

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (DB) No.588 of 2022**

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

SUBHASH KUMAR @ SUBHASH KUMAR SARDAR Son of Sri Mahendra Sardar Resident of Village - Narhaiya, P.S.- chhatapur, District - Supaul.

... .. Appellant

Versus

THE STATE OF BIHAR

... .. Respondent

with

**CRIMINAL APPEAL (DB) No. 198 of 2022**

**In**

**CRIMINAL APPEAL (SJ) No.2672 of 2021**

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

1. DAYJI DEVI W/o Mahendra Sardar R/o village- Narhaiya, P.S.- Chhatapur, District- Supaul
2. Sanjeev Sardar @ Sanjay Sardar @ Sanjay Kumar Sardar S/o Mahendra Sardar R/o village- Narhaiya, P.S.- Chhatapur, District- Supaul

... .. Appellants

Versus

THE STATE OF BIHAR

... .. Respondent

**Appearance :**

(In CRIMINAL APPEAL (DB) No. 588 of 2022)

For the Appellant/s : Mrs.Veena Kumari Jaiswal, Advocate  
Sri Upendra Prasad, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 198 of 2022)

For the Appellant/s : Mrs.Veena Kumari Jaiswal, Advocate  
Sri Upendra Prasad, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH**

**and**

**HONOURABLE MR. JUSTICE KHATIM REZA**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)**

**Date : 18-12-2023**

These appeals have been preferred by the appellants under Section 374(2) of the Code of Criminal Procedure, 1973 (CrPC for short), putting to challenge a judgment of conviction dated 22.03.2021 and the order of sentence dated 25.03.2021, passed by the learned Additional Sessions Judge-V1th-cum-Special Judge, POCSO Court, Supaul, in POCSO Case No. 37 of 2018, arising out of Supaul Mahila P.S. Case No. 104 of 2018, Trial No. 35 of 2020, whereby the appellants have been convicted and sentenced as under:

| Cr. Appeal (DB) No. 588 of 2022                      |                                         |                                     |                |                      |
|------------------------------------------------------|-----------------------------------------|-------------------------------------|----------------|----------------------|
| Appellant                                            | Penal provision                         | Sentence                            |                |                      |
|                                                      |                                         | Imprisonment                        | Fine (Rs.)     | In default of fine   |
| Shubhash Kumar @ Subhash Kumar Sardar                | Section 376(1) of the Indian Penal Code | R.I. for 13 years                   | Rs. 1,50,000/- | R.I. for six months  |
|                                                      | Section 493 of the Indian Penal Code    | R.I. for 10 years                   | Rs. 70,000/-   | S.I. for two years   |
|                                                      | Section 6 of the POCSO Act              | Life imprisonment                   | Rs. 1,00,000/- | S.I. for three years |
|                                                      | Section 4 of the POCSO Act              | R.I. for 12 years                   | Rs. 1,00,000/- | S.I. for three years |
| Cr. Appeal (DB) No. 198 of 2022                      |                                         |                                     |                |                      |
| Sanjeev Sardar @ Sanjay Sardar @ Sanjay Kumar Sardar | Section 493/34 of the Indian Penal Code | R.I. for three years and six months | Rs. 50,000/-   | S.I. for nine months |
| Dayaji Devi                                          | Section 493/34 of the Indian Penal Code | R.I. for three years and six months | Rs. 50,000/-   | S.I. for nine months |

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

3. A written report of PW-2, addressed to Mahila Police Station, Supaul dated 06.08.2018, is the basis for registration of the concerned Mahila Police Station Case No. 104 of 2018 levelling offences punishable under Sections 376, 493 read with Section 34 of the Indian Penal Code (IPC, in short) and Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act for short). Apart from Shubhash Kumar Sardar, who is the appellant in Cr. Appeal (DB) No. 588 of 2022, his father Mahendra Sardar, mother Dayaji Devi and brother Sanjeev Sardar (Dayaji Devi and Sanjeev Sardar are the appellants in Cr. Appeal (DB) No. 198 of 2022) were named in the FIR. In her written report, the informant stated her age to be 15 years and asserted that nearly one year before the date of lodging of the FIR, when she was returning to her maternal grandmother's house after attending a feast in the village, at 9 pm, the appellant Subhash Kumar Sardar forcibly took her to his house and committed rape upon her. He, thereafter, promised to marry her and on the pretext of marrying her, he continued to establish physical relationship with the informant, consequent upon which, she became pregnant. She, thereafter, narrated the occurrence to her Sister-in-law (*Bhabhi*, PW-4). After the registration of the FIR, the statement of the informant was recorded under Section 164 of the CrPC by learned A.C.J.M.,

