

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.475 of 2021

Arising Out of PS. Case No.-550 Year-2019 Thana- MAJHAULIA District- West Champaran

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KRISHNA RAM S/O TUNNA RAM @ NAND KISHORE RAM R/O
VILLAGE-MAUZA, BHUARWA, WARD NO.14, P.S-MANJHAULIA,
DISTRICT-WEST CHAMPARAN.

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Binay Kumar, Adv Mr. Vivek Kumar, Adv
For the Respondent/s	:	Ms. Shashi Bala Verma, APP

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 04-09-2023

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 assailing the judgment of conviction dated 19.03.2021 and an order of sentence dated 24.03.2021 passed by the learned ADJ-VI cum Special Judge POCSO, Bettiah (West Champaran) in CIS No. 117 of 2019 arising out of Majhauilya P.S. Case No. 550 of 2019 and SGR No. 116 of 2019, whereby and whereunder 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	-----	-----	-----
Section- 6 of the POCSO Act	Imprisonment for life	Rs.50,000/-	-----
Section- 8 of the POCSO Act	Rigorous Imprisonment for 5 years	Rs.20,000/-	-----

2. We are not disclosing the victim’s name and the name of her family members so as to protect her identity. The witnesses are being mentioned in the present judgment as PWs. without disclosing their names. The First Information Report was registered on 22.10.2019 based on a written report of the informant of the same date addressed to the Officer-in-charge of Majhaulia Police Station in the district of West Champaran, disclosing commission of offence punishable under Section 376 of the Indian Penal Code (hereinafter referred to as the ‘IPC’ in short) and Section 4 of the Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as the ‘POCSO Act’ in short). In her written report, she claimed that she was 15 year old and nearly one year ago, when she had gone to ease herself out of her house, the appellant, taking advantage



of her solitude, with false assurance to marry her, had established sexual relationship with her. Till, before the lodging of the FIR, the appellant continued establishing physical relationship with her. When the informant insisted for marriage, the appellant declined to marry her and thereafter started threatening her variously. Soon after registration of the FIR, on 24.10.2019, the victim (PW-1) was subjected to medical examination. During medical examination, the Doctor (PW-3) assessed the victim's age to be above 17 years and below 19 years. The doctor found no sign of recent sexual intercourse. It is noteworthy that it is not the prosecution's case that there was any sexual assault upon the victim soon before the registration of the FIR. The police, upon completion of investigation, submitted chargesheet whereupon cognizance was taken for commission of offence punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act against the appellant. Charges were subsequently framed on 28.01.2020 against the appellant for commission of offences punishable under Section 376DA of the IPC and Sections 4, 6, 8 and 12 of the POCSO Act.

3. At the trial, the prosecution got examined five witnesses, namely, the victim (PW-1), the victim's mother (PW-



2), victim's father (PW-5), the Doctor, who had medically examined the victim (PW-3) and the Investigating Officer of the case (PW-4). The prosecution also produced following documentary evidence to sustain charges against the appellant:-

“Exhibit 1 is the written report of the informant which is the basis of the FIR.

Exhibit 1/a is the signature of the victim as well as the Informant.

Exhibit 1/b is the endorsement of the Officer-in-charge over the written statement of the informant.

Exhibit 1/c is the signature of the Officer-in-charge over the formal F.I.R.

Exhibit 2 is the statement of the victim u/s 164 of the Cr.P.C.

Exhibit-2/a is Signature of the victim u/s 164 Cr.P.C.

Exhibit-3 is the School Transfer Certificate of the Victim.

Exhibit-4 is the Medical report.

Exhibit-4/a is the Signature of the Doctor on Medical Report.

Exhibit-5 is the application of the I.O. to the Medical Officer for examination of the victim.”

4. 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 evidence of the prosecution's witnesses. The appellant denied the incriminating circumstances against him and got exhibited following documents by way of evidence:-

“Exhibit A is the receipt of the Public Grievance Cell of the office of Superintendent of Police, Bettiah

Exhibit B is the F.I.R. of Majhauriya P.S. Case No. 627/2019.

Exhibit C is the Charge-sheet of Majhauriya P.S. Case No. 627/2019.



Exhibit C/1 is again the Charge-sheet of Majhauriya P.S. Case No. 627/2019.

Exhibit X is the application from the mother of the accused namely Janki Devi before the Superintendent of Police, Bettiah.”

