

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.851 of 2018

Arising Out of PS. Case No.-146 Year-2016 Thana- RIGA District- Sitamarhi

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Guddu Kumar S/o Late Babu Mahto, R/o Vill.- Chainpura, P.S.- Riga,
District- Sitamarhi Bihar.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
For the Respondent/s : Mr. Sadanand Paswan, Spl. P.P.

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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 : 23-08-2022

This appeal has been preferred against the judgment of conviction dated 14.06.2018 and order of sentence dated 20.06.2018 passed by learned 1st Additional Sessions Judge-cum-Special Judge (SC/ST Act), Sitamarh in G.R. No. 2175 of 2016/ Trial No. 47A/2016/ Registration No. 69/2017 arising out of Riga P.S. Case No. 146 of 2016.

2. At the outset, it has rightly been pointed out by learned Additional Public Prosecutor that the P.S. Case has wrongly been incorporated both in the physical records as well as digital records as 'Riga P.S. case No.186 of 2010' instead of 'Riga P.S. case No. 146 of 2010'. The said mistake appears to



have occurred in the impugned judgment and order itself, which came to be subsequently rectified on 23.07.2018, after filing of the present appeal registered on 19.07.2018.

3. It is accordingly directed that correct description of the case viz. Riga P.S. case No. 146 of 2010 be incorporated both in the physical as well as in the digital records of this appeal.

4. By the impugned judgment and order, the appellants have been convicted and sentenced as under: -

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of Fine
363 of the Indian Penal Code	5 years rigorous imprisonment	2,000/-	Six months rigorous imprisonment
366A of the Indian Penal Code	5 years rigorous imprisonment	2,000/-	Six months rigorous imprisonment
376 of the Indian Penal Code	10 years rigorous imprisonment	5,000/-	Six months rigorous imprisonment
3(1)(w)(i) of the SC/ST Act	One year rigorous imprisonment	1,000/-	Six months rigorous imprisonment
3(2)(v) of the SC/ST Act	For life	10,000/-	Six months rigorous imprisonment
4 of POCSO Act	10 years rigorous imprisonment	5,000/-	Six months rigorous imprisonment
12 of POCSO Act	2 years rigorous imprisonment	1,000/-	Six months rigorous imprisonment

All the sentences have been ordered to run concurrently.

5. We have heard Mr. Ajay Kumar Thakur, learned counsel for the appellant and Mr. Sadanand Paswan, learned Special Public Prosecutor (SC/ST Act) for the State.



6. Noticing the statutory requirement under sub-section (4) of Section 374 of the Code of Criminal Procedure ('Cr.P.C.', for brevity), hearing of the present criminal appeal has been prioritised.

7. Further, Section 15A(3) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SC/ST Act' for short) provides that a victim or his dependant shall have the right to reasonable, accurate, and timely notice of any Court proceeding and further that the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under the Act. A counter affidavit has been filed on behalf of the Superintendent of Police, Sitamarhi in this case from which it transpires that the informant, who is the mother of X (name of the alleged victim concealed), has been informed about the pendency of this appeal. It is evident from Annexure-A to the said counter affidavit that the informant has put her signature on the notice about pendency of this appeal, served upon her by the officer-in-charge of the concerned Riga Police Station. However, the informant has chosen not to appear in this proceeding.

8. The prosecution's case, as unfolded by the mother of X, (PW-1), in her written report addressed to the S.H.O, Riga



Police Station is that when she woke up in the morning of 06.07.2016, she found her daughter (X), aged about 13 years, missing. She considered her to have gone for coaching classes. She, however, did not return. She was informed by a co-villager, Kaushal Kumar (P.W.-7), that the X was seen with this appellant who had kidnapped her with an intention to marry her. The said written report was submitted on 15.07.2016, giving rise to registration of the First Information Report (F.I.R., for brevity) on the same date as Riga P.S. Case No. 146 of 2016. The cause in the delay of nine days in registration of the F.I.R has been mentioned by the informant as “to protect the dignity and grace of the family”.

