

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.362 of 2020

Arising Out of PS. Case No.-69 Year-2017 Thana- DARBHANGA District- Darbhanga

AKASH MAHTO Son of Ashok Kumar Mahto Resident of Village - Juraman
Singh, P.S.- Town, District - Darbhanga

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 282 of 2020

Arising Out of PS. Case No.-69 Year-2017 Thana- DARBHANGA District- Darbhanga

Sawan Kumar Son of Banarsi Sahu Resident of Village - Ganesh Mandir,
Darbhanga, P.S.- Nagar Darbhanga, Dist.- Darbhanga.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 369 of 2020

Arising Out of PS. Case No.-69 Year-2017 Thana- DARBHANGA District- Darbhanga

KRISHNA MAHASETH Son of Late Radha Mahaseth @ Radha Mahaseth
Resident of Near Naka No. 3, P.S.- Darbhanga Town, District- Darbhanga.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 362 of 2020)

For the Appellant/s : Mr. Rama Kant Sharma, Sr. Adv

Mr. Jitendra Kumar Rai, Adv

Mr. Lakshmi Kant Sharma, Adv

For the Respondent/s : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 282 of 2020)



For the Appellant/s : Mr. Vikramdeo Singh, Adv
Mr. Ranjit Kumar Yadav, Adv
For the Respondent/s : Mr. Manish Kumar No. 2, APP

(In CRIMINAL APPEAL (DB) No. 369 of 2020)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv
Mr. Rameshwar Mahaseth, Adv
Mr. Krishna Kumar, Adv
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 : 09-08-2023

The victim is the informant whose written report dated 26.04.2017, given to the Officer-in-charge of Town P.S. Darbhanga, is the basis for registration of the concerned Darbhanga Town P.S. Case No. 69 of 2017 registered for the offences punishable under Sections 376D of the Indian Penal Code, Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act' in short) and Sections 67, 67(A) and 67(B) of the Information Technology Act, 2000. In her written report, the victim claimed her date of birth to be 19.04.2001 and a student of Class-10. She alleged that for nearly two years, she and the appellant Akash Mahto (an appellant) were in love with each



other and Akash Mahto had established physical relationship with her on false assurance of marriage, in the house of the appellant Krishna Mahaseth, situate near Naka-3 (a police out post). The accused Prince Khattik (an appellant) had also intentions to commit similar act with her and during that course, one day, accused Prince Khattik and appellant Akash Mahto, took her to the house of Krishna Mahaseth where in a room, the appellant Akash Mahto established physical relationship with her whereafter he went upstairs on the roof of the house. Thereafter, accused Prince Khattik entered into the room and assaulted her sexually and videographed her while she was nude. Prince Khattik used to threaten her that should she disclosed the fact to anyone, he would make the video viral. In the meanwhile, one day accused Sawan Kumar was also called by Akash Mahto in the house of Krishna Mahaseth whereafter she was put in a room and was made to drink water whereafter she got intoxicated. All the four persons namely Krishna Mahaseth, Akash Mahto, Sawan Kumar and Prince Khattik committed rape upon her one by one. When she regained consciousness, she found herself completely nude and the four persons inappropriately fiddling with her body. They had kept her in the room for three days and committed rape upon her.



The allegation to this effect does not refer to any particular date, month or year. The cause of action for lodging of the FIR, according to the informant is an occurrence which had taken place on 24.04.2017, according to which the appellant Akash Mahto had lifted the victim and had taken her to the house of Krishna Mahaseth and committed rape upon her, in his house. She alleged that she was kidnapped by the appellant Akash Mahto when she was on her way to some place on 25.04.2017 at about 11:00 pm. After she managed to escape from the house of Krishna Mahaseth, upon noticing the police patrolling jeep she signalled the police party whereafter the policemen took her to her house. With these allegations she filed her written report.

