

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.1420 of 2017

Arising Out of PS.Case No. -151 Year- 2013 Thana -BARUN
District- AURANGABAD

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Chhotu Kumar son of Sri Mahamaya Prasad Singh resident of
village : Jangi Bigha, P.S.: Baroon, District : Aurangabad.

.... Appellant/s

Versus

The State of Bihar.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ravindra Kumar, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date: 19-03-2018

The appellant/Chhotu Kumar has been convicted under Section 376/34 of the Indian Penal Code and Section 4 of the Protection of Children From Sexual Offences Act, 2012 (in short POCSO Act) vide judgment dated 22nd of March, 2017 passed by the learned Special Judge, POCSO Act-cum-Additional Sessions Judge, 1st, Aurangabad in connection with Baroon P.S. Case No. 151 of 2013, corresponding to CIS No. 15614 of 2014 and by order dated 28th of March, 2017, he has been sentenced to undergo rigorous imprisonment for seven years and fine of Rs. 5000/- for each of the offences viz. under Section 376/34 I.P.C and Section 4 of the POCSO Act; the sentences, however having been ordered to run concurrently.



2. The prosecutrix/P.W. 3 is said to have been subjected to sexual intercourse by one Binod Choudhary and the appellant. The records reveal that the case of Binod Choudhary, on his being found juvenile, has been sent to the Juvenile Court for trial.

3. The victim/P.W. 3 has lodged the F.I.R on 04.07.2013 alleging that two days prior i.e. on 02.07.2013, at about 12 O' clock in the night, she has gone to the ground floor for operating the changer-switch as at that time, the electric line had been disconnected, when two persons, who were present there from before, gagged her and took her to a room by the side of the staircase. It has then been alleged that she was subjected to rape by the aforesaid two persons. She was also threatened of dire consequences in case she narrated about the occurrence to anybody. At the time of the occurrence only, her grand-father was available in the house. She did not awake her grand-father out of fear. Two days later, her mother, aunt and grand-mother arrived home on 04.07.2013 at about 7:00 A.M in the morning. She thereafter disclosed about the occurrence to them. All the family members of the prosecutrix had gone to attend a *Saradh* ceremony in house of a relative at Mahadeva, Nasriganj.

4. On the basis of the aforesaid written report, Baroon P.S. Case No. 151 of 2013 dated 04.07.2013 was instituted for



the offence under Section 376/34 of the Indian Penal Code.

5. The Trial Court, after examining eight witnesses on behalf of the prosecution, convicted and sentenced the appellant as aforesaid.

6. Two of the prosecution witnesses viz. P.W. 1/Lalmuni Choudhary and P.W. 2/Basunath Choudhary, co-villagers of the victim have not supported the prosecution version and have been declared hostile.

7. P.W. 3, the victim has however, during the trial has stated that the changer-switch which she had gone to operate in the night of the occurrence is inside the main gate. She was carrying a mobile which also had a torch fitted in it. The changer- switch was located around five feet above the ground. The main gate as well as the gate of the guest-room where she had been raped, was locked from inside. After the occurrence, she claimed to have come back to her room but did not inform anybody. Next day, her grand-father came in her room for asking her as to why she was so late in getting-up. She only told him that she was not feeling well. She did not ask her grand-father to get her examined by any Doctor. It has further been stated by her that she took bath with the clothes which she was wearing in the night of the occurrence. For two days, she did not do any work in the house. On the third day, when her mother arrived, she told her about everything what had happened to



her. After the accused persons had left the place of occurrence, she had a mind to inform her grand-father who was present in the house but, out of fear, she did not do so. She was taken to Police Station by her mother where she had to stay for whole of the night. She did not inform the Police about the name of her friends. She did not even know one of the named accused persons viz. Binod Choudhary.

8. During trial, she has admitted that there was no Test Identification Parade. She has denied that she had ever told the Investigating Officer that a boy, who studies in D.A.V School, had been accompanying Binod Choudhary, co-accused and that both of them had raped her.

9. From the deposition of P.W. 3, what appears to be clearly established that the changer-switch was located inside the main gate which was locked. The room where the prosecutrix was said to have been raped, also had an exit door, but that too was locked. The prosecutrix has not stated that the miscreants viz. Binod Choudhary and the appellant were inside the house when they caught hold of her and raped her. She has also not stated as to how they entered the house.

10. So far as identification of the appellant is concerned, in the F.I.R, she has clearly stated that Binod Choudhary was being accompanied by another person, who had concealed his face. During investigation as well as in the trial,



she never made any statement disclosing that she had identified the other person as the appellant. She has also not stated that while at the act, the appellant removed *Gamcha* from his face.

11. In this context, it would be necessary to go through the deposition of the father of the prosecutrix viz. Avinash Kumar, who has been examined as P.W. 4. He has stated that he owns his house in Baroon. His family members had gone to house of a relative for participating in a *Saradh* ceremony. On 04.07.2013, he learnt on telephone through his father that his daughter has been raped on 02.07.2013. He was further informed that amongst the accused persons, one was Binod Choudhary, who resided in the neighborhood. The other person, who was accompanying the Binod Choudhary had concealed his face with a *Gamcha*. On telephone only, he claims to have told his father to get a case registered. He also tried to know about the identity of the other accused person on phone but could not get any clue. He came back home only on 10.07.2013 after taking leave from his work. While trying to enquire about the accused persons, he learnt in the market that in the night of the occurrence, Binod Choudhary and the appellant were seen moving around near his house. He was also informed that the appellant was showing a photograph of rape to other persons. On the basis of the aforesaid information, he could gather that apart from Binod Choudhary, the appellant was also involved in



the occurrence of rape of his daughter.