9. The police, upon completion of investigation, submitted charge-sheet against the appellant for commission of the offences punishable under Sections 363, 366A/34 and 376 of the Indian Penal Code ('I.P.C., for brevity'); Section 3 (ii)(x) of the SC/ST Act and Section 4 of the Protection of Children from Sexual Offences Act, 2012, ('POCSO Act' in short). The cognizance was taken of the offences by the learned A.C.J.M.-III on 26.09.2016 and the case was sent to the Special Court (SC/ST Act) for trial and disposal. During the course of trial, the prosecution examined nine witnesses including said Kaushal



Kumar (P.W.-7) who, according to the F.I.R., had disclosed about kidnapping of X by the appellant. P.W.-7 came to be declared hostile, however, at the instance of the prosecution since he did not support the prosecution's case. P.W.-1, the informant, is the mother of X and P.W.-2 is the brother of P.W.-1. P.W.s 3, 4 and 5 are aunts of X. The Investigating Officer came to be examined as P.W.-6. P.W.-9 is the Doctor who happened to be a member of the Medical Board constituted to examine X who proved the medical report. X came to be examined at the trial as P.W.-8. Be it noted that name of P.W. 8 (X) was not mentioned in the list of prosecution witness in the charge-sheet submitted by the police. Apart from that, a defence witness D.W.-1 was also examined. After examination of the witnesses for the prosecution, the trial court called upon the appellant to explain the circumstances appearing in the evidence against him in accordance with the requirement of Section 313 of the Cr.P.C. to which the appellant pleaded not guilty.

10. The prosecution proved signature of the informant on the written report (Exhibit-1), signature of the then S.H.O on the formal F.I.R. (Exhibit-2), endorsement on the written report (Exhibit 2/1) and the Medical Board's report (Exhibit-3). Upon analysing the evidence of the witnesses adduced at the trial, the



Trial Court has held the appellant guilty of the offences punishable under Sections 363, 366A and 376 of the I.P.C.; Sections 3(1)(w)(i) and 3(2)(v) of the SC/ST Act and Section 4 and 12 of the POCSO Act by the impugned judgment.

11. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant has assailed the finding of the conviction recorded by the Trial Court of the offences punishable under Section 366 A of the I.P.C. and Sections 4 and 12 of the POCSO Act, mainly on the ground that the prosecution miserably failed to prove beyond all reasonable doubts, based on the evidence adduced at the trial, that X was a minor as on the date of occurrence. He has submitted that neither any scientific method was applied to determine the age of the victim nor any documentary evidence has been proved which can be said to be the basis for declaring X a minor as on the date of occurrence. On this point he has taken us, at the very outset, to the evidence of P.W.-1, the informant who is the mother of X. In paragraph-3 of her deposition, upon cross-examination, she has disclosed that P.W.-1 was married nearly 22 years ago and one year after her marriage, X was born to her. Referring to the age of X, as mentioned in the written report of the informant, she deposed that the person who had prepared the written report



had entered the age of X without making any enquiry from her. She further deposed that before obtaining her signature on the written report, the contents of the written report were not read over to her. She expressed her inability to disclose the exact age of X as on the date of occurrence. She further deposed that X had clearly told her that she was not kidnapped by any person.

12. It is noteworthy at this juncture that according to deposition of P.W.-1, X had returned home 6-7 days after she had gone missing since 06.07.2016.

13. Mr. Thakur has then taken us to the deposition of the Investigating Officer (P.W.-6) to submit that the appellant and X were apprehended by the police based on a secret information at a Government Bus Stand at Sitamarhi. The appellant and X are said to have disclosed to the Investigating Officer that they were in love with each other and wanted to marry. They further disclosed that they had established physical relationship also with each other. Statement of X was got recorded under Section 164 of the Cr.P.C. and in view of the disclosure made by the appellant and X to the police that they had established sexual relationship, X was referred to medical examination. It is also significant to note that the Investigating Officer found the date of birth of X to be 01.08.2006 as



recorded in educational certificate. No certificate of any kind disclosing date of birth of X was however exhibited at the trial. In response to a query during the cross-examination, the Investigating Officer (P.W.-6) deposed that he had not visited the concerned school for verification of date of birth entered in the educational certificate nor did he examine any teacher of the said school for the said purpose. He did not even peruse any record of the said school to ascertain the correct age of X. He has further taken us to the evidence of P.W.-2, the brother of X and P.W.s 3, 4 & 5, the aunts of X to contend that they have also not disclosed the accurate age of X though they have vaguely stated that she was 13 years old on the date of occurrence. He has further submitted that it is evident from the depositions of P.Ws 2, 3, 4 & 5 that X got married soon after the occurrence. X, in her deposition as P.W.-8 has admitted that she got married after the occurrence on 27.05.2017. Dealing with the deposition of X (P.W.-8), he has submitted that for the first time during the course of trial, after examination of the Investigating Officer, she deposed that the appellant had, under threat, kidnapped her and had taken her to a lonely place, kept her in a room for 12-13 days and during this period, he repeatedly established physical relationship with X. She disclosed nothing about her exact age