Supaul on 28.08.2018 (Ext.-2). The informant reiterated her narration of the appellant Subhash Kumar Sardar having established physical relationship with her for last one year. In her statement under Section 164 of the CrPC, she also mentioned that a panchayat was held subsequently, in which, the appellant Subhash Kumar Sardar declined to marry her, though the informant was willing to marry him. It is pertinent to mention, at this juncture, that it transpires from the statement of the informant recorded under Section 164 of the CrPC that she mentioned her age to be 18 years. The informant was examined by a medical board on 06.08.2018. The medical board found the informant's age to be between 17-19 years and, that there was no sign of rape. She was carrying pregnancy of 24 weeks.

4. The police, upon completion of investigation, submitted charge-sheet for the offences punishable under Sections 376, 493 read with Section 34 of the IPC and Sections 4/6 of the POCSO Act against all the four persons named in the FIR, whereupon cognizance was taken on 03.04.2019 of the aforesaid offences. Charges were subsequently framed against the appellant Subhash Kumar Sardar for the offences punishable under Sections 376, 493/34 and Sections 4/6 of the POCSO Act. Against rest three accused persons, charges were framed for the offences punishable

under Section 493 read with 34 of the IPC and Section 17 of the POCSO Act. All the four accused persons denied the charges and claimed to be tried. They were accordingly put to trial.

5. At the trial, the prosecution got examined altogether six witnesses, i.e., the informant (PW-2), her maternal uncles (PW-1 and PW-3), sister-in-law of the informant (PW-4), the Doctor, who was a member of the Medical Board (PW-5) and the Investigating Officer (PW-6). In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record following documentary evidences:-

| Sl. No. | Description                                                               | Exhibit Number |
|---------|---------------------------------------------------------------------------|----------------|
| 1.      | Signature of the Informant on the written report                          | Exhibit-1      |
| 2.      | Signature of the informant on the statement under Section 164 of the CrPC | Exhibit-2      |
| 3.      | Signature over the Medical Report                                         | Exhibit-3      |
| 4.      | Medical Report                                                            | Exhibit-4      |
| 5.      | Written endorsement over the written report                               | Exhibit-5      |
| 6.      | FIR                                                                       | Exhibit-6      |

6. After the closure of the prosecution's evidence, the appellants were questioned by the trial court under Section 313 of the CrPC, so as to give them an opportunity to explain the incriminating circumstances emerging against them, based on the evidence led by the prosecution, at the trial. The accused persons

answered the questions in negative. The defence got examined two witnesses (DW-1 and DW-2). From the deposition of the defence witnesses, it is manifest that they didn't dispute the relationship between the appellant and the informant and further deposed that the two wanted to marry each other.

7. The trial court, after having appreciated the evidence adduced at the trial, has recorded acquittal of co-accused, namely, Mahendra Sardar of the charges framed against him. However, as regards the appellant Subhash Kumar Sardar, the trial court has held him guilty of the offences punishable under Sections 376, 493/34 of the IPC and Sections 4/6 of the POCSO Act. Further, the trial court has convicted the appellants Dayaji Devi and Sanjeev Sardar of the offences punishable under Section 493 of the IPC. After having held the appellants guilty of the aforesaid offences, the trial court has sentenced them to imprisonment and fine, as has been noted above.

