

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.332 of 2021

Arising Out of PS. Case No.-59 Year-2019 Thana- MAHILA P.S. District- Bhojpur

DILIP SINGH @ DILIP KUMAR Son of Lal Babu Singh Resident of village
- Sukhraulu, P.S. - Hasanpura, District - Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Bikramdeo Singh, Advocate Mr.Prabhat Kumar Singh, Advocate Mr. Anirudh Kumar Singh, Advocate.
For the Respondent/s	:	Mr.Sujit Kumar Singh, 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 : 23-08-2023

This is an appeal under Section 374(2) of the
Code of Criminal Procedure, 1973 (CrPC in short).

2. By the impugned judgment and order of sentence dated 20.01.2021 and 28.01.2021, respectively, passed by the learned Additional District Sessions Judge-VI-cum-Exclusive POCSO Court, Bhojpur at Ara in Special Case(POCSO) 26/2019, arising out of Mahila P.S. Case No. 59 of 2019, the appellant has been convicted and sentenced as under:-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine



376(3) of the IPC	R.I. for twenty years	25,000/-	R.I. for six months
6 of the POCSO Act	X	X	X

3. The victim's name and that of her mother (PW-2) are not being mentioned in the present judgment, so that identity of the victim does not come in public domain. The victim's mother is the informant whose *fard-beyan* recorded by the Station House Officer, Mahila Police Station, Ara, is the basis for registration of Ara Mahila Police Station Case No. 59 of 2019 on 19.04.2019, disclosing commission of the offence punishable under Sections 376, 323, 506 read with 34 of the IPC and Section 6 of the POCSO Act. According to her *fard-beyan*, the informant had gone for harvesting as a labour in an agricultural field, owned by Lal Babu Singh (the appellant's father). Her daughter, the victim was alone in her house. When this appellant was supervising the harvesting work in the morning at 6 a.m. on 19.04.2019, the informant is said to have requested the appellant to ask the victim, aged about eight years, to cook food. She alleged that, thereafter, the appellant went to the informant's house and as the house was closed from inside, he entered into the house by scaling over the boundary wall and thereafter, committed rape upon her after putting off her pants.



The informant was given the information about the occurrence by the victim after she had returned home from the work of harvesting. When she went to the house of the appellant to inquire from him and register a protest about the occurrence, the appellant and his brother Pradeep Kumar (also an accused), assaulted and abused her and threatened her of eliminating the whole family. They asked her not to ever disclose the occurrence to anyone. From the formal FIR, it transpires that it was registered at 2.30 p.m. on 19.04.2019. It further appears that the victim was medically examined on the same day i.e. on 19.04.2019. The doctor assessed her age to be between 12 to 14 years. From the report of the doctor (exhibit-5), it transpires that no evidence of rape on the victim was found. Further, the statement of the victim was recorded under Section 164 of the CrPC before a learned Magistrate on 24.04.2019. She disclosed in her statement to the learned Magistrate that on having been asked by the victim's mother, the appellant had come to her house and knocked the door, but as she was sleeping, she did not open the door, whereafter the appellant scaled over the wall, entered into her house and did something which was wrong (*galat kam kiya*). As the victim gave the appellant teeth bite and started crying, the appellant fell down. She further stated that



when she had gone to the house of the appellant, he assaulted her. Thereafter, she went to the agricultural field and narrated her mother about the occurrence.

4. The police, upon completion of the investigation, submitted charge-sheet against the appellant on 22.07.2019 for commission of the offence punishable under Sections 376, 323 and 506/34 of the IPC and Section 6 of the POCSO Act, while keeping the investigation pending against co-accused Pradeep Kumar. Cognizance was taken on 05.08.2018 and record of co-accused Pradeep Kumar was split up. After compliance of the requirements of the Section 207 of the CrPC, charge was framed against the appellant on 19.08.2019 for commission of the offences punishable under Sections 376, 323, 506/34 of the IPC and Section 6 of the POCSO Act. The appellant pleaded not guilty and claimed for trial.

