

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.244 of 2021

Arising Out of PS. Case No.-57 Year-2014 Thana- MAHILA PS District- Jehanabad

Manjar Alam S/O Afzal Ansari R/O Village- Sohraiya, P.S.- Paras Bigha,
District- Jehanabad.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mr. Md. Imteyaz Ahmad, Advocate Mr. Ritwik Thakur, Advocate Mrs. Vaishnavi Singh, Advocate Mr. Pravin Kumar, Advocate
For the State	:	Ms. Shashi Bala Verma, 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 : 17-07-2023

This appeal has been preferred by the sole appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (CrPC for short), putting to challenge a judgment of conviction dated 11.02.2021 and the order of sentence dated 12.02.2021, passed by the learned Additional Sessions Judge-VI-cum-Special Judge, POCSO, Jehanabad, in POCSO Case No. 25 of 2016, (Arising out of Jehanabad (Mahila) P.S. Case No. 57 of 2014), whereby the appellant has been convicted and sentenced as under:



Cr. Appeal (DB) No. 244 of 2021				
Appellant	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Manzar Alam	376(2)(n)of the Indian Penal Code	For life	1,00,000/-	R.I. for two years
	Section 6 of the POCSO Act	For life	1,00,000/-	R.I. for two years

All the sentences have been ordered to run concurrently.

2. We have heard Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant and Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State

3. In the present judgment, we have concealed the name of the victim as also of her parents to conceal her indentity. The informant is the victim, whose written report dated 17.09.2014 addressed to the Officer-In-Charge, Mahila Police Station, Jehanabad is the basis for the registration of Mahila P.S. Case No. 57 of 2014. She alleged in the FIR that on a false pretext of marrying the victim, the appellant had been establishing physical relationship with her for last one year. She became pregnant in the meanwhile and was carrying four months’ pregnancy. She had proposed the appellant to marry, which he declined. The appellant thereafter started pestering her to get the pregnancy terminated. Thereafter, the appellant’s mother and his father came to the victim’s house and threatened the victim and her mother of killing the victim if they insisted for the victim’s marriage with the appellant. It is easily discernible from the allegation made in the



FIR that the victim had not disclosed her age and she had not claimed that she was a minor child when the occurrence had taken place. After lodging of the FIR on 17.09.2014, the victim was subjected to medical examination. The Doctor found that the victim was carrying six months' pregnancy and was aged nearly 16-17. A medical board was also constituted for determination of the victim's age. Age of the victim was found to be 16-17 years based on the radiological examination. It seems that because of the said finding recorded by the medical board, the prosecution treated the victim a child within the meaning of Section 2(d) of the POCSO Act.

4. The police, upon completion of investigation, submitted charge-sheet against this appellant, his father and mother, namely, Afzal Ansari and Baby Khatoon respectively on 31.07.2015 for the offences punishable under Section 376, 506, 504/34 of the IPC. Cognizance was taken and considering the victim's age, assessed in the medical examination, the appellant was charged of commission of offence punishable under Section 376(2)(n) of the IPC and Section 6 read with Section 5 of the POCSO Act on 06.02.2016. Two other accused persons, i.e., the parents of the appellant, namely, Baby Khatoon and Afzal Ansari, came to be charged for the offences punishable under Section



504/34 of the IPC. The appellant and the accused persons denied the charge and claimed to be tried.

5. The trial court, by the impugned judgment dated 11.02.2021 has recorded acquittal of the two other co-accused persons and conviction of the present appellant for the offences punishable under Section 376(2)(n) of the IPC and Section 5/6 of the POCSO Act and has sentenced him to imprisonment as has been noted hereinabove.

6. The prosecution examined at the trial altogether ten witnesses in support of the prosecution's case. The victim deposed as PW-6, her mother as PW-2, her sister as PW-1, her aunt as PW-3, her maternal grandfather as PW-4 and her uncle as PW-5. The Doctors came to be examined as PWs-7 and 8. The Investigating Officer deposed at the trial as PW-9. The prosecution also examined PW-10, President of Anjum Tameer Millat Committee of the area, before whom the matter was taken by the parties for amicable settlement of the disputes.

7. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant, assailing the impugned judgment, has submitted that the very foundation of the appellant's conviction for the offences punishable under Section 376(2)(n) of the IPC and Section 6 read with Section 5 of the POCSO Act is unsustainable



for the reason that the prosecution has miserably failed to prove at the trial that the victim was a minor, when the appellant is said to have committed consensual sexual intercourse with her. He has submitted that in the FIR, the victim did not claim that she was a child, i.e., aged below 18 years. At the trial, no evidence was produced by the prosecution to establish that the victim was a child when the occurrence had taken place. He contends that as the police did not find any concrete evidence during the course of investigation that the victim was a child, no charge-sheet was submitted by them for the offences punishable under Section 376(2)(n) of the IPC and Section 6 read with Section 5 of the POCSO Act. The Court below, at the stage of framing of charge, framed the charge for the aforesaid sections, apparently based on the opinion of the medical board. He submits that there was no evidence adduced at the trial by the prosecution to conclusively reach the conclusion that the victim was a child. He has drawn the Court's attention to the evidence of the mother of the victim (PW-2), in paragraph-3 whereof, she deposed that the victim was 22 years of age. He has submitted that the victim (PW-6), in her evidence, deposed that she was studying in a school in standard VII when the appellant used to follow her. Despite the fact that according to her evidence, she was studying in a school, the



