

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.69 of 2019

Arising Out of PS. Case No.-84 Year-2018 Thana- KOILWAR District- Bhojpur

Manoj Kumar Son of Siyaram Singh Resident of Village- Matiyara, P.S.-
Koilwar, District- Bhojpur, Ara

... .. Appellant

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Vikramdeo Singh, Advocate
Mr. Rajiva Ranjan, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH
SINGH

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 17-05-2023

This appeal has been preferred by the appellant under
Section 374(2) of the Code of Criminal Procedure, putting to
challenge the impugned judgment of conviction dated 03.11.2018
and order dated 16.11.2018, passed by learned Additional District
& Sessions Judge-I, Ara, in POCSO Case No. 15 of 2018, arising
out of Koilwar P.S. case no. 84 of 2018, whereby the appellant has
been convicted and sentenced as under:

Criminal Appeal (DB) No. 69 of 2019				
Appellant	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Manoj Kumar	6 of the POCSOAct	For life	10,000/-	S.I. for six months



2. A written report of the informant (PW-3), who happened to be the father of the victim is the basis for registration of concerned Koilwar P.S. Case No. 84 of 2018, disclosing commission of the offences punishable under Section 376(2)(1) of the Indian Penal Code and Sections 4 and 6 of the POCSO Act. The First Information Report was registered against unknown. We are not mentioning the name of the victim nor the names of her parents who deposed as the prosecution's witnesses at the trial, so as to conceal the victim's identity. According to the aforesaid written report, in the evening of 03.03.2018, the informant had sent his minor daughter, aged nearly four years, to bring tobacco (*khaini*) from the *gumati* (kiosk) of one Sitaram Chaudhary with a ten-rupees currency note. Nearly at 06:30 pm, the victim returned crying and sat in her mother's (PW-2's) lap and upon enquiry she remained speechless and scary for sometime. Subsequently, she disclosed that a person had taken her across the main road on the allurement of fetching her egg and thereafter committed wrong with her. The informant, thereafter, took the victim along with him to identify the miscreant but none was found there. In the meanwhile, bleeding started from the private part of the victim, whereafter, they rushed to the Sadar Hospital, Ara, where she was treated by a lady doctor. The informant, accordingly, alleged that his daughter, the victim, aged nearly four years was raped by some



unknown person. The FIR was registered against unknown. It further transpires that due to excessive bleeding, the victim was referred to Patna Medical College and Hospital (PMCH), Patna for further management and treatment. She was admitted in PMCH, Patna on 04.03.2018 and was discharged on 13.03.2018. The statement of the victim was recorded under Section 164 of the CrPC before the learned Additional Chief Judicial Magistrate, Ara on 21.03.2018. In her statement recorded under Section 164 of the CrPC, the victim disclosed to the learned Magistrate that a hefty person not known to her had asked her to come along with him as he would fetch her egg. He did not give her egg. He put off her pant and made her lay on the grass. He put off his pant also and started licking her body and, thereafter, he inserted his penis in her mouth. She had also disclosed before the Magistrate that the said person had thereafter inserted his penis in her body, pointing towards her vagina. She further disclosed in her statement under Section 164 of the CrPC that she had started weeping and had asked the said person to leave her otherwise her mother (victim's mother) would beat him. When blood started oozing from her private part, the miscreant ran away. She also stated that she could identify the miscreant. It would be pertinent to mention her that the victim did not disclose the name of any person who had committed



rape upon her till her statement was recorded under Section 164 of the CrPC on 21.03.2018.

3. From the evidence of the Investigating Officer it transpires that the victim was examined by the police who had described the physical feature of the miscreant as a 'fat' and 'bald' person. The appellant was arrested on 06.03.2018. During the course of investigation, according to the police, he confessed his guilt before the police. The pant which the victim was wearing at the time of occurrence was sent for forensic examination. The police upon completion of investigation submitted its chargesheet on 21.03.2018, against the appellant for commission of the offence punishable under Section 376 of the IPC and Section 4 and 6 of the POCSO Act. Cognizance was taken thereafter and subsequently charges were framed against the appellant for commission of the offences punishable under Section 376(1) of the IPC and Sections 4 and 6 of the POCSO Act. The appellant denied the charges and claimed to be tried.

4. At the trial, the prosecution got examined six witnesses including PW-1(the victim), PW-2 (victim's mother), PW-3 (victim's father), PW-4 (the Investigating Officer), PW-5 (the doctor, who had examined the victim) and PW-6 (victim's grandfather). The prosecution got exhibited following documentary evidence at the trial :-



Exhibit-1: Signature of the informant on the written report.

Exhibit-2: Medical Report.

Exhibit-3: The discharge ticket.

