

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.363 of 2021

Arising Out of PS. Case No.-19 Year-2018 Thana- MAHILA P.S. District- Bhagalpur

DHARMENDRA KUMAR @ DHARMENDRA YADAV Son of Sakichand
@ Sacho Yadav Resident of Village- Milki, P.S.- Sahikund, District-
Bhagalpur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. Baxi S.R.P.Sinha, Senior Advocate
Mr. Rajive Ranjan Singh, Advocate
For the Respondent : Mr. Sujit Kumar Singh, 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 : 28-08-2023

This appeal has been preferred under Section 374(2)
of the CrPC against the judgment of conviction dated 11.01.2021
and the order of sentence dated 13.01.2021 passed by the learned
Exclusive Special Judge (POCSO)-cum-Additional District and
Sessions Judge-6th, Bhagalpur, in G.R. No.1445/2018(C) arising
out of Mahila P.S. Case No. 19/2018, whereby the appellant has
been convicted and sentenced as under: -

Cr. Appeal (D.B.) No. 363 of 2021				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Dharmendra Kumar @ Dharmendra Yadav	376D of the IPC	R.I. for 20 years	10,000/-	S.I. for one year
	Section 6 of the POCSO Act	No separate	-	-



		sentence		
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2. We are not disclosing the name of the victim and her mother so as to conceal her identity. The victim's mother (PW 2) is the informant of Bhagalpur Mahila P.S. Case No. 19 of 2018, registered for the offences 376 D/376 (2)(i) and Section 4/6 of the Protection of Children from Sexual Offences Act, 2012. A written report dated 02.04.2018 is the basis for registration of the said FIR. She alleged in her written report that on the previous day at about 3:00 to 4:00 P.M., the victim was sleeping and her daughter, while attempting to awake her for giving her food, noticed presence of blood on the victim's clothes. On enquiry, she disclosed that the appellant, co-accused Pritam Yadav and Swastik Yadav had taken her to a maize field and committed rape upon her.

3. The police, upon completion of investigation, submitted charge-sheet against the appellant and two other persons, namely, Pritam Yadav and Swastik Yadav for commission of offences punishable under Sections 376D/376(2)(i) of the IPC and Sections 4/6 of the POCSO Act. It transpires from the records that two co-accused persons, namely, Pritam Yadav and Swastik Yadav were found to be minor on an enquiry made by the Juvenile Justice Board. The appellant had also claimed to be a minor. The Juvenile Justice Board, Bhagalpur, however, found that



the appellant was major above 18 years as on the date of occurrence. Accordingly, charge was framed against this appellant only by the learned Special Court on 07.05.2019 for the offence punishable under Section 376D of the IPC and Section 4 of the POCSO Act.

4. In order to prove the charge, the prosecution examined five witnesses, namely, the victim (PW 1), the victim's mother (PW 2), the Doctor, who had examined the victim (PW 3), the Investigation Officer (PW 4) and one Dilip Yadav (PW 5). The Doctor (PW 3) proved following injury on the person of the victim: -

“(i) There is linear abrasion on right hand left side which is approx 3 and 1/2 inch long. On private parts examination there is vaginal tear with bleeding.”

5. Based on radiological examination, the victim's age was found to be between 8 to 10 years. Let it be noted, at this juncture, that there is no much controversy as regards the age of the victim being less than 12 years as on the date of occurrence.

6. The victim (PW 1) deposed at the trial that she was allured by the appellant of giving her corn (*Bhutta*) and money, by the appellant, who had taken her to a maize field. Subsequently, co-accused Pritam and Swastik also came, whereafter both of them did something dirty (*ganda kaam*) with her. She had disclosed the



occurrence to her mother. It is worthwhile mentioning that her statement was recorded under Section 164 of the CrPC. Her signature on the statement made under Section 164 of the CrPC came to be marked as Exhibit-1 at the trial and her signature on the written application as Exhibit-2. The victim's mother (PW 2) supported the prosecution's case. PW 4, the Investigating Officer, deposed *inter alia* at the trial that the maize plants in the middle of the maize field, where the occurrence was alleged to have taken place, were found trampled.

7. Apart from the oral evidence of the prosecution's witnesses the prosecution brought on record by way of exhibits following documents by way of evidence: -

Exhibit-1	Signature of victim on statement u/s 164 CrPC.
Exhibit-2	Signature of the victim on fardbeyan.
Exhibit-2/1	Signature of Ranju Devi on the Fardbeyan.
Exhibit-2/2	Registration by I.O. on written report.
Exhibit-3	Medical report.
Exhibit-4	Formal FIR.

