

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.124 of 2017

Arising Out of PS.Case No. -264 Year- 2014 Thana -SITAMARHI District- SITAMARHI

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1. Subodh Paswan, Son of Pheran Paswan, resident of Village- Punaura, Tole, Banaughia, Ward No. 11, P.S.- Sitamarhi, District- Sitamarhi.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ashhar Mustafa
Mr. Talib Mustafa

For the Respondent/s : Mr. Parmeshwar Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 30-01-2018

Heard the counsels for the appellant and the State.

2. The appellant, Subodh Paswan, has been convicted under Sections 363, 366A and 376 of the Indian Penal Code as well as Section 4 of the POCSO Act, 2012 vide judgment dated 27.10.2016 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Sitamarhi in S.Tr. No. 548/2014, 107/2014, arising out of Sitamarhi P.S. Case No. 264/2014 and by order dated 29.10.2016, he has been sentenced to undergo R.I. for ten years, to pay a fine of Rs. 50,000/- and in default of payment of fine, to further suffer additional S.I. for six months for the offence under Section 376 of the Indian Penal Code; R.I. for seven years, to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo additional S.I. for three months for the offence



under Section 366A of the Indian Penal Code and R.I. for five years, to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo additional S.I. for two months for the offence under Section 363 of the Indian Penal Code. Because of the provision of Section 42 of the POCSO Act, 2012, no separate sentence has been awarded to the appellant under the POCSO Act. The sentences awarded to the appellant have been directed to be run concurrently.

3. The case of the prosecution is based upon the F.I.R. lodged by the father of the victim, viz. Paras Sada, who has been examined at the trial as P.W.2.

4. Paras Sada (P.W.2)/ informant has alleged in his F.I.R. dated 02.04.2014 that his daughter, viz. Kiran Kumari (Victim), aged about 12 years, has been kidnapped on 24.03.2014 by the appellant and his parents for the purposes of marrying her in an unauthorized manner. At the time of occurrence, P.W. 2 claims to have gone to his cattle-shed for milching the cattle, when his wife (mother of the victim), who has been examined as P.W. 1, came and informed him that the victim is not available at home. Immediately thereafter, P.W. 2 claims to have learnt that the appellant has eloped with the victim.

5. On the basis of aforesaid written report of P.W. 2, a case vide Sitamarhi P.S. Case No. 264/2014 dated 02.04.2014 was instituted initially for the offences under Sections 363, 366A and 34 of the Indian Penal Code.



6. The police after investigation submitted charge-sheet against the appellant under Sections 363, 366A and 376 of the Indian Penal Code. However, charges against the appellant were framed under Sections 363, 366A, 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012.

7. The Trial Court after examining 5 witnesses on behalf of the prosecution and none on behalf of the defence, convicted and sentenced the appellant as aforesaid.

8. Learned counsel for the appellant, while assailing the trial court judgment of conviction, has submitted that the witnesses are totally discrepant, so far as the prosecution version is concerned. It has further been argued that from the deposition of the victim herself, who has been examined as P.W. 4, no case of rape can at all be said to have been made out against the appellant. Even the statement of the victim under Section 164 of the Cr.P.C., which is said to have been recorded during the course of investigation, has not been proved. The father of the victim (P.W.2) has categorically stated before the trial court that the victim was lastly found in the house of the Bua of the appellant.

9. In order to appreciate the contentions of the appellant, it would be first necessary to go through the deposition of the victim herself as she is the person who can only tell about the occurrence.

10. Kiran Kumari (P.W.4) has stated before the trial court that on the date of occurrence, she was at her home alone, when the



appellant had come to her home and had asked her to accompany him as his father was calling her. This happened at about 5 O'clock in the evening. Initially, P.W. 4 was not willing to go with the appellant, but the appellant used force and took her along with him. She was first taken to village Bajpatti by a three wheeler and was kept in the house of the sister of the appellant. P.W. 4 was not put to any sexual misdemeanor on that night. On the next day, she was taken to Pupri where she was kept in the house of the Mausi of the appellant. At that place in the night, the appellant had raped her. Thereafter, on the next day, it has been deposed by the prosecutrix that she was taken to Runni Saidpur, where also she was kept at the house of one of the relatives of the appellant. On that night, nothing happened between the appellant and the prosecutrix and thereafter, she was kept in the house of the Bua of the appellant where she was subjected to repeated sexual intercourse. During examination, P.W. 4 has admitted that the appellant is her neighbour and that when she was being forcibly taken to Bajpatti, she did not raise any hue and cry as she was gagged by the appellant. She has admitted of having made statement before the learned Magistrate and such statement was not made by her at the instance of any body. P.W. 4 has admitted of a past dispute between the two families and she has categorically denied all suggestions of the case being false.