5. The defence also examined one witness, DW-1 (the mother of the appellant).

6. Learned counsel, appearing on behalf of the appellant, has submitted that the learned trial court’s finding that the victim was a child about 15 years of age as on the date of occurrence is without any cogent evidence and such finding is manifestly erroneous. He contends that soon after filing of the FIR, the victim was subjected to medical examination wherein her age came to be determined as ‘17-19’ years. The prosecution did not prove the age of the victim at the trial in accordance with the requirement under Section 34(2) of the POCSO Act so as to make out a case that the victim was a child during the period of occurrence and thus failed to prove the charge of commission of offence punishable under the provisions of the POCSO Act and Section 376(3) of the IPC. He has submitted that it has been deposed by the victim’s father in his evidence that two criminal cases were there between him and this appellant, one was registered as Majhauriya P.S. Case No. 550 of 2019 and the other registered as Majhauriya P.S. Case No. 627 of



2019. In connection with Majhauria P.S. Case No. 627 of 2019, the brother of PW-5 was in jail and in connection with the other, PW-5 was in custody for five months. The victim's mother (PW-2) also deposed that the appellant had sexually exploited the victim on false assurance of marrying her. Coming to the evidence of (PW-1), we notice that she claimed her date of birth to be 09.05.2003 and supported her version, as disclosed in the First Information Report that the appellant had committed rape upon her and when the victim had told the appellant that she would complain to her parents, the appellant had assured to marry her and thereafter he continued sexually exploiting her. The victim produced before the court a School Transfer Certificate, issued on 06.04.2018, wherein the victim's date of birth was mentioned as 09.04.2003 and her date of admission in the School as 03.03.2010. The original copy of the School Transfer Certificate was returned to the victim by the court and its photostat copy was kept on record marked as Exhibit-3. It is evident from the deposition of the victim (PW-1) that an objection was taken on behalf of the defence that in the absence of original certificate, the photostat copy of the School Transfer Certificate may not be marked as exhibit. A photostat copy of the School Transfer Certificate was handed over to the defense



counsel. In her cross-examination, she deposed in paragraph 35 at the trial that she had stated in her statement recorded under Section 164 of the CrPC before the Magistrate that she wanted to marry the appellant.

7. From the tenor of the written report of the informant and the depositions of the witnesses, it can be easily inferred that according to the victim herself she was a consenting party to the sexual intercourse between her and the appellant, if any. Denial by the appellant to marry her, according to the victim was the proximate reason for lodging of the FIR. It is true that a person below 18 years and therefore a child within the meaning of Section 2(1)(d) of the POCSO Act cannot be treated to be a consenting party to sexual intercourse and a person entering into sexual relationship with a child below the age of 18 years is liable for punishment under the provisions of the POCSO Act. Further, if a girl is found to be below 16 years of age, a person engaged in sexual intercourse with her would be liable for punishment under Section 376D of the Indian Penal Code.

8. The moot question, in the present case is as to whether the prosecution can be said to have proved beyond all reasonable doubts at the trial that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act to attract the



provisions of the POCSO Act and below 16 years of her age to attract Section 376(3) of the IPC.

9. Be it noted that the FIR was registered on 22.10.2019 and the victim was subjected to medical examination on 24.10.2019. The Doctor, who had examined the victim on 24.10.2019 opined that the victim's age was between 17 years to 19 years. In between the disclosure made by the victim in her written report leading to registration of FIR and the finding of the doctor that the victim was aged about 17 to 19 years, there was no other material for the police to reach a conclusion that the victim was a child within the meaning of Section 2 (1)(d) of the POCSO Act.

10. Thus, in the light of the medical opinion as regards the victim's age, a dispute was there as to whether the victim was a child or not. Section 34(2) of the POCSO Act casts an obligation on the Special Court to determine whether a person is a child or not after satisfying itself about the age of such person. It further casts an obligation that the court shall record its reason for such determination. Further, it has been laid down in case of *Jarnail Singh Vs. State of Haryana* reported in (2013) 7 SCC 263, that if a question arises as regards age of a victim under the POCSO Act, the procedure prescribed under the Juvenile Justice



Act shall be adopted to determine, the age of such victim.

