

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.649 of 2021

Arising Out of PS. Case No.-83 Year-2019 Thana- MOHIUDDIN NAGAR District-
Samastipur

Golu Kumar Singh, Son of Dinesh Singh, Resident of Village - Bhasingpur,
P.S. - Mohiuddinnagar, District - Samastipur.

... .. Appellant/s
Versus
The State of Bihar

... .. Respondent/s

Appearance :
For the Appellant/s : Mr. Vishwanath Pd. Singh, Sr. Advocate
Mr. Sanjay Kumar Singh, Advocate
For the Respondent/s : Ms. Shashi Bala Verma, 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 : 10-10-2023

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 24.08.2021 and an
order of sentence dated 26.08.2021, passed by learned 6th
Additional Sessions Judge-cum- Special Court (POCSO), in
Trial No. 107 of 2021, arising out of Mohiuddinnagar P.S. Case
No. 83 of 2019, whereby the appellant has been convicted and
sentenced as under:-

Penal Provision	Sentence		
	Imprisonment	Fine	In default of fine



		(Rs.)	
Section 376 of the IPC	R.I. for 20 years	50,000/-	S.I. for six months
Section 4 of the POCSO Act	X	X	X

2. The victim's (PW-1) written report to the Officer-in-Charge of Mohiuddinnagar Police Station in the district of Samastipur is the basis for registration of Mohiuddinnagar P.S. Case No. 83 of 2019 dated 23.05.2019 disclosing commission of the offences punishable under Section 376 of the Indian Penal Code, Section 4 of the Protection of Children from Sexual Offences Act ('POCSO Act' in short) and Sections 3(1)(r), 3(1)(s), 3(1)(w) and 3(2)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SC/ST Act' in short). The informant claimed her age to be 17 years, belonging to a Scheduled Caste. She alleged that at 10:00 PM on 22.05.2019 when the victim had gone out of her house to ease herself, her co-villager (the appellant), aged 18 years took her in his cattle shed and committed rape upon her. After she raised a cry, the villagers assembled, whereafter the appellant was apprehended by them and based on information given to the police by the villagers, the police came to whom the appellant was handed over.

3. In the formal FIR, it is mentioned that the



information regarding the occurrence was received at the police station at 6:35 AM on 23.05.2019. The victim was subjected to medical examination on 23.05.2019 to ascertain her age and give opinion on the point of sexual assault. Based on radiological examination the age of the victim was found to be 16-17 years. The Medical Board further noted that no injury was found on the private parts of the victim but sexual contact had been established in past. Though the appellant was apprehended by the villagers and handed over to the police soon after the occurrence, as per the prosecution's case, despite there being allegation of sexual assault, he was not subjected to any medical examination in accordance with the requirement under Section 53A of the CrPC.

4. The police after investigation submitted chargesheet on 10.07.2019 against the appellant for commission of the offences punishable under Section 376 of the IPC, Sections 3(1)(w), 3(2)(v) of the SC/ST Act and Section 4 of the POCSO Act, whereupon cognizance was taken of the aforesaid offences. On 02.09.2019, the charge came to be framed against the appellant for commission of the offences punishable under Section 376 of the IPC, Section 4 of the POCSO Act and Sections 3(1)(w), 3(2)(v) of the SC/ST Act. The appellant



denied the charge and claimed to be tried.

5. At the trial, the prosecution examined altogether seven witnesses in support of the charge, which included the victim (PW-1), her mother (PW-2), the victim's brothers (PW-3 and PW-4), the doctor who had examined the victim and was member of the Medical Board (PW-5) and the Investigating Officer (PW-7). One Randhir Kumar Paswan, a co-villager also deposed at the trial in support of the prosecution (PW-6).

6. In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record following documentary evidence by way of exhibits :-

Sl. No.	Contents	Exhibit No.
1	Signature of the informant with mobile no. of the witness on written application	Exhibit-1
2	Signature of the informant on her statement under Section 164 of CrPC	Exhibit-2
3	Signature of the informant on her medical requisition	Exhibit-3
4	Signature of Sudhir Kr. Paswan on memo of arrest & seizure-list	Exhibits-4, 4/1
5	Medical report of victim	Exhibit-5
6	Endorsement on the written report	Exhibit-6
7	Formal FIR	Exhibit-7
8	Seizure-list	Exhibit-8
9	Arrest Memo	Exhibit-9
10	Chargesheet	Exhibit-10

7. After closure of the prosecution's evidence the appellant was questioned by the court 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. We deem it appropriate to reproduce hereinbelow the questions which were put to the appellant and his response thereto during the examination under Section 313 of the CrPC as under :-

"प्रश्न : गवाहों का बयान आपने सुना है ?

उत्तर : जी हाँ !

प्रश्न : गवाहों का कहना है की 22 मई 2019 को 10 pm मे जब पीड़िता को अपने बथान के कमरा में बलात्कार किया ? इस सम्बन्ध में क्या कहना है ?

उत्तर : जी गलत है !

प्रश्न : सफाई में क्या कहना है ?

