

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.183 of 2019

Arising Out of PS. Case No.-26 Year-2016 Thana- MAHILA P.S. District- Kaimur (Bhabua)

Uday Kumar Singh @ Uday Kumar Kushwaha @ Uday Pratap Singh Son Of
Rameshwar Singh Kushwaha Resident Of Akhini, P.S.- Nuwan, District-
Kaimur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv.
	:	Mr. Bimlendu Shekher Thakur, Adv.
For the Respondent/s	:	Mr. Binay Krishna, Spl. P.P.

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 31-07-2023

1. We have heard Shri Ajay Kumar Thakur, the learned advocate for the appellant and Mr. Binay Krishna, the learned Special Public Prosecutor for the State.

2. The appellant has been convicted under Section 376 (2)(N), 354B and 506 of the Indian Penal Code, Section 6 of the POCSO Act, 2012 and under Section 3 (i)(w) (i), 3(2)(v) of the SC/ST Prevention of Atrocities Act, 2015 and has been sentenced to undergo imprisonment for life, to



pay a fine of Rs. 50,000/- under Section 376(2)(N) of the IPC, R.I. for four years, to pay a fine of Rs. 20,000/- under Section 354B of the IPC, R.I. for one year under Section 506 of the IPC, R.I. for two years to pay a fine of Rs. 10,000/- under Section 3(i)(w) of the SC/ST Act and in default of payment of fine, to further suffer R.I. for six months, vide judgment of conviction dated 21.12.2018 and consequent order of sentence dated 24.12.2018 passed by the learned by the learned Additional Sessions Judge -1st -cum-Special Judge, Kaimur, Bhabhua in POCSO Trial Registration No. 19 of 2016 arising out of Bhabhua (Mahila) P.S. Case No. 26 of 2016. The sentences were ordered to run concurrently.

3. The prosecutrix is alleged to have been raped successively by the appellant and on the night of the occurrence, about which F.I.R. has been registered, the appellant is alleged to have forced her to follow him down the rooftop but because of the intervention of the other family members, any untoward event was warded off.

4. The F.I.R. was registered on the written report of 'X' who has been examined as P.W.-5 at the trial.



She has alleged at that time she was aged about 14 to 15 years and belonged to Scheduled Caste community. On the night of the occurrence i.e. 16.08.2016, she had been sleeping on her roof when at about 01:00 in the night, the appellant, who is her neighbour, jumped from his roof to her roof and tried to drag her down. This awakened her and she shouted for help. The appellant is then said to have run away to his own house. While fleeing, the appellant was seen and identified by the two younger sisters of the prosecutrix. All of them could identify the appellant because it was a moon-lit night. Earlier also, the appellant is said to have stalked her and had also established physical relationship with her. About 10 days ago, the appellant had threatened the prosecutrix of dire consequences. Because of fear, she did not tell anything to her parents.

5. On the basis of the aforementioned written report, a case vide Bhabhua Mahila P.S. Case No. 26 of 2016 dated 16.08.2016 was registered for investigation under section 376 of the Indian Penal Code, Section 6 of the POCSO Act and Section 3(i)(xi)(2)(v) of the SC/ST Act.



6. The police after investigation submitted charge-sheet, whereupon, the appellant was put on trial.

7. The Trial Court after having examined nine witnesses on behalf of the prosecution has convicted and sentenced the appellant as aforesaid.

8. The primary thrust of the defence of the appellant as argued by Mr. Thakur is that the entire story is false and that the victim is not a minor for the offence under the POCSO Act, 2012 to be attracted. Apart from this, Mr. Thakur has argued that no part of the statement of either the prosecutrix or of her parents or of her sisters who are said to have been the witnesses to the occurrence, can be accepted as true as each one of their statements contradict some part of their testimony which goes to the root of the matter.

9. It has been pointed out by the learned counsel for the appellant that the F.I.R. was lodged on 16.08.2016 for an occurrence which took place in the night intervening between 15th and 16th of August 2016. In that occurrence, the prosecutrix was never subjected to any sexual misdemeanour. In fact, according to the First Information



Report, the appellant had scaled over the rooftop of the house of the prosecutrix where she was sleeping along with her two sisters and when she woke up and was about to be dragged by the appellant, the appellant managed to run away. In that context, the prosecutrix has stated about the appellant having established sexual relationship with her in the past and of having physically troubled her earlier. All this was never reported to her parents ostensibly for the reason that the appellant had been doling out threats to her and she took such threats to be real.

10. During the trial, P.W.-5 has made a complete about turn and has narrated something which was not there in her initial version. She has deposed before the Trial Court that on the night of the occurrence, her parents were away and her sisters were sleeping on the roof. She was made to climb down the bamboo staircase by the appellant and was taken into one of the rooms out of the two rooms in the house which was empty and was subjected to sexual intercourse. It was only when one of the sisters arrived that the appellant ran away. No part of this statement appears to be correct for two



reasons; the prosecutrix could not have been forcibly dragged down to the room of the house as there was no regular staircase but only a temporary stairs made of bamboo sticks. A person cannot be forcibly brought down the rooftop by using such a ladder else the ladder will fall down. Apart from this, there was every occasion for the prosecutrix to have extricated herself from the clutches of the appellant even if the story were true. She could have run away or would have shouted for help waking up her sisters. That not having been done, the very story about which there is no reference in the F.I.R. cannot be accepted to be the correct account. Apart from this, we find from the deposition of P.W.-1 and 2, who are the parents of the prosecutrix, that the couple had 9 daughters and the prosecutrix is at No. 4. All three elder daughters of P.W. 1 and 2 are quite aged. In fact, the father of the prosecutrix has clearly stated that the date of the birth of the prosecutrix is the year 1989 though he did not remember the date and the month of her birth. This definitely makes her more than the age for which the provisions under the POCSO Act, 2012 could be attracted.



