

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.274 of 2021

Arising Out of PS. Case No.-21 Year-2017 Thana- MAHILA PS District- Buxar

MUNNA SINGH Son of Late Brij Bihari Mahto, Resident of Village -
Bharauli, P.S.- Nawanagar, District – Buxar.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Sumeet Kumar Singh, Adv. Mr. Nikhil Singh, Adv. Mr. Binod Kumar Singh, Adv. Mrs. Alka Singh, Adv.
For the State	:	Mr. Dilip Kumar Sinha, APP
For the Informant	:	Mr. Navneet Govindam, Adv.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY)

Date : 17-08-2023

This appeal has been preferred under Section 374 (2) and 389 (1) of the Code of Criminal Procedure, 1973 for setting aside the judgment dated 04.02.2021 and the order of sentence dated 08.02.2021 passed by the learned Additional District Judge-VI-cum-Special Judge, POCSO Act, Buxar in POCSO Case No. 13 of 2017, CIS No. 5 of 2017, arising out of Buxar (Mahila) P.S. Case No. 21 of 2017, whereby the appellant has been convicted and sentenced as under:-



Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376 of the IPC	RI for 10 years	10,000/-	SI for six months
4 of the POCSO Act	RI for 10 years	20,000/-	SI for six months
6 of the POCSO Act	RI for 15 years	20,000/-	SI for six months

2. The victim is a child of 5 years of age. As per allegation, the appellant has committed rape upon her. We do not quote the name of the victim to avoid her identity in public domain. For the sake of convenience, the victim, hereinafter, is referred as ‘X’.

3. Asha Devi, PW 4 is mother of the victim, on whose statement, (*Fardbeyan*), Buxar (Mahila) P.S. Case No. 21 of 2017 was registered under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012. As per her statement recorded on 21.05.2017, she with her husband and two daughters, aged about 3 years and 5 years (the victim) had gone to her *Maike* on the occasion of marriage of her younger sister. The ill-fated day (18.05.2017) was the day of marriage of her younger sister. In the house, there was a ceremonious ambiance. The female inmates of the house were engaged in ritual of the marriage. At the occasion of *Lawa* ceremony (a ceremony performed at the occasion of marriage in the locality in which



the female members of the house goes out to the *Bhansar* for roasting paddy), the female inmates of the house had gone to *Bhansar*. PW 4 did not go to attend the *Lawa* ceremony, as she was feeling abdominal pain. She was taking rest in her house. She assumed that the X was also with the female members, who had gone at the *Lawa* ceremony. When the female members returned, PW 4 did not notice her daughter X with them. Then the family members started searching the victim and they found her in the tent, which was erected for the ceremony. She was lying there in a pool of blood, her *Lehanga* was wet in blood and her condition was serious. She was writhing in pain and was respirating with trouble. On asking of PW 4, she stated that Munna Bhaiya (the appellant) had asked her that her mother was calling her to the temple, where she was performing worship. The victim went with the appellant, who brought her in a bush situated besides the tent and committed rape upon her and after threatening the victim not to disclose the occurrence to anybody, he brought her again in tent and after leaving her in tent, he fled away. The victim was not in a position to move, as she was serious. The family members immediately brought her to hospital, where she was treated. It has been mentioned further that during course of the treatment, two stitches were done at



her private part. When the condition of the victim improved, PW 4 lodged the FIR in the Mahila police station. Due to unawareness of legal implication, the informant had washed the *Lehanga*, which the victim was wearing at the time of rape.

4. On the basis of *Fardbeyan* of PW 4, Mahila P.S. Case No. 21 of 2017 was registered for the offences punishable under the sections noted-above. The investigating authorities submitted charge-sheet No.31 of 2017 on 31.05.2017 against the appellant under Section 376(2)(i) of the Indian Penal Code and clause (i) of Section 376 (2) was in existence at the time of the occurrence, but was subsequently omitted by Section 4 of the Amendment Act, 22 of 2018 with effect from 21.04.2018 and its place, a new sub-section 3 was added by the same amending Act, which read as “*whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extent to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine: Provided that such fine shall be just and reasonable to meet medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this sub-section shall be paid to the victim*” and Section 4 of the POCSO Act, 2012. During course of investigation, the statement of X was also recorded under



Section 164 of the Cr.P.C., which is exhibit-4.

5. Vide order dated 19.06.2017, the learned Special Court, POCSO had taken cognizance under Section 4 of the POCSO Act. After complying the requirements under Section 207 of the Cr.PC, the case was committed to the court of Sessions. On 14.08.2017 the charges were framed under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, which were read over and explained to the appellant, to which he pleaded not guilty and claimed to be tried. The prosecution examined nine witnesses, including the victim, the doctors and the Investigating Officers.

