

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.3027 of 2017

Arising Out of PS. Case No.-41 Year-2014 Thana- KARJA District- Muzaffarpur

Md. Washi @ Washi S/o Md. Kalim, R/o Village- Jean Khurd, P.O.- Amea Bishunpur, P.S.- Karja, District- Muzaffarpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Ganesh Prasad Singh
For the Respondent/s : Mr. Abhay Singh

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 16-08-2018

Heard learned counsel for the appellant and the State.

2. The sole appellant has been convicted under Section 376 of the I.P.C. and Section 6 of the POCSO Act, 2012 by judgement dated 18.08.2017 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, POCSO, Muzaffarpur in connection with Trial No. 5 of 2014 and by order dated 23.08.2017, the appellant has been sentenced to undergo RI for 10 years and a fine of Rs. 10,000 /- (ten thousand) and in default to further suffer imprisonment for one year for the offence under Section 6 of the POCSO Act, 2012. No separate sentence has been awarded under Section 376 of the I.P.C. in view



of the provisions contained in Section 42 of the POCSO Act, 2012.

3. The appellant is said to have ravished a girl of four years, who is the niece of informant / P.W. 8. The case of the prosecution rests on the F.I.R. lodged by Md. Kurban / P.W. 8. He has alleged that while his niece / victim was playing outside his house along with the other children, on 02.03.2014 at around 10.00 A.M., the appellant gagged her, took her to a drain near the house and subjected her to rape. He is also said to have assaulted the victim.

4. On the basis of the aforesaid F.I.R., a case vide Karja P. S. Case No. 41 of 2014 dated 29.03.2015 was instituted for investigation for offences under Section 323 and 376 of the I.P.C.

5. The police after investigation submitted charge-sheet under Section 376 / 511 of the I.P.C. and Section 18 of the POCSO Act, 2012.

6. The trial court, after examining 10 witnesses on behalf of the prosecution and none for the defence, convicted and sentenced the appellant as aforesaid.

7. Learned counsel for the appellant, while assailing the judgement and order of conviction, has submitted that the verdict of the court below is against the weight of overwhelming evidence and all the canons of



appreciating the evidence has been thrown to the winds. He has further submitted that the judgement of guilt arrived at is absolutely unwarranted and is not based on records. He has laid special emphasis on the fact that there has been a total non-application of mind, in as much as, the conviction has been recorded under Section 6 of the POCSO Act, 2012, which is punishment for aggravated penetrated sexual assault and the facts of the case, even if admitted to be true, would not fall in the category of aggravated penetrated sexual assault.

8. That apart, it has been argued that the victim has not been examined and all the witnesses who have deposed in favour of the prosecution have only stated that they saw the appellant running away from a distance. Even with respect to the reaction of the victim, deposition of the witnesses are highly discrepant. On the aforesaid ground, it was argued that the judgement and order of conviction be set aside and the appellant be set free.

9. In order to appreciate the contention of the appellant, it would be necessary to go through the deposition of the witnesses.

10. Shabana Khatoon, wife of the informant has been examined as P.W. 1. She has supported the prosecution version in the sense that she has stated that



the victim had come to her house some days ago. On the day of the occurrence while she was cooking food inside her house, the victim played outside the house along with other children. In the meantime, the appellant, after gagging her, took her to a drain. When the aforesaid witness did not see her niece, she came out from the house in search of her. Near the drain, she found the victim weeping. There was swelling on her cheeks and in the eyes. She was also injured on her chest. It appeared to P.W. 1 that she had been raped. The victim took the name of the appellant before her. In the same breath, P.W. 1 has stated that the victim was found in an unconscious state and only after regaining consciousness, did she name the appellant. In her cross-examination, she has stated that the victim was playing outside the house and this witness had not seen the victim being lifted from in front of her house. The drain near which the victim was found by P.W. 1 is at a distance of about 50 mtrs. In between the house of P.W. 1 and the drain, there are 100-150 houses. Nobody had told P.W. 1 about the occurrence. She had herself gone out of the house at about 10 o'clock in the morning. In a short while, during her search, she could spot the victim.

11. Learned counsel for the appellant has submitted that the statement of P.W. 1 cannot be



accepted to be the correct version for the following reasons:

- (i) She has not stated as to the period for which the victim had been playing outside the house.
- (ii) How did she come to know that the victim had been taken away is also not known. She claims to have come out her house in search of the victim at about 10 o'clock. This time of the morning would not have otherwise given any impression to the aforesaid witness that the victim has been taken away by somebody or has gone missing.
- (iii) From her deposition, it further appears that the victim had become unconscious near the drain. If the victim had been taken away from in front of her house, that must have been witnessed by the residents of the locality. Admittedly, there are 100-150 houses in between the house of P.W. 1 and the drain where the girl was found unconscious.
- (iv) Apart from this, the learned counsel for the appellant has also doubted the correctness of the version in as much as the victim was only four years of age and how did she know the appellant for naming him as her tormentor is not known. The appellant hails from a different village and is a rickshaw puller.

