically examined and there was no significant gap in between the last alleged physical and sexual harassment to the victim and the examination of the victim by medical experts and as per the allegation, the victim was raped by the appellant/A1 and during that course, her both shoulders were caught hold by the other appellant/A2 and when she cried both the appellants fed her *roti* (bread) laced with drugs and thereafter she was closed in a village toilet from where she was brought at an abandoned house. In view of the nature of said allegations, there must be some medical evidence to prove the physical and sexual harassment to the victim as she was medically examined just one day after the last physical harassment committed with her by the appellants but the medical evidence appearing from Ext.7 does not support the allegations levelled by her. Accordingly, in our view, the medical evidence available on the



record of the trial Court does not help the prosecution and the same is not sufficient to prove the offences charged.

20. The learned Trial court placed reliance on the provision of Section 29 of POCSO Act. But the said provision does not help the prosecution in the present matter as firstly the appellants were charged under Sections 6/17 of POCSO Act and convicted for the offence punishable under the said sections, while as per Section 29 of POCSO Act which deals with only the offences punishable under Sections 3, 5, 7 and 9 of the POCSO Act, a presumption of the commission of any of these offences shall be made by the Special Court only when such accused is prosecuted for any of these offences and moreover the provision of Section 29 applies where prosecution succeeds to establish the primary facts constituting any of the offences punishable under Sections 3, 5, 7 and 9 of the POCSO Act. Accordingly, the provision of Section 29 of the POCSO Act does not help the prosecution.

21. While convicting the appellants, the learned Trial Court mainly placed reliance upon the statement of the victim recorded under Section 164 of Cr.P.C. No doubt, the victim supported the allegations levelled by her in written FIR before the Judicial Magistrate in her statement recorded under Section



164 of Cr.P.C. but it is a settled principle of law that the statement recorded under Section 164 of Cr.P.C. can never be used as substantive evidence of truth of the facts and the same may be used only for contradiction and corroboration of a witness who makes it. In this regard, the observation made by Hon'ble the Supreme Court in the case of *Utpal Das and another versus State of West Bengal, reported in (2010) 6 SCC 493* is relevant and important. Though the victim's statements made in the chief examination in her court evidence are relevant to the alleged offences and the same also go in favour of the prosecution's case as well as the allegations levelled by her in the FIR but the victim did not remain firm to her stand in her cross examination and revealed a different story which goes against the prosecution story and also casts a serious doubt on the allegations levelled by her in her written FIR and statement recorded before the Judicial Magistrate.us

22. The Court is of the view that in the light of the above discussed facts, it was not proper for the Trial Court to convict the appellants merely on the basis of victim's statement recorded by her before the Judicial Magistrate and the statements made by her in the chief examination of her court's evidence as, if victim's whole evidence is taken into account



then a serious contradiction in her statements creating a serious doubt in the prosecution story appears.

23. In the light of above discussed facts and evidences, the Court is of the considered view that the Trial Court has erred in convicting the appellants for the offences for which they were charged as the so called victim made contradictory statements before the trial Court in her evidence and the medical evidence also goes against her allegations and other material witnesses went hostile.

24. Under the afore-noted circumstances, it is highly unsafe to affirm the judgment and order of conviction and sentence against the appellants.

25. For the afore-noted reasons, the judgment of conviction and order of sentence dated 08.06.2018 and 18.06.2018 respectively passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Kaimur at Bhabhua in POCSO Trial No.26/ 2017, Reg. No.26/2017 arising out of Bhabhua Mahila P.S. Case No.50 of 2017 are set aside.

26. The appellants are in custody. They are acquitted of the charges levelled against them and are directed to be released forthwith unless their detention is required in any other case.

27. The appeals stand allowed.



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

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

30. Interlocutory application/s, if any, also stand disposed of accordingly.

(Shailendra Singh, J)

I agree.

(Ashutosh Kumar, J)

(Ashutosh Kumar, J)

Sanjay/-
Sangam/-

AFR/NAFR	AFR
CAV DATE	21.07.2023
Uploading Date	15.09.2023
Transmission Date	15.09.2023