2. Upon investigation chargesheet was submitted against Krishna Mahaseth and Sawan Kumar (appellant in Criminal Appeal (DB) No. 282 of 2020) for the offences punishable under Sections 376D of the Indian Penal Code, Sections 4 and 6 of the POCSO Act and Sections 67, 67(A) and 67(B) of the Information Technology Act, 2000, while keeping the investigation pending against two other co-accused persons namely, Prince Khattik and Akash Mahto, whereafter cognizance was taken on 31.08.2017 for the offences punishable



under section 376D of the Indian Penal Code, Sections 4 and 6 of the POCSO Act and Sections 67 of the Information Technology Act, 2000.

3. Charges were framed against accused Sawan Kumar, and Krishna Mahaseth on 05.03.2018 for the offences punishable under Section 376D of the Indian Penal Code, Section 6 of the POCSO Act and Section 67 of the Information Technology Act, 2000. It is noteworthy that a supplementary chargesheet was submitted by the police against the appellant Akash Mahto on 30.11.2017, for commission of offences punishable under Section 376D of the Indian Penal Code, Sections 4 and 6 of the POCSO Act and Section 67, 67(A) and 67(B) of the Information Technology Act, 2000 against accused persons whereupon cognizance was taken of the aforesaid offences. Subsequently, on 27.02.2018, charges were framed against Akash Mahto also for commission of the offences punishable under Section 376(D) of the Indian Penal Code, Section 6 of the POCSO Act and Section 67 of the Information Technology Act, 2000. From the records, it transpires that the trial court by an order dated 17.03.2018, amalgamated the trial being faced by Sawan Kumar, Krishna Mahaseth and Akash Mahto. This is how the three appellants namely Akash Mahto,



Krishna Mahaseth and Sawan Kumar were put on trial on the charge for commission of the offences punishable under Section 376D of the Indian Penal Code, Sections 4 and 6 of the POCSO Act and Section 67 of the Information Technology Act, 2000, since, they had denied the charges and claimed to be tried.

4. It is also worthwhile mentioning that chargesheet was subsequently submitted against Prince Khattik by the police on 30.05.2019 for the offences punishable under Section 376(D) of the Indian Penal Code, Sections 4 and 6 of the POCSO Act and Section 67, 67(A) and 67(B) of the Information Technology Act, 2000, whereupon, cognizance was taken and charges were framed against them by an order dated 06.08.2019. Co-accused Prince Khattik was made to face trial in POCSO G.R. Case No. 13A of 2017.

5. Akash Mahto, Sawan Kumar and Krishna Mahaseth have been convicted by the trial Court in POCSO G.R. Case No. 13 of 2017 whereas accused Prince Khattik has been convicted in separate trial i.e. POCSO G.R. Case No. 13A of 2017 by separate judgment of the same date. This is the background in which all the four appeals which arise out of the same Darbhanga Sadar P.S. Case No. 69 of 2017, have been heard together. However, the appeals arising out of two separate



trials are being disposed of by separate judgments, dealing with the evidence adduced by the parties in the two separate trials.

6. The appellants have preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction dated 07.01.2020 and order of sentence dated 20.01.2020 passed by the learned 1st Additional Sessions Judge cum Special Judge (POCSO Act), Darbhanga in POCSO G.R. Case No. 13 of 2017 arising out of FIR no. 69 of 2017, whereby and whereunder the appellants have been convicted and sentenced as under :-

Akash Mahto appellant in Criminal Appeal (DB) No. 362 of 2020

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 376D of the IPC	Rigorous Imprisonment for 20 years	1,00,000/-	RI for 2 years
Section 6 of the POCSO Act	Rigorous Imprisonment for 10 years	1,00,000/-	RI for 2 years

Sawan Kumar appellant in Criminal Appeal (DB) No. 282 of 2020

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 376D of the IPC	Rigorous Imprisonment for 20 years	1,00,000/-	RI for 2 years
Section 6 of the POCSO Act	Rigorous Imprisonment for 10 years	1,00,000/-	RI for 2 years

