

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 1031 of 2019

Arising Out of PS. Case No.-261 Year-2015 Thana- VAISHALI District- Vaishali

MD. ISLAM Son of Md. Suleman Resident of Village - Damodarpur, P.S.-
Kanti, District- Muzaffarpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Girish Chandra Jha

For the Respondent/s : Mr.Satya Narayan Prasad

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 10-10-2022

Heard Mr. Vindhya Keshri Kumar, learned Senior Counsel appearing on behalf of the appellant and Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State.

2. By the impugned judgment and order dated 02.07.2019/10.07.2019 passed by the Court of learned 1st Additional Sessions Judge-cum- Special Judge, POCSO Act, Vaishali, Hajipur in G.R. No. 4272 of 2015, arising out of Vaishali P.S. Case No. 261 of 2015, this appellant has been convicted and sentenced as under:-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 6 of Protection of Children from Sexual Offences Act	Imprisonment for 12 years	50,000/-	S.I. for 6 months



3. The victim of the occurrence is being referred to as 'AB' in the present judgment for concealing her identity.

4. The informant (PW-6) is the mother on whose written report submitted on 21.08.2015, the concerned Vaishali P.S. Case No. 261/15 came to be registered leveling offences punishable under Sections 363, 366A, 376, 120B of the Indian Penal Code, Section 6 of the Protection of Children from Sexual Offences Act, 2012, and Section 3(i)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities), Act, 1989.

5. In the First Information Report the informant alleged that she belonged to a scheduled caste. There is a mosque located in front of her house at Rahimpur in which this appellant worked as *Maulana*. The Dafadar of her village Md. Mazaz Akhtar and Md. Dilshad Rahman @ Samsi, are also residents of the same village. There existed some dispute between the informant and the two others viz. Md. Mazaz Akhtar and Md. Dilshad Rahman @ Samsi for putting up a stall (*gumti*) at certain place. On 20.08.2015, her daughter AB had gone to school but she did not return. Upon inquiry she learnt that AB had been kidnapped by Dafadar Md. Mazaz Akhtar and Md. Dilshad Rahman @ Samsi under a conspiracy to get her



married to this appellant and had taken her to the residence of the appellant at Muzaffarpur. She complained in her written report that considering her to be belonging to a *Mahadalit* caste, her daughter had been kidnapped in order to get her married to the appellant. She also mentioned that the victim, AB was recovered from the house of the appellant and that the appellant had sexually assaulted her.

6. The *fardbeyan* bears right thumb impression of the informant (PW-6) and signatures of Kishori Rai (PW-2), Madan Chaudhary (PW-3) and Naresh Chaudhary (PW-4). The statement of AB (PW-5) was recorded by learned Judicial Magistrate First Class, Vaishali on 22.08.2015 which has been exhibited at the trial as Exhibit-1 wherein she described the manner in which the occurrence had taken place. She disclosed in her statement under Section 164 of the Code of Criminal Procedure that soon after she came out of her school for catching an auto-rikshaw, she found the appellant standing there with a motorbike. She told the appellant that she was going to her house. The appellant offered her to drop her at her house. On his asking she sat on the appellant's motorcycle who, instead of dropping her at her house, took her to Muzaffarpur and locked her in a room and raped her. He kept AB in the room at



Muzaffarpur in the night. Subsequently, the appellant received a call on his mobile phone whereafter, the appellant locked AB in the room from outside and went back to Rahimpur. Taking advantage of an opening through a window of the room she managed to escape and came to Muzaffarpur town. Thereafter she called her family members and asked them to come to Muzaffarpur, upon which her brother came at Muzaffarpur to take her back. She further disclosed in her statement under Section 164 of the Code of Criminal Procedure that the appellant had sexually assaulted her twice in the night. She further disclosed that the appellant had assured AB to marry her but at Muzaffarpur the appellant told her that he was already married.

7. The victim AB was medically examined for determination of her age by a radiologist and a lady doctor in the wake of allegation of sexual assault on 24.08.2015. The radiologist determined the age of the victim to be 17 years and found evidence of sexual intercourse. On an examination of the vaginal swab sent by the lady doctor to the pathologist, non-motile spermatozoa was found upon pathological examination.

8. The police, upon completion of investigation



submitted charge-sheet against this appellant only, on 31.08.2015, while keeping the investigation against two other persons named in the FIR, pending.