6. PW 4 is the informant Asha Devi, mother of the victim. In her deposition, she has reiterated her earlier version and stated that on the occasion of the marriage of her younger sister, she went to her *Maike* with her two daughters. On the day of marriage, she was feeling pain in her abdomen and she was taking rest. The family members of the house went out for *Lawa* ceremony. They returned, but X was not with them, on search the victim was found in the tent in a pool of blood. The blood was oozing from her private part, her condition was serious and she was writhing in pain. On asking the X disclosed that Munna Bhaiya (the appellant) at the pretext that her mother was calling



her, brought her in the bush and committed rape upon her. The appellant allured her to give toffee and biscuit and also threatened her to kill, had she not obeyed his command. Thereafter, this witness along with her husband brought the victim to police station and lodged the case.

7. PW 3 is father of the victim. He has stated that on ill-fated day at 9:30 P.M., his daughter was found in a pool of blood in the tent, her condition was serious and blood was oozing from her private part. This witnesses has stated further that on query, the victim apprised him that the appellant asked her that her mother was searching her in temple, on that pretext, he committed rape upon the victim. This witness identified his signature on the *Fardbeyan*, which has been marked as exhibit-2.

8. PW 2 is the victim herself. While recording the deposition of this witness, the learned trial court has assessed her age as seven years, as mentioned in the column of the deposition form. Before jotting down the deposition of this witness, the learned trial court put some questions to her to ascertain whether she (the victim) was able to give evidence or not? The learned trial court has mentioned while taking deposition of the victim that she was able to give evidence. The victim has stated that the appellant, at the pretext of providing



her biscuits and mixtures, brought her in the bush and he inserted his penis into her vagina and due to that blood was oozing from her private part. She has stated further that when the blood was oozing, her mother brought her to Buxar Hospital and thereafter, she came to the house with her mother. The victim identified the appellant, who was present in the court.

9. PW 5 is brother of PW-4. He has stated that it was the occasion of marriage ceremony of the sister of this witness, in which the family members of the victim had participated. This witness has also supported the prosecution's case and has stated that on search, the victim was found in injured condition. The blood was oozing from her private part. The victim had stated that it was Munna Bhaiya, (the appellant), who committed rape upon her after bringing her into the bush. The signature of this witness on *Fardbeyan* has been marked as exhibit-2/B. He has stated that at the time of occurrence, the victim was five years old.

10. PW 6 is uncle of PW 4. He has also deposed in the similar words as PW 5.

11. PW 1 is Dr. Madhu Singh, who is a member of Medical Board, which examined the victim. She has stated that on 21.05.2017 she examined the X and found as follows:-



“Intra Keth is seen in her left hand. On private parts examination- two stichers are seen on perinium and lower part of latria minora hymen poorly visualised due to stichers. Vaginal swab taken. Vaginal swab examination report given by Dr. B.N. Chaubey. No spermatozoa found dead or alive on low and high power of microscopic examination- A few ephithelial cells are seen. Dental examination report given by Dr. Ritesh Kumar Singh total no. Of teeth 20 all are dessiduous no permanent teeth are seen.

MI- A small mole on upper part of chest. Regarding age X-ray report is awaiting.

Opinion:- Injury in private part.

This report is in my pen and bears by signature which is marked as Exhibit 1. Apart from the Dr. Namita Singh, Dr. B.N. Chaudhary, Dr. R.K. Singh have also put their signature which I identify the same is marked as Exhibit 1/a to 1/c.”

The medical report is exhibit-2.

12. PW-7 is Dr. Yogendra Kumar, who is also member of the Medical Board, which examined the victim. This



witness identified his signature on medical examination report and the X-ray report, which is marked as Exhibit-1/D.

13. PW-8 is Investigating Officer, Mr. Ramesh Ram (Retired Sub-Inspector). He has identified his signature on formal FIR (exhibit-3). This witness visited the place of occurrence, got the statement of the victim recorded under Section 164 of the CrPC and after completion of the investigation, submitted charge sheet No. 31 of 2017 on 31.05.2017.

14. PW-9 is the Judicial Magistrate, who recorded the statement of the victim under Section 164 of the Cr.PC, which is exhibit-4. He has stated that he recorded the statement of the victim in his/her chamber in the presence of her mother.

15. The prosecution has also adduced the following documentary evidences in support of the charges made against the appellant, which are as follows:-

Exhibit-1 - Injury report of victim

Exhibit -1/A to Exhibit-1/C- Signatures of
doctors on Injury Report

Exhibit-2 - Signature of Brajesh Singh @
Brajeshwar Singh on Fardbeyan

Exhibit- 1/D- Signature and report of Dr.