8. Mr. Upendra Prasad, learned counsel appearing on behalf of the appellants has argued that the Court's finding, holding the appellants guilty of the offences punishable under the provisions of the POCSO Act is patently illegal and erroneous for the reason that the prosecution miserably failed to prove at the trial that the age of the victim was less than 18 years and, therefore, a

‘child’ within the meaning of Section (2)(1)(d) of the POCSO Act. To bolster his contentions, he has drawn the Court's attention to the finding of the medical board which assessed the victim's age to be between 17-19 years. He has also submitted that in her statement under Section 164 of the CrPC, the informant (PW-2) herself disclosed her age to be 18 years. In any event, he contends, the trial court did not adopt the requisite procedure under Section 34 (2) of the POCSO Act read with Section 94 of the Juvenile Justice (Protection and Care of Children) Act, 2015, for determination of the victim's age which ought to have been mandatorily done. He contends that it is evident from the evidence of the informant herself that she had studied up to Class 8. No evidence was brought on record regarding her date of birth based on the entries made in the school admission register.

9. On the point of conviction of the appellants for the offence punishable under Section 376 of the Indian Penal Code, he has submitted that it is clear from the evidence of the informant herself that the informant and appellant Subhash Kumar Sardar had established physical relationship with their mutual consent. Even the appellant Subhash Kumar Sardar has not denied that he and the informant were in love with each other and they had established physical relationship also. He further submits that there

is no evidence to the effect that the appellant Subhash Kumar Sardar had ever denied to marry the informant, rather he wanted to marry her. He accordingly contends that the prosecution's case that the promise of the appellant Subhash Kumar Sardar, made to the informant was false, has no basis. He argues that considering the depositions of the prosecution's witnesses to the effect that the informant and the appellant Subhash Kumar Sardar were in love with each other and were having physical relationship with consent since long, no offence of rape within the meaning of Section 375 of the Indian Penal Code is made out. Finding of the trial court, convicting the appellant of the charge punishable under Section 376 of the Indian Penal Code, is completely erroneous, he argues.

10. He has further argued that the trial court has committed gross error of law in holding the appellants Dayaji Devi and Sanjeev Sardar of the offence punishable under Section 493 of the IPC. Section 493 of the IPC will not have any application in so far as the same relates to the appellants Dayaji Devi and Sanjeev Sardar.

11. Learned Additional Public Prosecutor appearing on behalf of the State has defended the finding of conviction recorded by the trial court and has submitted that the evidence adduced at the trial would suggest that the informant gave birth to a female

child after lodging of the FIR and, upon DNA test, the appellant Shubhash Kumar Sardar has been found to be the biological father of the child. She submits that the denial by the appellant Shubhash Kumar Sardar to marry the informant after having remained in physical relationship with her for nearly one year on the false promise to marry her does constitute an offence of rape within the meaning of Section 375 of the IPC as the consent for such relationship obtained by the appellant Subhash Kumar Sardar cannot be said to be voluntary. She submits that the informant claimed her age to be 15 years and the medical report also found her age to be between 17-19 years. Thus, on the date of the first offence of rape, committed by the said appellant, the victim should be presumed to be a child and, therefore, the appellant's conviction does not suffer from any legal infirmity requiring this Court's interference.

12. We have perused the impugned judgment and order of the trial court and the records of the trial court. We have given our thoughtful consideration to the rival submissions made on behalf of the parties.

13. The first question, which requires consideration in the present appeals, is as to whether the prosecution could establish at the trial that the victim was a 'child' within the

meaning of Section 2(1)(d) of the POCSO Act. The person can be said to be a 'child' within the said provision of the POCSO Act, if it is conclusively proved at the trial that he/she was not 18 years of age. Sub-Section (2) of Section 34 of the POCSO Act requires the Special Court under the Act to determine the age of victim of rape. The Supreme Court has held in the case of ***Jarnail Singh v. State of Haryana***, reported in **(2013) 7 SCC 263** that the procedure prescribed for assessment of age of a juvenile under the provisions of Juvenile Justice (Care and Protection of Children) Rules 2007 shall apply for the purpose of determination of age of a child victim under the provisions of POCSO Act. Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 lays down definite procedure for age determination, which reads as under:-

(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 2(1)(d) 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.*

