

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.356 of 2021**

Arising Out of PS. Case No.-4 Year-2020 Thana- MOTIHARI MUFASIL District- East
Champaran

=====

RITIK KUMAR @ NILU SAHANI Son of Ram Bharosh Sahani Resident of
Village - Lakhaura Purbari Tola, P.S.- Muffasil (Lakhaura), District - East
Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Singh, Advocate Mr. Shashank Shekhar Sinha, Advocate
For the Respondent/s	:	Mr. Dharmesh Kr. Shrivastava, Advocate Mr. Abhimanyu Sharma, 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 : 18-10-2023

This appeal has been preferred by the appellant under
Section 374(2) of the Code of Criminal Procedure, putting to
challenge a judgment of conviction dated 08.02.2021 and an order
of sentence dated 18.02.2021, passed by learned 6th Additional
Sessions Judge-cum-Special Judge (POCSO Court), East
Champaran at Motihari in POCSO Trial No. 12 of 2020, arising
out of Muffasil (Lakhaura) P.S. Case No. 04 of 2020, whereby the
appellant has been convicted and sentenced as under:-



Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 376(3) of the IPC	RI for 25 years	50,000/-	SI for six months
Section 506 of the IPC	SI for two years	500/-	SI for one month
Section 4 of the POCSO Act	RI for ten years	25,000/-	SI for six months

2. The appellant was charged of commission of the offences punishable under Sections 376-AB, 506 of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act ('POCSO Act' in short). As the trial court reached a conclusion that the prosecution could not establish, based on the evidence adduced at the trial, that the victim was less than 12 years of age, the appellant has been held guilty of the offence punishable under Section 376 (3) and Section 4 of the POCSO Act after recording a finding that the victim was less than 18 years of age as on the date of occurrence.

3. The victim's mother (PW-5) is the informant, whose written report bearing her thumb impression addressed to the Officer-in-Charge of Lakhaura Police Station in the district of East Champaran, is the basis for registration of FIR. According to the First Information Report, the victim aged 11 years had gone to wash the utensils at a hand pump at 7:00 PM on 01.01.2020 but as she did not return till late, out of anxiety, they started searching



for her but not to be found out. At 11:00 PM, the victim returned crying and disclosed to the informant that when she was washing utensils, suddenly the appellant caught her from behind, gagged her mouth, took her to a nearby bamboo orchard and forcibly committed sexual intercourse with her and left her, thereafter. The written report was given to the police on 02.01.2020 at 11:00 AM leading to registration of Muffasil (Lakhaura) P.S. Case No. 04 of 2020 for commission of the offences punishable under Sections 376-AB and 506 of the IPC and Section 4 of the POCSO Act.

4. It transpires from the materials on record that the statement of the victim (PW-6) was recorded under Section 164 of the CrPC, wherein she reiterated commission of sexual intercourse upon her by the appellant in the bamboo orchard. The victim was medically examined on the date of registration of FIR itself on 02.01.2020 on the point of her age determination as also the alleged incident of sexual assault upon her. The Medical Board constituted for determination of the victim's age opined her age to be between 13-14 years based on physical and radiological examination. The lady doctor, who had examined the victim, found the victim's hymen ruptured. The garments and frock which the victim was wearing were packed and sealed by the lady doctor for being sent for forensic examination. The victim's frock was



marked as 'A/1' and her *Janghiya* as 'A/2'. The Regional Forensic Science Laboratory, Muzaffarpur, Government of Bihar noted in its report dated 28.02.2020, the result of examination, which is as under :-

"1. Blood has been detected at places in each of the exhibits marked 'A/1' and 'A/2'.
2. Blood mixed semen has been detected in each of the exhibits marked 'A/1' and 'A/2'.
3. Serological report on origin and group of blood and semen would follow."

5. The police, upon completion of investigation, submitted its chargesheet, whereupon cognizance was taken on 17.03.2020 of the offences punishable under Sections 376-AB and 506 of the IPC and Section 4 of the POCSO Act. Subsequently charges were framed by the court on 18.12.2020 for commission of the offences punishable under Sections 376-AB and 506 of the IPC and Section 4 of the POCSO Act. The appellant denied the charge and claimed to be tried.

6. At the trial, the prosecution examined altogether eight witnesses including the doctor, who had examined the victim (PW-7), the Investigating Officer (PW-8), the victim (PW-6) and the informant (PW-4). The victim's father deposed as PW-3. PW-1, who has supported the prosecution's case, is said to to be one of



the cousins of the victim. PW-2, the wife of PW-1 and PW-5 said to be an uncle of the victim, also deposed at the trial. It is noted that the victim's age was found to be approximately 11 years by the learned Magistrate who had recorded the victim's statement under Section 164 of the CrPC.

