

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.3372 of 2017

Arising Out of PS.Case No. -14 Year- 2013 Thana -MAHILA P.S. District- SEKHPURA

=====

Rajesh Kumar, S/o Ram Briksh Saw, Resident of Village- Jaymangla,
P.S.+District- Sheikhpura.

.... Appellant/s

Versus

The State of Bihar.

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Rakesh Kumar Sharma, Advocate

For the State : Mr. Sadanand Paswan, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 09-03-2018

Rajesh Kumar, the appellant has been convicted under Section 366(A)/34 of the Indian Penal Code by judgment dated 13.09.2017 passed by the learned Special Judge (POCSO Act & ST/ST Act)-cum-Additional Sessions Judge, 1st, Sheikhpura in connection with SC/ST Case No. 54 of 2014, arising out of Sheikhpura Mahila P.S. Case No. 14 of 2013 and by order dated 18.09.2017, he has been sentenced to undergo rigorous imprisonment for five years, to pay a fine of Rs. 10,000/- and in default to payment of fine, to suffer further rigorous imprisonment for six months.

2. The appellant is said to have kidnapped the



victim girl aged about thirteen years (at the time of the occurrence) and is also alleged to have subjected her to sexual intercourse.

3. The case of the prosecution is based on the written report of Khakhri Devi, the mother of the victim girl, who has been examined as P.W. 4 at the trial. In her written report which was lodged on 03.05.2013, she has stated that on 27.04.2013, her daughter viz. Khushboo Kumari aged thirteen years and student of Class-IX was taken away while she and her daughter had gone to witness Ramleela in the village. It was alleged by P.W. 4 that at the time when her daughter was taken away, she was wearing gold ornaments. On information to her that the appellant and two others have kidnapped her daughter, she went to the house of the accused persons but was abused and assaulted. On the basis of the aforesaid written report, a case vide Sheikhpura Mahila P.S. Case No. 14 of 2013 dated 03.05.2013 was instituted for the offences under Sections 341, 323, 504, 506, 366(A) and 34 of the Indian Penal Code.

4. The police, after investigation submitted charge-sheet, whereupon cognizance was taken and the case was committed to the Court of Sessions for trial.

5. Learned Trial Court first examined eight witnesses and thereafter on the insistence of the prosecution, framed charge against the appellant under Section 6 of the Protection of



Children From Sexual Offences Act (in short POCSO Act), 2012. After framing of charge under Section 6 of the POCSO Act, out of aforesaid eight witnesses, four witnesses were again examined and thereafter, by the judgment and order of conviction and sentence referred to above, the appellant was convicted and sentenced as aforesaid.

6. The appellant was however acquitted of the charges under Section 6 of the POCSO Act and Section 3(1)(X)(XI) SC & ST (Prevention of Atrocities) Act.

7. Learned counsel appearing for the appellant has assailed the impugned judgment and order of conviction on several grounds, some of them being that the deposition of the witnesses including that of the victim are absolutely discrepant and that it was highly unsafe for the Trial Court to have relied upon the same for convicting the appellant under Section 366(A)/34 of the Indian Penal Code. The F.I.R was registered after an unusually long time and the explanation for such delayed lodging of the F.I.R is absolutely unconvincing and, therefore, unacceptable. The victim prevaricated in her statement before the Trial Court and finally never turned-up in the witness box after the framing of charge under Section 6 of the POCSO Act. The Trial Court did not consider the fact that two other persons along with the appellant were named but charges



against them could not be established and that the conviction has only been recorded under Section 366(A)/34 of the Indian Penal Code which is not in consonance with the prosecution version at all.