rather expressed her inability to furnish her date of birth as recorded in the admission register. In paragraph-15 of her evidence, she deposed that the facts disclosed in her deposition at the trial were not disclosed by her to the magistrate in her statement recorded under Section 164 of the Cr.P.C.. Further, she had not disclosed such facts even to the police and for the first time she was giving her evidence at the trial before the court. He has submitted that even on the basis of deposition of X, her minority for the purpose of prosecuting the appellant for the offences punishable under Section 4 and 12 of POCSO Act and Section 366A of the I.P.C. is not established. It is submitted that the finding recorded by the Trial Court that X was minor as on the date of occurrence is wholly unsustainable and accordingly the appellant's conviction under Sections 4 and 12 of the POCSO Act and Section 366A of the I.P.C. is untenable. In support of his submission, on the issue of determination of minority of a victim for criminal prosecution, he has relied on Supreme Court's decisions in the case of *Sunil v. State of Haryana (AIR 2010 SC 392)* and *Rajak Mohd. Vs. State of Himachal Pradesh* reported in *(2018) 9 SCC 248*. He has also placed reliance on a decision of a learned Single Judge of this Court in case of *Sunny Deol Vs. State of Bihar* reported in



(2021) 2 BLJ 287 in support of his contention. He has further submitted that P.W.-1, the mother of X, is clear in her deposition that X was born one year after her marriage and she was married 22 years ago. He accordingly contends that the entire case of the prosecution that X was minor stands demolished in view of deposition of P.W.-1 who has not been declared hostile nor any prayer was made by the prosecution to declare P.W.-1, a hostile witness. Relying on the Supreme Court's decisions in the cases of *Raja Ram v. State of Rajasthan* reported in **(2005) 5 SCC 272** ; *Mukhtiar Ahmed Ansari v. State (NCT of Delhi)* reported in **(2005) 5 SCC 258** and *Javed Masood and Anr. Vs. State of Rajasthan (AIR 2010 SC 979)*, he has submitted that the accused can rely on deposition of a prosecution witness who does not support the case of prosecution and has not been declared hostile. Referring to the evidence of the doctor, he has submitted that though age X in the medical report has been mentioned as 14-16 years, such opinion cannot be said to be conclusive on the point of deciding minority of X for the reason that before assessing the age, X was neither sent to a dental expert nor was made to undergo ossification test. Further, the doctor who had examined X, as mentioned in the evidence of P.W.-9, was not examined nor the X-ray plate was exhibited at



the trial. He has placed heavy reliance on the Supreme Court's decision in case of *Rajak Mohammad v. State of H.P.* reported in **(2018) 9 SCC 248** to submit that there is ample scope of doubt as regards correct age of X and, therefore, benefit of doubt must go in favour of the appellant. He has further submitted that once the appellant is successful in demonstrating before this Court that the prosecution failed to establish its case that X was a minor, the prosecution cannot be said to have established the charge of commission of offence under Section 376 of the I.P.C. as the sexual relationship, if any, between the appellant and X was manifestly consensual, if all the facts and circumstances emerging from the evidence, including the conduct of X (P.W.-8) are taken into account in totality. He as reiterated that P.W.-8 cannot be treated to be a truthful witness for more than one reasons. Firstly, she, for the first time deposed at the trial that she was forcibly taken away by the appellant. Secondly, the accusation in her deposition of kidnapping/abduction and establishing sexual relationship without her consent is highly improbable and unbelievable in the wake of the fact that X and the appellant were apprehended by the police from a public place 6-7 days after she had gone missing and as per the deposition of mother of X, she was told



by X that the X was not kidnapped by the appellant.

14. He has further submitted that the finding recorded by the Trial Court of commission of offence by the appellant under Section 363 of the I.P.C. is equally vulnerable for the same reason. Coming to the appellant's conviction of the offences punishable under Sections 3(1)(w)(i) and 3(2)(v) of the SC/ST Act, he has submitted that such finding is completely perverse, inasmuch as, there is no iota of evidence adduced at the trial to establish that offence, if any, was committed by the appellant against X was because or on the ground that the X belonged to a scheduled caste. In support of his contention he has placed reliance on the Supreme Court's decision in case of ***Ramdas and Ors. Vs. State of Mahashtra*** reported in ***2007 (1) PLJR (SC) 40*** and ***Patan Jamal Vali Vs. State of Andhra Pradesh*** reported in ***2021 SCC OnLine SC 343***.

