

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.394 of 2021

Arising Out of PS. Case No.-37 Year-2018 Thana- MAHILA P.S. District- Sheikhpura

RAHUL TIWARI @ RAHUL KUMAR TIWARI S/O PRAMOD TIWARI
R/O VILLAGE-SAMAS BUJURG, P.S. BARBIGHA, DISTRICT
SHEIKHPURA

... .. Appellant

Versus

THE STATE OF BIHAR

... .. Respondent

Appearance :

For the Appellant : Mr. Bindhyachal Singh, Senior Advocate
Mr. Vipin Kumar Singh, Advocate
For the Respondent : Ms. Shashi Bala Verma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 31-08-2023

This appeal has been preferred under Section 374(2)
of the CrPC against the judgment of conviction and the order of
sentence dated 10.02.2021 passed by the learned Special Judge
(POCSO)-cum-Additional District and Sessions Judge-VIth,
Sheikhpura, in POCSO Case No.36/18 arising out of Sheikhpura
Mahila P.S. Case No. 37/18, whereby the appellant has been
convicted and sentenced as under: -

Cr. Appeal (D.B.) No. 394 of 2021				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Rahul Tiwari @ Rahul Kumar Tiwari	376(3) of the IPC	R.I. for life	50,000/-	R.I. for one year
	Section 6 of the POCSO Act	No separate	-	-



		sentence		
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2. The girl, who, according to prosecution's case, was subjected to sexual assault, is herself the informant, whose name is not being disclosed in the present judgment and order. We are not disclosing the names of such prosecution's witnesses, who are family members of the informant, so as to ensure that her identity is not disclosed in any manner. Accordingly, the informant is being referred to the present judgment as the informant/PW 4 and other prosecution's witnesses as PWs 1, 2 and so on.

3. The informant, in her written report addressed to the Officer-in-Charge, Mahila Police Station, Sheikhpura, dated 24.08.2018, asserted that she was aged nearly 14 years and, in the evening at 5:00 PM on 23.08.2018, she had gone to the appellant's shop to purchase sugar. According to her, the appellant, after seeing her, came out of the shop and after assessing the situation outside, he came back into the shop and closed the shop's door. The appellant, on the point of dagger, committed rape upon her. She explicitly alleged in her written report that the appellant inserted his private part into the private part of the informant to satisfy his lust. In the meanwhile, aunt of the informant (PW 1) came searching for her and reached near the shop. As she found the shop closed from inside, she became suspicious, whereafter



she went back to her house to call the informant's father. Further, in the meanwhile, the appellant, taking advantage of the situation, opened the shop, locked it from outside and escaped, leaving thus the informant locked inside the shop. Subsequently, several persons assembled and she was taken out of the shop after breaking open the lock of the shop from outside.

4. The said aunt of the informant (PW 1) and father of the informant (PW 3) are the witnesses, whose signatures figure on the written report of the informant. Based on the said written report of the informant in relation to the occurrence, which had taken place on 23.08.2018, Shiekhpora Mahila P.S. Case No. 37 of 2018 came to be registered on 24.8.2018 at 2:30 PM. We consider it desirable to mention, in the background of the statements which have been advanced on behalf of the appellant, that, according to the formal FIR, the information regarding the occurrence was received by the police at 2:30 PM, whereupon the FIR was registered immediately. The informant was examined before a learned Magistrate under Section 164 of the CrPC on 25.08.2018 (Exhibit-16). In her evidence, she supported the accusation made by her in her written report. She, however, did not mention in her statement that the appellant had used dagger/knife on the point of which he had committed sexual assault upon her. The victim was



subjected to medical examination by a Board of Doctors on 25.8.2018 for the purpose of determination of her age. The Medical Board found the age of the informant to be between 16-17 years. She was also examined by a Doctor (PW 5) to assess the injuries sustained by her. The medical report (Ext. 8) does not indicate any external injury on her body except mild swelling on *labia minora*.

