

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.91 of 2022

Arising Out of PS. Case No.-57 Year-2016 Thana- ADHAOURA District- Kaimur (Bhabua)

BIRENDRA YADAV SON OF SHIVPUJAN YADAV RESIDENT OF
VILLAGE- DAHAR, P.S.- ADHAURA, DISTRICT- KAIMUR AT
BHABUA

... .. Appellant

Versus

THE STATE OF BIHAR

... .. Respondent

Appearance :

For the Appellant : Mr. Rajani Kant Pandey, Advocate
For the Respondent : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE BIBEK CHAUDHURI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 07-12-2023

This appeal has been preferred by the sole appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (CrPC for short), putting to challenge a judgment of conviction dated 10.12.2021 and the order of sentence dated 17.12.2021, passed by the learned Additional Sessions Judge-V1th-cum-Special Judge, POCSO Act, Kaimur at Bhabhua, in POCSO Case No. 2693 of 2016, Registration No. 28-A of 2016 arising out of Adhaura P.S. Case No. 57 of 2016, whereby the appellant has been convicted and sentenced as under:



Cr. Appeal (DB) No. 91 of 2022				
Appellant	Penal provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Birendra Yadav	Section 376(2)(i) of the Indian Penal Code	R.I. for 15 years	10,000/-	R.I. for six months
	Section 8 of the POCSO Act	R.I. for three years	Rs.5,000.00	R.I. for six months
	Section 4 of the POCSO Act	X	X	X

2. All the sentences have been ordered to run concurrently.

3. The victim (PW-1) was the informant of the concerned Adhaura P.S. Case No. 57 of 2016, disclosing commission of offences punishable under Section 376D of the Indian Penal Code (IPC in short) and Sections 4, 6, 8 and 10 of the POCSO Act claiming her age to be 15 years. The victim in her written report, addressed to the S.H.O. of the concerned Police Station dated 24.10.2016, alleged that on 23.10.2016 at about 3:00 PM, when she had taken cattle for grazing in *Karaki* forest, two persons, i.e., this appellant and co-accused Jagdish Paswan came and both of them committed rape upon her, one by one.

4. The Police upon completion of investigation submitted charge-sheet for the offences punishable under Sections 376, 174A of the IPC and Section 4 of POCSO Act against both the accused persons. The learned Special Court took cognizance of the offences punishable under Section 376D of the IPC and Section 6 of the POCSO Act. It transpires that by an order dated



19.08.2017, the case as against the present appellant was separated, as he had absented himself from the court. Co-accused Jagdish Paswan was put on trial. It is not in dispute that said Jagdish Paswan has been acquitted of the charges levelled against him.

5. Be that as it may, the appellant was charged of commission of the offences punishable under Section 376D of the IPC and Sections 6 and 10 of the POCSO Act, by an order dated 21.01.2020, in POCSO Case No. 2693 of 2016 (28-A/2016). As the appellant denied the charges, he was put to trial.

6. At the trial, the prosecution examined altogether nine witnesses including the victim (PW-1), her sisters (PW-4 and PW-7), her mother (PW-9), the doctors, who had examined the victim for the purpose of determination of her age and assessment of injuries in the wake of accusation of rape as PW-5 and PW-6. The Investigating Officer deposed at the trial as PW-8.

7. In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record following documentary evidence to substantiate the charges by way of exhibits:-

Sl. No.	Description	Exhibit Number
1.	Signature of the witness in the register of Police Station	Exhibit-1



2.	Signature of the witness on the statement under Article 164	Exhibit-2
3.	Medical Report(PW-5)	Exhibit-3
4.	Signature of the witness of age determination Report (PW-5)	Exhibit-4
5.	Age determination Report (PW-6)	Exhibit-4/1
6.	Signature of Dr. Anil Kumar on age determination report (PW-6)	Exhibit-4/2
7	Endorsement on the written application (PW-8)	Exhibit-5
8	Formal FIR (PW-8)	Exhibit-6
9	The attested copy of order-sheet from dt. 16.01.2019 to 13.05.2019/23.08.2019 of Aghaura Police Station Suit No. 03/2019 (Public Document)	Exhibit-7
10	The attested copy of the chargesheet of the case no. 03/2019 of the Aghaura Police Station (Public Document)	Exhibit-8
11	Transfer certificate issued by the middle school of Dahar in connection with the age of the victim	Exhibit-9

8. The defence brought on record by way of Exhibit-A, a certified copy of the judgment dated 28.03.2018 in POCSO Case No. 28 of 2016, rendered by A.D.J.-I, Kaimur at Bhabhua, whereby co-accused Jagdhish Paswan was acquitted by the trial court.