11. One of the sisters of the prosecutrix has a different story to narrate. She saw the appellant raping the prosecutrix when she had entered the room but on her shouts, the appellant ran away. This does not fit in the story-line suggested by the prosecution. So far as the earlier sexual relationship/encounter of the appellant with the prosecutrix is concerned, it is difficult to accept such proposition for the reason that it was never reported to and the story of the threat for life also does not appear to be correct. The appellant stays next doors and there are no details of his parentage or his status in the society. It thus appears that the prosecutrix, if at all had consented to some liaison with the appellant, it was because she was a major at the time of the occurrence. We say so for the reason that though during the trial, she has responded to the questions about her education that she never had any formal education in any school but the prosecution has not come forward with any definite proof of the age of the victim for pressing the provisions contained in POCSO Act, 2012. Compulsorily, the age of the victim had to be ascertained.



12. In **Jarnail Singh Vs. State of Haryana; (2013) 7 SCC 263**, the Supreme Court while deciding the case with respect to the age of the victim against the allegation of sexual assault, has opined that on the issue of determination of age of a minor, one would only need to make reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. The afore-noted rules are framed under Section 68 (1) of the Juvenile Justice (Care and Protection of Children) Rules, 2000. Rule 12 refers to the procedure to be followed in determination of age. The same rule has been adopted in Juvenile Justice (Care and Protection of Children) Act, 2015. The rules provide that in every case concerning a child or juvenile in conflict with law, the age determination enquiry shall be conducted by the Court or the Board, or as the case may be, the Committee by seeking evidence by obtaining - (a) the Matriculation or equivalent certificates, if available and in the absence whereof; (b) the date of birth certificate from the school (other than the play school first attended); and in the absence whereof; (c) the Birth Certificate given by a Corporation or a Municipal Authority or a Panchayat; (d) and



only in the absence of either of these, the Medical opinion would be sought from a duly constituted Medical Board, which will declare the age of the juvenile or the child. In case exact assessment of the age cannot be done, the Court or the Board or as the case may be, the Committee for the reasons to be recorded by them may, if considered necessary, give benefit to the child or the juvenile by considering his/her age on lower side within the margin of one year and while passing orders in such case shall, after taking into consideration such evidence as may be available, or the Medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specify in any one of the clauses of the Rule or in the absence whereof, such report shall be conclusive proof of the age as regards such child of the juvenile in conflict with law.

13. Even though, Rule 12 is strictly applicable only to determine the age of a child in conflict with law, the Supreme Court was of the view that the aforesaid statutory provision should be the basis for determining age even of a child who is a victim of crime. In view of the Supreme Court, there is hardly any difference in so far as the issue of minority



is concerned between a child in conflict with law and a child who is a victim of crime.

14. Nothing of this kind appears to have been done by the prosecution.

15. On the contrary, Dr. Krishna Kumar Singh, who has been examined as P.W.-9, only has testified that on 08.08.2016, a Medical Board was constituted for the determination of the age of the prosecutrix of which Committee, he was one of the members. According to the report of the Board, the victim was between 16 to 17 years of age. In cross-examination, he has candidly admitted that on the report, the L.T.I. of the victim was not obtained. He also claimed complete ignorance about X-ray reading and, therefore, refrained from making any conclusive statement with respect to the age of the victim. All that he had to say to the Court was that the victim did not have her third molar properly developed and a person with well developed third molars is normally expected to be within the age group of 18 to 25 years.



16. He has also stated that in the report that the age group was initially stated to be 16 to 18 years but 18 years was later struck off and was replaced with 17 years. He had admitted that molars and the formation of teeth would be dependent on the presence of magnesium and calcium in the body of a particular person.

17. Apart from this, we have also carefully examined the statement of all the witnesses including the victim who has said that on a regular basis, she had been visiting the house of the appellant for watching television programmes. This only gives us an inkling that there was an association between the victim and the appellant from before and that the victim was never being stalked by the appellant. Had that been true, the victim would not have ever ventured to the house of the appellant for watching television programmes.

18. This leaves us with a very important question as to why and under what circumstance, has this case been lodged by her.

19. We have not been able to find any reason whatsoever except for the fact that the victim perhaps would



have deposed against the appellant under some societal or parental pressure.

20. Be that as it may, since we have not found the assertion of the prosecution that the victim is a minor, we have not pressed the application of Section 29 of the POCSO Act, 2012 which provides that if a person is prosecuted for committing or abetting or attempting to commit any offence under Section 375 and 9 of the POCSO Act, 2012, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. It needs no repetition that Section 29 of POCSO Act, 2012 cannot just be applied. It can be applied only when the prosecution fails to establish primary facts constituting the offence (**Subrata Biswas & Anr. Vs. State (2019) SCC Online Cal. 1815**).

21. The discrepant statements made by the victim; the doubts regarding the victim being a minor and she being in constant touch with the appellant make us disbelieve the entire prosecution case.



22. For the aforementioned reasons, we have no option but to set aside the judgment and order of conviction and sentence and acquit the appellant of the charges levelled against him.

23. The appellant, we are told, is in custody.

24. He is directed to be released forthwith from jail, unless his detention is requires in any other case.

25. The appeal is allowed.

26. Let a copy of this order be dispatched to the Superintendent of concerned jail for record and compliance.

27. Let the records of this case be also returned to the concerned court below forthwith.

(Ashutosh Kumar, J)

(Vipul M. Pancholi, J)

Sunil/-Sachin/-

AFR/NAFR	A.F.R.
CAV DATE	
Uploading Date	02.08.2023
Transmission Date	