Krishna Mahaseth appellant in Criminal Appeal (DB) No. 369 of 2020



Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 376D of the IPC	Rigorous Imprisonment for 20 years	1,00,000/-	RI for 2 years
Section 6 of the POCSO Act	Rigorous Imprisonment for 10 years	1,00,000/-	RI for 2 years

7. We have consciously refrained from disclosing the identity of the victim as also that of parents in the present judgment and order. Before we proceed to address the evidence, we consider it appropriate to take notice of the statement of the victim recorded under section 164 of the CrPC by the learned SDJM, Darbhanga on 29.04.2017(Exhibit-18). The said statement does not disclose any misdeed on the part of these appellants before 24.04.2017. Similarly, she disclosed in her statement that she had friendship with the appellant Akash Mahto for last two years and they used to meet with each other. As regards, the occurrence of 24.04.2017, she stated that she had met the appellant Akash Mahto while she was on her way back home from the school. The appellant Akash Mahto asked her to come to a place called Gandhi Chowk, after 10 minutes, where she went on his request. The appellant thereafter told the victim that he was going to the house of Krishna Mahaseth and advised her also to come there. Thereafter she went to the house



of Krishna Mahaseth where Sawan Kumar, Prince Khattik and Krishna Mahaseth were present. The victim and Akash Mahto went on the roof of the house. The victim wanted to have water and made a request to Akash Mahto to fetch her water. Five minutes thereafter Akash Mahto came with water and gave her to drink. Two minutes after consumption of water, she became unconscious and when she regained consciousness she noticed that there was no clothe on her body. In the said room Akash Mahto, Krishna Mahaseth, Prince Khattik and Sawan Kumar were present. She thereafter pulled a bedsheet on her body to cover herself. She inquired from the accused persons as to what they had done with her in response to which they told her that they had videographed her and if she disclosed it to anyone, they would make the video viral. She alleged that Akash Mahto, Krishna Mahaseth, Prince Khattik and Sawan Kumar had committed rape upon her and had prepared video. She also stated that Akash Mahto had established physical relationship with her on several occasions.

8. It would not be out of place to mention at this juncture that the victim was subjected to medical examination on 26.04.2017, itself by a medical board presided over by the Head of the Department of Obstetrics and Gynaecology, Head



of the Department of FMT, Doctors in the department of Radiology and Dental of Darbhanga Medical College and Hospital. Upon physiological and radiological finding, the medical board reached to a conclusion that the age of the victim was 17-18 years and there was no evidence to suggest commission of forceful sexual intercourse with her. However, previous sexual connections could not be ruled out, the Board opined. The accused appellant Sawan Kumar was also examined by a Doctor on 27.07.2017, who in his report opined that there was no positive evidence to suggest commission of recent sexual intercourse by him. Similarly, the accused/appellant Krishna Mahaseth was also subjected to medical examination on the same date i.e. 27.07.2017; in his case also the Doctor opined that there was no positive evidence to suggest commission of sexual intercourse by him.

9. At the trial, the prosecution got examined altogether eight witnesses including Dr. Bibha Jha (PW-5) a Doctor of the medical board who had examined the victim on 26.07.2017 and Dr. Vijay Prakash Singh (PW-6) who examined two accused persons namely, Sawan Kumar and Krishna Mahaseth. Two investigating officers Neelam Kumari and Jogendra Manjhi deposed at the trial as PW-4 and PW-7. The victim deposed as



PW-3 while her mother as PW-1. The victim's father deposed at the trial as PW-2. The Magistrate who had recorded the statement of the victim under Section 164 of the CrPC came to be examined as PW-8 and he proved the statement which was given by the victim in his presence and recorded under Section 164 of the CrPC. The prosecution also brought on record following documentary evidence to prove the charges against the appellants.

