

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.88 of 2021

Arising Out of PS. Case No.-162 Year-2018 Thana- KHANPURA District- Samastipur

Randheer Rai S/O Nandkishore Ray R/o village- Reora Singhyahi, P.S.-
Kalyanpur, Distt.- Samastipur

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Vikram Deo Singh, Advocate Mr. Pramod Kumar Singh, Advocate Mr. Pravin Kumar, Advocate
For the Respondent	:	Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH

SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 22-12-2022

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure putting to challenge the judgment of conviction dated 30.09.2020 and the order of sentence dated 05.10.2020, passed in T.R. No. 131 of 2020/ R.N. No. 1448 of 2018, arising out of Khanpur P.S. Case No. 162 of 2018, by the trial court, whereby the sole appellant has been convicted and sentenced as under: -

Convicted under Sections	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376 of the Indian Penal Code	R.I. for 20 years	30,000/-	One year simple imprisonment
4 of Protection of Children from	R.I. 30 years	50,000/-	Two years



Sexual Offences Act			simple imprisonment.
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2. The sentences have been ordered to run concurrently with set off for the period of judicial custody.

3. Heard Mr. Vikram Deo Singh, learned counsel appearing on behalf of the appellant and Ms. Shashi Bala Verma, learned Additional Public Prosecutor representing the State.

4. Briefly narrated, the prosecution's case, as disclosed in the written statement of the informant, (PW-6), is that his sister (the victim, PW 8), a minor had gone to ease herself in a nearby agricultural field on 31.10.2018 at 8 am, when three persons including this appellant caught her and sexually assaulted her. The victim was dumb and after hearing sound of her murmuring, the witnesses Satyanarayan Sahni (PW-2), Shyam Sahni (PW-4) and Santosh Sahni (PW-7) proceeded towards them and found that the appellant was committing rape on her. All the aforesaid persons caught hold of the appellant and were bringing him in the village. In the meanwhile, he managed to escape from their clutches. The victim was thereafter taken to hospital for treatment.

5. For the occurrence, said to have taken place at 8 am in the evening on 31.10.2018, the FIR came to be registered at 10:45 am on the same day, disclosing the commission of the offences



punishable under Sections 4 and 8 of the Prevention of Children from Sexual Offences Act, 2012 (POCSO Act), and Section 376 of the Indian Penal Code. The police submitted the charge-sheet upon completion of investigation, whereupon cognizance was taken by an order dated 15.02.2019. Charges came to be formally framed on 09.03.2017 for the offences punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act. At the trial, altogether 9 witnesses came to be examined. It is to be noted that the statement of the informant was recorded under Section 164 of the Cr.P.C. in which he supported the prosecution's case. The statement of Satyanarayan Sahni (PW-2) and Arun Sahni (PW-5) were also recorded under Section 164 of the Cr.P.C. during the course of investigation, who supported the prosecution's case.

6. It is noticeable that the prosecution did not lead any evidence to prove that the victim was a child as on the date of occurrence, i.e., below 18 years. The Medical Board, upon examination, found the age of the victim to be more than 18 years. The mother of the victim (PW-3) did not support the prosecution's case and denied to have ever stated before the police that her daughter was aged about 15 years. PW-4, who, according to the prosecution's case, as disclosed in the *fardbayan*, had also seen the occurrence, did not support the case of the prosecution. PW-2,



in his testimony at the trial deposed that he had seen this appellant raping the victim, whereafter he had caught hold of the appellant who was found nude. He had, thereafter, put on his clothes. When he and other passersby, who had seen the occurrence were attempting to take him towards the village, he somehow or the other managed to escape. PWs-5 and 6 are hearsay witnesses. PW-7 has not supported the prosecution's case and has been declared hostile. The Medical Officer, in his evidence, deposed that there was no external sign of violence or injury found on the body of the victim during the medical examination. Though sign of sexual assault was found, but, during the cross examination, he clarified that the sexual assault might not be in the nature of rape. Most significantly, the victim (PW 8) has also not supported the prosecution's case and refused to identify the appellant present in the dock during the course of trial.

7. Learned trial court, after having evaluated the evidence of the prosecution's witnesses, has held the appellant guilty of commission of offence punishable under Section 4 of the Act taking the aid of Section 29 of the Act as in the opinion of the Court, the defence failed to bring any evidence on the point of rebuttal against his prosecution, either oral or documentary. The trial court noticed the medical evidence to the effect that there was



sexual assault on the victim and accordingly has held the appellant guilty of the offence punishable under Section 376 of the Indian Penal Code also. Accordingly, the trial court imposed the sentences for commission of the proved offences as has been noted hereinabove.

8. We have heard learned counsel for the appellant and learned Additional Public Prosecutor for the State and we have perused the impugned judgment and order and the lower court records.

9. On perusal of the evidence adduced at the trial, we find that there is absolutely no evidence led by the prosecution to establish its case that the victim was child within the meaning of the Act as on the date of occurrence. Further, the evidence is rather otherwise. During the course of medical examination by a Medical Board, the age of the victim has been found to be more than 18 years. The parents have not supported the case that the victim was child as on the date of occurrence. In such circumstance, the provisions of the Act could not have been invoked by the trial court.

10. In our considered opinion, thus, the trial court committed serious error of law by holding the appellant guilty of the offence punishable under Section 4 of the Act by taking aid of



Section 29 of the Act presuming the victim to be a child and thereafter applying statutory presumption under Section 29 of the Act which shifts burden of proof on a person facing prosecution under the Act that he had not committed the offence. The finding of conviction against the appellant by the trial court of commission of offence punishable under Section 4 of the Act, in our considered opinion, is not at all sustainable.

11. Coming to the finding of conviction of the offence punishable under Section 376 of the Indian Penal Code is concerned, we need to take note of the essential requirements to be established for establishing a case under Section 376 of the IPC with reference to definition of rape underlying under Section 375 of the Indian Penal Code, which reads thus:-

“375 A man is said to commit “rape” if he —

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or



(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions
—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or



unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.”

12. Even if the incident of any sexual interaction between the appellant and the said victim is taken to be correct, we do not find any evidence that the same was against her consent or will. The victim was not a child and there is no evidence of any use of force or undue inducement by the appellant. Victim herself has supported the prosecution's case.

13. In such circumstance, in our view, benefit of doubt deserves to be extended to the appellant. Resultantly, the appellant's conviction for the offence punishable under Section 376 of the IPC also cannot be sustained.

14. Accordingly, the impugned judgment and order dated 30.09.2020/05.10.2020 passed by the learned Additional Sessions Judge-VI cum Special Judge, POCSO Act, Samastipur in T.R. No. 131 of 2020, R.N. No. 1448 of 2018, arising out of Khanpur P.S. Case No. 162 of 2018 is hereby set aside. The



appellant is acquitted of the charge of commission of the offences punishable under Section 376 of the Indian Penal Code and Section 4 of the Act.

15. The appeal is allowed. The appellant is in jail. Let him be released forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Chandra Prakash Singh, J)

Pawan/-

AFR/NAFR	NAFR
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