

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.423 of 2021

Arising Out of PS. Case No.-142 Year-2018 Thana- MAJHAULIYA District- West
Champaran

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KRISHNA SHARMA Son of Aitwarchand Sharma @ Etvar Chand Thakur
Resident of Village - Madhopur, Ahir Toli, P.S. - Majhauliya, District - West
Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Sanjeev Kumar, Adv Mr. Raushan Raj, Adv Ms. Bharti Rai, Adv
For the State	:	Ms. Shashi Bala Verma, APP

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date : 15-09-2023

The appellant has preferred this appeal under Section
374(2) of the Code of Criminal Procedure assailing the
judgment of conviction dated 20.02.2021 and an order of
sentence dated 25.02.2021 passed by the learned Additional
Sessions Judge-VI,-cum Special Judge, POCSO, Bettiah, West
Champaran in Majhauliya P.S. Case No. 142 of 2018 (CIS No.
25 of 2018) corresponding to S.G.R. No. 41 of 2018, whereby



and whereunder, the appellant has been convicted and sentenced as under :-

Penal Provi- sion	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 6 of the POCSO Act	Rigorous Imprisonment for life	Rs. 25,000/-	In the event of failure of deposit of fine amount the same shall be liable to be recovered as arrears of land revenue out of the estate of the convict at the cost of the defaulter.
Section 306 of the IPC	Rigorous Imprisonment for 10 years	Rs. 25,000/-	
Section 376	-----	-----	-----

2. The facts of the present case are truly disturbing, either way. The appellant is the father of the victim (deceased) and the informant, is the mother. It is the prosecution's case itself that the victim committed suicide by hanging using her *stole (dupatta)*, on 19.04.2018, between 11 A.M. to 12 A.M. The dead body of the victim was found hanging from the ceiling of a room in the informant's house. She gave a written report to the Officer-in-Charge of Majhauriya Police Station at 12:15 P.M. alleging that this appellant had subjected their 14 year minor daughter (victim) to sexual assault nearly 10 days before she



committed suicide. She further alleged that the informant had earlier berated and abused the appellant for his conduct. Recently on 17.04.2018, also when the family had gone to the village home, the appellant had again sexually assaulted the victim. On her return from the village, the victim had narrated the informant about the occurrence. Later, out of frustration the victim had left the house for some unknown destination. Thereafter, the victim was noticed roaming around at Bettiah by some acquaintance, who informed the informant, whereupon some relatives from the village went to bring the victim back. The victim, it is alleged, disclosed to them about the misdeeds of the appellant and had initially declined to return to her home. However, upon much persuasion she agreed to come back. On 19.04.2019 at about 11:00 A.M., the informant had gone out of the house for certain work and on return at 12:30 A.M., she found the victim having committed suicide. The informant alleged that the victim committed suicide because of the aforementioned misdoings of the appellant. Based on the aforesaid allegation, Majahulia P.S. Case No. 142/2018 came to be registered on 19.04.2018 disclosing commission of offences punishable under Sections 376 and 306 of the IPC and Section 4 of the Protection of Children from Sexual Offences Act,



2012(hereinafter referred to as the 'POCSO Act' in short). It would be significant to notice from the formal FIR that the distance of the police station from the place of occurrence has been mentioned as 12 kilometre. It is the informant who is said to have seen first the victim having committed suicide at about 12:00 noon. The information regarding the occurrence was received at the police station at 12:15 P.M and the FIR was registered at 3:05 P.M., as mentioned in the FIR format.

3. Upon completion of investigation, the police submitted chargesheet, whereafter cognizance was taken of the offences punishable under Sections 376 and 306 of the Indian Penal Code and Section 4 of the POCSO Act. Charges were framed for commission of the offences punishable under Sections 376 and 306 of the IPC and Section 4 of the POCSO Act on 20.12.2018. Later, charge of commission of offence punishable under Section 302 of IPC was added. The appellant denied the charges and claimed to be tried.

