

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.15 of 2022

Arising Out of PS. Case No.-60 Year-2019 Thana- MAHILA P.S. District- Banka

Shrikant Mandal @ Shrikant Kumar Mandal, Son of Tridev Mandal, Resident
of Village- Kenuatikar, P.S- Barahat, Dist- Banka

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

... .. Respondent/s

Appearance :
For the Appellant/s : Mr. Ajay Mukherjee, Advocate
For the Respondent/s : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and
HONOURABLE MR. JUSTICE BIBEK CHAUDHURI
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 06-12-2023

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 dated 27.10.2021 and
an order of sentence dated 29.10.2021, passed by learned 6th
Additional Sessions Judge-cum-Special Judge (POCSO), Banka
in G.R. No. 168 of 2019, arising out of Mahila (Banka) P.S.
Case No. 60 of 2019, whereby the appellant has been convicted
and sentenced as under:-

Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Shrikant	376D of the IPC	R.I. for 20	20,000/-	R.I. for six



		years		months
Mandal	4 of the POCSO Act	RI for 10 years	10,000/-	RI for three months

2. Two persons including this appellant were made accused in Mahila (Banka) P.S. Case No. 60 of 2019, instituted on the basis of the written report of the victim. The case of co-accused Sohan Kumar was, however, referred to Juvenile Justice Board in the light of the prosecution's case itself that he was below 18 years of age as on the date of occurrence. Undisputedly, the appellant and said Sohan Kumar are cousins. This fact we have mentioned at the outset in the light of nature of accusation made by the victim in her written statement recorded under Section 164 of the Cr.P.C. and her deposition at the trial.

3. Briefly narrated, it is the prosecution's case, as disclosed in the written report of the victim, that she was 15 years old, when on 08.12.2019 at 7:00 PM, she had gone out of her house, away from the village into a field to defecate. In the meanwhile, this appellant and his cousin Sohan Kumar came. They firstly assaulted her, tied her mouth and both of them dragged her to a place near a brickkiln. Thereafter, both of them committed rape upon her one by one. They threatened her of serious consequences, if she disclosed the occurrence to anyone.



On return to her house she disclosed the occurrence to her aunt. One of the victim's cousin, when went to the house of the accused to make a complain about the occurrence, both of them assaulted him (the victim's cousin). She further alleged that after uproar and commotion, the people present nearby gathered there. Subsequently, she went to Police Station, Barahat for lodging a case and subsequently to the Mahila Police Station at Banka. The said written application given on 09.12.2019 gave rise to Mahila (Banka) P.S. Case No. 60 of 2019, disclosing commission of offence under Section 376D of the IPC and Section 4 of the POCSO Act.

4. It further transpires from the records that this appellant and co-accused Sohan Kumar were arrested on 09.12.2019 from their house. The statement of the victim (PW-5) was recorded under Section 164 of the CrPC. The victim was subjected to undergo medical examination. It transpires from the records that the victim's age, based on radiological examination, was assessed by the Medical Board to be between 15-16 years. The following marks were found on the person of the victim:-

- (a) One black mole on right knee
- (b) One old scar mark on right foreleg
- (c) Hymen injury caused by forceful insertion of hard



and blunt substance, may be caused by sexual intercourse.

(d) The vaginal swab was collected for examination.

It would be apt to notice, at this juncture itself, that the appellant was not subjected to any medical examination as contemplated under Section 53A of the CrPC.

5. The police, upon completion of investigation submitted charge-sheet against the appellant and said Sohan Kumar for the offences punishable under Section 376D of the IPC and Section 4 of the POCSO Act. The record of co-accused Sohan Kumar was separated and sent for further action to the Juvenile Justice Board, Banka on 10.12.2019. Cognizance was taken for the aforesaid offences on 25.04.2020. Subsequently, this appellant was charged of commission of the offences punishable under Section 376D of the IPC and Section 4 of the POCSO Act. The appellant denied the charge and claimed to be tried. Accordingly, he was put to trial.

6. At the trial, the prosecution examined altogether seven witnesses including the victim (PW-5), her mother (PW-4), her aunt (PW-3) and her cousin (PW-2). The Investigating Officer deposed as PW-1 and the Doctor who had examined the victim, as PW-6. The learned Magistrate, who had recorded the victim's statement under Section 164 of the CrPC came to be



examined as PW-7, who proved the victim’s statement recorded by her, which was marked as Exhibit-6.

