

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.159 of 2018

Arising Out of PS. Case No.-396 Year-2015 Thana- DUMRAO District- Buxar

Arjun Kumar @ Prince S/o Ram Prakash Shah, R/o Village- Simari Deo, P.S.-
Karahgar, District- Rohtas.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Vikram Deo Singh, Advocate. Mr. Arabind Nath Pandey, Advocate.
For the Respondent/s	:	Mr. Bipin Kumar, APP.

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
C.A.V. JUDGMENT

Date : 07-07-2021

The sole appellant Arjun Kumar @ Prince faced trial in POCSO Case No. 06 of 2016 arising out of Dumrao P.S. Case No. 396 of 2015 for offence under Sections 363, 366A and 376 of the Indian Penal Code as well as 4 of the POCSO Act. By the impugned judgment dated 13.11.2017, the learned trial Judge found guilty and convicted to the appellant for offences under Sections 366A and 376 of the Indian Penal Code and 4 of the POCSO Act. By the impugned order of sentence dated 17.11.2017, the appellant was directed to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 20,000/- for offence under Section 366A IPC. Three months imprisonment was ordered for non-payment of the fine aforesaid. For the offence under Section 376 IPC, the appellant was sentenced to undergo rigorous imprisonment of 10 years



and to pay a fine of Rs. 20,000/-. In default of payment of fine, three months imprisonment was ordered. No separate sentence under Section 4 of the POCSO Act was passed considering the provisions of Section 42 of the POCSO Act.

2. The prosecution case as disclosed in the written report of Pushpa Devi (PW-3) the mother of the victim girl, is that on 29.11.2015 at about 10 a.m., her daughter aged about 13 years left the house for getting tuition. The youngest son Niku Kumar aged about 10 years reported that he had seen the victim girl going on an auto rickshaw towards the railway station. Soon thereafter the appellant, from the referred mobile, called to the informant and said that he is along with the victim girl and he is taking her to Patna for marrying with her. The informant alleges that her minor daughter was induced by the appellant for the purpose of marriage. On the written report aforesaid, Dumrao P.S. Case No. 396 of 2015 was registered on 29.11.2015 itself. On 03.12.2015, the victim girl was found at the railway station Dumrao by the police vide evidence of the investigating officer (PW-6) in Para-6. Medical examination of the victim was done on 04.12.2015 vide report at Ext.-2 and her statement under Section 164 Cr.P.C. was recorded on 04.12.2015 itself vide Ext.-1.



3. After investigation, the police submitted chargesheet and accordingly the appellant was put on trial. The prosecution examined altogether 10 witnesses.

4. PW-1 the victim girl consistent with her statement before the Magistrate under Section 164 Cr.P.C deposed that one year ago at 10 a.m., she was ready to go for tuition. Just then a mobile call came on the mobile of her mother. The victim received the call. The appellant said that he wants to meet her and called her at once and proposed that appellant wants to marry with her. She left her house along with her brother, but the appellant induced her to go with him. Thereafter the appellant was in physical relation with her for three days. Later on brought her to railway station Dumrao and left her there-at. Then the victim telephonically informed to her mother. Her mother came and she went to her house. She went to the police station and her statement was recorded before the Magistrate. She was medically examined by the doctor. In the cross-examination, the witness said that the appellant had met her at the railway station. The people were coming and going at the railway station. She had not disclosed anyone that the appellant had induced her to go with him. Then the appellant purchased ticket and both took a train. Neither at the time of



boarding the train nor getting off the train, she made any alarm. She was kept in a house at Patna where no one was there. On all the three days, she had herself locked the room from inside. However whenever the appellant used to go outside he was locking the room from outside. After three days, both came at Patna railway station and from there they again returned to Dumrao railway station.

PW-2 Dr. Bharti Dwivedi had medically examined the victim vide report at Ext.-2. According to PW-2, there was no external injury on the person of the victim. Her breasts were well developed. Axillary hairs and pubic hairs were present. The hymen was found ruptured. No spermatozoa was noticed in the vaginal swab. On the basis of dental and radiological examination, the age of the victim was assessed between 15-16 years.

PW-5 Dr. Yogendra Kumar had taken X-ray of the victim and submitted a report on the basis of X-ray examination. However, that report was not before him at the time of examination in court nor the same was brought on the record.

PW-10 Dr. Ritesh Kumar Singh had submitted dental examination report of the victim, but this report was also not brought on the record nor was there before PW-10 on the



date of his examination before the Court.

PW-3 Pushpa Devi is mother of the victim and she has supported what she had disclosed in the first information report.

PW-4 Ram Niwas Singh is maternal grand father of the victim and he has supported the occurrence as a hearsay witness.

PW-6 Deepak Kumar is first investigating officer of the case and PW-7 Tarkeshwar Rai is second investigating officer of the case. Both have supported the investigation done by them.