7. In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record following documentary evidence by way of exhibits :

Sl. No.	Contents	Exhibit
1	Original complaint	Exhibit-1
2	Thumb impression of informant over complaint/ information	Exhibit-1/A
3	Statement of victim u/s 164 CrPC	Exhibit-2
4	Thumb impression of victim over the statement u/s 164 CrPC	Exhibit-2/A
5	Medical report of victim	Exhibit-3
6	Thumb impression of the victim on her medical examination report	Exhibit-3/1
7	The signature of Dr. Vandana, who appeared as witness over MLC	Exhibit-3/2
8	The age determination report	Exhibit-4
9	The signature of SHO over FIR in whose handwriting the FIR was registered	Exhibit-5
10	The FSL report	Exhibit-6

8. After closure of the evidence of the prosecution's witnesses, 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



evidence of the prosecution's witnesses. The appellant denied the incriminating circumstances which were explained to him. In response to the question put by the court under Section 313 of the CrPC as to whether he knew the victim from before i.e. prior to the date of incident, he answered in negative. In response to the question that the victim had identified him in the court, the appellant replied that it was because they were co-villagers.

9. The trial court, after having appreciated the evidence adduced at the trial, by the impugned judgment and the order, has held the appellant guilty of offence punishable under Sections 376(3), 506 of the IPC and Section 4 of the POCSO Act and has sentenced him to undergo imprisonment and fine as has been noted above.

10. Learned counsel appearing on behalf of the appellant has submitted that the prosecution failed to prove that the victim was a child within the meaning of Section 2(d) of the POCSO Act in accordance with the requirement under Section 34(2) of the said Act. He submits that it was incumbent upon the prosecution to follow the procedure prescribed under Section 94 of the Juvenile Justice (Care and Protection of Children) Act for the purpose of determination of age of the victim in the light of the Supreme Court's decision in case of *Jarnail Singh vs. State*



of Haryana reported in **(2013) 7 SCC 263**. He has next submitted that the appellant was not subjected to any medical examination requisite under Section 53A of the CrPC. He has further submitted that though, according to the FSL report, semen was detected on the undergarment of the victim, the prosecution failed to establish the appellant's connection with the semen so detected on the victim's undergarments. He has also argued that none of the prosecution's witnesses, other than the victim herself are eye-witnesses to the occurrence and they are merely hearsay witnesses and their evidence has no evidentiary value in the eye of law. He has argued that the appellant in his examination under Section 313 of the CrPC took specific plea that it was because of previous fight between the appellant and the father of the victim that a false case was registered against the appellant. He submits that it would be unjust if this Court upholds the finding of conviction recorded by the trial court by the impugned judgment based on the sole testimony of the victim.

11. Learned Additional Public Prosecutor representing the State of Bihar has submitted that the evidence of the victim has been consistent during the course of investigation, her examination under Section 164 of the CrPC and in her deposition at the trial. He has submitted that the prosecution successfully



proved at the trial that the age of the victim was less than 18 years as on the date of occurrence. There was no dispute raised at the trial as regards the victim's age. The medical evidence goes to suggest that the victim, a child, was subjected to sexual intercourse on the date of occurrence. Such being the position, taking into account the deposition of the victim and the medical evidence, the trial court has rightly convicted the appellant for the offences punishable under Section 376 (3) of the IPC and Section 4 of the POCSO Act. He has submitted that in the given facts and circumstances the trial court has rightly held the appellant guilty, also of the offence punishable under Section 506 of the IPC, in view of the clear evidence of the victim that the appellant had threatened to kill her if she disclosed the occurrence to anyone.

12. 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 thoughtful consideration to the rival submissions advanced on behalf of the parties.

13. On conjoint reading of the evidence of PW-1, PW-2, PW-3, PW-4 and PW-5 we notice that they are consistent in their testimony that the victim had gone to wash the utensils at a hand pump at 7:00 PM on 01.01.2020. She had not returned till late, which was a matter of anxiety for them. They attempted to find



her out but in vein. The victim returned at 11:00 PM on the said date. On being questioned by his family members, who are the prosecution's witnesses, she started crying and disclosed them about commission of sexual assault by the appellant. It is true that they are not eye-witnesses and it is normally not expected that there would be an eye-witness to such an occurrence. None of the witnesses have made any improvement in the prosecution's case at the trial from what was disclosed in the FIR by the victim's mother (PW-5). The evidence of the prosecution's witnesses other than the victim and the other official witnesses is only to the extent that the victim had not returned after she had gone in the evening at 7:00 PM to wash the utensils till late in the evening and when she returned at 11:00 PM she made the disclosure of commission of sexual intercourse by the appellant. The victim (PW-6) deposed at the trial that the appellant had committed wrong with her (गलत काम किया). She proved her statement recorded under Section 164 of the CrPC (Exhibit-2), her thumb impression and medical report (Exhibit-3/1).