12. In his cross-examination, he has deposed that both the accused persons are residents of the same village and the participation of the appellant in the case was disclosed to him by some of the persons of the village.

13. Similar statement has been made by P.W. 5, who is mother of the victim.

14. From the deposition of P.W. 4, it becomes very clear that his wife i.e. the mother of the victim had come back home on 04.07.2013. Till 10.07.2013 i.e. till the time, he had come back from his place of work to his village home, he did not have any idea about the appellant. Only while trying to enquire from the neighbourhood about the accused persons, he learnt, through the mouth of the villagers, that the appellant along with co-accused Binod Choudhary was seen roaming near his house at about 11-12 P.M. in the night of the occurrence. The other source of information was that the appellant was heard and seen showing photographs of rape to some other persons.

15. What becomes obvious from the deposition of P.W. 4 is that till about seven days from the date of occurrence, there was no clue about the other associate of Binod Choudhary. It was only later that the name of the appellant transpired; that also under a peculiar circumstance.

16. The deposition of P.W. 4, it has been argued,



cannot be relied upon for the simple reason that P.W. 4 has failed to disclose the name of the persons who had told him that the appellant was seen moving near his house in the night of the occurrence. He has also not disclosed the names of the persons who had told him that the appellant was seen showing photographs of rape. What was that photograph, by what mode was the photograph taken and what part of the photograph was being shown by the appellant, is also not known.

17. Thus, identification of the appellant is absolutely doubtful.

18. The victim was examined by the Medical Board which was constituted for the purpose of examining her. The report of the Medical Board has been proved by Dr. Reena Kumari, P.W. 7, who was part of the Medical Board. No definite opinion of sexual intercourse could be given on the physical examination of the victim. It has only been stated that the report reveals that the victim had undergone sexual act. This opinion was based on the fact that vagina admitted one finger.

19. Sri. Santosh Kumar Singh, Investigating Officer of this case has been examined as P.W. 8. He also, on examination of the place of occurrence, found the changer-switch to be inside the main gate. He had got the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure. In the aforesaid statement, the victim did not take the name of



the appellant. The aforesaid prosecution witness did not know as to what was being done by the victim/prosecutrix between the period that the occurrence had taken place and the case was lodged. During the investigation, he could not know whether the prosecutrix slept in the same room after the occurrence or had gone to another room to sleep. He had recorded the statement of the 68 years old grand-father of the victim also. For two days before the lodging of the case, she had not spoken anything to her grand-father. In para 6 of his cross-examination, P.W. 8 has clearly stated that the two doors of the house through which there could be an entry of the outsider was completely locked. Nobody entered the house and nobody made any attempt to run away from the house. The neighbours of the prosecutrix or her father were not examined by him. P.W. 8 had actually found out during the investigation that the appellant and the other accused person had scaled over the wall by using a staircase. The staircase was seized but no sketch map was prepared. P.W. 8, on being specifically questioned, did not reveal as to how the staircase was used from the house of the neighbour/Pramod Kumar.

20. Thus, from the conspectus of the deposition of the witnesses, what appears to be very evident is that the prosecutrix did not identify another accused apart from Binod Choudhary, who was named by her in the F.I.R. This gets further



confirmed by the fact that no Test Identification Parade was held. There is no statement of the prosecutrix that any attempt was made by the appellant to expose his face to her, giving her any opportunity of recognizing her. The name of the appellant only transpired when the father of the prosecutrix was enquiring about the name of the other accused person apart from Binod Choudhary.

21. The statement of the father of the victim also cannot be accepted on the point of identity of the appellant for the reason that his statement stands completely uncorroborated. Who gave him the information that the appellant was showing photographs, is not known. Those persons also have not been brought to the witness box. Thus, there is no connecting link of the appellant with the crime, for which, he has been charged, tried and convicted.

22. The evidences of P.W.s 3 and 4, therefore, on the issue of identity of the appellant, are not cogent enough to be relied upon.

23. For the aforesaid reasons, the judgment and order of conviction and sentence against the appellant cannot be sustained in the eyes of law.

24. Accordingly, the judgment of conviction dated 22.03.2017 and the order of sentence dated 28.03.2017 passed by learned Special Judge, POCSO Act -cum-Additional Sessions



Judge, Ist, Aurangabad in G.R. No. 8 of 2013, arising out of Baroon P.S. Case No. 151 of 2013 are set aside.

25. The appeal succeeds.

26. The appellant is in jail. He is directed to be released forthwith from jail, if not wanted in any other case.

27. A copy of the judgment be transmitted to the Superintendent of Jail for information, compliance and needful action.

(Ashutosh Kumar, J)

Shageer/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22/03/2018
Transmission Date	22/03/2018

