

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.148 of 2021

Arising Out of PS. Case No.-312 Year-2017 Thana- SABAUR District- Bhagalpur

Mirtunjay Kumar @ Mritunjay Kumar, S/O Harihar Nath Yadav @ Harihar Yadav, Resident of English, P.S.- Sabour, District- Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 159 of 2021

Arising Out of PS. Case No.-312 Year-2017 Thana- SABAUR District- Bhagalpur

Rohit Kumar @ Vishwajeet Bhardwaz, Son of Anirudh Jha Resident of Village- Balha, P.S.- Parbatta, District- Khagaria.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 148 of 2021)

For the Appellant/s : Mr.Dilip Kumar Sinha, Advocate
Mr. Parmatma Singh, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 159 of 2021)

For the Appellant/s : Mr.Bharat Bhushan, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 20-06-2023

By the impugned judgment and order dated

21.12.2020/ 05.01.2021 passed by the learned Exclusive Special



Judge (POCSO)-cum- Additional District and Sessions Judge- VI, Bhagalpur in GR Case No. 5349 of 2017(C), arising out of Sabour P.S. Case No. 312 of 2017, the appellants have been convicted and sentenced as under:

Cr. Appeal (DB) No. 148 of 2021				
Appellant's name	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Mirtunjay Kumar	6 of the POCSO Act	RI for Life	20,000/-	SI for one year
	306/34 of IPC	RI for 10 years	10,000/-	SI for one year
	506/34 of IPC	RI for 2 years	10,000/-	SI for one month
	509/34 of IPC	RI for 2 years	5,000/-	SI for one month
Cr. Appeal (DB) No. 159 of 2021				
Appellant's name	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Rohit Kumar @ Vishwajeet Bhardwaz	6 of the POCSO Act	RI for Life	20,000/-	SI for one year
	306/34 of IPC	RI for 10 years	10,000/-	SI for one year
	506/34 of IPC	RI for 2 years	10,000/-	SI for one month
	509/34 of IPC	RI for 2 years	5,000/-	SI for one month

2. According to written report of the informant, which is the basis for registration of the concerned Sabour P.S. Case No. 312 of 2017 registered on 11.10.2017, her daughter (the victim), committed suicide on the said date. She alleged in her written



report addressed to the Officer-in-Charge of Sabour Police Station that on 09.10.2017, the victim aged nearly 18 years, was kidnapped by the appellant Mirtunjay Kumar and another person not known to her and was taken to a house near Basant Bahar Hotel and was raped by them. They had threatened her that in case she disclosed the occurrence to anyone, they would make the video of the occurrence viral and they would kill her. According to the FIR, the victim had disclosed these facts to the informant. She further alleged that on the date of occurrence, she had gone to bring her daughter from near Basant Bahar Hotel and on their way back home, the victim had received a call on her mobile No. 9771224807 from a mobile No. 8340623154, issuing a threat to the effect that if the facts were disclosed, they would be killed. She (the informant) returned and narrated the occurrence to the members of the family. Out of social shame, the informant did not disclose the occurrence of 09.10.2017 to anyone and on 11.10.2017, the victim committed suicide. The FIR was registered levelling commission of the offences punishable under Sections 376-D/306/34 of the IPC against appellant Mirtunjay Kumar and one unknown. Subsequently, under order passed by the court below dated 02.11.2017, Sections 6 and 12 of the Protection of Children



from Sexual Offences Act (POCSO Act in short) were added. Upon completion of investigation the charge-sheet was submitted against these appellants by the police for the offences punishable under Sections 376-D, 306, 506, 509/34 of the IPC and section 6/12 of the POCSO Act. On 24.05.2018, the trial court framed charges against the appellants for commission of the offences punishable under sections 376-D, 306, 506, 509 read with section 34 of the IPC and Section 4 of the POCSO Act. The appellants denied the charge and claimed to be tried.