12. Najboon Nisha (P.W. 2) another relative of the victim has, though, supported the prosecution version



but her statement is highly discrepant and not in consonance with the consistent prosecution version. She has deposed that after hearing hulla, she came out of her house and saw that the victim was crying. If this statement is accepted to be correct, then the story that the victim had been taken to a drain situated about 50 mtrs. away from the house of P.W. 1 is incorrect. The victim, according to P.W. 2, was crying in front of the house. In that context, even the statement of P.W. 2 that she saw the appellant running away also appears to be incorrect.

13. Ganour Sah and Gulab Sah are residents of the same area and have been examined as P.W.s 3 and 4. The aforesaid two witnesses have only spoken about their having seen the appellant running away, who was being chased by the villagers. The victim was found crying. She was bleeding from her private parts and was nervous. The aforesaid two witnesses claimed to have arrived at the place of occurrence on hulla raised by people who were trying to chase the appellant. Both the aforesaid witnesses have categorically admitted that they did not see any part of occurrence and only saw the appellant running away.

14. The mother of the victim, namely, Shogra Khatoon has been examined as P.W. 7. Since she has



deposed that she came only after the occurrence, her deposition / evidence would of no avail.

15. Md. Kurban / P.W. 8, who is the informant of the case, has supported the prosecution version, but has stated that the appellant had taken away the victim to a distance of about 200 yards in the field. There, it was alleged, the victim was assaulted and raped. On hulla raised by local people, he ran towards the place of occurrence, where he found the victim unconscious. He saw the appellant running away.

16. From his deposition, it appears that the place where the victim was found was not the drain but a field situated about 200 yards from his house. Who were the persons, who raised hulla; whether those persons had seen the appellant committing rape on the victim; and whether the victim was taken away in the field by the appellant from in front of the house of P.W. 8 is now known. The appellant hails from the same panchayat. However, the aforesaid witness has denied the suggestion that because of the enmity post-hustings, he has lodged a false case against the appellant.

17. Dr. Bipin Kumar / P.W. 9, the doctor who has examined the victim after about three days of the occurrence on 05.03.2014 has assessed the age of the victim be between five to six years. He found bruises and



swelling over her body. However, on internal examination, it was found that the victim had not developed any primary or secondary sexual features. However, there was swelling over vagina and rupture of hymen. The vaginal swab did not test positive for either dead or alive spermatozoa. Thus, the medical board, according to P.W. 9, was of the view that the sexual assault of the victim could not have been ruled out. He has further stated that injuries on the person of the victim could not have been caused by fall while playing.

18. What is of absolute relevance is the deposition of the Investigating Officer of this case, namely, Bibha Rani, who has been examined as P.W. 10. She has deposed that she examined the witnesses after the registration of the case. She has inspected the place of occurrence. The second place of occurrence according to P.W. 10 was the drain in the village Darapatti. She had arranged for the medical examination of the victim girl. She had arrested the appellant and had taken down his confession. She did not seize the clothes of the victim. She did not find any injury on either the private parts of the victim or on any part of her body. She did not record the statement of the victim because she was not capable of making any statement. On the basis of evidence



collected, she submitted charge-sheet under Sections 376 / 511 of the I.P.C.

19. From the perusal of the evidence on record, the offences could not be proved as against the appellant. The discrepant statements made by the witnesses regarding the place where the victim was found crying makes the prosecution version highly doubtful. The occurrence is said to have taken place in the day time and that also in the middle of the village. It is not the case of the prosecution that victim was taken to any secluded place and was subjected to sexual assault. The victim was playing in front of the house of P.W. 8 along with other children. It was not possible, it has been argued, for any outsider to have taken the victim away by gagging her. If that would have happened, even the children playing with the victim would have raised hue and cry.

20. That apart, what strikes the attention of this Court is that if the victim was unconscious, when did she regain consciousness, has not been stated by the witnesses. It also appears to be rather improbable that the victim would know her tormentor, who is not the resident of the same village. The victim was not found to be capable enough for giving any statement in the police station. This was not because of the impact of the sexual assault but because of her tender age and her not having



requisite mental faculty to know and convey her feelings. If such was the mental condition of the victim, it is difficult to presume that the victim would have told the name of the appellant to her mother.

21. Thus, but for the witnesses having made a vague statement that they saw the appellant running away, there is no other evidence to connect the appellant with the offence. The allegation of the victim having been put to any sexual assault has also been rendered suspect by the nature of injury which was found on her person.

22. Further, if the victim was not in a position to speak because of her mental faculties not being pronounced by that time, she ought to have been brought before the Magistrate for testifying that she could not have made any statement.

23. Thus from a holistic reading of the entire evidence on record, it is difficult to sustain the conviction and sentence of the appellant.

24. Considering the totality of the facts and circumstances, the appeal is allowed.

25. The judgement and order of conviction, being without any evidence, is set aside. The appellant is acquitted of all the charges.



26. The appellant is in custody. He directed to be released on bail forthwith, if not required in any other case.

A copy of the judgement be transmitted to the Superintendent of the concerned Jail for information, compliance and records.

(Ashutosh Kumar, J)

skm/-

AFR/NAFR	N.A.F.R.
CAV DATE	
Uploading Date	21.08.2018
Transmission Date	21.08.2018

