

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (DB) No.530 of 2021**

Arising Out of PS. Case No.-80 Year-2014 Thana- KAJRAILI District- Bhagalpur

Md. Banti @ Afroj S/O Md. Idrish R/O Naya Tola Sahpur, P.S-Kajraili,  
District-Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

**Appearance :**

|                     |   |                                                                    |
|---------------------|---|--------------------------------------------------------------------|
| For the Appellant/s | : | Mr. Najmul Hodda, Adv<br>Mr. Pranjal Kumar, Adv<br>Ms. Shewta, Adv |
| For the State       | : | 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 : 09-10-2023**

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure assailing the judgment of conviction dated 25.03.2021 and an order of sentence dated 27.03.2021 passed by the learned Exclusive Special Court (POCSO) cum-6<sup>th</sup> Additional Sessions Judge, Bhagalpur, in GR Case No. 3485 of 2014 arising out of Kajraili P.S. Case No. 80 of 2014 CNR No. BRBG01-000415-2014 whereby and whereunder, the appellant has been convicted and sentenced as under :-



| Penal Provision              | Sentence                           |            |                    |
|------------------------------|------------------------------------|------------|--------------------|
|                              | Imprisonment                       | Fine (Rs.) | In default of fine |
| Section 4 of the POCSO Act   | Rigorous Imprisonment for 20 years | 10,000/-   | SI for 3 months    |
| under Section 376 of the IPC | -----                              | -----      | -----              |

2. The victim (PW-1) is the informant whose *fardbeyan* was recorded by the SHO of Mahila Police Station, Bhagalpur at 4:00 pm on 14.09.2014. The victim described her age to be 18 years. According to the *fardbeyan*, she had gone to the outskirts of the village for collecting grass and when she was returning at about 5:00 pm, at a place called Teengacchiya Bagicha, the appellant came to her, grabbed her and after gagging her mouth took her into the orchard and forcibly committed penetrative sexual assault on her. She explicitly mentioned in the FIR that the appellant committed the act of inserting his penis into her vagina forcibly. During the course of occurrence, itself, her mother (PW-2) learnt about it and rushed to the place of occurrence. The appellant started fleeing away after having seen the victim's mother. The victim's mother (PW-2) had caught hold of the appellant, whereupon the appellant agreed that he would marry the victim. Mukhiya of the village was informed about the occurrence and a panchayat was convened. The



appellant's father and mother, however, did not agree to the panchayat's decision. They managed the appellant leave the village. For the occurrence said to have taken place on 04.09.2014, the said *fardbeyan* was recorded on 14.09.2014 and the case was forwarded to the SHO Kajraili, Bhagalpur. It transpires that the victim submitted a written complaint to the Officer-in-charge of Kajraili Police Station, Bhagalpur on the same day i.e. 14.09.2014 leading to registration of Kajraili P.S. Case No. 80 of 2014 disclosing commission of offence punishable under Section 376 of the Indian Penal Code. The victim was subjected to medical examination on 14.09.2014 for the purpose of determination of her age in the background of allegation of rape. On the test of radiological examination, the age of the victim was assessed to be less than 18 years. No sign of recent sexual intercourse was found during the medical examination. Apparently, since because in the medical report the victim's age was mentioned as less than 18 years, the police submitted chargesheet upon completion of investigation against this appellant on 10.12.2015 for commission of offences punishable under Section 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act' in short).



Later, charge was framed against the appellant for commission of the offence punishable under section 375 of the Indian Penal Code and Section 4 of the POCSO Act. The appellant denied the charges and claimed to be tried.

3. In order to establish the charge against the appellant, the prosecution examined altogether nine witnesses including the victim (PW-1), victim’s mother (PW-2), the Doctor who had examined the victim (PW-9) and the Investigating Officer (PW-8). In addition, the prosecution examined co-villagers as prosecution’s witnesses namely Bibi Gulshan (PW-3), Shamima Khatoon (PW-4), Noorjanha (PW-5), Bibi Ashmin (PW-6) and Bibi Maizun (PW-7).

