

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.104 of 2022

Arising Out of PS. Case No.-46 Year-2019 Thana- MAHILA PS District- Jehanabad

SUBIR KUMAR @ CHHOTIYA, S/O SUDHIR PRASAD R/o village-
Pandui, P.S.- Paras Bigha, Distt.- Jehanabad

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	M/s Ajay Kumar Thakur, Alok Kumar Alok, Advocates
For the Respondent/s	:	Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. GUNNU ANUPAMA CHAKRAVARTHY

CAV JUDGMENT

(Per: HONOURABLE JUSTICE SMT. GUNNU ANUPAMA CHAKRAVARTHY)

Date : 08-11-2023

This criminal appeal has been preferred against Judgment of conviction dated 29.11.2021 and order of sentence dated 30.11.2021 passed by the learned Additional Sessions Judge VI – cum – Special Judge POCSO, Jehanabad, in POCSO Case No. 50 of 2019, arising out of Jehanabad (Mahila) P.S. Case No. 46 of 2019. By the judgment and order aforesaid, the appellant has been convicted and sentenced as under: -



Cr. Appeal (D.B.) No. 104 of 2022				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Subir Kumar @ Chhotiya	376 of the IPC	R.I. for Life	10,000/-	R.I. for one year
	4 of the POCSO Act	R.I. for Life	10,000/-	R.I. for one year

All the sentences have been directed to run concurrently.

2. As the matter relates to Section 376 of the Indian Penal Code and section 4 of the POCSO Act, we are of the considered view that the names of the victim or the parents of the victim shall not be disclosed in the judgment in order to safeguard the identity of the victim girl as per the directions of the Hon’ble Supreme Court.

3. We have heard Mr. Ajay Kumar Thakur, learned counsel for the appellant and Ms. Shashi Bala Verma, learned APP for the State.

4. The criminal case was set into motion basing on the written information given by the mother of the victim, who is the informant (PW 4), dated 20.7.2019 to the S.H.O., Mahila P.S., Jehanabad, wherein the informant has specifically stated that the victim was aged about 15 years and was pregnant at the time of preferring the information. PW 4/informant noticed the changes in the body of the victim and on confrontation with victim, she came



to know that the appellant i.e., Sudhir Kumar @ Chhotiya of their village had lured the victim, used to do wrongful acts with the victim near the pond and under the Banyan tree for which she preferred the written application.

5. Basing on the report, the SHO, Mahila P.S., Jehanabad registered the case against the appellant vide FIR bearing Jehanabad (Mahila) P.S. Case No. 46 of 2019 dated 20.7.2019 for the alleged offence punishable under section 376 of the IPC and under Section 4 of the POCSO Act.

6. During the course of investigation, the Investigating Officer has recorded the statement of witnesses under Section 161 of the Cr.P.C., who also got examined the victim under Section 164 of the Cr.P.C.. She also referred the victim for medical examination. On completion of the investigation and after receiving of the documents, laid charge-sheet against the appellant for the aforesaid offences.

7. The trial court took cognizance against the appellant vide order dated 21.10.2019 for the above said Sections and later charges were framed under Section 376 of the IPC and Section 4 of the POCSO Act on 18.12.2019, against the appellant, read over and explained to him.



The accused pleaded not guilty and claimed to be tried.

8. In order to prove the case against the appellant beyond the reasonable doubt, the prosecution has examined six witnesses i.e. PW1 the victim herself, PW 2, the mother of the victim (informant), PW 3 and 4, the Medical Officers of Sadar Hospital, Jehanabad, P.W. 5, the Investigation Officer and P.W. 6 the father of the victim.

9. In addition to the oral evidence of the prosecution's witness, the prosecution also brought on record documentary evidence i.e., Exhibits 1 to 8 viz. column no. 1 & 2 and column no. 5 to 10 of medical report Ext. 1, Ultra Sonographic report Ext. 2. Entire medical report Ext. 3, Endorsement regarding registration of the case on the written petition of the informant Ext. 4, Formal F.I.R Ext. 5, Requisition for medical examination of the victim Ext. 6, Arrest memo of the accused Ext. 7, Statement of the victim u/s 164 Cr.PC Ext. 8.