5. The police, upon completion of the investigation, submitted charge-sheet for commission of the offences punishable under Section 341, 354, 452, 376 of the IPC and Section 4 of the POCSO Act, whereafter, cognizance was taken of the offences punishable under Section 376, 354, 341 of the IPC and Section 4 of the POCSO Act by an order dated 26.03.2019. Charges were framed subsequently for the commission of the offences punishable under Section 376, 341, 354, 452, 376(3) of the IPC and Section 6 of the POCSO Act. The appellant denied the charge and claimed to be tried.

6. At the trial, the prosecution examined 8 witnesses including the I.O. Sudha Kumari (PW 6), the Doctors, who had examined the informant, namely, Dr. Krishna Murari Prasad Singh (PW 5) and Dr. Mrigendra Prasad Singh, who was a member of the board constituted for the determination of the informant's age (PW



7). The learned Magistrate, who had recorded the informant's statement under Section 164 of the CrPC, came to examined as PW 8 at the trial. Other than these witnesses, the informant's aunt deposed as PW 1, informant's mother as PW 2 and her father as PW 3. The informant deposed at the trial as PW 4. The prosecution brought on record documentary evidence also in addition to the oral evidence of the prosecution's witnesses, as noted-above, some of which are as under:-

1.	Signature of PW 1 on the seizure list	Ext. 1
2.	Signature of PW 1 on the FIR	Ext. 2
3.	Signature of PW 2 on the statement of the informant recorded under Section 164 of the CrPC	Ext. 3
4.	Signature of PW 3 on the written application of the informant	Ext. 4
5.	Signature of PW 3 on the seizure list	Ext.-5
6.	Signature of PW 3 on the statement of the informant under Section 164 of the CrPC	Ext. 6
7.	Signature of the informant on her written statement	Ext. 7
8.	Signature of informant on her statement recorded under Section 164 of the CrPC	Ext. 8
9.	Signature of the informant on the medical report relating to	Ext. 9



	her age determination	
10.	Signature of the informant on the seizure list	Ext. 10
11.	The injury report proved by PW 5	Ext-11
12.	Supplementary injury report	Ext. 12
13.	Formal FIR	Ext. 13
14.	Seizure list	Ext. 14
15.	The entire report of the Medical Board	Ext. 15
16.	The statement of the victim recorded under Section 164 of the CrPC	Ext. 16

7. After conclusion of the evidence of the prosecution's witnesses, the appellant was questioned by the trial court under Section 313 of the CrPC so as to give him an opportunity to explain the incriminating circumstances emerging against him based on the evidence of the prosecution's witnesses. The appellant denied the circumstance explained to him. Thereafter, though no defence witnesses was examined, the defence brought on record a certified copy of the FIR of Barbigha P.S. Case No. 111 of 2017 (Ext. A) and the charge-sheet filed in the said case by the police as Ext.-B, apparently to make out a case that lodging of the present criminal case was an act of false implication because of previous dispute.



8. The trial court, having evaluated the evidence adduced at the trial, has held the appellant guilty of the offences punishable under Section 341, 354, 376(3) of the IPC and Section 6 of the POCSO Act and has sentenced him to undergo imprisonment with fine as noted-above for the offence punishable under Section 376 (3) of the IPC and decided not to impose separate sentence for the offence punishable under Section 6 of the POCSO Act in the light of the provision under Section 42 of the POCSO Act.

9. Mr. Bindhaychal Singh, learned Senior Counsel appearing on the behalf of the appellant, has submitted that it is evident from the judgment of conviction of the trial court that the trial court has taken aid of Sections 29 and 30 of the POCSO Act to hold the appellant guilty of the offence punishable under Section 6 of the POCSO Act. He submits that the provisions of the POCSO Act can be invoked only if the prosecution successfully establishes beyond all reasonable doubt that the victim was a child as on the date of occurrence within the meaning of Section 2(1)(d) of the POCSO Act. There is no age determination of the informant in the present case other than what has been done by the Medical Board, based on the radiological test. The age of the informant has been found by the Medical Board to be between 16-17 years. He