15. Mr. Sadanand Paswan, learned Special Public Prosecutor appearing on behalf of the State has vehemently contested the submissions advanced by Mr. Ajay Kumar Thakur. He has greatly relied on the medical report (Exhibit-3), wherein a Medical Board consisting of doctors of Sadar Hospital, Sitamarhi found the age of X to be between 14 - 16 years, based on physical examination and other tests. X was found to be



habituated to sex by the Medical Board and, therefore, Mr. Paswan contends that the fact that since the appellant had established physical relationship with X, found to be a minor, the charges stood conclusively proved at the trial. Further, the prosecution witnesses No. 2, 3, 4 and 5 in their deposition have described X as a minor as on the date of occurrence. He contends that as the appellant committed the offence with X knowing well that she belonged to scheduled caste, the finding that the appellant was guilty of the offence punishable under SC/ST Act cannot be said to be unjustified.

16. We have carefully perused the impugned judgment and order of the Trial Court and we have carefully scrutinized the evidence adduced at the trial. We have also perused the lower court records to appreciate rival submissions made by the parties. We have given our anxious consideration to the submissions advanced by Mr. Thakur, learned counsel for the appellant and Mr. Paswan, learned Special Public Prosecutor for the State.

17. The foremost moot question of seminal significance which requires determination for proper adjudication of the present appeal is as to whether the prosecution can be said to have established beyond reasonable



doubt, that X was a minor on the date of occurrence. To determine this aspect of the dispute we need to notice the evidence of mother of X (P.W.-1) who, in our opinion, is the most competent witness to throw light on age of her daughter X. In her written report to the police, she had disclosed age of X to be 13 years. In her deposition at the trial, she has stated that she was married 22 years ago and one year after the marriage, X was born. She disputed mentioning of age (13 years) of X in the written report based on which the F.I.R. came to be registered by emphatically stating that the person who had drawn the written report had made the said entry without making any inquiry from her (P.W.-1). She further disclosed that before she had put the signature on the written report, the same was not read over to her. It is specific case of the appellant that X was not made to undergo ossification test nor she was referred to dental surgeon/dentist for proper and accurate evaluation of her age. The X-ray report was also not available at the Trial. No document was produced to establish her date of birth in the first school where X was admitted or the second school where she was subsequently admitted.

18. At this stage, it would be beneficial to refer to the Supreme Court's decision in case of **Rajak Mohammad** (supra),



paragraphs 9 and 10 of which read as under :-

“9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

10. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.”

19. In case of ***Sunil v. State of Haryana*** (supra) the Supreme Court has in no uncertain terms held that the conviction of an accused cannot be based on an approximate age which is not supported by any record. Paragraph 29 of the said decision is of significance and is being reproduced hereinbelow:-

“29. The short question in the facts and circumstances of this case remains to be determined is whether the prosecutrix was a minor? Dr. Sadhna Verma, PW1 who examined the prosecutrix referred her for verification to the Dental Surgeon and the Radiologist. The failure of getting the prosecutrix examined from the Dental Surgeon or the Radiologist despite the fact that she was referred to them by Dr. Sadhna Verma, PW1 is a serious flaw in the prosecution version. We are not laying down as a rule that all these tests must be



performed in all cases, but in the instant case, in absence of primary evidence, reports of the Dental Surgeon and the Radiologist would have helped us in arriving at the conclusion regarding the age of the prosecutrix.”

20. In view of the facts which have emerged on analysis of evidence adduced at the trial, in the light of the Supreme Court's decisions in case of **Rajak Mohammad** (supra) and **Sunil Vs. State of Haryana** (supra), in our opinion, it would be unsafe to confirm the finding recorded by the Trial Court that the X was a minor as on the date of occurrence. Mr. Thakur appears to be right in his contention in the light of the Supreme Court's decisions in case of **Javed Masood and Anr. v. State of Rajasthan** (supra) that an accused can validly rely on evidence of a prosecution witness who does not support the case of the prosecution and is not declared hostile. In case of **Raja Ram** (supra) the Supreme Court has observed in paragraph 9 as under:-

“9. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined.”



21. Relying on the said observation made by the Supreme Court in case of ***Raja Ram*** (supra), the Supreme Court in case of ***Mukhtiar Ahmed Ansari v. State (NCT of Delhi)*** (supra) has held that it was open to the defence to rely on the evidence of the prosecution witness (in that case the doctor) and the same was binding on the prosecution. Similar view has been taken by Supreme Court in case of ***Javed Masood and Anr.*** (supra) [see. Paragraphs 13, 14 and 15].