4. In addition to the oral evidence, the prosecution brought on record following documentary evidence adduced at the trial to prove the charge:-

| Sl. No. | Description                                                           | Exhibit Number |
|---------|-----------------------------------------------------------------------|----------------|
| 1.      | Written petition (complaint) by the Informant/victim dated 14.09.2014 | Exhibit-1      |
| 2.      | Statement/ <i>fardbeyan</i> of victim                                 | Exhibit-2      |
| 3.      | Formal FIR                                                            | Exhibit-3      |
| 4.      | Registration details on the written petition                          | Exhibit-4      |
| 5.      | Application for adding Section-4 of the POCSO Act                     | Exhibit-5      |
| 6.      | Medical report                                                        | Exhibit-6      |

5. After closure of the evidence of the prosecution’s witnesses, the appellant was questioned under Section 313 of



the CrPC by the trial court so as to enable him to explain the incriminating circumstances emerging against him based on the evidence of the prosecution's witnesses. The appellant answered in negative, the circumstances said to be incriminating as put by the trial court to him.

6. Two defence witnesses Md. Sohrab Alam and Md. Abbas deposed at the trial.

7. The trial court, after having appreciated the evidence adduced at the trial has reached a conclusion by the impugned judgment dated 25.03.2021 that the prosecution was able to establish the charge against the appellant of commission of offence punishable under section 376 of the Indian Penal Code and section 4 of the POCSO Act. After having held the appellant guilty of the aforesaid offences, the trial court sentenced the appellant to imprisonment and fine as has been noted above.

8. Learned counsel appearing on behalf of the appellant has submitted that the findings recorded by the trial court of conviction for the offence punishable under Section-4 of the POCSO Act is not, at all, sustainable in absence of any definite evidence adduced at the trial that the age of the victim was 18 years. In support of this contention, he has submitted that the victim disclosed her age to be less than 18 years in her



*fardbeyan* and the written complaint. The prosecution did not follow any procedure prescribed for determination of victim's age in accordance with the requirement under Section 34(2) of the POCSO Act read with Section-94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The finding that the victim was less than 18 years of age as on the date of occurrence is manifestly based on the tentative assessment on the ground of radiological examination to be less than 18 years. He has further submitted that there is no cogent explanation for delay of ten days in reporting the matter to the police except that the appellant's family members were not ready for the victim's marriage with the appellant. He has further submitted that no sign of injury was detected by the Doctor on the person of the victim during the medical examination. He contends that the prosecution's story appears to be highly improbable, inasmuch as, the mother of the victim is said to have arrived at the place of occurrence during the course of occurrence. He has also argued that if, at all, the case of the victim is accepted to the extent that the appellant was engaged in any sexual intercourse with the victim, the same was consensual and the same cannot be said to be forceful or without her consent.

9. Mr. Abhimanyu Sharma, learned Additional Public



Prosecutor representing the State defending the findings recorded by the trial court has submitted that the delay in registration of FIR stands explained as after commission of the offence, the victim was given a false assurance by the appellant that he would marry her. In that background, she had chosen not to lodge the FIR and when the appellant and his family members declined the proposal for marriage of the victim with the appellant, the appellant was left with no other option but to lodge the FIR. He submits that it is very natural circumstance, in which, the registration of FIR got delayed under certain misconception which cannot be said to be fatal to the prosecution's case. He has further submitted that the prosecution's case has been proved by the victim herself who is the best witness and her mother (PW-2) who had seen the occurrence. Merely, because the victim had disclosed her age to be 18 years in her *fardbeyan* or the written complaint the same cannot absolve the appellant's culpability under the provisions of the POCSO Act in view of medical evidence to the effect that the victim was less than 18 years as on the date of occurrence. He contends that it is clear from the evidence of the prosecution's witnesses that the victim was subjected to penetrative sexual assault without her consent by the appellant



and, therefore, the findings recorded by the trial court does not suffer from any legal infirmity.

10. We have perused the impugned judgement and order of the trial court as well as trial court's records and we have given our thoughtful consideration to the rival submissions advanced on behalf of the parties, as noted above.