10. Learned counsel appearing on behalf of the appellant contended that the trial court had convicted the appellant for the above said offences, which is erroneous and perverse. The prosecution has miserably failed to prove that the appellant has committed penetrative sexual assault against the victim girl.



11. It is also specific contention of the learned counsel for the appellant that even the evidence of the victim and her parents disclose that the case was filed against the appellant, because the appellant refused to marry the victim girl. Further, it is contended that the appellant was not subjected to medical examination in accordance with the requirement under Section 53A of the Cr.P.C.. It is further submitted that in order to attract the offence under POCSO Act, the prosecution has to establish that the victim was less than 18 years, as on the date of occurrence. Further, he has drawn our attention to the evidence of the doctors, which disclose that no age determination test was conducted on the victim, as she was pregnant at the time of her examination. It is also contended by the learned counsel for the appellant that the prosecution has miserably failed to prove that the victim was aged below 18 years as on the date of occurrence and the evidence do not reveal that the appellant has committed sexual offence against the victim girl and, therefore, the judgment passed in POCSO Case No. 50 of 2019, arising out of Jehanabad (Mahila) P.S. Case No. 46 of 2019 is unsustainable and deserves to be set aside.

12. On the other hand learned Additional Public Prosecutor appearing on behalf of the State of Bihar contended



that the evidence of PW 2, who is the mother of the victim girl clearly disclose that the victim was a dull-mind, who speaks less and does not understand much. The victim / PW 1 was playing at the pond, when the appellant did the wrongful acts with the victim. PW 2 was able to notice the physical changes / appearances of the victim and on confrontation only came to know about the incident and further contended that in 164 Cr.P.C. statement of victim disclose that the appellant committed sexual assault, which include oral and physical penetration, therefore, prayed to confirm the judgment of the trial court.

13. We have perused the impugned judgment of the Trial Court and also perused the records. On consideration of rival contentions of both the parties, the point for determination which arose for determination in the appeal is that:-

(i) “whether the prosecution has proved the guilt of the appellant beyond reasonable doubt for the alleged offence punishable under Section 376 of the Indian Penal Code, and under Section 4 of the POCSO Act ?

(ii) whether the Trial Court have rightly convicted the accused for the aforesaid offences?

(iii) Further the crucial question which is to be determined is that whether the victim is below the age of 18 years



as on the date of occurrence, in order to attract the provisions of POCSO Act ?

14. It is relevant to mention that First Information Report do not disclose the date of the offence. The First Information Report as well as evidence of P.W.2, i.e., the victim's mother disclose that the written report was given by her and she noticed the physical changes in the body of the victim. In the F.I.R., it was specifically mentioned that the age of the victim was 15 years and she was pregnant as on 20.07.2019. However, P.W.1, who is the victim testified that she was aged 16 years as on 22 February 2021. Further P.W.5 / I.O. evidence disclose that she received the written report of P.W.2, from the mother of the victim girl, and registered the case which is Exhibit- P4. P.W. 5 did not speak about the age of the victim as on the date of the occurrence. The Investigating Officer failed to produce any medical evidence or other documentary evidence to prove that the victim was aged below 18 years as on the date of registering the first information report. P.W.6., who is the father of the accused, also did not state about the age of the victim.

15. It is relevant to mention that POCSO Act 2012 came to force on 19.06.2012 with an object to protect the children from offences of sexual assault, sexual harassment and



pornography and to provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. The Act also prescribes that it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means.

