

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.14 of 2020

Arising Out of PS. Case No.-66 Year-2017 Thana- BAKHTIARPUR District- Saharsa

1. Mojahid Ansari @ Mozahid @ Mozahid Ansari @ Md. Mojahi Ansari Son of Md. Israfil, Resident of Village - Kumharpur, P.S. Bihariganj, District- Madhepura.
2. Shamsad @ Shamsuddin @ Md. Shamsad @ Md Shamsad Ansari @ Shamsuddin Son of Late Md. Farooque Resident of Village - Khamhauti, Police Station - Bakhtiyarpur, District - Saharsa.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellants	:	Mr. Bikramdeo Singh, Advocate Mr. Satish Kumar Singh, Advocate Mr. Dinesh Maharaj, Advocate
For the Respondent	:	Km. Shashi Bala Verma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH

SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 17-11-2022

This appeal has been preferred by the appellants under Section 374(2) of the Code of Criminal procedure, 1973 (Cr.P.C. in short) assailing a judgment of conviction dated 12.12.2019 and an order of sentence dated 18.12.2019, passed by learned 1st Additional Sessions Judge-cum-Special Judge (POCSO), Saharsa, in POCSO Case No. 21/2017, arising out of Bakhtiyarpur P.S. Case No. 66 of 2017, whereby the appellants have been convicted and sentenced as under:-



Appellant No.	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
1. (Mojahid Ansari @ Mozahid @ Mozahid Ansari @ Md. Mojahi Ansari)	366(A) of the I.P.C.	R.I. for eight years	8,000/-	R.I. for four months
	376(D) of the I.P.C.	R.I. for 20 years	20,000/-	R.I. for 10 months
	6 of the POCSO Act	R.I. for 10 years	10,000/-	R.I. for five months
2. (Shamsad @ Shamsuddin @ Md. Shamsad @ Md Shamsad Ansari @ Shamsuddin)	366(A) of the I.P.C.	R.I. for eight years	8,000/-	R.I. for four months
	376(D) of the I.P.C.	R.I. for 20 years	20,000/-	R.I. for 10 months
	6 of the POCSO Act	R.I. for 10 years	10,000/-	R.I. for five months

2. The sentences have been ordered to run concurrently.

3. The name of the victim has been concealed and she has been referred to as ‘the victim/PW-7’ in the present judgment.

4. Heard Mr. Bikramdeo Singh assisted by Mr. Satish Kumar Singh, learned counsel for the appellants and Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the respondent State.

5. The prosecution’s case, as disclosed in the written report dated 20.03.2017 of the informant (PW-6), who is the father of the victim, is that the victim, i.e., PW-7, had left her house at 9.30 AM on 18.03.2017 for school. She, however, did not return till 5.30 PM. Apprehending that the victim might have been kidnapped either for marriage or for killing her, he got registered the First Information Report giving rise to Bakhtiyarpur P.S. Case No. 66 of 2017. He categorically



mentioned the age of the victim to be 18 years and seven months and that she was married to someone nearly six months before the date of occurrence. The case was initially registered for the offences punishable under Sections 365 and 366 of the Indian Penal Code.

6. From the evidence on record, it transpires that the victim was recovered with the appellant No. 1, Mojahid Ansari @ Mozahid @ Mozahid Ansari @ Md. Mojahi Ansari, from a railway platform of Bhatinda Railway Station in Punjab on 23.03.2017 by the Punjab Police. She was subsequently brought back by the police and her brother and was subjected to medical examination on 27.03.2017. During the medical examination, no evidence of any sexual assault on the victim was found. Based on the report received from the Department of Radiology, J.L.N.M.C.H., Bhagalpur, the Doctor assessed the victim's age to be less than 16 years. Statement of the victim recorded under Section 164 of the Cr.P.C. has not been exhibited at the trial though the victim's signature on the said statement has been exhibited as Exhibit-3.

7. It is evident from the records that in the light of the statements of the victim recorded under Section 164 of the Cr.P.C., Sections 366A, 376 read with 120B of the Indian Penal



Code and Section 4 of Protection of Children from Sexual Offences Act (POCSO) were added in the First Information Report under the order of the court below dated 05.05.2017.

