

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.224 of 2022

Arising Out of PS. Case No.-36 Year-2016 Thana- MAHILA P.S. District- Bhagalpur

Ajit Kumar Son Of Gopal Mandal Resident Of Village - Purani Kherhi, P.S.-
Shahkund, District - Bhagalpur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Manoj Kumar Sinha, Advocate
For the Respondent	:	Ms. Shasi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. G. ANUPAMA

CHAKRAVARTHY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 13-12-2023

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 03.12.2021 and an order of sentence dated 08.12.2021 passed by Exclusive Special Judge, (POCSO)-cum-Additional District & Sessions Judge-VI, Bhagalpur in POCSO Case No. 4377 of 2016 arising out of Mahila P.S. Case No. 36 of 2016, whereby the appellant has been convicted and sentenced as under:-



Appellant's name	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Ajit Kumar	Section 6 of the POCSO Act	R.I. for 20 years	10,000/-	S.I. for 3 months
	Section 376 of the IPC	X	X	X

2. The mother of the victim said to have been sexually assaulted by the appellant is the informant (PW-4) of the concerned Bhagalpur Mahila P.S. Case No. 36 of 2016 disclosing commission of the offences punishable under Sections 376 and 420 of the Indian Penal Code. The gist of accusation in the FIR is that on a false pretext of marriage the appellant established sexual relationship with the victim because of which she became pregnant. On the date of lodging of the First Information Report, on 15.12.2016, the victim was said to be carrying eight months' pregnancy. Denial by the appellant to marry the victim, according to the FIR, gave rise to a cause of action for the informant to register the criminal case.

3. It would be pertinent to mention at the outset, as is evident from the First Information Report, that according to the informant herself, the age of the victim was 19 years, as on the date of registration of the FIR. It also emerges from the FIR that the victim had gone to the house of her married elder sister and the appellant is the younger brother of the husband of the elder sister



of the victim. The victim, it transpires, was subjected to medical examination on the same day i.e. 15.12.2016. From the medical report (Exhibit-1), it transpires that the age of the victim was found to be less than 18 years, based on radiological examination. The Ultrasonography (USG) Report suggested that the victim was carrying a single live fetus of 32 weeks.

4. It appears that based on the finding of the Medical Board regarding the victim's age being less than 18 years, the police treated the victim to be a child within the meaning of Section 2(1)(d) of the Protection of Children from Sexual Offences Act ('POCSO Act' in short) and, accordingly, filed its charge-sheet on 31.12.2016 against the appellant for the offences punishable under Section 376 of the IPC and Section 6 of the POCSO Act. After taking cognizance, charges were framed against the appellant for commission of the offences punishable under Section 376 of the IPC and Section 6 of the POCSO Act. The appellant pleaded not guilty and claimed to be tried. Accordingly, the appellant was put to trial.

5. In order to prove the charges against the appellant, the prosecution examined altogether five witnesses including the Investigating Officer (PW-5), the Doctor, who had examined the



victim (PW-1), the informant (PW-4) and the father of the victim (PW-3).

6. In addition to the oral evidence of the witnesses, the prosecution also brought on record following documentary evidence to substantiate the charge against the appellant:-

Sl. No.	Description	Exhibit No.
1	Medical Report	Exhibit-1
2	Signature of the victim over the written report	Exhibit-2
3	Signature of the informant over the written report	Exhibit-2/1
4	Signature of the victim over the statement made under Section 164 of the Cr.P.C.	Exhibit-3
5	Formal FIR	Exhibit-4

7. After closure of the prosecution’s witnesses, the appellant was examined under Section 313 of the Cr.P.C. The appellant reiterated his innocence and denied the circumstance said to be incriminating against him as put by the Trial Court to him.

8. The defence got examined three witnesses to counter the prosecution’s case. The gist of the defence developed at the trial by way of oral evidence of the defence witnesses is that it was the elder brother of the appellant who had developed illicit physical relationship with the victim out of which she became pregnant and this appellant was falsely implicated by the victim



and her family members. *Panchayat* meetings had been held to resolve the dispute arising out of the victim becoming pregnant because of her relationship with the elder brother of the appellant.

