

THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.696 of 2021

Arising Out of PS. Case No.-164 Year-2018 Thana- KALYANPUR District- Samastipur

Sanjeev Kumar @ Bitthu @ Bittu Son of Late Laxmi Sahani @ Late Laxmi
Narayan Chaudhari Resident of Village - Gopalpur, P.S. - Kalyanpur, District
- Samastipur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 763 of 2021

Arising Out of PS. Case No.-164 Year-2018 Thana- KALYANPUR District- Samastipur

Santosh Sahani @ Bantha Son of Gopal Sahani @ Ganga Sahani Resident of
Village - Gopalpur, P.S.- Kalyanpur, District - Samastipur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 696 of 2021)

For the Appellant : Mr. Shashank Chandra, Advocate
Ms. Kumari Shubham, Advocate

For the Respondent : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 763 of 2021)

For the Appellant : Mr. Ranjan Kumar, Advocate

For the Respondent : 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 : 06-10-2023

As both the appeals, preferred under Section 374(2) of
the CrPC, arise out of the same judgment of conviction dated
13.09.2021 and the order of sentence dated 15.09.2021 passed by
the learned Additional Sessions Judge-VIth-cum-Special Judge



POCSO Act, Samastipur, in T.R. No. 184 of 2021 and R.N. No. 1163 of 2018, they have been heard together and are being disposed of by the present judgment and order. By the judgment and order aforesaid, the appellants have been convicted and sentenced as under: -

Cr. Appeal (D.B.) No. 696 of 2021				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Sanjeev Kumar @ Bitthu @ Bittu	363 of the IPC	R.I. for Seven years	5,000/-	S.I. for one month
	366-A of the IPC	R.I. for 10 years	10,000/-	S.I. for two months
	376-DA of the IPC (under the provisions of alternate punishment U/s 42 POCSO Act)	R.I. for Life	50,000/-	-
Cr. Appeal (D.B.) No. 763 of 2021				
Santosh Sahani @ Bantha	363 of the IPC	R.I. for Seven years	5,000/-	S.I. for one month
	366-A of the IPC	R.I. for 10 years	10,000/-	S.I. for two months
	376-DA of the IPC (under the provisions of alternate punishment U/s 42 POCSO Act)	R.I. for Life	50,000/-	-

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

3. The victim's father (PW 1) is the informant of the concerned Kalyanpur P.S. Case No. 164 of 2018 registered for the offence punishable under Sections 363, 366-A, 354-D, 343 read with 34 of the IPC. A written report of the informant, addressed to the Officer-in-Charge of Kalyanpur Police Station, is the basis for



registration of the said FIR on 06.10.2018. According to the allegation in the FIR, on 01.10.2018 at about 3 A.M., when the informant's minor daughter (aged 13 years) had come out her house for easing herself, four persons, named in the FIR, viz. Santosh Sahani @ Bantha (appellant), Sachindra Sahani, Sanjeev Kumar @ Bitthu @ Bittu (the appellant) and Manjay Sahni were waiting out the house in a Bolero vehicle and all of them kidnapped the victim in the said vehicle. An oral information was given to Officer-in-Charge of the Police Station on the same day and the family members started searching for the victim. Under social pressure, it is alleged, the victim was released and dropped at 2 PM at a place called Gopalpur barrage. The informant belonged to Scheduled Caste.

4. The police, upon completion of investigation, submitted charge-sheet on 09.01.2019 against the appellants Santosh Sahani @ Bantha and Sanjeev Kumar @ Bitthu @ Bittu on 19.01.2019 for the offences punishable under Section 363, 366-A, 354(D)(i), 343 read with 34 of the IPC and Section 3 (1)(r)(s) (w) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SC/ST Act' for short). Cognizance was subsequently taken of the offences punishable under Sections 366-A of the IPC, Section 6 of the Protection of Children from Sexual



Offices Act, 2012, (POCSO Act) and Section 3 (1)(r)(s)(w) of the SC/ST Act. The appellants were charged of the offences punishable under Sections 363/34, 366-A/34, 376/34 of the IPC, Section 6 of the POCSO Act and Section 3 (1)(r)(s)(w) of the SC/ST Act.

5. As the appellants denied the charge and claimed to be tried, they were put on trial.

6. It is mentioned here that we are not disclosing, in the present judgment, the names of the victim and her parents, who deposed at the trial for the prosecution, so as to conceal her identity and they have been referred to in the present judgment based on their status as prosecution witnesses.