Yogendra Kumar on injury report.

Exhibit-3 - Formal FIR

Exhibit-4 - Statement of 164 of Cr.P.C.

16. The learned counsel for the appellant has submitted that there are some material contradictions in the depositions of the witnesses, which make the prosecution case doubtful. He has submitted further that the victim, in her statement under Section 164 of the Cr.PC, has stated that the appellant had raped her and inserted his finger in her private part, but in her deposition, this thing is missing. He has also submitted that somewhere in the deposition of the witnesses it has come that the appellant brought the victim behind the bush after giving allurements to give her toffee and biscuits, but on other occasions the witnesses, including the victim, have stated that the accused had brought her in the bush, at the pretext that her mother was calling her in temple.

17. The second submission of the learned counsel for the appellant is that as there are some doubts on the commission of the offence, as such, the statutory presumption under Sections 29 and 30 of the POCSO Act are not attracted in the present case.

18. Per contra, the learned Additional Public



Prosecutor for the State has submitted that the victim is a minor child of five years of age. The prosecution has proved that the appellant had committed rape in most barbaric and heinous manner on a child of five years of age and there is nothing on the record, which shows that it was a case of false implication of the appellant.

19. We have carefully perused the records of the learned trial court with the evidences and heard the rival arguments of the appellant and the State. It is not in much controversy that the victim is a child defined in Section 2 (1) (d) of the POCSO Act. The medical evidence as well as the statement of the witnesses establishes beyond all the shadows of reasonable doubts that the victim, who is a child, was subjected to rape.

20. So far as, the contradictions crept in the depositions of the victim as well as the other witnesses are concerned, in our opinion, it do not render the prosecution's case incredible or untrustworthy. The victim is a child of five years of age. She, in her own words and way, depicted the entire occurrence that took place with her. The factum of rape committed by the appellant has vividly been described by this witness in her statement recorded in the court as well as under



Section 164 of the Cr.PC, corroborated by the medical evidence. Two stitches were given to stop the bleeding at her private part. Her deposition was corroborated by the other witnesses, e.g. her mother, father, maternal uncle and maternal grandfather. We do find any reason to discredit the victim and the witnesses. There is nothing, which shows the motive for false implication of the appellant in this case. On the basis of above-mentioned observations, we do not find any reason to interfere with the conviction of the appellant under Section 376 of the Indian Penal Code.

21. We are of the opinion that the learned court below has rightly convicted the appellant under Section 376 of the Indian Penal Code and awarded the sentence to undergo rigorous imprisonment for ten years and fine of Rs. 10,000/- (ten thousand rupees only) and in default of payment of fine, he would undergo further six months of simple imprisonment.

22. So far as the sentence inflicted on the appellant under Sections 6 and 4 of the POCSO Act is concerned that should not be inflicted on him for two reasons:- (i) The charges were not framed under Section 6 of the POCSO Act and (ii) Section 42 of the POCSO Act provides as follows:-

“Alternate punishment. – Where an act or omission constitutes an offence punishable



under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB,] [376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”

23. From bare perusal of Section 42 of the POCSO Act, it appears that if an accused is found guilty for commission of the offence under the provisions of POCSO Act and also under the provisions of Section 376 of the Indian Penal Code, he shall be liable to be punished under the POCSO Act or the Indian Penal Code, which provides punishment which is greater in degree. Section 376 of the Indian Penal Code is greater in degree because one of the punishments under Section 376 of the Indian Penal Code is “imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life”, whereas under Sections 4 and 6 of the POCSO Act though life imprisonment has been provided as the punishment for penetrative sexual assault (as on the date of commission of the offence), but that is for the simple imprisonment for life and not



for the remainder of natural life of the accused, as such, in our view, only the sentence under Section 376 of the Indian Penal Code should be awarded to the appellant.

24. Accordingly, while upholding the appellant’s conviction for the offences punishable under section 376 and section 4 of the POCSO Act as recorded by the trial court, the sentence is modified to rigorous imprisonment for ten years with fine as imposed by the trial court for the offence punishable under Section 376 of the IPC. No separate sentence is required to be imposed for the proved offence under section 4 of the POCSO Act. Remaining part of the impugned judgment and order doesn’t require interference.

25. With the amendments in sentence indicated above, the appeal is allowed in-part.

I agree
Chakradhari Sharan Singh, J

(Nawneet Kumar Pandey, J)

(Chakradhari Sharan Singh, J)

Kundan/Mahesh

AFR/NAFR	NAFR
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