

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.872 of 2016

Arising Out of PS. Case No.-232 Year-2013 Thana- BAIRIYA District- West Champaran

Pramod Chaudhary Son of Harendra Chaudhary, Resident of Village- Malahi Tola, P.S.- Beriya, District- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

Criminal Appeal (SJ) No. 923 of 2016

Arising Out of PS. Case No.-232 Year-2013 Thana- BAIRIYA District- West Champaran

Raju Chaudhary son of Late Lakhu Chaudhary resident of Village- Malahi Tola, Police Statio- Bairiya, District- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (SJ) No. 872 of 2016)

For the Appellant : Mr. Bipin Kumar, Advocate.

Ms. Minakshi Kumari, Advocate.

For the Respondent : Mr. Binod Bihari Singh, APP.

(In Criminal Appeal (SJ) No. 923 of 2016)

For the Appellant : Mr. Khatim Reza, Advocate.

For the Respondent : Mr. Shyed Ashfaque Ahmad, APP.

Ms. Abha Singh, APP.

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 08-03-2018

Both the appeals have been heard together and a common judgment is being delivered.

2. The appellants stand convicted under Section 376/34 of the Indian Penal Code as well as the Sections 6 and 8 of the Protection of Children from Sexual Offences



Act, 2012 by judgment dated 28.02.2016 passed by the learned 1st Additional District and Sessions Judge-cum-Special Judge, Bettiah in connection with S.G.R. No. 2 of 2013, arising out of Bariya P.S. Case No. 232 of 2013 and by order dated 26.08.2016 they have been sentenced to undergo R.I. for ten years, to pay a fine of Rs. 50,000/- and in the event of non-payment of fine, to further suffer imprisonment for six months for the offence under Sections 376/34 of the Indian Penal Code and R.I. for ten years each for the offences under Sections 6 and 8 of the Protection of Children from Sexual Offences Act, 2012, to pay a fine of Rs. 25,000/- each and in the event of non-payment of fine to further suffer imprisonment for three months; the sentences however having been ordered to run concurrently.

3. The appellants are said to have committed rape on a ten year old girl/prosecutrix.

4. The learned counsels for the appellants have submitted that the conviction and sentence is without any cogent evidence and the judgment of guilt arrived at by



the trial court is against the weight of overwhelming evidence. In their defence, they have submitted that the witnesses have made discrepant statements at the trial which goes to the root of the matter. It has been pointed out that the case was instituted at the instance of local Mukhiya with whom the appellants were not getting along well and that important persons who could have unravelled the prosecution version have deliberately not been examined. Their non-examination, it has been argued, has made the case absolutely doubtful. The judgment of conviction and sentences have also been assailed for paucity of any medical evidence to bring home charges of rape against the appellants. Lastly, it has been urged that assuming every allegation in the FIR and in the deposition of witnesses to be true, the appellants could not have been sentenced under Sections 6 and 8 of the POCSO Act as they do not fall in the category of persons against whom aggravated sexual assault can be alleged.



5. In order to appreciate the contentions of the appellants, it would be necessary to examine the FIR as well as the deposition of the witnesses offered on behalf of the prosecution.

6. But before doing that, it may be indicated that on the fardbeyan/statement of prosecutrix recorded on 02.09.2013 at about 06:30A.M., at Malahi Tola, Bariya P.S. Case No. 232 of 2013 was registered for investigation for the offences under Section 376 of the IPC and Sections 4, 5(G) and 6 of the Protection of Children from Sexual Offences Act, 2012. It was alleged by the prosecutrix that in the previous night, she along with her aunt had gone to the neighbouring village to witness a Mela. She got lost in the melee and her aunt who was accompanying her, went back home. The appellant/Raju Chaudhary met her in the Mela who offered to take her back home. On way back home, the appellant/Pramod Chaudhary also came on a motorcycle and offered to reach her home on the motorcycle. She was made to sit on the motorcycle along with the appellants. Midway, on the



pretext of a cat having crossed the way, the motorcycle was turned towards a desolate place. Thereafter, it has been alleged by the victim that she was subjected to sexual intercourse by the appellants. Later, the appellants reached her home but cautioned her for not disclosing about the occurrence to anybody at home. On such fardbeyan/statement, the case referred to above was registered for investigation.

7. The police, after investigation, submitted charge sheet whereupon cognizance was taken and the case was committed to the trial court for the trial of the appellants.

8. The trial court, after examining six witnesses on behalf of the prosecution and none on behalf of the defence, convicted and sentenced the appellants as aforesaid.