22. Based on the aforesaid discussions, we reach an irresistible conclusion that the prosecution failed to prove beyond reasonable doubts that X was a minor as on the date of occurrence. A natural sequitur of the conclusion that the prosecution failed to establish that X was minor as on the date of occurrence would be that the appellant's conviction of the offences punishable under Section 366A of the I.P.C. and Sections 4 and 12 of the POCSO Act would become unsustainable on the said ground.

23. Coming to the appellant's conviction of the offence punishable under Section 376 of the I.P.C., it is not difficult rather easy to ascertain that the said conviction is primarily on the premise that the appellant had established sexual relationship with X who was a minor and her consent for



such intercourse was immaterial because of her incompetence to give consent. There is no evidence of any witness other than X herself recorded for the first time at the trial, in her deposition that she had not consented to sexual intercourse with the appellant.

24. It is true that conviction under Section 376 of the I.P.C. can be recorded on the basis of the sole testimony of victim herself. The question in the present case is as to whether the evidence of X (P.W.-8) can be said to be truthful in the background of the facts and circumstances of the present case and evidence of other witnesses adduced at the trial. Absence of name of X in the list of prosecution witnesses in the charge-sheet filed by the police assumes significance for proper appreciation of the issue as to whether X can be treated to be a truthful witness and whether based on the testimony of P.W.-8 only, it would be safe to hold the appellant guilty of the offence punishable under Section 376 of the I.P.C.. The reason why the name of X was not mentioned in the charge-sheet as one of the witnesses is evident. That was for the apparent reason that till conclusion of investigation, she herself was not supporting the case of the prosecution of her kidnapping or abduction or unconsented sexual relationship by the appellant with her. In her



statement before the police, she denied the accusation against the appellant that he had kidnapped her. It is clear from the evidence of the I.O. (P.W.-6) that X had disclosed to the I.O. that she had voluntarily gone with the appellant and the sexual relationship between them was consensual. X appears to have admitted that she remained with the appellant for 12-13 days. The evidence on record demonstrates that there are villages between the residence of X from where she was found missing or the place where she had gone for coaching and the place where she stayed with the appellant. She traveled to bus stand at Sitamarhi with the appellant. There is no evidence of any resistance put by X or force or other inducement used by the appellant compelling X to remain in company with the appellant until she was recovered by the police. During the movement of X with the appellant, she must have come across many people at different points of time, yet she did not complain to anyone, any criminal act on the part of appellant. Evidence of X at the trial with regard to the incident of her abduction and commission of rape stands contradicted by her previous statement recorded during the course of investigation. The deposition of P.W.-1 i.e. the mother of the X, is crucial on the point of commission of rape by the appellant on X in view of her clear deposition which



has already been mentioned hereinabove to the effect that X had disclosed to P.W.-1 that she was neither abducted by the appellant nor was she ravished by him.

25. Considering contradictory evidence of the I.O. and X coupled with evidence of P.W.-1 as noted above, in our considered view, the appellant's conviction of the offence punishable under Section 376 is also not sustainable.

26. Further, for the same reason as discussed hereinabove, the appellant's conviction under Section 363 of I.P.C. is not sustainable in the absence of essential ingredients of kidnapping/abduction within the meaning of section 359, 361 and 362 of the I.P.C.. This Court's opinion in this connection is in the light of the deposition of P.W.-1 (mother of X) and the Investigating Officer (P.W.-6) which contradict the subsequent story developed by X for the first time at the trial in her deposition.

27. As this Court has held, based on analysis and scrutiny of the evidence on record that the appellant's conviction under Sections 363, 366A and 376 of the I.P.C. and Section 4 and 12 of the POCSO Act cannot be sustained, his conviction under Sections 3(1)(w)(i) and 3(2)(V) of the SC/ST Act can also be not sustained



28. In view of the discussions noted above, we conclude that the finding recorded by the Trial Court convicting the appellant under various provisions of I.P.C, POCSO Act and SC/ST Act is unsustainable and deserves interference by giving the appellant benefit of doubt.

29. This appeal accordingly succeeds and is allowed. The appellant stands acquitted of the charges framed against him.

30. The impugned judgment and order dated 14.06.2018/20.06.2018 passed by the learned 1st Additional Sessions Judge-cum-Special Judge (SC/ST Act), Sitamarhi is hereby set aside.

31. The appellant is in custody since 21.07.2016. Let him be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

K.K.RAO/-

AFR/NAFR	NAFR
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