3. At the trial, the prosecution got examined altogether six witnesses including the Investigating Officer (PW-5), the doctor, who had conducted the postmortem examination (PW-4), the victim's father (PW-3), the victim's mother (PW-2) and the victim's younger sister (PW-1). PW-6 proved the written report (Exhibit-1), search cum seizure list (Exhibit-9) and the confessional statement of the appellant Rohit Kumar @ Vishwajeet Bhardwaj (Exhibit-10). It was PW-6, who had recorded the confessional statement of the appellant Rohit Kumar @ Vishwajeet Bhardwaj when he was in police custody. The prosecution proved at the trial the documentary evidence, e.g., the written report, the seizure list, postmortem report (Exhibit-3), formal FIR (Exhibit-4), inquest report (Exhibit-5),



seizure list (Exhibit-6), suicide note of the deceased (Exhibit-7).

After closure of the evidence of the prosecution's witnesses the trial court questioned the appellants under section 313 of the Cr.P.C. in order to give them opportunity to explain the circumstances emerging against them based on the evidence of the prosecution's witnesses. They answered in negative.

4. The defense produced at the trial a photograph (Exhibit-A) by way of documentary evidence in support of the defense. The trial court, upon evaluation of oral and documentary evidence adduced at the trial, has concluded that the age of the victim based on matriculation certificate was 16 years and 9 months as on the date of occurrence. The suicide note written by the victim was in the nature of dying declaration which showed that the victim committed suicide because of humiliation suffered by her. The trial court, after having held so, upon invoking of Sections 29 and 30 of the POCSO Act recorded finding of conviction for the offences punishable under Sections 376-D, 306, 506, 509 read with Section 34 of the IPC and Section 6 of the POCSO Act and sentenced them to undergo rigorous imprisonment for life and fine.

5. We have heard Mr. Dilip Kumar Sinha and Mr. Bharat Bhushan, learned counsel appearing on behalf of the



appellants and Ms. Shashi Bala Verma, learned Additional Public Prosecutor representing the State.

6. Mr. Sinha, learned counsel for the appellants has submitted that it is a case of no evidence to the extent it relates to kidnapping of the victim and commission of rape upon her. He has further submitted that the prosecution miserably failed to prove at the trial that the victim was child within the meaning of Section 2(1)(d) of the POCSO Act to attract the provisions of the said act. He has argued that the informant, who is the mother of the victim, herself disclosed in her written report that the age of the victim was 18 years. He has further submitted that the learned trial court has committed serious error while determining the age of the victim based on the matriculation certificate, which was not proved at the trial and was not marked as an exhibit. He has submitted that in such view of the matter, Sections 29 and 30 of the POCSO Act have incorrectly been invoked by the learned trial court. He has further submitted that the suicide note said to have been written by the victim before committing suicide, was not duly proved at the trial, inasmuch as, it was not proved that the same was written by the victim by comparing her handwriting in the suicide note with her handwriting available on any other document. It has also been



argued that the postmortem report also does not corroborate the charge of accusation of commission of rape. He has contended that the circumstance in which the victim died becomes mysterious in view of contradictory evidence of PW-2 (mother of the victim) and PW-3 (father of the victim). He has argued that the finding of conviction recorded by the trial court requires interference by this Court for the aforesaid reasons.

7. Ms. Verma, learned Additional Public Prosecutor, appearing on behalf of the State, on the other hand, has submitted that though the age of the victim was mentioned in the First Information Report as 18 years as on the date of occurrence but it emerged subsequently in course of the trial based on the matriculation certificate of the victim that she was child within the meaning of section 2(1)(d) of the POCSO Act. She has submitted that the trial court has rightly appreciated the evidence adduced at the trial including the suicide note from which it is clear that the victim had to take the extreme step of committing suicide because of the conduct of these appellants. She contends that it is evident from the evidence of the victim's sister (PW-1) and her mother (PW-2) that the victim was put under serious threat of the video being made viral of the occurrence. She has accordingly submitted that the finding of the



trial court does not require any interference by this court.

8. We have carefully perused the impugned judgment and order of the trial court as well as the lower court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties. It would be in the fitness of the things to consider first as to whether the prosecution was able to establish beyond all reasonable doubts that the victim was a child as on the date of occurrence, within the meaning of Section 2(1)(d) of the POCSO Act.