9. The victim has been examined as P.W. 4. At the trial though, she has supported the basic fact of the prosecution version of her having been raped by the appellants but has dithered on certain other material aspects of the case. She has deposed that the occurrence



took place about two years ago when she had gone to the neighbouring village for witnessing a Mela along with her aunt. She lost touch with her aunt and later met appellant/Raju Chaudhary. Raju Chaudhary telephonically called appellant/Pramod Chaudhary. Thereafter, the appellants took her on motorcycle on the pretext of bringing her back home. On the way only, the appellant Raju Chaudhary started misbehaving with her. The victim was taken to a place called Dhobi Ghat where an attempt was made to disrobe her. She was dashed by the appellant/Raju Chaudhary as a result of which she got injured. Thereafter, she was subjected to rape and during the course of rape she kept crying and interceding with the accused persons for leaving her, but to no avail. She was thereafter left at her home. Appellant/Pramod Chaudhary ran away but appellant Raju Chaudhary hid himself in a paddy field. The maternal uncle of the victim searched the appellant/Raju Chaudhary and brought him home. The police arrived at her house at about 6 o'clock in the morning when her statement was recorded.



10. During her cross- examination, she has stated that during the course of rape, she was physically assaulted as well. Her hands and legs started bleeding. On specific question as to who had apprehended the appellants, the victim has stated that her maternal uncle had caught hold of the appellant/Raju Chaudhary from the field at about 12 o' clock in the night. She was thereafter taken to police station. At her house, the local Mukhiya had also come along with a lady police constable. She was treated by a doctor at the instance of her mother. Stitches were applied on her knees as she had been bleeding because of her having been thrown to the ground. Lastly she has stated that after deliberations with the maternal uncle and the local Mukhiya, the police was informed, whereafter the case was lodged. She had gone to witness the mela for the first time in her life along with her aunt and her aunt had given her statement before the police. She has denied the suggestion that because of the dispute between the local Mukhiya and the appellant/Raju Chaudhary, who was a contractor for erecting toilet in the



village, a false case has been instituted at the instance of the local Mukhiya.

11. Learned counsel for the appellants has submitted that the deposition of P.W. 4 is not worthy of acceptance as she has spoken differently from the other witnesses. It has been submitted that such different statement, at different times, by the prosecutrix renders the prosecution case absolutely doubtful. In this context, an attempt was made by the learned counsel for the appellants to demonstrate that with respect to catching hold of the appellant/Raju Chaudhary, other witnesses have spoken other facts. Thus, for all practical purposes, the prosecutrix could not withstand the test of cross-examination and has made statements which cannot be accepted as true account of the occurrence.

12. What appears established and found from the deposition of P.W. 4 is that she was subjected to sexual intercourse by the appellants at a desolate place and that also when the aforesaid appellants had offered to reach her home. This had happened because she had lost touch



with her aunt with whom she had gone to witness the mela. How one of the appellants was arrested and from where may be relevant in some respects but any different deposition regarding the arrest/nabbing of one of the appellants would not be sufficient to discredit the testimony of P.W. 4.

13. The mother, brother and brother-in-law of the prosecutrix/victim/P.W. 4 have been examined as P.Ws. 1, 2 and 3 respectively. All the aforesaid witnesses have supported the prosecution version so far as the act of sexual assault is concerned. However the aforesaid witnesses are not consistent with respect to nabbing of appellant/Raju Chaudhary. All the aforesaid witnesses had come to know about the incident through the mouth of P.W. 4 only.

14. P.W. 1, the mother of the victim has stated before the trial court that her daughter, after coming back home, told her about the occurrence. She has also stated that the aunt of P.W. 4 i.e. her sister-in-law came back from about 1½ hours earlier and she did not inform her



that P.W. 4 was lost in the Mela. She did not even ask Lalwati about P.W. 4. Her son, who has been examined as P.W. 2 also had gone to Mela but he did not accompany P.W. 4. The son of P.W. 1, according to her, came back home at about 10 o'clock in the night. On specific question by the defence, P.W. 1 has stated that none of the neighbours have been made witnesses in this case. However, she has admitted that her daughter was treated in hospital where she was admitted for about four days. What is of relevance is that P.W. 1 has stated that appellant/Raju Chaudhary was caught hold of by her brother, son-in-law and son from the paddy field. Her brother stays in the same village.

15. Thus, apart from supporting the basic prosecution version of sexual assault on P.W. 4, this witness has also supported the fact that appellant/Raju Chaudhary was caught hold of by her brother and two other persons. Learned counsels for the appellants have submitted that since P.W. 4 has clearly deposed that appellant/Raju Chaudhary was searched and caught hold



of by her maternal uncle only, the other witnesses have been rendered unbelievable.

