IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.229 of 2023

Arising Out of PS. Case No.-3 Year-2019 Thana- MAINATAND District- West Champaran

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MUNNA ANSARI SON OF LATE KALIM ANSARI @ LATE KALIM MIAN R/O Village - Mainatand, P.S.- Mainatand, District - West Champaran.

..... Appellant/s

Versus

The State of Bihar ..... Respondent/s

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The incidents in this case are as follows: Informant's daughter aged about 12 years went outside the house for nature's call after taking her meal at about 8pm. One Anirudh Sah came to the house and informed that he had seen two persons escaping the field when informant made query from his wife about his daughter return but the victim was not found at the house. On searching in the fields her dead body was found. It was found after committing rape her throat was pressed out of seven only 2 her mother and father have supported the case. Other witnesses turned hostile. Impugned judgement of conviction and order of sentence set aside and appellant acquitted. Appeal allowed.

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Appearance :
For the Appellant/s : Mr. Bimlesh Kumar Pandey, Adv.
Mr. Krishna Kant Pandey, Adv.
For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY)

Date : 19-01-2024

This appeal is directed against the judgment of conviction dated 06.02.2020 and order of sentence dated 24.02.2020 passed by learned 1st Additional Sessions Judge- cum-Special Judge, (SC/ST/POCSO), Bettiah, West Champaran in Mainatand P.S. Case No. 03 of 2019, CIS No. 02 of 2019 whereby the appellant has been held guilty for the offences punishable under Sections 376(D), 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 4, 6 of Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act.') and has been sentenced to undergo life imprisonment and fine of Rs. 50,000/- under Section 302 of the IPC and in default of payment of fine, the appellant has been directed to suffer further

five years imprisonment; 20 years rigorous imprisonment and fine of Rs. 50,000/- under Section 376(D) of the IPC and in default of payment of fine, the appellant has been directed to suffer further four years imprisonment; and life imprisonment and fine of Rs. 50,000/- under Section 6 of the POCSO Act and in default of payment of fine, the appellant has been directed to suffer further five years imprisonment. The sentences have been ordered to run concurrently.

2. The names of the victim and PWs-1 and 5 (who are victim's mother and father) have been concealed in the judgment to protect their prestige and dignity.

3. According to written report of informant (PW-5), the occurrence is of 01.01.2019 at about 8:00 PM for which information was given to the S.H.O. Mainatand police station on 02.01.2019 at 9 hours and immediately whereafter FIR was registered.

4. The prosecution case as stated by the informant (PW-5), in brief, is that on the fateful day i.e. 01.01.2019 at about 8 PM, informant's daughter aged about 12 years went outside the house in the east direction to answer her nature's call after taking meal. At the relevant time, informant and his family members were warming their hands by fire heat at the gate. In the meantime,

Anirudh Sah (PW-2) came to the house from Mainatand and it was stated by him that two persons made to escape towards east field after having seen him. One person was identified as Munna Ansari (appellant) whereas other person was not identified. After having heard the said fact, informant (PW-5) made query to his wife (PW-1) regarding returning of her daughter from nature's call but when victim was not found at the house, search was made by the informant (PW-5) and his family members towards the east field and other places. At last, her dead body was found towards the west of haystack of Ramchandra Patel. It was found that after having committed rape upon the victim, her neck was pressed after inflicting injury on her mouth.

5. On the basis of written report of informant (PW-5), Mainatand P.S. Case No. 03 of 2019 dated 02.01.2019 was registered under Sections 376(d), 302 of the IPC and Section 4/6 of the POCSO Act. Routine investigation followed. The statement of witnesses came to be recorded and on completion of the investigation, the appellant and other were charge-sheeted under the aforesaid sections. The learned Trial court was pleased to frame charges under Sections 302, 376(D) of the IPC and Sections 4, 6 of the POCSO Act. Charges were read over and explained to

the appellant and other to which they pleaded not guilty and claimed to be tried.

6. In order to bring home guilt of the accused persons, prosecution has examined altogether seven witnesses. PW-1 (mother of the victim/deceased), PW-2 Anirudh Sah, PW-3 Chandeshwar Sah, PW-4 Ankur Sah, PW-5 (informant cum father of the victim/deceased), PW-6 Ramvinod Singh(I.O.) and PW-7 Dr. K.M.P. Parve.