16. In order to attract the said act, burden is always on the prosecution to prove that the victim is a child aged below 18 years. It is the cardinal principles of criminal law that the prosecution has to establish the guilt of the accused beyond reasonable doubt and till then the accused shall be presumed to be innocent. But as far as POCSO Act is concerned, the onus lies on the appellant to establish that he is innocent in view of Section 29 of the POCSO Act which is a statutory presumption.

17. We are of the considered opinion that the prosecution has miserably failed to prove that the victim was minor as on the date of the occurrence and that the victim was a child within the meaning of Section (2) (1) (d) of the POCSO Act in order to attract the POCSO Act. Therefore, the appellant cannot be held guilty for the offences punishable under the Special Enactment Act, i.e., POCSO Act and the conviction and sentence



under Section 4 of the POCSO Act is not sustainable and is liable to be set aside.

18. Further the appellant has been convicted for offence punishable under Section 376 of the Indian Penal Code. The medical evidence plays crucial role to prove the offence under Section 376 of the Indian Penal Code. The evidence of P.Ws. 3 and 4, who are the doctors, has to be scrutinized. P.W.3 is a female doctor i.e., Dr. Renu Singh and P.W. 4, Dr. Vinod Kumar Singh are the members of the Medical Board constituted by the order of Superintendent of Sadar Hospital, Jehanabad, in order to examine the victim. The victim was examined by the Board of Doctors on 20.07.2019 at 8:00 pm. The following findings have been given by the doctors :-

- (a) External Injury – not present.
- (b) Secondary sexual characters - present/developed
- (c) Hymen ruptured
- (d) No foreign body was found in the private part
- (e) The victim had sexual contact
- (f) Pregnancy test not done.

Advised ultrasonography of the victim.

As per ultrasonography done in Sadar Hospital Jehanabad



(g) Single live foetus in cephalic presentation and longitudinal lie with gestational age of 27 weeks and 4 days corresponding to dates

(h) Approximate foetal weight – 1095 gms.

As per the vaginal swab report given by Dr. B.K.Jha,

(i) spermatozoa - not found,

(ii) Epithelial cell - a few present

(iii) W.B.C. – None

(iv) R.B.C. - None

19. On the basis of the above findings, the victim had sexual contact and she was pregnant of 27 weeks and 4 days. It is further testified by P.W.3 that DNA test is essential to determine with whom the victim became pregnant.

20. The evidence of P.W.4, Dr. Binod Kumar, disclose that Age Determination Test could not done, as the victim was pregnant. The medical reports have been marked as Exhibit nos. 1 to 3.

21. Furthermore, the evidence of P.W.1 clearly disclose that the appellant used to call her near the Pond and Banyan tree in order to do wrongful acts against her, but both the places are said to be public places. No specific dates or days were stated by the victim. It is also the specific admission of the victim/P.W.1 that the



appellant did not agree for the marriage and, therefore, the complaint was made. Her evidence further disclose that as on 22 February 2020 she delivered a baby, who was aged about one year. P.W.2 only testified that she noticed a baby bump on the victim and when inquired with the victim, the victim disclosed the name of the appellant. Therefore, it can be presumed that the victim had sexual relationship with the appellant with her consent. Furthermore, the accused have also lead defence evidence. D.W.1 testified before the court that the mother of the victim had disputes with the father of the accused and further the appellant used to live in Delhi along with his uncle.

22. In order to support his contention, the appellant has relied upon the judgments of the Hon'ble Apex Court in **Mukhtiar Ahmed Ansari Vs. State (NCT of Delhi)** reported in **(2005) 5 SCC 258**, wherein learned counsel has relied on paragraph nos. 29 to 31, which are as follows:

“29. The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW1 "hostile". His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.



30. A similar question came up for consideration before this Court in *Raja Ram v. State of Rajasthan*, JT (2000) 7 SC 549. In that case, the evidence of the Doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The Doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the Doctor and it was binding on the prosecution.

31. In the present case, evidence of PW1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to police in which police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, accused can rely on that evidence.”

