

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.102 of 2022**

Arising Out of PS. Case No.-124 Year-2019 Thana- FATEHPUR District- Gaya

1. SARYU MANJHI Son of Briksh Manjhi Resident of village - Pakri, P.S. - Fatehpur, District - Gaya.
2. Ajai Manjhi @ Ajay Son of Late Paro Manjhi Resident of village - Pakri, P.S. - Fatehpur, District - Gaya.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Mrigendra Kumar, Adv
For the Respondent/s : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. G. ANUPAMA HAKRAVARTHY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 02-01-2024

The appellants have preferred this appeal under Section 374(2) of the Code of Criminal Procedure assailing the judgment of conviction dated 30.11.2021 and an order of sentence dated 06.12.2021 passed by the Special Judge, Exclusive POCSO Court cum ADJ-VI, Gaya, in connection with POCSO Case No. 52 of 2019 CIS No. POCSO 52/2019 arising out of Fatehpur P.S. Case No. 124 of 2019 whereby and whereunder, the appellants have been convicted and sentenced as under:-

Appellant Saryu Manjhi

Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 6 of the POCSO Act	RI for 25 years	Rs. 10,000/-	Six months
Section 376AB	-----	-----	-----

Appellant Ajai Manjhi

Penal Provision	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 6 of the POCSO Act	RI for 25 years	Rs. 10,000/-	Six months
Section 376AB	-----	-----	-----

2. The age of the victim for the purpose of present adjudication is not in dispute. In the FIR, the victim’s age has been mentioned as three years by her mother who is the informant. During the medical examination, her age has been found to be 3 to 4 years. In the assessment of the trial court, as on the date of her evidence on 27.01.2021, the victim’s age was four years.

3. A written complaint of the victim’s mother (PW-1) addressed to the Officer-in-charge of Fatehpur PS dated

24.05.2019 is the basis for registration of the connected Fatehpur PS Case No. 124 of 2019 disclosing commission of the offences punishable under Section 376AB of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act' in short). It was alleged in the written complaint of the informant that in the night of 23.05.2019, the informant and other family members were sleeping after having taken their meals. At about 3:00 am when the informant's son (not examined), returned after having attended a marriage function, he noticed the absence of the victim in the house. During the course of rigorous search for her they learnt that these appellants had kidnapped the victim and taken her to Sevari Nagar village and committed rape upon her. When the villagers raised *hulla*, they escaped leaving the victim behind. The victim was subjected to medical examination on 25.05.2018 at 2:25 pm. The Doctor (PW-2) found rupture of hymen and third degree perineal tear. Scratch marks on the face and neck of the victim of 48-72 hours of duration were also found.

4. It is the prosecution's case that these appellants had confessed their guilt in their statements made before the Sub Inspector Abujar Ansari on 26.05.2019. In the wake of the

disclosures said to have been made by these appellants before the police one Shintu Manjhi was also made an accused. Clothes which the victim was wearing were sent for forensic examination.

5. The police upon completion of investigation submitted chargesheet on 31.10.2019 against three persons including these two appellants for commission of the offences punishable under Sections 376AB/376DB/120B/34 of the Indian Penal Code and Section 6 of the POCSO Act, whereupon cognizance of the aforesaid offences was taken.

6. It further appears that the case records of accused Shintu Manjhi was separated and sent to the Juvenile Justice Board in the light of claim of juvenility made on his behalf. It was in that background that these two appellants stood charged of commission of the offences punishable under Sections 376AB of the IPC and Section 6 of the POCSO Act. .