4. Three witnesses came to be examined at the trial namely, the informant (PW-1), the Investigating Officer (PW-2) and the Doctor who had conducted the *postmortem* examination (PW-3). The prosecution also brought on record following documentary evidence namely:-



Sl. No.	Description	Exhibit Number
1.	Signature of the Informant over the written statement	Exhibit-1
2.	Endorsement on the written statement of the informant	Exhibit-2
3.	Signature of the Officer-in-charge on the written statement	Exhibit-2/A
4.	Formal FIR	Exhibit-3
5.	Inquest report	Exhibit-4
6.	Signature of Sudhir Kumar, Police Officer on the inquest report	Exhibit-4/A
7.	<i>Postmortem</i> report	Exhibit-5
8.	Signature of Doctor over the <i>postmortem</i> report	Exhibit-5/A

5. After closure of the prosecution’s evidence, the appellant was questioned under Section 313 of the CrPC, so as to give him an opportunity to explain the incriminating circumstances emerging against him based on the prosecution's evidence adduced at the trial. He answered the questions in negative and in response to one of the questions, he answered that the informant and his daughter were of questionable character. The informant had falsely implicated him and that she was enjoying her life with someone else after having got him arrested in the case. The defence did not produce any evidence.

6. The trial court, after having appreciated the evidence adduced at the trial has come to the conclusion in its impugned judgment of conviction that the prosecution was successfully able to establish that the victim was repeatedly raped by the



appellant and the victim committed suicide out of shame. The age of the victim was 14 years as stated by the witnesses as also found in the medical report and accordingly, the trial court convicted the appellant of commission of offences punishable under Sections 376, 306 of the IPC and Section 6 of the POCSO Act.

7. Mr. Sanjeev Kumar, learned counsel appearing on behalf of the appellant has submitted that the entire case of the prosecution is based on the evidence of sole witness i.e. the informant herself (PW-1) which is based on the disclosure said to have been made by the deceased to her. He has submitted that the said evidence being in the nature of hearsay, is inadmissible in view of Section 60 of the Evidence Act. He has further submitted that according to the informant's evidence, persons other than the informant were told about the commission of offence of sexual assault by the appellant on the victim but no witness came to be examined to corroborate the accusation. There is reference about a person acquainted with the informant who had noticed the presence of the victim at Bettiah after she had left her house. Who was the said person, has not been disclosed, let alone his examination at the trial. Further, two persons namely, Chandan Thakur and Dasrath Thakur have been



described to be the attesting witnesses of the F.I.R who have not been examined at the trial and have been apparently withheld. He has relied on illustration 'G' of Section 114 of the Evidence Act to submit that the Court should draw adverse inference for withholding evidence of the witnesses who ought to have been produced and were mentioned as the prosecution's witnesses in the chargesheet. In support of his submission, he has relied on a Supreme Court's decision in the case of *Vijender and Anr Vs. State of Delhi* reported in *(1997)6 SCC 171*. He has argued that it is apparent from the deposition of the informant that there was marital discord between the appellant and the informant which appears to be the reason for false implication of this appellant in the present case. He has also argued that the prosecution has not been able to prove, based on the medical evidence, that the deceased was subjected to any kind of sexual assault. In such view of the matter, conviction of the appellant under Section 6 of the POCSO Act and Section 376 of the IPC is wholly unsustainable. An argument has also been advanced that the finding of conviction under Section 306 of the IPC is perverse in the absence of any evidence of aiding, abetting or instigating the victim to commit suicide. He has also submitted that in the present facts and circumstances of the case, Sections 29 and 30



of the POCSO Act shall have no application, the prosecution having miserably failed to prove by adducing evidence, basic ingredients of commission of penetrative sexual assault.

8. Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State has submitted that there is no reason to disbelieve the accusation made by the informant and her deposition at the trial of commission of sexual assault on the victim by her father (the appellant). She has further submitted that the conviction recorded by the trial court for the offences punishable under Section 6 of the POCSO Act is fully justified invoking Sections 29 and 30 of the POCSO Act which casts reverse burden on an accused to prove that he had not committed the offences described under Sections 3, 5, 7 and 9 of the POCSO Act. The appellant having failed to discharge the reverse burden, has rightly been convicted of the offence defined under Section 5 of the POCSO Act, punishable under Section 6 thereof.

9. We have perused the impugned judgment and order of the trial Court as well as the lower Court's records and we have given our anxious consideration to the rival submissions advanced on behalf of the parties.