9. Learned Special Judge (POCSO), after having taken cognizance of the offence by an order dated 01.02.2016, framed charge against the appellant for commission of the offences punishable under Sections 376(2)(i), 363, 366A, Sections 4, 6, 8 and 10 of the POCSO Act and Section 3(i)(xii) of the SC/ST Act. As the appellant denied the charges, he was put on trial.

10. At the trial, 11 prosecution witnesses came to be examined, including Investigating Officer (PW-10), the radiologist (PW-11), the lady doctor (PW-7), three witnesses to the FIR i.e. PW-2, PW-8 and PW-9. The informant came to be examined as PW-6, victim as PW-5. In addition the prosecution proved following documents without objection by way of exhibits:-

(i) Statement of victim recorded under Section 164 of the Cr.P.C. (Exhibit-1).

(ii) Statement of the AB recorded by lady police officer (Exhibit-2)



(iii) Medical Report (Exhibit-3)

(iv) Pathological Report (Exhibit-4)

(v) Signatures of the witnesses to FIR (PW-5) and (PW-6), (Exhibit-5 and Exhibit-6)

(vi) Formal FIR (Exhibit-7)

(vii) Written application (Exhibit-8)

(viii) Requisition for medical examination (Exhibit-9)

(ix) Radiological Report (Exhibit-10)

(x) Dental Report (Exhibit-11)

11. The defence produced two witnesses in support of its defence DW-1 and DW-2.

12. The trial court, upon appreciation, evaluation and analysis of the evidence adduced at the trial has acquitted the appellant of the charge of commission of the offences punishable under Section 3(i)(xii) of the SC/ST Act and Sections 363, 366A of the Indian Penal Code. While acquitting the appellant of the charge of the commission of the offence punishable under Sections 363, 366A of the Indian Penal Code, the trial court noticed manifest inconsistencies in the statements of AB (PW-5) at different stages, i.e., in her statement recorded under Section 164 of the Code of Criminal Procedure and in her



deposition at the trial, mainly, on the point of the vehicle, which according to her, was used for her kidnapping. The trial court has, however, held the appellant guilty of the offence punishable under Section 376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act based on evidence adduced at the trial to the effect that the appellant established sexual relationship with AB, who was a minor on the date of occurrence. After having held the appellant guilty of these offences, the trial court has sentenced him to undergo rigorous imprisonment for a term of 12 years by the judgment and order, which is impugned in the present criminal appeal.

13. Mr. Vindhya Keshri Kumar, learned Senior Counsel appearing on behalf of the appellant has contended that the appellant's conviction recorded by the court below is based primarily on the evidence of AB, who has been held by the court below to be a minor. He contends that the definite finding recorded by the trial court that AB was a minor on the date of occurrence is contrary to the evidence of the medical expert. He has taken us to the deposition of the Doctor, who in his cross-examination, upon perusing his own medical report testified that the age of the victim could be between the age group of 18 to 19. He has accordingly submitted that the conclusive finding of



the trial court that the victim AB was a minor as on the date of occurrence is contrary to the evidence on record. He has submitted that the prosecution, based on the evidence adduced at the trial, has thus failed to establish beyond all reasonable doubts the most essential ingredient to attract the penal provisions under the provisions of POCSO Act. He has further submitted that it is evident from the *fardbeyan* itself that a false criminal case was got instituted in the background of certain disputes regarding putting up a stall (*gumti*) near the Mosque. He had further submitted that AB is not at all a truthful witness, there being apparent contradictions in her statements recorded by the police under Section 161 of the Code of Criminal procedure and her deposition at the trial. He accordingly submits that it would be unjust to uphold the conviction recorded by the trial court considering conflicting and inconsistent deposition of the prosecution's witnesses. He has also drawn our attention to the evidence of the Investigating Officer (PW-10) to contend that the victim AB was apparently not recovered from the house of the appellant which had been falsely mentioned in the FIR. Further, though the appellant was arrested the very next day of the alleged occurrence, he was not put to any medical examination nor the clothes, which the



victim was wearing, were sent for forensic examination to connect the appellant with the act of sexual intercourse with the victim. He had submitted that condemnation of a person of the charge of offence of sexual assault is a serious matter. Unless there is clinching evidence to record a conclusive finding of guilt for commission of such offence, based solely on the oral testimony of a victim who has been found to be truthful, a person cannot be convicted for commission of such offence.