16. What is important is that appellant/Raju Chaudhary was arrested. One of the persons according to P.W. 1 was her brother which fact stands proved and established by her as well as from the deposition of P.W. 4.

17. Similarly, Anup Kumar and Algu Chaudhary who are the brother and brother-in-law of P.W. 4 and have been examined as P.W. 2 and 3 have also supported the prosecution version. Only with respect to the person who caught hold of appellant/Raju Chaudhary, a different statement has been given by both the aforesaid prosecution witnesses. As stated earlier, this fact does not go to the root of the matter so far as the basic allegation of sexual assault on the prosecutrix is concerned.

18. The injuries on the person of prosecutrix were examined by Doctor Usha Das who has been examined as P.W. 5 at the trial. She has deposed that she had examined the victim/prosecutrix on 02.09.2013 at about 4:10 P.M.



On examination, she found the hymen to be ruptured but there was no bleeding injury. According to her opinion, the age of victim was between 12-14 hours. Though she did not find any obvious sign of recent sexual assault but deposed that there could be a case of sexual assault. The injury report was proved by her during trial. In her cross-examination, she has specifically stated that the victim was not accustomed to sexual act or habitual of sexual intercourse.

19. The deposition of P.W. 5 therefore lends credence to the allegations leveled against the appellants that they had subjected the victim to sexual assault.

20. Navin Sharma, the I.O. of this case has been examined as P.W. 6. He has deposed that he had recorded the statement of the victim, her mother, brother, brother-in-law, maternal aunt and others. He had also examined the place of occurrence and had obtained the injury report from the doctor. He had also got the statement of the victim recorded under Section 164 Cr.P.C. After fully investigating the case, he had submitted charge sheet



against the appellants. However, he has submitted that he did not get the appellants physically examined and no explanation has been offered by him for not putting the appellants also for medical examination.

21. Learned counsel for the appellants therefore has submitted that investigation of this case was not done in accordance with the established procedure of investigation in cases of rape with a minor girl.

22. But from his deposition the allegations against the appellants do not get diluted. All the witnesses examined on behalf of the prosecution have stated the age of the victim to be less than 18 years. Thus at the time of the occurrence, the victim was a minor.

23. On a conspectus of the materials collected during the course of trial, the offence of rape is clearly made out against the appellants.

24. Thus, this Court finds no reason to interfere with the judgment of conviction under Section 376/34 of the Indian Penal Code as against the appellants.



25. However, assuming every allegation to be true, the appellants cannot be said to have committed offences under Sections 6 and 8 of the POCSO Act, 2012 as they cannot be said to have subjected the prosecutrix to aggravated, penetrative sexual assault.

26. Aggravated penetrative sexual assault has been defined under Section 5 of the POCSO Act which makes the offence an aggravated one if a police officer commits such a sexual assault on a child.

27. The appellants can only be said to have committed offence under Section 3 punishable under Section 4 of the POCSO Act, 2012.

28. Section 3 defines penetrative sexual assault and Section 4 provides for punishment for penetrative sexual assault. The minimum sentence provided under Section 4 of the POCSO Act, 2012 is seven years but it could extend to imprisonment for life and also imposition of fine.

29. Thus the conviction and sentence of the appellants under Sections 6 and 8 of the POCSO Act,



2012 is held to be bad in the eyes of law and therefore not sustainable.

30. The appellants ought to have been convicted and sentenced under Section 4 of the POCSO Act, 2012.

31. So far as the sentence is concerned, this Court is of the view that the interest of justice would be met if the appellants are sentenced to a period of seven years R.I., a fine of Rs. 50,000/- and in default of payment of fine to further suffer R.I. for a period of six months.

32. Since Section 42 of the POCSO Act provides for alternate punishment, no sentence is required to be imposed on the appellants under Section 4 of the POCSO Act, 2012.

33. Thus the conviction of the appellants under Section 376/34 of the IPC is affirmed and upheld but the sentence is reduced to the period of seven years R.I. and fine of Rs. 50,000/- and in default of payment of fine to further suffer imprisonment for six months.

34. The conviction and sentence of the appellants under Sections 6 and 8 of the POCSO Act are set aside.



The appellants are convicted under Section 4 of the POCSO Act, 2012 but no separate sentence is being awarded to them.

35. The appeals are dismissed with the modification in the sentence as indicated above.

(Ashutosh Kumar, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	14.03.2018
Transmission Date	14.03.2018