9. It is worthwhile mentioning that after closure of the prosecution's evidence, the appellant was examined under Section 313 of the CrPC, so as to give him an opportunity to explain the incriminating circumstances emerging against him, based on the evidence of the prosecution's witnesses. The appellant in his



response reiterated his plea of innocence and answered the questions relating to incriminating circumstances in negative.

10. The trial court after having appreciated the evidence adduced at the trial has reached a conclusion in its impugned judgment of conviction dated 10.12.2021 that the prosecution was able to prove against the appellant the charge of commission of offences punishable under Sections 376(2)(i) of the IPC and Sections 4 and 8 of the POCSO Act and has sentenced the appellant to imprisonment and fine by order dated 17.12.2021, as has been noted above. Noticing the provision under Section 42 of the POCSO Act, the trial court has chosen not to impose separate sentence for the offences punishable under Section 4 of the POCSO Act.

11. Learned counsel appearing on behalf of the appellant assailing the impugned judgment of conviction has submitted that the appellant's conviction for the offence punishable under Section 4 of the POCSO Act, taking aid of Section 29 thereof, is wholly unsustainable in the background of the fact that the prosecution miserably failed to prove at the trial that the age of the victim, as on the date of occurrence, was less than 18 years and, therefore, a child within the meaning of Section 2(1)(d) of the POCSO Act. It has been argued that even as per the assessment done by the



Medical Board, regarding the victim's age, based on radiological examination, her tentative age has been found to be between 16-18 years. The said finding cannot be said to be conclusive proof that the age of the victim was less than 18 years and she was, therefore, a child to attract the provisions of the POCSO Act. As there has been failure on the part of the prosecution and the Court to undertake the exercise of age determination in accordance with the procedure prescribed under the POCSO Act read with Section 94 of the Juvenile Justice (Protection and Care of Children) Act, 2015, the benefit of doubt deserves to be extended to the appellant.

12. On the point of the appellant's conviction for the offence punishable under Sections 376(2)(i) of the IPC, learned counsel appearing on behalf of the appellant has argued that the evidence of the victim is not reliable and her depositions at the trial as PW-1 are mutually destructive. He has further submitted that in absence of any evidence to the effect that the victim was less than 16 years of age as on the date of occurrence, trial court has wrongly recorded the appellant's conviction for the offence punishable under Sections 376(2)(i) of the IPC. He has further argued, referring to the deposition of the victim herself that at the trial against the co-accused Jagdish Paswan, she appears to have deposed that Jagdish Paswan had not committed any offence,



because of which the trial court had acquitted him in the said separate trial. She is not consistent in her deposition in the present trial as to whether co-accused Jagdish Paswan was there with the appellant in commission of the offence of sexual assault on her. He submits that the Judgment of conviction recorded by the trial court, based on the evidence of the victim is not at all sustainable. The evidence of other witnesses i.e. her sisters and mother are apparently based on the disclosure made to them by the victim. The medical report does not corroborate the accusation of commission of penetrative sexual assault. In such view of the matter, the appellant deserves to be acquitted by giving him benefit of doubt, he contends.

13. Ms. Shashi Bala Verma, learned Additional Public Prosecutor appearing on behalf of the State has defended the finding recorded by the trial court and has submitted that the trial court has rightly discarded the evidence adduced in the other trial held against the co-accused Jagdish Paswan and has recorded his finding based on the evidence adduced in the present trial. She contends that minor inconsistencies in the evidence of the victim should be ignored by this Court taking into account the kind of trauma which she must have undergone at the time and after commission of sexual assault upon her. She contends that since the



victim has fully supported the accusation of sexual assault by the present appellant in the present trial and has truthfully deposed that the evidence which she had given in the trial against Jagdish Paswan, was incorrect, her evidence should not be disbelieved by this Court. She has referred to the depositions of the sisters of the victim from which it can be seen that the victim committed suicide sometime after she had deposed at the trial. Taking into account the victim's mental status in that background, this Court may not interfere with the finding recorded by the trial court on the ground of certain inconsistencies in her deposition at the trial.

14. We have perused the impugned judgment and order of the trial court as well as the records of the trial court. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted above.