Exhibit-1	Signature of Ms.Y (P.W.1) on the written report
Exhibit-2	Signature of Ms.Y (P.W.1)on the seizure list of dress of victim
Exhibit-3	Signature of Mr.Z(P.W.2) on the written report of the informant
Exhibit-4	Signature of Mr.Z (P.W.2) on the seizure list of bed sheet condom etc.
Exhibit-4/1	Signature of Manoj Kumar on the seizure list of bed sheet condom etc.
Exhibit-5	Signature of Mr.Z (P.W.2) on the seizure list of Mobile.
Exhibit-5/1	Signature of Manoj Kumar on the seizure list of Mobile.
Exhibit-6	Signature of Mr.Z (P.W.2) on the seizure list of dress of his daughter.
Exhibit-7	Written report
Exhibit-8	Signature of Ms. X on the statement recorded u/s 164 CrPC.
Exhibit-9	Endorsement made on the written report of informant by Ajit Kumar Ray, S.H.O Town P.S.
Exhibit-10	Signature of Ajit Kumar Rai, S.H.O. Town P.S. on the formal F.I.R.
Exhibit-11	Seizure list of dress of victim Ms.X.
Exhibit-12	Medical report of victim Ms.X.
Exhibit-13	Medical report of accused Sawan Kumar.
Exhibit-14	Medical report of accused Krishna Mahaseth.
Exhibit-15	Seizure List of bed sheet, condom etc.
Exhibit-16	Seizure List of Mobile
Exhibit-17	Arresting Memo of accused Krishna Mahaseth and Sawan Kumar.



Exhibit-18	Statement of victim recorded u/s 164 Cr.P.C.
Exhibit-19	Registration Card of victim Ms. X
Exhibit-20	Birth certificate of victim Ms. X
Exhibit-21	Admit Card of Ms. X victim of Bihar School Examination Board, Patna
Exhibit-22	C.C. of order sheet dated 12-01-2017 of Court of Sessions Judge, Darbhanga in G.O.Case No 5/16 arising out of P.R.No.15/16
Material Exhibit-I	Mobile of Geoni company recovered from Krishna Mahaseth
Material Exhibit-II	Mobile of OPPO Company recovered from accused Sawan Kumar
Material Exhibit-III	Mobile of Samsung Company recovered from accused Sawan Kumar

10. The appellants were questioned by the trial court under Section 313 of the CrPC to give them opportunity to explain the circumstances emerging against them based on the prosecution's evidence adduced at the trial. The appellants answered in negative. The appellant Krishna Mahaseth in his answer to the question put to him under Section 313 of the CrPC said that he did not even know the victim. Appellants Sawan Kumar and Akash Mahto in their reply stated to the trial court that they were falsely implicated.

11. The defence got examined two witnesses Manoj Kumar (DW-1) and Munna Panjiyar (DW-2). The trial court, upon appreciation of the evidence on record reached a conclusion that the prosecution could successfully prove the charge against these appellants of commission of offences punishable under Sections 376D of the Indian Penal Code and



Section 6 of the POCSO Act. As regards, the charge under Section 67 of the Information Technology Act, 2000, the learned trial court concluded that the prosecution did not produce a single evidence to prove the said charge. One mobile phone of an accused Krishna Mahaseth said to have been recovered by the police which was used for videography of the victim was not sent for scientific examination, the trial court noted in its judgment.

12. We have heard Mr. Ramakant Sharma, learned senior counsel appearing on behalf of the appellant in Criminal Appeal (DB) No. 362 of 2020, Mr. Vikram Deo Singh, learned counsel appearing on behalf of the appellant in Criminal Appeal (DB) No. 282 of 2020 and Mr. Ajay Kumar Thakur learned counsel appearing in Criminal Appeal (DB) No. 369 of 2020.

