

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.798 of 2017**

Arising Out of PS. Case No.-489 Year-2014 Thana- KOTWALI District- Patna

Sunny Deol Son of Suresh Prasad, Resident of village - Badki Delha, P.S.
Delha, District - Gaya

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mr. Sanjay Kumar Sharma, Advocate
For the Respondent/s	:	Mr. Shyed Ashfaque Ahmad, APP

**CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT**

Date : 12-02-2021

The sole appellant Sunny Deol has questioned the correctness of his conviction in Special (POCSO) Case No.29 of 2014, arising out of Patna Kotwali P.S. Case No.489 of 2014. The learned trial Judge (1st Additional Sessions Judge, Patna) by the impugned judgment dated 16.01.2017 found the appellant guilty for offences under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act. The learned trial Judge has, by order dated 21.01.2017, awarded ten years rigorous imprisonment and a fine of rupees ten thousand under both the aforesaid heads. In default of payment of fine; the appellant would undergo further six months imprisonment. The



sentences have been ordered to run concurrently.

2. A conjoint reading of the written report of the victim dated 10.08.2014 (Exhibit-1) and her statement recorded under Section 164 Cr.P.C. on 11.08.2014 vide Exhibit-2 discloses the following prosecution case:

The informant stated in her first information to the police that she is aged about 14 years and is a student of Class-VIII in Awadhpura Upgraded Middle School in the town of Chapra. The appellant is relative of her Bhabhi and, as such, was visiting the house of the informant since last two years. The informant got intimacy. On 06.08.2014 when the informant was standing near her school at 10:00 AM, the appellant reached there on a motorcycle and asked her to accompany for a tour. Since the appellant was known to the informant; she believed and seated on the said motorcycle and they reached from Chapra to Patna. At about 12:00 night the appellant took the informant to the residence of one Ganesh Pal and ravished her. The appellant kept the informant thereat on 06.08.2014 and 07.08.2014 and on both dates the appellant allegedly ravished the informant. On 08.08.2014 Ganesh Pal took the informant to his village Painal where full-brother of the informant Munna (PW 3) was called on and everything was reported to Munna.



Thereafter, the informant went to Maner Police Station. The Maner Police stated that the matter is of the jurisdiction of Patna Kotwali. Hence, the written report was submitted to the Patna Kotwali and FIR was registered.

In her statement, under Section 164 Cr.P.C., the informant stated that her Bhabhi was sleeping at the roof of the house along with her children. At about 10:00 PM mobile of Bhabhi rang. The victim came down and saw that the caller was the appellant. The appellant asked her to come out. The victim went out. Thereafter the appellant forcibly took her on the motorcycle and carried her to Patna at the residence of Ganesh Pal and ravished her. She has stated that Ganesh Pal is her own Mause and the appellant addresses Ganesh Pal as grand-father. In the prosecution evidence it has come that Ganesh Pal is brother of father-in-law of PW 3 Munna Rai, who is full-brother of the victim. In the statement under Section 164 Cr.P.C., the victim further admitted that since several months the appellant used to come to her house in the night and used to be in physical relation with her. Thereafter, the victim conceived of the appellant. When she was carrying five months pregnancy her bhabhi Ms. Mamta (who was not examined as prosecution witness but her husband has been examined as PW 3) took her



to the doctor and get aborted. Even after abortion the appellant was in physical relation with the victim; rather the appellant had physical relation with Mamta also as Mamta was allured by the gifts of the appellant.

3. During trial prosecution examined altogether seven witnesses. PW 1 Ramesh Rai is cousin brother of the victim and is a hearsay witness of the occurrence. PW 2 Dr. Bibha Sinha had medically examined the victim. PW 3 Munna Rai is full brother of the victim and has supported the prosecution case as hearsay witness, PW 4 Lakho Devi is mother of the victim, PW 5 the victim girl herself and PW 6 Pappu Kumar Rai, a cousin brother of the victim has turned hostile. PW 7 Punam Chaudhary is Investigating Officer of this case.