Prosecution has relied upon following documentary evidence on record:-

Ext. 1- Thumb impression of informant on written report.

Ext. 2- Thumb impression of informant on seizure list.
Ext. 3- Endorsement on written statement.
Ext. 3/a- Signature of I.O. on endorsement.
Ext. 4- Signature of I.O. on FIR.
Ext. 5- Inquest report.
Ext. 5/a-Signature on the inquest report.
Ext. 6-Seizure list.
Ext. 6/a- Signature on the seizure list.
Ext. 7-Second seizure list.
Ext. 7/a Signature on the second seizure list.
Ext. 8-Postmortem report.
Ext. 8/a-Signature of doctor on the postmortem report.
Ext. 9-FSL report.

Defence of the appellant as gathered from the line of cross-examination of prosecution witnesses as well as from the statement under Section 313 of the Cr.P.C. is that of total denial. However, the appellant did not enter into defence.

7. After hearing the parties, the learned Trial court convicted the appellant and sentenced him as indicated in the opening paragraph of the judgment. By the same impugned judgment, co-accused Bullet Sah was also convicted and sentenced under the aforesaid sections in the same manner.

8. We have heard Mr. Bimlesh Kumar Pandey, the learned counsel for the appellant at sufficient length of time. Following submissions have been made on behalf of learned counsel for the appellant:-

Learned counsel for the appellant submitted that appellant's conviction is based without having any cogent evidence. He further submitted that it appears from the initial version of written statement that none is the eye witness of the occurrence. It has been further submitted that out of seven prosecution witnesses, PWs-2, 3 and 4 have been declared hostile at the instance of the prosecution. Only PW-5 who is the informant and his wife (PW-1) supported the prosecution case but the statement of PW-5 adduced during the course of trial is quite inconsistent with his initial information given through written statement. In the initial information, the informant (PW-5) stated that PW-2 had seen Munna Ansari (appellant) and another person fleeing away in the eastern outskirts of the village but the

informant during course of cross examination deposed that he himself had seen Munna Ansari (appellant) fleeing away. He further submitted that in the light of said contradictory statement of informant (PW-5), his statement is neither reliable nor trustworthy. Learned counsel further submitted that PW-1 is not eye witness of the occurrence as she has also not seen any person going alongwith the victim. Learned counsel further submitted that clothes of appellant and deceased were seized and sent to F.S.L. for examination alongwith viscera of the victim but DNA profiling did not match with the appellant. He further submits that confessional statement of the appellant has been recorded which has no evidentiary value in the eye of law and nothing was recovered on the basis of confessional statement of the appellant. The appellant was apprehended only on the basis of suspicion and except suspicion, there is nothing on record to connect the present appellant with the alleged occurrence. In the light of aforesaid facts and circumstances, there is no connecting material to establish the link that appellant is in any way connected with the alleged occurrence. Learned counsel of the appellant further submits that co-convict Bullet Sah, on the same set of evidence suffered same quantum of sentence under the aforesaid sections, stands acquitted by co-ordinate Division Bench of this Court vide

Cr. Appeal (DB) No. 443 of 2020 and hence, appellant also deserves same treatment.

9. Mr. Bipin Kumar, the learned Additional Public Prosecutor representing the State submits that the appellant is seen and identified by Anirudh Sah (PW-2) as same is stated in initial version of PW-5 (informant) given through written statement. He further submits that informant has also reiterated the statement of initial version of prosecution story during adducing the evidence and same is corroborated and supported by PW-1 in her evidence. The postmortem report supports the initial version of prosecution story. In this way, impugned judgment and order passed by the learned Trial court is justified and legal and no interference is needed.

10. We have perused the impugned judgment, order of Trial court and Trial court records. We have given our thoughtful consideration to the rival contention made on behalf of the parties as noted above.

11. It is necessary to evaluate, analyze and screen out the evidence of witnesses adduced before the Trial court in the light of the offences punishable under Sections 376(D), 302 of the IPC and Section 4/6 of the POCSO Act.