7. At the trial prosecution examined altogether six witnesses including the victim (PW-5) and her mother, the informant (PW-1). One Munni Devi, a resident of village Sevari Nagar where the occurrence had taken place deposed at the trial as PW-3. The Investigating Officer deposed as PW-6 and the Doctor who had examined the victim as PW-2. The lady police

officer posted as Officer-in-charge of Mahila PS, Gaya who had recorded the statement of the informant on 25.05.2019 deposed as PW-4 at the trial. In addition to the oral evidence of the prosecution’s witnesses, the prosecution brought on record following documentary evidence:-

Sr. No.	Exhibit Number	Description
1.	Exhibit P-1/PW1	Written application of FIR doc
2.	Exhibit P-2/PW2	Medical Report of the victim
3.	Exhibit P-3/PW4	Statement of informant
4.	Exhibit P-4-PW6	Confessional Statement of accused Ajai Manjhi
5.	Exhibit P-4/1-PW6	Confessional statement of accused Sintu Manjhi
6.	Exhibit P-4/2-PW6	Confessional statement of accused Sarju Manjhi
7.	Exhibit P-5-PW6	Seizure list
8.	Exhibit P-6 PW-6	Formal FIR
9.	Exhibit P-7	Statement of victim recorded u/s 164 CrPC
10.	Exhibit P-8	F.S.L report

8. After closure of the prosecution’s evidence, the appellants were examined under Section 313 of the CrPC so as to give them an opportunity to explain the circumstances emerging against them based on the evidence adduced at the trial. The appellants denied the aforesaid circumstances.

9. The defence examined one witness namely Bajrangi Kumar Bhuiya, who deposed at the trial that he had not informed the informant about the commission of rape upon the

victim. He also deposed that these appellants had gone to their respective in-laws' places on the date of occurrence and they had been falsely implicated. Upon analysis and appreciation of the evidence adduced at the trial, the trial court reached a definite conclusion by its impugned judgment dated 30.11.2021 that the prosecution successfully proved the charge of commission of the offences punishable under Sections 376AB of the IPC and Section 6 of the POCSO Act. After having held the appellants guilty of the charge, the trial court sentenced the appellants to imprisonment and fine as has been noted above by the order dated 06.12.2021.

10. Mr. Mrigendra Kumar, learned counsel appearing on behalf of the appellants assailing the impugned judgment of conviction passed by the trial court has submitted that even if it is accepted that the prosecution could prove at the trial that the victim was subjected to sexual assault, it miserably failed to prove by cogent evidence, involvement of these appellants in commission of such offence. He has submitted that despite specific provision under Section 53A of the CrPC, the appellants were not subjected to any medical examination to connect them with the occurrence of sexual assault upon the victim. He has also submitted that conviction of these appellants based on the

sole evidence of the child witness cannot be sustained as she appears to be a tutored witness. He has also argued that the victim (PW-5) in her statement under Section 164 of the CrPC had not disclosed the name of appellant no. 2 as one of the offenders and there is patent improvement in her evidence before the court, wherein, she named appellant no. 2 also who had physically abused her. He submits that this improvement is essentially an outcome of tutoring by the family members of the victim. He has also submitted that the evidence of the informant (PW-1) becomes completely doubtful as in her evidence she deposed *inter alia* at the trial that the information regarding recovery of the victim was received on the mobile phone of a co-villager Bajrangi Kumar Bhuiyan, whereafter she learnt about the said recovery. The said co-villager of the informant (PW-1) has deposed at the trial as a defence witness and has denied that he had any knowledge about the recovery of the victim or about the occurrence or rape. The DW-1 also deposed in his evidence that on the date of occurrence these appellants were not in the village and they had gone to their in-laws' place. He has submitted that specific plea of *alibi* was taken on behalf of the appellant at the trial which has not been duly considered by the trial court.

11. Learned Additional Public Prosecutor, defending the findings of conviction recorded by the trial court has submitted that the same is based on due appreciation of evidence and sound principles of law. She contends that the prosecution successfully proved at the trial that the victim, a child, was subjected to sexual assault. The evidence of the prosecution's witnesses namely the victim (PW-5) and Munni Devi (PW-3) made out a case before the trial court of commission of aggravated penetrative sexual assault by the persons including these appellants against whom the charge was framed. These two basic ingredients having been proved at the trial, Section 29 of the POCSO Act fully applies. The appellants did not take any step to prove their innocence at the trial. The weak and vague plea of *alibi* taken on behalf of the appellants through DW-1 has been duly dealt with by the trial court and rightly rejected. She submits that the trial court, after having duly dealt with the evidence of DW-1 has rightly held him not to be a reliable witness.

