

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.120 of 2022

Arising Out of PS. Case No.-12 Year-2021 Thana- MAHILA PS District- Gaya

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UJJAWAL KUMAR KESHARI Son of Anil Kumar Keshri @ Anil Kumar
Resident of Village - Gurudwara Road, In the House of Kumar Babu
Advocate, P.S.- Kotwali, Dist.- Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Dr. Kamal Deo Sharma, Adv Mr. Tushar Vaibhav, Adv
For the State	:	Ms. Shashi Bala Verma, APP
For the O.P NO. 2	:	Mr. Ganesh Prasad Singh, Adv

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. GUNNU ANUPAMA CHAKRAVARTHY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 06-11-2023

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure assailing the impugned judgment of conviction and order the of sentence dated 05.01.2022 passed by the learned Special Judge, Exclusive (POCSO) Court-cum-Additional District and Sessions Judge-VI, Gaya in POCSO Case No. 55 of 2021 CIS



No. POCSO 55 of 2021 arising out of Mahila P.S. Case No. 12 of 2021, whereby and whereunder the appellant has been convicted and sentenced as under :-

Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 6 of the POCSO Act	Rigorous Imprisonment for 20 years	10,000/-	RI for six months
Section 376 (2) (3) of the IPC	-----	-----	-----

2. We are not disclosing the name of the victim and the prosecution's witnesses who are closely related to the victim so as to conceal the victim’s identity.

3. The victim (PW-1) is the informant of the concerned Mahila P.S. Case No. 12 of 2021 registered on 20.03.2021 for the offences punishable under Section 376 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the ‘POCSO Act’ in short). The victim alleged in her written statement addressed to the Officer-in-Charge of Mahila PS dated 20.03.2021 that she and the appellant had developed amorous relationship with each other in course of which they established physical relationship consequent upon which the victim became pregnant. When she



disclosed to the appellant about her pregnancy, he declined to owe the *foetus*. Despite best efforts, the appellant declined to accept that the *foetus* which the victim was carrying a result of their physical relationship. The victim asserted in her written statement that her age was fifteen and half years as on the date of lodging of the FIR.

4. The victim was subjected to medical examination. The medical board found her age to be more than 19 years, who was carrying six months' pregnancy at the time of medical examination. The medical board further found that nearly one year back, a one-month's pregnancy was got terminated.

5. Be that as it may, the police upon completion of investigation submitted chargesheet against the appellant for commission of the offences punishable under section 376 of the Indian Penal Code and section 6 of the POCSO Act, whereupon cognizance was taken for the offences punishable under Section 376(2) and 376(3) of the IPC and section 6 of the POCSO Act. Subsequently, charges were framed against the appellant for commission of the offences punishable under Section 376(2) and 376(3) of the Indian Penal Code and Section 6 of the POCSO Act.

6. At the trial, prosecution examined altogether five



witnesses to substantiate the charge, including the victim (PW-1), her mother (PW-2), the Doctor (PW-3), the brother of the victim (PW-4) and the I.O. of the case (PW-5). In addition to the documentary evidence adduced at the trial, prosecution also brought on record following documentary evidence to substantiate the charge:-

Sl. No.	Description	Exhibit Number
1.	Written application which was the basis for registration of FIR	Exhibit-1
2.	Victim's signature on her statement recorded under section 164 of the CrPC	Exhibit-2
3.	Medical report	Exhibit-3
4.	FIR	Exhibit-4
5.	Statement of the victim recorded under section 164 of the CrPC	Exhibit-5

7. Upon closure of the prosecution's evidence the appellant was questioned 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 answered in negative the questions which referred to incriminating circumstances.

8. The trial court, after having appreciated the evidence adduced at the trial reached a conclusion that the prosecution was able to prove based, on the evidence adduced at the trial,



that the age of the victim was below 16 years and therefore a 'child'. As there was allegation of commission of rape on a child by the appellant, there was a reverse burden of proof of innocence was there on the appellant in terms of section 29 of the POCSO Act, which he miserably failed to discharge the trial court has held. After having held so, the trial court recorded conviction of the appellant for the offences punishable under section 376(2) and 376(3) of the Indian Penal Code and Section 6 of the POCSO Act by the impugned judgment of conviction dated 05.01.2022 and sentenced him to undergo imprisonment and pay fine as has been noted above for the offences punishable under section 376 of the Indian Penal Code. Applying section 42 of the POCSO Act, the trial court has not passed any separate order of sentence against the conviction under section 6 of the POCSO Act.

