

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.69 of 2021**

Arising Out of PS. Case No.-283 Year-2017 Thana- KARAHGAR District- Rohtas

Shashi Kumar Singh, Son of Bahadur Raut, Resident of Village- Tendua, P.S.-
Kargahar (Barahari O.P.), District- Rohtas at Sasaram.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr Vindhyachal Singh, Sr. Advocate Mr. Babu Nandan Prasad, Advocate
For the Respondent/s	:	Mr Abhimanyu Sharma, APP

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

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

CAV JUDGMENT

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

Date: 16-01-2023

We have taken utmost care to ensure that the identity of the informant's daughter, who is said to be the victim of the offence, may not be inferred, not only by concealing her name but also other relevant details concerning the victim.

2. By the impugned judgment and order dated 27.11.2020/ 28.11.2020, passed by the Additional District and Sessions Judge-VI -cum-Exclusive Special Judge (POCSO), Rohtas at Sasaram in POCSO Case No. 78 of 2017, arising out of Kargahar (Barahari O.P.) PS Case No. 283 of 2017, the appellant has been convicted and sentenced as under:



Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376 of the IPC	-	-	-
6 of the POCSO	RI for 20 years	60,000/-	RI for one year

3. A written report of the informant dated 09.10.2017 is the basis for the registration of Kargahar P.S. Case No. 283 of 2017, disclosing the commission of the offences punishable under Section 376(B) of the Indian Penal Code and Sections 4/6 of the Protection of Children from Sexual Offences Act (POCSO Act for short). The appellant, whose name figures in the column of the accused, has been described as an *in-charge* Headmaster of a Government Basic School where, according to the prosecution's case, the victim was studying in Class VIII. He alleged in his written report that his daughter, aged nearly 13 years, was sexually exploited by the appellant on the false pretext of marriage. Because of social shame and fear, the victim did not let him (the informant) know about it. When she (the victim) disclosed this fact to the informant, he went to the appellant. The appellant is said to have accepted his fault but threatened the informant of adverse consequences if he lodged a case in that regard. The father and the mother of the appellant also showed him (the informant) the door when he went to meet them



complaining about the act of the appellant. The FIR does not disclose the particular dates/ period when the appellant is said to have committed the alleged acts, nor does it mention the date when the informant had gone to meet the appellant with the said complaint against him.

4. The police, upon completion of the investigation, submitted its charge sheet on 05.03.2018 for the offences punishable under Section 376(B) of the Indian Penal Code and Sections 4 and 6 of the POCSO Act, after which the cognizance was taken on 09.03.2018. On 18.05.2018, a charge was framed against the appellant for the commission of the offences punishable under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act. The charge was read over to the appellant, and as the appellant completely denied the charge, he was put on trial.

5. At the trial, the prosecution examined seven witnesses as under:-

1. The maternal uncle of the victim (PW-1)
2. The informant and the father of the victim (PW-2)
3. The victim (PW-3)
4. The doctors who had examined the victim, also for the purposes of determination of her age (PWs. 4, 5 and 6)



5. The Investigating Officer (PW-7) (wrongly mentioned in the form of the heading of deposition as PW-5)

6. The response of the appellant was sought by the trial court upon closure of the evidence of the prosecution's witnesses in terms of the requirement under Section 313 of the Code of Criminal Procedure, 1973 (CrPC in short). The appellant answered negatively to the questions put by the learned trial court to him under Section 313 CrPC. Thereafter, two witnesses came to be examined for the defence as DW-1 and DW-2.

7. It is noticeable that during the course of the investigation the statement of the victim was recorded under Section 164 of the Cr.P.C. on 11.10.2017, which came to be marked as Exhibit-7 at the trial. The prosecution proved the medical reports and signatures thereon as Exhibits 4, 4/1, 4/2 and 5. The written report of the informant and the formal FIR were exhibited as Exhibits 1 and 6, respectively. It is emphasized here that no documentary evidence other than the aforesaid was proved by the prosecution at the trial to establish its case.

8. The appellant brought on record an information petition, which was filed by the appellant prior to the date of filing of the written report, wherein he had apprehended his false implication in a criminal case by the informant, which came to be



exhibited, with objection by the prosecution, as Exhibit-A.

9. The learned trial court, upon analysis, appreciation and scrutiny of the evidence on record, has held the appellant guilty of the offences as noted above by its judgment which is impugned in the present appeal and sentenced him to undergo rigorous imprisonment for 20 years with fine.