has placed reliance on Supreme Court's decision in case of ***Jaya Mala v. Govt. of J & K***, reported in **(1982) 2 SCC 538**, to submit that this court may take judicial notice of the fact that margin of error in age determination by radiological examination is two years on the either side. As the prosecution failed to prove the age of the informant to bring the case within the ambit of the POCSO Act, the appellant deserves to be given benefit of doubt for the purpose of application of the provisions of the POCSO Act against him. He has submitted that the prosecution miserably failed to follow the procedure prescribed for determination of age in accordance with the provision under Section 34(2) of the POCSO Act, read with Section 94 of the Juvenile Justice (Care and Protection of Children Act), 2015 ('JJ Act' for short). He has relied on Supreme Court's decisions in case of ***Jarnail Singh v. State of Haryana***, reported in **(2013) 7 SCC 263**, with reference to paragraph 23 and 24 thereof to submit that the it has been conclusively held that the procedure, as prescribed under the JJ Act, should be followed to determine the age of the victim of sexual assault for the purpose of application of the POCSO Act. He has also placed reliance on the Supreme Court's decision in case of ***Jyoti Prakash Rai v. State of Bihar***, reported in **(2008) 15 SCC 223**, to submit that medical report determining the age of a



person cannot be considered by the court of law as also by the medical board to be conclusive in nature since after a certain age, it becomes difficult to determine the age of the person concerned even on the basis of ossification test or other test. He has argued that in the case of ***Jyoti Prakash Rai*** (supra) also, it has been held flexibility of two years on either side shall be considered in case of age determination by a doctor/board of doctors. He has accordingly submitted that as the prosecution failed to prove beyond all reasonable doubt that the informant was a child within the meaning of Section 2(1)(d) of the POCSO Act, the informant's conviction for the offence punishable under Section 6 of the POCSO Act by taking aid of Sections 29 and 30 of the Act is not at all sustainable. On the point of the appellant's conviction for commission of the offence punishable under Section 376(3) of the IPC, he has submitted that for the same reason, the conviction under the said provision cannot be sustained since Section 376(3) of the IPC can be invoked only if it is proved at the trial that the rape was committed on a woman under 16 years of the age. Since in the present case, the prosecution failed to prove that the informant was under 16 years of age, the trial court has committed gross error in holding the appellant guilty of the offence punishable under Section 376(3) of the IPC. He has further



submitted that in any view of the matter, considering inconsistent and contrary evidence of prosecution's witnesses, it is manifest that the appellant has been falsely implicated because the parties were on inimical term, which fact the defence was able to prove by bringing on record cogent evidence and has been admitted by the prosecution's witnesses in their respective depositions. Referring to the depositions of the prosecution's witnesses other than official witnesses, he has submitted that none of them are reliable and falsehood in their evidence is apparent. He would contend that though there is no dispute over the legal principle that a person can be convicted of an offence of sexual assault based on sole testimony of the victim of such crime, but only if such witness is found to be fully reliable and trustworthy and evidence of such witness is of stellar quality without any embellishment.

10. Ms. Shashi Bala Verma, learned Additional Public Prosecutor representing the State has submitted that though there are certain contradictions in the evidence of the prosecution's witnesses, but they are consistent on the point that the informant was found by them inside the shop of the informant, which was locked from outside. She submits that the informant had explicitly mentioned in her written statement, recorded under Section 164 of the CrPC, and in her deposition at the trial, the manner in which an



offence of penetrative sexual assault was committed upon her by the appellant. Her evidence cannot be completely brushed aside, she contends. She has further submitted that it is very unlikely that only because of some previous enmity between the family of the informant and the appellant, the informant would lodge a case of the present nature, which seriously affects her dignity in public. She submits that this Court, noticing the evidence of the informant herself, may not interfere with the finding of conviction recorded by the trial court.

11. We have perused the impugned judgment and order of the trial court and the trial court's record. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted above.

12. At the outset, we must address the submissions made on the behalf of the appellant as regards the age determination of the informant to consider as to whether the prosecution was able to establish beyond doubt that she was a child as on the date of occurrence within the meaning of Section 2(1)(d) of the POCSO Act. The prosecution's case to prove the age of the informant below 18 years of age is apparently based on the report of the Medical Board, which suggests her age to be between 16-17 years as on the date of occurrence. We find substance in submission



made on behalf of the appellant with reference to the law laid down by the Supreme Court in the case of ***Jaya Mala*** (supra), wherein the Supreme Court has in no uncertain terms observed that one should take judicial notice that the margin of error in age ascertained by the radiological examination is two years on the either side. In the case of ***Jyoti Prakash Rai*** (supra), the Supreme Court has noticed the decision in case of ***Vishnu v. State of Maharashtra***, reported in (2006) 1 SCC 283. The Supreme Court, in case of ***Vishnu*** (supra) held in paragraph 20 as under: -

“20. It is urged before us by Mr Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact.”

