

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.638 of 2021**

Arising Out of PS. Case No.-83 Year-2016 Thana- GOH District- Aurangabad

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Anil Ram, S/o Kameshwar Ram, Resident of Village- Chhathu Bigha, P.S.-
Daudnagar, District- Aurangabad (Bihar).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Bachan Jee Ojha, Advocate Mr. Navin Kumar, Advocate Mr. Akhilesh Pandey, Advocate
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 : 11-10-2023

This appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, putting to challenge a judgment of conviction dated 21.08.2021 and an order of sentence dated 27.08.2021 passed by the learned Additional District & Sessions Judge-VI- cum- Special Exclusive Judge, (POCSO), Aurangabad in POCSO (G.R.) No. 03 of 2017/ CIS No. 03 of 2017, arising out of Goh P.S. Case No. 83 of 2016, whereby the appellant has been convicted and sentenced as under:-



Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 6 of the POCSO Act	RI for 20 years	20,000/-	SI for six months
366-A of the IPC	RI for five years	5,000/-	SI for three months
376-D of the IPC	X	X	X

2. The victim's (PW-3's) father (PW-2) is the informant of Goh P.S. Case No. 83 of 2016 registered on 10.08.2016, which gave rise to POCSO (G.R.) No. 03 of 2017/ CIS No. 03 of 2017, disclosing commission of offence punishable under Section 366-A read with Section 34 of the Indian Penal Code. His written report handed over to the Officer-in-Charge of the said police station on 10.08.2016 is the basis for registration of the said FIR. The occurrence is of 11.07.2016. It would be relevant to notice, at this juncture, that the FIR does not disclose commission of any sexual assault and the allegation is confined to kidnapping of the victim (PW-3) by the appellant and others, which is one of the crucial aspects of the present case as would emerge from the discussions hereinbelow.

3. The informant alleged the victim's age to be 14 years in the First Information Report. The only evidence available on record as regards the victim's age is based on medical examination, according to which her age was found to be 18-19



years.

4. In the facts and circumstances of the case, we deem it proper to give a detailed description of the accusation made in the FIR which is the earliest version of the prosecution and, therefore, significant for just adjudication of this appeal. According to the informant, he received a telephone call on his mobile No. 7482857047 from mobile No. 7542949873 on 11.07.2016 at 3:00 PM cautioning the informant that he would kidnap his daughter. On the next day i.e. 12.07.2016 his daughter (the victim) had gone for her studies in a school but did not return after the school timings were over. The informant and the relatives started searching for her but she could not be traced. Subsequently, the informant received another call on his same mobile No. 7482857047 from mobile No. 7582852900 when the caller informed him that he was taking the victim away for marriage and in case the informant made any attempt to locate her, he would be losing his daughter. The informant (PW-2) called his son-in-law Sudhir Kumar (not examined) to find out the person in whose name said SIM No. 7582852900 was registered. The informant's son-in-law got an information that the said SIM was in the name of one Gyanti Devi, the wife of the appellant. The informant is said to have gone to the house of the said Gyanti Devi, the



appellant's wife and upon enquiry the appellant's wife told him that the appellant was in habit of kidnapping minor girls and abandoning the girls after committing rape on them. Few days thereafter, the informant got an information from the co-villagers of the appellant that the appellant was residing in Amritsar. The informant, along with other persons, went to Amritsar in search of her daughter and after taking assistance of the Amritsar police he was successful in locating the appellant and the victim together. The informant, thereafter, made enquiries from the victim. Initially, the victim told the informant that she had come to Amritsar out of her own volition but, on further enquiry, the victim disclosed in confidence that this appellant and his three friends had kidnapped her for marriage and thereafter the appellant pressurized the victim for establishing physical relationship. She is said to have further disclosed that, in the meanwhile, nothing unseemly had happened with her except that the appellant would make her take intoxicants. The informant further disclosed that the appellant had managed to escape, whereafter the informant went to the Officer-in-Charge of the police station with the victim.

5. It is evident from the written report of the informant, which is the basis for registration of the FIR, that it was he who



had located the victim in Amritsar with the help of local administration. There is no assertion in the FIR that the victim had disclosed about any sexual misconduct upon her by the appellant. No case was registered in Amritsar. The victim was brought from Amritsar to Goh (Bihar) where the FIR came to be registered on 10.08.2016. There being no allegation of sexual assault and since the allegation related only to the kidnapping of the victim, a minor, with the aid of other three persons, the FIR disclosed commission of offence punishable under Section 366-A of the IPC read with 34 thereof.

