

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.280 of 2015

Arising Out of PS.Case No. -43 Year- 2013 Thana -MAHILA PS District- JEHANABAD

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Atendra Sao, Son of Tulsi Sao, resident of village Safepur, P.S. Kako, District Jehanabad.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Mr. Kiran Thakur, Adv.
Mrs. Babita Kumari, Adv.
Mr. Nilesh Kumar, Adv.
For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 16-03-2017

The sole appellant Atendra Sao, who has been found guilty for the offences punishable under Section 6 read with Section 5(1) (m)(n) of the POCSO Act as well as under Section 376 (2) (1) of the I.P.C., but sentenced to undergo R.I. for ten years only relating to POCSO Act and no separate sentence has been passed under Section 376 (2)(1) of the I.P.C. by judgment of conviction dated 28.02.2015 and order of sentence dated 03.03.2015 passed by 1st Additional Sessions Judge, Jehanabad in Session Trial No.600 of 2013/POCSO Case No.4 of 2014, arising out of Jehanabad Mahila P.S. Case No.43 of 2013.

2. After going through the records, it is apparent that



the victim, PW-6, had confirmed the old phrase blood is thicker than water. At the initial stage, the instant case has been registered on the basis of written report having been filed by the victim alleging therein that the appellant who happens to be her father ravished her and was continuing with the same for last one year. She had disclosed to her family members, but none accepted the same and lastly, on arrival of her maternal uncle, she narrated about the occurrence before him whereupon she was taken to police station where written report was filed.

3. After registration of Jehanabad Mahila P. S. Case No.43 of 2013, investigation commenced during course thereof., the victim was medically examined as well as was also examined under Section 164 Cr.P.C. along with examination of other witnesses and after concluding the same, charge-sheet was submitted which ultimately led prosecution culminating in a manner, as indicated above, subject matter of instant appeal.

4. The defence case, as is evident from the mode of cross-examination as well as statement having been recorded under Section 313 Cr.P.C., is of complete denial.

5. In order to substantiate its case, the prosecution had examined altogether 10 PWs. Out of whom, PW-1 is Dr. Ramadhar Sharma, PW-2 is Dr. Mina Kumari, PW-3 is Rachna Raj, PW-4 is



Radha Krishna, PW-5 is Phula Devi, PW-6 is victim herself, PW-7 is Chhotan Paswan, PW-8 is Mahajani Devi, PW-9 is Shyam Sundar Paswan and PW-10 is Sahendra Sao.

6. The prosecution had also exhibited Exhibit-1 medical reports, Exhibit-1/1 medical report, Exhibit-2 statement of victim under Section 164 Cr.P.C., Exhibit-3 signature of informant on 1st information report and Exhibit-4, the signature of victim on the statement of 164 Cr.P.C.

7. From the materials available on the record, it is apparent that three kinds of evidences have been adduced on behalf of the prosecution. The first part happens to be medical evidence and for that PW-1, PW-2 and PW-4 have been examined. Out of these witnesses, PW-1 and PW-4 are over the estimation of age while PW-2, the Gynecologist, had examined the victim. She had not found external or internal injury at the time of her examination, but had opined that hymen was torned but not of recent origin and on account thereof no definite opinion was given by her though possibility of rape was not at all ruled out. Apart from this, from the evidence of PW-1 and PW-4, it is evident that age of victim was ascertained in between 14 to 16 years.

8. The second kind of evidence, which the prosecution had produced, is by way of examining PW-3 Rachna Raj, the then



Judicial Magistrate, who had recorded the statement under Section 164 Cr.P.C. of the victim. In the similar way, she had deposed that after testing the mental capability of the victim she had recorded her statement, read over the same whereupon victim put her signature as well as the she also put her signature.

9. The third kind of evidence happens to be oral evidence by way of examination of other chargesheet witnesses. It is evident that all the witnesses that means to say PW-5, PW-7, PW-8, PW-9 and PW-10 have gone volte face to the prosecution and on account thereof, were declared hostile. During course thereof, it is evident from the evidence of PW-9 that he has deposed that victim had instituted the case about a year ago against her father on account of committing rape on her but, he had not shown his own assertion on that very score. That being so, his status happens to be even beyond the corroborative in nature.

10. The worst part of the evidence adverse to prosecution came out from the deposition of PW-6 (victim). After going through the same, it is apparent that she has completely disowned her allegation whatever been at initial stage by way of presentation of written report and further, submitted that as she was annoyed with the activities of her father who used to beat and assault the family members after consuming liquor and further, did not



provide congenial atmosphere, sufficient economical support, whereupon she had made such kind of allegation as well as she had also made false statement during the course of 164 Cr.P.C. statement. Reason best known to the prosecution, she was not at all declared hostile nor she was confronted with her previous statement either by way of attracting her attention towards written report or her statement under Section 164 Cr.P.C. That means to say the victim, PW-6, by her own action completely ruined the prospect of the prosecution.

11. From perusal of the judgment impugned, it is apparent that learned lower court was very much influenced with the medical evidence in consonance with the statement having been recorded under Section 164 Cr.P.C. The purpose of statement under Section 164 Cr.P.C. is basically apprehending the status of the witness to be deterrent to the prosecution in future and further, it always happens to be for the purpose of corroboration or contradiction. It is not a substantive piece of evidence. The only substantive piece of evidence happens to be the evidence whatever the witnesses have deposed during the course of trial. Therefore, once the witness has disowned the statement recorded under Section 164 Cr.P.C., then in that event, the only course left for the prosecution to confront those statements after declaring the witness hostile but, even then, it could not be treated as substantive piece of evidence, whereupon



prosecution case is to be found duly substantiated.

12. That being so, the judgment of conviction and sentence recorded by the learned trial court is not at all found sustainable in the eye of law. Consequent thereupon, the same is set aside. The appeal is allowed. The appellant is under custody. Hence, he is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Arvind/-

AFR/NAFR	NAFR
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