

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.277 of 2022**

Arising Out of PS. Case No.-297 Year-2018 Thana- MADHEPURA District- Madhepura

RAUSHAN KUMAR S/o Naresh Paswan R/o Azad Nagar, Ward No. 8, P.S.
and District- Madhepura

... .. Appellant

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Baxi S.R.P. Sinha, Sr. Advocate Mr. Rupesh Kumar, Advocate Mr. Rajnish Kumar Singh, Advocate Mr. Laxmi Kumari, Advocate Ms. Ankita Kumari, Advocate
For the State	:	Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. G. ANUPAMA

CHAKRAVARTHY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 08-01-2024

This appeal has been preferred by the sole appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (CrPC for short), putting to challenge a judgment of conviction dated 14.12.2022 and the order of sentence dated 22.02.2022, passed by the learned VIth Additional Sessions Judge Cum Special Judge (POCSO), Madhepura, in POCSO Case No. 21/2018/C.I.S. No. - 21/18 of Madhepura P.S. Case No. 297 of 2018 whereby the appellant has been convicted and sentenced as under:



Cr. Appeal (DB) No. 277 of 2022				
Appellant	Penal provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Raushan Kumar	Section 366-A of the IPC	R.I. for seven years	10,000/-	S.I. for three months
	Section 376 of the IPC	X	X	X
	Section 4 of the POCSO Act	R.I. for 20 years	Rs. 20,000/-	S.I. for three months

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

3. We are not disclosing the names of the victim and her near relatives who have deposed at the trial, so as to protect the victim’s identity. The victim’s father (PW-4) is the informant whose written report addressed to the Officer-in-Charge of Madhepura Police Station dated 10.05.2018 is the basis for registration of the concerned Madhepura P.S. Case No. 297 of 2018, for an occurrence which had taken place on 05.05.2018. It was alleged in the FIR that the informant’s daughter, aged nearly 13 years, was student of Class VIII and on the date of occurrence she had left for coaching centre at about 01:00 PM. She, however, did not return after the coaching hours and on enquiry from the teachers of the coaching centre, the informant learnt that she had left the coaching centre long back for her house. Despite a thorough search, the victim could not be found. On 10.05.2018, he learnt that Suresh Paswan, his son Chhotu Kumar, Naresh Paswan, his son Raushan Kumar (the appellant), Ashok Yadav and his son



Manish Kumar under a conspiracy had kidnapped the victim. Thus, altogether six persons were named in the FIR including this appellant by the informant based on suspicion.

4. It transpires from the materials on record that according to the prosecution's case, the Investigating Officer received an information on 26.06.2018 about the presence of the victim somewhere near Civil Court, Madhepura. He proceeded for the Civil Court and recovered the victim. On 26.06.2018 itself, the victim was subjected to medical examination. A Medical Board was constituted and based on the radiological examination, the victim's age was found to be between 14-16 years. The doctor did not find any bruise or abrasion on any part of the body of the victim including her private parts. On internal examination, no internal injury was found, though the features of sexual intercourse were found to be present. Spermatozoa was not found in the vaginal swab test. The victim's statement was recorded under Section 164 of the Cr.P.C. before a Magistrate on 28.06.2018 (Ext. 1). The statement of victim under Section 164 of the Cr.P.C. is significant in the present case which is the first version of the victim about the occurrence. She stated that when she was on her way to the coaching centre on 05.05.2018, the appellant made the victim elope with him to Delhi where he forcibly performed



marriage with her. The appellant would make her consume intoxicants. She all through remained unconscious. She had not gone with the appellant out of her own volition and that he had kidnapped her. The statement of the victim under Section 164 of the CrPC does not disclose any sexual act committed by the appellant on her. She did not allege any act of rape against the appellant. She alleged that the appellant had kidnapped her and married her against her willingness. The statement of the victim under Section 164 of the CrPC needs to be read with the FIR in the present facts and circumstances. If what is alleged in the FIR is to be considered, the victim, on the date of occurrence, had reached the coaching centre and thereafter she had left the coaching centre for her house. This has emerged after the informant had made inquiries from the teachers of the coaching centre. As has been noticed above, it transpires from the statement of the victim under Section 164 of the CrPC that on the date of occurrence, i.e., 05.05.2018, she had not reached the coaching centre rather she was kidnapped on her way to the coaching centre. It is also relevant to reiterate, at this juncture, that the victim in her statement under Section 164 of the CrPC did not mention anyone's role in her kidnapping other than this appellant.



