

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.306 of 2021

Arising Out of PS. Case No.-11 Year-2020 Thana- MAHILA P.S. District- Bhagalpur

MUKESH DAS Son of Late Bhikhan Das Resident of Village - Harijan Tola
Khairpur, P.S. Kharik, Distt. - Bhagalpur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Pankaj Kumar Sinha, Advocate Mr. Rajiv Kumar Singh, Advocate Mr. Diwakar Sinha, Advocate Mr. Raunak Kumar Singh 'Pankaj', Advocate
For the Respondent State:		Ms. Sashi Bala Verma, A.P.P.
For the Informant	:	Mr. Ashok Kumar Choudhary, Senior Advocate Mr. Amish Kumar, Advocate Mr. Krishna Chandra Jha, Advocate Mr. Akshansh Ankit, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR

PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 22-08-2023

The victim of the alleged sexual assault is a dumb girl.

One of the primordial issues which has arisen in the present criminal appeal, is as to whether there has been due compliance of Section 119 of the Evidence Act, while examining the victim (PW 2) at the trial.

2. This appeal has been preferred under Section 374(2) of the CrPC against the judgment of conviction dated 05.04.2021 and the order of sentence dated 12.04.2021 passed by the learned Exclusive Special Court (POCSO-II)-cum- 7th Additional District



and Sessions Judge, Bhagalpur, in POCSO Case No. 54 of 2020 arising out of Naugachia Mahila P.S. Case No. 11 of 2020, whereby the appellant has been convicted and sentenced as under:
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Cr. Appeal (D.B.) No. 306 of 2021				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Mukesh Das	Section 4 of the POCSO Act	R.I. for life	50,000/-	S.I. for six months
	Section 448 of the IPC	S.I. for one year	-	-

3. Utmost care is being taken to ensure that the victim’s identity is not revealed. For the said purpose, neither the victim’s name nor the names of her near relatives is being disclosed in the present judgment and order.

4. The victim’s father (PW 1) is the informant of Naugachia Mahila P.S. Case No. 11 of 2020 registered on 24.05.2020 for commission of offence punishable under Section 376, 448 and 506 of the IPC and Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act) in relation to an occurrence, which had taken place on 14.05.2022. It is the informant’s case, as disclosed in his written report addressed to the Officer-in-Charge of Mahila P.S. Naugachia, Bhagalpur, that, on 14.05.2020, he and his wife had gone on 04.05.2020 for harvesting of crops to Sonbarsha *diara* leaving their minor daughter, a dumb



girl, behind in the house. Taking advantage of victim's solitude in the house, the appellant committed rape upon the victim in the informant's house. The victim's statement was recorded by a Magistrate under Section 164 of the CrPC on 28.05.2020 in the presence of the informant with the aid of her signs and gestures since the victim was unable to speak. She is said to have disclosed in her statement under Section 164 of the CrPC with sign and gestures, how was she sexually assaulted by the appellant. The statement of the informant was also recorded under Section 164 of the CrPC, wherein he deposed that, on 14.05.2020, he and his wife had gone to the fields for harvesting and in the house the victim and their younger son were there. On 20.05.2020, when they returned in the evening at about 4.30 PM, the victim disclosed to them about the sexual assault committed by the appellant. The victim was subjected to medical examination on 24.05.2020. No marks of violence or injury was found on the body of the victim, external or internal. As per radiological report, the victim's age was found to be between 14-16 years as on the date of examination.

5. The police, upon completion of investigation, submitted charge-sheet on 31.07.2020 for commission of offence punishable under Section 354B, 448 of the IPC and Section 4 of



the POCSO Act against the appellant, whereafter cognizance was taken of the offence punishable under the abovementioned provisions on 03.09.2020.

6. At the trial, the prosecution examined altogether seven witnesses including the IO (PW 4), the Doctor (PW 7), the informant (PW 1) and the victim (PW 2). The victim’s aunt deposed as PW 3 at the trial. PWs 5 and 6 are the co-villagers, who are hearsay witnesses. Apart from oral evidence, the prosecution also brought on record the following documentary evidence to bring home the charge against the appellant: -

1.	Signature of the informant over the written report	Exhibit-1
2.	Formal FIR	Exhibit-1/a
3.	Signature of the victim over statement under Section 164 CrPC	Exhibit-2
4.	Charge-sheet	Exhibit-3
5.	Medical Report	Exhibit-4

7. 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. The appellant answered the question in negative. The appellant, while pleading his innocence in his statement under Section 313 of the CrPC, stated that the victim’s father (the informant) had borrowed from the appellant vegetables



and payment against the same was due. As the appellant was pressing his demand for payment of the money, the informant lodged a false case against him. The defence got examined two witnesses, namely, Bablu Das (DW 1) and Abhinandan Kumar (DW 2), who supported the case of the defence that there was some amount due on the informant to the appellant, which he was not paying, for which there was a meeting held earlier in the village.

