

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.305 of 2023

Arising Out of PS. Case No.-191 Year-2019 Thana- LODIPUR District- Bhagalpur

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Pramod Mandal S/O Keshar @ Kesho Mandal, Resident Of Village-
Badineema, P.S.-Jagdispur, District- Bhagalpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s: Mr. Ajay Kumar Sinha, Advocate

For the State : Mr. Parmeshwar Mehta, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE JITENDRA KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)

Date : 19-08-2024

The present appeal has been preferred against the impugned judgment of conviction and order of sentence dated 15.11.2022 and 18.11.2022, respectively passed by Ld. A.D.J.-VI-cum-Special Judge POCSO, Bhagalpur in POCSO Case No. 149 of 2019, arising out of Lodipur P.S. Case No. 191 of 2019, whereby the sole appellant has been found guilty of the offence punishable under Section 6 of POCSO Act and Section 376 of the Indian Penal Code and sentenced to undergo R.I. for 20



years and to pay a fine of Rs. 1,00,000/- under Section 6 of POCSO Act and in case of default to pay the fine, he has been ordered to further undergo additional S.I. for six months. The fine has been directed to be paid to the victim. Learned Trial Court has also directed the District Legal Services Authority, Bhagalpur to pay Rs.5,00,000/- towards compensation.

2. The F.I.R. bearing Lodipur P.S Case No. 191 of 2019 was registered on 30.10.2019 on the fardbeyan of the mother of the victim for offence punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act against the sole appellant.

3. The prosecution case as emerging from the fardbeyan of the informant recorded by S.I. Chandan Kumar Dubey at JLN M College and Hospital, Bhagalpur on 30.10.2019 at 2:30 hours is that the appellant came to her house at 5:00 PM on 29.10.2019 and asked the victim to take a biscuit and after lifting the victim in his lap, went out from her house. After some time, two children namely, Sonu Kumar and Priyanshu of the same locality came to her and informed that the appellant is committing bad thing to the victim after dropping her pant. On getting this information, she rushed to the house of Gopal and saw the appellant committing wrong thing to her daughter. The



victim was ensanguined in blood and there was no pant on her body. Thereafter, she took the victim on her shoulder and went to Mayaganj Hospital for treatment along with some co-villagers but the doctor did not treat her and hence, she went to Lodipur Police Station, wherefrom she went to Sadar Hospital along with police.

4. After registration of the F.I.R., the investigation commenced and charge-sheet bearing no. 208 of 2019 dated 20.12.2019 was filed against the sole appellant for offence punishable under Section 376 of the Indian Penal Code and under Section 4 of the POCSO Act. Thereafter, cognizance of the offence was taken and charges under Section 376 of the Indian Penal Code and Section 6 of the POCSO Act were framed against the appellant which he pleaded not guilty and claimed to be tried.

5. During trial, the following eleven witnesses were examined on behalf of the prosecution:

- (i) **P.W.-1** – Priyanshu Kumar @ Prince Kumar
- (ii) **P.W.-2** – Sonu Kumar
- (iii) **P.W.-3** – Raja Kumar
- (iv) **P.W.-4** – Shoshia Devi
- (v) **P.W.-5** – Father of the victim
- (vi) **P.W.-6** – Mother of the victim
- (vii) **P.W.-7** – Victim
- (viii) **P.W.-8** – Munnilal Paswan
- (ix) **P.W.-9** – Kaushal Kumar Bharti, I.O.
- (x) **P.W.-10** – Dr. Tina Hussain