prosecution did not make any effort to bring on record any certificate with respect to the date of birth of the victim recorded in the first attended school or in any school register. He has further argued that the age of the victim, as found by the medical report, based on radiological test, cannot be said to be conclusive proof to reach a conclusion that the victim was a child when the occurrence, according to her, had taken place. He has given much emphasis on the evidence of PW-10, the President of the Anjum Tameer Millat Committee, to contend that it is evident from his evidence that when the parties had gone before him for resolution of the dispute where the appellant had denied the allegation made by the informant of any physical relationship with the victim. A plea was taken before him that the fetus in the womb of the victim was not of the appellant and the Committee had accordingly asked the parties to go for a DNA test. Thereafter, the victim got the pregnancy terminated as is evident from the evidence of PW-10.

8. Ms. Shashi Bala Verma, learned Additional Public Prosecutor representing the State, has submitted that the age of the victim has been found to be below 18 years by the medical board. She submits that the consent, said to have been given by the informant to the appellant, cannot be treated to be a legal consent, she being a minor, to absolve the appellant of his criminal liability



for commission of offence punishable under Section 376(2)(n) of the IPC and Section 6 of the POCSO Act. She has submitted that it is evident from the evidence adduced at the trial that the appellant induced the victim on false assurance of marrying her, whereafter, he repeatedly sexually exploited her. She contends that conduct of the appellant, as proved at the trial, constitutes commission of rape repeatedly on the victim within the meaning of Clause (n) of Sub-section (2) of Section 376 of the IPC. She submits that the finding of conviction recorded by the trial court does not suffer from any legal infirmity, which is based on correct appreciation of the evidence adduced at the trial.

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, as noted above.

10. It is significant to note that the victim (PW-6) did not allege in her written report, addressed to the Officer In-Charge of the police station, that she was less than 18 years of age and, therefore, a child, within the meaning of Section 2 (d) of the POCSO Act. It is also evident from the depositions of the prosecution's witness including the informant herself that according to them the victim was a consenting party to the sexual



acts between the appellant and the informant. There is no accusation that the appellant used any force or misrepresented himself in any manner for seeking the informant's consent for sexual intercourse. It is the prosecution's case that the appellant established physical relationship with the victim and entered into sexual intercourse on multiple occasions on the false pretext of marriage, and after the victim became pregnant, the appellant declined to marry her. It is not the case of the prosecution that the appellant was incapable of giving assurance to marry the victim, even if the prosecution's case is considered to be correct to this extent. In the given circumstance, in the Court's opinion, the prosecution could have established the charge against the appellant only if it was in a position to prove, at the trial, in accordance with law, that the victim was a child as on the date of occurrence. In our considered view, if the prosecution is found to have failed in establishing with cogent evidence the fact that the victim was a child as on the date of occurrence, no charge framed against the appellant can be said to have been proved.

11. In the present case, it is manifest that the prosecution is relying on the evidence of the medical board only, which had examined the victim, to prove the charge that the victim was below 18 years of age as on the date of occurrence. The age of the victim,



based on radiological report, has been found to be between 16 to 17 years. As it was not the case of the victim/informant in her written report that she was a child when the alleged offence was committed by the appellant and the sexual interactions between the victim and the appellant were with consent, in our opinion, the first fact, which the prosecution was required to prove at the trial, and the first question, which can be considered to have arisen in the proceeding before the Special Court, as to whether the victim was a child or not.

12. Section 34(2) of the POCSO Act prescribes that such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reason for such determination. In the present case, we notice that the mother of the victim, who was examined at the trial as PW-2, deposed that the age of the victim was 22 years. The victim, in her evidence, though deposed that she had studied in a school, no document was, however, brought on record by way of evidence regarding the entry of date of birth in the school admission register first attended by her or otherwise. In the case of ***Rajak Mohammad Vs. State of Himachal Pradesh***, reported in (2018) 9 SCC 248, the Supreme Court has held that age determined on the basis of a radiological examination may not be an accurate



determination and sufficient margin either way will have to be allowed and appropriate cases benefit of doubt naturally must go in favour of the accused.

13. Considering the evidence of the mother of the victim as regards the age of the victim; the fact that the report of the medical board, based on radiological examination, was the only evidence adduced at the trial disclosing the victim's age to be between 16 to 17 years; and further that the prosecution did not make any endeavour to adduce any evidence in support of date of birth of the victim recorded in the school register, we are of the considered view that these facts leave ample room for doubt with regard to the correct age of the victim. The benefit of the doubt shall go in favour of the appellant, in our opinion.

14. For the discussions noted above, in our considered opinion, the finding of conviction recorded by the trial court for commission of the offence punishable under Section 376(2)(n) of the IPC and Section 6 of the POCSO Act cannot be upheld. The appellant stands acquitted, by giving him the benefit of doubt.

15. The impugned judgment of conviction dated 11.02.2021 and the order of sentence dated 12.02.2021, passed by the learned Additional Sessions Judge-VI-cum-Special Judge, POCSO, Jehanabad, in POCSO Case No. 25 of 2016, (Arising out



of Jehanabad (Mahila) P.S. Case No. 57 of 2014) are hereby set aside.

16. The appeal is accordingly allowed.

17. 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)

Sachin/Sonali/-

AFR/NAFR	NAFR
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