6. The police after investigation, however, submitted chargesheet for commission of the offences punishable under Sections 366A and 376 read with Section 34 of the IPC and Section 4 and 8 of the POCSO Act. Later, charges were framed on 30.11.2017 and amended on 07.08.2021 for commission of the offences punishable under Sections 376-D and 366-A of the IPC and Section 6 of the POCSO Act. The appellant pleaded not guilty and claimed trial.

7. At the trial, the prosecution examined six witnesses including the doctor (PW-6), the informant (PW-2), the victim (PW-3) and the victim's mother (PW-1). PW-4, a co-villager of the informant, did not support the prosecution's case and



accordingly he came to the declared hostile at the instance of the prosecution.

8. In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record following documentary evidence to prove the charges against the appellant:-

Sl. No.	Contents	Exhibit No
1	Signature on the statement under Section 164 CrPC	Exhibit-1
2	Formal FIR	Exhibit-2
3	Endorsement on the FIR	Exhibit-3
4	Signature of the informant on the FIR	Exhibit-3/1
5	Application for statement of the victim under Section 164 CrPC	Exhibit-4
6	Chargesheet	Exhibit-5
7	Medical report of victim	Exhibit-6

9. The learned trial court, after having appreciated the evidence adduced at the trial, has held the appellant guilty of the offences punishable under Sections 366-A and 376-D of the IPC and Section 6 of the POCSO Act by the impugned judgment dated 21.08.20121 and sentenced him to imprisonment and fine by an order dated 27.08.2021, as has been noted above.

10. Mr. Bachan Jee Ojha, learned counsel appearing on behalf of the appellant has submitted that the entire case of the prosecution is false and manifestly doubtful for the reason that, according to the First Information Report, the informant had gone



to Amritsar in search of the victim where the victim was located with the appellant, with the assistance of the local administration. He contends that even in the evidence at the trial, the informant (PW-2) deposed that he had gone to Amritsar with police personnel of Goh Police Station and had contacted Amritsar police for recovery of the victim. The Investigating Officer, on the other hand, has clearly deposed that he had not gone to Amritsar nor there is anything in his deposition to show that any police personnel or police party had gone to Amritsar with the informant in search of the victim. He has further submitted that there is no evidence on record other than the depositions of the informant and his wife (PW-1) that villagers from three different villages, the informant and his son-in-law had gone with the police to Amritsar, there is absolutely no reliable evidence brought on record to suggest that Goh Police or the Amritsar Police played any role in recovery of the victim. He has further argued that the evidence of the doctor (PW-6) suggests that age of the victim was above 18 years and, therefore, there would have been no question to convict the appellant for the offence punishable under Section 366-A of the Indian Penal Code and under the provision of POCSO Act. He contends that the allegation of commission of sexual assault by the appellant after kidnapping the victim is,



apparently, an afterthought. The informant (PW-3) does not, at all, appear to be truthful in his deposition that the appellant and others had committed rape upon the victim in the background of the fact that no assertion to this effect is there in the First Information Report which was registered on the basis of the disclosures made by the victim.

11. Learned Additional Public Prosecutor representing the State defending the findings recorded by the trial court has submitted that absence of definite allegation of commission of sexual assault in the First Information Report is not of much relevance in the background of the fact that the victim clearly deposed at the trial that she was subjected to sexual assault not only by this appellant but his other friends who had kidnapped her. She contends that the victim has described in her evidence the manner in which she was kidnapped by the appellant and his accomplices when she was coming out of her school on 12.07.2016. She has also argued that as the victim has fully supported the prosecution's case of commission of rape, the finding of conviction recorded by the trial court does not require any interference.