Paragraph nos. 22 and 23 of the said judgment reads as under:-

“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as “the 2007 Rules”). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12. *Procedure to be followed in determination of age.*—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either *(i)*, *(ii)* or *(iii)* of clause *(a)* above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact



assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our



considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.”

11. It may be mentioned that with the enactment of the Juvenile Justice (Care and Protection Of Children) Act, 2015, the Juvenile Justice (Care and Protection Of Children) Act, 2000 came to be repealed. Under the Juvenile Justice (Care and Protection Of Children) Act, 2000, the Juvenile Justice (Care and Protection Of Children) Rules 2007 was framed, Rule 12 of



which prescribed the procedure to be followed in determination of age. After repeal of the Juvenile Justice (Care and Protection Of Children) Act, 2000 and with the enactment of the Juvenile Justice (Care and Protection Of Children) Act, 2015, Section 94 of the Juvenile Justice (Care and Protection Of Children) Act, 2015 lays down the procedure for determination of age of a person which reads as under:-

“Section 94. Presumption and determination of age.

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:



Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

12. In the present case, when the victim was brought to the Doctor her age came to be assessed as between 17 to 19 years. In such circumstances, in the court’s opinion, following the law laid down in the case of *Jarnail Singh (supra)*, the prosecution ought to have undertaken the process of determination by seeking evidence in accordance with the procedure prescribed under Sub-Section (2) of Section 94 of the Juvenile Justice (Care and Protection Of Children) Act, 2015.

13. Merely, on the basis of statement of the victim in her written report and her deposition at the trial, she could not be treated to be a child within the meaning of Section 2 (1)(d) of the POCSO Act, so as to attract the penal provisions under the said Act. As there was no exercise undertaken at all for the purpose of conclusive determination of the age of the victim so as to apply the provisions of the POCSO Act, there could be no conclusive satisfaction recorded by the trial court about the age of the victim. In such circumstance, the prosecution having failed to establish conclusively the fact that the victim was a



child within the meaning of Section 2 (1)(d) of the POCSO Act, the charge of commission of offence under the provisions of the POCSO Act cannot be said to have been proved against the appellant based on the evidence of the prosecution's witnesses. Accordingly, the finding of the trial court holding the appellant guilty of the offence punishable under Sections 6 and 8 of the POCSO Act is unsustainable. For the same reason, the trial court's finding that the victim was aged about 15 years cannot be sustained. We reiterate that there is no due determination nor any conclusive finding based on any cogent evidence that the victim's age was 15 years as on the date of occurrence and lodging of the FIR. We need also to keep in mind that flexibility of 2 years is to be given in case of determination of age with the aid of radiological/ ossification test as has been laid down in the case of *Jyoti Prakash Rai v. State of Bihar*, reported in (2008) 15 SCC 223.

14. The next question which comes for consideration is, as to whether based on the evidence of the prosecution's witnesses, the prosecution can be said to have proved commission of offence of rape punishable under Section 376D of the Indian Penal Code against the appellant for having had sexual intercourse with the victim on false assurance of



marriage. It is noticeable that there is no evidence that the appellant was incapacitated by virtue of law for any other reason to marry the victim. Even if the prosecution's case that the appellant had assured the victim to marry her, the prosecution has not been able to prove that assurance was falsely made. Refusal by the appellant to marry the victim *per se* will not amount to giving false assurance of marriage unless it is conclusively proved that such assurance was false from its very inception. As the victim cannot be held to be a child within the meaning of Section 2(1)(d) of the POCSO Act, from the evidence of the witnesses and she had herself consented to sexual intercourse, it cannot be said that the victim was not knowing the consequences of such acts.

15. In such view of the matter, we are of the considered opinion that the findings of conviction recorded by the trial court cannot be sustained. The appellant deserves to be acquitted by giving him benefit of doubt. We hold accordingly.

16. The appellant stands acquitted of the charge for commission of offences punishable under Sections 6 and 8 of the POCSO Act and Section 376(3) of the Indian Penal Code.

17. Accordingly, the impugned judgment of conviction dated 19.03.2021 and the order of sentence dated 24.03.2021



passed by the learned ADJ-VI cum Special Judge POCSO, Bettiah (West Champaran) in CIS No. 117 of 2019 arising out of Majhauriya P.S. Case No. 550 of 2019 and SGR No. 116 of 2019, is hereby set aside.

18. This appeal is allowed.

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

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

ranjan/nirmal-

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