8. The trial court, after having evaluated the evidence adduced at the trial, has reached a conclusion by the impugned judgment that the prosecution was able to prove the charges of commission of offences punishable under Sections 448, 376 of the IPC and Section 4 of the POCSO Act. As regards the charge for commission of offence punishable under Section 354B of the IPC, the trial court has taken a view that the charge is inclusive of the proved offence punishable under Section 376 of the IPC.

9. Learned counsel appearing on behalf of the appellant has submitted that the finding recorded by the trial court is based on the evidence of the prosecutrix, who was unable to communicate verbally, is unsustainable, the victim's deposition having not been taken in accordance with the requirement under Section 119 of the Evidence Act. He submits that the *proviso* to



Section 119 of the Evidence Act mandates that if a witness is unable to communicate verbally, the Court shall be required to take assistance of an interpreter or a special educator in recording the statement and that such statement shall be videographed. He contends that the trial court erred in recording the evidence of the victim in tune with the requirement under Section 119 of the Evidence Act and has wrongly relied upon the evidence of the victim as understood by him with the aid of the informant (PW 1) and the victim's mother. He has placed reliance on the Supreme Court's decision in case of *State of Rajasthan v. Darshan Singh*, reported in (2012) 5 SCC 789. He has further submitted that the case of the prosecution that the victim was subjected to sexual assault on 14.05.2020 and the informant learnt about the occurrence on 22.05.2020 does not appear to be probable in natural circumstances. It has also been argued that in any case there has been delay in registration of FIR and that the accusation of commission of rape has not been corroborated by medical evidence.

10. Learned Additional Public Prosecutor representing the State, defending the impugned finding of conviction recorded by the trial court, has argued that in the present case the trial court has rightly held the appellant guilty of the offences by recording



the evidence of the victim herself. The victim was able to express through her sign and gesture. She has submitted that the trial court rightly took the aid of the victim's mother, who was present in the court to understand what the victim, who was unable to communicate verbally, was trying to communicate through her signs and gestures. She submits that non-corroboration of the evidence of sexual assault by medial evidence is immaterial when the victim herself was in a position to communicate to the court the nature of act done by the appellant on her, which constitutes offence punishable under Section 376 of the IPC and Section 4 of the POCSO Act.

11. Learned counsel appearing on behalf of the informant has drawn the court's attention that the trial court has taken note of the fact that the victim was able to read and write and she had, in fact, written something, the transcript of which could not be preserved with the record by the ministerial staff. He has submitted that the trial court has followed the requirement of recording evidence of the person not able to verbally communicate as laid down under Section 119 of the Evidence Act and the Supreme Court's decision in case of *Darshan Singh* (supra).

12. We have perused the impugned judgment and order of the trial court as well as the trial court's records. We have given



our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted above.

13. In order to answer the question which is a central issue in the present case, we need to take up the deposition of the victim (P 2) herself. From her deposition it transpires that the trial court before taking her deposition ascertained that she was able to read. The trial court further noticed that the mother of the victim was present when the evidence of the victim was being recorded by the trial court. The trial court has noted, while recording the evidence of PW 2, the victim that the mother of the victim was able to understand and explain the expressions of the victim and the victim's mother told the court as to what the victim was trying to convey at the trial. It is apparent from the deposition of PW 2 that the narration of the victim's mother based on expressions/signs/gestures of the victim has been treated as evidence of the victim by the trial court. The victim is said to have expressed that when she was in her house on the date of occurrence the appellant came with a cigarette and made her drink water with the cigarette mixed in that. Thereafter, the appellant lifted her in his lap, put off her pant and committed rape upon her, whereafter she became unconscious. When the victim left the house, her father returned from the Diara and when she regained



conscious, she disclosed every aspect to her father (PW 1). The appellant's misdeed was taken to the society where the appellant was present and the victim had chased the appellant with a *Katta* to assault him. It further transpires that the trial court has recorded evidence of the victim during her cross-examination. In her cross-examination she is said to have expressed that the appellant was gang leader of the tower (possibly mobile tower) and he used to engage the victim and others on payment of a sum of rupees three hundred per day which was paid weekly. The appellant used to engaged her father (PW 1) and her uncle, a full brother of PW 1. It is noted at this juncture that PW 3 is the wife of the said uncle and thus the victim's aunt. It also emerged during the cross-examination that the transaction borrowing an amount of Rs.15,000/- had taken place between the victim's uncle and the appellant, in relation to which a panchayat was also held.