13. Mr. Ajay Kumar Mishra learned APP has represented State in Criminal Appeal (DB) No. 362 of 2020, Mr. Manish Kumar No. 2 learned APP in Criminal Appeal (DB) No. 282 of 2020 and Mr. Sujit Kumar Singh learned APP in Criminal Appeal (DB) No. 369 of 2020.

14. Assailing the impugned judgment, it has been argued on behalf of the appellants that the foremost duty of the prosecution to establish commission of the offence punishable



under section 6 of the POCSO Act was to be established at the trial beyond all reasonable doubts that the victim of the offence was a child within the meaning of Section 2(1)(d) of the POCSO Act. It has been submitted that in the absence of a conclusive proof to this effect the prosecution cannot be said to have proved the charge of commission of offence punishable under Section 6 of the POCSO Act. They have argued that during the medical examination the victim's age has been determined to be between 17 to 18 years. Beyond the determination of age of the victim by the medical board, the prosecution did not bring on record any material worth evidence to prove its case that the victim was a child as on the date of the occurrence. Reliance has been placed on the Supreme Court's decision in the case of *Jarnail Singh Vs. State of Haryana* reported in **(2013) 7 SCC 263**, to contend that as laid down in the said decision, the rule applicable for determination of age of juvenile under the Juvenile Justice (Care and Protection Of Children) Act, (hereinafter referred to as the 'J.J. Act' in short) applies also although for the purpose of determination, as to whether a person is a child or not within the meaning of section 2(1)(d) of the POCSO Act. Section 94 of the J.J. Act lays down the procedure prescribed for determination of age when a



dispute arises as regards the juvenility of a person. In the present case, the prosecution miserably failed to follow the procedure for determination of age of the victim in order to prove that she was a child so as to attract the provisions of the POCSO Act. It has further been argued, referring to the impugned judgment of conviction of the trial court that for holding the appellants guilty of the offence punishable under Section 6 of the POCSO Act, the trial court has taken aid of sections 29 and 30 of the POCSO Act. As the prosecution failed to establish that the victim was a child, the legal presumption under Sections 29 and 30 of the POCSO Act shall have no application, they contend. It has also been argued that the victim does not appear to be a trustworthy witness. She has been vacillating in her stand as regards the accusation of commission of the offence by these appellants against her. In her written statement, which was the basis for registration of FIR, she alleged that she was lifted by the appellant Akash Mahto and taken to the house of Krishna Mahaseth when she was on her way back home. In her statement under Section 164 of the CrPC recorded soon thereafter she disclosed that on a request made by the appellant Akash Mahto, she had gone to the house of Krishna Mahaseth. They have also argued that the allegations



made by the victim in her written report to the Officer-in-charge of the P.S. is materially different from what she disclosed before the Magistrate in her statement recorded under Section 164 of the CrPC. A reference has been made to the allegation of the victim in her written statement that the victim was confined in the house of Krishna Mahaseth for three days, which fact she did not utter in her statement recorded under Section 164 of the CrPC. There is no evidence even otherwise that the police was ever informed about the victim's disappearance for three days, as alleged in the FIR. It has been argued that the entire prosecution's case is based on the evidence of the victim herself, whose evidence is not at all reliable, considering different statements made by her at different stages of the investigation and the trial. The accusation that the victim was videographed while she was, semiconscious/unconscious has not been proved, rather there is no iota of evidence that there was any videography done by the appellants, though mobile phone of one of the appellant Akash Mahto was seized. It has further been argued that there is conflicting evidence on the point of circumstances in which the victim was found by the police and subsequently taken to her house.

15. Learned APPs representing the state on the other



hand have submitted that the victim had disclosed in her written statement, her specific date of birth, according to which she was less than 18 years as on the date of occurrence, which had led to registration of the FIR. It is further submitted that the accusation made by the victim goes to suggest that the appellant Akash Mahto used to sexually assault her, a child, for last two years when she was much less than 18 years, if the medical evidence is taken into account. In such circumstance, the trial court was justified in invoking section 29 and 30 of the POCSO Act in the wake of specific accusation of sexual assault by these appellants constituting commission of offence punishable under Section 6 of the POCSO Act. It has also been argued that it is not expected from a child that her statements at different stages would be parrot like, and minor contradictions/deviations should be overlooked by this Court, in the interest of nature of the crime against a child.