5. Be that as it may, the police upon completion of investigation submitted its first charge-sheet on 19.07.2018 against accused Naresh Paswan. A supplementary charge-sheet was submitted on 27.10.2018 against this appellant and accused Manish Kumar. A second supplementary charge-sheet was submitted on 31.12.2018 against the co-accused Ashok Yadav and Chhotu Kumar.

6. After submissions of charge-sheet cognizance was taken of the offences punishable under Sections 366-A read with Sections 34, 376, 120B of the I.P.C. and Section 4 of the POCSO Act. Charges were subsequently framed against Naresh Paswan, Raushan Kumar (the appellant), Ashok Yadav, Suresh Paswan and Chhotu Kumar for commission of the aforesaid offences. The accused persons denied the charge and claimed to be tried. Accordingly, they were put to trial.

7. At the trial, the prosecution got examined altogether seven witnesses including two medical experts (PWs 5 and 7) and the Investigating Officer (PW-6). The victim was examined as PW-1, her father as PW-4 and her mother as PW-3. Khokhan Yadav, a person acquainted with the family of the victim, deposed at the trial as PW-2. Apart from the oral evidence of prosecution's



witnesses, the prosecution brought on record following documentary evidence at the trial to prove the charges:-

Sl. No.	Description	Exhibit Number
1.	Signature of the victim 'X' Kumari on her statement recorded u/s 164 CrPC	Exhibit-1
2.	Signature of victim 'X' Kumari on the report of the Medical Board	Exhibit- 1/1
3.	Signature of victim 'X' Kumari on her medical examination report	Exhibit- 1/2
4.	Signature of informant Suresh Malakar at the foot of the written report	Exhibit- 2
5.	Medical Examination Report of victim 'X' Kumari	Exhibit- 3
6.	Report of the Medical Board.	Exhibit- 3/1
7.	Endorsement of S.H.O., Madhepura on the written report.	Exhibit- 4
8	Report of the duly constituted Medical Board.	Exhibit- 5

8. After closure of the evidence of the prosecution’s witnesses, the persons facing trial including this appellant was questioned under Section 313 of the CrPC, so as to give them an opportunity to explain the incriminating circumstances which emerged against them. Following was the only question put to the appellant by the trial court under Section 313 of the Cr.P.C.

प्रश्न:- आपके विरुद्ध आरोप एवम साक्ष्य है कि आपने दिनांक को समय दोपहर के बजे से बजे संध्या के बिच सूचक सुरेश मालाकार के नाबालिग पुत्री का अपहरण कर लिए तथा उसके साथ बलात्कार किये। इस संबंध में क्या कहना है?
उत्तर :- जी, नहीं।

9. The appellant reiterated his plea of innocence in response. The defence thereafter, examined two witnesses, namely,



Bramhdeo Paswan (DW-1) and Vijay Paswan (DW-2) to make out a case that the victim, in fact, had gone to some unknown destination from the coaching centre with her brother-in-law (*Bahnoi*) and the entire case of the prosecution against the appellant and other accused persons was completely false. The trial court, after dealing with the evidence adduced at the trial reached a conclusion in its impugned judgment dated 14.02.2022 that the charges levelled against other persons, namely, Naresh Paswan, Suresh Paswan, Ashok Yadav and Chhotu Kumar could not be established beyond all reasonable doubts. However, the prosecution could successfully substantiate the charge of offence punishable under Sections 366-A, 120B, 376 of the IPC and Section 4 of the POCSO Act against the appellant. After having held the appellant guilty of the aforesaid offences, the trial court has sentenced the appellant to imprisonment and fine as noted above.

