

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.298 of 2021

Arising Out of PS. Case No.-104 Year-2018 Thana- MAHILA P.S. District- Nalanda

Niraj Kumar, S/o Badhan Tanti, Resident of Village- Lalganj, P.S.- Ben,
District- Nalanda.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mr. Ritwik Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate
Ms. Kiran Kumari, Advocate
Mr. Ganesh Sharma, Advocate
Mr. Bhola Prasad, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, 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 : 27-07-2023

By the impugned judgment and order dated 10.03.2021/ 19.03.2021 passed by the learned Additional Sessions Judge-VI- cum- Special Judge, POCSO Court, Nalanda, Bihar Sharif in connection with POCSO/ G.R. Case No. 4300 of 2018, arising out of Mahila P.S. Case No. 104 of 2018, the appellant has been convicted and sentenced as under:

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine



376 of the IPC	X	X	X
4 of the POCSO Act	RI for 14 years	10,000/-	SI for 6 months

2. The victim's name is not being disclosed in the present judgment in the interest of her privacy and dignity. Her father (PW-8) is the informant of the case. The FIR was registered based on his written report dated 02.10.2018 addressed to the Officer-in-Charge, Mahila Police Station, Nalanda, Bihar Sharif. He alleged in his written report that the victim, a minor girl aged 13 years, was a student of a school. Taking advantage of her minor age and lack of mental maturity the appellant used to sexually exploit her, after the school hours, behind the school building on the banks of a river. On further enquiry, the informant learnt about the activities of the appellant. He also alleged that the victim had become pregnant with the appellant. Once, in the evening, the victim was taken in a motorcycle and her pregnancy was terminated and she was thereafter brought back to the informant's house. His attempt to get the case registered failed, whereupon he met the Superintendent of Police and on the direction of the Superintendent of Police he submitted his written statement before the Officer-in-Charge of Mahila Police Station.

3. Based on the aforesaid allegation in the written



report of the informant, Mahila P.S. Case No. 104 of 2018 came to be registered for commission of offences punishable under Sections 376, 313 read with 34 of the Indian Penal Code and Sections 4/6 of the Protection of Children from Sexual Offences Act (POCSO Act in short).

4. Upon completion of investigation the police submitted chargesheet, whereupon cognizance was taken by the learned Special Court, POCSO on 04.12.2019 for commission of the offences punishable under Section 376 of the IPC and Sections 4/6 of the POCSO Act. Charge was thereafter framed against the appellant for commission of the offences punishable under Sections 4 and 8 of the POCSO Act. The appellant pleaded not guilty and claimed to be tried.

5. To bring home the charge against the appellant the prosecution examined ten witnesses including the informant (PW-8), the victim's brother (PW-5), victim's sister (PW-6) and the victim herself (PW-7). Three co-villagers of the informant were examined as PWs-1, 2 and 3, all of whom came to be declared hostile at the instance of the prosecution as they did not support the prosecution's case. The Investigating Officer deposed as PW-9. The doctor, who was one of the members of the Medical Board and proved the report of the Board regarding



determination of the age of the victim, deposed as PW-10 at the trial.

6. The prosecution adduced documentary evidence also at the trial including signature of the informant on the typed report (Exhibit-1), the endorsement on the typed report in the handwriting and signature of the SHO Mahila P.S (Exhibit-2), signature of SHO on formal FIR(Exhibit-3) and the report of the Medical Board (Exhibit-4).

7. 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 circumstances emerging against him based on the evidence of the prosecution's witnesses adduced at the trial. The questions were answered in negative by the appellant. The defence got marked as exhibit, the signature of the informant (PW-8) on a petition filed on his behalf in the court of ADJ-I, the then Special POCSO Court and the signature of learned counsel through whom the said affidavit was filed.

8. After having analyzed and appreciated the evidence of the prosecution's witnesses, the trial court reached a conclusion that the prosecution was able to prove the charge of commission of offence punishable under Section 376 of the



Indian Penal Code and Section 4 of the POCSO Act against the appellant beyond all reasonable doubts and sentenced him to imprisonment and fine as has been noted above.

9. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant has submitted that the prosecution miserably failed to bring home the charge of commission of offence punishable under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act. He has submitted that the prosecution failed to prove the basic fact that the victim was a minor child, when the First Information Report was registered. He contends that according to the informant himself, the victim was studying in a school. The prosecution did not make any endeavour to prove, based on the entries made in the school register that the victim was a child as on the date of lodging of the FIR. He has further submitted that the allegations made in the First Information Report stand falsified by the deposition of the victim herself at the trial, inasmuch as, the victim has not deposed that she had ever become pregnant and that the appellant was instrumental in getting the pregnancy terminated. He has further argued that PWs 5, 6 and 8 have vaguely deposed in their evidence regarding commission of sexual assault by the appellant upon the victim. He has submitted that it is evident



from the evidence of PW-5, the brother of the victim that his statement was not recorded during the course of investigation and for the first time, he deposed at the trial in support of the charge, though with vague evidence. He has further submitted that there is no evidence of penetrative sexual assault upon the victim caused by the present appellant and, therefore, the charge of commission of rape under Section 376 of the IPC and penetrative sexual assault under Section 4 of the POCSO Act cannot be said to have been proved by the prosecution at the trial. He has argued that the accusation of continuous sexual encounters by the appellant with the victim, as disclosed in the First Information report and in the evidence of the informant at the trial, is not supported by the victim herself in her deposition at the trial. He contends that no time nor date of sexual assault is mentioned in the evidence of either of the witnesses. He has argued that the finding of conviction recorded by the trial court is patently erroneous requiring this court's interference in the present appeal.