12. PW-1 is mother of the deceased. She reiterated the version of written statement regarding time of occurrence. She deposed that she was at her house alongwith children at the relevant time. When query was made by her husband about the victim, she told that victim went to ease herself in the field. During course of examination-in-chief she made statement that during course of search informant's elder brother pointed out that the appellant and Bullet Sah were being seen in running condition but in initial version of story of prosecution, the search regarding whereabout of the deceased was initiated only after suspicious escape of appellant and other. From version of PW-1, during examination-in-Chief it clarifies that without prior suspicious running of the appellant and other, search was made to find out the victim which is totally inconsistent with the initial version of prosecution story wherein search was made after receiving information of suspicious escaping of the appellant and other. In this way, even her statement is not quite consistent with the story of prosecution which forms the basis of written statement. In this way, suspicious escaping of the appellant and other is not found to be reliable and authentic as she has stated that during course of search the informant's elder brother gave information about the suspicious activity of the appellant and other. On the point of

recovery of dead body from the haystake of Ramchandra Patel was consistent with the initial version of story of prosecution. During course of cross-examination, she has clearly stated that she has not seen the occurrence through her own eye and her daughter went alone outside for easing herself and she has not seen any person going alongwith the victim. In this way, the statement of PW-1 can be seen as a hearsay witness and even she has not seen the appellant going alongwith the victim and her statement is neither reliable nor authentic to base the conviction of the appellant.

13. PW-2 (Anirudh Sah) has stated that at 8.00 PM he was returning from Mainatand and he had seen the appellant and other to whom he did not identify, escaping away from haystack. From initial version of prosecution story, his statement is relevant only to the extent that he has seen the appellant and other in escaping away after seeing this witness. But during examination-in-chief, he made quite different statement from initial version that he saw the appellant and other escaping away from haystack of Ramchandra Patel. PW-2 has been declared hostile as he has not supported the case of prosecution but his statement regarding suspicious activity of the appellant and other is quite inconsistent when it is found in initial version that he has seen escaping away the appellant and other after seeing the PW-2. It is quite obvious

that the dead body was recovered near haystack of Ramchandra Patel. In that situation, PW-2 has made improvement in the statement that he has seen the suspicious escape of the appellant and other from the place where the dead body was recovered. In both way, even prosecution has declared the statement of PW-2 as hostile and his statement with regard to the suspicious escape of the appellant is also not authentic or not reliable as he has made statement which suits the prosecution story in case of the appellant.

14. From the evidence of PW-3 Chandeshwar Sah and PW-4 Ankur Sah it is crystal clear that they are not eye witness of the occurrence and they have not supported the case of prosecution and their evidence is of no relevance to prove the prosecution case and they have been declared hostile by the prosecution.

15. PW-5 is the informant and father of the victim (deceased). He deposed that the victim was aged about 12 years at the time of alleged occurrence. His statement regarding time of the occurrence is quite consistent with the initial version. He has reiterated specifically and categorically that the victim went to ease herself in field but the statement of the PW-5 during examination-in-chief is quite inconsistent regarding the search of victim. During initial version of prosecution story, he has stated

that search was made when information was given by PW-2 Anirudh Sah that he saw the appellant and other escaping away after seeing PW-2. But during examination-in-chief he stated that search of his daughter began when she did not return in time. He made bald statement which has no connectivity with the early version given through written statement that during course of search, Anirudh Sah who was moving towards market, has stated regarding escaping of the appellant and other. The statement of PW-5 on the issue of search was quite inconsistent with the initial version of prosecution story as search was initiated on the statement given by Anirudh Sah regarding escaping of the appellant and other. During examination-in-chief, he stated that search was initiated as the victim did not return in time and during course of search, information was given by Anirudh Sah regarding escaping of the appellant and other. In this way, the statement of informant (PW-5) regarding initiation of search of victim are quite divergent at the time of initial version of written statement and that of evidence adduced during trial. At one occasion, he stated that initiation of search of victim was made at the information given by PW-2. At another occasion search of victim was initiated when she did not return in time after easing herself. He has specifically and categorically supported the story of prosecution on the point of

recovery of the dead body of the victim from the haystock of Ramchandra Patel and found injury on cheek, chest and lip. In this way, he has supported that the victim was killed after committing rape upon her. During cross-examination, he has stated that he has himself seen the appellant running away and he also stated that the appellant is the driver of his brother. In this way, statement of the informant that he has himself seen the appellant in running condition is quite inconsistent with the story of prosecution. His statement during examination-in-chief has been made in order to suit the prosecution evidence. He has not seen the occurrence. His statement regarding the initiation of search of the victim was not in consonance with the initial version of prosecution story and he has also admitted that victim went outside the house alone for easing herself and no one has been seen going towards the victim and he has admitted that there was darkness in night when his brother gave information at 8.00 PM and there is no source of light to identify the appellant in night and even the initial version of prosecution story is taken into account, then question arises how the person in running condition can be identified by other without hearing the voice in darkness. Prudently and pragmatically, it is difficult to identify a person in dead silence of night only on the basis of running condition of the appellant. Pragmatically, it is

impossible to identify a person in running condition in darkness. From perusal of the evidence of PW-5, it is crystal clear that he has deposed before the court to frame the charges against the appellant in order to prove the prosecution case.