14. Learned Additional Public Prosecutor representing the State, on the other hand, has submitted that there is a long line of decisions of the Supreme Court laying down the law that the testimony of a rape victim, in the context of the Indian setting should be treated to be correct. She submits that the prosecution has been able to establish during the course of trial that the victim was a minor as on the date of occurrence. The trial court, based on the oral evidence of the victim (PW-5) has rightly held that the appellant had engaged in sexual intercourse with AB, a minor. The fact that sexual intercourse had happened with the victim has been corroborated by the medical evidence of the Doctors, she contends. She accordingly submits that the impugned judgment and order passed by the trial court suffers from no legal infirmity requiring this Court's



interference.

15. We have carefully perused the impugned judgment and order of the trial court as well as the lower court records. We have given our thoughtful consideration to the rival submissions made on behalf of the appellant and the State as noted above.

16. Before we begin to address the issue as to whether, the prosecution has been able to prove beyond all reasonable doubts, commission of offence punishable under Sections 376(2)(i) of the Indian Penal Code and Sections 4 and 6 of the POCSO Act, we need to notice that based on the evidence adduced at the trial, the trial court has found the charge of kidnapping the victim AB punishable under Sections 363 and 366A of the Indian Penal Code as not proved. It was the specific case of the prosecution that the victim AB was kidnapped by this appellant and two others in a *Bolero* vehicle. The trial court has disbelieved the story of kidnapping of the victim AB and has, accordingly, acquitted the appellant of the charge of commission of offence punishable under Section 363 and 366A of the I.P.C..

17. To establish an offence under Section 376(2)(i)



and the provision of the POCSO Act, it is primary duty of the prosecution to establish that the victim was a minor as on the date of occurrence. According to the prosecution, the date of occurrence is 21.08.2015. Section 376(2)(i) of the IPC as the same existed then, read as under:-

“376 (1) * * * *

(2) *whoever*,-

(a) * * * *

(b) * * * *

(i) *commits rape on a woman when she is under sixteen years of age;*

* * * *

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.”

18. In the medical report of the Radiologist the age of the victim has been determined as 17 years. The Doctor in his evidence has deposed, based on the findings recorded in the said report, that age of the victim AB could be between 18 to 19 years. No evidence other than the evidence of the medical expert is available, based on which it can be reasonably



concluded that age of the victim was less than 16 years as on the date of occurrence when Section 376(2)(i) was in force. Section 376(2)(i) of the Indian Penal Code has since been omitted by Act 22 of 2018 w.e.f. 21.04.2018 and new sub-section 3 has been added to Section 376 of the Indian Penal Code. Be that as it may, the prosecution having failed to establish at the trial that the victim AB was less than 16 years of age as on the date of occurrence, the appellant's conviction for the offence punishable under Section 376(2)(i) of the Indian Penal Code cannot be upheld.

19. The next question which arises in the present case is as to whether the prosecution could establish that the victim AB was a child as on the date of occurrence in order to attract the provisions of the POCSO Act. A child has been defined under Section 2(d) of the POCSO Act, as a person below the age of 18 years. It has been rightly pointed out by learned Senior Counsel appearing on behalf of the appellant that the only evidence adduced at the trial regarding age of the victim AB is based on age determination made by the radiologist, who in his report has found the age of the victim to be 17 years. However, at the trial the Doctor (PW-11) has deposed during the cross-examination that the age of the victim



AB could be between 18 to 19 years based on the said medical report. We are thus of the view that the prosecution failed to establish conclusively its case at the trial that the victim AB was a child/minor as on the date of occurrence. In such view of the matter, the conviction of the appellant under Sections 4 and 6 of the POCSO Act cannot be upheld.

20. We, however, do not intend to leave the matter here without dealing with the evidence adduced at the trial, in the wake of submissions which have been advanced on behalf of the appellant.

21. It is noteworthy that the informant had asserted in her written report on the basis of the information which she had gathered after the victim AB was found missing, that Dafadar Md. Mazaz Akhtar and Md. Dilshad Rahman had kidnapped the victim for getting her married to the appellant. From the written report it appears that at the time of filing of the written report the victim AB was already found. The informant alleged in the FIR that the victim AB (PW-5) was found in the house of the appellant. The victim AB (PW-5) in her statement under Section 164 of the Code of Criminal Procedure, disclosed before the learned Magistrate that she had fled away from the