11. After having perused the materials on record, in the peculiar facts and circumstances of the case, we consider it apt to notice the evidence of PWs. 3 to 7 first. According to P.W. 3, a co-villager, the occurrence had taken place at 5.00 P.M. when she was in her house. The victim's mother had caught the victim and the appellant both and was inquiring from them about their conduct. PW-4 also deposed at the trial that the victim's mother had caught both of them i.e. the victim and the appellant and brought them to her house. The mother of the appellant thereafter had arrived at the house of the victim, thrashed the appellant and had taken the appellant back to house. Similar is the deposition of PW- 5 and PW-6. PW-7 in her evidence deposed that the victim and the appellant were coming from different directions when she was collecting food for cattle. He saw both of them i.e. the appellant and the victim going inside the orchard. She saw both of them present in the orchard and



thereafter, she (PW 7) informed the mother of the victim (PW-2). Thereafter, the mother of the victim (PW-2) came there and caught both of them.

12. There are two things that are evident from the depositions of PW-7 and PWs. 3 to 6. Firstly; that no force was used by the appellant to take the victim into the orchard. The victim appears to have gone there out of her own volition. Further, on conjoint reading of the evidence of both PW-7 and PW-2, it transpires that PW-7 had informed PW-2 about the presence of the appellant and the victim together in the orchard. Thereafter, PW-2 had gone there and from where, the victim and the appellant were found. Both of them were brought by the mother of the victim to her (informant's house) and both of them were questioned by PW-2 about their conduct. In that background, the sexual intercourse, if that had happened between the appellant and the victim on the date of occurrence, cannot be said to be without consent of the victim.

13. It may be noted that the consent of the victim may have no meaning if the prosecution was able to establish at the trial that the victim was a 'child' within the meaning of Section 2(1)(d) of the POCSO Act. The victim herself described her age to be 18 years in her *fardbeyan*. Based on radiological



examination, the doctor has found her age to be less than 18 years. The determination of age based on radiological examination cannot be said to be accurate. It has been rightly submitted on behalf of the appellant that the procedure prescribed for age determination laid down under Section-34(2) of the POCSO Act read with Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015, was not followed at the trial.

14. We are, thus, of the considered view that the prosecution miserably failed to establish its case that the victim was a 'child' within the meaning of Section 2(1)(d) of the POCSO Act so as to attract the provisions of the POCSO Act. The appellant's conviction for the offence punishable under Section 4 of the POCSO Act is, therefore, not at all sustainable.

15. PW-2 in her evidence deposed that she had seen the appellant and the victim indulging in sexual intercourse. It cannot be discerned from the evidence of PW-3 that the appellant had used any undue force to bring his act within the definition of rape under Section 375 of the Indian Penal Code. The evidence of PW-1 that the appellant had used force to take her into the orchard is contradicted by the evidence of PW-7 who has not been declared hostile and specifically deposed at



the trial that she had seen the appellant and the victim, going into the orchard. Had there been any use of force by the appellant, PW-7 must have testified it at the trial in her deposition.

16. Furthermore, it is the case of the prosecution itself that the appellant had agreed to marry the victim and because he had declined to marry her, the FIR was subsequently lodged. The defence witnesses deposed at the trial that the victim's side was mounting pressure upon the appellant to marry the victim and because the appellant's family members were not agreeable to that, the present criminal case was lodged.

17. Considering all the evidence adduced at the trial in entirety, we are of the considered view that the prosecution could not prove its case that the victim was a 'child' within the meaning of Section 2(1)(d) of the POCSO Act. Further taking into account holistic view of all the witnesses, the act of sexual intercourse, if any, between the appellant and the victim, appears to be consensual as they appear to have entered into the orchard together willingly.

18. In view of the evidence of PW-7 who has been an independent witness and has not been declared hostile, PW-1 cannot be treated to be a witness of sterling character on whose



testimony, the finding of appellant’s conviction punishable under Section 376 of the Indian Penal Code cannot be sustained.

19. Accordingly, in our opinion, the impugned finding of conviction recorded by the trial court deserves interference. The appellant deserves acquittal by giving him benefit of doubt.

20. Accordingly, the judgment of conviction dated 25.03.2021 and order of sentence dated 27.03.2021 passed by the learned Exclusive Special Court (POCSO) cum-6<sup>th</sup> Additional Sessions Judge, Bhagalpur, in GR Case No. 3485 of 2014 arising out of Kajraili P.S. Case No. 80 of 2014 CNR No. BRBG01-000415-2014, are set aside.

21. This appeal is allowed.

22. 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)**

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