16. PW-6 (Ramvinod Singh) is Investigating Officer of this case. He took charge of investigation of this case on 02.01.2019. During course of investigation he prepared inquest report of the deceased (Ext.-5) which indicates that after having committed rape upon the victim, her neck was pressed after inflicting injury on her mouth. He has also recorded the re-statement of the informant, his wife and other witnesses. He submitted charge-sheet against the appellant and he got the postmortem of the victim conducted. The statement of PW-6 (I.O) suffers from serious inherent defects. He is not a factual witness rather he is an official witness. He has not stated that statement of witnesses of the inquest report was recorded after how much time and how he has mentioned that Anirudh Sah (PW-2) is the eye witness. Even Anirudh Sah (PW-2) has not seen the occurrence which is clear from initial version of prosecution story. In this way, his investigation suffers from inherent defects.

17. PW-7 Dr. K.M.P. Parve conducted the postmortem examination on the dead body of victim/deceased and the

postmortem report indicates incident of sexual assault on the victim before she died of asphyxia, as a result of throttling and time elapsed since death was within 24 hours.

18. From perusal of record, it is found that inner garment of the deceased and an inner lower body warmer of the appellant was seized and sent for forensic examination to the Forensic Science Laboratory. The result of the Forensic Science Laboratory reads as under:-

> "DESCRIPTION OF ARTICLES CONTAINED IN PARCELS.
>
> 1. The old dirty blue kachhiya marked 'A' bore reddish brown stains at places. It also bore greyish white stains which were stiff to feel and which produced characteristic bluish white fluorescence in ultra violet light. The kachhiya was said to be of deceased.
>
> 2. The old dirty maroon colour inner lower body warmer-paizama marked 'B' bore brownish stains. It also bore greyish white stains which were stiff to feel and which produced characteristic bluish white fluorescence in ultra violet light. The paizama was said to be of appellant Munna Ansari.
>
> RESULT OF EXAMINATION
>
> 1. Blood has been detected at places in the exhibit marked 'A'.
>
> 2. Semen has been detected in each of the exhibits marked 'A' and 'B'.

3. Blood could not be detected in the exhibit marked 'B'.

4. Serological report on origin and group of blood and semen would follow.

5. Opinion on other point is not possible.

FSL report clearly indicates that appellant is not in any way connected with the alleged occurrence.

19. After analyzing the evidence of the present case, we find that this case is not based on direct evidence as there is no eye witness account which is evident from FIR itself. PW-5 who is narrator of initial version of written statement has unfolded the story of prosecution in a sequence of events. In the first sequence, he reveals that the victim left the house for easing herself alone and no one is seen going alongwith her and in same breath, it is told by the informant that Anirudh Sah (PW-2) informed about the suspicious escaping of the appellant and other after seeing the Anirudh Sah (PW-2) and on the basis of said information, search was made to find out the victim and her dead body was found at the haystack of Ramchandra Patel.

20. From the aforesaid narration of initial version, it is clear that no one is eye witness of the alleged occurrence. But when we scrutinize the evidence of PW-1 and PW-5, we find that PWs 1 and 5 have improved their case in order to make their depositions fit in the scheme of the prosecution version put forth

before the trial. On the issue of search to find out the victim, the statement of both witnesses are quite inconsistent with the story of prosecution. They have already stated that both are not eye witness of the alleged occurrence and they have also not seen anyone going towards the victim. Then the question of raising finger against the appellant is merely a ball park assessment against the appellant. Their evidence are full of infirmities and imperfection which strike at root of prosecution story as they are the factual witnesses who have not been declared hostile. So far as the hostile witnesses such as PWs 2, 3 and 4 are concerned, they have been declared hostile because they have not supported the case of prosecution as they have displayed mendacity in adducing the evidence before the Court. From the perusal of initial version of story of prosecution only PW-2 is the witness who has seen the suspicious escape of the appellant but it has not been stated in initial version that from which place the appellant and other have escaped away. Only important fact came to fore that the appellant and other escaped after seeing Anirudh Sah (PW-2). It has not been revealed that the appellant and other were escaping from the place where dead body was recovered but during course of adducing the evidence Anirudh Sah (PW-2) has developed a new story that he has seen the appellant and other escaping away from the place

where dead body was being recovered. One reason is quite obvious that as to why PW-2 has made such statement, in order to make his deposition fit in the scheme of prosecution version. In this way, PW-2 has played suspicious mendacity to implicate the appellant without any basis.

