

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.922 of 2018

Arising Out of PS. Case No.-325 Year-2016 Thana- MOTIHARI MUFASIL District- East
Champaran

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Jitendra Paswan S/o- Mushar Paswan, resident of Village- Katahan, P.S.-
Motihari Muffasil, District- East Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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with

CRIMINAL APPEAL (DB) No. 694 of 2018

Arising Out of PS. Case No.-325 Year-2016 Thana- MOTIHARI MUFASIL District- East
Champaran

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Mushar Paswan S/o Late Mangal Paswan, Resident of Village- Katahan, P.S.-
Motihari Muffasil, District- East Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 922 of 2018)

For the Appellant : Mr. Rajeev Ranjan, Advocate
Mr. Ankur Prakash Sinha, Advocate
Mr. Chandra Kant, Advocate

For the Respondent : Ms. Shashi Bala Verma, APP

For the Informant : Mr. Jivay Shankar, Advocate

(In CRIMINAL APPEAL (DB) No. 694 of 2018)

For the Appellant : Mr. Rajeev Ranjan, Advocate
Mr. Ankur Prakash Sinha, Advocate
Mr. Chandra Kant, Advocate

For the Respondent : Ms. Shashi Bala Verma, APP

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date : 08-12-2022

Since both these appeals arise out of the same
judgment and order of the learned Trial Court, they have been



heard together and are being disposed of by the present common judgment and order.

2. These appeals have been preferred by the appellants under Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C.) assailing the judgment of conviction dated 09.04.2018 and order of sentence dated 12.04.2018 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, POCSO Act, Motihari in POCSO Trial No. 28 of 2016 arising out of Motihari Muffasil P.S. Case No. 325 of 2016, whereby the appellants have been convicted and sentenced as under:

Appellant's name	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
CRIMINAL APPEAL (DB) No. 922 of 2018				
Jitendra Paswan	341 read with 34 of the Indian Penal Code	7 (Seven) days simple imprisonment	-	-
	323 read with 34 of the Indian Penal Code	3 (Three) months rigorous imprisonment	-	-
	363 read with 34 of the Indian Penal Code	3 (Three) years rigorous imprisonment	5,000/-	Three months imprisonment
	366 read with 34 of the Indian Penal Code	5 (Five) years rigorous imprisonment	10,000/-	Six months imprisonment
	376D of the Indian Penal Code	20 (Twenty) years rigorous imprisonment	25,000/-	One year imprisonment
	6 of the Protection of Children from Sexual	10 (Ten) years rigorous imprisonment	25,000/-	One year imprisonment



	Offences Act			
CRIMINAL APPEAL (DB) No. 694 of 2018				
Mushar Paswan	341 read with 34 of the Indian Penal Code	7 (Seven) days simple imprisonment	-	-
	323 read with 34 of the Indian Penal Code	3 (Three) months rigorous imprisonment	-	-
	363 read with 34 of the Indian Penal Code	3 (Three) years rigorous imprisonment	5,000/-	Three months imprisonment
	366 read with 34 of the Indian Penal Code	5 (Five) years rigorous imprisonment	10,000/-	Six months imprisonment
	376D of the Indian Penal Code	20 (Twenty) years rigorous imprisonment	25,000/-	One year imprisonment
	6 of the Protection of Children from Sexual Offences Act	10 (Ten) years rigorous imprisonment	25,000/-	One year imprisonment

3. We have heard Mr. Rajeev Ranjan, learned counsel with Mr. Ankur Prakash, learned counsel for the appellants; Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State and Mr. Vijay Shankar Shrivastava, learned counsel for the informant.

4. The appellant, Mushar Paswan, of Criminal Appeal (DB) No. 694 of 2018 is the father of appellant Jitendra Paswan of Criminal Appeal (DB) No. 922 of 2018. The father of victim is the informant, whose written report dated 28.08.2016 to the Station House Officer, Muffasil Motihari is the basis for



registration of First Information Report (F.I.R. for brevity) levelling commission of the offences punishable under Sections 366A and 506 of the Indian Penal Code (I.P.C. for brevity).