उत्तर : मैं निर्दोष हूँ "

8. The trial court after having appreciated the evidence on record, reached a conclusion that the age of the victim was less than 18 years based on result of medical examination and, therefore, a child within the meaning of Section 2(d) of the POCSO Act. After having held so, the trial court held the appellant guilty of commission of rape under Section 376 of the IPC and Section 4 of the POCSO Act. The trial court has also reached a conclusion that the prosecution could not establish the charge of commission of offence



punishable under the provisions of the SC/ST Act and, accordingly, acquitted the appellant of the said charge and finally sentenced the appellant to imprisonment and fine as has been noted above.

9. Mr. Vishwanath Pd. Sinha, learned senior counsel appearing on behalf of the appellant has made three fold submissions. He has submitted that it was incumbent upon the prosecution to establish in accordance with the legally prescribed procedure under Section 34 (2) of the POCSO Act read with Section 94 of the Juvenile Justice (Care and Protection of Children) Act that the age of the victim was less than 18 years so as to attract the provisions under the POCSO Act. He contends that the age, as determined by the Medical Board based on the radiological examination i.e. 16-17 years, cannot be said to be accurate. Further, the victim deposed in her evidence that she had studied upto Class-V and had left the school thereafter. No effort was made to ascertain the age of the victim based on the entry made in the school register and obtain necessary certificate from the Principal of the school where the victim had been first admitted. He contends that the prosecution having miserably failed to establish that the victim was a child within the meaning of Section 2(d) of the POCSO Act, the



appellant's conviction for the offence punishable under Section 4 thereof is not at all sustainable. He has secondly submitted that it can be easily deduced on a close scrutiny of the evidence of the victim that if there was any sexual intercourse between the appellant and the victim on the date and at the time of occurrence, the same was with consent. The victim was apparently consenting party in view of her clear deposition at the trial that she had not put any resistance when the appellant was committing rape upon her and that was the reason why her clothes were not damaged. He has further argued that in the present circumstance, when the appellant was apprehended at the time of commission of offence, there was no reason why he was not put to medical examination there being accusation of sexual assault, in accordance with the requirement under Section 53A of the CrPC. He contends that the prosecution miserably failed to prove two essential facts at the trial to establish the charge of commission of the offences punishable under Section 376 of the IPC and Section 4 of the POCSO Act; firstly that the victim was a child and secondly the sexual intercourse alleged to have been committed by the appellant was without her consent.

10. Learned Additional Public Prosecutor representing



the State has defended the impugned finding of the trial court and has submitted that the requirement of medical examination under Section 53A of the CrPC is not mandatory in nature rather it simply enables the Investigating Agency to get an accused of sexual assault medically examined. Failure on the part of the police to examine the appellant as required under Section 53A of the CrPC cannot be said to be fatal to the prosecution's case. She has submitted that, in any event, a defective investigation of this nature may not be the basis for this Court to upset the finding of conviction recorded by the trial court. She has further argued that it was a clear case of the victim herself in her written statement that her age was 17 years as on the date of occurrence which was found to be correct during the medical examination. The prosecution was, thus, able to establish that the age of the victim was less than 18 years as on the date of occurrence. She contends that once the victim's age could be proved at the trial to be less than 18 years, her being a consenting party to the sexual intercourse, becomes meaningless. She submits accordingly that the trial court has rightly convicted the appellant of the offence punishable under Section 376 of the IPC and Section 4 of the POCSO Act.

11. We have perused the impugned judgment and



order of the trial court as well as the lower court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted above.

12. At the outset, we find force in the submission made on behalf of the appellant that the prosecution was not able to establish the age of the victim to be below 18 years and, therefore, she was a child within the meaning of Section 2(d) of the POCSO Act. In our opinion, it was the duty of the prosecution to establish at the trial that the victim was a child. Determination of age of a victim is a condition precedent to attract the provisions of the POCSO Act. Section 34 of the POCSO Act reads as under:-

"34. Procedure in case of commission of offence by child and determination of age by Special Court

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of 1[the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].

(2) If any question arises in any proceeding before the Special Court whether a person is a 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.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person



13. The Supreme Court in case of ***Jarnail Singh vs. State of Haryana*** reported in ***2013 (7) SCC 263*** has held in no uncertain terms that the procedure prescribed under the Juvenile Justice (Care and Protection of Children) Act should be the basis for determination of age in case of a child, who is a victim of crime. The Supreme Court observed in the said decision that there was 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. Paragraph 23 of the said decision is being reproduced hereinbelow for quick reference :-

"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."

14. We may point out, at this juncture, that the provision under the Juvenile Justice (Care and Protection of Children) Rules, 2007 framed under Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2000 has been referred to in case of **Jarnail Singh** (supra). Juvenile Justice (Care and Protection of Children) Act, 2000 stood repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015. Sub-section (2) of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 now lays down the procedure for determination of age of a person in conflict with law. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is akin to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Section 94 of the Juvenile



Justice (Care and Protection of Children) Act, 2015 reads thus :-

"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.”