13. Referring to the said decision, the Supreme Court in case of ***Jyoti Prakash Rai*** (supra) has held that age determined by the Doctors should be given flexibility of two years on either side. This being the situation, we have no hesitation in reaching a conclusion that the prosecution could not be said to have established beyond reasonable doubt that the informant was below



18 years of age as on the date of occurrence which is a condition precedent for attracting the provisions of the POCSO Act. It would be apt here to refer to the Supreme Court's decision in case of **Jarnail Singh** (supra), paragraphs 23 and 24 of which laid down the procedure for determination of age of a victim of sexual assault. Paragraph 23 of which reads as under: -

“23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by



the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.”

14. Situated thus, the appellant's conviction for the offence punishable under Section 6 of the POCSO Act cannot be upheld. Further, in no case the prosecution could be said to have established that the informant was below 16 years of age as on the date of occurrence, and, therefore, there would be no question of attracting Section 376(3) of the IPC, which reads as under: -

“376(3). 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 extend 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 the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.]"



15. A question arises now as to whether the appellant, in the facts and circumstances of the present case, based on evaluation of the evidence adduced at the trial can be held guilty of offence punishable under Section 376(1) of the IPC instead of the offence punishable under Section 376(3) of the IPC.

16. To answer the question, this Court is required to analyse and reevaluate the evidence of the prosecution adduced at the trial, mainly in order to ascertain as to whether the prosecution's witnesses are reliable or not. For the said purpose, in the background submissions which have been advanced on behalf of the appellant, we are required to have an overall view of all attending circumstances.

17. There are two persons whose evidence are crucial which have to be read with the evidence of other witnesses. These two witnesses are the victim (PW 4) and her aunt (PW 1). As could be easily noticed from the evidence of PW 1, that according to her at 5 PM in the evening, she had gone to the appellant's shop to purchase sugar. The appellant's shop was four houses away from the house of the victim. There is no gainsaying that the victim's aunt (PW 1), her father (PW 3) and her mother (PW 2) lived together in the same house. PW 1 had gone to search for the victim realising that her return was getting delayed. According to her, she



had heard the victim crying inside the house. Without doing anything then and there, she returned to her house and took other members of the family. By the time they came to the appellant's shop, the appellant had escaped from the shop, after locking the shop from outside. According to her, grandmother of the appellant came thereafter, broke upon the lock and found the victim inside, who disclosed that this appellant had committed rape upon her at the point of dagger. PW 1 also deposed in her cross-examination that at the time of occurrence, there was no male member in the family. She further deposed that by 6 in the evening, all the male members came whereafter, upon deliberation, they got registered the case on the next day, i.e., on 24.08.2018.

18. Mother of the victim (PW 2), in her examination-in-chief claimed that she was there in her village (Samas) when the occurrence had taken place. She claimed to have seen the house of the appellant locked from outside and the victim crying inside the room, whereafter, the mother of the appellant opened the door and in the room, the victim was found. In her cross-examination, she accepted that on the date of occurrence, she was not there in her matrimonial home in the village Samas and she had learnt about the occurrence after registration of the case when she returned to village Samas from her paternal home. She also deposed that she



was not examined by the police during the course of investigation. She admitted in response to a question put during the cross-examination regarding a criminal case registered as Barbigha Case No. 111 of 2017 lodged by the grandfather of the appellant against her husband (PW 3) and brother-in-law (devar) and other members of the family in which the appellant was witnesses and the case was pending for evidence. She also admitted in her cross-examination that nearly a year ago, they had approached the appellant and requested him not to depose in the criminal case, which request was declined by this appellant.