14. The doctor (PW-7) proved the medical report and her signature. She deposed in her evidence based on examination of the victim as under :-

"The victim was about 4 feet 8 inches long, her weight was 34 kg., total no. of



teeth was 28 (14 each jaw) and her mark of identification was mole on chin. Her vaginal swab for spermatozoans was checked and found that no spermatozoa was not found. Her urine pregnancy test was also negative. Her x-ray was taken for age determination and the report upon her age determination was also furnished to the investigating officer. The age determination was conducted by the Board of Doctors consisting three doctors. I identify the doctors of the Board and can also identify their signatures appearing over the said age determination test. The test method was ossification test. The medical report is exhibited as Ext. 4.

The victim, on the date of medical inspection, informed to me that on dated 01.01.2020 at about 7:00 PM, a boy from her village namely Nilu abducted her and took her to bushes and abused her.

Upon her local examination, I found that her L.M.P. (Last Menstrual Period) is not known to her. Mild spotting was present over her vagina and her hymen was ruptured. Vagina admits tip of finger. I have sealed her clothes and handed it over to the I.O. concerned for forensic examination."

15. In her cross-examination she deposed that only internal injury was found and no external injury on the body of the victim was noticed. She specifically deposed in paragraph-7 of her cross-examination that the victim's hymen was ruptured because of the said occurrence. It is noteworthy that age determination of the victim on the basis of radiological



examination by a Medical Board has been proved at the trial by way of Exhibit-4. The opinion of the Medical Board, as recorded in the report (Exhibit-4), reads thus :-

"On the basis of physical & radiological findings– the age of the victim is between thirteen and fourteen years approx."

16. The FSL report has been brought on record by way of Exhibit at the trial, the result of which has been quoted hereinabove. It is evident from the said report that blood mixed semen was detected on the frock and *janghiya* of the victim.

17. The evidence of the doctor (PW-7) suggests that the victim was subjected to penetrative sexual assault because of which her hymen had got ruptured. It is the victim's clear deposition that the appellant had committed sexual intercourse, forcibly on 01.01.2020. The victim was medically examined on 02.01.2020. On careful reading of the oral evidence of the victim, who was put to cross-examination also, in our opinion, she does not appear to be an unreliable witness. Her deposition to the effect that she did not sustain any injury on other parts of the body, in the court's opinion, does not belie the accusation of commission of sexual intercourse by the appellant.

18. In our considered view, a passive submission by the victim, a child, will not lessen the appellant's culpability of



commission of rape punishable under Section 376(3) of the IPC. What stands proved, based on conjoint reading of the report of the FSL, the medical evidence and the deposition of the victim, that the victim was a child on the date of occurrence, who was subjected to sexual intercourse by the appellant. At the cost of reiteration, we record that none of the prosecution's witnesses have introduced any improvement in their evidence at the trial.

19. In the aforesaid background, in the Court's opinion, the prosecution brought on record by adducing cogent evidence at the trial foundational facts of commission of the offence punishable under Section 4 of the POCSO Act by the appellant. In such view of the matter, Section 29 of the POCSO Act came into operation with full force which casts on an accused reverse burden to establish his innocence. In the present case, we find that the defence did not take any step to get over the presumption under Section 29 of the POCSO Act. The conviction recorded by the trial court under Section 3 of the POCSO Act of the offence punishable under Section 4 thereof against this appellant is wholly justified and requires no interference by this Court.

20. It is worthwhile mentioning that based on the age of a child, Section 4 prescribes two kinds of punishments; firstly when penetrative sexual assault is committed on a child below 16



years of age then under Section 4(2) of the POCSO Act which act is punishable for imprisonment for a term which shall not be less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine. Sub-section (1) of Section 4 provides punishment for commission of penetrative sexual assault with imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine. Apparently, Section 4 provides graver punishment of imprisonment for not less than 20 years when the offence of penetrative sexual assault is committed on a child below 16 years of age and not less than ten years extendable to imprisonment for life and fine in other cases. For quick reference, Section 4 of the POCSO Act is being reproduced hereinbelow :-

“4. Punishment for penetrative sexual assault.