12. We have carefully gone through the impugned judgment and order of the trial court as well as the trial court's records and we have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted

above.

13. On careful analysis of the evidence adduced at the trial, it can be easily inferred that it was the prosecution's case that the victim, aged three years, was sleeping in her house with her mother (PW-1) and other siblings. One of the brothers of the victim who had returned to his house after attending marriage function was the first to notice the victim's absence in the house. The victim was found in village Sevari Nagar, about one kilometre from the house of the informant. PW-3, a resident of village Sevari Nagar was the first to recover the victim when she had heard a child wailing near her house. She was awake in the night as she and her family members were engaged in casting of a roof in their house. The time of occurrence, according to PW-3 was 1:30 am. PW-3 had noticed that the victim was bleeding from her genitalia. She disclosed, on being asked by PW-3, that she was resident of village Pakri. The parents of the victim were searching for her who came to her (PW-3) place and took the victim to their house. The victim is said to have disclosed to her mother (PW-1) that these appellants had taken her away. Thereafter, the victim was taken to Fatehpur Hospital where she was told by the Doctor that the victim was subjected to sexual assault whereafter she had gone

to the police station to register the FIR. The appellant no. 1 was almost next door neighbour of the informant as there was only one house between his house and that of the informant. The medical report suggests that the victim was subjected to sexual assault. The victim, sitting in a child friendly witness room, identified the appellants and stated at the trial that the appellants had done “dirty acts” with her.

14. In our opinion, based on the evidence adduced the prosecution successfully proved at the trial that the victim (child) was subjected to penetrative sexual assault and according to the victim herself the offence was committed by these appellants and one more person. The primary fact that the victim was a ‘child’ who had been subjected to sexual assault was thus established by the prosecution. Given this situation, since the appellants were facing prosecution for committing offence of aggravated penetrative sexual assault defined under Section 5 of the Act punishable under Section 6 of the POCSO Act thereof, the statutory presumption of commission of the offence by the appellant arose in terms of Section 29 of the POCSO Act, which reads as under:-

“Section 29: Presumption as to certain offences.

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this

Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

15. The presumption under Section 29 of the POCSO Act is apparently not absolute rather it is rebuttable. In order to rebut the said presumption, it was incumbent upon these appellants to prove the contrary.

16. We find in the present case that the appellants facing the trial set up a defence by way of plea of *alibi* through DW-1. The defence got examined DW-1 firstly to counter the evidence of the informant (PW-1) that the information regarding recovery of the victim in village Sevari Nagar was given by DW-1 and secondly that the appellants had gone to their in-laws' place on 23.05.2019, 24.05.2019, on the date of occurrence.

17. In the Courts opinion, the trial court has rightly held in its judgment that DW-1 was not a truthful witness for the reason that in his evidence, he deposed that he had not even heard about any rape having been committed upon the victim. Secondly, the fact that the appellants had gone to their in-laws' place was not specific and that too was based on some information which he had received from one of his friends, without disclosing the name or identity of the said friend. The plea of *alibi* taken by the defence at the trial based on the

evidence of DW-1, in our opinion, deserves to be rejected and has rightly been rejected by the trial court. DW-1 does not appear to be a reliable witness in our considered opinion.