10. It is worthwhile mentioning that the trial against the co-accused Manish Kumar was split up by the trial court as he could not be produced at the trial.

11. Assailing the impugned judgment of conviction Mr. Baxi S.R.P. Sinha, learned senior counsel appearing on behalf of the appellant has argued that the prosecution has failed in its duty



and the trial court has not performed its obligation to conclusively determine the victim's age requisite under Section 34(2) of the POCSO Act. He submits that it was incumbent upon the trial court as well as the prosecution to establish that the victim was a 'child' within the meaning of Section 2(1)(d) of the POCSO Act by following the procedure prescribed by the Supreme Court in case ***Jarnail Singh v. State of Haryana***, reported in (2013)7 SCC 263 read with Section 34(2) of the POCSO Act and Section 94 of the Juvenile Justice Care and Protection Act, 2015. He has argued that to bring home any charge of commission of offence punishable under the provisions of the POCSO Act, it is essential and primary obligation of the prosecution to prove that the victim is a 'child' within the meaning of Section 2(1)(d) of the POCSO Act. He submits that the prosecution has failed to discharge its obligation and the appellant's conviction for the offence punishable under Section 4 of the POCSO Act is not at all sustainable.

12. Addressing the appellant's conviction for the offence punishable under Section 376 of the IPC he has submitted that the victim in her first statement under Section 164 of the CrPC had not alleged any instance of sexual assault caused by the appellant upon her. He contends that there is apparent improvement in the evidence of the victim (PW-1) at the stage of trial. He has further



argued that the investigation in the present case has been completely perfunctory inasmuch as the Investigating Officer did not bother even to find out the place where the victim was allegedly made to live with the appellant in Delhi after she was kidnapped. The Investigating Officer did not examine the victim nor did he visit the places of occurrence. He did not even bother to go to the coaching centre to find out as to whether the victim had in fact attended her coaching class or not on the date of occurrence. He has also submitted that the statement of the victim under Section 164 of the CrPC gives an impression that the victim and the appellant had eloped. The victim has not mentioned in her statement made under Section 164 of the CrPC that any force was used or she was otherwise induced to go with the appellant to Delhi. He has submitted that the victim made substantial improvement for the first time at the trial in her deposition. For the first time, she asserted in her evidence that this appellant, co-accused Manish and Chhotu Kumar sprinkled some medicine around her mouth and tied her mouth with some cloth. She had, thereafter became unconscious and regained her consciousness at a place *Sukhasan* in the house of one of the appellant's friends. The appellant, according to her, took her to Delhi and did some wrongful acts (गलत काम) after making her unconscious. On



26.06.2018, the appellant brought the victim back to Madhepura and dropped her at the Madhepura Bus-stand whereafter, she was recovered by the police. He submits that the victim is not at all a truthful witness whose evidence ought not to have been the basis for recording the appellant's conviction by the trial court. He has argued that based on what has been deposed at the trial by the prosecution's witnesses, the trial court ought not have held the appellant guilty of commission of offence punishable under Sections 366A and 376 of the IPC. He has further argued that there is no explanation for delay of five days in lodging of the FIR inasmuch as according to the informant, the victim was missing since 05.05.2018 and the FIR was registered on 10.05.2018.

13. Learned Additional Public Prosecutor representing the State, defending the finding recorded by the trial court, has argued that the victim appeared to be a minor to the court. During the medical examination, her approximate age, based on radiological test, was found to be 14 to 16 years. She contends that there was no dispute as such relating to the victim's age which required determination in the light of the provision under Section 34(2) of the POCSO Act by taking recourse to the law laid down by the Supreme Court in case of *Jarnail Singh* (supra). She has further argued that generally the witnesses of such age are not



expected to be explicit while describing acts of sexual violence and the expression ‘ गलत काम’ used by the victim at the trial should be treated by this Court to be an act of sexual assault. She has accordingly submitted that the trial court, applying the principle underlying Section 29 of the POCSO Act and upon due appreciation of the evidence, has rightly held the appellant guilty of the offence punishable under Section 4 of the POCSO Act and Sections 366-A and 376 of the IPC.