4. The defence examined DW 1 Srikant Prasad, DW 2 Indu Devi, DW 3 Anand Kumar, DW 4 Rajendra Prasad and DW 5 Suresh Prasad. All these witnesses stated that since marriage negotiation between the victim and the appellant failed after getting information that the victim was not carrying good reputation, the present FIR was lodged.

5. Mr. Ajay Kumar Thakur, learned counsel for the appellant, submits that on a closure and careful scrutiny of the



prosecution case and prosecution evidence, it would be evident that the victim was in consensual physical relationship with the appellant. Because, since years both were in physical relation which was known to the brother (PW 3) and Bhabhi of the victim. The child in her womb was aborted, she voluntarily left the house along with the appellant and travelled to different places without any protest, she did not inform about the act of the appellant to anyone even to Mr. Dinesh Prasad, an employee residing near the residence of Ganesh Pal and victim simply stated to Mr. Dinesh that she has come to see her Mause. According to learned counsel, the prosecution has failed to prove that the victim was below 18 years of age on the date of occurrence to bring the case under mischief of Clause “sixthly” of Section 375 of the Indian Penal Code. Learned counsel contends that the doctor who had performed the radiological examination to determine the age of the victim was not produced before the Court. Hence, opinion of the expert is not a direct evidence on the record on the point of age of the victim; rather hearsay evidence is there. Likewise, other prosecution witnesses including mother of the victim have only deposed on the basis of their assessment about the approximate age of the victim. Therefore, this was a case wherein the trial Judge should



have held that the prosecution has failed to prove the charges against the appellant. Reliance has been placed on the following cases: **Jarnail Singh V. State of Haryana** reported in **2013 CRI.L.J. 3967**, **State of Madhya Pradesh V. Munna @ Shambhoo Nath** reported in **(2016) 1 SCC 696** and **Rajak Mohammad V. State of Himachal Pradesh** reported in **(2018) 9 SCC 248**.

6. Learned counsel for the State-respondent Mr. Shyed Ashfaque Ahmad submits that none of the prosecution witnesses, who deposed that the victim was below 18 years of age, was cross-examined on the point nor any suggestion was made that the prosecution witnesses are telling lies. Hence, it would amount to tacit acceptance by the defence of what the prosecution witnesses stated. Therefore, it is well proved that the victim was a minor on the date of occurrence. Moreover, the act of the appellant committed on 6th and 7th of August, 2014 was against the consent of the victim and if the victim so says the onus was on the accused to prove otherwise. Hence, conviction of the appellant requires no interference.

7. PW 5 the victim girl in her deposition besides supporting the statement made in the FIR has admitted that on her dictation her cousin Anil Kumar had written the first



information to the police and she had signed on that. Likewise, she had made statement before the Magistrate and had signed on the said statement. The witness stated that she was married few months back in the State of Uttar Pradesh. Mother had got her admitted in the school in Class-VI and the school wherein she had studied from Class-I was nearby the said school. When she left Chapra along with the appellant there was crowd everywhere but she did not make any alarm. PW 4 Lakho Devi besides supporting the allegation as hearsay witness stated that age of the victim is in between 17 to 18 years. PW 3 Munna Rai, the full brother of the victim, besides supporting the prosecution case as hearsay witness admitted that his wife had participated in abortion of the victim two months back. The termination of pregnancy was done to the knowledge of this witness and all family members. The police was not informed about the termination of pregnancy. The victim was studying since Class-IV and she failed in Class-VII for 3 to 4 times. PW 7, the Investigating Officer, when confronted by the defence admitted that she could not trace out the school where the victim was studying. The victim had not produced any school certificate to the I.O. neither the Investigating Officer asked for any school certificate nor the family members had produced any such



certificate from any school.

8. PW 2 Dr. Bibha Sinha deposed that on the basis of radiological examination, the age of the victim was assessed between 16 to 17 years. The witness admitted that determination of age was not done by her; rather it was done by the radiology department. The determination of age of the victim by ossification test is also done by the radiology department.

