IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.945 of 2017
Arising Out of PS. Case No.-34 Year-2014 Thana- MALAYPUR District- Jamui

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Sakindar Yadav, Son of Sri Mishri Yadav, resident of Village- Devachak, Police Station- Malaypur in the district of Jamui.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with
CRIMINAL APPEAL (DB) No. 875 of 2017
In
CRIMINAL APPEAL (SJ) No.2034 of 2017
Arising Out of PS. Case No.-34 Year-2014 Thana- MALAYPUR District- Jamui

==========

Dr. Nagendra Kumar, son of Sri Umesh Prasad, Resident of village- Bardih, P.S. Islampur, District- Nalanda.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

==========

S.376(D), 201 and 120 (B) Of Indian Penal Code, S. 4 Pocso Act S. 164 Criminal Procedure Appeal arise out of common judgement which are heard and disposed of. The father of the victim due to his ill health sent his daughter to one Dr. Birju Kumar for treatment – while returning alone after treatment near her school - accused - caught - gagged - victim – took her inside the school - committed rape - threatened to kill - if identify disclosed - informant - father of victim for treatment - blood administration - treatment going on - conviction suffering - infirmities - impugned judgment not sustainable - no independent witness - Dr. Birju not examined- medical examination of victim - fails to establish rape - no visible marks of violence in body - non determination of age of victim - findings lack material evidence – victim deposition indicate accused forcibly took her - shouted and cried during occurrence – victim herself returned home - no witnesses conviction of appellant not sustainable – appeal allowed appellant to be released from custody. Dr. N. Kumar discharge from liability of bail bond.

Ref : Takhaji Hiraji v Thakore Kubersing Chamasingh (2001) 6 SCC 145

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Dr. Nagendra Kumar, son of Sri Umesh Prasad, Resident of village-Bardih, P.S. Islampur, District- Nalanda.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :
(In CRIMINAL APPEAL (DB) No. 945 of 2017)
For the Appellant : Mr. Ashok Kumar Jha, Advocate
Mr. Binod Kumar, Advocate
For the Respondent : Mr. Abhimanyu Sharma, A.P.P.
(In CRIMINAL APPEAL (DB) No. 875 of 2017)
For the Appellant : Mr.Ajay Kumar Thakur, Advocate
Mr. Ritwik Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate
For the Respondent : Mr. Abhimanyu Sharma, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 14-07-2023

Heard the learned counsels for the appellants and learned counsel for the State.

2. The criminal appeals arise out of common judgment of conviction and the order of sentence, hence they have been heard together and are being disposed of by this common judgment.

3. Both the criminal appeals have been preferred against the judgment of conviction and the order of sentence dated 29.06.2017 passed by Shri Rajesh Kumar, Additional Sessions Judge 1st, Jamui in Sessions Trial No.247 of 2015 corresponding to POCSO case No.16 of 2015 arising out of Malaypur P.S. case No.34 of 2014, whereby and whereunder the appellant Sakindar Yadav has been convicted under Sections 376(D), 201 and 120(B) of the Indian Penal Code (referred to 'I.P.C.') and Section 4 of the POCSO Act and appellant Dr. Nagendra Kumar has been convicted under Section 201 of the I.P.C. Appellant Sakindar Yadav has been sentenced to undergo 20 years rigorous imprisonment with fine of Rs.50,000/- for the offence under Section 376(D) of the I.P.C. and in default of payment of fine, additional imprisonment for one year and has been sentenced to undergo 3 years rigorous imprisonment for the offence under Section 201 of the I.P.C. and has been sentenced to undergo life imprisonment with fine of Rs.50,000/- for the offence under Section 4 of the POCSO Act and in default of payment of fine, additional imprisonment for one year. No separate sentence has been awarded to the appellant Sakindar

Yadav under Section 120B of the I.P.C. All the sentences of the appellant Sakindar Yadav have been directed to run concurrently. Appellant Dr. Nagendra Kumar has been sentenced to undergo rigorous imprisonment for 3 years with fine of Rs.20,000/- for the offence under Section 201 of the I.P.C. and in default of payment of fine, additional imprisonment for six months.