10. We consider it expedient to begin with the evidence



of the informant (PW-1) adduced at the trial. She had supported the prosecution's case that the appellant would regularly sexually assault the deceased because of which she was unwilling to reside any more in the house and therefore, she had left the house and gone to Bettiah. At Bettiah, she had met someone (name not disclosed) to whom the victim is said to have narrated the commission of rape by the appellant upon her. The said person is said to have called the villagers on phone, asking them to take the victim back home, whereafter, the informant had brought her back. There is no evidence as to who was the person whom the victim had met at Bettiah and who were the villagers who were informed telephonically by the said person from Bettiah. There is deposition of the informant at the trial to the effect that the villagers to had chastised the appellant for his conduct but no such villager was examined to corroborate it. It is her evidence that on 19.04.2018, she had gone in the fields to work at about 11:00 A.M. and when she returned at about 11:30 A.M., she found the victim hanging with her *duppatta* around her neck. She was not wearing any clothe, when she was found hanging. In her cross-examination, she deposed that she had informed all the villagers about the commission of rape by the appellant on the victim including her



father-in-law and brother-in-law (elder brother of the appellant). In response to a question in the cross-examination, she deposed that the appellant did not share with her, his earnings as has been noted, hereinabove. Contrary to the testimony of PW-1 the inquest report (Exhibit-4) prepared at 01:00 PM, on 19.04.2018 that the deceased was found wearing *pajama* and *kurti*. The inquest report thus, contradicts the informant's evidence that the victim was not wearing any clothe when she was found dead after having committed suicide.

11. The Doctor (PW-3), who had examined the victim on 19.04.2018, proved following *antemortem* injuries:

“Ligature mark - Size 1/2" wide, situated on the upper part of neck directed obliquely upwards along the line of mandible extending from the Rt. ear to Lt. ear and was absent on the back of neck.

On dissection-Head- The brain was found congested

-Neck- dissection under the ligature mark showed dry and glistening white band of subcutaneous tissue.

-Chest-Both the lungs were congested,

-Heart- Rt chamber full, Lt chamber empty.

-Abdomen-Stomach empty

Liver, spleen and kidney were congested.

UB empty

Uterus- normal in size.

No injury was found in her private parts.

Vaginal swab was taken and sent for pathological exam



Pathological report-spermatozoa not seen.

-R.B.C. not seen

-W.B.C. present 2-4/HPF

-epithelial cells present(+) vide SL No.

11 dated 19.04.2018

Time since death and PM held- within 12 hours.

Opinion-1. The cause of death was asphyxia due to hanging.

2. The above finding was not suggestive of sexual assault.”

12. It is apparent thus that PW-1 is a hearsay witness on the point of commission of rape by the appellant on the victim. The offence of commission of rape has not been conclusively established at the trial. There is no gainsaying that though Section 29 of the POCSO Act creates an exception to general Rule of innocence available to an accused in a criminal trial and puts onus on the accused to rebut the presumption and establish his innocence, such presumption shall operate only if the foundation is laid by legally admissible evidence. The presumption under Section 29 of the POCSO Act cannot lessen the primary duty of the prosecution to establish the foundational facts essential to constitute an offence under the said Act. We are thus, of the considered view that the prosecution has not been able to lay the foundation of commission of rape by this appellant on the deceased so as to constitute an offence under



Section 5 of the POCSO Act punishable under Section 6 thereof. For the same reason, the charge of commission of offence punishable under Section 376 of the IPC also cannot be said to have been established against the appellant beyond all reasonable doubts.

13. We are at dismay as to in what circumstance the trial court held the appellant guilty of commission of offence punishable under Section 306 of the I.P.C. There is absolutely no evidence that the appellant in any manner abetted commission of suicide by the victim or instigated her to do so in any manner.

14. In our considered view, the finding of conviction as recorded by the trial Court cannot be sustained and the appellant deserves to be acquitted of the charges punishable under Section 376, 306 of the IPC and Section 6 of the POCSO Act by giving him benefit of doubt.

15. Accordingly, the impugned judgment of conviction dated 20.02.2021 and an order of sentence dated 25.02.2021 passed by the learned Additional Sessions Judge-VI,-cum Special Judge, POCSO, Bettiah, West Champaran in Majhauriya P.S. Case No. 142 of 2018 (CIS No. 25 of 2018) corresponding to S.G.R. No. 41 of 2018, are set aside.



16. This appeal is allowed.

17. Since the appellant is in custody, let him be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

ranjan/annapurna-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	05.10.23
Transmission Date	05.10.23