14. After having noticed relevant depositions of the witnesses, it is considered desirable to address the issue of evidence of the victim, who was unable to communicate verbally.

15. Section 119 of the Evidence Act, 1872 reads as under:

"119. Witness unable to communicate verbally.—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but



such writing must be written and the signs made in open court, evidence so given shall be deemed to be oral evidence:

Provided that if the witness is unable to communicate verbally, the court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be video-graphed.”

16. The Supreme Court in case of ***Darshan Singh*** (supra), while dealing with Section 119 of the Evidence Act, 1872, has observed that the only requirement under the said provision is that the witness may give his/her evidence in any manner in which he/she can make it intelligible, as by writing or by sign, and such evidence can be deemed to be an oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods of head is admissible and such nods and gestures are not only admissible, but possesses self-evidentiary value. While holding that a deaf and dumb person can be a competent witness, the court in the case of ***Darshan Singh*** (supra) held in Paragraph 29 as under:-

“29. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the



interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.”

17. Contrary to the law laid down by the Supreme Court in the case of **Darshan Singh** (supra), the trial court in the present case did not provide any interpreter for the purpose of recording the statement of victim in sign language. In our opinion, the trial court grossly erred by relying on the statement of the victim's mother for the purpose of recording evidence of the victim (PW 2). It is pertinent to mention that the victim's mother has not been examined at the trial. Further, if the evidence of the victim as recorded by the trial court is taken to be correct, according to the victim, the informant had returned soon after the occurrence, whereupon she had disclosed to him the details of the occurrence. On the other hand, it is the specific case of the prosecution that the informant had returned six days after the occurrence, i.e., on 20.05.2020, whereafter the victim had disclosed to the informant and his mother about the occurrence. Evidence of PW 3 is also significant in the present case. PW 3 is wife of the full brother of the informant and, thus, the victim's aunt. According to her evidence, at the time of occurrence she was there in the house and she had learnt about the occurrence from the victim. In the



aforesaid background, the fact that the medical evidence does not at all corroborate the accusation of rape becomes important.

18. To sum up, we are of the view, on careful analysis of the evidence of the witnesses relied upon by the trial court, that the trial court has treated, as evidence, disclosures made by the victim's mother as evidence of the victim at the trial, which was impermissible. Secondly, we find patent inconsistencies in the evidence of the informant and that of the victim on the point of the date when the victim had disclosed to the informant about the occurrence. Evidence of PW 3 that she was present in the house when the occurrence had taken place and she did not inform about the occurrence to anyone is another circumstance which creates serious doubt on the prosecution's case. These facts coupled with the fact that the medical evidence does not corroborate the charge of commission of sexual assault makes the finding of conviction vulnerable. Last but not the least, we find that the victim has been held to be below 18 years of age based solely on the radiological examination and treated to be a child within the meaning of Section 2(1)(d) of the POCSO Act, without undertaking any exercise for determination of her age in accordance with the procedure prescribed. The delay in registration of FIR is another



aspect which cannot be ignored in the present facts and circumstances of the case.

19. Situated thus, we do not find it safe to uphold the appellant’s finding of conviction recorded by the trial court.

20. Accordingly, the impugned judgment of conviction dated 05.04.2021 passed by the learned Exclusive Special Court (POCSO-II)-cum- 7th Additional District and Sessions Judge, Bhagalpur, in POCSO Case No. 54 of 2020 arising out of Naugachia Mahila P.S. Case No. 11 of 2020 is set aside. The appellant stands acquitted of the charge of commission of offences punishable under Section 448 of the IPC and Section 4 of the POCSO Act giving him benefit of doubt. The order of sentence dated 12.04.2021 also stands set aside.

21. This appeal is allowed.

22. 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-Suraj

AFR/NAFR	NAFR
CAV DATE	N/A
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