(xi) **P.W.-11** – Dr. Priyanka Kumari

6. The prosecution brought on record the following documentary evidences also:

- (i) **Ext. 1-** Signature of Arvind Mandal on the written report
- (ii) **Ext. 2** – Signature of Arvind Mandal on Seizure lists
- (iii) **Ext. 3** – Signature of the informant on the written report
- (iv) **Ext. 4** – Statement of the victim u/s-164 Cr.PC
- (v) **Ext. 5** – Signature of the informant on the statement of the victim
- (vi) **Ext.6** – Signature of the informant on the seizure list
- (vii) **Ext. 7** – Signature of the witness Munnilal Sharma on the seizure list
- (viii) **Ext. 8-** Signature of the I.O. on the seizure list
- (ix) **Ext. 9** – Signature of the accused Pramod Mandal on his confessional statement
- (x) **Ext. 10-** Signature of I.O. on the whole seizure list
- (xi) **Ext. 11** – **Signature** of S.I. Rita Kumari on the Statement recorded under Section 161 Cr.PC
- (xii) **Ext. 12-** Signature on the application for sending samples to FSL
- (xiii) **Ext. 13** – Original report of the FSL
- (xiv) **Ext. 14** – Signature of the I.O. on the formal F.I.R.
- (xv) **Ext. 15** – Signature of I.O. on registration of the case
- (xvi) **Ext. 16-** Whole medical report of Dr. Teena Hussain
- (xvii) **Ext. 17-** Whole discharge slip of the victim
- (xviii) **Ext. 18-** Admission register of JLNMC

7. After closure of the prosecution evidence, the appellant was examined under Section 313 Cr.PC confronting



him with incriminating circumstances which came in the prosecution evidence, so as to afford him opportunity to explain those circumstances. During this examination he claimed himself innocent and stated that the prosecution evidence is false.

8. The appellant has also examined following three witnesses in his defence:

- (i) **D.W.1-** Mannu Sah
- (ii) **D.W.2-** Manoj Mandal
- (iii) **D.W. 3-** Jairam Mandal

9. Learned Trial Court, after appreciating the evidence on record and considering the submissions of the parties, found the appellant guilty of the offence punishable under Section 6 of the POCSO Act and Section 376 of the Indian Penal Code. Accordingly, the impugned judgment of conviction and order of sentence were passed.

10. We have heard learned counsel for the appellant and learned APP for the State.

11. The learned counsel for the appellant submits that the appellant is innocent and has falsely been implicated. He further submits that even as per the prosecution evidence, there is no sufficient material on record to connect the appellant with the alleged offence beyond reasonable doubts. The prosecution



has badly failed to prove the foundational facts of allegation of rape against the victim by the appellant. The impugned judgment of conviction and the order of sentence are not sustainable in the eye of law and same are liable to be set aside.

12. *Per contra*, learned Additional Public Prosecutor for the State submits that there is no illegality or infirmity in the impugned judgment and the appellant has been rightly convicted and appropriately sentenced.

13. We considered the submissions advanced by both the parties and perused the relevant material on record.

14. There is no dispute that the victim was five years of age on the date of occurrence. However, even then the prosecution is required to prove the foundational facts with regard to the alleged offence of rape against the victim by the appellant for application of provisions of the POCSO Act despite Sections 29 and 30 of the POCSO Act.

15. This Court in **Islam Miyan Hajam Vs. State of Bihar, (2024 SCC OnLine Pat 4354)**, after referring to relevant statutory provisions and case laws has, held as follows:

“27. Hence, it clearly emerges that despite statutory provisions of Sections 29 and 30 of the POCSO Act, the prosecution is not absolved of its burden to prove that the alleged victim is a child i.e. below 18 years of age and he/she has been subjected to sexual assault by the accused and such foundational facts have to be



proved by the prosecution beyond reasonable doubts and once the presumption is raised against the accused, the accused can rebut such presumption either by cross-examination of the prosecution witnesses or by leading evidence in his/her defence, on the touchstone of preponderance of probability. The presumptions are bats in law. They fly in a twilight, but vanish in the light of facts.”

16. Hence, we are required to examine the evidence on record to find whether the prosecution has proved the foundational facts of alleged rape against the victim by the appellant beyond all reasonable doubts.

17. Coming to the evidence of the prosecution, we find that **the victim** has been examined as **P.W.-7**. In her **examination-in-chief**, she has deposed that in the evening, she was playing with her elder sister and friends and while playing, she had fallen down. She has also deposed that previously, she had never given any statement in Court. She was not taken to doctor for medical test. She could not identify the appellant also who was standing in the dock.