5. At the trial, the prosecution examined altogether six witnesses viz. the victim (PW 1), the victim's mother (PW 2), the doctor, who had conducted medical examination (PW 3), the I.O. (PW 5). PW-4 and PW-6, who were examined as prosecution's witnesses, came to be declared hostile at the instance of the prosecution, as they did not support the prosecution's case. It is worthwhile mentioning that PWs 4 and



6 happened to be the co-villagers. In addition to the oral evidence of the witnesses, the prosecution got exhibited the following documents at the trial to prove the charge against the appellant:-

1. Statement of victim under Section 164 of the CrPC (Exhibit-1).
2. The informant's *fard-beyan* (Exhibit-2).
3. The informant's signature over the victim's statement under Section 164 of the CrPC (Exhibit-3)
4. Signature of the informant on the seizure list dated 19.04.2019 (Exhibit-4)
5. Medical report dated 19.04.2019 (Exhibit-5)
6. Seizure list dated 19.04.2019 (Exhibit-6)
7. Charge-sheet dated 22.07.2019 (Exhibit-7)
8. Signature of the SHO of Mahila Police Station on the *fard-beyan* (Exhibit-8)
9. FSL report dated 22.10.2019 (Exhibit-9)

6. After closure of the prosecution's evidence, the appellant was questioned by the trial court under Section 313 of the CrPC, so as to give the appellant an opportunity to explain the circumstances emerging against him, based on the prosecution's evidence. The appellant denied the circumstances. The defence did not produce any witness for examination at the trial. The trial court, after having appreciated the evidence of the



prosecution's evidence, has concluded in the impugned judgment that the prosecution was able to prove the charge of commission of rape and aggravated penetrative sexual assault by the appellant with cogent and reliable evidence and that the defence failed in creating any dent to the prosecution's allegation and further failed to rebut the presumption under Sections 29 and 30 of the POCSO Act. The trial court found the testimony of the victim in respect of allegation of rape to be trustworthy and reliable.

7. Mr. Bikramdeo Singh, learned counsel appearing on behalf of the appellant, has argued that in order to attract the provisions under Sections 29 and 30 of the POCSO Act, it is imperative on the part of the prosecution to establish basic ingredients, which constitute penetrative sexual assault within the meaning of Section 3 of the POCSO Act. He has submitted that the victim's evidence does not make out clearly commission of offence of penetrative sexual assault within the meaning of Section 3 of the POCSO Act. He has, however, not raised any controversy over the victim being a child within the meaning of Section 2(1)(d) of the POCSO Act. He has submitted that it is out and out a malicious prosecution and false implication of this appellant because of certain disputes which had arisen between



the victim's mother and the appellant's father, as can be seen from the evidence of the victim (PW 1) herself. He would argue that on the one hand it is the narration of the informant in the *fard-beyan* that the victim had informed her about the occurrence on her return to her house from the field, the victim in her statement recorded under Section 164 of the CrPC stated that after the occurrence she had gone to the agricultural field where her mother was working and had narrated her the entire occurrence. This patent contradiction in the prosecution's version is irreconcilable and demonstrates that the prosecution's witnesses are not trustworthy. He has further argued, with reference to the evidence of PW-2, that according to her, she had noticed white stain on the victim's pant, which was wet and for that reason the victim's pant was sent for forensic examination. Referring to the FSL report, he submits that no semen or human blood on the victim's pant was detected. He further submits that it is highly improbable that there would be no evidence of any penetrative sexual assault on a child, aged nearly eight years, during medical examination conducted within 12 hours of the commission of rape. He, accordingly, submits that neither the medical report nor the FSL report supports the prosecution's case. The evidence of the victim does not make out a case of



penetrative sexual assault within the meaning of Section 3 of the POCSO Act. The two of the prosecution's witnesses, i.e., PWs 4 and 6 have not supported the prosecution's case at all. In such circumstance, the finding of guilt recorded by the trial court in its impugned judgment of conviction is wholly unsustainable and deserves interference.

8. Learned Additional Public Prosecutor, representing the State of Bihar, defending the findings recorded by the trial court, has argued that though not in so many words, the victim has narrated in her deposition at the trial that the appellant had committed sexual assault upon her, which falls within the definition of penetrative sexual assault. He has submitted that there is no reason to discredit the evidence of the victim, an eight-year-old child, who has fully supported the prosecution's case, as was disclosed in *fard-beyan*. Such evidence cannot be discarded, he submits, merely on the ground that the medical evidence and the FSL report do not corroborate her evidence. He has submitted that the impugned judgment of conviction and the order of sentence passed by the learned trial court does not suffer from any legal infirmity, requiring this Court's interference.

