

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.690 of 2021

Arising Out of PS. Case No.-10 Year-2020 Thana- MAHILA P.S. District- Bhagalpur

SURAJ KUMAR Son of Vindeshwari Mandal Resident of Village -
Goshaygaon, P.S. - Gopalpur, District - Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv Mr. Ranjan Kumar Jha, Adv Mr. Rana Pratap Singh, Adv Mr. Vikas Kumar, Adv
For the State	:	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 : 11-10-2023

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure assailing the judgment of conviction dated 22.09.2021 and an order of sentence dated 28.09.2021 passed by the learned Exclusive Special Court (POCSO-II) cum-7th Additional Sessions Judge, Bhagalpur, in POCSO Case No. 52 of 2020 arising out of Naugachia P.S. Case No. 10 of 2020, whereby and whereunder the appellant has been convicted and sentenced as under :-



Penal provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 376(A)(B) of the IPC	-----	-----	-----
Section 4 r/w section 5(m) of the POCSO Act	Rigorous Imprisonment for life	Rs. 25,000/-	SI for 6 months

2. There does not appear to be any controversy over the fact that the victim (not examined) who was an infant, aged less than five years, as on the date of occurrence. Her mother (PW-5) is the informant. She alleged in her written complaint addressed to the Officer-in-Charge, Naugachiya (Bhagalpur) Police Station that it was raining at 2:00 pm. on 21.05.2020, when the victim had gone out of her house to ease herself. The appellant aged 18 years, a cousin of the husband of the informant committed rape upon her, taking advantage of the victim's solitude being alone. The victim returned with *litchis* in her hand and by her gestures she disclosed that her uncle (the appellant) had gagged her mouth and caused penetration. On further queries made by the informant, the victim disclosed that the appellant had taken her to the cattle shed. Based on the aforesaid circumstance, the informant believed that the appellant had committed rape upon the victim. The informant's husband was not there in the house.



The occurrence was narrated to him when he returned at 4:00 pm in the evening. Thereafter, the informant's husband (PW-8) took the victim for treatment to a village quack (PW-3). The written complaint was filed with the police on 22.05.2020. The informant, thus, explained the delay in lodging of FIR on the next day.

3. The victim was examined by a Doctor on 22.05.2020. While opining that the age of the victim was between 3 to 5 years, the Doctor opined that there was evidence of sexual assault. The statements of the victim and the informant were recorded under Section 164 of the CrPC.

4. The police, upon completion of investigation submitted chargesheet for commission of the offence punishable under Section 376(A)(B) of the IPC and Section 4 of the POCSO Act against the appellant. After taking cognizance, charges were framed against the appellant for commission of offence punishable under Section 376(A)(B) of the IPC and Sections 4 and 6 read with Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act' in short). The appellant denied the charge and claimed to be tried. Accordingly, he was put to trial.

5. At the trial, the prosecution examined altogether



eight witnesses including the victim's father (PW-8), victim's mother (PW-5), victim's grandfather (PW-1), the village quack who had treated the victim first (PW-3) and sister of husband of the informant (PW-4). The Doctor who had examined the victim deposed at the trial as PW-7 and the Investigating Officers as PWs 2 and 6. In addition to the oral evidence of the prosecution's witnesses, the prosecution brought on record following documentary evidences at the trial:-

Sl. No.	Description	Exhibit Number
1.	Endorsement over written complaint	Exhibit-1
2.	Formal FIR	Exhibit-1/A
3.	Chargesheet	Exhibit-2
4.	Report of the Doctor	Exhibit-3

6. It is evident from the list of the documentary evidence adduced at the trial that even the statement of the informant and that of the victim said to have been recorded under Section 164 of the CrPC were not proved by getting them exhibited.

7. After conclusion of the trial, the appellant's statement was recorded 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. While answering in negative, the said circumstances



explained to him, he took a plea that a quarrel had taken place earlier in relation to a land dispute because of which he was falsely implicated. In response to one of the questions, he answered in affirmative saying that blood was oozing out from the private part of the victim and he had seen her weeping before she was taken to the Doctor. The trial Court, after having appreciated the evidence adduced at the trial, reached a conclusion that the prosecution was able to establish the charge against the appellant of commission of offence punishable under Section 376(A)(B) of the IPC and Section 4 read with Section 5 (m) of the POCSO Act beyond all reasonable doubts and after having convicted the appellant of the said offence sentenced him to imprisonment and fine as noted above.

8. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant has submitted that none of the witnesses have supported the prosecution's case of commission of sexual assault on the victim by the appellant. He contends that the prosecution's witnesses have rather denied the occurrence of any sexual assault on the victim and have explained that the victim had sustained such injuries because of her fall on some substance injuring her private parts. He contends that even the informant and father of the victim have



not supported the prosecution's case. He submits that the evidence of the Doctor (PW-7) is the only material in support of the fact that the victim was subjected to sexual assault. Even if the said finding is treated to be correct, the prosecution has miserably failed to connect this appellant with the injury said to have been sustained by the victim as appearing in the medical evidence. He has submitted that the witnesses who have not supported the prosecution's case have not been declared hostile at the instance of the prosecution and therefore, it is permissible for appellant to rely on their evidence in support of his defense of innocence. Mr. Thakur has further submitted that under Section 164A(3)(4) of the CrPC the registered medical practitioner is obligated to record the consent of the woman or of the person competent to give such consent on her behalf for such examination but in this case no consent has been obtained before undertaking the exercise of medical examination of victim of rape. Further, sub-section (3) of Section 27 of the POCSO Act requires that the medical examination of a child should be conducted in the presence of the parents of the child or any other person in whom the child reposes trust or confidence. In the present case, the doctor has neither recorded that the permission was obtained before undertaking medical



examination requisite under Section 164 A(3)(4) of the CrPC nor the presence of the parents of the child in the medical report. He has further argued that even if it is accepted for the sake of argument that the appellant was subjected to penetrative sexual assault, the prosecution has miserably failed to establish that it was the appellant, who committed the said criminal misconduct. He submits that though Section 53(A) of the CrPC is directory in nature and not mandatory, in the facts and circumstances of the present case, the appellant ought to have been subjected to medical examination in accordance with the requirement under Section 53(A) of the CrPC.

9. Learned Additional Public Prosecutor, representing the State, has submitted that the medical evidence eloquently suggests that the victim was subjected to sexual assault. Considering the minor age of the victim, who was an infant on the date of occurrence, it cannot be expected that she would be in a position to describe the occurrence like a mature person. She had disclosed the occurrence to her mother whereupon, the FIR was registered. She submits that based on the evidence of and other attending circumstances, the learned trial court has rightly appreciated the evidence adduced at the trial. Taking aid of Section 29 of the POCSO Act, the trial court convicted the



appellant of the offence punishable under Section 376(A)(B) of the IPC and Section 4 read with Section 5(m) of the POCSO Act. She submits that there is no illegality in the impugned order which requires this Court's interference.

10. We have perused the impugned order and judgment 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.

11. In the present case, none of the prosecution's witnesses, namely, the victim's mother and informant (PW-5), victim's father (PW-8), victim's grandmother (PW-1) and the victim's aunt (PW-4) have supported the prosecution's case. They have categorically deposed at the trial that no occurrence of rape had taken place; rather because of fall, the victim had sustained certain injuries whereafter she was taken to PW-3 for treatment. PW-3 in his evidence deposed that the victim got injured by kick of a calf, whereafter, the victim's father had called him to his house for treatment and he had given one injection. He deposed that the appellant was innocent.

12. In response to a query during the cross-examination, PW 7, the Doctor, deposed that the nature of injury sustained by the victim could not have been caused by falling on



any sharp-edged material. She had noticed vaginal tear with blood and redness of vulva.

13. From the evidence of the prosecution's witnesses, it transpires that according to them, the victim had not stated anything to anyone. The Investigating Officer (PW-2) interacted with the victim in the presence of her parents, but she had not disclosed anything to her. PW-6, another I.O. deposed at the trial, *inter alia*, that in his statement recorded under Section 161 of the CrPC, Umesh Das (PW-3) had stated that the father of the victim (PW-8) told him that the victim was kicked by a cattle on 21.05.2020 and he (PW-8) had requested PW-3 to treat his daughter.

14. On careful scrutiny of the evidence of the prosecution's witnesses, we are of the considered view that the prosecution has not been able to establish at the trial that the victim, a minor, was subjected to sexual intercourse by the appellant. The conviction of the appellant recorded by the trial court for commission of offence punishable under Sections 376(A)(B) of the IPC and Section 4 of the POCSO Act cannot be sustained. The appellant deserves to be given benefit of doubt as none of the prosecution's witnesses have supported the case of the prosecution of sexual assault except the Doctor.



15. The appellant, accordingly, stands acquitted of the charge of commission of offence punishable under section 376(A)(B) of the IPC and Sections 4 and 6 of the POCSO Act by giving him benefit of doubt.

16. Accordingly, the judgment of conviction judgment conviction dated 22.09.2021 and the order of sentence dated 28.09.2021 passed by the learned Exclusive Special Court (POCSO-II) cum-7th Additional Sessions Judge, Bhagalpur, in POCSO Case No. 52 of 2020 arising out of Naugachia P.S. Case No. 10 of 2020, are set aside.

17. This appeal is allowed.

18. 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)

ranjan/sonali-

AFR/NAFR	NAFR
CAV DATE	NA
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