9. Assailing the impugned judgment of conviction, learned counsel appearing on behalf of the appellant has submitted that the prosecution miserably failed to establish at the trial that the victim was a 'child' within the meaning of section 2(1)(d) of the POCSO Act, inasmuch as, it could not be established that the age of the victim was less than 18 years when she had consented for sexual intercourse with the



appellant. He has submitted that the medical report falsifies the prosecution's case that the victim was a child and no other legal procedure was followed by the prosecution to establish that the victim was a child. He has accordingly, submitted that the appellant's conviction for the offences punishable under section 6 of the POCSO Act is erroneous and perverse. He has further submitted that the victim, in her written application to the police which is the basis for registration of FIR, did not disclose that prior to the present pregnancy, she had conceived earlier also which is evident from her deposition at the trial and the report of medical examination. He has submitted that even if the entire case of the prosecution is treated to be correct on its face value, it is patent that the sexual intercourse between the appellant and the victim was consensual and that the victim was not a 'child' within the meaning of Section 2(1)(d) of the POCSO Act.

10. Learned Additional Public Prosecutor representing the state of Bihar has defended the finding of conviction recorded by the trial court and has submitted that the trial court has rightly held the appellant guilty of the offences upon due appreciation of evidence adduced at the trial.

11. We have perused the impugned judgment of the trial court as well as the trial court's records and we have given our



thoughtful consideration to the rival submissions advanced on behalf of the parties, which have been noted hereinabove.

12. The first and foremost aspect which requires to be addressed by this Court in the present case is as to whether the prosecution was able to establish beyond all reasonable doubts that the victim was a 'child' within the meaning of section 2(1) (d) of the POCSO Act so as to attract the provisions of the POCSO Act.

13. In her written application, the victim disclosed her age to be 15 years and 6 months. The FIR was registered on 20.03.2021. In her statement, recorded under section 164 of the CrPC, the victim disclosed 2001 as the year of her birth. In her evidence, at the trial, the victim (PW-1) stated her date of birth to be 17.10.2005, as per the matriculation certificate. The matriculation certificate was, however, not brought on record by way of evidence at the trial. The mother of the victim (PW-2) deposed that the victim was born in the year 2001 but in the certificate, 2005 was mentioned as the year of birth. From her evidence, it is manifest that she knew from before about the nature of relationship between the appellant and the victim were having. She also deposed that the victim and appellant were happily married as on the date of her deposition. PW-1 also



deposed in her evidence that the victim's age was 20 years as on the date of occurrence. The victim's brother (PW-4) too deposed at the trial that the age of the victim was 20-21 years as on the date of occurrence.

14. After having gone through the medical evidence and the evidence of the prosecution's witnesses, we have no *iota* of doubt that the prosecution completely failed to establish at the trial that the age of the victim was less than 18 years. The prosecution witnesses including the victim themselves have deposed at the trial that the victim was nearly 20 years as on the date of occurrence. The finding recorded by the trial court that the victim was a 'child' as on the date of occurrence, in such circumstance cannot be sustained.

15. Accordingly, the appellant's conviction for the offence punishable under section 6 of the POCSO Act applying section 29 thereof also cannot be sustained.

16. The evidence of the prosecution's witnesses goes to suggest that the victim was a major as on the date of occurrence and the physical relationship between the victim and the appellant was with their consent. The conviction of the appellant of the offences punishable under sections 376(2) and 376(3) of the Indian Penal Code as recorded by the trial court is not



sustainable.

17. Accordingly, the impugned impugned judgment of conviction and order of sentence dated 05.01.2022 are hereby set aside.

18. This appeal is allowed.

19. Since the appellant is in custody, let him be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Gunny Anupama Chakravarthy, J)

ranjan/-

AFR/NAFR	NAFR
CAV DATE	NA
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