

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.330 of 2021

Arising Out of PS. Case No.-641 Year-2018 Thana- SASARAM NAGAR District- Rohtas

NASSEM SHEIKH Son of Shamim Sheikh @ Shameem Ahamad Resident of
Village - Shahjalalpeer, Ward no.- 24, P.S.- Sasaram Nagar, District - Rohtas.
... .. Appellant

Versus

The State of Bihar
... .. Respondent

Appearance :
For the Appellant : Mr. Hitesh Suman, Advocate
Mr. Ashok Kumar, Advocate
For the Respondent : Ms. Shashi Bala Verma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH
and
HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 18-08-2023

This appeal has been preferred under Section 374(2) of the CrPC against the judgment of conviction and the order of sentence dated 21.12.2020 passed by the learned Exclusive Special Court (POCSO) (Additional District and Sessions Judge-VI), Rohtas at Sasaram, in POCSO Case No. 23 of 2018 arising out of Sasaram (Town) P.S. Case No. 641 of 2018, whereby the appellant has been convicted and sentenced as under: -

Cr. Appeal (D.B.) No. 330 of 2021				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Naseem Sheikh	376(3) of the IPC	R.I. for 20 years	60,000/-	R.I. for one year
	Section 4 of the POCSO Act	No separate sentence	-	-



2. Name of the victim has been concealed and she has been referred to in the present judgment as the victim (PW 2). The victim's father, PW 1, is the informant, whose written report addressed to the Officer-in-Charge, Sasaram (Town) Police Station is the basis for registration of Sasaram (Town) P.S. Case No. 641 of 2018 on 21.04.2018. It was alleged in the written report that, at about 1 PM, on 21.04.2018, the informant's daughter (PW 2), aged about 10 years, was having ice-cream in front of their house. In the meanwhile, the informant's neighbor, i.e., the appellant, forcibly took the victim in his house and committed rape upon her. The appellant's father had made the appellant to open the door, whereafter, the appellant and the victim came out of the room. Thereafter, the victim disclosed the entire occurrence to her mother (not examined) and the informant. The statement of the victim was recorded before a Magistrate under Section 164 of the CrPC on the very next date, i.e., 22.04.2018. She disclosed in her statement that the appellant had committed rape upon her after putting off her clothes. He had tied her mouth and had pointed a gun towards her. When her mother came there, searching for her, the appellant threatened her also by brandishing a dagger. The appellant also used abusive language.



3. The victim was subjected to medical examination on the date of registration of the FIR itself, i.e., 21.04.2018 by a medical board so as to determine her age and record opinion as regards the injuries. The victim's age, in the assessment of the medical board, was 9-11 years as on the date of her examination. On the point of sexual assault, upon examination, the doctor (PW 4) recorded following opinion: -

“(a) On the basis of clinical and pathological examination, it is very difficult to say whether recent sexual intercourse has been done or not.

(b) Age determination by medical board: Nine to Eleven years old. (9 to 11 yrs).”

4. The police, upon completion of investigation, submitted charge-sheet for commission of offence punishable under Section 376 of the IPC and Section 4 of the POCSO Act against the appellant, whereafter cognizance was taken. Charges were framed under Section 376 of the IPC and Section 4 of the POCSO Act against the appellant. As the appellant denied the charge and claimed to be tried, he was put to trial.

5. At the trial, five witnesses came to be examined to support the prosecution's case including the informant (PW 1), the victim (PW 2), the victim's uncle (PW 3), who came to be declared hostile at the instance of the prosecution, the doctor, who



had examined the victim (PW 4) and the Investigating Officer (PW 5). It is worthwhile mentioning, according to the prosecution's case the *salwar*, which the victim was wearing, was retained soon after the medical examination and handed to the police, which was sent for forensic examination. The report of the Forensic Science Laboratory, which has been marked as exhibit-3 suggests that semen was detected over the *salwar*.

6. After closure of the prosecution's evidence, the statement of the appellant was recorded under Section 313 of the CrPC by the trial court so as to give him an opportunity to explain the circumstances emerging against him based on the evidence of the prosecution's witnesses. Following were the questions put by the learned trial court to the appellant for his response under Section 313 of the CrPC: -

"प्रश्न : (1) क्या आपने गवाहों की गवाही सुनी है ?