Exhibit-4: The FSL report.

5. After closure of the evidence of the prosecution's witnesses the statement of the appellant was recorded by the trial court under Section 313 of the CrPC by putting questions with reference to the evidence emerging from the depositions of the prosecution's witnesses. The appellant answered in negative all the questions. A defence witness (DW-1) was examined to prove the appellant's innocence.

6. The trial court on analysis and appreciation of the evidence adduced at the trial has held the appellant guilty of the charges for commission of the offences punishable under Section 376 of the Indian Penal Code and Sections 4 and 6 of the POCSO Act. Considering the provision under Section 42 of the POCSO Act, the learned trial court deemed it proper not to award separate punishment for the offence punishable under Section 4 of the POCSO Act and Section 376 of the IPC and awarded the sentence of imprisonment for life with a fine of Rs. 2,000/- for the offence punishable under Section 6 of the POCSO Act and with default clause as has been noted above.



7. Mr. Vikramdeo Singh, learned counsel appearing on behalf of the appellant has submitted that the finding of conviction recorded by the trial court is not sustainable for various reasons including the fact that the victim was not seen by any person with the appellant before the commission of the offence. Further, the police failed in its duty to make a request before the court for putting the appellant for identification by the victim. He has argued that the identification of the appellant has not been proved by the prosecution beyond all reasonable doubts and that in the present facts and circumstances, failure on the part of the police to hold test identification parade before submission of the chargesheet is fatal for the prosecution's case. He has further argued that it would appear from the evidence of the witnesses that the photograph of the appellant was shown by the police to the victim based on which she identified the appellant to be the person who had committed rape upon her. He has argued that the description, which was given by the victim of the miscreant in her statement under Section 164 of the CrPC, did not tally with the appearance of the appellant and therefore, it is a case of mistaken identity. He has also argued, with reference to the deposition of the grandfather of the victim (PW-6) that according to him 2-4 hours after the occurrence, he had learnt as to who had committed the offence, but the victim had not taken the appellant's name in her



statement recorded under Section 164 of the CrPC. He has further argued that it was obligatory on the part of the investigating agencies to have got the appellant medically examined soon after the arrest in due compliance of Section 53A of the CrPC.

8. Learned Additional Public Prosecutor appearing on behalf of the State on the other hand has argued that the appellant has not disputed the age of the victim which has been found to be six years or below. Section 29 of the POCSO Act casts a reverse burden on the person being prosecuted for commission of the offence under the Act to prove his innocence, there being presumption of commission of offence by such person. It has been argued that the victim identified the appellant in the dock as the person who had committed rape upon her. The argument advanced on behalf of the defence at the trial regarding appearance of the appellant as described by the victim in her statement under Section 164 of the CrPC and his physical appearance in the court has been duly noticed by the trial court which had its own advantage of seeing the appellant. It has accordingly been argued that the finding of conviction as recorded by the trial court does not suffer from any legal infirmity requiring this Court's interference.

9. We have perused the order and judgment of the trial court as well as the evidence, both oral and documentary adduced at the trial and we have given our thoughtful consideration to the



rival submissions made on behalf of the parties as noted above. We need to notice at the outset the evidence of the victim (P.W.1). The trial court appears to have put such questions to the victim, a child, in order to ascertain as to whether she was able to understand the questions or not. She deposed in her evidence that she was lifted by the appellant and was taken by him across the road, whereafter, he had put off her pant. She explicitly deposed that the appellant inserted his penis in her mouth and in her vagina (private part). The victim was cross-examined. From the pattern of cross-examination of the victim, it appears that the defence attempted to elicit response from the victim in order to demonstrate that whatever she was deposing at the trial was based on the prompting of her mother. She deposed in her evidence that she had never had eggs till the date of her deposition. P.W. 2 supported the prosecution's case as was disclosed in the FIR and the fact that the victim was firstly taken to a doctor at Ara and subsequently to PMCH, Patna for treatment by ambulance where she remained admitted for nearly 10 days. Similar is the deposition of P.W. 3, the informant. The I.O. deposed that the clothes which the victim was wearing was seized and because of excessive bleeding, the statement of the victim was not recorded at Sadar Hospital, Ara. She described the place of occurrence as the field situated near NH-30 at village Kayam Nagar. A suggestion was made that the



appellant's implication was mainly on the basis of disclosure made by one Ajay Sharma to which the I.O. answered in negative. P.W. 5 (the medical officer) had examined the victim at Sadar Hospital, Ara on 03.03.2018, proved following injuries and the injury report (Exhibit 2):

Per vagina Examination:- Heavy bleeding and clot present at vulva and perineum. Tender to touch. After gentle mop and IV injection there bilateral tear at perineum and around vagina was found present. Two lateral tears are prominent at 7 O' clock position and at 5 O' clock perineum position.