7. At the trial, the prosecution got examined eight witnesses including the victim's father and the informant (PW 1), her mother (PW 5), grandmother (PW 6) and the victim (PW 2). The Investigating Officer deposed at the trial as PW 7 and the Doctor, who had examined the victim, as PW 8. PWs 3 and 4 are the co-villagers. In addition to the oral evidence of the prosecution's witness, the prosecution also brought on record documentary evidence viz. FIR (exhibit-1), the victim's signature on her statement recorded under Section 164 of the CrPC (exhibit-2), the victim's statement recorded under Section 164 of the CrPC



(exhibit-3), signature of the informant over the written report (exhibit-4), formal FIR (exhibit-5), charge-sheet (exhibit-6) and the medical report of the victim (exhibit-7).

8. After 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 opportunity to explain the incriminating circumstance emerging against them based on the evidence of the prosecution's witnesses. The appellants answered the said question in negative and again pleaded their innocence. No defence witness was produced by defence at the trial.

9. The trial court, after having appreciated the evidence adduced at the trial, has reached a conclusion that the prosecution was able to prove the charge of kidnapping of the victim punishable under Section 366-A of the IPC and penetrative sexual assault upon a minor girl aged 15 years punishable under Section 376-DA of the IPC and Section 6 of the POCSO Act. The trial court has acquitted the appellants of the charge of commission of offence punishable under the provisions of the SC/ST Act on the ground that the prosecution failed to prove, based on oral or documentary evidence, that the offence was committed by the appellants because the victim belonged to a Scheduled Caste or it was done out of reason that the appellants were in a position of



authority over the prosecutrix due to the fact that she belonged to that particular caste. After having held the appellants guilty of the aforesaid charges, the trial court has sentenced the appellants to undergo imprisonment with fine, as has been noted hereinabove.

10. We have heard Mr. Shanshank Chandra, learned counsel for the appellant in Cr. Appeal (DB) No. 696 of 2021, Mr. Ranjan Kumar, learned counsel for the appellant in Cr. Appeal (DB) No. 763 of 2021 and Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State.

11. Learned counsel appearing on behalf of the appellants has submitted, firstly, that the prosecution miserably failed to prove beyond doubt that the victim was a child within the meaning of Section 2(d) of the POCSO Act inasmuch as it could not be established beyond doubt that the victim was less than 18 years as on the date of occurrence. It has been argued that the victim's age has not been proved at the trial in accordance with the procedure prescribed under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 ('JJ Act' for short) in the light of the Supreme Court's decision in case of ***Jarnail Singh v. State of Haryana***, reported in **(2013) 7 SCC 263** and the mandate of law under Section 34(2) of the POCSO Act. It has further been submitted that none of the prosecution's witnesses,



who have supported the prosecution's case, appear to be trustworthy. The occurrence of kidnapping had taken place on 01.10.2018, which fact was informed to the police orally. There appears to be no reason why the FIR was not registered immediately on 01.10.2018 itself. Further, it is manifest from the FIR that the victim was found by the informant on 02.10.2018. The FIR was registered on 06.10.2018. The FIR does not disclose commission of sexual assault by these appellants. The prosecution's case that the victim was sexually assaulted is apparently an afterthought. It has been argued that photographs of the victim with the appellant Santosh Sahani @ Bantha was brought on record by way of Exhibits (exhibit-X and X/1) on behalf of the defence. Though, the victim admitted in her deposition that her photograph was there with appellant Santosh Sahani @ Bantha, she expressed her inability to say as to under what circumstance the said photograph was taken. It is contended on behalf of the appellants that it is evident from Exhibit-X and X/1 that the appellant Santosh Sahani @ Bantha and the victim were known to each other from before and the victim and appellant had performed certain formalities in the nature of marriage, with appellant Santosh Sahani @ Bantha applying vermilion on the parting of hair of the victim. He has submitted



that on close scrutiny of the evidence of PW 1 (father of the victim) and PW 2 (victim herself), it can be easily inferred that PW 1 had not seen the occurrence as has been deposed at the trial. He has also submitted that from the statement of the victim recorded under Section 164 of the CrPC, it can be easily gathered that she was not willing to go back with her parents, rather she wanted to go to the house of her maternal uncle. This goes to suggest that victim was under some kind of pressure mounted by her parents.

12. Learned Additional Public Prosecutor appearing on behalf of the State, on the other hand, has submitted that the age of the victim was found to be 15-16 years during the medical examination and, thus, the trial court has rightly held her to be a child within the meaning of Section 2(d) of the POCSO Act. He has further submitted that it is evident from the deposition of the victim that she was subjected to penetrative sexual assault by these appellants and, therefore, the finding of conviction recorded by the trial court does not appear to be legally infirm in any manner. The prosecution's case has been fully supported by all the witnesses and, therefore, the finding of conviction for the offence punishable under Section 363, 366-A and 376-DA also cannot be said to be suffering from any illegality.



13. 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.