5. In brief, the prosecution's case as disclosed in the F.I.R. is that on 25.08.2016, at about 10.00 AM, the informant's thirteen-year old daughter (P.W. 4, name concealed) was alone in her house as the family members had gone to earn there livelihood, the appellant, Jitendra Paswan kidnapped her with the intention to marry her. He also learnt that appellants Mushar Paswan, Sheikh Nasim, Rajan Paswan and Achhe Lal Paswan were also involved in the commission of the occurrence. The victim (P.W. 4) was subsequently recovered and produced before the learned Magistrate for recording of her statement under Section 164 of the Code of Criminal Procedure (Cr.P.C. for short) on 30.08.2016. The said statement of the victim (P.W. 4) came to be exhibited as a piece of evidence without any objection, as is evident from the lower court records. In the said statement, she disclosed that she had gone in the field for cutting grass, in the meanwhile the accused persons, namely, appellant Jitendra Paswan (appellant), Rajan Paswan, Mushar Paswan (appellant), Sheikh Nasim, Achhe Lal Paswan came from behind and after blindfolding and gagging her, took her away.



When she opened her eyes, she found herself in a maize field where all the aforesaid persons were standing. When the victim urged to let her go back to her house, they assaulted her, because of which, she bled from her nose. Appellant Jitendra Paswan is said to have sexually assaulted her forcibly. Subsequently, all of them dropped her at '*Chatoni Road*' and fled away. At a time when she was crying thereafter, she noticed her father the informant, on the road. She called him and he (the informant) took her back home.

6. Though the F.I.R. was registered alleging commission of offences punishable under Sections 366A and 506 of the I.P.C., the police based on subsequent materials, upon completion of investigation, submitted its charge-sheet on 20.10.2016 against the accused Rajan Paswan and the appellant Mushar Paswan for commission of the offences punishable under Sections 366A, 376, 323 read with 34 of the I.P.C. and Section 6 of the Protection of Children from Sexual Offences Act (POCSO Act for brevity). Accordingly, cognizance of the aforesaid offences was taken by the learned Special Court on 21.10.2016. Another charge-sheet was submitted on 18.01.2017 against the appellant Jitendra Paswan for commission of the said offences upon which a cognizance was taken by the learned



Special Judge, POCSO Act.

7. After taking of the cognizance, charges were framed for the offences punishable under Sections 341, 366A, 363, 323 of the IPC all read with Section 34 thereof, and Section 6 of the POCSO Act against Rajan Paswan and the appellant Mushar Paswan in POCSO Trial No. 28 of 2016 on 29.03.2017. Further, on 24.06.2017, charges were framed for commission of the aforesaid offences against appellant Jitendra Paswan in POCSO Trial No. 10 of 2017. The charges were explained to the persons put to trial who pleaded not guilty and, accordingly, the trial ensued. It is also evident from the records that subsequently the charge was altered by the Special Court by an order dated 28.02.2018 whereby the charge of commission of offences punishable under Section 366A r/w 34 of the I.P.C. earlier framed against all the accused persons was deleted and in place thereof, the charges of commission of the offences punishable under Section 366 r/w 34 and 376D was added. The said charges were also explained to the persons put to trial, including these appellants.

8. Further, as the two trials, namely, Trial No. 10 of 2017 and Trial No. 28 of 2016 arose out of the same criminal case, the POCSO Trial No. 10 of 2017 was amalgamated with



the POCSO Trial No. 28 of 2016. It further transpires that, for reasons recorded in the order dated 29.03.2018 passed by the Trial Court, the trial of the accused Rajan Paswan was separated and accordingly these two appellants faced criminal trial in the concerned POSCO Trial No. 28 of 2018.

9. At the trial, altogether seven witnesses were examined including the informant (P.W. 1), the victim (P.W. 4), the Investigating Officer (P.W. 5), the doctors (P.Ws 6 and 7). The defence also produced three witnesses to establish their innocence. The Trial Court, upon the appreciation, scrutiny and analysis of the evidence adduced at the trial, has reached a conclusion that the prosecution succeeded in establishing the charges levelled against these appellants of commission of the offences punishable under Sections 341, 323, 363, 366 all read with 34 of the I.P.C., 376D of the I.P.C. and Section 6 of the POCSO Act. The Trial Court, after having held the appellants guilty of the aforesaid charges imposed sentences, as have been noted at the very outset.