4. The prosecution case, as per the fard beyan of informant Sanjay Tanti (P.W.5) recorded by Smt. Raj Ranjani Kumari (P.W.6), Station House Officer of Mahila Police Station, Jamui on 02.11.2014 at about 01:00 p.m. at Sadar Hospital, Jamui is that on 28.10.2014, due to illness, he sent his daughter (the victim-P.W.4) to Dr. Birju for treatment. It is said that the victim was sick for the past 3-4 days, the informant used to send the victim to Dr. Birju. On 28.10.2014, the victim was returning alone after taking injection from the doctor and when she reached near the School, accused Sakaldeo Yadav of the same village told the victim to stop, then the victim asked as to what was the reason, then Sakaldeo Yadav came near the victim and caught hold her and thereafter Lalan Yadav, Gorelal Yadav and Sakindar Yadav (appellant in Criminal Appeal (DB) No.945 of 2017), who were hiding behind the School, all resident of village Devachak caught hold of the daughter of the informant, put cloth on her mouth and

took her inside the School, where they all committed rape with the daughter of the informant and threatened the victim to kill her parents if she disclosed the incident to any one. Occurrence is said to have taken place on 28.10.2014 at about 10:00 a.m. The informant also stated that the accused persons took the victim to Jamui for treatment and the doctor had advised that blood is to be administered to the daughter of the informant. The informant further stated that as *Chhath parva* was performed by him, due to which he could not realise and his daughter also did not disclose him about the occurrence. When the condition of the daughter of the informant was deteriorated and having enquiry made to her, she disclosed the occurrence to the informant and her mother on 01.11.2014 at about 03:00 p.m. Thereafter, the informant took the victim for treatment at Jamui Hospital, where her treatment was going on.

5. On the basis of aforesaid fardbeyan of the informant, formal F.I.R. was drawn up and Malaypur P.S. case No.34 of 2014 was registered. After investigation, charge sheet was submitted, whereafter cognizance was taken. Thereafter, charges were framed against the appellants to which the appellants pleaded not guilty and claimed to be tried.

6. During trial, the prosecution examined altogether eight witnesses, namely, Urmila Devi (P.W.1), Hiriya Devi (P.W.2), Rekha Devi (P.W.3), victim (P.W.4), Sanjay Tanti-informant (P.W.5), Raj Ranjani (P.W.6), Dr. Veena Singh (P.W.7), Dr. Rajesh Kumar (P.W.8) and Dr. Arbind Kumar (P.W.9). In support of its case, the prosecution has also produced exhibits as Ext.1 (signature of victim on statement under Section 164 Cr.P.C.), Ext.2 (seizure list), P.W.3 (formal F.I.R.), Ext.4 (Medical report), Ext.5 (Injury report of Lalan Yadav), Ext.6 (Age determination report of victim by Dr. Arvind Kumar). The defence has not produced any direct ocular evidence in support of its case. The defence has produced documentary evidence as Ext.A (injury report of accused Sakindar Yadav). After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants in the manner as indicated above.

7. The learned counsels for the appellants have submitted that the judgment of conviction suffers from several infirmities that have been overlooked by the learned trial court, and therefore, the impugned judgment is not sustainable in the eyes of the law. It has been pointed out that despite the serious allegation that the alleged rape took place at a government middle school during the widely observed Chhath festival, there is a lack of

independent witnesses to corroborate the incident. The significant influx of people in the village during the festival further raises doubts regarding the absence of such witnesses. Furthermore, it has been highlighted that the prosecution has alleged that the victim, after receiving an injection from Dr. Birju, was returning home at the time of the incident. However, Dr. Birju himself has not been examined as a witness in this case, which casts doubt on the fairness of the trial. The appellants' counsel further argued that the medical examination of the victim fails to establish the commission of rape. They emphasize the absence of spermatozoa, negative pregnancy test results, and the doctor's statement indicating the lack of swelling or redness in the vulva, which are commonly observed in cases of gang rapes. Additionally, there are no visible marks of violence on the victim's body. Moreover, it is alleged that the non-determination of the victim's age in accordance with Section 34(2) of the POCSO Act has caused prejudice to the case. The appellants' counsel argued that this omission has undermined the prosecution's ability to establish the appropriate legal provisions applicable to the victim. With regard to appellant Dr. Nagendra Kumar, it was contended that there is a lack of evidence to substantiate his involvement. No witnesses have testified to the doctor's identity, and there is insufficient

material proof to support his alleged medical examination of the victim. Based on these arguments, the appellants' counsel submitted that the learned trial Court's findings lack material evidences, reasoning, and merit. Therefore, the impugned judgment of conviction should be set aside.

8. The learned A.P.P. appearing for the State has submitted that the prosecution has been able to prove its case beyond all reasonable doubts, and therefore, learned trial court has rightly convicted the appellants by relying upon the evidence brought on record by the prosecution during trial. It has been contended that minor contradictions and variations in the testimony of the witnesses cannot be a ground to discard their evidence as a whole. Therefore, the judgment and order assailed in this appeal requires no interference and appeal is liable to be dismissed.