15. We find force in submission made on behalf of the appellant that the prosecution has not proved beyond doubts at the trial that the victim was under 18 years of age and, therefore, a child within the meaning of Section 2(1)(d) of the POCSO Act. We form this opinion, taking into account the fact that the Medical Board, based on radiological examination, has found the age of the victim to be between 16-18 years. No other documentary evidence in accordance with the requirement under Section 94 of the



Juvenile Justice (Care and Protection of Children) Act, 2015 was brought on record by way of evidence for appropriate determination of the victim's age. The determination of age by the Medical Board based on radiological examination cannot be said to be accurate. The Supreme Court has reiterated the view that two years' margin has to be given both ways, in an age determination based on medical examination. In the present case, the Medical Board itself has found the victim's age to be 16-18 years. In such circumstance, it cannot be said that the prosecution was able to successfully prove that the victim was a child to attract the provisions of the POCSO Act. Accordingly, the finding of conviction recorded by the trial court against the appellant for the offence punishable under Section 4 of the POCSO Act cannot be sustained and the said finding is accordingly set aside.

16. Coming to the question of the sustainability of the finding of conviction for the offence punishable under Section 376(2)(i) of the IPC, we are of the considered opinion that the said finding is manifestly erroneous. Section 376(2)(i) of the IPC shall have application if and only if there is evidence of commission of rape of a woman under 16 years of age. In the absence of any cogent evidence to prove that the victim was below 16 years of



age, the appellant's conviction for the offence punishable under Section 376(2)(i) of the IPC cannot be upheld.

17. However, the next question, which arises for this Court's consideration is, whether based on the evidence adduced at the trial, it can be said that the prosecution was able to prove beyond all reasonable doubts an offence of rape punishable under Section 376(1) of the IPC. To answer the said question, we need to carefully examine the evidence of the victim (PW-1) herself. Reiterating what she had alleged in the FIR, she deposed in her examination-in-chief that this appellant and co-accused (Jagdish Paswan) had committed rape upon her. In her cross-examination she deposed in paragraph 11 that she had deposed at the trial against co-accused Jagdish Paswan after having compromised the case. She also deposed in paragraph 11 that Jagdish Paswan was innocent. In paragraph 13 of her deposition, she further testified that she had deposed in the present trial that the her evidence that Jagdish Paswan had committed rape upon her was false. She also deposed that she had seen the accused persons coming towards her from a distance of nearly 5 ft., whereafter she had raised a cry for help, thereafter Lalu Maurya (PW-3) and Chandu Devi (PW-2) had rushed to the place of occurrence and the accused persons had escaped. Chandu Devi (PW-2) and Lalu Maurya (PW-3) have not



supported the prosecution's case and accordingly, they have been declared hostile. We, thus, notice manifest contradictions in the deposition of victim (PW-1) which cannot be reconciled.

18. It is also evident from the records that the victim was subjected to medical examination on the very next date of occurrence on 24.10.2016. The doctor (PW-5) in her deposition, proved her opinion that there was no evidence of recent sexual assault, though history of past sexual intercourse cannot be ruled out. The oral evidence of the victim is not corroborated by the medical evidence. It is true that based on solitary evidence of a victim of rape, without any corroborative evidence, a person can be convicted if such witness is found to be of sterling quality and her evidence is trustworthy.

19. Considering the nature of patent contradictions in the evidence of the victim (PW-1) and the fact that the medical report does not corroborate accusation of rape by two persons, as testified by her, we are of the view that the appellant cannot be convicted of the offence punishable under Section 376(1) of the IPC. The appellant deserves acquittal by giving him benefit of doubt in the facts and circumstances as noted above.

20. Accordingly, the finding of conviction recorded by the trial court cannot be sustained.



21. In the result, the impugned judgment of conviction dated 10.12.2021 and the order of sentence dated 17.12.2021, passed by the learned Additional Sessions Judge-V1th-cum-Special Judge, POCSO Act, Kaimur at Bhabhua, in POCSO Case No. 2693 of 2016, Registration No. 28-A of 2016 arising out of Adhaura P.S. Case No. 57 of 2016 are set aside. The appellant stands acquitted of the charges of commission of offences punishable under Section 376(2)(i) of the IPC and Section 8 of the POCSO Act by giving him benefit of doubt.

22. This appeal is allowed accordingly.

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

(Chakradhari Sharan Singh, J)

(Bibek Chaudhuri, J)

Suraj/Pravin-

AFR/NAFR	NAFR
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