

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.476 of 2021

Arising Out of PS. Case No.-12 Year-2020 Thana- MAHILA P.S. District- Kaimur (Bhabua)

MANISH KUMAR Son of Vijaymal Ram Resident of Village - Biuri, P.S.-
Chand, Distt.- Kaimur (Bhabhua).

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. Vikram Deo Singh, Advocate
Mr. Shankar Kumar, Advocate
For the Respondent : Km. Shashi Bala Verma, 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 : 06-09-2023

This appeal has been preferred under Section 374(2)
of the CrPC against the judgment of conviction dated 17.06.2021
and the order of sentence dated 23.06.2021 passed by the learned
Additional Sessions Judge-VIth-cum-Special Judge POCSO Act,
Kaimur (Bhabhua), in POCSO Case No. 13 of 2020 arising out of
Mahila (Bhabhua) P.S. Case No. 12 of 2020, whereby the appellant
has been convicted and sentenced as under: -

Cr. Appeal (D.B.) No. 476 of 2021				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Manish Kumar	376 of the IPC	R.I. for Ten years	10,000/-	R.I. for six months
	323 of the IPC	R.I. for One year	1,000/-	R.I. for three months



	341 of the IPC	S.I. for one month	-	-
	Section 4 of the POCSO Act	R.I. for 12 years	10,000/-	R.I. for six months

2. All the sentences have been directed to run concurrently.

3. The victim is the informant (PW-2), whose name has not been disclosed in the present the judgment and order. We have taken utmost care to ensure that the name of her parents, who have deposed at the trial as witnesses, do not appear in the judgment so as to protect the identity of the victim. The victim/informant is being referred to, in the present judgment, as PW-2, whereas her father as PW-1.

4. The written report of PW-2, addressed to the Officer-in-Charge, Mahila Police Station dated 09.03.2022 in respect of the occurrence, which had taken place on 08.04.2020, is the basis for registration of Mahila(Bhabhua) P.S. Case No.12/2020, disclosing commission of the offences punishable under Sections 341, 323, 376 of the Indian Penal Code and Section 4 of the POCSO Act. The victim claimed her age to be fifteen years. At 4:00 PM on 08.03.2020, she had gone out of her village to collect grass on the banks of a river. This appellant, taking advantage of her loneliness, caught hold of her. He gagged the victim (PW-2) with *Gamcha* and committed rape upon her. She became



unconscious, whereafter the appellant sprinkled water on her face for her to regain consciousness and fled away. When she regained consciousness, there was none at the place of occurrence. She returned home and thereafter explained to her parents about the occurrence. On 09.03.2020, the victim (PW-2) was subjected to medical examination for ascertaining her age and examination in relation to sexual assault. We consider it beneficial to place in verbatim the report of medical examination, which came to be proved by PW-3, a doctor, who was member of the Medical Board, constituted for examination of PW-2. It reads as under: -

“Examination regarding sexual intercourse (rape)

(a) Examination of clothes- According to girl and her mother incidence occurred on 08.03.2020. Clothes were not changed bath not taken. So, clothes were sealed and handed over to Mahila Sipahi accompanying her. Sealed clothes included- (a) Anarkali Kurta- White colour (b) Leggings- Maroon colour, (c) Dupatta- maroon colour, (d) Slip- Under garments cream in colour, (e) Panty- Cream colour.

No tear; no patch seen either dried or wet.

(b) Marking of physical violence over body- No signs of physical injuries seen over any part of body.

(c) Examination of external genitals- No signs of injuries seen over or around genital.

(d) Internal examination of genitals- Vaginal swabs taken and sent for pathological examination. Anal's swab taken and sent for pathological examination. Urine sent for pregnancy



test. Whole abdomen USG advised. Pathological Report shows no spermatozoa found dead or alive. Anal swab shows no spermatozoa found dead or alive. Urine pregnancy test found negative. Whole abdomen found normal. All reports are attached in original copies.

2. Opinion- On the basis of above findings and evidence, incidence of recent rape can not be ascertained.

3. Mark of identification- (i) A til below left eye. (ii) A til below right eyebrow.”

5. The Medical Board, constituted for determination of age of the victim, based on radiological examination, opined that the age of PW-2 was between 15-17 years. The age determination report has been proved by PW-5, a doctor, who was one of the members of the Medical Board.

