

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.139 of 2022

Arising Out of PS. Case No.-109 Year-2018 Thana- MAHKAR District- Gaya

Shravan Prasad @ Shravan Kumar Son of Yogender Prasad Resident of
Village - Naili, P.S.- Mahkar, Distt.- Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Ms. Vaishnavi Singh, Advocate Mr. Ritwik Thakur, Advocate Mr. Arun Kumar Singh, Advocate
For the Respondent/s	:	Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. GUNNU ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. GUNNU ANUPAMA CHAKRAVARTHY)

Date : 07-11-2023

This criminal appeal has been preferred against judgment of conviction dated 04.12.2021 and order of sentence dated 08.12.2021 passed by the Learned Exclusive Special Judge (POCSO Act)-cum-7th Additional Sessions Judge, Gaya in POCSO Case No. 57 of 2018 (arising out of Mahkar PS Case No. 109 of 2018). By the judgment and order aforesaid, the appellant has been convicted and sentenced as under:-



Cr. Appeal (D.B.) No. 139 of 2022				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Shravan Prasad @ Shravan Kumar	4 of the POCSO Act	RI for life	Rs. 25,000/-	SI for six months
	376(1) of the IPC	No separate sentence		

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 application given by the father of victim, who is the informant (PW-1) dated 14.06.2018 to the Station House Officer, Mahkar P.S. at about 15.00 hours.

5. The brief contents culled out of the said application is that on 13.06.2018 at about 8.00 pm, when the daughter of the informant who was aged about 13 years went outside the house to attend the natural call, the appellant lifted her and took her



away about half a kilometer and forcibly committed rape on her. Thereafter, he fled away from the place of occurrence. It is further alleged that the informant's daughter, somehow reached her house and got fainted. After regaining consciousness she disclosed about the incident.

6. Basing on the report, the SHO, Mahkar P.S. Case registered the case against the appellant vide FIR bearing Mahkar PS Case No. 109 of 2018 dated 14.06.2018 for the offence punishable under Section 376(3) of IPC, under Sections 4, 12 of the POCSO Act and under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act.

7. During the course of investigation, the appellant was arrested on 22.06.2018 and was produced before the Chief Judicial Magistrate, Gaya. Further the appellant was remanded to judicial custody on the same day and since then he was in jail. Further, the investigating officer recorded the statements of the witnesses under Section 161 Cr.P.C and the statement of victim was also recorded under Section 164 Cr.P.C by the Learned Chief Judicial Magistrate. Later, victim was referred to medical examination. On completion of the investigation, chargesheet was filed u/s 6 of the POCSO Act, u/s 376(3) of Indian Penal



Code and section 3(2)(v) of the SC/ST Act for which cognizance was taken by the court below on 04.09.2018. Further the trial court have framed charges against the appellant for the offences punishable under Section 4 of the POCSO Act, under Section 376(3) of the Indian Penal Code and under Section 3(2) (v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, read over and explained to the appellant on 01.03.2019 for which he pleaded not guilty and claimed to be tried.

8. During the course of trial, the prosecution has examined ten witnesses i.e., PWs-1 to PW-10 and got marked Exhibits 1 to 5.

Prosecution witnesses	Relation
PW-1	Father of victim
PW-2	Victim
PW-3	Aunt of victim
PW-4	Medical Officer
PW-5	Co-villager
PW-6	Investigating Officer
PW-7	Cousin of the Victim
PW-8	Police Official
PW-9	Co-villager
PW-10	Uncle of the victim

Details of Exhibits

Exhibit-1	Written petition
Exhibit-2	Signature of victim girl on the statement recorded under Section 164 Cr.P.C
Exhibit-3	Medical examination report
Exhibit-4	Formal FIR
Exhibit-5	Letter no. 41 dated-21.01.2021 sent by Police Inspector, Speedy



	Disposal Cell of the office of the SSP, Gaya.
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The appellant was examined under Section 313 Cr.P.C bringing to his notice incriminating evidence found against him from the evidence of the prosecution witnesses for which he denied and reported no defence evidence. The trial court after considering the oral and documentary evidence convicted the appellant for the aforesaid offences except for the offences punishable under Section 3(2)(v) of the SC/ST Act and appellant was acquitted for offence under SC/ST Act.