7. Apart from the oral evidence of the prosecution's witnesses as noted above, the prosecution brought on record by way of exhibits, following documentary evidence to substantiate the charge at the trial :-

Sl. No.	Description	Exhibit No.
1	FIR	Exhibit-1
2	Endorsement	Exhibit-2
3	Seizure- list	Exhibit-3
4	Written report	Exhibit-4
5	Injury report of victim	Exhibit-5
6	Supplementary injury report of victim	Exhibit-5/1
7	Statement U/s 164 of CrPC	Exhibit-6
8	Forwarding letter dated 30.09.2020	Exhibit-7
9	Serological report dated 08.07.2020	Exhibit-8
10	General report dated 29.02.2020	Exhibit-9

8. After closure of the prosecution's evidence, the appellant was questioned under Section 313 of the Cr.P.C. so as to give him an opportunity to explain the incriminating circumstances emerging against him, based on the prosecution's evidence, adduced at the trial. Following was the only question which was put to the appellant in purported discharge of function under Section 313 of the CrPC :-



"प्रश्न : आपके विरुद्ध साक्ष्य है कि दिनांक 08.12.2019 को 7 बजे शाम में ग्राम केनुआटिकर थाना बाराहाट जिला बांका में सीरो मंडल के ईटा भट्टा के पास एक पीड़ित नाबालिक लड़की के साथ अन्य अभियुक्तों के साथ मिलकर सामूहिक बलात्कार किया। क्या कहना है ?

उत्तर : नहीं, गलत है।"

9. No defence witness was examined at the trial.

10. The Trial Court, after having analysed and appreciated the evidence adduced at the trial reached a conclusion that the prosecution was able to prove the charge of commission of the offences punishable under Section 376D of the IPC and Section 4 of the POCSO Act. After having held the appellant guilty of the said charge, the trial court sentenced the appellant to undergo imprisonment and fine as has been noted hereinabove.

11. Learned counsel appearing on behalf of the appellant, assailing the impugned Judgment and order of the trial court, has submitted that the prosecution miserably failed to prove at the trial that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act, in accordance with the provision prescribed under Section 34 of the POCSO Act. He has submitted that it was incumbent upon the prosecution to prove and the trial court to undertake an exercise for determination of the victim's age in accordance with the procedure laid down under Section 94 of the Juvenile Justice



(Care and Protection of Children) Act. He has submitted that no accuracy can be attached to the finding of the Medical Board based on radiological examination for ascertaining the victim's age so as to reach a conclusion that she was a child as on the date of occurrence. He has further argued that it is evident from the evidence of the victim's mother (PW-4) that the victim was admitted in a School in 2004, when she was four years old. In view of the deposition of the victim's mother at the trial, the victim could not be held to be a child within the meaning of Section 2(1)(d) of the POCSO Act. He has further submitted with reference to the age determination of the victim that the victim's aunt (PW-3) also deposed that the victim had passed Class-VIII examination in the year 2016. No effort was made by the prosecution to establish conclusively that the victim was a child, he contends.

12. He has further argued that the entire case of the prosecution is based on the disclosure made by the victim about the occurrence. No one had seen the victim going towards the place of occurrence or she was being taken away by the accused persons to the place where she was subjected to sexual assault. He contends that the victim is not a truthful witness at all, as can be easily seen from the nature of statements which she had



made initially for the purpose of registration of FIR and subsequently under Section 164 of the CrPC and lastly at the time of deposition at the trial. He contends that her own statements/deposition contradict each other. Therefore, the Trial Court ought not to have recorded conviction of the appellant based solely on the evidence of the victim, which cannot be said to have been corroborated fully by the medical examination and forensic report. Referring to the report of the forensic examination, he has submitted that according to the said report semen was found on the cutting of *Janghiya* said to be of the victim, but result of serological analysis does not at all connect the appellant with the finding of the Forensic Science Laboratory, based on serological analysis. He has further argued that the trial court has wrongly taken into account such materials for recording the appellant's conviction which were not explained while examining under Section 313 of the CrPC. He has further submitted that if the deposition of PW-3 (Aunt of the victim) is taken into account, it can be easily culled out that 08.12.2019 was not the date of occurrence, as according to her, the occurrence has taken place nearly 3-4 days before the registration of the FIR. The FIR was registered on 09.12.2019.