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

9. The mother of the victim/informant of this case, who has been examined as P.W. 4 has deposed that on the day when she along with her daughter had gone to witness *Ramleela*, her daughter left her company for drinking water. She did not arrive for quite some time and this forced the P.W. 4 to raise hue and cry. Some of the persons present in the *Ramleela* informed her that the appellant and one Gopal as well as Yogendra have taken her daughter to some unknown destination. She, therefore, is said to have gone to the houses of the co-accused persons but none of them were present in their houses. The family members of the appellant and others abused her and refused to hand over the daughter to her. She came back home and thereafter lodged the case. On her own, she has deposed before the Trial Court that the appellant asked her to search for her daughter and that he would also help her in searching her. Again after 6-7 days, a case was filed by her. She could meet the victim only after one and half month. The victim girl disclosed before her that she was kept in



Surat where she was subjected to rape. The victim girl was taken to the Police Station where she was kept for about four days. Her medical examination was done. It was also deposed by the aforesaid witness that she had become pregnant but before she could deliver, she started bleeding aborted. She has identified the appellant and others in the dock.

10. After the addition of Section 6 of the POCSO Act, the mother of the victim/informant P.W. 4 was again brought to the Trial Court and was examined as P.W. 2. In the later deposition before the Trial Court, she has made various improvements in her earlier version. Later, she has deposed that when her daughter went missing, she started looking for her but she could not find her. She went back to her home and informed her husband. The villagers told her that the appellant and two others viz Gopal and Yogendra (since acquitted) have kidnapped her daughter. She herself went to the house of the appellant where she did not meet anybody. Later, she again on her own stated that the parents of the appellant met her and did not treat her properly. While she was about to go to Serari for lodging a case, the Officer-in-charge of Sheikhpura Mahila Police Station assured her that he would search for her daughter. It took her almost about a month in searching her daughter but one month later, while she and her husband came to the railway station for going to



Lakhisarai, she saw the victim at the railway station. On enquiry, she is said to have told her that she was taken to Surat and the person who had taken her to Surat only had reached her to Sirari railway station and thereafter fled away. P.W. 4 has further stated that her daughter stated the name of the appellant and two other accused persons viz. Gopal and Yogendra.

11. What is surprising in her deposition is that she has stated that her daughter told her that the aforesaid three persons including the appellant fought among themselves for marrying her daughter. The appellant was also alleged to have hit the victim in her stomach. However, in her cross-examination, she has stated that on the day of the occurrence i.e. on the day when her daughter went missing, her husband was at Chandigarh and came back only after few days. The husband of P.W. 4 was informed on telephone.

12. From the deposition of the aforesaid witness, learned counsel for the appellant has submitted, that no head or tale of the story can be discerned. The entire story has been changed several times. A different version was narrated in the written report from what was deposed before the Court. It has further been submitted that it is difficult to believe P.W. 4 for the simple reason that initially, she has stated that she informed her husband after coming back home from



Ramleela but later, after another charge was added, she stated before the Trial Court that on the day that her daughter went missing, her husband was in Chandigarh and came back only after six days. P.W. 3 has made different statement even with respect to her having gone to the house of the appellant and others alone.

13. Thus, it has been submitted that the main person who brought the criminal case into existence has not withstood the rigors of cross-examination and has spoken something which goes to the root of the matter.

14. The husband of P.W. 4 viz Balmiki Ram, who is the father of the victim, has also been examined as P.W. 1. His statement also is replete with contradictory statement which makes it very obvious that he has only conjured up the facts for the purposes of getting the appellant convicted and sentenced. He has deposed that in the night of the occurrence, *Ramleela* was being performed in his village, where his wife and daughter had gone for witnessing the same but he stayed back at home. From the *Ramleela*, his daughter was taken away by the miscreants. Their names were stated to be as that of the appellant and two others. This information was given to him by his wife. When the aforesaid prosecution witness went to the houses of the aforesaid three accused persons including the appellant, they were not found present in their houses. Their family members started



abusing him. After the addition of Section 6 of the POCSO Act, he was again examined at the trial as P.W. 1. In the later deposition, he has stated that the Officer-in-charge of the Police Station assured him that he will make efforts to find out his daughter and only thereafter he would register the case. After that, the F.I.R was registered after 5-6 days. A month later, he met his daughter who had detained at Lakhisarai. He was informed at the station by his daughter that the appellant and two others had taken her away. This information was given to him by his daughter only in the Police Station. The information regarding his daughter having been ravished also was given by her daughter at the Police Station.