9. We have 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. There does not appear to be any controversy about the status of the victim, being a child within the meaning of Section 2(1)(d) of the POCSO Act. The question, which requires determination in the present case, is as to whether based on evidence of the victim, it can be safely stated that a foundation of case of commission penetrative sexual assault within the meaning of Section 3 of the POCSO Act was laid at the trial based on the evidence of the victim so as to attract statutory presumptions under Sections 29 and 30 of the POCSO Act. The victim, in her examination-in-chief, deposed that the appellant scaled over the boundary wall of her house and opened the door of the room in which she was sleeping by kicking the door. She deposed that, thereafter, she went to the house of the appellant to make a complaint and then she disclosed the occurrence to her elder sister.

10. Section 3 of the POCSO Act reads thus:-

“(3) Penetrative sexual assault-- A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other



person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

11. On a careful scrutiny of the evidence of PW-1, we find that the same cannot be said to be constituting an act of penetrative sexual assault within the meaning of Section 3 of the Act by the appellant. This fact, coupled with the finding of the doctor that no sign of rape was found on the victim, casts a serious shadow of doubt on the prosecution's case of commission of an act of penetrative sexual assault within the meaning of Section 3 of the Act by the appellant. It is noteworthy that the victim, in her cross-examination, admitted that long before the occurrence, the victim's mother and the appellant's father had quarrelled with each other and had exchanged abuses. She, however, denied that it was because of



the animosity that a false case was registered. The victim's mother (PW 2), in her deposition, reiterated that the story of commission of rape was narrated by the victim to her after she had returned home from the work of harvesting. The victim's evidence on this point is materially different in her deposition. According to her, she had disclosed about the occurrence to her elder sister. The victim's mother (PW 2) also deposed at the trial that she had noticed white stain on the victim's pant after the victim had narrated her the story of the occurrence and had also noticed that the pant was wet. The pant was handed over to the police which was seized and sent for examination to the Forensic Science Laboratory. The report of the Forensic Science Laboratory has been brought on record by way of exhibit-9. It is apparent from the FSL report that no presence of semen or blood was detected on forensic examination.

12. On a conjoint reading of the deposition of the victim (PW 1), her mother (PW 2), the doctor (PW 3), coupled with the report of the Forensic Science Laboratory, we are of the opinion that the prosecution was not able to conclusively prove at the trial, the essential ingredients constituting an act of penetrative sexual assault within the meaning of Section 3 of the POCSO Act. For the said reason, it can be easily concluded that



the prosecution also failed to make out a case of commission of aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act.

13. Sexual assault has been defined under Section 7 of the Act, which reads as under:-

“7. Sexual assault. *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.”*

14. We find it difficult, based on the evidence of the prosecution’s witnesses that the prosecution was able to lay down a foundation for constituting an act of sexual assault within the meaning of Section 7 of the Act also. We are, thus, of the view that Sections 29 and 30 of the Act could not be applied, the prosecution having failed to establish primary facts constituting the offence of penetrative sexual assault/sexual assault.

15. There is yet another aspect, which cannot be lost sight of. In relation to the occurrence, the First Information Report was registered on 19.04.2019 at Ara. The victim was



examined by the doctor on the same day. It is manifest from the records, however, that the FIR was received in the court on 22.04.2019.

16. Learned counsel, appearing on behalf of the appellant, has argued that there is hardly any distance between the police station and the court and there is no explanation coming forth justifying three days delay in getting the FIR received in the court.

17. In any event, we find, in the present case, that the prosecution cannot be said to have adduced adequate evidence to prove the basic essential ingredients for constituting an act of penetrative sexual assault within the meaning of Section 3 of the POCSO Act. We are, thus, of the view that in the present set of facts and circumstances of the case, it would be unsafe to uphold the impugned finding of conviction recorded by the trial in its judgment dated 20.01.2021 passed in POCSO Case No. 26 of 2019 by the learned Additional District Sessions Judge-VI-cum-Exclusive POCSO Court, Bhojpur at Ara.

18. Accordingly, the impugned judgment dated 20.01.2021, passed by the learned Additional District Sessions Judge-VI-cum-Exclusive POCSO Court, Bhojpur at Ara in



Special Case(POCSO) 26/2019, arising out of Mahila P.S. Case No. 59 of 2019, is set aside. *A priori*, the order of sentence dated 28.01.2021 is also set aside. This appeal is allowed.

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

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

SONALI/-HR

AFR/NAFR	NAFR
CAV DATE	NA
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