8. Upon completion of the prosecution's evidence, 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



evidence of the prosecution's witnesses. The appellant denied all the circumstances and got examined two defense witnesses mainly to make out a case that it was because of certain disputes between the father of the appellant and the informant that a false case had been registered.

9. The trial court, after having appreciated the oral and documentary evidence adduced at the trial, reached a conclusion, with the aid of Sections 29 and 30 of the POCSO Act, that essential ingredients of Section 376D of the IPC and Section 6 of the POCSO Act stood proved at the trial. The prosecution was able to prove commission of offence of gang rape within the meaning of Section 5(g) of the POCSO Act. After having held the appellant guilty of the offences, the trial court sentenced him to imprisonment and fine as has been noted at the outset.

10. Mr. Baxi S.R.P. Sinha, learned Senior Counsel appearing on behalf of the appellant, has submitted that there are inherent contradictions in the prosecution's case. He has submitted that, on the one hand, the victim's mother (PW 2) alleged in the written report, which is basis for registration of FIR, that the victim was found sleeping and, upon enquiry, she had disclosed to her about commission of rape by this appellant and two other accused persons, however, in her deposition, the informant (PW



2) has testified that some children of Madarsa had brought the victim to her house. When the victim was brought to her house by the said children, she was unconscious and she regained consciousness in a hospital. He contends that there is manifest contradiction in the prosecution's case as disclosed in the FIR and PW 2. The evidence of PW 2 cannot be treated to be trustworthy. He has also submitted that for an occurrence, said to have taken place on 01.04.2018, the written report was filed on 02.04.2018, without any explanation for delay of one day in lodging the FIR. He has also submitted that though, at the trial, the prosecution has proved the signatures of the informant and the victim present on the FIR, the contents of the FIR have not been proved. He submits that this being a major lacuna on the part of the prosecution, the finding of the trial court based on such FIR is vitiated.

11. Mr. Sujit Kumar Singh, learned Additional Public Prosecutor representing the State, has, on the other hand, defending the finding recorded by the trial court, submitted that the prosecution successfully proved at the trial that the victim was a child below 12 years as on the date of occurrence and that she was subjected to penetrative sexual assault. In that background, in the light of the deposition of the victim that it was the appellant, who had committed sexual assault, Sections 29 and 30 of the



POCSO Act has been rightly invoked by the trial court, which casts statutory presumption of commission of offence and culpable mental state of an accused. The only defense, which the appellant took at the trial by producing two defense witnesses, was that he was falsely implicated because of some animosity between the appellant's father and victim's mother.

12. We have perused the impugned judgment and order of the trial court as well as the trial court records. We have given our thoughtful consideration to the rival submissions made on behalf of the parties as noted above. It is a case where the victim, aged about 8-10 years, complained of sexual assault by this appellant and two others. The fact that she had suffered penetrative sexual assault is corroborated by the medical evidence, relevant portion of which has been noted hereinabove. The IO, in her evidence, proved the place of occurrence at the trial by clearly mentioning that maize plants at the place of occurrence in the middle of the maize field were found trampled. This situation also corroborates the allegation against the appellant of assault at the place of occurrence. An attempt has been made on behalf of the appellant to convince this Court that the victim has been taking different stands at different stages inasmuch as, in her statement under Section 164 of the CrPC, she had not disclosed the



appellant's name. The fact, however, remains that the victim had disclosed the appellant's name to her mother, which was the basis for registration of FIR. She had taken the appellant's name also during the course of investigation, who had committed sexual assault on her. She identified the appellant in the Court.

13. In our opinion, the testimony of the victim cannot be said to be unreliable. We find force in the submission advanced on behalf of the State that since the prosecution was able to establish foundational facts to bring home the charge against the appellant of commission of offence punishable under Section 6 of the POCSO Act, statutory presumptions arose against the appellant under Sections 29 and 30 of the POCSO Act, which reads thus: -

29. Presumption as to certain offences.—

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court



believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

14. We notice, based on the materials on record, that the appellant could not rebut the presumption under Sections 29 and 30 of the POCSO Act by adducing any cogent evidence.

15. In such view of the matter, we do not find any reason to take a different view than what has been taken by the trial court by convicting the appellant of the offences punishable under Section 376D and Section 6 of the POCSO Act. The sentence of imprisonment, which has been awarded, is the minimum, which could have been imposed on the appellant.

16. We, accordingly, do not find any merit in this appeal, which stands dismissed.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Pawan-Nirmal

AFR/NAFR	NAFR
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