14. The appellants' conviction is also for the offence punishable under Section 6 of the POCSO Act. The first and foremost question, which we need to answer is as to whether the prosecution could duly prove that the victim was a child within the meaning of Section 2(d) of the POCSO Act and in accordance with the procedure prescribed for determination of age under Section 34(2) of the POCSO Act read with Section 94 of the Juvenile Justice Act. The finding on the point of the victim's age, in the present case, is apparently based on the doctor's report, which, in turn, is based on radiological examination. In the opinion of the Medical Board, the age of the victim was found to be between 15-16 years as on the date of medical examination. The said determination of age cannot be said to be accurate. The Supreme Court in case of *Jarnail Singh* (supra) had the occasion to consider the procedure for determination of age of a victim to attract prosecution under the provisions of POCSO Act. The decision in case of *Jarnail Singh* (supra) was rendered on 01.07.2013, when the Juvenile Justice (Care and Protection of



Children) Rules, 2007 were in force. Rule 12 of 2007 Rules prescribed the procedure for determination of age of a juvenile. In case of **Jarnail Singh** (supra), noticing the procedure prescribed under Rule 12 of the Rules, the Supreme Court, in the case of **Jarnail Singh** (supra) held in paragraph 23 as under:-

“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.”

15. The Juvenile Justice (Care and Protection of Children) Act of 2000 came to be repealed with enactment of Juvenile Justice (Care and Protection of Children) Act, 2015. Section 94(2) of which lays down the procedure for determination of age which is as under:-

94. Presumption and determination of 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:

16. In our considered view, in the light of Supreme Court's decision in case of **Jarnail Singh** (supra), the prosecution ought to have followed the procedure prescribed under Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 to establish that the victim was a 'child' within the meaning of Section 2(d) of the POCSO Act.

17. In the present case, it is evident from the form of heading of deposition of PW 2 that she was a student and had studied upto class 9. No effort was made by the prosecution to establish the age of the victim on the basis of the entry made in the school admission register and certificate issued by the principal of school on that basis. It has rightly been pointed out by the learned counsel for the appellants that medical evidence was the only basis for the prosecution to prove and the trial court to hold that the victim was a 'child' as on the date of occurrence. The victim's age



has been found to be between 15-16 years by the medical board based on radiological examination.

18. The Supreme Court, in case of ***Jaya Mala v. Govt. of J & K***, reported in **(1982) 2 SCC 538**, has held that one can take judicial notice that margin of error in age ascertained by radiological examination is two years on either side. It was incumbent upon the prosecution to establish beyond all reasonable doubts that the victim was below 18 years as on the date of occurrence to attract the provisions of the POCSO Act.

19. In case of ***Jyoti Prakash Rai v. State of Bihar***, reported in **(2008) 15 SCC 223**, the Supreme Court has reiterated that age determination by the Doctors should be given flexibility of two years on the either side. A medical report determining the age of a person has never been considered by the courts of law as also by the medical scientists to be conclusive in nature, the Supreme Court opined in the case of ***Jyoti Prakash Rai*** (supra).

20. In such view of the matter, the finding recorded by the trial court that the victim was a child under the age of 18 years cannot be sustained. For the same reason, the conviction of the appellants for the offence punishable under Section 376-DA of the IPC is not sustainable, which is attracted when age of a woman, subjected to gang rape, is found to be under 16 years.



21. So as to consider the question as to whether the prosecution could establish beyond reasonable doubts its case of kidnapping of the victim by these appellants, we need to notice the evidence of the prosecution's witnesses. According to PW 1, the victim's father, the occurrence of kidnapping of the victim had taken place at 3 AM on 1.10.2018, when the victim had come out of her house to ease herself behind the house, when the informant was feeding the cattle. According to him, at 3 AM in the morning, he had seen a Bolero vehicle parked outside the house of the victim in which four persons were sitting, who came out of the vehicle soon after the victim had come out from her house. All of them forcibly lifted the victim and took her away in the said vehicle. The informant is said to have ran after the vehicle for some distance. Later, he disclosed the fact of victim's kidnapping to other villagers and all of them started searching for the victim. As the victim was not found, they had gone to the police station and had given a written report to the police. The said written report was prepared by his relative Dhaneshwar Das (not examined). He identified his signature on the said written report, marked as Exhibit-1. From the evidence of PW 2, it transpires that according to him, the said written report, which was bearing signature of the



informant, marked as exhibit-1, was handed over to the police before the victim was found.