6. On 10.03.2020, the appellant was arrested. He was, however, not subjected to any medical examination as stipulated provisions under Section 53A of the CrPC. There are two aspects, which emerge from the result of the medical examination. Firstly, it was disclosed to the doctor (PW-3) that PW-2 was wearing the same garments at the time of medical examination on 09.03.2020, which she was wearing at the time of occurrence on 08.03.2020 and had not taken bath. According to the said report, the clothes, which PW-2 was wearing, were sealed and handed by the doctor to the policeman accompanying her. The sealed clothes included: -

“(1) Anarkali Kurta – white colour



- (2) Leggings – Maroon Colour*
- (3) Dupatta – Maroon Colour*
- (4) Slip – under-garments cream colour*
- (5) underwear panty cream colour”*

7. The doctor (PW-3) did not find any sign of injury over or around genitals of PW-2. PW-3 also reached the conclusion that based on above findings, incident of recent rape could not be ascertained (within seven days).

8. Upon completion of investigation, the police submitted charge-sheet on 27.05.2020 for the offences punishable under Sections 323, 341, 376 of the IPC and Section 4 of the POCSO Act, whereupon cognizance was taken. The appellant was charged of the offences punishable under Sections 323, 341, 376 of the IPC and Section 4 of the POCSO Act on 19.09.2020. The appellant denied the charge and claimed to be tried. Accordingly, he was put to trial.

9. Before we proceed to consider the evidence adduced at the trial, we must not lose sight of a significant development, which had taken place, in the meanwhile, according to the prosecution's case. As we have noted hereinabove, according to the doctor (PW-3), the garments, which the victim were wearing, was sealed and handed over to the police personnel, who was accompanying her when she was examined. Nearly three months after submission of charge-sheet on 27.03.2020, the prosecution



made an application before the court for sending the clothes of the victim (PW-2) for forensic examination. The said application was allowed. On the same date, i.e., on 27.08.2020, the clothes were delivered to the Forensic Science Laboratory, Patna, as is evident from the Forensic Science Laboratory report dated 28.10.2020 (Exhibit 7). There is no clue as to where were the sealed garments were kept in the meanwhile and whether they were handed over to the IO by the police personnel to whom the same were handed over by the doctor. It is after framing of charge that the report of biological examination (Exhibit-7) and serological examination (Exhibit-7/1) were prepared by the Forensic Science Laboratory, Patna on 22.12.2020.

10. At the trial, the prosecution examined five witnesses, as has been noted above. The victim was examined as PW 2 and her father as PW 1, the doctor, who had medically examined the victim, as PW 3, the IO as PW 4, and the doctor, who was a member of the Medical Board constituted for determination of the victim's age, as PW 5. We must add that PW 3 was also one of the members of the Medical Board constituted for determination of the victim's age.

11. The father of victim (PW 2) deposed at the trial that in the evening he had returned home at about 4:00 PM, when PW



2 complained about commission of rape upon her by the appellant. According to him, the age of PW 2 was 15-16 years. In paragraph No. 11, he deposed that he had informed the villagers about the occurrence, whereafter about 50-60 persons from the side of the appellant had gone to the police station with the purpose of getting the appellant and PW 2 married. They stayed back in the police station for five days. PW 2, in her evidence, while supporting the incident of commission of rape by the appellant upon her, admitted in her cross-examination, that before lodging of the present case, the appellant had lodged a case against her father (PW 1) and others for commission of offence punishable under Section 307 of the IPC. She also deposed that when she was going to collect grass, her aunt's daughter was accompanying her and except for her aunt's daughter, there was none around her. Though she had not disclosed it in her FIR, she deposed at the trial that the appellant had tied victim's hands with *Gamcha*. In paragraph no. 7 of her evidence, PW 2 deposed that at the time of occurrence, she was wearing a frock, and a pair of black pyjama, which she had shown to the police officer. She also deposed that the appellant had remained at the place of occurrence for about one hour, whereafter he had fled away and, in the meanwhile, she had not raised any voice. Her aunt's daughter had untied her hands, which were tied



by the appellant. About half an hour after the appellant had disappeared from the place of occurrence, she reached her home and described the occurrence to her parents.

12. The doctor (PW 3) proved the medical report as Exhibit-3. We have reproduced hereinabove the opinion of the doctor PW 3, which she proved at the trial. In her cross-examination, she explained the expression “recent rape”, which meant between seven to ten days. She clearly deposed that there was no injury found on the private parts of PW 2.

13. PW 5, the doctor, proved the age determination report (exhibit-4), which was based on radiological examination. According to him, the age of PW 2, as on the date of her examination, was between 15-17 years.

14. The IO (PW 4), in her cross-examination, deposed that she had not recorded statement of any person other than the victim (PW 2), her mother (since deceased) and father (PW 1) during the course of investigation. She also deposed that PW 2 had not disclosed to any one, other than the parents about the occurrence. From the place of occurrence, no suspicious material was recovered nor the *arhar* plants were found trampled.