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



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

13. Beginning from the accusation made in the FIR, it can be easily seen that initially the victim herself had told the informant that she was not kidnapped rather she had come to Amritsar willingly with the appellant. Further, the FIR did not disclose commission of any sexual assault. Though the allegation made in the First Information Report itself is not a substantive piece of evidence, the contents of the FIR is of much significance which disclosed the foremost version of the prosecution's case. We do not find any explanation in the evidence of the witnesses as to why the act of commission of rape by the appellant on the victim was not disclosed by her to the informant at the time of lodging of the FIR. Secondly, the evidence of the prosecution's witnesses that the police at Goh had accompanied the informant to Amritsar and the victim was recovered with the appellant with the aid of Amritsar police is not proved in view of categorical disclosure made in the evidence of the Investigation Officer (PW-5). PW- 5, in his cross-examination, categorically disclosed that at no point of time he had gone to Amritsar. It cannot be culled out from his deposition that any police personnel from Goh Police Station had gone to Amritsar to locate the victim. Had the



informant disclosed to the police about kidnapping of his minor daughter whereupon the police had gone to Amritsar, there appears to be no reason why the FIR would not have been registered on the basis of such disclosure made by the informant to the police. There can be two circumstances: either the prosecution's witnesses 1 & 2 are untruthful and are telling lies at the trial that Goh Police personnel had gone to Amritsar for locating the victim, a minor, upon her kidnapping or, the prosecution has completely suppressed the first version of the prosecution's case, if it is accepted that the witnesses had informed the police about the victim's kidnapping before lodging of the FIR. It is apparent from the deposition of the victim, the informant and P.W. 1 that improvements came to be introduced at the trial, deviating substantially from what was disclosed in the First Information Report.

14. In our view thus, the prosecution's witnesses 1, 2 & 3 do not appear to be truthful. PW- 4 has not supported the prosecution's case and has, accordingly, been declared hostile.

15. There is no gainsaying that in order to establish an offence under Section 6 of the POCSO Act and Section 366-A of the Indian Penal Code, it is incumbent upon the prosecution to establish that the victim was a minor on the date of occurrence.



16. From the depositions of the witnesses and other materials on record, it is evident that the victim was studying in a school. No age determination procedure was adopted by the prosecution to establish its case in accordance with Section 34 of the POCSO Act read with Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 to establish that the victim was a minor/child as on the date of occurrence. The medical evidence though does not give an accurate assessment of age, it discloses, based on sexual secondary character, dental report, radiological report, that the age of the victim was between 18-19 years. There is, thus, no evidence at all on record to prove the prosecution's case that the victim was a minor as on the date of occurrence. Section-366A of the Indian Penal Code reads thus:-

"366A. Procuration of minor girl.—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

17. Unless minority of a victim is established, the prosecution cannot claim to have proved an offence punishable under Section 366-A of the IPC.

18. For the same reason, the appellant's conviction for



the offence punishable under Section 6 of the POCSO Act as recorded by the trial court, cannot be sustained. The trial court, while recording conviction of the appellant under Section 6 of the POCSO Act, has taken aid of Section 29 thereof which casts a reverse burden on an accused of commission of sexual assault on a child to prove his innocence. Section 29 of the POCSO Act can come into play only when the prosecution is able to establish that the victim of offence is a child within the meaning of Section 2(d) of the POCSO Act. The judgment of the trial court holding the appellant guilty of the offence punishable under Section-366A of the Indian Penal Code and Section 6 of the POCSO Act, therefore, cannot be sustained.

19. This situation leaves us to decide as to whether the prosecution has been able to make out a case of the victim's abduction and sexual assault by the appellant and his friends so as to establish commission of offence punishable under Section 366-A & 376 of the Indian Penal Code.

20. As has been noted hereinabove, there are three witnesses who have supported the prosecution's case, namely, the victim herself, her father and her mother. None of the witnesses appear to be truthful in their evidence, considering the inconsistencies between the disclosure made in the First



Information Report and subsequent depositions at the trial.

21. In such circumstance, we are of the view that the appellant deserves acquittal giving him benefit of doubt as the prosecution’s witnesses do not appear to be truthful.

22. Accordingly, the appellant stands acquitted of the charge of offences punishable under Sections 366-A and 376-D of the Indian Penal Code and Section 6 of the POCSO Act by giving him benefit of doubt.

23. In the result, the impugned judgment of conviction and the order of sentence dated 21.08.2021/ 27.08.2021 passed by the learned Additional District & Sessions Judge-VI- cum-Special Exclusive Judge, (POCSO), Aurangabad in POCSO (G.R.) No. 03 of 2017/ CIS No. 03 of 2017, arising out of Goh P.S. Case No. 83 of 2016 are set aside.

24. This appeal is allowed accordingly.

25. The appellant is in jail custody. Let him be released forthwith, if he is not required in any other case.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Rajesh/Ashok

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	17.10.2023
Transmission Date	17.10.2023