22. A plain reading of the FIR gives altogether a different picture. The FIR was registered on 06.10.2018, whereas the victim was found on 02.10.2018 itself. The written report dated 06.10.2018 does not disclose commission of rape by these appellants and other accused persons. This is significant for the reason that in paragraph 3 of the evidence, the informant deposed that after the victim was found on the next day of the occurrence, i.e., 02.10.2018 at 2 PM, the victim had disclosed to him (the informant) that all the four persons had committed rape upon her. If the occurrence of rape was disclosed by the victim on 02.10.2018 itself, after she was found by the informant, there could be no apparent valid reason as to why the same was not mentioned in the FIR registered four days thereafter on 06.10.2018.

23. The victim (PW 2) supported the prosecution's case of her kidnapping and commission of rape by all the four accused persons. In response to the question by the prosecution, PW 2 explicitly explained the meaning of rape. In her evidence, she further deposed that on the next date of occurrence of kidnapping, his father (the informant, PW 1) had learnt about her kidnapping.



Her matrimonial uncle had also learnt about it. This deposition of the victim falsifies the entire case of the informant that he had seen the kidnapping of the victim by four named accused persons in a Bolero vehicle when the victim had come out of her house to ease herself and the informant could see the occurrence taking place while feeding cattle. The victim deposed that she was raped in the vehicle itself by the accused persons and that she was made to stay in the house of sister of the appellant Santosh Sahani @ Bantha. She denied the suggestion that she had married the appellant Santosh Sahani @ Bantha and that they were in love with each other. A photograph (exhibit-X) was shown to her during cross-examination. She accepted that it is she who was there with the appellant Santosh Sahani @ Bantha in the photograph, but she expressed her ignorance as to when and how the photograph was taken.

24. PW 5, the mother of the victim, also claimed to be an eye-witness to the occurrence of kidnapping. According to her, she had also raised alarm. The victim had disclosed to her about commission of rape by all the accused persons after she was found on 02.10.2018. At the cost of repetition, we note that there was no such disclosure of commission of rape in First Information Report of the informant.



25. The grand mother of the victim (PW 6) deposed in her evidence that on the day of occurrence, the victim was sleeping with her and had gone out of her house at 3 AM to ease herself. In her cross-examination, PW 6 deposed that she knew the appellant Santosh Sahani about whom the victim used to discuss with her from before. She identified the appellants in the court, but deposed that she was seeing them for the first time.

26. On close reading of the evidence of the main prosecution's witnesses, namely, PW 1, PW 2 and PW 5, in our opinion, they do not appear to be trustworthy either on the point of kidnapping of the victim or commission of rape upon her. There are additional reasons to arrive at this conclusion. Firstly, there is no mention in the FIR after the victim was found by her relatives she had disclosed to them about the commission of rape. PW 1 has claimed in his deposition that the victim had disclosed to him about commission of rape by the accused persons soon after she was found at the barrage. PW 1 is certainly not an eye-witness to the occurrence of kidnapping considering the deposition of the victim herself, according to which PW 1 had learnt about her kidnapping on the next day. The entire prosecution story that at 3 AM, the accused persons were waiting outside in a Bolero vehicle when the victim came out of her house to ease herself and at the



same time, the informant was present there feeding his cattle, appears to be doubtful and improbable at the same time. Doubt becomes stronger with the evidence of the victim's mother (PW 5), who also claimed to be an eye-witness of kidnapping of the victim by the four accused persons. PWs 3 and 4 are hearsay witness and their evidence is of no much significance. The Doctor's evidence does not support the prosecution's case of gang rape. We are conscious of the situation in the present case that the occurrence, according to the informant and the prosecution's witnesses, had taken place on 01.10.2018, whereas the FIR was registered on 06.10.2018 and five days thereafter, signs of rape might not have been found during medical examination and further that oral evidence of the victim cannot be discarded in the absence of corroboration by the medical evidences. In the present case, however, we do not find the evidence of the victim to be of such sterling character as to justify finding of conviction based on her oral evidence alone.

27. In our considered opinion, in view of the above-noted discussion, the prosecution cannot be said to have proved the offence of kidnapping for commission of sexual assault upon the victim beyond all reasonable doubts.



28. The finding of conviction recorded by the trial court requires interference. The appellants deserve to be acquitted by giving them benefit of doubt.

29. Accordingly, the impugned judgment of conviction dated 13.09.2021 passed by the learned Additional Sessions Judge-VIth-cum-Special Judge POCSO Act, Samastipur, in T.R. No. 184 of 2021 and R.N. No. 1163 of 2018 is hereby set aside. The appellants stand acquitted of the charge of commission of offences punishable under Sections 363, 366A, 376-DA of the IPC and Section 6 of the POCSO Act. The order of sentence dated 15.09.2021 also stands set aside.

30. This appeal is allowed.

31. The appellant are in custody. Let them be released forthwith, if not required in any other matter.

(Chakradhari Sharan Singh, J)

(Nawneet Kumar Pandey, J)

Pawan-Kundan

AFR/NAFR	NAFR
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