23. In **Raja Ram Vs State of Rajasthan** reported in **(2005) 5 SCC 272** wherein learned counsel has relied on paragraph no. 9, which is as follows.

“9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined.”



24. In **Javed Masood & Anr Vs. State of Rajasthan** reported in **AIR 2010 SC 979**, wherein learned counsel has relied on paragraph nos. 10, 11, 14 and 15, which are as follows:

“10. The evidence of Ayub Bhai (PW-6) is very crucial. It is in his evidence that on the fateful day the deceased alone had come on a motorcycle to his shop at about 12.30 p.m. to repay an old debt. The deceased requested for sale of some more tyres on credit basis to which he refused. There was conversation for about 15 minutes in that regard. While the deceased was sitting in the shop he went into the basement of the shop to find as to any old tyres were available to sell as requested by the deceased and when he returned to the shop the deceased was not found in the shop. Then he found crowd in the street parallel to his shop and went to the place to know as to what transpired and found the deceased was lying overturned completely soaked in blood. He had died at the place of occurrence. Within 5-10 minutes the police came in gypsy and removed the body to hospital in gypsy. It is specifically stated in his evidence that PW-5-Chuttu who is none other than the brother of the deceased came to the spot after 10 minutes of the removal of the dead body and enquired from him regarding the occurrence and he informed that the police took him to the hospital. He also stated in his evidence that he has not given the names of any individuals to the police in as much as he had not seen the actual occurrence of the incident. It is also in his evidence that immediately after the incident he telephoned to one Habib with a request to communicate the message to Chuttu about the occurrence. He repeatedly stated that Chuttu (PW-5),



Noor (PW-13), Saleem (PW-7) and Rayees (PW-14) were not present when the police kept the dead body of Mullaji (deceased) in gypsy. He also explained that there was no need for him to send any telephonic message had they been present at the scene of occurrence. This witness did not support the prosecution case. He was not subjected to any cross-examination by the prosecution. His evidence remained unimpeached.

11.The evidence of Noor (PW-13) and Rayees (PW-14) is more or less the same as of PW-5 and therefore no detailed discussion is required about their evidence.

14.The proposition of law stated in the said judgment is equally applicable to the facts in hand.

15. It is clear that the evidence of PW-6 completely rules out the presence of Chuttu (PW-5) at the scene of offence. It is thus clear that PW-5 was not speaking truth, being interested witness obviously made an attempt to implicate the appellant in the case due to previous enmity. Be it noted that the entire prosecution case rests upon the Parcha Bayan (Ext. P12) lodged by PW-5. Once his presence is disbelieved, the whole case of the prosecution collapses like a pack of cards. In addition, the evidence of PWs 18, 29 and 30 who are all independent witnesses, also cast a serious shadow on the evidence of PWs 5, 13 and 14 as regards their presence at the scene of offence. It is under those circumstances, we find it difficult and impossible to place any reliance whatsoever on the evidence of PW-5 who is a highly interested and partisan witness. No reliance can be placed on his evidence in order to convict the



appellants of the charge under [Section 302, IPC](#). For the same reasons, the evidence of PWs 13 and 14 also is to be discarded. None of them was speaking truth.”

25. The evidence of P.W.6 also disclose that there were disputes between P.W.2 and father of the accused, P.W.2 preferred case against accused.

26. All the above citations of Apex Court squarely apply to the present case. It is the specific contention of learned counsel for the appellant that though the witnesses were not declared as hostile, they supported the case of the appellant, therefore, the evidence of the said witness i.e., P.W.6 has to be taken into consideration in order to prove the innocence of the appellant herein.

27. Further the learned counsel also relied on judgment of the Hon’ble Apex Court in **Manak Chand @ Mani Vs. The State of Haryana**, wherein learned counsel has relied on paragraph nos. 5 and 6, which are as follows:

“9. This Court in [Birad Mal Singhvi v. Anand Purohit](#) (1988) Supp SCC 604 had observed that the date of birth in the register of a school would not have any evidentiary value without the testimony of the person making the entry or the person who gave the date of birth.