18. Coming to the depositions of the prosecution's witnesses; PW-1 deposed at the trial *inter alia* that she was sleeping with her other children and in the night. Her son, after returning from a marriage party told her that the victim was not in the house. The fact that the victim was recovered was learnt by her when Bajrangi Kumar Bhuiyan (DW-1) received a call on his mobile phone, from Sevari Nagar. Bajrangi had informed the informant that the victim was there in the house of Muniya Gwalin (PW-3) whereafter she went there and brought the victim back from the house of PW-3. According to her, the victim was taken to Fatehpur Hospital for treatment where she was told by the Doctor that the victim was subjected to sexual assault (rape). The evidence of PW-1 stands fully corroborated by the deposition of PW-3 which contains natural description of the circumstance in which the presence of the victim was found near her house at Sevari Nagar. In her examination-in-chief, PW-3 deposed that when she heard the wailing sound of the victim, she was initially under the fear that there was some ghost. Later she realized that there was a child who was

weeping. She thereafter called the child whereupon she came. PW-3 noticed that blood was oozing out from the genital organ of the victim. She thereafter spread a gunny bag for her to lie down and gave her a head massage with oil. She also fed her with milk. There was an uproar in the village about the identity of the child. The victim disclosed that she was resident of village Pakri. Further, the victim's parents came to her house who were already searching for her.

19. It would be apt to consider now the evidence of the victim herself as has been noted above. The victim identified both the appellants who had committed wrongful acts with her. The evidence of PW-1, 3 and 5 consistently support the prosecution's case of the victim having been taken to the place of occurrence by these appellants and having sexually assaulted her in a manner that she was bleeding and was found to have been raped. The medical evidence, in our opinion corroborates the prosecution's case of the victim having been sexually assaulted. PW-2, the Doctor who had examined the victim, proved the medical report. Rupture of hymen of the victim was found. There were scratch marks found on the face and neck of the victim of 48-72 hours of duration. The victim was examined on 25.05.2019 at 2:25 pm. The Doctor proved at the trial

following conclusion which was recorded in her medical report after examining the victim:-

“Conclusion:-

1. Age between 3-4 years.

2. About 48-72 hours back some incident happened with victim, there is infected IIIrd degree perineal tear. There is no spermatozoa live or dead in HVS; It is difficult to say that it has been done by the sexual intercourse or by any blunt object.

2. The medical report was prepared written by me and it bears my signature which is marked as exhibit 2.”

20. The picture, thus, which emerges on scrutiny of the evidence of the victim (PW-5), her mother (PW-1) and Munni Devi (PW-3) read with the medical evidence is that the victim was 3-4 years child who was noticed by PW-3 late in the night in village Sevari Nagar where she was weeping and blood was oozing out from her private parts; her hymen was found ruptured in the medical examination. The victim herself had disclosed the names of these appellants who had done dirty acts with her. The victim identified the appellants in the court room at the trial as the persons who had sexually abused her. The prosecution, in our opinion, successfully established the case of commission of rape by these appellants by adducing cogent evidence. The appellants were given an opportunity to explain

the incriminating circumstances which had emerged against them based on the evidence of the prosecution's witnesses while being questioned under Section 313 of the CrPC. They did not set up any defence at the trial and except for simple denial, the appellants did not put forth any explanation in their examination under Section 313 of the CrPC. They did not take any plea of *alibi* while being questioned by the trial court under section 313 of the CrPC. No effort of any kind was made by the appellants to rebut the legal presumption under section 29 of the POCSO Act. In the aforesaid background, in our considered view we do not find any reason to interfere with the finding of conviction recorded by the trial court for the offence punishable under Section 376 of the Indian Penal Code and Section 6 of the POCSO Act. The impugned judgment of conviction passed by the trial court is accordingly affirmed.

21. Coming now to the question of sentence, considering the young age of the appellants and their chance of reformation, the sentence of imprisonment imposed by the trial court is modified to a term of 20 years of rigorous imprisonment instead of 25 years for the offence punishable under Section 376AB of the Indian Penal Code. No separate sentence is required to be passed for the proved offence punishable under Section 6 of the

POCSO Act, applying Section 42 of the said Act. The sentence of fine imposed by the trial court does not require any alteration.

22. This appeal is, accordingly, dismissed with the modification in the sentence as noted above.

(Chakradhari Sharan Singh, J)

(G. Anupama Chakravarthy, J)

ranjan/-

AFR/NAFR	NAFR
CAV DATE	02.01.2024
Uploading Date	10.01.2024
Transmission Date	10.01.2024