(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with 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 natural life of that person and shall also be liable to fine.



(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

21. We find, in the present case, that the appellant has been sentenced to undergo rigorous imprisonment for ten years along with fine of Rs. 25,000/- by the trial court for the offence punishable under Section 4 of the POCSO Act, which is a punishment under Section 4 (1) of the POCSO Act and not under Section 4(2) thereof.

22. The victim's age has been held to be between 13-14 years, apparently on the basis of the age determination done by the Medical Board based on radiological examination. It has been held by the Supreme Court that age determination based on radiological examination may not be accurate and a margin of two years will have to be given on either side. Situated thus, in our opinion, the benefit of doubt on the point of determination of age of the victim so as to attract Section 376(3) of the IPC shall have to be given to the accused.

23. In our considered view, the prosecution cannot be said to have established beyond all reasonable doubts that the victim was under 16 years of age as on the date of occurrence based only on the radiological examination. The appellant's conviction for the offence punishable under Section 376 (3) of the



IPC, in our opinion, cannot be sustained. However, in view of our opinion already recorded that the victim was a child below 18 years as on the date of occurrence, the fact proved against the appellant was within the definition of rape under Section 375 of the IPC, *sixthly* i.e. “with or without her consent when she is under 18 years of age”.

24. We do not find any cogent evidence adduced at the trial to establish the charge of commission of offence punishable under Section 506 of the IPC. Section 506 of the IPC reads as under :-

“506. Punishment for criminal intimidation.—Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc.—And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or I[imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.”

25. We do not find any evidence even in the deposition of the victim that she was intimidated by the appellant, in any manner whatsoever. Accordingly, the appellant deserves to be acquitted of the charge of offence punishable under Section 506



of the IPC.

26. Resultantly, based on the close analysis of the evidence adduced at the trial and in the light of the above-mentioned discussions, we conclude as under :-

(i) The appellant stands convicted of the offence punishable under Section 376 (1) of the IPC instead of Section 376(3) thereof. The finding of conviction recorded by the trial court under Section 376 (3) of the IPC stands modified accordingly.

(ii) The appellant is held guilty of commission of the offence under Section 3 of the POCSO Act punishable under Section 4(1) thereof as the prosecution cannot be said to have proved beyond all reasonable doubts that the victim was below 16 years of age as on the date of occurrence.

(iii) The appellant stands acquitted of the charge of offence punishable under Section 506 of the IPC.

27. The next question which arises for determination is as to what punishment should be imposed upon the appellant for the offences in relation to which the appellant has been held guilty by the present judgment.

28. Learned counsel for the appellant has submitted that it is the appellant's first offence. A supplementary affidavit has



been filed on behalf of the appellant that the appellant is illiterate and is unmarried. His father is mentally ill. The appellant's brother had met with an accident on 29.05.2023 whereafter he was admitted in PMCH, Patna because of which his right leg got completely damaged and amputation of right leg has been advised by the doctors. His brother has two minor children aged 2-3 years with no one in the family to look after them. The grandfather of the appellant also lives with the appellant's family. Considering the socioeconomic background of the appellant, learned counsel for the appellant has submitted that a lenient view may be taken for imposition of sentence.

29. Taking into account a holistic view of the entire matter and the submissions advanced on behalf of the appellant on the point of sentence with reference to the supplementary affidavit which has been filed on behalf of the appellant, we consider it proper in the interest of justice to impose punishment of ten years for the offence punishable under Section 376(1) of the IPC with a fine of Rs. 50,000/- failing which he shall have to undergo simple imprisonment for a term of six months. For the proved offence punishable under Section 4 of the POCSO Act, the appellant is directed to undergo rigorous imprisonment for ten years with a fine of Rs. 25,000/- in default of which he shall



undergo further imprisonment for six months. The sentences of imprisonment shall run concurrently. The appellant shall be entitled to benefit of Section 428 of the CrPC.

30. The fine imposed upon the appellant shall be given to the victim once the same is deposited by the appellant. The entire fine amount shall be payable to the victim upon its realisation.

31. Let a copy of this order be sent to the District Legal Services Authority, East Champaran at Motihari to work out computation and payment of adequate amount of compensation to the victim.

32. This appeal is party allowed with the aforesaid finding and order.

(Chakradhari Sharan Singh, J)

I agree
Nawneet Kumar Pandey, J

(Nawneet Kumar Pandey, J)

Rajesh/-

AFR/NAFR	NAFR
CAV DATE	05.09.2023
Uploading Date	01.11.2023
Transmission Date	01.11.2023