8. Upon completion of investigation, the police submitted its charge-sheet for the commission of the offence punishable under Sections 365, 366A, 376 and 120B of the IPC and Section 4 of the POCSO Act. The cognizance was accordingly taken by the court below and subsequently charges were framed against the appellants for commission of the offences punishable under Section 6 of the POCSO Act and Sections 366A and 376D of the Indian Penal Code. The appellants claimed to be tried, pleading not guilty before the court below and accordingly they were put to trial.

9. At the trial, altogether eight witnesses were examined for the prosecution and two for the defence. After the closure of the examination of the of the prosecution's witnesses, the appellants were asked by the trial court to explain the circumstances, which were emerging against them, based on the evidence adduced by the prosecution at the trial. The appellants denied the circumstances. Upon evaluation and scrutiny of the evidence of the witnesses as well as the documentary evidence adduced at the trial, the trial court has recorded conviction and



imposed sentences as noted above.

10. Learned counsel appearing on behalf of the appellants has argued that the finding recorded by the trial court of conviction is patently erroneous. It has been argued that the essential ingredients constituting offences punishable under Section 6 of the POCSO Act, Sections 366A and 376D of the IPC cannot be said to have been established by the prosecution based on the evidence adduced at the trial. It has been argued that the prosecution failed to prove beyond all reasonable doubts the basic fact that the victim was below 18 years of age as on the date of occurrence, rather the prosecution's witnesses (PW-3, mother of the victim, and PW-6, father of the victim, the informant) clearly proved that she was above 18 years of age as on the date of occurrence. It has accordingly been submitted that no offence can be said to have been established by the prosecution attracting Section 366A of the IPC and Section 6 of the POCSO Act. He has further submitted that on closer scrutiny of the evidence of the victim herself, it can be seen that even she has not supported in her evidence at the trial prosecution's case of the commission of offence punishable under Section 376D of the IPC.

11. Learned Additional Public Prosecutor appearing on



behalf of the State refuting the contention advanced on behalf of the appellants has, on the other hand, submitted that the medical evidence suggests that the victim was below 16 years of age as on the date of the occurrence. She has further submitted that the victim disclosed in detail, the entire occurrence right from the moment when she was taken away from the lawful guardianship of her parents till she was recovered by the police at Bhatinda. She has submitted that the disclosures made by the victim in her statement under Section 164 of the Cr.P.C. do constitute offences punishable under Section 6 of the POCSO Act and Section 376D of the IPC. She has accordingly contended that the trial court has rightly convicted these appellants of commission of the offence punishable under Section 6 of the POCSO Act and Sections 366A and 376D of the IPC.

12. We have perused the impugned judgment and order of the trial court as well as the oral and documentary evidence adduced at the trial. We have given our thoughtful consideration to the rival submissions made on behalf of the parties.

13. From the prosecution's case, as disclosed in the First Information Report based on written report of the father of the victim, two facts are clear. Firstly, that the victim, according to the informant, who is the father of the victim, was above 18



years of age and she was already married, six months before the date of occurrence.

14. The manner in which she was allegedly taken away by these appellants came to be disclosed by the victim in her statement recorded under Section 164 of the Cr.P.C.. She disclosed in her said statement that on the date of occurrence, while she was returning from the school, she met these appellants, who were in a motorcycle. According to her, appellant No. 2 is maternal uncle of the appellant No.1. In response to a query made by appellant No.1, she told him that she was going to her father's shop, who ran a furniture-business. They offered the victim to drop her to her father's shop. She apparently agreed and sat with them in the motorcycle. Thereafter, there is narration of her being taken to Bakhtiyarpur Railway Station and then to Delhi. According to her, she had become unconscious after appellant No.1 had put his handkerchief on her mouth. She was taken firstly to Delhi and from Delhi to Bhatinda. At Bhatinda, she was kept in a room for 2-3 days, where three persons misbehaved with her (जबरदस्ती करने लगे). The statement also contains an allegation that appellant No.1 would talk with the appellant No.2 on phone for selling the victim to someone. She was subsequently taken to Bhatinda Railway Station by appellant



No.1. At Bhatinda Railway Station, the appellant No.1 is said to have told her to sit there for him to bring some poison, which both of them shall consume. Before leaving, the appellant No.1 had left behind his mobile phone. Utilizing this opportunity, she called her brother (PW 2) using mobile phone of appellant No.1 and informed him about her location. Thereafter, the police came, apprehended them, took to the police station and as has been mentioned hereinabove, she was brought to Bakhtiyarpur from Bhatinda, where she was subjected to medical examination. The statement of the victim recorded under Section 164 of the Cr.P.C. has not been proved at the trial.