13. Ms. Shashi Bala Verma, learned Additional Public



Prosecutor, representing the State had defended the findings recorded by the trial court. She has submitted that there does not appear to be any reason why the appellant would have been falsely implicated by the victim. She contends that the victim had disclosed her to be 15 years old in her written statement. The Medical Board found the victim's age to be between 15-16 years, which is much less than 18 years. She submits that the question of determination of age in accordance with Section 34 (2) of the POCSO Act would have arisen had there been any dispute as regards her childhood. The trial court found the victim to be a child based on her appearance and there being assessment done by the Medical Board suggesting the victim's age to be below 18 years, the finding of the trial court that the victim was a child, cannot be said to be suffering from any legal infirmity. She has argued, with reference to sub-section (3) of Section 34 of the POCSO Act that, in any case, the order of the Special Court, which conducted the trial, cannot be deemed to be invalid, merely on the ground that the victim's age was not duly determined under sub-section (2) of Section 34.

14. We have perused the impugned judgment and order of the trial court as well as the trial court's records. We have given our thoughtful consideration to the rival submissions



advanced on behalf of the parties as noted above.

15. Before we begin to address the submissions advanced on behalf of the parties, with reference to the evidence adduced at the trial, we must note that we are conscious of the statutory prescription under Section 29 of the POCSO Act, which casts reverse burden of proof of innocence on an accused charged of commission of the offences defined under Sections 3, 5, 7 and 9 thereof. We are, at the same time, of the definite view that in order to attract the provisions of the POCSO Act and the reverse burden of proof under Section 29 thereof, it is the primary duty of the prosecution to prove in accordance with law at the trial that a victim of crime is a child within the meaning of Section 2(1)(d) thereof. It has been laid down in no uncertain terms in case of ***Jarnail Singh vs. State of Haryana*** reported in ***(2013)7 SCC 263*** that the provision applicable for determination of age of a juvenile under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 shall have application for determining the age even of a child who is a victim of a crime. Paragraph 23 of the said decision reads 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."

16. It is noteworthy that in case of **Jarnail Singh** (supra) the Supreme Court was considering Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007



framed under the Juvenile Justice (Care and Protection of Children) Act, 2000. Juvenile Justice (Care and Protection of Children), 2000 has been repealed by the subsequent Juvenile Justice (Care and Protection of Children) Act, 2015, Section 94 (2) of which lays down the procedure for age determination in case of doubt regarding a person brought to Committee/ Board under the Act is a child or not. For ready reference, we consider it beneficial to reproduce sub-section (2) of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, which reads as under :-

"94(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."

17. In all fairness to learned Additional Public



Prosecutor for the State, we must address her submission that as there was no reasonable ground for doubt regarding the fact that the victim was a child, there was no requirement to undertake the process of age determination by seeking evidence in accordance with sub-section (2) of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The said submission deserves to be rejected in view of the evidence of mother of the victim herself. The mother of the victim (PW-4) has deposed at the trial that the victim was admitted in a school in the village in 2004. She further deposed that when the victim was admitted in the school she was four years old. The deposition of the victim's mother (PW-4) before the trial court goes to suggest that the victim was more than 18 years of age, according to her mother, in 2019 when the occurrence had taken place. The occurrence, according to the prosecution's case, had taken place on 08.12.2019.

18. In view of the clear deposition of the victim's mother in paragraph 4 at the trial, her submission that there was no ground for the trial court to doubt the victim's age is not tenable and deserves to be rejected.

19. The victim was studying in a school, as is evident from the deposition of the victim's aunt (PW-3). In the aforesaid



background, the failure on the part of the prosecution to prove and the trial court to undertake an exercise, in the light of the Supreme Court's decision in case of **Jarnail Singh** (supra) for age determination, has serious impacts on the finding of the trial court that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act. We are thus, of the opinion that the prosecution failed to prove at the trial that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act and, therefore, the provisions of the POCSO Act cannot be applied against the appellant for the offence under the POCSO Act. The conviction recorded by the trial court against the appellant of commission of the offence punishable under Section 4 of the POCSO Act is therefore, unsustainable and it is held accordingly.

20. As we have held that the provisions of the POCSO Act cannot be invoked, the prosecution having failed to establish that the victim was a child as on the date of occurrence, therefore, Section 29 of the POCSO Act shall have no application.