11. One of the members of the medical team, who had examined the prosecutrix, viz. Shivesh Bharti, has been examined as



P.W. 5. He has deposed before the trial court that on 05.04.2014, i.e. after three days of the lodging of the F.I.R., a medical board was constituted under the chairmanship of the Civil Surgeon, Sitamarhi, of which he also was one of the members. On examination of the victim (Kiran Kumari), no external injuries were found on her body and there was no medical evidence with regard to her being raped. Her age was assessed as 18 years.

12. Father of the victim/informant/P.W. 2 has supported the prosecution version and has deposed that his daughter (P.W.4) was taken away by the appellant for wrong purposes. He has stated that he filed the case after three days of the missing of the victim and has explained that the delay in lodging the F.I.R. was because of attempts to search the victim. He has also categorically refuted the suggestions of the defence that the victim was recovered from his house and that he has lodged false case because of enmity. The mother of the victim, viz. Baso Devi has been examined as P.W. 1 and she has also supported the prosecution version. However, she has stated that the prosecutrix has now been married in village Banjara.

13. Learned counsel for the appellant has submitted that none of these witnesses are consistent in their versions rendering them completely unreliable and unbelievable. It has further been submitted that it does not appear to be probable that the victim would be taken to so many places under force/duress, but she would not make any hue and



cry or do anything to catch the attention of others. It has further been argued that precisely for this reason, there has been a delay of about 9 days in filing the case and the explanation offered for such delay does not also appear to be acceptable. It has also been argued that the victim, after being recovered, stated before them that she was subjected to continuous rape by the appellant. Lastly, it has been argued that the victim was put to medical examination on 05.04.2014 and at that time, her age was assessed to be 18 years. In that view of the matter, the mischief of the POCSO Act would not get attracted and the entire case would then appear to be a cooked up story by the prosecutrix or her father.

14. On perusal of the material available on record, it appears that the victim has supported the factum of rape and has clearly stated that she was subjected to rape at Pupri and at the house of the Bua of the appellant.

15. From the deposition of P.W. 5 itself, it would appear that the age of the victim was assessed to be 18 years but what parameters were used by the medical board for assessing the age of the victim is not known. In that view of the matter, it would only be safe to rely upon the age of the victim as given by her father and mother.

16. Though, the statement of the victim under Section 164 of the Cr.P.C. has not been proved but since it is part of record, the same has been perused. In the statement, which was recorded on



05.04.2014, the victim has stated her age to be 12 years. Thus, there is no other material to disbelieve the deposition of the witnesses, including the prosecutix, about her being a minor.

17. It appears to be slightly doubtful that the victim would be taken to different places for so many days, but she would not resist her being taken without her consent. The victim was kept in the house of the relatives of the appellant. This also creates doubt about the victim having been abducted or kidnapped.

18. In any view of the matter, since the victim, who is a minor, was subjected to sexual intercourse, the provisions of Section 376 is attracted. But from the conspectus of the material available on record, it appears that the prosecution has not been able to prove the charges under Sections 363 and 366A of the Indian Penal Code as against the appellants and perforce, this Court sets aside the conviction of the appellant under the aforesaid two sections. From the attending circumstances, however, the offence of rape with a minor is clearly made out and therefore the charges/conviction under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012 is hereby sustained and affirmed.

19. On the question of sentence, learned counsel for the appellant has submitted that now the victim (P.W.4) is happily married and the appellant is a young person who has to live for his own family, the sentence be reduced to the minimum prescribed under Section 376 of



the Indian Penal Code.

20. From the circumstances available on record, this Court is of the view that interest of justice would be met, if the appellant is sentenced to a period of seven years for the offence under Section 376 of the Indian Penal Code.

21. As such, while affirming the conviction under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, the sentence imposed upon the appellant is reduced to a period of seven years. The period for which the appellant has remained in custody shall be set off against the sentence.

22. The appeal is dismissed but the sentence awarded is modified to the extent indicated above.

(Ashutosh Kumar, J.)

Rakhi

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