15. The question, which has emerged for this Court's consideration, is as to whether the offences punishable under Section 6 of the POCSO Act and Sections 366A and 376D of the IPC can be said to have been proved based on the evidence adduced at the trial and whether the finding of conviction recorded by the trial Court is worth being affirmed by this Court.

16. Before addressing the said question, it would be apt to evaluate the evidence of the witnesses on the point as to whether the victim could be held to be a minor below 18 years of age, as on the date of occurrence, based on the evidence adduced at the trial.



17. In our considered view, the parents of the victim are the best witnesses to certify the exact age of the victim. The father of the victim (PW-6) in the FIR itself had disclosed the victim's age to be 18 years and seven months. The mother of the victim, in her deposition in paragraph 7, has emphatically stated that the victim was major as on the date when she was married. The occurrence had apparently taken place six months after the victim's marriage. On the point of determination of the age of the victim, except for the opinion of the Doctor that the victim's age was below 16 years, there is no other evidence to support the said opinion formed by the Doctor. Based on the evidence of the father (PW-6) and mother (PW-3), the Court finds it difficult to uphold the finding recorded by the trial court, i.e., victim was a minor as on the date of occurrence. In such circumstance, the conviction recorded by the trial court of offence punishable under Section 6 of the POCSO Act cannot be upheld.

18. For the same reason, the appellants' conviction under Section 366A of the IPC, as recorded by the trial court, is unsustainable as the victim could not be treated to be a minor as on the date of occurrence.

19. The aforesaid findings leave us to examine the correctness of the finding recorded by the trial court of



conviction under Section 376D of the IPC. Section 376D of the IPC reads as under: -

[376-D. Gang rape.—*Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:*

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.]

20. We have carefully evaluated the evidence of the victim (PW-7) herself to examine as to whether an offence punishable under Section 376D of the IPC can be said to have been established against the appellants. We, at the very outset, must record that there is no evidence at all so far as appellant No.2 is concerned to even indicate commission of any offence



against him. The only material, which has come against him, is that he was accompanying appellant No.1 when the victim was offered by him to drop her to her father's shop in the motorcycle. In our opinion, so far as appellant No.2, Shamsad @ Shamsuddin @ Md. Shamsad @ Md Shamsad Ansari @ Shamsuddin, is concerned, his conviction under Section 376D of the IPC is not at all sustainable.

21. Now, coming to the deposition of the victim to assess the culpability of appellant No.1, Mojahid Ansari @ Mozahid @ Mozahid Ansari @ Md. Mojahi Ansari, is concerned, we notice that there is no clear evidence of any sexual assault committed by appellant No.1. During the cross examination, in response to a question put by the defence counsel, she has vaguely stated in paragraph 6 that appellant No.1 had done something wrong (गलत काम किया था). The said deposition of the victim, in our considered view, cannot be said to be constituting an offence under Section 376 of the IPC, let alone offence under Section 376D of the said Code.

22. We find substance in the submission made on behalf of the appellants that the narration of the chain of events in the deposition of victim (PW-7) goes to suggest that the victim and appellant No.1 were all along at public places and the



appellant No.1 did not have any opportunity to have engaged in any sexual intercourse with the victim, with or without consent.

23. In view of the discussions noted above, we are of the considered opinion, that the prosecution failed to establish the charges of commission of offences punishable under Section 6 of the POCSO Act and Sections 366A and 376D of the Indian Penal Code. It is not safe for this Court to uphold the conviction recorded by the trial court by the impugned judgment and order. Accordingly, the impugned judgment of conviction dated 12.12.2019 and order of sentence dated 18.12.2019, passed by learned 1st Additional Sessions Judge-cum-Special Judge (POCSO), Saharsa, in POCSO Case No. 21/2017, arising out of Bakhtiyarpur P.S. Case No. 66 of 2017 are hereby set aside.

24. This appeal is allowed.

25. The appellants are in custody. Let them be released forthwith, if they are not required in any other case.

(Chakradhari Sharan Singh, J)

(Chandra Prakash Singh, J)

Pawan/-

AFR/NAFR	NAFR
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