9. Learned counsel for the appellant contended that the evidence of PW-1 who is the informant is contrary to the contents of the written application and the theory of the prosecution is contradicting each of the witnesses. It is further contended that the evidence of the witnesses disclose that the back of the victim alone was injured and no other parts are injured however there is no medical evidence on record to corroborate the oral evidence and therefore, the prosecution has not made out the case against the appellant. It is further contended that the age of the victim and time of the occurrence of the incident testified by the witnesses is inconsistent with each other and therefore, prayed to set aside the judgment.

10. On the other hand, learned Additional Public



Prosecutor contended that there is no error or irregularity in the orders passed by the trial court and the conviction holds good, therefore, prayed to confirm the judgment and sentences passed by the trial court.

11. The point for determination in the appeal is that whether the prosecution is able to prove guilt of the accused for the offences punishable under Section 376(1) of IPC and section 4 of the POCSO Act and whether the trial court has rightly convicted the appellant herein for the said offences.

12. Heard the rival contentions of the parties and perused the record.

13. In a criminal case the cardinal principles are that the prosecution has to prove the guilt of the accused beyond reasonable doubt and the accused shall be presumed to be innocent, but under the special enactment i.e. the POCSO Act there is a reverse burden on the accused to prove his innocence.

14. On perusal of the written application of the informant i.e. PW-1 who is father of the victim it is alleged that on 16.06.2018 around 8.00 pm, the victim who was aged about 13 years went to the backyard of the house for defecation and the appellant took away the victim half a kilometer away, forcibly assaulted her sexually (raped) and fled away leaving



her behind. It is further alleged that somehow the victim managed to reach home and got fainted at the house. After regaining consciousness she informed the details of the incident. Further, the *Sarpanch* along with other villagers suggested PW-1 to make a written application before the police, on that he further preferred the report/written application.

15. Whereas, PW-1 testified before the court that on the date of incident. The victim went for defecation and appellant sexually assaulted the victim girl. The said incident took place around 8.30 pm and that he came to know about the incident from the women of the village. On perusal of contents of the written statement i.e. exhibit-1 and the evidence of PW-1 it is evident that there are contradiction as to the learning about the incident by him/PW-1 as well as witnessing the victim reaching home alone, getting unconscious and later regaining consciousness. In the cross-examination PW-1 testified that his daughter went for defecation and three women of the village also went along with her. Further, it is admitted by PW-1 that he was not present at the house at the time of incident and came to know about the incident by the wife of Arjun Das. Further, blood stain was noticed/found on the girl/victim clothes. It is specifically deposed by PW-1 that at the behest of one Nutan



Kumari written application was made by him but not voluntarily.

16. It is relevant to mention that the alleged incident took place on 13.06.2018 at about 8.00 pm, whereas, the written complaint was given by PW-1 on 14.06.2018 at 15 hours. Further, the victim was referred to the government hospital after two days. Further contradiction from the evidence of PW-1 and as to the contents of written application is with regard to the age of the victim. In the written application the age of the victim was mentioned as 13 years by PW-1, but he testified before the court that the age of the victim as on the date of occurrence was 16 years.

17. PW-2 is the victim who testified her age 11 years before the court. In the chief-examination, the victim stated that the appellant has raped her by putting off her *pyjama*. She stated that she studied till 3rd class and did not know what was her date of birth as per school record. In the cross-examination, while narrating about the incident, she testified that at the time of defecation no women were defecating next to her and that the appellant came and grabbed her from behind for which she started screaming and got fainted. She further testified that she alone had gone to her house and explained the whole incident to



PW-1 who is her father. Her evidence further disclose that her back was injured and no other part of the body was injured and that she gave her clothes to the Sub-Inspector of Police. She further testified that she gave her statement under Section 164 Cr.P.C as per the instruction of her aunt, but not voluntarily.