10. Learned Additional Public Prosecutor appearing on behalf of the State has submitted that the victim's age has been found to be 16 years by the trial court at the time when she was deposing as a witness at the trial. He further submits that the



Medical Board has found the victim's age to be 15 years. In the said background, since the prosecution's witnesses have consistently deposed that the victim was being sexually exploited by the appellant for a long period of time, it can be easily inferred that the victim was a child when she was subjected to sexual assault by the appellant.

11. We have perused the impugned judgment and order of the trial court and the lower court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the prosecution.

12. In the present case, three out of the ten prosecution's witnesses have been declared hostile at the instance of the prosecution. It has been the prosecution's case that the informant had learnt about sexual assaults caused by this appellant upon the victim from several persons including the headmaster/ teacher of the school where the victim studied. The teacher of the said school Pramod Lal came to be examined at the trial as PW 4. PW 4 did not support the prosecution's case in his evidence at the trial in any manner whatsoever except that the victim was a student of standard-V in the school and regularly came to the school for studies.

13. In the facts and circumstances of the present case,



we deem it proper to take up the evidence of the victim herself, who can be considered to be the best witness of the occurrence; if her evidence is found to be trustworthy and without any embellishment. She deposed at the trial that the appellant had taken her to the side of river. Further, co-accused Chandan Kumar and the appellant had taken her in a motorcycle. She was deposing before the trial court on 02.03.2020. She deposed at the trial that appellant had done something dirty with her (गन्दा काम किया) ten days ago. She identified the appellant who was present in the dock. In the cross-examination, she deposed that she was not interrogated by anyone in relation to the occurrence. She further deposed that her sister and the 'Madam' had enquired from her about the occurrence. Prior to lodging of the present case, her father had lodged a case against the appellant nearly two months before lodging of the present case. Both the parties used to quarrel because of the said case. She expressed her ignorance about filing of written report by her father (the informant) leading to registration of the FIR of the present case. There is no evidence in the deposition of the victim (PW-7) that she had become pregnant because of any sexual assault committed by the appellant on her. It is difficult to conclude based on the evidence of PW 7 that she was subjected to



penetrative sexual assault by the appellant so as to constitute offence punishable under Section 4 of the POCSO Act or Section 376 of the IPC.

14. Coming to the evidence of the informant (PW 8), we find that in his examination-in-chief he deposed that the appellant's brother, in connivance with other anti-social elements had got the pregnancy of the victim terminated in a private clinic. According to him, the appellant had been sexually assaulting the victim for last 1-2 months before 06.06.2018. It can be easily discerned from the evidence of PW 8 (the informant) that there is nothing specific in his deposition and in any case his deposition is not consistent with the evidence of the victim herself.

15. PW 5, brother of the victim, deposed for the first time at the trial who was not examined during the course of investigation by the police and his statement under Section 161 of the CrPC was not recorded. The depositions of PWs 5 and 6 are completely vague on the point of any sexual assault committed by the appellant on the victim.

16. The Investigating Officer (PW-9) in her cross-examination deposed that the victim had never stated before her (IO) that her pregnancy was terminated. Neither the victim nor



the informant had stated about the day, date or year when the occurrence of sexual assault had taken place, in their statements taken during the course of investigation. According to the Investigating Officer, the year of the occurrence was disclosed by the sister of the victim (PW 6) as 2017. From the deposition of the IO it further appears that the informant did not allow medical examination of the victim or the victim's statement being recorded under Section 164 of the CrPC.

17. In our opinion, in order to bring home charge under Section 4 of the POCSO Act, it is obligatory on the part of the prosecution to prove two fundamental facts. Firstly, that the victim is a child within the meaning of Section 2 (1)(d) of the POCSO Act and secondly, the accused has committed penetrative sexual assault within the meaning of Section 3 of the POCSO Act. Section 3 of the POCSO Act reads as under :-

"3- Penetrative sexual assault.- A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the



vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

18. We do not find from the evidence adduced at the trial that the prosecution could successfully establish a case of penetrative sexual assault on the victim. The prosecution completely failed to prove its case that the victim had become pregnant and that the pregnancy was aborted. As a matter of fact, the prosecution totally failed to establish the case of penetrative sexual assault based on the evidence of the prosecution's witnesses at the trial. Further, the prosecution could not conclusively establish its case that the victim was a child within the meaning of Section 2(d) of the POCSO Act.

19. Be that as it may, since we are of the opinion that the ingredients, fundamental to establish the charge of penetrative sexual assault, are missing, conviction of the appellant for the offence punishable under Section 4 of the POCSO Act cannot be sustained. For the same reason, the appellant's conviction for the offence punishable under Section 376 of the IPC cannot be sustained.

20. Accordingly, the impugned judgment of conviction and order of sentence dated 10.03.2021/ 19.03.2021 passed by



the learned Additional Sessions Judge-VI- cum- Special Judge, POCSO Court, Nalanda, Bihar Sharif in connection with POCSO/ G.R. Case No. 4300 of 2018, arising out of Mahila P.S. Case No. 104 of 2018 are set aside. The appellant stands acquitted of the charge of offences punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act.

21. This appeal is allowed accordingly.

22. The appellant is in jail custody. Let him be released forthwith, if he is not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/Nirmal

AFR/NAFR	NAFR
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