9. After perusing the record and hearing the arguments advanced by the parties, following issues arise for consideration in this appeal: -

> (I) Considering the place of occurrence and time of occurrence, whether the allegation of commission of rape in a Govt. School situated in the heart of the village at 10 a.m. in the morning during the chhath festival on the 1st floor (Varamda) of the School can be believed on the basis of evidences adduced on behalf of the prosecution?

(II) Whether the medical examination report of the victim supports the statement of the victim (PW4)?

(III) Whether the non-determination of the age as per the Section 34(2) of the POCSO Act regarding the age will cause prejudice to the fair trial?

(IV) Whether the non-production of the document related to the medical examination by Dr. Nagendra Kumar would cause prejudice to the appellants?

10. In order to deal with issue no. I, it is relevant to consider the statement of the victim under Section 164 Cr.P.C., who precisely identified the place of occurrence as the first floor of the school. Furthermore, both the PW4 in paragraph 7 and PW5 in paragraph 12 state that there are numerous houses situated between the school and the road. Notably, the PW2 in paragraph 10 of his deposition estimates that approximately 900 houses are located between the school and the victim's residence, with clear visibility of the school from these houses. Moreover, from the fardbeyan and the victim's (PW4) testimony in paragraph 1, it is established that the incident occurred at approximately 10 am in the morning. The victim (PW4) in paragraph 12 further highlights that during the winter season, villagers tend to gather on rooftops and along the roads to bask in sunlight. These contextual details contribute to our understanding of the situation and the potential visibility of the alleged incident. The fardbeyan, section 164

Cr.P.C. statement, and the victim's deposition all indicate that the accused forcibly took her to the first floor of the school where she shouted and cried during the occurrence. It appears from the testimonies of the PW5 in paragraph 1 and PW4 in paragraph 1 that the victim herself returned home. In view of these circumstances, it appears expedient that there might have been a single person to witness anything related to this occurrence. Furthermore, it is essential to note that the prosecution witnesses have made testimonies affirming that the victim had visited Dr. Birju's residence prior to the alleged incident. Surprisingly, neither the Investigating Officer (PW6 in paragraph 7) nor the prosecution has taken any initiative to examine Dr. Birju to corroborate about the visit of victim to the said doctor and specific time and other relevant evidences relating to the incident. In this context, it becomes imperative to refer to the Hon'ble Supreme Court judgment delivered in the case of ***Takhaji Hiraji v. Thakore Kubersing Chamansing*** reported in ***(2001) 6 SCC 145***, wherein in paragraph 19, it has been observed that the non-examination of a material witness, who could provide essential information or fill gaps in the prosecution's case, may lead the court to draw an adverse inference against the prosecution. However, if overwhelming evidence has already been presented,

the non-examination of additional witnesses may not be significant. In such cases, the court must scrutinize the value of the evidence already presented and consider whether the witness in question was available but withheld. Therefore, we are of the view that an adverse opinion against the prosecution can be formed as there is no independent witness in this case, despite having a number of houses from the alleged place of occurrence to the victim's house, additionally where the incident took place in broad daylight at 10 a.m. in the morning during the Chhath puja. Thus, according to the alleged time and place of occurrence, the commission of rape cannot be accepted.

Accordingly, issue no. I is decided in the negative.

11. With reference to issue no. II, in evaluating the statement made by the victim (PW4) and the medical examination report conducted by Dr. Veena Singh (PW7), several key points come to light. The PW7 in paragraph 7 states that a definite opinion cannot be formed. This indicates that the medical report does not provide conclusive evidence of the commission of rape. Additionally, it is worth noting that the medical report does not indicate any visible signs of violence on the victim's body. This is in contrast to the victim's section 164 statement where she mentioned shouting and crying, which can be interpreted as the

use of force and the occurrence of violence. The absence of mark of violence in the medical examination report raises questions about the consistency of the victim's account. Also, the Investigating Officer (PW6) in paragraph 11 stated that no signs of injury were found on the victim. This observation aligns with the absence of visible signs of violence in the medical report. Furthermore, the PW7 in paragraph 9 states that in cases of gang rape, there is usually swelling and redness in the vulva, which were not present in this particular case. This further weakens the correlation between the victim's testimony and the medical evidence on record. Considering these facts, the ocular testimony of the victim is not substantiated by the available medical evidence. It is imperative, at this point, to consider the significant precedent set by the Hon'ble Supreme Court in the case of ***Ram Narain Singh versus State of Punjab and Ama Singh & Ors. versus State of Punjab*** reported in ***(1975) 4 SCC 497***, wherein the Hon'ble Supreme Court held that inconsistency between the ocular and medical evidence is a fundamental defect in the prosecution case, and unless reasonably explained, it is sufficient to discredit the entire case. Therefore, in the absence of any reasonable explanation by the prosecution regarding such material inconsistency, there arises a fundamental defect in the