18. It is pertinent to mention that as per evidence of prosecutrix/victim it is evident that except her, none of other witnesses were present at the scene of offence and none accompanied her, to her house and she alone came to her house and informed about the incident to her father.

19. On perusal of the evidences of PWs 1 and 2, it is evident that the they are inconsistent with each other as to the age of the victim as well as about learning the incident by PW-1 and also about the seizure/non-seizure of blood stained clothes of the victim.

20. PW-3 is the Aunt of the victim. The evidence of PW-3 disclose another theory projected by the prosecution. The evidence of PW-3 disclose that on the date of incident PW-2 victim girl screamed on that PW-3 went to the place of occurrence, and saw the victim in unconscious state. In order to regain consciousness PW-3 sprinkled water on the face of victim. After regaining consciousness the victim informed PW-3



that the appellant/accused molested her. The evidence of PW-3 further disclose that one Usha Devi and another woman (whose name was not known to her) were present at the place of occurrence. It is specifically deposed by PW-3 that the victim girl was not wounded and that they took the victim girl from the place of occurrence to the house of victim and left her.

21. PW-5 Kameshri Devi also testified that they went out for defecation to the field along with Vimla Devi, Rita Devi and after hearing the screams of victim they went to the place of occurrence, turned on the torch light, saw the victim lying and a boy running away. On regaining consciousness, victim informed them about the incident. It is important to note that PW-5 did not speak about the presence of PW-3 and PW-3 also did not speak about the presence of PW-5.

22. PW-4 is the doctor who examined the victim girl. The evidence of the doctor discloses that on 15.06.2018 she examined the victim and found hymen mildly lacerated, but the lacerations were old, healed and radial. She further opined that there was no sign or symptom of present intercourse, but intercourse done in past may not be denied and that she was not sure whether the victim has been raped or not?

23. In the cross-examination, it is specifically



admitted by PW-4 that she has not found injury on the private parts of the victim and also did not find any injury or of nail marks on the body parts of the victim. Further the undergarments which were examined did not find any sign of semen and that they were not the original clothes which were worn by the victim at the time of occurrence. It is pertinent to mention that there was a delay of two days in referring the victim to medical examination.

24. As per the evidence of PW-4 doctor, it is evident that she was not sure whether the victim was raped or not? Even the evidence of the victim only disclose that the accused had caught her from the back. Therefore, we are of the considered view that rape was not committed by the appellant against the victim girl.

25. The other witnesses in this case are the second Investigating Officer PW-6, PW-8 Sub-Inspector of Police through whom the death report of the first Investigating Officer was filed before the court. As per the evidence of PW-6 he was the second Investigating Officer who filed the chargesheet before the court. He testified that the date of birth of the victim as per the school register is 17.05.2006. But no document was filed to prove the date of birth of the victim as 17.05.2006. It is



specifically admitted by PW-6 that he has not recorded the statements of any of the witnesses, not visited the scene of offence and did not send the clothes of the victim to Forensic Science Laboratory. Further, the evidence of PW-8 clearly disclose that the first Investigating Officer had visited the scene of offence, recorded the statements. However, the death report of first Investigating Officer was filed by the court. PW-8 has no special knowledge of the case, but testified that he came to the court, as the Inspector of Police directed him to file the death certificate of the first Investigating Officer.

26. PW-7 is the brother of the victim. PW-9 is the fellow villager, but both of them have turned hostile and did not support the case of the prosecution.

27. PW-10 is the uncle of the victim. His evidence disclose that the time of occurrence of the incident as between 6 to 7 pm and stated the age of the victim as 13 years which is contradicting the evidence of PWs-1, 2, 3 and 5. The evidence of PW-10 cannot be given much weightage as he specifically stated that he was not present at the time of incident, but came to know about the incident through the victim which is a hearsay evidence.