21. The next question is as to whether the appellant's conviction for the offence punishable under Section 376D of the IPC can be sustained or not, which is based mainly on the



evidence of the victim. It is settled legal principle that solitary evidence of the victim of sexual assault/ rape can be the basis for conviction of a person charged of such offence, only when the victim is found by the court to be truthful witness and her evidence is of sterling quality, right from the beginning i.e. from the stage of registration of the FIR. Upon comparative reading of the written statement of the victim, which is the basis for registration of FIR dated 09.12.2019, and her statement recorded under Section 164 of the CrPC on the very next day i.e. 10.04.2019, we find manifest contradictions. In her written statement, she disclosed that the co-accused Sohan Kumar studied with her in tuition classes. She further alleged that when she had gone out of her house into the field to ease herself, both the accused persons came, assaulted her, tied her mouth and both of them dragged her towards a brickkiln and committed rape upon her. On the next day, in her statement recorded under Section 164 of the CrPC (Exhibit-6), she deposed that she had gone to ease herself and the moment she had sat to defecate, only this appellant came, tied her mouth with a muffler, dragged her towards brickkiln and from there he called someone else and thereafter, co-accused Sohan Kumar came. Sohan Kumar committed rape upon her firstly and thereafter this appellant



raped her. Whereas in the First Information Report she alleged that both the persons named in the FIR had caught her and taken her towards the brickkiln, in her statement recorded under Section 164 of the CrPC she alleged that it was this appellant who had caught her and taken her towards the brickkiln. In our considered view, this variance in her two statements is substantial and cannot be overlooked.

22. It would be useful, at this juncture, to notice the evidence of the victim (PW-5). While reiterating what she had disclosed in her written statement, she deposed at the trial that she had denied at the trial of her any friendship or otherwise association with co-accused Sohan Kumar though she admitted that both of them studied in the same class. She further deposed that before the date of occurrence co-accused Sohan had committed wrong with her (गन्दा काम किया) 5-7 times and after the occurrence also Sohan Kumar had committed similar acts with her 5-6 times. She also deposed that neither before the present case nor thereafter she lodged any case against Sohan Kumar. The deposition of PW-5 in paragraphs 4 and 5 is suggestive of the nature of association between Sohan Kumar and the victim. As regards this appellant, she deposed that he had beaten her up 2-3 times before the occurrence and after the



occurrence also he had beaten her up. It appears from her deposition that this appellant, cousin of Sohan Kumar, being much older in age had objection to Sohan Kumar and the victim maintaining the kind of relationship which they were having for which the appellant had beaten her up also.

23. On careful reading of the evidence of the victim, we find that the depositions are self-contradictory. Responding to one of the questions she deposed that this appellant was not her neighbour and she did not know him from before. Her evidence is contradicted by the evidence of PW-2. PW-2 in his evidence has deposed that the house of the persons named in the FIR was hardly 300-400 meter away from his house. It also appears from the evidence of the prosecution's witnesses that PW-2 (a cousin of the victim) and the victim's family reside in the same house having common courtyard.

24. We also consider it apt to notice the deposition of PW-3, the victim's aunt, who, in her cross-examination, deposed that the FIR was registered 3-4 days after the date of occurrence and her statement was recorded two days after the date of occurrence. The deposition of PW-3 goes to suggest that some occurrence had taken place prior to 08.12.2019 when the victim was beaten up and she had sustained some injuries also.



25. Considering in totality, the evidence of the victim, as noted above, read with the evidence of other prosecution's witnesses, we are of the view that the victim (PW-5) does not appear to be trustworthy, on whose solitary evidence, it would be safe to uphold the finding of conviction recorded by the trial court. We find force in submission advanced on behalf of the appellant that the forensic examination to the effect that semen was detected on the *Janghiya* of the victim, cannot be said to be connecting this appellant beyond doubt. The prosecution had chosen not to subject this appellant to medical examination despite there being specific provision under Section 53A of the CrPC.

26. Considering the facts and circumstances as noted above, the finding of conviction recorded by the trial court for the offence punishable under Section 376D of the IPC also cannot be sustained. In the result, the appellant is acquitted of the charge of offences punishable under Section 376D of the IPC and Section 4 of the POCSO Act giving him benefit of doubt.

27. Accordingly, the impugned judgment of conviction and order of sentence dated 27.10.2021/ 29.10.2021, passed by learned 6th Additional Sessions Judge-cum-Special



Judge (POCSO), Banka in G.R. No. 168 of 2019, arising out of Mahila (Banka) P.S. Case No. 60 of 2019 are set aside.

28. This appeal is allowed.

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

(Chakradhari Sharan Singh, J)

(Bibek Chaudhuri, J)

Rajesh/Pravin

AFR/NAFR	NAFR
CAV DATE	NA
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