16. We have perused the impugned judgment of conviction and the order of sentence of the trial court and we have given our anxious consideration to the rival submissions made on behalf of the parties. We have also perused, accordingly, the lower court's records including the evidence adduced at the trial by the parties.



17. The foremost question which we need to consider in the present appeals is as to whether the prosecution was able to establish at the trial conclusively that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act. We find, based on the evidence adduced at the trial that no effort at all was taken by the prosecution to prove conclusively that the victim was a child. According to the evidence of the prosecution's witnesses including the parents of the victim and the victim herself, victim was studying in a school. No effort was made to adduce by way of evidence, any certificate issued by the school showing entry of date of birth of the victim. Father of the victim PW-2 in his cross-examination deposed that he did not know, as to what was the date of birth, which was entered in the school register, at the instance of his elder daughter, who had got the victim admitted in a school. We find substance in the submission advanced on behalf of the appellants that except the tentative determination of age, as recorded by the medical board i.e. between 17 to 18 years as on the date of the medical examination i.e 26.04.2017, the prosecution did not adduce any evidence at the trial, as regards, the age of the victim. The Supreme Court in the case of **Jarnail Singh(Supra)** has held in paragraph no. 22 as under:-

“22. On the issue of determination of age of a



minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as “the 2007 Rules”). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12.Procedure to be followed in determination of age.—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or 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 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 specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

18. It may be noted at this juncture that the J.J. Act 2000 stood repealed with the enactment of Juvenile Justice (Care and Protection Of Children) Act, 2015, section 94 of which serves the purpose now i.e. of laying down the procedure for determination of age which was previously there in Rule-12 of



the Juvenile Justice (Care and Protection Of Children) Act, 2007 and was being considered by the Supreme Court in the case of *Jarnail Singh (supra)*.

19. We are thus of the view that the prosecution cannot be said to have established conclusively 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. In such circumstances, neither sections 29 and 30 of the POCSO Act shall have any application nor section 6 of the POCSO Act could be attracted to hold the appellants guilty of the said offences. We are, accordingly of the view that the finding of the trial court holding the appellants guilty of commission of offence punishable under section 6 of the POCSO Act, cannot be upheld.

20. The next question which we require to address is as to whether the prosecution was able to prove the offence of gang rape punishable under section 376D of the Indian Penal Code.

21. In order to consider the said aspect of the matter, we deem it appropriate to take into account the first version of the victim in her written report and in quick succession her statement recorded subsequently, under Section 164 of the CrPC which has been proved by the learned Magistrate at the trial. We



have noticed in detail, hereinabove, the tenor of accusation made by the victim in her written report, which became the basis for registration of the FIR and her subsequent statement recorded under Section 164 of the CrPC. It is her own case that she was in love with the appellant Akash Mahto whereas in the First Information Report she alleged that she was lifted by the appellant Akash Mahto and was taken to the house of the appellant Krishna Mahaseth. Her statement under Section 164 CrPC in this regard is materially different. She stated before the Magistrate that on the asking of the appellant Akash Mahto, she had firstly gone to Gandhi Chowk and thereafter again on his asking had followed him to the house of Krishna Mahaseth. Further whereas in her written report, she had specifically mentioned that she was sexually assaulted by all the three appellants, in her statement recorded under Section 164 of the CrPC she disclosed that she had asked Akash Mahto to fetch her water, whereafter he had given her a glass of water and after consuming water she had become unconscious. She, in her statement recorded under Section 164 of the CrPC, had stated that she did not know as to what had happened with her after she had become unconscious and after regaining consciousness, she had found herself completely nude and further these