28. It is just necessary to reappraise the statement of



the victim girl was recorded under Section 164 Cr.P.C. As per the said statement, at around 8.00 pm, the victim went for defecation, the appellant came and grabbed her mouth, took her to the field and when she shouted the appellant did wrong act and after that she got unconscious.

29. It is pertinent to mention that in the decision of the Apex Court in **R Shaji vs. State of Kerala in Criminal Appeal No. 86 of 2006** dated 10.12.2009 that their lordships have held that “the evidence given in the court under the oath has great sanctity, which is why the same is called substantive evidence”. Statements under 161 Cr.P.C can be only used for the purpose of contradiction and statements under Section 164 Cr.P.C, can be used for both corroboration and contradiction.

30. Therefore, we are of the considered view that the 164 statement of the victim/PW-2 recorded by the Magistrate can be used for corroboration and contradiction and it is a weak piece of evidence. The trial court heavily relied on the 164 statement of victim and convicted the appellant which is not at all sustainable.

31. Considering the rival submission and on re-appreciation of the entire evidence, we are of the considered view that the exact age of the victim was not determined or



proved by the prosecution. Further the medical evidence do not support the case of prosecution in any manner for the offence punishable under Section 376 of IPC. It is important to note that one Nutan Kumari was not examined though the written application was made by PW-1 at her instance.

32. The charge framed against the appellant for the major offence under Section 376 of IPC is not proved. However, the offence under Section 354 of IPC is made out in the case where the victim testified that the accused had grabbed her from behind in order to commit sexual assault.

Section 354A- Sexual harassment and punishment for sexual harassment defines as under:-

(1) A man committing any of the following acts--

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with



fine, or with both.

33. The age of the victim was not determined however, as per the evidence of PW-1, PW-2 and PW-10, the age of the victim differs from 11 to 16 years. If their oral evidence is taken into consideration the provisions under POCSO Act can be attracted and the appellant is also liable to be punished under Section 7 of the POCSO Act.

34. Section 7 of the POCSO Act defines as follows:-

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

35. The maximum punishment prescribed under POCSO Act is five years with fine and the maximum punishment prescribed for section 354(A)(i) is three years with fine or with fine or with both.

36. It is needless to say that the prosecution has miserably failed to prove the guilt of the accused/appellant for the offence punishable u/s 376 of IPC or of section 4 of the



POCSO Act. Therefore, the conviction imposed against the appellant for section 4 of the POCSO Act and section 376 of the IPC are liable to be set aside.

37. As per the abovesaid discussion the conviction of the appellant for the offence punishable under Section 4, 12 of the POCSO Act and under Section 376(3) of the IPC as recorded by the trial court are not sustainable and impugned judgment of conviction dated 04.12.2021 and order of sentence dated 08.12.2021 are hereby set aside.

38. However, we are of the considered view that the appellant is liable to be convicted under Section 7 of the POCSO Act and under Section 354(A)(i) of the IPC.

(a) Therefore, we modify the sentence imposed by the trial court to that of section 7 of the POCSO Act and section 354(A)(i) of the IPC instead of section 4 of the POCSO Act and Section 376(3) of the IPC. Therefore, the appellant is convicted for the offence punishable under Section 354(A)(i) of IPC and he is sentenced to undergo rigorous imprisonment for a period of three years.

(b) Further the appellant is convicted for the offence punishable under Section 7 of the POCSO Act and sentenced to undergo rigorous imprisonment for a period of three years and



shall pay a fine of Rs. 25,000/- payable to the prosecutrix.

39. The record reveals that the appellant is in jail since 22.06.2018 i.e. for more than five years. The trial court has awarded a fine of Rs. 25,000/- and if the same is paid by the appellant, he need not pay the fine amount which was awarded to him in this appeal. If the fine amount imposed by the trial court is not paid, the appellant shall pay fine amount forthwith or if paid, he shall be released forthwith, if the appellant is not required in any other case.

40. In result the appeal is partly allowed.

(Chakradhari Sharan Singh, J)

(Gunnu Anupama Chakravarthy, J)

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