Vaginal and rectal Swab taken- No Spermatozoa either alive or dead found.

Due to heavy bleeding and severe pain she was referred to PMCH Patna for further management and treatment.

10. She also proved the discharge slip of PMCH as Exhibit-3, depicting that the victim was referred from Sadar Hospital, Ara and she was treated in PMCH, Patna as under:

Operation – complete perineal tear repair + lateral (done on 04.03.2018) Vaginal wall tear (Right side)

Indication – complete perineal tear.

Under TIVA (Ketamine + Propotol), taking all septic and antiseptic precaution. Perineal examination done.- there was complete perineal involving external anal sphincter and rectal mucosa of about 2.5 cm length. There was deep lateral



vaginal wall tear on right side with clots in vaginal cavity. Complete perineal tear was repaired in 3 layers – rectal mucosa, followed by external anal sphincteroplasty and muscle layer repaired. After that, lateral vaginal wall tear repaired. Hemostasis secured.

Postoperative period uneventful. (10 days)

11. Based on the oral and documentary evidence adduced by the prosecution at the trial it can be conclusively held that the victim was subjected to penetrative sexual assault within the meaning of Section 3 of the POCSO Act and there does not appear to be any controversy that the victim was less than 6 years of age as on the date of occurrence and, therefore, it can be conclusively held that the victim was subjected to aggravated penetrative sexual assault within the meaning of Section 5(m) of the POCSO Act. We need to examine now as to whether the prosecution was able to bring on record the basic evidence to prove that it was the appellant who was the perpetrator of the crime. D.W.-1 was examined for the defence in order to make out a case that initially one Ajay Sharma was apprehended by the police who was short, hefty and bald and that said Ajay Sharma had got implicated this appellant because of certain dispute between Ajay Sharma and this appellant. In the present case, we notice that the victim, an innocent child, has been consistent in her statements



during the investigation and at the trial: While disclosing the occurrence for the first time to her parents, she did not name the person who had committed sexual assault as she did not know him. That is the reason why the FIR was registered against unknown. The statement of the victim was recorded during the course of investigation when she described the physical features of the person who had lifted her to be 'fat' and 'bald' from the front portion. The appellant was arrested on 06.03.2018 at 3:50 P.M. The appellant is said to have confessed his guilt before the police while in custody, according to the evidence of the Investigating Officer. Our opinion in the present Judgment, however, is not at all influenced by the so-called confessional statement of the appellant recorded by the I.O. during the course of investigation.

12. It is evident from the records that the victim identified the appellant as the perpetrator of the offence of sexual assault on her, in the dock. It is noteworthy that in his cross-examination the informant deposed that a police officer from Koilwar Police Station had shown to the victim photograph of the appellant in a mobile phone to inquire as to whether it was the same person who had committed the offence, in response to which the victim had answered in affirmative. The trial court in paragraph 19 of its judgment has recorded as under:



"19. It has been argued on behalf of the defence that there was confusion whether the accused was fatty and bald or not, hence there is suspicion and accused can be given benefit of doubt. But from perusal of the appearance of the accused, it is observed that the accused is bald and is not thin."

13. The trial court found the appellant not to be thin and found him to be bald matching with the description of the perpetrator of the crime as disclosed by the victim in her statement under Section 161 and 164 of the CrPC.

14. The evidence of the victim identifying the appellant in the dock as the person who had committed penetrative sexual assault on her cannot be doubted on the ground that she had described the physical appearance of the person as fat ("mota"). The child of 6 years may have his/her own understanding of appearance of a person like fat/thin/obese/tall/short etc.

15. Had it been a case of tutoring of the victim child by her parents, she could have been made to disclose the name of this appellant in her statement under Section 164 of the CrPC recorded by the Magistrate on 21.03.2018, in the background of the admitted fact that the appellant was apprehended during the course of investigation on 06.03.2018 itself. The evidence of D.W. 1 to the effect that Ajay Sharma was apprehended on 06.03.2018, in connection with the said case and that Ajay Sharma and this appellant were on inimical term is of no



consequence in view of the clear evidence of the prosecution's witnesses particularly, P.W. 1 (the victim) which has been duly corroborated by the medical evidence as noted above.

16. In our view, thus, the finding of conviction and the order of sentence recorded by the trial court does not suffer from any legal infirmity requiring this Court's interference.

17. This appeal has no merit and is accordingly dismissed.

(Chakradhari Sharan Singh, J)

I agree.
Chandra Prakash Singh, J: -

(Chandra Prakash Singh, J)

Nishant/Suraj-

AFR/NAFR	NAFR
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