

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.274 of 2023

Arising Out of PS. Case No.-499 Year-2018 Thana- KAHALGAON District- Bhagalpur

Doman Mahto, Son of Late Shankar Mahto, Resident of village-
Maheshmunda, Bind Toli, P.S.- Kahalgaon, Distt.- Bhagalpur

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr. Manoj Kumar Jha, Advocate

For the Respondent/s : Mr. Mukeshwar Dayal, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 06-08-2024

This appeal has been preferred by the appellant/convict under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') challenging the impugned judgment of conviction dated 24.11.2022 and order of sentence dated 02.12.2022 passed by learned Exclusive Special Court (POCSO Act)-cum-7th Additional Sessions Judge, Bhagalpur in POCSO Case No.3935 of 2018 arising out of Kahalgaon P.S. Case No.499 of 2018, whereby the concerned Trial Court has convicted the appellant/convict for the offences punishable under Section 376 of the Indian Penal Code (for short 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act) and sentenced to undergo



rigorous imprisonment for ten years with fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for three months under Section 6 of the POCSO Act. No separate sentence is awarded for the offence punishable under Section 376 of the IPC.

2. The case of prosecution, in brief, as available through written information of informant/PW-1, which is the basis of FIR is that on 31.07.2018 at about 11.00 A.M., her neighbour, namely, Doman Mahto (appellant/convict), son of late Shankar Mahto came to her house and took away her daughter (victim)/PW-2 on pretext of providing biscuit. Whereafter, at about 12 O' clock, her minor daughter returned crying and said that appellant/convict made an attempt to commit wrong with her, from where she anyhow managed to escape. The appellant/convict was alleged to be in drunken condition.

3. With aforesaid factual allegation, informant/PW-1 requested to the S.H.O., Kahalgaon Police Station for taking appropriate legal action against the appellant/convict, whom she handed over to police after apprehending him with



the help of others.

4. On the basis of aforesaid information of informant/PW-1, the police registered Kahalgaon P.S. Case No.499 of 2018 dated 31.07.2018 for the offences punishable under Sections 376, 511 of the IPC, Sections 3/4 of the POCSO Act and Section 37(c) of the Bihar Prohibition and Excise Amendment Act, 2016, arraying accused/appellant, Doman Mahto as an accused.

5. After completion of investigation and on the basis of materials collected during investigation, the Investigating Officer of this case (PW-4) submitted charge-sheet No.227 of 2018 dated 24.09.2018 for the offences punishable under Sections 376, 511 of the IPC, Section 37(c) of the Bihar Prohibition and Excise Act, 2016 and Section 8 of the POCSO Act, 2012. The learned trial court after supplying the police papers under Section 207 of the Code framed charges under Sections 376, 511 of the IPC and under Section 3/4 of the POCSO Act and also under Section 37(c) of the Bihar Prohibition and Excise Act, 2016 on 11.12.2020, later on, charges were altered and framed



under Section 5/6 of the POCSO Act vide order dated 03.01.2022 through order-sheet dated 24.11.2022, the date on which the judgment was pronounced, which were explained to the appellant/convict to which, he pleaded not guilty and claimed to be tried.

6. To substantiate its case, the prosecution has examined altogether four witnesses. They are:- **(i) PW-1 Mother of the victim (X); (ii) PW-2 the victim (X-1); (iii) PW-3 Dr. Pusp Sudha**, who has examined the victim and; **(iv) PW-4 Mr. Sugriv Singh**, who is Investigating Officer of this case.

7. Apart from the oral evidence, the prosecution has also relied upon following exhibits/documentary evidences, which are:-

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|-------------------|----------------|
| (i) Exhibit -P-1 | Medical Report |
| (ii) Exhibit-P-2 | Formal FIR |
| (iii) Exhibit-P-3 | Charge-sheet |

8. On the basis of evidences/circumstances as surfaced during the trial, the learned trial court has examined the appellant/accused under Section 313 of the



Code, where he completely denied all the evidences surfaced during the trial and claimed his complete innocence.

9. The appellant/convict in order to prove his innocence examined one defence witness, who is DW-1 namely, Amar Mahto.

10. Taking note of the evidence as surfaced during the trial and after considering the arguments as advanced by both the parties, the learned Trial Court has convicted the appellant/convict/accused for the offences under Sections 376 of the IPC and Section 6 of the POCSO Act along with fine whereas the learned trial court has acquitted the appellant/convict for the offence under Section 37(c) of the Bihar Prohibition and Excise Act.