place where she was taken by the appellant on a motorcycle and has kept in a room. Further, in the statement under Section 164 of the Code of Criminal Procedure, she disclosed that the appellant had offered her to sit with him on his motorcycle for her to be dropped at her house but she was taken to certain place at Muzaffarpur, where she was raped. Investigating Officer, in paragraph-4 of his deposition, has stated that the victim was recovered by him at Muzaffarpur whereafter they had come to Police Station. During the cross-examination the Investigating Officer has deposed that the victim was recovered on 21.08.2015 from her house at Rahimpur. The appellant, at the relevant point of time, resided in front of the house of the victim at Rahimpur, according to the evidence of victim AB (PW-5) herself. Further, during the cross-examination, the Investigating Officer accepted that he had not visited the place where the victim (PW-5) alleged that she was raped. No effort was made to locate the place of occurrence at Muzaffarpur to find out the truth. It also appears from his evidence that, though the appellant was arrested on 22.08.2015 itself, he was not made to undergo any medical test nor the clothes of the victim were sent for any forensic examination to connect the appellant with the alleged offence of rape/sexual assault or sexual intercourse.



22. It is significant to note that for the first time at the trial the victim (PW-5) deposed that all the three accused persons were standing outside the school of the victim with a *Bolero* (four wheeler) vehicle and all of them had kidnapped her and further that all the three persons had raped her. It may be recalled that in her statement under Section 164 of the Code of Criminal Procedure, which has been proved at the trial, the victim (PW-5) had disclosed that the appellant had enticed her to marry her and taken her to Muzaffarpur from her school. PW-2 (Kishori Rai) and PW-3 (Ramchandra Baitha) have been declared hostile at the instance of the prosecution. The informant PW-6 in her deposition in paragraph-4 has stated that victim was missing for 12 hours. The fact that the victim was kidnapped in a *Bolero* vehicle was disclosed to her by the victim (PW-5), the informant deposed in her evidence.

23. On a cumulative analysis of the evidence of the victim (PW-5) and the informant (PW-6), we are of the view that the prosecution's evidences are full of inconsistencies and contradictions. The evidence of the victim (PW-5) is not trustworthy and it is not safe to uphold the appellant's conviction under the provisions of the POCSO Act, in the background of the fact that prosecution failed to establish that



the victim was a minor as on the date of occurrence.

24. In view of the nature of evidence adduced at the trial by the prosecution as discussed above, absence of medical examination of the appellant immediately after his arrest in the wake of nature of allegation against him assumes significance and cannot be overlooked. The presence of non-motile spermatozoa in the vaginal swab of victim (PW-5) may indicates of sexual intercourse but that itself cannot be a proof to establish that the appellant had indulged in sexual intercourse with AB.

25. We are conscious of the settled legal position that an evidence of victim of rape does not essentially require corroboration by medical evidence and if the evidence of a victim of rape inspires confidence, conviction can be recorded even without corroboration by medical evidence. It would, however, be useful to notice at this juncture the dictum of the Supreme Court enunciated in case of **Krishan Kumar Malik v. State of Haryana** reported in (2011) 7 SCC 130 paragraph 40 of which reads as under:-

“40. The appellant was also examined by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix,



male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the appellant.”

26. In the present case, the place where the occurrence of sexual assault had taken place, the manner in which PW-5 was taken to the said place forcibly or otherwise, have not been proved at the trial. Except for the evidence of AB, there is no evidence at all adduced at the trial to prove that AB was taken to the place of occurrence by the appellant. The evidence of AB, without any corroboration cannot be relied upon as she has not been found to be truthful. Learned trial court has rightly disbelieved the prosecution's case of the victim's kidnapping so as to constitute offence punishable under Sections 363 and 366A of the Indian Penal Code.

27. Situated thus, in view of the afore-mentioned discussions, we are of the considered opinion that conviction of the appellant for the offences punishable under Section 376(2)(i) of the IPC and Sections 4 and 6 of the POCSO Act cannot be upheld.



28. The impugned judgment and order dated 02.07.2019/10.07.2019 passed by the Court of learned 1st Additional Sessions Judge-cum-Special Judge, POCSO Act, Vaishali, Hajipur in G.R. No. 4272 of 2015 arising out of Vaishali P.S. Case No. 261 of 2015, being unsustainable is hereby set aside.

29. The appellant is acquitted of the charge of offence punishable under Sections 376(2)(i) of the IPC and Sections 4 and 6 of the POCSO Act.

30. This appeal is accordingly allowed.

31. The appellant is in jail serving sentence. Let him be released forthwith if not required in any other case.

(Chakradhari Sharan Singh, J)

I agree
(Khatim Reza, J) :

(Khatim Reza, J)

anand/-

AFR/NAFR	NAFR
CAV DATE	29.09.2022
Uploading Date	13.10.2022
Transmission Date	13.10.2022