9. Section 2(1)(d) of the POCSO Act reads as under :-

"2(1)(d) child" means any person
below the age of eighteen years"

10. The mother of the victim, who is the informant and whose written report is the basis of registration of the FIR, mentioned the age of the victim as 18 years. Mother of a child is normally the best witness to tell the correct age of her child, unless contrary is proved. It was the case of the informant herself that the victim was not below the age of eighteen years. The trial court has referred to the entry of the date of birth of the victim made in the matriculation certificate for reaching a conclusion that the age of the victim was 16 years and 9 months as on the date of occurrence.

11. We have carefully seen the records including the



documents adduced at the trial by way of exhibits. The Matriculation certificate was not proved during the course of the trial. We, therefore, find substance in the submission made on behalf of the appellants that the prosecution was not able to conclusively establish at the trial that the victim was a child as on the date of occurrence.

12. In such view of the matter, conviction of the appellants for commission of offence punishable under Section 6 of the POCSO Act cannot be sustained. It is noteworthy that the trial court has invoked Sections 29 and 30 of the POCSO Act on the premise that the victim was a child as on the date of occurrence and, therefore, the onus to rebut the charge was against these appellants, there being presumption of commission of offence by them.

13. In view of our finding that the prosecution failed to prove that the victim was child within the meaning of the provisions of the POCSO Act, the question of presumption of commission of offence under Section 29 of the POCSO Act does not arise.

14. We are now required to examine as to whether the offences punishable under Sections 376-D, 306, 506, 509, read with section 34 of the IPC can be said to have been proved



against these appellants or not, based on the evidence adduced at the trial.

15. We have no hesitation in recording our opinion that no case of abetment of suicide punishable under section 306 of the IPC could be said to have been proved against these appellants, based on the evidence adduced at the trial. There is no proof that the appellants, in any manner, abetted the commission of suicide by the victim. It is well settled law that in order to convict a person for an offence punishable under Section 306 of the IPC, it is incumbent upon the prosecution to establish that there was clear *mens rea* to commit an offence and that there ought to be an active or direct act leading to the deceased to commit suicide, being left with no option. We do not find any such evidence on record in the present case. Accordingly, the conviction of these appellants for the offence punishable under Section 306 of the IPC recorded by the trial court cannot be upheld.

16. Before coming to the conviction recorded by the trial court for the offences punishable under Sections 506 and 509 of the IPC, it would be apt to deal with the sustainability of the conviction of these appellants for the offence punishable under Section 376-D of the IPC. It is noteworthy that in the



present case, the FIR came to be registered after the victim committed suicide. The evidence of the witnesses is based on what was disclosed by the victim to them. PW-2, the mother of the victim, deposed at the trial that on 09.10.2017, the victim had gone to her college for attending classes and at 2:00 PM, she had called the informant at Tilka Manjhi Chowk. When she reached there, the victim was seen crying and upon being asked, she had disclosed that these appellants had committed rape upon her and had videographed the occurrence. When she was returning from Tilka Manjhi Chowk to her house with the victim, the appellant Mirtunjay Kumar called the victim and asked her to go back silently else the video of the occurrence shall be made viral. She also deposed that she narrated the occurrence to her husband (PW-3) in the evening. In her cross-examination, she (PW-2) disclosed that she had gone to the *mukhiya* not for the purpose of any compromise rather to ensure that the video prepared by the appellants was returned to her.

17. It is clear from the depositions of the witnesses that the video said to have been prepared was not recovered in any form during the course of investigation. The prosecution could not bring on record any material to show existence of any such video. PW-2 deposed in her cross-examination that she realized



that the victim had committed suicide when she had gone to serve her food. She further deposed that she made attempts to save the victim by entering into the room through ventilator of the room. Evidence of PW-3, the father of the victim, is based on what was narrated to him by PW-2 and the victim. In his deposition, he stated that on the date of occurrence, when the victim committed suicide, she was sleeping with her younger sister (PW-1) aged nearly 13-14 years. She, however, could not know as to when the victim had committed suicide. There is apparent inconsistency between the evidence of PW-2 (mother of the victim) and PW-3 (father of the victim) on the point of the manner, time and circumstance in which they had noticed the victim having committed suicide. Whereas PW-2 deposed at the trial that she had gone in the kitchen to lay food when, in the meanwhile, the victim had bolted the room from inside and, thereafter, she noticed through the ventilator of the room that the victim had committed suicide, PW-3, on the other hand, deposed, *inter alia*, that the victim was sleeping with her younger sister in the room and her younger sister (PW-1) could not realise as to when the victim had committed suicide.