15. The statement of the victim recorded under Section 164 of the CrPC came to be marked as Exhibit-2 at the trial,



wherein she had stated that this appellant had committed rape upon her after gagging her and tying her hands.

16. After closure of the evidence of the prosecution, the appellant was questioned under Section 313 of the CrPC so as to give him an opportunity to explain the incriminating circumstance appearing against him based on evidence of the prosecution's witnesses. The appellant denied those circumstances responding to the questions. Thereafter, two witnesses were examined on behalf of defence, namely, Karan Kumar (DW 1) and Manish Kumar, the appellant, (DW 2). Based on the evidence of DW 2, copy of Chand P.S. Case No. 91 of 2019 was marked as Exhibit-A, of which the appellant was the informant, registered against PW 1 and his brothers.

17. DW 1, in his evidence, deposed that the present case was instituted by PW 1 and PW 2 because of the said case, i.e., Chand P.S. Case No. 91 of 2019, registered at the instance of the appellant.

18. The trial court, after having evaluated the evidence adduced at the trial on behalf of the prosecution and defence, as noted above, has reached a conclusion by the impugned judgment that the prosecution successfully proved the charge of commission of offence punishable under Sections 323, 341, 376 of the IPC and



4 of the POCSO Act. After having convicted the appellant of the aforesaid offences, the trial court sentenced the appellant to imprisonment and fine, as has been noted hereinabove.

19. Mr. Vikram Deo Singh, learned counsel appearing on behalf of the appellant has submitted that the prosecution could not prove beyond all reasonable doubts that the victim (PW 2) was below 18 years of age as on the date of occurrence and, therefore, a child within the meaning of Section 2(1)(d) of the POCSO Act to attract penal provisions of the POCSO Act against the appellant. He has submitted that no procedure, other than examination by a medical board of PW 2, was adopted by the prosecution to determine her age. It has been argued that it would transpire from deposition of PW 2 that on the date of her deposition, she was student of class IX at Utkramit Madhya Vidayla, Biuri. No effort, however, was made to determine her age on the basis of the entries made in the admission register and obtaining necessary certificate of the Principal of the school regarding the victim's date of birth. A finding, on the point of age, based on a radiological examination, cannot be accurate and since, in the present case, the victim's age has been assessed to be approximately 15-17 years, benefit of doubt should go to the appellant on the point of the age of the victim. He has further submitted that it is apparent that the medical



evidence does not corroborate the evidence of commission of rape upon PW 2. He contends that PW 2 is not at all a reliable witness in view of patent inconsistencies in her statement based on which the FIR was registered, her deposition at the trial and evidence of her father (PW 1). He has submitted that the investigation, in the present case, has been completely perfunctory as the IO has admitted that except for the victim, her father and mother, no other person of the village was examined by the IO. According to him, the conduct of the IO in seeking court's permission, three months after the submission of the charge-sheet for getting the clothes of PW 2 delivered to the Forensic Science Laboratory on 27.08.2020, makes the entire case doubtful. In any event, he contends, the finding recorded in the FSL report, in no manner, connects the present appellant in the absence of appellant having been medically examined.

20. Ms. Shashi Bala Verma, learned Additional Public Prosecutor representing the State, defending the finding of conviction recorded by the trial court, has submitted that in a case of rape, corroboration by the medical evidence is not required, if the victim is found to be a trustworthy witness, consistent in her evidence regarding commission of rape. She has submitted that minor contradictions, here and there, are immaterial and,



according to her, the finding of conviction does not suffer from any legal infirmity, requiring this Court's interference.

21. We have perused the impugned judgment and order of the trial court and the trial court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties, as noted above. We find substance in the submission made on behalf of the appellant that the prosecution could not establish beyond all reasonable doubts that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act. The medical board assessed the age of the victim to be between 15-16 years based on radiological examination. The said finding in respect of the victim's age cannot be said to be accurate. If flexibility of two years is given on both sides, the victim (PW 2) cannot be held to be a child within the meaning of Section 2(1)(d) of the POCSO Act. Section 34(2) of the POCSO Act, in no uncertain terms specifies that if any question arises in any proceeding for the special court, whether a person is child or not, such question shall be determined by the special court after satisfying itself about the age of such person and it shall record, in writing, its reasons for such determination. The Supreme Court in case of *Jarnail Singh v. State of Haryana*, reported in (2013) 7 SCC 263, has observed in paragraphs 22 and 23 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.”