19. The evidence of father of the victim (PW 3) suffers from inherent contradictions. While supporting the prosecution's case of the victim having been found inside the shop after lock of the door was broken open, he specifically deposed in paragraph 9 of his evidence that it was he, who had broken open the lock of the door. The said evidence is contrary to the evidence of PW 1, according to whom the lock was broken by the grandmother of the appellant and PW 2, according to whom, the lock was opened by the mother of the appellant. PW 3 further deposed in paragraph 9 that the broken lock was handed over by him to the police on the next day. It will be relevant to mention that PW 3, in his cross-examination, deposed that on the date of occurrence, his wife (PW



2) was there in village Samas, whereas PW 2 specifically deposed at the trial that she was not in village Samas when the occurrence had taken place. There is yet another crucial aspect of evidence of PW 3. He deposed in paragraph 12 that, for the first time, he had received the information about the occurrence on his mobile number from Mahila Police Station. It is significant to mention here that the FIR was registered on the next day of occurrence, i.e., on 24.08.2018 at 2:30 PM. No information was given to the police prior to 24.08.2018. The deposition of PW 3, thus, that he was there in the village and it was he who had broken open the lock, is thus manifestly false. The narration of the prosecution's case by PW 1, in the court's opinion, also suffers from inherent improbability for the reason that it cannot be easily accepted that after having noticed the victim inside the shop of the appellant, without raising any voice or doing any other thing, she would return to her house to bring other persons present in the house to the shop.

20. Taking into account, a cumulative view emerging from the evidence of PWs 1, 2 and 3, we are of the view that they cannot be treated to be reliable witnesses. This takes us to the evidence of the victim of sexual assault herself, who in such cases are treated to be the best witnesses. In her examination-in-chief,



she deposed that it was his father, who had opened the door of the shop. This is not consistent with the evidence of PW 3, who deposed in his cross-examination in paragraph 12 that the first information about the occurrence had been received by him from the police station. This is also significant for the reason that PW 1 deposed in her evidence that no male member of the family was there in the house when the informant was noticed present in the shop of the appellant. In her cross-examination also, she deposed that soon after her aunt had come near the shop, her father had also come. Situated thus, we are of the view that PW 4, the victim, in the facts and circumstances, as discussed above, cannot be treated to be a reliable witnesses.

21. Further, in her examination-in-chief at the trial, she did not testify that rape was committed upon her on the point of dagger. She developed a new case of her hands and legs having been tied by the appellant at the time of commission of rape upon her.

22. Thus, the evidence of the prosecution's witnesses including that of the victim do not appear to be trustworthy and without embellishment. In the aforesaid background, absence of corroboration by medical evidence, in our opinion, assumes



significance. In the present case, we find that medical/scientific evidence does not fully support the prosecution's case.

23. We have perused the FSL report also. Upon examination of the informant's undergarments, which reads as under:-

“(i) Blood has been detected over small areas in each of the exhibit marked ‘1’ and ‘2’ (Undergarment – Ext. 1 and Leggings Ext.-2).

(ii) Semen could not be detected, in any of the exhibits marked ‘1’ and ‘2’.”

24. There is no evidence to connect the appellant with any finding of the FSL report.

25. Considering the overall effect of the circumstances, as noted above, we are of the considered opinion that it would not be safe for this Court to uphold the appellant guilty of the offence punishable under Section 376(1) of the IPC. The prosecution's witnesses do not appear to be reliable. Further, the prosecution has not been able to prove beyond all reasonable doubt the charge of commission of penetrative sexual assault against the appellant. The appellant deserves to be given benefit of doubt in the facts and circumstances as noted above.

26. Accordingly, the impugned judgment of conviction and the order of sentence dated 10.02.2021 passed by the learned Special Judge (POCSO)-cum-Additional District and Sessions



Judge-VIth, Sheikhpura, in POCSO Case No.36/18 arising out of Sheikhpura Mahila P.S. Case No. 37/18, are hereby set aside. The appellant stands acquitted of the charge of commission of offences punishable under Section 376(3) of the IPC and Section 6 of the POCSO Act giving him benefit of doubt.

27. This appeal is allowed.

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

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Pawan-Kundan

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	04.09.2023.
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