PW-8 Nikku Kumar Singh is younger brother of the victim. He has deposed that the appellant forcefully took the victim on an auto rickshaw going towards Dumrao railway station. His statement was got recorded before the police and the aforesaid statement is inconsistent with the case of PW-1, the victim girl who has said that the appellant was there at the railway station and was not in the auto rickshaw.

PW-9 Navin Kumar Dubey is a witness on the first information report.

5. Mr. Vikram Deo Singh, learned counsel for the appellant submits that on bare perusal of the prosecution case



and prosecution evidences, there is no case at all that the appellant committed offence under Section 366A IPC. Even if it is assumed for argument sake that a minor girl was induced to go, there is no allegation that purpose was of illicit intercourse with another person. Therefore, conviction under Section 366A IPC is bad in law.

Learned counsel next contends that in her statement under Section 164 Cr.P.C., the victim stated that 3-4 months back, the appellant had phoned on the mobile of her mother which the victim had received. The appellant disclosed his name and the victim voluntarily left her house to meet the appellant at Dumrao railway station. The conduct of the victim in voluntarily leaving the house alone, meeting the appellant at the railway station and accompanying the appellant for Patna on a train, and lack of evidence that the appellant had persuaded the victim to go to Patna on the pretext of some unreal purpose for taking her to Patna would make it clear that the prosecutrix had gone along with the appellant voluntarily. Moreover, when she was in physical relation with the appellant for three days, she did not make any protest nor any complain to anyone.

The prosecution has failed to prove the exact age of the victim to substantiate that on the alleged date of occurrence



she was incapable of giving consent. The evidence of approximate age cannot take the place of proof of exact age.

6. Mr. Bipin Kumar, learned APP contends that since the victim was a minor and there is no cross-examination, to the prosecution witnesses who had deposed that the victim was a minor including to the victim girl, regarding correctness of her age. Therefore, in absence of any other evidence, the available evidence would show that the victim was a minor. Once she was a minor, her consent or no consent is immaterial for the purpose of consideration of charge against the appellant. The victim is consistent that she was sexually exploited by the appellant. Therefore, conviction requires no interference.

FINDING

7. It is not the prosecution case that the 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 time of incident the victim was under 18 years of her age. Hence, her consent was immaterial.

8. 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.

9. The prosecution has sought to prove the age of the victim by asserting that from very inception it is case of the prosecution that the victim was aged about 13-14 years. The medical report also revealed that she was in between 15-16 years. The prosecution witnesses were not cross-examined nor any suggestion was put forward by the defence that the witnesses were making wrong statement regarding age of the prosecutrix. On the basis of aforesaid material, the prosecution claims that it has proved that the victim was below 18 years of age on the date of occurrence. As such, her consent or no consent was immaterial.

10. 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.

Similarly in **State of Madhya Pradesh v. Munna @ Shambhoo Nath** reported in **(2016) 1 SCC 696**, 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 **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 the 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(3), preference is to be given to the school documents in determination of age of the victim. Only in absence of the school documents, the opinion of medical expert is permissible.

11. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 reads as follows:-

“12. Procedure to be followed in determination of Age.-

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning



a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the



Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

The aforesaid Rule was applicable on the date of occurrence of this case. An identical provision is there under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which came into effect from 15.01.2016, admittedly after the date of occurrence of this case.

Thus, it is evident from perusal of the Rule 12 above that only in absence of the school documents, other evidences are permissible to determine the age of the juvenile victim. In this case, the mother of the victim (PW-3) has said that the victim was a student of Class-VII. Therefore, school document of age of the victim was there which was deliberately not brought on the record by the prosecution. Even the report of ossification / radiological test was not produced to have opportunity to the defence to cross-examine the experts regarding scientific method adopted by them while performing such examination. Therefore, the evidence of exact date of birth



of the victim which was available with the prosecution was not brought on the record and the evidence of approximate age cannot take the place of proof of exact age. Once the prosecution failed to prove that the victim was below 18 years of age, the above discussed evidence of her consent, assumes importance. As noticed above, the victim was in consensual relationship with the appellant. Therefore, charge under Section 376 IPC and 4 of the POCSO Act fails.

12. Section 366A of the Indian Penal Code reads as follows:-

366A. Procurement of minor girl.

—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

Evidently, there is no prosecution case that a minor was induced to go for the purpose of illicit intercourse with another person. Therefore, conviction of the appellant is illegal under Section 366A of the Indian Penal Code also.

13. Thus, the irresistible conclusion is that the prosecutrix was in consensual relationship with the appellant, the prosecution has failed to prove that the victim was of the age



incapable of giving consent. Likewise the prosecution has failed to prove that the victim was induced to go with the appellant for the purpose of illicit intercourse with another person.

14. In the result, the impugned judgment of conviction and order of sentence are hereby set aside and this appeal is allowed.

Let the appellant be set free at once.

(Birendra Kumar, J)

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AFR/NAFR	A.F.R.
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