22. In such view of the matter, the appellant's conviction for commission of offence punishable under Section 4 of the POCSO Act cannot be sustained. Accordingly, the finding of appellant's conviction under Section 4 of the POCSO Act, as recorded by the trial court, is hereby set aside.

23. Now, coming to the question as to whether the prosecution was able to establish against the appellant the charge of commission of offence punishable under Section 376 of the IPC or not, it is apparent that the medical report does not support the accusation of commission of rape on PW 2 on 08.03.2020. She was subjected to medical examination on the very next date, i.e., 09.03.2020. According to the victim, the appellant had committed rape on her in an agricultural field having grown up *arhar* plants. No injury was found on any part of the victim's body in her medical examination. Further, according to the victim, her cousin was accompanying her when she had left her home to collect grass and that the victim's cousin had untied the victim's hands after rape was committed on her. In such circumstances, non-examination of the victim's cousin, in the Court's opinion, adversely affects the prosecution's case.

24. Despite our sincere efforts, we have not been able to find any material on record to justify the failure on the part of the



prosecution to make a belated application on 27.08.2020 before the Magistrate seeking permission to send the clothes for forensic examination. There is no evidence that the said clothes were ever seized by the IO. It has come only in the evidence of the doctor that the clothes, which the victim was wearing, were sealed and handed over to the police personnel accompanying her, in the background of the disclosure made by the victim and her mother to the doctor (PW 3) that she was wearing the same garments at the time of medical examination, which she was wearing at the time of occurrence and had not taken bath. There is no evidence that the garments were handed over by the police personnel to the IO subsequently. There is no clue as to how the IO got hold of the sealed garments, suddenly, more than five months after the medical examination and three months after submission of the charge-sheet. In the Court's considered opinion, the investigation was apparently conducted in a very casual way. To top it all, we find apparent difference between description of clothes, which the victim was wearing at the time of occurrence, as disclosed by her in her cross-examination (paragraph 7), and the clothes, which she was wearing at the time of medical examination and were handed over to the police personnel, in the light of her disclosure that she had not changed her clothes and had not taken bath. In her cross-



examination, PW 2 deposed that, at the time of occurrence, she was wearing a frock and a pair of black *pyjamas*. From the report of medical examination, it appears that the doctor found her wearing following clothes: -

*“(1) Anarkali Kurta – white colour
(2) Leggings – Maroon Colour
(3) Dupatta – Maroon Colour
(4) Slip – under-garments cream colour
(5) underwear panty cream colour”*

25. In such view of the matter, we are of the considered view that PW 2 cannot be treated to be a trustworthy witness and her evidence not of stellar quality based on which the finding of conviction for the offences punishable under Section 376 of the IPC can be sustained despite the same having been not corroborated by the medical evidence.

26. It is worthwhile mentioning that it is not at all in controversy that the appellant had lodged a case against the victim's father and other persons for an offence punishable under Section 307 of the IPC before lodging of the present case. The plea on behalf of the appellant that the appellant's false implication in the background of the said dispute, thus, cannot be totally ruled out.

27. Further, the result of biological examination conducted by the F.S.L., Patna, should not be overlooked,



according to which, semen was detected on the *janghia*, which was marked 'A' for the purpose of examination. The prosecution has not been able to connect this appellant, in any manner with the result of biological examination or serological analysis conducted by the F.S.L. on the clothes said to be belonging to the victim and delivered to the F.S.L. for examination.

28. We, accordingly, conclude that the prosecution's case suffers from inherent lacuna. The entire case of the prosecution has become doubtful in view of the discussions, as noted above. The appellant's conviction for the offences punishable under Section 323 and 341 of the IPC also cannot be said to have been proved beyond all reasonable doubts. The appellant deserves acquittal by giving him benefit of doubt in respect of the charges of the offences punishable under Sections 323, 341 and 376 of the IPC.

29. In the result, the finding of conviction recorded by the trial court by the impugned judgment of conviction dated 17.06.2021 passed by the learned Additional Sessions Judge-Vith-cum-Special Judge POCSO Act, Kaimur (Bhabhua), in POCSO Case No. 13 of 2020 arising out of Mahila (Bhabhua) P.S. Case No. 12 of 2020, is hereby set aside. The appellant stands acquitted of the charge of commission of offences punishable under Section



323, 341 and 376 of the IPC and Section 4 of the POCSO Act giving him benefit of doubt. The order of sentence dated 23.06.2021 also stands set aside.

30. This appeal is allowed.

31. 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-Mahesh

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	11.09.2023.
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