10. Learned counsel appearing on behalf of the appellants has firstly submitted that the prosecution's case, to the effect, that the appellant Mushar Paswan was a party to the commission of sexual assault with his son, appellant Jitendra



Paswan and other accused persons is highly improbable and unbelievable. He contends that the victim (P.W. 4) does not appear to be a truthful witness in view of her conflicting statements made during the course of investigation and at the trial. He has further submitted that the evidence of the informant (P.W. 1) is materially different from the evidence of P.W.-4, the victim. He has argued that the prosecution miserably failed to establish its case that the victim was a child as on the date of occurrence and, therefore, according to him the provisions under the POCSO Act are not at all attracted. In support of his submission that the prosecution could not establish its case that the victim was a child as on the date of occurrence, he has drawn our attention to the evidence of the doctor who found her age to be between $15 \frac{1}{2}$ to $16 \frac{1}{2}$ based on radiological examination. He has contended that the determination of age by the said doctor (P.W. 6) cannot be treated to be accurate. Further, even if his deposition is treated to be correct, it could not be conclusively held by the Trial Court that the victim was a child as on the date of occurrence. He has further submitted that, as the victim cannot be said to be a trustworthy witness, her evidence cannot be treated to be of sterling character. In the absence any corroborative evidence her testimony that she was



sexually assaulted, cannot be believed, including medical evidence. He has also argued that the medical evidence does not prove the prosecution's case that the victim was sexually abused.

11. Learned Additional Public Prosecutor appearing on behalf of the State, on the other hand, has submitted that the Doctor, while determining the age of victim has found her age between 15 ½ years to 16 ½ years. She contends that the said determination of age cannot be said to be incorrect. Further, it has been the consistent case of the prosecution that the victim was a child and in the absence of any educational certificate, the Trial Court has rightly relied on the determination of age carried out by the Doctor, for the purpose of applying the provisions of the POCSO Act. She has accordingly submitted that since the POCSO Act was applicable in the present case, onus lied upon the appellants to establish that they were innocent, in view of the statutory presumption under Section 29 of the POCSO Act. She has further submitted that the evidence of the victim, in any case, cannot be discarded because of minor deviations, contradictions emerging from the evidence of the witnesses.

12. We have perused the impugned judgment and order of the Trial Court. We have also perused the lower court records. We have given our anxious consideration to the rival



submissions advanced on behalf of the parties.

13. In order to test the legality of the impugned judgment and order of the Trial Court, we consider it apposite to examine the correctness of finding as regards the age of the victim first, which issue rests at the core of the controversy and is one of the significant aspects which needs to be addressed at the very outset. The informant, in the F.I.R., disclosed the age of the victim to be 13 years. The victim was produced before the Magistrate for recording of her statement under Section 164 of the Cr.P.C. on 30.08.2016. From the said statement under Section 164 of the Cr.P.C. (Exhibit-4), it appears that learned Magistrate, *prima facie*, found her age to be between 17 to 18 years. In this regard, evidence of the Doctor (P.W. 6) becomes crucial. In his examination-in-chief, he deposed as under :-

“1. On 30.08.2016, I was posted as Medical Officer in Sadar Hospital, Motihari and on the same day I examined Raushan the victim, Registration No. 7305 dt. 30.08.2016, X-ray plate No. R-1848 and advised following X-ray:-

- i. X-ray pelvis- A/P view shows-epiphysis around iliac crest- not fused,
- ii. X-ray right Elbow – A/P lateral view-shows-epiphysis around elbow joint fused,
- iii. X-ray right wrist- A/P lateral



view-epiphysis around-right lower end of radius and ulna-not fused.

So on the above radiological findings:-

Age of the victim is between 15 ½ to 16 ½ years.

2. I alongwith Dr. R.K. Verma was member of Medical Board for age determination of the victim and have jointly opined about age of the victim.

3. This age determination report dt. 30.08.2016 of the victim bears my pen and signature as well as signature of Dr. R.K. Verma which is marked as Ext-'2'

X X X

”

14. In his cross-examination, he deposed as under:-

“On behalf of accused persons

4. The X-ray plate of victim girl is neither available in case record nor before him.

5. Victim girl is not present before Court.

6. There may be variation of two years in our finding relating to determination of age of persons.

7. Age determination report is based only on X-ray plate which is not available today before him.

8. We have not opined age of victim on other grounds except X-ray plate.

9. It is not the fact that report is not based on relevant grounds/basis.”

15. It is evident from the deposition of P.W. 6, based



on radiological findings, that the age of the victim was found to be 15 ½ years to 16 ½ years based on X-Ray plate. X-Ray plate of the victim girl was neither available in the case record nor the same was available with him. He admitted, in response to a question, that there might be variation of two years in the finding relating to the determination of age of a person. He also admitted that age determination report was based only on the X-Ray plate which was not available before him on the date of deposition. Other than the medical evidence, the prosecution did not adduce any evidence to establish its case that the victim was a child under 18 years of age as on the date of occurrence.