18. PW-1 in her deposition, consistent with the evidence of PWs. 2 and 3 deposed that the victim had disclosed in her



presence that she was raped by these appellants. The evidence of PW-1 to this effect is palpably incorrect for the reason that even in the First Information Report name of the appellant Rohit Kumar was not mentioned. It does not appear from the evidence of PW-1 that she was sleeping with the victim in the same room at the time when the victim had committed suicide.

19. Further, there is no conclusive finding in the medical evidence to support the charge of commission of rape though there is a finding that the victim was habituated to sex. We are conscious of the fact that according to the prosecution's case, the occurrence of rape had taken place on 09.10.2017 whereas the postmortem examination was conducted on 12.10.2017. Absence of any sign of rape in the medical evidence cannot be the sole basis for disbelieving evidence regarding commission of rape if otherwise duly proved by the oral evidence. We find from the finding recorded by the trial court that the trial court has treated the suicide note of the victim as a dying declaration.

20. We find substance in submission made on behalf of the appellants that the prosecution was not able to establish that the said suicide note was in the handwriting of the victim. The contents of the relevant portion of the suicide note, which has been quoted in the impugned judgment, read as under:-

“हम खुद अपने आप को खत्म कर रहे हैं माँ क्योंकि मेरे



साथ इतना बुरा करके भी वो अपने लाइफ में खुशी से जियेगा। वो अपना गुनाह मानने को भी तैयार नहीं है। मेरे साथ इतना सब कुछ करके वो साफ मना कर रहा है कि उसने कुछ नहीं किया तो हम अपना सब कुछ खो कर जी कर क्या करेंगे। उसने तो मेरा सब बर्बाद कर दिया। हम नहीं देख पायेंगे ये सब कि उसे उसके गुनाह की कोई सजा नहीं मिली।”

21. It cannot be culled out on the basis of what has been mentioned in the note said to be the suicide note of the victim that she was subjected to any forcible sexual assault by these appellants. In our view, the prosecution failed to prove conclusively commission of penetrative sexual assault by these appellants upon the victim for the offence punishable under Section 376-D of the IPC. We are further of the view that based on the evidence adduced at the trial that the offences punishable under Sections 506 and 509 of the IPC also cannot be said to have been proved against these appellants beyond all reasonable doubts.

22. It would not out of place to mention that the suicide note was not sent for forensic examination for coming to a definite finding that the same was in the victim's handwriting. The evidence of the prosecution's witnesses adduced at the trial have been contradicted by the Investigating Officer in his deposition. For example, PW-2 in her evidence deposed that on a suggestion having been made to the victim by her to go to the



police station, she had started crying disclosing that the appellants had videographed the occurrence which they might make viral, the Investigating Officer in his deposition stated at the trial no such statement of PW-2 was recorded in the case diary.

23. Upon taking into account the evidence of the prosecution's witnesses in entirety, we are of the view that the prosecution was not able to prove at the trial commission of rape within the meaning of Section 375 of the IPC and, thereafter, the conviction for the offence punishable under Section 376-D of the IPC is unsustainable. Accordingly, the appellants stand acquitted of the charges punishable under Section 6 of the POCSO Act and Sections 376-D, 306, 506 and 509 read with Section 34 of the Indian Penal Code by giving them benefit of doubt.

24. In the result, the impugned judgment of conviction and order of sentence dated 21.12.2020/ 05.01.2021 passed by the learned Exclusive Special Judge (POCSO)-cum- Additional District and Sessions Judge-VI, Bhagalpur in GR Case No. 5349 of 2017(C), arising out of Sabour P.S. Case No. 312 of 2017 are set aside.

25. These appeals are accordingly allowed.



26. The appellants are in jail custody. Let them be released forthwith, if they are not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/kundan

AFR/NAFR	NAFR
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