15. This witness also does not appear to be trustworthy for the different kinds of statements which he had made before the Trial Court on two occasions.

16. Mannu Kumar @ Abhimanyu Kumar, brother of the victim has been examined as P.W. 2 and the aforesaid witness was not examined again after the addition of the charge under Section 6 of the POCSO Act. He is only a hearsay witness who has not spoken anything which should be taken advantage of for unravelling the prosecution version.

17. The victim, who has been examined as P.W. 3 has also narrated a very different story. She alleges to have been



kidnapped by the appellant and two others by gagging her on the point of weapon. All the three i.e. the appellant and his two associates raped her, whereafter she became unconscious and thereafter she could not know where she was being taken. She has stated that all the three accused persons wanted to marry her and on that issue, they fought amongst themselves. The uncle of the appellant dropped her at Sirari railway station and from there she came to the Mahila Police Station and gave her statement. The aforesaid witness/victim, despite all processes having been exhausted by the Trial Court, never turned up again to depose after the addition of Section 6 of the POCSO Act against the appellant.

18. Learned counsel for the appellant, therefore has submitted that the evidence of the prosecutrix/victim cannot now be taken into account as it would seriously prejudice the case of the appellant. Her non-examination after the addition of the additional charge renders her earlier statement completely inadmissible in the eyes of law.

19. One Chandan Kumar, who has been examined as P.W. 5 has become hostile and has not supported the prosecution version.

20. The Investigating Officer of this case has been examined as P.W. 6 who has only stated that he recorded the



statements of the witnesses and had also got the 164 Cr. P.C. statement of the victim recorded. He had sent the vaginal swab for examination to the Forensic Science Laboratory. The victim, according to P.W. 6, was examined on 14.06.2014 and her age was assessed as 16 years. He has submitted the charge-sheet in the case.

21. Soni Devi and Gayatri Devi have been examined as P.Ws. 7 and 8. Soni Devi has been declared hostile whereas Gayatri Devi only claimed to be hearsay witness. She did not identify the appellant as he did not hail from the same village.

22. The Medical Officer, who had examined the victim, was brought to the witness box only after addition of Section 6 of the POCSO Act, who has deposed that she did not find any evidence of rape. She has stated that a Medical Board had been constituted which was requested by the Civil Surgeon for examination of her age. The victim was examined by the Board and her age was assessed at 16 years. She was part of the Medical Board which had examined the victim. She has identified the signature of the other members of the Medical Board (Ext-5).

23. Thus, from the conspectus of the evidence of the aforesaid witness, it appears that the witnesses have faltered at the trial and have not spoken consistently. Most of the witnesses are hearsay witnesses who have neither seen the appellant taking away the



victim or of her having been subjected to any sexual intercourse.

24. For the paucity of any evidence with respect to rape of the victim and the appellant and others having not committed the offence under Section 3(1)(X)(XI) of the SC & ST (Prevention of Atrocities) Act, the appellant was not convicted under the aforesaid Section and was acquitted.

25. Thus, this Court finds that there is an inordinate delay in lodging of the F.I.R and the explanation which has been offered by the parents of the victim is highly unbelievable. The medical evidence with respect to rape is also lacking. The victim had come back to Sirari railway station of her own. The witnesses have also not disclosed the names of the persons who had told them that appellant and two others had taken away the victim.

26. In the absence of the victim's deposition after the addition of charge, even the identification of the appellant by her in the dock loses all relevance.

27. Finding no cogent evidence against the appellant, this Court is left with no option but to set aside the judgment and order of conviction and sentence.

28. The appeal thus succeeds and the judgment and order of conviction against the appellant are set aside.

29. The appellant is in custody. He is directed to



be released forthwith, if not required in any other case.

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

(Ashutosh Kumar, J)

Shageer/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	13/03/2018
Transmission Date	13/03/2018