“14. ...The date of birth mentioned in the scholar’s register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the



scholar's register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value."

In our opinion, the proof submitted by the prosecution with regard to the age of the prosecutrix in the form of the school register was not sufficient to arrive at a finding that the prosecutrix was less than sixteen years of age, especially when there were contradictory evidences before the Trial Court as to the age of the prosecutrix. It was neither safe nor fair to convict the accused, particularly when the age of the prosecutrix was such a crucial factor in the case.

Secondly, we cannot lose sight of the fact that since age was such a crucial factor in the present case, the prosecution should have done a bone ossification test for determination of the age of the prosecutrix. This has not been done in the present case. On the other hand, as per the clinical examination of the prosecutrix which was done by PW-1, Dr. Kulwinder Kaur on 28.10.2000 and which has also been referred to in the preceding paragraph of the present judgment, we find that the secondary sex characteristics of the prosecutrix were well developed. The doctor in her report mentions that the prosecutrix is a "well built adult female". At another place it mentions "well developed pubic hair" and "external genitalia were fully developed and normal". It then records her age as sixteen years as told to her by the mother of the prosecutrix. The report records that there were no external marks of injury over her breast, neck,



face, abdomen and thigh. The report then concludes, inter alia, about her age as under:

“At the time of medical examination of the patient, no force seems to have been used against her. I cannot opine about the age of the patient on the basis of development of her pubic hairs and genitalia etc. The patient was habitual to sexual intercourse because her labia minora was hypertrophied and hymen admitted two fingers.”

The doctor has refrained from giving an opinion herself as to the age, but in the same report the age is recorded as sixteen years. Under the facts and circumstances of the case, what was required to be done was a bone ossification test in order to come to some reliable conclusion as to the age of the prosecutrix. This has evidently not been done. Moreover, it has also come in evidence that the mother of the prosecutrix too had said that her daughter was sixteen years of age.”

28. It is further submitted that the evidence of the prosecutrix is not reliable, therefore, conviction does not sustain.

29. In spite of the specific observation made by P.W.3 for conducting a DNA test, the prosecution has not done any DNA test to child born to the victim in order to connect the crime with that of the accused. Therefore, we are of the considered opinion that the prosecution has miserably failed to prove that the appellant has committed sexual offence against the victim for the offence punishable under Section 376 of the Indian Penal Code.



30. As per the aforesaid discussion, we are of the considered view that the evidence of the prosecution witnesses do not appear to be trustworthy and the manner of occurrence is itself doubtful. There is no iota of evidence and prosecution has miserably failed to establish the age of the victim as below 18 years, and there is no other evidence on record to prove that the accused has committed rape on the victim. Hence, it is not safe to confirm the judgment of the Trial Court and the appellant deserves for benefit of doubt. Therefore, the conviction and sentence of the Trial Court are liable to be set aside.

31. In view of the above discussion, the appellant is entitled for benefit of doubt and therefore he is acquitted for the charges punishable under Section 4 of the POCSO Act and under Section 376 of the Indian Penal Code.

32. Accordingly, the impugned judgment of conviction dated 29.11.2021 and order of sentence dated 30.11.2021 passed by the learned Additional Sessions Judge VI – cum – Special Judge POCSO, Jehanabad, in POCSO Case No. 50 of 2019, arising out of Jehanabad (Mahila) P.S. Case No. 46 of 2019 is hereby set aside.

33. Accordingly, the appeal is allowed.



34. The appellant, namely, Subir Kumar @ Chhotiya is in custody. Let him be released forthwith, if not required in any other matter.

(Gunny Anupama Chakravarthy, J)

Chakradhari Sharan Singh, J: - I agree

(Chakradhari Sharan Singh, J)

Spd/-Aditi

AFR/NAFR	AFR
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