11. Being aggrieved with the aforesaid judgment of conviction and order of sentence, the appellant/convict has preferred the present appeal.

12. Hence, the present appeal.

Argument on behalf of the appellant/convict:

13. Learned counsel appearing on behalf of the appellant/convict submitted that the written information of



PW-1, which is the basis of present criminal proceeding was not proved during the trial. It is submitted that the police submitted charge-sheet in very contradictory manner i.e. under Sections 376/511 of IPC and Sections 3/4 of the POCSO Act, which itself is sufficient to doubt the case of prosecution from very inception, as prosecution in itself under doubt that whether this is a case of attempt for penetrative sexual assault or in actual penetrative sexual assault was committed upon the victim. It is further submitted by learned counsel that the place of occurrence out of deposition of PW-1, 2 and 4 appears complete contradictory, because PW-1 is stating that the occurrence took place in forest, where PW-2, the victim said that the occurrence took place in field, where as per the Investigating Officer/PW-4, it appears that the occurrence took place in the house of appellant/convict.

13.1. Learned counsel also pointed out that the deposition of PW-3, who conducted medical examination upon victim within 24 hours of the occurrence, did not find any violence of sexual assault in or around the private part



of the victim. It is also highlighted out of deposition of PW-1 that the appellant/convict was in previous enmity with the family of victim and there was a dispute regarding passage/way between the parties. It is also submitted that the time of occurrence out of deposition of victim is highly doubtful, as she deposed that it took place at about 6.00 P.M., thus by falsifying the entire case of prosecution.

13.2. While concluding the argument, it is submitted that as prosecution has failed to prove the foundational aspect *qua* crime in question, therefore, the provision of presumption as available under Section 29 of the POCSO Act is bad in the eyes of law and, therefore, the judgment of conviction as recorded by the learned trial court is liable to be quashed/set aside.

Argument on behalf of the State:

14. Learned APP while opposing the appeal submitted that the victim was between the age group of 5-6 years at the time of occurrence and she categorically stated during trial that appellant/convict committed wrong work with her. It is also submitted that the doctor, upon



examination, found the age of victim between 5-6 years also and moreover, the victim as a child within the meaning of Section 20(1)(d) of the POCSO Act was not disputed by appellant/convict during the trial and, therefore, the import of presumption as available under Section 29 of the POCSO Act cannot be viewed with doubt.

14.1. It is submitted that in view of specific deposition of victim against the appellant/convict as to commit wrong work with her, who is much less than 12 years of age on the date of occurrence, the conviction recorded under Section 6 of the POCSO Act is justified. Hence, there is no occasion for this Court to interfere with the present judgment of conviction as recorded by the learned trial court.

15. I have perused the trial court records carefully and gone through the evidences available on record as also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

Discussion and Conclusion:-

16. The most important witness of this case is the



victim herself, who at the time of occurrence was between age group of 5-6 years. It appears from her deposition that she came to court only to send the appellant/convict to jail. While putting a question by the court to victim that what was done by appellant/convict, it was deposed by her that while her mother (PW-1) was sleeping, the appellant/convict came to her house and after persuading her, taken to the field side of the village, where he opened her *paint* and committed wrong work with her. She returned back to home and nothing disclosed to anyone. Upon cross-examination, she stated that she has no knowledge about the date of occurrence. She stated that occurrence took place at about 6.00 P.M. and she was examined medically. It also appears from her deposition that she was the student of Class-II. In view of aforesaid deposition of victim, facts which appears regarding crime in question, is that the occurrence took place in the field of village at about 6.00 P.M. whereafter victim returned to home on her own and did not disclose the occurrence to anyone.

17. From the deposition of PW-1/informant, who



is mother of the victim, it appears that at the time of occurrence, the age of her daughter was about 8 years, where occurrence took place before 3-3½ years, contradicting the age of victim at the time of occurrence. She stated that the appellant/convict accompanied her daughter on pretext of providing biscuit and committed rape upon her after taking her in a forest. When she called appellant/convict on mobile, it was found switched off. Thereafter, searching for victim along with others she went upto near a temple of village and by that time, the appellant/convict told her daughter to go with her mother and he also came over there later on and stated that he committed rape upon her daughter and now he will rape her also. Upon cross-examination, she denied any relation with appellant/convict. She further stated that on the date of occurrence, appellant was in drunken condition. She arrested appellant with the help of 2-4 persons. They also assaulted him. She even failed to disclose that who called the police. Though, she stated in her examination-in-chief that written information was drafted by advocate, but in cross-



examination, she stated that she made her statement before police, who reduced the same in writing. She further stated that the appellant/convict prior to this occurrence assaulted her and her husband. She denied the suggestion that there is any dispute regarding passage with appellant/convict. She failed to disclose about the date of occurrence.