9. The learned Trial Court, after having appreciated the evidence adduced at the trial by the impugned judgment dated 03.12.2021, has held the appellant guilty of offences punishable under Section 6 of the POCSO Act and Section 376 of the IPC. The Trial Court imposed sentence of rigorous imprisonment for 20 years and fine for the offence punishable under Section 6 of the POCSO act as has been noted above and did not consider it fit to impose separate sentence for the offence punishable under Section 376 of the IPC, in the light of the provisions under Section 42 of the POCSO Act.

10. Learned counsel appearing on behalf of the appellant, assailing the impugned judgment and order of the Trial Court, has submitted that the finding of the Trial Court that the victim was under 18 years of age and, therefore, a child within the meaning of Section 2(1)(d) of the POCSO Act is perverse for the reason that the same is based on no evidence. The Trial Court ought not to have held the victim a child based merely on the assessment made by the Medical Board of her age to be below 18 years. He contends that it is the informant's own case, who is



mother of the victim, that the victim was 19 years of age as on the date of registration of the FIR. In that background, even if it is presumed that any incident of sexual intercourse had happened between the victim and this appellant leading to the victim becoming pregnant, she could not be treated to be a child within the meaning of Section 2(1)(d) of the POCSO Act. He further submits that it was incumbent upon the prosecution to conclusively prove at the trial by following procedure for age determination of the victim that she was a child so as to attract the provisions of the POCSO Act. He, accordingly, submits that the appellant's conviction for the offences punishable under Section 6 of the POCSO Act is wholly unsustainable.

11. Assailing the impugned finding of the Trial Court on the point of the appellant's conviction for the offences punishable under Section 376 of the IPC, learned counsel for the appellant firstly contends that the prosecution has not proved at the trial that the victim was carrying the pregnancy out of physical relationship with the appellant. He contends that the Trial Court has not duly addressed the defence taken on behalf of the appellant to the effect that the victim had physical relationship with the elder brother of the appellant and she had become pregnant out of the said relationship. He argues that, in any event, no offence punishable



under Section 376 of the IPC can be said to be made out based on the prosecution's case as set out in the First Information Report and disclosed by the prosecution's witnesses at the trial since there is no material in the nature of evidence of any force used by the appellant or false assurance given by him to the victim.

12. Learned Additional Public Prosecutor for the State has defended the finding recorded by the Trial Court and has submitted that the charge-sheet was filed and the charge was framed against the appellant rightly for the offence punishable under Section 6 of the POCSO Act there being medical evidence to the effect that the victim was a child within the meaning of Section 2(1)(d) by the POCSO Act. She contends that it was obligatory on the part of the appellant to prove at the trial that the victim was not a child and, therefore, he could not be charged of the offence punishable under Section 6 of the POCSO Act. She submits that the depositions of the defence witnesses do not conclusively establish that the appellant was not the person with whom the victim had physical relation. She contends that the willingness of the victim for sexual intercourse obtained by the appellant by playing fraud cannot be said to be voluntary in nature and, therefore, the appellant's conviction, as recorded by the Trial



Court for the offence punishable under Section 376 of the IPC, requires no interference.

13. 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 as noted above.

14. We deem it just and proper to address the question as to whether the prosecution was able to prove at the trial that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act. We notice from the First Information Report, which is based on the disclosure made by the informant's mother that the victim, according to her, was not below the age of 18 years. The opinion of the Medical Board based on radiological examination to the effect that the victim was less than 18 years as on the date of examination, cannot be said to be so accurate as to hold, on that basis alone, the victim to be a child within the meaning of Section 2(1)(d) of the POCSO Act and thereby attracting the provisions of the POCSO Act. It is manifest from the records that no procedure was adopted to determine the victim's age, except by Medical Board, that too based on the radiological examination.