21. The postmortem report indicates incident of sexual assault on the victim before she died of asphyxia, as a result of throttling though which is quite in consonance with the initial version of prosecution story. The FSL report does not show any connectivity of the appellant with the victim. The I.O. (PW-6) has not taken pain to find out the document regarding the age of victim which is necessary under statutory provision of POCSO Act. He has only collected Adhar card to determine the age of the victim, as the age of the victim is determined under the statutory provision of Section 94 of Juvenile Justice Care and Protection of Children Act, 2015 which is lacking in the investigation of the I.O. (PW-6) and prosecution has not taken pain to establish the age of the victim under statutory provision though, it is self proclaimed by the informant and other witnesses without any basis of legal requirement that victim is of 12 years.

22. We can test the material of present case on the circumstantial evidence as there is no eye witness account of the

present case but each circumstance (which may be relevant facts or fact in issue) should be proved beyond reasonable doubt and the proved circumstance must form complete chain. The chain of circumstances must unerringly point towards the guilty of the accused i.e. it should be only reasonable probability of causation of offence. When we are analyzing the evidence of present case, it is found that neither the statement of PW-1 nor the statement of PW-5 or other witnesses indicate that the appellant was lastly seen with the deceased at any point of time. From the version of PWs 1 and 5, victim was not seen with anyone when she left her house for attending the natural call. In this way, even the present case is not the case of last seen with the deceased.

23. In the present scenario, Section-3 of the Evidence Act is relevant and first part of said section covers belief which relates with direct evidence and the second part covers the supposition relating to circumstantial evidence and Section-3 of the said Act gives guidelines how to appreciate the direct evidence and it is clearly mentioned how the fact is proved.

> **"Proved"**-*A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.*

24. It is a clear cut guideline how to appreciate the direct evidence and how to appreciate the circumstantial evidence. In the first portion it is mentioned that a fact is said to be proved when, after considering the matters before it, the court; either believes it to exist and in the second part it is mentioned that how a prudent man can make his supposition towards a particular case.

25. The words used in the section are-“a fact is said to be proved when after considering the matter before it”- the section does not warrant a court to consider only evidence. For example a weapon of offence- a knife or gun- is not evidence, oral or documentary but it still has to be considered by the court. Again take for example, matters of which judicial notice can be taken. These things are not to be proved, but are matters permitted to be considered by the court. Now, Section 3 talks about belief of a judge for a fact to be proved and second part of section talks about probability of such a degree that a prudent man would act upon supposition that the fact exists. Judge should step into shoes of a prudent man. A common man would have many suppositions for the cause of occurrence in a case which is based on circumstantial evidence. There are several circumstances which are placed before the court but it is only based on supposition. Then the court evaluate each supposition when the court have ruled out the

suppositions, it is only such suppositions which has the highest probability, should be relied upon and taken as a proved. That is how the fundamental principle in respect of circumstantial evidence evolves.

26. In this way, the present case is neither related with direct evidence nor that of circumstantial evidence and the prosecution has failed to prove its case beyond reasonable doubt and the contention of counsel of the appellant is quite tenable and sustainable that neither there was any eye witness nor was there any material to prove the prosecution case beyond reasonable doubt and the Trial court has failed to prove the evidence in correct perspective.

27. Keeping in view all the facts and the discussions made above, impugned judgment of conviction and order of sentence are hereby set aside and appellant is acquitted of the charges levelled against him.

28. The appeal stands allowed.

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

30. The records of this appeal be returned to the Trial Court forthwith.

31. Interlocutory application/s, if any, also stands disposed of accordingly.

(Alok Kumar Pandey, J)

(Ashutosh Kumar, J)

shahzad/
amitkumar

AFR/NAFR	AFR
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