9. The conduct of the victim (a) in being physical relation with the appellant since years together, (b) this fact being known to the brother and bhabhi of the victim, (c) she got termination of pregnancy with the consent of the family members, (d) after termination of the pregnancy again she was in physical relation with the appellant, (e) even on 6th and 7th August, 2014 she had gone with the appellant from Chapra to Patna on a motorcycle of the appellant without making any protest or making any alarm, for help, to anyone, (f) she was in physical relation with the appellant in the house of her own relative Mr. Ganesh Pal, who was not examined, and (g) she did not disclose this fact to anyone, goes to show that the victim was a consenting party to the physical relation with the appellant.

10. It is not the prosecution case that consent of the



victim was obtained by fraud, or by putting her or anyone in whom she was interested in fear of death, or at the time of giving consent she was of unsound mind or under influence of intoxication, consequently unable to understand the nature and consequence of that for which she gave consent. Rather prosecution case is that at the said time the victim was under 18 years of age. Hence, her consent was immaterial.

11. Now the question would be whether the prosecution has proved beyond reasonable doubts that the victim was under 18 years of age at the time of physical relation with the appellant to bring the case under the mischief of clause 'sixthly' of Section 375 of the Indian Penal Code.

12. The age of the victim has been sought to be proved by the prosecution by asserting that from very inception it is consistent case of the prosecution that the victim was aged about 14 years. The prosecution witnesses including the victim and her mother have deposed that the victim was below 18 years of age. The medical report also revealed that the victim was between 16 to 17 years. These witnesses were not cross-examined nor any suggestion was made that they are making wrong statement. Therefore, on the basis of aforesaid material prosecution claims that it had proved that the victim was below



18 years of age on the date of occurrence. As such, her consent or no consent was immaterial.

13. In the case of **Sunil v. The State of Haryana** reported in **AIR 2010 SC 392**, the Hon'ble Supreme Court held that conviction cannot be based on an approximate age of the victim. In the case of **Jarnail Singh V. State of Haryana** reported in **2013 CRI. L. J. 3976**, the Hon'ble Supreme Court said that the age of the victim of rape should be determined in the manner provided under Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007, there is no difference as regards minority between the child in conflict with law and the child who is victim of crime. Under Rule 12 preference is to be given to the school documents in determination of the age of the victim. The prosecution has not produced any school document to prove the age of the victim. Even the parent of the victim gave an approximate age of the victim. The doctor, who conducted the ossification/radiological examination of the victim, was not produced by the prosecution. Hence, direct evidence of age determination was not there.

14. It is trite proposition that in criminal trial the prosecution is bound to prove the charges against the accused beyond reasonable doubts and not by preponderance of



probability. Even where statutes provide for reverse burden of proof on the accused, the prosecution must discharge its initial burden by producing trustworthy and acceptable evidence. Therefore, it cannot be argued by the State-respondent that non-cross-examination of the prosecution witnesses on the point of age of the victim exonerate the prosecution from the burden of proving the age of the victim beyond all reasonable doubts.

15. In the case of **State of Madhya Pradesh V. Munna @ Shambhoo Nath** reported in **(2016) 1 SCC 696**, the consensual intercourse was proved and the prosecution failed to prove the age of the victim below the statutory requirement of that time beyond reasonable doubts. Hence, the Hon'ble Supreme Court refused to interfere with the judgment of acquittal recorded by the High Court. The Hon'ble Supreme Court held that the evidence on approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.

In the case of **Rajak Mohammad V. State of Himachal Pradesh** reported in **(2018) 9 SCC 248**, where the case was of consensual intercourse but the prosecution had failed to prove that the victim was a minor on the date of occurrence. Hence, the Hon'ble Supreme Court set aside the



conviction recorded by the High Court.

16. Thus, the irresistible conclusion in this case would be that the victim was in consensual relationship with the appellant and the prosecution has failed to prove that she was below the age prescribed under the law. Hence, she was competent to consent. Therefore, in my view, the prosecution has failed to prove the charges against the appellant and the learned trial Judge has failed to appreciate the aforesaid infirmity in the prosecution case.

17. In the result, the impugned judgment and order are hereby set aside and this appeal is allowed.

18. Let the appellant be set free at once.

(Birendra Kumar, J)

Mkr./-

AFR/NAFR	AFR
CAV DATE	09.02.2021
Uploading Date	12.02.2021
Transmission Date	12.02.2021