18. As per deposition of PW-3 Dr. Pusp Sudha, who is a doctor and conducted medical examination upon victim, found the age of victim between the age group of 5-6 years. She specifically opined that as per clinical finding, there is no clinical evidence of rape. She also found that there is no sign of violence present in or around vagina or any part of body. She also found that there is no sign of foreign body/foreign discharge present in or around vagina or any part of body. Upon pathological examination, there was no spermatozoa in vaginal swab of victim.. The said medical report was exhibited by **Exhibit No. P-1**. The testimony of doctor clearly negates penetrative sexual assault upon victim.

19. PW-4 is the Investigating Officer, who



categorically stated that the place of occurrence of crime in question is the house of appellant/convict contradicting the version of PW-1 and PW-2. He identified the signature of the then S.H.O., namely, Baidya Nath Vedic Pathak upon formal FIR and upon his identification, the formal FIR was exhibited as **Exhibit No. P-2**. He also identified his hand-writing and signature on charge-sheet dated 24.09.2018 bearing no. 227/2018, where he submitted charge-sheet against the appellant/convict under Section 376, 511 of the IPC and also Sections 3/4 of POCSO Act. Upon his identification, the said charge-sheet was exhibited as **Exhibit No. P-3**.

19.1. Upon cross-examination, he stated that the appellant/convict was handed over to him by villagers in drunken condition. He did not recorded the name of villagers. He further stated that he did not recorded the statement of victim during investigation and also her statement under Section 164 of the CrPC.

20. From the aforesaid depositions, it appears that the victim was a school going children and she was the student of Class-II but, her birth certificate was not



produced/proved before the Court, which may be the best document/evidence as to establish her "child" within the meaning of Section 2(1)(d) of the POCSO Act.

21. Considering the statement of victim/PW-2, her mother/PW-1, Doctor/PW-3, her age appears variable on the date of occurrence. From the deposition of PW-4, it appears that neither the statement of victim was recorded under Section 161 of the CrPC nor under Section 164 of the CrPC. The time of occurrence is also appears doubtful as PW-1 stated through her written information (not proved) that it took place somewhere between 11.00-12 O'clock on 31.07.2018, whereas as per victim/PW-2, the occurrence took place at about 6 P.M. The place of occurrence is also appears variable, where PW-1 stated that it was the forest, PW-2/victim stated that it was the field and PW-4/I.O. stated that it was the house of appellant/convict.

22. If the statement of victim be taken into consideration, it appears that she came to her house after the occurrence on her own and she did not disclose the occurrence to anyone, which appears completely contrary to



that of statement of PW-1/mother, who stated that her victim daughter returned to home crying at about 12 O' clock and stated that appellant/convict made an attempt to commit rape upon her on pretext of providing biscuit. It is also appearing from the testimony of PW-1 that it was the appellant/convict, who asked the victim to go near the temple, where her mother (PW-1) was standing along with others and thereafter, he also came over there and said that he committed rape upon her daughter and now he will commit rape upon her. PW-1 categorically stated that the accused/appellant was not apprehended by co-villagers, whereas PW-4 stated that it was the co-villagers, who handed over the appellant to him in drunken condition.

23. Having all such contradictions, it is clear beyond any doubt that the prosecution has failed to established the foundational aspect to import the presumption as available under Section 29 of the POCSO Act.

24. In view of above, it can be said safely that the prosecution has failed to established its case during the



trial by proving charges levelled against the appellant/convict.

25. Accordingly, appeal stands allowed.

26. The impugned judgment of conviction dated 24.11.2022 and order of sentence dated 02.12.2022 passed by learned Exclusive Special Court (POCSO Act)-cum-7th Additional Sessions Judge, Bhagalpur in POCSO Case No.3935 of 2018 arising out of Kahalgaon P.S. Case No.499 of 2018, is hereby quashed/set aside.

27. The appellant/convict, Doman Mahto is acquitted from the aforesaid charges levelled against him. He is directed to be released forthwith, if not required in any other case.

28. Office is directed to send back the trial court records along with a copy of the judgment to the learned trial court forthwith.

(Chandra Shekhar Jha, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	09.08.2024
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