15. Dealing with determination of age of a person based on radiological examination and orthopedic test the Supreme Court



has held in case of *Jyoti Prakash Rai vs. State of Bihar* reported in *(2008) 15 SCC 223* that the same has never been considered by the courts of law as also by medical scientist to be conclusive in nature.

16. In case of *Jaya Mala vs. Home Secretary, Government of Jammu & Kashmir & Ors.* reported in *(1982) 2 SCC 538* the Supreme Court has noted that judicial notice can be taken of the fact that margin of error in age ascertained by radiological examination is two years on the either side. In our view thus, the prosecution failed to conclusively prove that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act so as to attract the provisions of the POCSO Act.

17. Situated thus, in our considered opinion, the finding of conviction recorded by the trial court for the offence punishable under Section 6 of the POCSO Act is unsustainable and is accordingly set aside.

18. Now, coming to the question of appellant's conviction for the offence punishable under Section 376 of the IPC, it would be apt to notice the definition of rape available under Section 375 of the IPC, which reads as under :-

"375. Rape.-- A man is said to commit "rape" if he-
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or



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

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. With or without her consent, when she is under eighteen years of age.

Seventhly. When she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape. Exception 2. Sexual



intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

19. There are seven circumstances described under Section 375 of the IPC where sexual acts mentioned in Sections 375(a), 375(b), 375(c) and 375(d) shall fall within the definition of rape. It is not the prosecution's case against the appellant that any sexual act was done by him upon the victim against her will without her consent or with her consent by putting her in fear of death or of hurt. There is no material that such consent was given by the victim by the reason of unsoundness of her mind or intoxication etc. to bring it under the fifth description of Section 375.

20. On careful examination of Section 375 of the IPC read with the evidence adduced at the trial by the prosecution, we are satisfied that the acts alleged against the appellant to prove a case of commission of offence punishable under Section 376 of the IPC do not come under either of the seven descriptions under Section 375 of the IPC. It would be useful to notice Explanation-2 of Section 375 of the IPC which defines consent as an unequivocal voluntary agreement when the woman by words, gesture or any form of verbal communication, communicates to participate in the specific sexual act.



21. In the present case, we find that it is rather the case of the prosecution that the consent of the victim was unequivocal and voluntary. It is the only case of the prosecution that the appellant had made false promise to marry the victim. It has been repeatedly held that if a person makes a promise to marry with an intention to seduce a woman to indulge in sexual acts, such an act would amount to rape. However, consensual acts would not amount to rape. It is not the case of the prosecution that the appellant suffered any disqualification to marry. It cannot be said, on the basis of the evidence which has been adduced at the trial that the promise, if at all was made, it was made with the sole intention to seduce the victim in sexual acts. We notice, according to the prosecution's case itself, that according to the victim she had intimate relationship, engaging sexual activities with the appellant.

22. Before we conclude, we must not miss to take into account a crucial aspect of the matter that, according to the prosecution, the appellant's denial to marry the victim was the only reason for setting into motion the criminal case and that is the only basis on which the appellant was put on trial.

23. Having considered the evidence adduced at the trial and the submissions advanced on behalf of the parties, we are of the view that the trial court 's finding convicting the appellant of



the offence punishable under Section 376 of the IPC is not sustainable.

24. In the result, the appellant stands acquitted of the charge of offences punishable under Section 6 of the POCSO Act and Section 376 of the IPC.

25. Accordingly, the impugned judgment of conviction and the order of sentence dated 03.12.2021/08.12.2021 passed by learned Exclusive Special Judge, (POCSO)-cum-Additional District & Sessions Judge-VI, Bhagalpur in POCSO Case No. 4377 of 2016, arising out of Mahila P.S. Case No. 36 of 2016 are set aside.

26. This appeal is allowed.

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

(Chakradhari Sharan Singh, J)

(G. Anupama Chakravarthy, J)

Rajesh/Shanu

AFR/NAFR	NAFR
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