15. In the present case, no exercise at all was undertaken by the court/the prosecution to establish that the victim was under 18 years of age by following the procedure prescribed under the Juvenile Justice (Care and Protection of Children) Act, 2015.

16. It has been held in case of **Rajak Mohammad Vs. State of Himanchal Pradesh** reported in (2018) 9 SCC 248 that age determined on the basis of radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. The Supreme Court in case of **Rajak Mohammad** (supra) held in paragraph 9 as under :-

"9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused."

17. In view of the Supreme Court's decision in case of **Jarnail Singh** (supra) and **Rajak Mohammad** (supra), we are



of the opinion that the prosecution was not able to establish that the victim was a child within the meaning of the provisions of the POCSO Act. Thus, neither Section 4 of the POCSO Act nor the provisions under Sections 29 and 30 thereof would apply in the present case. Sections 29 and 30 put a reverse burden on an accused charged of offence punishable under the provisions of the POCSO Act to establish his innocence. The presumption of guilt under Sections 29 and 30 of the POCSO Act shall have no application in this case.

18. We must take into account, at this stage, the question which was put to the appellant by the trial court under Section 313 of the CrPC. He was told by the court that according to the evidence of the prosecution's witnesses, the age of the victim was 16 years on whom the appellant had committed rape. The appellant answered the said question in negative. The said question put by the trial court had two components. Firstly, the age of the victim was 16 years and secondly, the appellant had committed rape upon her. It was not the case of the victim herself, as disclosed in her written report, that her age was 16 years. Rather according to her, her age was 17 years on the date of occurrence. The second component of that question was that the appellant had committed rape upon



the victim. The appellant answered in negative, the said question meaning thereby that he disputed both the aspects i.e. the age of the victim and commission of rape (बलात्कार) upon her.

19. Having noted thus, we now need to take into account the evidence of the prosecution's witnesses. The victim herself is the most competent witness of the occurrence. In her examination-in-chief, the victim deposed that when in the night at 10:00 PM he had come out of her house to ease herself, the appellant tied her mouth with a *gamacha* and thereafter took her to his cattle shed and committed rape upon her. After rape having been committed upon her she raised cry, whereafter her mother (PW-2) arrived. Subsequently, her father (not examined), brother (PW-3) came and thereafter villagers also came. In her cross-examination, she deposed that she had raised cry 15 minutes after the occurrence had taken place. She further deposed that after she had raised cry nearly 15 villagers had assembled. According to her, she had herself untied the *gamacha* 15 minutes after the occurrence. In paragraph 29 of her cross-examination she clearly deposed that she did not put any resistance to the act of the appellant because of which her cloths were not torn. Further, the appellant stayed with the victim at the place of occurrence for nearly 15 minutes. In



response to one of the questions during the cross-examination, she deposed initially (paragraph 31) that she did not know the appellant from before. However, at the same breath she disclosed that she knew the appellant from her childhood, but she was not on talking terms with him. She denied the suggestion that there was any love affair between her and the appellant. It is significant to note that from the evidence of the mother of the victim (PW-2), it appears that the appellant and the victim are neighbours. She reached at the place of the occurrence on hearing the cry raised by the victim.

20. We need to notice, at this juncture, that according to the victim she had raised cry 15 minutes after the occurrence had taken place. According to the depositions of the witnesses, the appellant was present at the place of occurrence when the victim's mother reached there. In the background of the evidence of the prosecution's witnesses, the statement of the victim recorded under Section 164 of the CrPC assumes significance. From her statement under Section 164 of the CrPC it transpires that it was not because of the victim's cry that her mother and other persons had reached the place of occurrence. They were rather searching for the victim, who had disappeared and thereafter the victim and the appellant were found in the



cattle-shed of the appellant. The victim's earliest version, which is her written report, also does not indicate that responding to cry raised by the victim her family members and villagers had reached the place of occurrence.

21. On careful reading of the evidence of the prosecution's witnesses, we are of the view that the victim cannot be said to be a witness of sterling quality on the point of commission of sexual intercourse by the appellant without her consent. Her deposition in paragraph 29 of the cross-examination demolishes the prosecution's case of commission of sexual intercourse without her consent.

22. Taking into account a holistic view of the evidence adduced at the trial, we are of the opinion that the prosecution cannot be said to have established the charge of commission of offence punishable under Section 376 of the Indian Penal Code beyond all reasonable doubts. The victim, in our opinion, does not appear to be truthful and the prosecution's case is full of inconsistencies.

23. Situated thus, we do not consider it safe to uphold the finding of conviction recorded by the trial court for the offence punishable under Section 376 of the Indian Penal Code. Accordingly, the appellant stands acquitted of the charges



punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act.

24. The impugned judgment of conviction and the order of sentence dated 24.08.2021/ 26.08.2021, passed by learned 6th Additional Sessions Judge-cum- Special Court (POCSO), in Trial No. 107 of 2021, arising out of Mohiuddinnagar P.S. Case No. 83 of 2019 are hereby set aside.

25. This appeal is allowed accordingly.

26. 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/Nirmal

AFR/NAFR	NAFR
CAV DATE	NA
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