10. Mr Vindhyachal Singh, learned Senior Counsel appearing on behalf of the appellant, has submitted that the appellant's conviction for the offence punishable under Sections 6 of the POCSO Act is manifestly erroneous in the absence of any exercise having been undertaken by the prosecution to establish that the victim was a child as on the date of occurrence within the meaning of Section 2(d) of the POCSO Act. He has relied on the Supreme Court's decision in the case of ***Jernail Singh vs State of Haryana*** reported in ***(2013) 7 SCC 263*** with particular reference to paragraph 23 thereof to contend that in the light of the law laid down in the said case, the prosecution was obligated to prove beyond reasonable doubts that the victim was a child as on the date of occurrence in accordance with the procedure prescribed under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, in order to establish the commission of an offence punishable under the provisions the



POCSO Act. He has argued that the medical evidence based on radiological examination to the effect that the age of the victim was between 15-16 years as on the date of examination by the Medical Board is the only evidence brought on record by the prosecution to establish that the victim was a child as on the date of occurrence. He has submitted that the age determination on the basis of radiological examination cannot be accurate. He has further submitted that it can be easily deduced from the evidence of the prosecution's witnesses themselves that, as a matter of fact, the family members of the victim wanted the victim to be married to the appellant, and as the negotiation could not materialise, the false case came to be instituted. He has argued that Section 29 of the POCSO Act, which casts a burden on an accused of commission of an offence punishable under the provisions of the POCSO Act to prove his innocence, is not attracted as the prosecution, in the present case miserably failed to establish the essential pre-requisite and the foundational fact that the victim was a child and that any sexual assault was committed upon her by the appellant. According to him, the medical evidence does not at all corroborate the prosecution's case of commission of sexual assault by the appellant, and in view of the material contradictions in the evidence of the



prosecution's witnesses, it is not safe for this Court to uphold the finding of conviction recorded by the trial court. Referring to the evidence of the Investigating Officer, he has submitted that the prosecution has failed to prove even the place of occurrence. He has also submitted that the prosecution has also failed to establish that the victim was a student of the school of which the appellant was the *in-charge* Headmaster. He accordingly contends that the impugned judgment of conviction and the order of sentence are unsustainable and deserve to be interfered with and set aside by this Court.

11. Learned Additional Public Prosecutor representing the State, on the other hand, has argued that it is evident from the report of the medical Board that as on the date of examination of the victim, *i.e.* 11.10.2017, her age was found to be between 15-16 years. He has submitted that delay in registration of the FIR, in such cases, is a natural phenomenon which happens primarily in order to protect the family's prestige and dignity. He has submitted that the evidence of the prosecution's witnesses does not suggest that there was any proposal for marriage from before; rather, at the utmost, may suggest that once family members of the victim learnt about the physical relationship which the appellant had established with the victim, attempts might have



been made to get them married to safeguard the dignity and prestige of the family.

12. We have perused the impugned judgment and order of the trial court as well as the lower Court's records. We have given our anxious consideration to the rival submissions made on behalf of the parties.

13. To begin with, we consider it useful to address the seminal question as to whether the prosecution, based on the evidence adduced at the trial, can be said to have established that the victim was a child as of the date of occurrence. To answer this question, we need to take into account the prosecution's case that the victim was the student of the school of which the appellant was the *in-charge* Headmaster. The Investigating Officer in his evidence has deposed that though he had gone to the concerned school of which the victim was a student, he had not inspected the admission register even in order to find out as to whether she was the student of the said school or not. He is said to have enquired from the clerk of the school as to whether the victim was the student of that school or not. In his cross-examination, he deposed that he did not record the statement of any student or teacher of the school. In such view of the matter, we find force in the submission advanced on behalf of the



appellant with reference to the Supreme Court's decision in the case of **Jarnail Singh** (supra), wherein the Supreme Court has held in paragraphs 22 and 23 as under:-

"22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "the 2007 Rules"). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

"12.Procedure to be followed in determination of age.—(1) In every case concerning a child or a juvenile in conflict with law, the Court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the



school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year;

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3)



of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be



treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion."

14. It will be useful to notice at this stage, the Supreme Court's decision in the case of **Rajak Mohammad vs State of Himachal Pradesh** reported in **(2018) 9 SCC 248**, paragraph 9 of which reads 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."

15. Reading the law laid down in the case of **Jarnail Singh** (supra) and the observation made by the Supreme Court in the case of **Rajak Mohammad** (supra) conjointly, with reference to the facts of this case, in our opinion, on the question as to whether the victim was a child or not, the benefit of the doubt



will go in favour of the accused/the appellant. In such a view of the matter, in our opinion, the conviction of the appellant recorded by the trial court for the commission of the offence punishable under Sections 4/6 of the POCSO Act cannot be sustained.

16. The next question, which arises to be dealt with in the present appeal, is whether the appellant's conviction for the commission of the offence punishable under Section 376 of the Indian Penal Code can be upheld or not. In order to address this question, we need to refer to the depositions of the prosecution's witnesses first.

17. Let us begin with the evidence of the victim herself. According to her, the first occurrence with her had taken place on 22.12.2016. Thereafter, she had gone to her maternal uncle's place, and from there, she used to go to a nearby village to take tuition. During that course, the appellant provided her with a mobile phone to facilitate conversation between them. On 22.18.2017 at 12:00 noon, the appellant called her at a lonely place where he had done something inappropriate with her (*galat kam kiye*). Three days thereafter she was again called by the appellant and had done wrong to her (*galat kam kiye*). In her cross-examination, she deposed that the appellant and the victim



belonged to the same caste, and there was some negotiation for marriage between them was going on and 2-3 days after the appellant had declined to marry her, the criminal case was instituted.