appellants were present. She covered her body with a bedsheet which was lying there and inquired from the appellant as to what had they done with her, whereupon, they disclosed to her that they had prepared a video which they would make viral if the victim disclosed the facts to any person. It cannot be inferred from the statement of the victim recorded under Section 164 of the CrPC that she alleged commission of rape upon her by these appellants on 24.04.2017, in view of her own clear disclosure that she did not know as to what had happened with her. According to her, these appellants had disclosed about the videography having being done by them but the accusation of preparation of video has not been proved at the trial, as has been noted above. These facts coupled with the fact that the medical evidence does not support the prosecution case of commission of gang rape by three persons, we find it difficult to affirm the finding recorded by the trial court of conviction for commission of offence punishable under Section 376D of the IPC. We consider it apposite to notice at this juncture by reproducing verbatim paragraphs 3 to 7 of the evidence of the doctor (PW-5) who had examined the victim, as under:-

“3. Vaginae was normally became pink (sic). I will (sic)not found hymen to be red and congested (sic) at the time of examination of the victim. I didn't find any inflammation and bruises in labia. At the time of examination I didn't find any



injury on the fourchetted.

4. During the examination I didn't find blood on blood clot in vaginal wall or passes.

5. If four or five young man committed gang rape with a minor girl then there would be major injury on the fourchetted all (sic) the labias but I didn't find such type of injury in this case. I didn't find any injury or laceration in the perineum. I find during the examination hymen to be old tear which goes to show that she may be a custom (sic) to sexual intercourse since earlier.

6. The medical board including me examined the victim minutly (sic) and conducted all the required test but we didn't find any sign of recent sexual intercourse. I didn't find any injury on the any part of the body of the victim.

7- Normally spermatozoa alive (sic) 24 hours but in this case I didn't find any live or dead spermatozoa.

8. I can't say age assessed (sic) by ossification test and in that case that test there is a possibility of margin either two or three years.”

22. Contrary to what the victim had asserted in her statement recorded under Section 164 of the CrPC, she had deposed at the trial that though after consuming the water given by the appellant Akash Mahto her vision had become blurred but, she was conscious of the situation that she was being raped by all these appellants. She denied in her evidence at the trial to have stated something else before the Magistrate in her statement under Section 164 of the CrPC. There is yet another aspect of the matter. According to the victim, the rape was committed on 24.04.2017 by these appellants and on 25.04.2017 in the night she had met the police party whereafter she had



reached her house at 12:30 but she had not disclosed to her parents about the occurrence. It is true that if the evidence of the victim of rape appears to be trustworthy and without any embellishment a person charged with commission of rape can be held guilty even if the medical evidence does not fully corroborate the accusation. In the present case, we are of the view that the conduct of the victim is not such as to reach a conclusion that she is a witness of sterling character and her evidence at the trial does not suffer from any embellishment. We find substance in the submissions advanced on behalf of the appellants that the victim has made substantially different statements at different stages of investigation and trial. Her deposition that she was raped by four persons is not at all corroborated by the medical evidence as has been noted above. We, therefore, do not consider it safe to uphold the conviction recorded by the trial court. The appellants deserve to be acquitted by giving them benefit of doubt in the facts and circumstances as noted above.

23. Accordingly, the impugned judgment of conviction dated 07.01.2020 and order of sentence dated 20.01.2020 passed by the learned passed by the learned 1st Additional Sessions Judge cum Special Judge (POCSO Act), Darbhanga in POCSO



G.R. Case No. 13 of 2017 arising out of FIR no. 69 of 2017, is hereby set aside.

24. These appeals are allowed.

25. Since the appellants are in custody, let them be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

ranjan/suraj-

AFR/NAFR	NAFR
CAV DATE	NA.
Uploading Date	28.08.2023
Transmission Date	28.08.2023