उत्तर : जी हाँ

प्रश्न : (2) आपके विरुद्ध साक्ष्य है की दिनांक 21.04.2018 को समय एक बजे दिन में XXXXX (पीड़िता) को जोर जबरदस्ती हाथ पकड़कर अपने घर मे ले गए और घर को अंदर से बंद कर दिए और उसके साथ मार पीट डाट फटकार वो दुर्व्यवहार किये और बुरी नियत से उसके साथ छेड़छाड़ किये वो गलत काम वो हरकत किये । आपका क्या कहना है ?

उत्तर : जी नहीं

प्रश्न : (3) अपने सफाई में आपको क्या कहना है ?

उत्तर : निर्दोष हैं "

7. The trial court, after having appreciated the evidence adduced at the trial, has concluded the appellant to be guilty of the



offences punishable under Section 4 of the POCSO Act and Section 376(3) of the IPC. The learned trial court came to this finding with the aid of Sections 29 and 30 of the POCSO Act. After having held the appellant guilty of the said offence, the trial court imposed the sentence of imprisonment and fine, as has been noted above.

8. Learned counsel appearing on behalf of the appellant has submitted that the witnesses are thoroughly unreliable and inconsistent in their evidence. He has also submitted that, in any case, the prosecution could not establish at the trial commission of sexual assault of the nature of penetrative sexual assault. He has given much emphasis on the deposition of the victim herself during her cross-examination, which indicates that she had grievance against the appellant of having scolded her and beaten her up. She specifically denied in her deposition in paragraph 18 that the appellant had not done anything beyond scolding, beating and abusing her. He has further submitted that the victim was medically examined on the very same day when the doctor did not find any evidence of recent sexual intercourse, which fact does not corroborate the prosecution's case of commission of penetrative sexual assault to attract the provisions under Section 376 of the IPC and Section 4 of the POCSO Act.



9. Learned Additional Public Prosecutor representing the State has, on the other hand, submitted that for the reasons not apparent, the victim did not support the prosecution's case in her cross-examination though she had supported the same in her statement under Section 164 of the CrPC and in her examination-in-chief. She has also submitted that the charge of commission of rape stands corroborated by the F.S.L. report.

10. We have perused the impugned judgment and order of the trial court as well as the trial court's records and we have given our thoughtful considerations to the rival submissions advanced on behalf of the parties. From the FIR, it can be easily seen that the allegation of commission of rape was based on the information, which was given by the victim to the informant. The FIR does not suggest that the victim was found by her mother (not examined) and that the appellant had pointed a gun towards the victim, brandished a dagger and threatened her mother when she had found them out, as narrated in the statement of the victim recorded under Section 164 of the CrPC. Further, the victim, in her deposition at the trial, almost resiled from what she had stated in her examination-in-chief. She denied that the appellant had committed any sexual assault upon her. The victim's uncle (PW 3) has been declared hostile at the instance of the prosecution as he



did not support the prosecution's case. The victim's mother was not examined. On careful reading of the evidence of the informant himself (PW 1), it can be easily found that he too has not fully supported the case of commission of penetrative sexual assault upon the victim.

11. Considering the evidence of the prosecution's witnesses, as noted above, in our opinion, the prosecution failed to establish the charge against the appellant. The evidence was not sufficient to attract the requirements of Sections 29 and 30 of the POCSO Act. In such view of the matter, we do not find it safe to uphold the conviction recorded by the trial court by the judgment of conviction dated 21.12.2020 passed by the learned Exclusive Special Court (POCSO) (Additional District and Sessions Judge-VI), Rohtas at Sasaram, in POCSO Case No. 23 of 2018 arising out of Sasaram (Town) P.S. Case No. 641 of 2018.

12. Accordingly, the impugned judgment of conviction dated 21.12.2020 passed by the learned Exclusive Special Court (POCSO) (Additional District and Sessions Judge-VI), Rohtas at Sasaram, in POCSO Case No. 23 of 2018 arising out of Sasaram (Town) P.S. Case No. 641 of 2018, is hereby set aside. The appellant stands acquitted of the charge of commission of offences punishable under Section 376(3) of the IPC and Section 4 of the



POCSO Act giving him benefit of doubt. The order of sentence dated 21.12.2020 also stands set aside.

13. This appeal is allowed.

14. The appellant is in custody. Let him be released forthwith, if not required in any other matter.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Pawan-Sudha

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	24.08.2023.
Transmission Date	24.08.2023.