14. In the present case, no procedure has been followed to determine conclusively the age of the informant. Her age, based on radiological examination, has been found to be between 17-19 years by the Medical Board. From her evidence, it transpires that she had studied up to Class 8. No attempt was made by the prosecution to prove her age before the Special Court, based on the entry of date of birth made in the admission register of the school. No other step was taken to prove the fact that the informant was less than 18 years as on the date of occurrence, in accordance with the requirement under sub-Section (2) of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Even as per the assessment made by the medical board, based on a radiological examination, the age of the informant was between 17-19 years. No accuracy can be attached to such assessment. It is clear from the requirement under sub-Section (2) of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 that in the absence of the documents under sub-Section 2(i) and 2(ii), the Court ought to have determined the age of the informant based on the ossification test, which was not held in the present

case. Thus, in our view, the prosecution miserably failed at the trial to establish 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 Act. Accordingly, the conviction of the appellant Subhash Kumar Sardar for the commission of offences punishable under the provisions of the POCSO Act are unsustainable. Situated thus, the appellant Subhash Kumar Sardar stands acquitted of the charge of commission of offence punishable under Section 4 of the POCSO Act.

15. Now, coming to the conviction of the appellant Subhash Kumar Sardar for the offence punishable under Section 376 of the IPC, we notice from the records and consistent depositions of the witnesses that the informant and the appellant Subhash Kumar Sardar were in love with each other and wanted to marry. They were in continued physical relationship for a considerable period of time. There is no evidence on record to suggest that the promise, said to have been given by the appellant to the informant, was a false promise. Both of them knew each other well. There is no evidence that the appellant Subhash Kumar Sardar suffered from any legal incapacity to marry the informant and knowing that well, he had given a false promise to marry the informant. It is manifest from the consistent depositions of the

witnesses that refusal by the appellant Subhash Kumar Sardar to marry the informant gave rise to cause of action for the informant to file the FIR. The appellant Subhash Kumar Sardar, in response to the questions put to him under Section 313 of the CrPC, has not denied the factum of the nature of relationship between him and the informant. After having considered the evidence of the prosecution's witnesses, we find force in the submission advanced on behalf of the appellant Subhash Kumar Sardar that it was a case of consensual relationship between the informant and the appellant Subhash Kumar Sardar, which does not fall within the definition of rape under Section 375 of the IPC. The appellant's conviction for the offence punishable under Section 376 of the IPC, in the Court's opinion, is also unsustainable. The appellant Subhash Kumar Sardar accordingly stands acquitted of the charges of offence punishable under Section 376 of the IPC.

16. Coming to the conviction of the appellants Dayaji Devi and Sanjeev Sardar for the offence punishable under Section 493 read with Section 34 of the IPC. We are of the view that the said finding of the trial court is not at all sustainable. Section 493 of the IPC reads thus:-

*“493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—Every man who by deceit causes any woman who is not lawfully married to him*

*to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”*

17. On a plain reading of the provision under Section 493 of the IPC in the background of the evidence adduced at the trial, it is manifest that the said finding of conviction suffers from perversity.

18. In the result, these appeals are allowed. The appellants stand acquitted of the charges.

19. Accordingly, the impugned judgment of conviction dated 22.03.2021 and the order of sentence dated 25.03.2021, passed by the learned Additional Sessions Judge-V1th-cum-Special Judge, POCSO Court, Supaul, in POCSO Case No. 37 of 2018, arising out of Supaul Mahila P.S. Case No. 104 of 2018, Trial No. 35 of 2020, are set aside.

20. These appeals are allowed accordingly.

21. The appellant, namely, Shubhash Kumar Sardar in Cr. Appeal (DB) No. 588 of 2022 is in jail custody. Let him be released forthwith, if he is not required in any other case.

22. Appellants, namely, Dayaji Devi and Sanjeev Kumar in Cr. Appeal (DB) No. 198 of 2022 are on bail. They stand discharged from the liabilities of bail bonds and sureties, if any.

**(Chakradhari Sharan Singh, J)**

**( Khatim Reza, J)**

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