18. **Mother of the victim** has been examined as **P.W.-6**. In her **examination-in-chief**, she has clearly deposed that she does not know who had committed the occurrence against her daughter. She has further deposed that in course of playing, her daughter had fallen on stone and got injured and when she saw injury on her body, she went to police station due



to anger. She has also deposed that nothing wrong has been committed against her daughter and she has not lodged any case in this regard. The police had taken her signature on a blank paper. The contents of the fardbeyan was neither stated, nor read over to her by the police. She has also deposed that no statement of her was recorded by the police. Her daughter is alright and nothing wrong had happened to her. Even to Court question, she has reiterated that nothing wrong had happened to her daughter.

19. P.W.-1 is Priyanshu Kumar @ Prince Kumar aged about 12 years. From perusal of his evidence, it appears that without testing his testifying capacity as required under Section 118 of the Evidence Act, he has been examined on oath. He has deposed in support of the prosecution case but for want of testing of his deposing capacity by learned Trial Court, the evidence of this child witness could not be relied upon.

20. P.W.-2 is Sonu Kumar aged about 12 years. Again, his deposing capacity has not been tested by the learned Trial Court. Even otherwise, he has not supported the prosecution case and has been declared hostile.

21. P.W.-3 is Raja Kumar, aged about twelve years, who again has been examined on oath without being tested by the learned Trial Court regarding his deposing capacity. Hence,



his evidence could not be relied upon.

22. P.W.-4 is **Soshila Devi**, aged about 58 years. She has not supported the prosecution case and she has been declared hostile. She is not an eye witness to the alleged occurrence, nor is she aware of any relevant facts regarding the alleged offence. The prosecution case gets no support from this witness also.

23. P.W.-8 is **Munnilal Paswan**, aged about 38 years. He knows nothing about the case. His evidence is of no use for the prosecution.

24. P.W.-9 is **Kaushal Kumar Bharti**. He was the Investigating Officer of the case. He has seized frock of the victim and saree of her mother for forensic examination.

25. P.W.-10 is **Dr. Teena Hussain** who has examined the victim on 29.10.2019. In her **examination-in-chief** she has deposed that no spermatozoa was found in the private part of the victim. However, she has deposed in her **cross-examination** that the injury as received by the victim cannot be caused by falling on stone.

26. P.W.-11 is **Dr. Priyanka Kumari** who had also examined the victim and had found small tear in posterior fornix of the victim. She had also found bleeding from private part of the victim.



27. All the three Defence Witnesses have deposed that the appellant has falsely been implicated by the informant for extraneous consideration.

28. From perusal of the aforesaid evidences, we clearly find that the prosecution case is supported neither by the victim nor her parents against the appellant. Though, injury has been found on the private part of the victim but whether this injury has been caused by rape by the appellant could not be proved by the prosecution beyond reasonable doubt. There is not a single word against the appellant in the evidence of the victim or her parents. Though one child witness has supported the prosecution case, but for want of his testing by learned Trial Court regarding deposing capacity prior to his deposition, his evidence could not be relied upon. More so, for want of any incriminating evidence from the mouth of the victim and her parents, the appellant could not be convicted on feeble evidence of a child witness.

29. As such, we find that the prosecution has badly failed to prove foundational facts of the alleged rape against the victim by the appellant beyond reasonable doubts. As such, no offence is made out either under the POCSO Act or under Section 376 of the IPC.



30. Hence, the impugned judgment of conviction and the order of sentence are not sustainable in the eye of law. Accordingly, they are set aside.

31. The Appeal stands allowed.

32. Since the appellant Pramod Mandal is in custody, he is directed to be released forthwith, if he is not required to be detained or wanted in any other case.

33. Let a copy of this judgment be dispatched to the Superintendent of the concerned jail forthwith for compliance and record.

34. The records of the case be returned to the Trial Court forthwith.

35. Interlocutory application/s, if any, also stand disposed of accordingly.

(Jitendra Kumar, J.)

I agree.

(Ashutosh Kumar, J.)

Ravishankar/
S. Ali/chandan

AFR/NAFR	NAFR
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