16. In our opinion, it has been rightly submitted on behalf of the appellant that based on medical evidence only to the aforesaid effect only, it could not be definitely concluded that the victim was a child as on the date of occurrence. In order to attract the provisions of the POCSO Act, it is the primary duty of the prosecution to establish, beyond all reasonable doubts with a reasonable accuracy that the victim was a “child” within the meaning of Section 2(d) of the POCSO Act. The word “Child” has been defined as a person below the age of 18 years. In our opinion, since the prosecution failed to adduce definite evidence on the point of age of the victim to be above



18 years, the benefit of doubt must go to the accused persons.

17. In such view of the matter, the finding recorded by the Trial Court that the victim was child as on the date of occurrence is unsustainable. Accordingly, the conviction of these appellants for the offences punishable under Section 6 of the POCSO Act cannot be sustained.

18. The next issue which the Court is required to consider in the facts and circumstances of the case is as to whether the prosecution has been able to prove beyond all reasonable doubt commission of offence punishable under Section 376D of the I.P.C. or not. The said finding recorded by the Trial Court is based on the solitary evidence of the victim. Apparently, the accusation of sexual assault has not been corroborated by any other evidence including medical evidence. This Court, in such circumstance, is required to consider as to whether the conviction of these appellants for commission of the offence punishable under Section 376D of the I.P.C. is justified, based on the sole testimony of the victim.

19. As we have noted above, the victim in her statement under Section 164 of the Cr.P.C., which has been proved at the trial, had deposed that she was kidnapped by the five accused persons and was taken to a maize field by them and



when she wanted to go back her home, she was variously assaulted by them. There was no accusation in the said submission that persons other than appellant Jitendra Paswan had made any sexual assault on her. Secondly, she had disclosed that after the said occurrence, accused persons including these appellants had dropped her on Chatauni Road where she met her father, who brought her back. The evidence of the victim (P.W. 4) adduced at the trial assumes significance in the background of statement recorded under Section 164 of the Cr.P.C.. In her examination-in-chief, she deposed that all the five persons had sexually assaulted her after she was abducted from the maize field, whereafter the police had picked her up. This is contrary to the disclosure which was made by her before the Magistrate in her statement under Section 164 of the Cr.P.C.. In her cross-examination in paragraph 21, she deposed that she had come to the road on foot from the maize field, the second place of occurrence where she had met her father (P.W. 1). She also admitted in her deposition that in her statement made under Section 164 of the Cr.P.C., she had made accusation against the appellant Jitendra Paswan only of having sexually assaulted her. On careful reading of the evidence of P.W. 4 at the trial and her statement recorded under Section 164 of the Cr.P.C., we are of



the view that the P.W. 4 does not appear to be a sterling witness on whose evidence alone of sexual assault committed by all these appellants, in the absence of any corroboration the finding of conviction can be upheld. Therefore, in the absence of any corroboration in the medical report about the sexual assault cause on the victim by all these appellants, conviction of the appellants for the offence punishable under Section 376D of the I.P.C. can also not be sustained.

20. Further, on perusal of the evidence of the prosecution's witnesses and the evidence of the defence witnesses, we are of the view that as the prosecution's witnesses did not appear to be trustworthy and the manner of occurrence itself has become doubtful, it is not safe for this Court to uphold the conviction of these appellants for the offences punishable under Sections 341, 323, 363, 366 read with 34 of the I.P.C. as the appellants deserve to be given benefit of doubt.

21. In such circumstance, in our opinion, the judgment of conviction recorded by the Trial Court requires interference.

22. Consequently, the appellants stand acquitted of the charges punishable under Sections 341, 323, 363, 366 and 376D of the IPC all read with Section 34 thereof, and Section 6 of the Protection of Children from Sexual Offences Act,



2012. The judgment of conviction dated 09.04.2018 and order of sentence dated 12.04.2018 passed by the learned 1st Additional Sessions Judge-cum-Special Judge, POCSO Act, Motihari in POCSO Trial No. 28 of 2016 arising out of Motihari Muffasil P.S. Case No. 325 of 2016, are hereby set aside.

23. These appeals are accordingly allowed.

24. The appellant, namely, Jitendra Paswan of Criminal Appeal (DB) No. 922 of 2018 is in custody. Let him be released from jail forthwith, if he is not required in any other case.

25. The appellant, namely, Mushar Paswan of Criminal Appeal (DB) No. 694 of 2018 is on bail. He stands discharged of his liabilities of bail bonds and sureties, if any, furnished by him, pursuant to his acquittal by the present order.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

K.K.RAO/Sankalp-

AFR/NAFR	NAFR
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