prosecution's case, and as such, the prosecution has failed to prove the manner of occurrence beyond all reasonable doubts. In the present case, the absence of visible signs of violence, injuries, and typical signs of sexual assault, as noted by the medical experts and the investigating officer, raises doubts about the veracity of the victim's statement.

Accordingly, issue no. II is also decided in the negative.

12. With reference to issue no. III, it is important to determine whether lack of determination regarding the victim's age would prejudice the trial. Notably, the court itself did not examine the age of the victim through any supporting documentation. In view of the authoritative pronouncement of the Hon'ble Supreme Court in the case of ***Jarnail Singh versus State of Haryana*** reported in ***(2013) 7 SCC 263***, it is clear that the word 'person' in Section 34(2) of the POCSO Act includes not only a child who is accused of committing an offense but also a child who is a victim of the offense. The legislative intent behind using the word 'person' cautiously has to be paid proper homage by interpreting the word 'child' in a broader manner to include even a 'child victim'. Thus, Section 34(2) of the POCSO Act casts a positive duty on the Special Court to satisfy itself with recorded reasons as to whether the 'person' is a child or not.

Establishing the minority of the victim child is a condition precedent to proceeding with a case under the POCSO Act. However, in the present case, there is no such finding by the learned trial court regarding whether the victim was a child at the time of the alleged occurrence. Non-compliance with such procedural requirements amounts to a failure of justice, and the benefit should certainly go in favor of the accused.

Accordingly, issue no. III is decided in the affirmative.

13. In order to deal with issue no. IV, let us consider that the informant did not mention any statement in the fardbeyan regarding the victim’s medical examination by Dr. Nagendra Kumar under the influence of the accused. Additionally, the victim’s mother (PW3 in the paragraph 3) also did not mention anything regarding Dr. Nagendra Kumar during the proceedings at the Juvenile Justice Board involving another accused. This statement suggests that there is no mention or acknowledgment of Dr. Nagendra Kumar's involvement in the case from an earlier stage of the legal proceedings. Moreover, PW3 also states that they do not possess any doctor's slip from Dr. Nagendra, which could have served as supporting evidence for the medical examination. Furthermore, all the prosecution witness including the victim fails to identify the identity of the doctor. It is

imperative, at this point, to consider the significant precedent set by the Hon'ble Supreme Court in the case of ***Palvinder Kaur v. State of Punjab*** reported in ***(1952) 2 SCC 177***, wherein the Hon'ble Supreme Court held that mere suspicion or belief is not sufficient to establish the charge under Section 201 IPC. The judgment reinforces the principle that the life and liberty of individuals should not be jeopardized based solely on suspicions, regardless of their strength, and can only be deprived when there is definite proof of an offence. Thus, the absence of supporting documentation, inconsistencies in the statements of the witnesses, and the lack of identification of Dr. Nagendra raise significant doubts regarding the credibility of the medical examination of the victim by Dr. Nagendra.

Accordingly, issue no. IV is decided in the affirmative.

14. In view of the findings arrived at on the issues formulated above, we are of the opinion that the prosecution has failed to prove the charges framed against the appellants beyond all reasonable doubts by adducing sufficient material evidences required under the law.

15. Therefore, we are of the considered opinion that the conviction of the appellants is not sustainable in the eyes of law. Both the criminal appeals stand allowed and the judgment of

conviction and the order of sentence dated 29.06.2017 passed by Shri Rajesh Kumar, Additional Sessions Judge 1st, Jamui in Sessions Trial No.247 of 2015 corresponding to POCSO case No.16 of 2015 arising out of Malaypur P.S. case No.34 of 2014 are set aside.

16. Since the appellant Sakindar Yadav of Criminal Appeal (DB) No.945 of 2017 is in jail custody, he is directed to be released from custody forthwith, if not wanted in any other case. The appellant Dr. Nagendra Kumar of Criminal Appeal (DB) No.875 of 2017 is on bail, he is discharged from the liability of his bail bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

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