18. It would be relevant to refer to the evidence of PW-2, the father of the victim and the informant of the case. It is pertinent to note here that he deposed at the trial that he had learnt about the occurrence on 22.08.2017. We have mentioned the evidence of PW-3, the victim, where she had deposed at the trial that she had gone to meet the appellant on 22.08.2017 at 12:00 in the noon, on which date, the appellant had committed wrong with her (*galat kaam*). Three days thereafter, she had again gone to meet the appellant, on which day also, the victim was sexually exploited by him.

19. It is evident on the combined reading of the evidence of PW-3 and PW-2 that PW-2 had learnt about physical relationship between the victim and the appellant from the information given to him by the victim after she had returned from her maternal uncle's place. Apparently, thus, the victim had gone to meet the appellant even after 22.08.2017, when her father (PW-2) already knew about their relationship. These facts need to be considered in the background of the evidence that



there was a negotiation for the marriage of the victim and the appellant going on, which could not fructify, and three days after the groom's side declined the proposal for wedding, the FIR came to be registered.

20. On a close reading of the evidence of the prosecution's witnesses, it cannot be concluded that no force or inducement was utilised by the appellant to obtain the consent of the victim for a physical relationship. It is true that the consent of a child is not valid consent, but in the present case, the prosecution has not established that the victim was a child. The victim herself, in her deposition at the trial, testified that some discussion had taken place for her marriage with the appellant, and the criminal case was registered after the refusal by the appellant to marry. A suggestion was given to PW-2 in his cross-examination to this effect, but he denied that he wanted the victim's marriage with the appellant. His deposition is evidently contrary to the evidence of the victim (PW-3). It is noticeable that the informant (PW-2), in his deposition, has stated, *inter alia*, that he had gone to the house of the appellant 3-4 times on 03.09.2017, 05.09.2017 and 08.09.2017 with 4-5 persons. At the cost of repetition, it is noted here that on the dates when PW-2 had visited the house of the appellant, according to his own



deposition, he knew about the occurrence of 22.08.2017 on that very day.

21. The maternal uncle of the victim (PW-1), in his evidence, deposed that the victim had gone to her maternal uncle's place on 18.08.2017. He was told by the victim that the appellant had asked the victim, using a mobile phone, to come at a desolate place and thereafter had committed sexual assault on her on the false pretext of marriage. She had, however, not disclosed the facts to him (PW-1) on 22.08.2017, and after much pestering, the victim had disclosed to him about the sexual exploitation by the appellant.

22. As has been noted above, the FIR was registered nearly 17 days thereafter, on 09.10.2017, as the negotiations for marriage could not yield any result. The victim was put on a medical examination. The medical evidence loses its relevance for the purpose of determination as to whether any sexual assault was committed on her or not. The medical report is to the effect that it was difficult to say as to whether any recent intercourse had taken place or not. The medical examination was done on 11.10.2017. According to the evidence of the victim (PW-3), she was sexually assaulted by the appellant on 22.08.2017, and three days thereafter, she was again sexually exploited. From the deposition of PW-3 (the victim), it appears that there is no specific testimony to the effect that the occurrence had taken



place on the premises of the school. The place of occurrence of 22.08.2017 and/ or subsequent occurrence have not been proved by the prosecution. The IO did not even visit the said place of occurrence, as disclosed by the victim in her deposition.

23. On close reading of the evidence of the prosecution's witnesses, in the Court's opinion, they do not appear to be truthful. In the Court's opinion, based on evidence adduced at the trial, the prosecution has not been able to establish beyond all reasonable doubt that there was any sexual intercourse between the appellant and the victim. Considering the contradictions in the evidence of the prosecution's witnesses, the evidence of PW-3 cannot be said to be fully reliable.

24. In any view of the matter, in the light of the Supreme Court's decision in the case of **Rajak Mohammad** (supra), in the facts and circumstances of the case, the benefit of the doubt will go in favour of the appellant. Paragraph 10 of the said decision reads as under:-

"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."

25. In such a view of the matter, in the Court's opinion,



the impugned judgment of conviction holding the appellant guilty of the commission of an offence punishable under Section 376 of the IPC cannot be upheld. We have already concluded hereinabove that the appellant's conviction for the offence punishable under Section 6 of the POCSO Act is not sustainable.

26. Consequently, the appellant stands acquitted of the charge of commission of offences punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act. Accordingly, the impugned judgment and order dated 27.11.2020/ 28.11.2020, passed by Additional District and Sessions Judge-VI -cum-Exclusive Special Judge (POCSO), Rohtas at Sasaram in POCSO Case No. 78 of 2017, arising out of Kargahar (Barahari O.P.) PS Case No. 283 of 2017 are set aside.

27. The appellant is in custody. Let him be released forthwith if he is not required in any other case.

(Chakradhari Sharan Singh, J)

I agree
Rajesh Kumar Verma, J

(Rajesh Kumar Verma, J)

Rajesh/-

AFR/NAFR	NAFR
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