14. We have perused the impugned judgment and order of the trial court and we have gone through the lower court’s records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties. There is no scope of any doubt that so as to prove the commission of an offence under the provisions of the POCSO Act, it is obligatory on the part of the prosecution to conclusively prove a victim to be a ‘child’ with the meaning of Section 2(1)(d) of the said act.

15. At the same time, it is the duty of the trial court cast under Section 34(2) of the Act to determine the age of the victim. Such determination may not be required in a case where it is apparent on the face of it that the victim is a child. We do not find from the judgment of the trial court that the victim has been found to be a child based on an assessment done by the trial court. The



trial court has held the victim to be a child on the basis of her approximate age assessed by the Medical Board based on radiological examination. Her age, according to the Medical Board, was between 14 to 16 years.

16. Mr. Baxi S.R.P. Sinha, learned senior counsel appearing on behalf of the appellant has rightly placed reliance on a Division Bench's decision of this Court rendered on 15.12.2023 in Criminal Appeal (DB) No. 262 of 2022, wherein referring to the decisions in case of ***Jarnail Singh*** (Supra) and ***P. Yuvaprakash vs State Rep. By Inspector of Police (AIR 2023 SC3525)*** following has been held in paragraphs 20 and 21 as under:-

“20. In our opinion, it has rightly being argued on behalf of the appellant, referring to the case of P. Yuvaprakash (supra) that Section 94(2)(iii) of the Juvenile Justice(Care and Protection of Children) Act, 2015 clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred, in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat shall be taken into account. Only in case of absence of these documents, the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority. We may also usefully refer to the Supreme Court’s decision in case of Rishipal Singh Solanki v. State of U.P., reported in (2022) 8 SCC 602, paragraph 20 of which reads thus:-



“... 22.Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining : (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year. If a juvenile in conflict with law was found to be below 18 years, an order had to be passed declaring the status of the juvenility by the Court. The said procedure was also applicable to dispose of cases where the status of the juvenility had not been determined in accordance with the Act and the Rules made thereunder...”

21. We need not encumber our decision with the other Supreme Court’s decisions and this Court’s decisions on the point of the statutory mandate of determination of age of a person said to be a victim of sexual assault in accordance with Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 for the purpose of invoking the provisions of the POCSO Act. It is settled legal position by now that to bring an offence within the ambit of the provisions of the POCSO Act, when a question of age of the person, who is said to be victim of sexual assault, arises, the prosecution and the Court will have to undertake the procedure prescribed under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.”



17. There is no gainsaying that a medical report determining age of a person has never been considered by the courts of law as also by the medical scientists to be conclusive in nature as held in case of ***Jyoti Prakash Rai v. State of Bihar***, reported in ***(2008) 15 SCC 223***.

18. At this juncture, we reiterate again the observation made in Criminal Appeal (DB) No. 262 of 2022 in the case of **Raushan Kumar vs The State of Bihar**, paragraphs 25 to 27 of which are relevant and are being reproduced hereinbelow:-

“.....25. We reiterate that in a trial relating to an offence punishable under the provisions of the POCSO Act, it is obligatory for the trial court to undertake the procedure for determination of age of the victim of sexual assault under the Act as prescribed under Section 94 of the J.J. Act, 2015. This is for the reason that unless such determination is conclusively made, the provisions of the POCSO Act cannot be applied. It is high time when the trial court must appreciate the significance of the statutory requirement under sub-section (2) of Section 34 of the POCSO Act which casts upon them an obligation to first conclusively determine the age of the victim of a sexual assault strictly in accordance with the requirement under sub-section (2) of Section 94 of the J.J. Act, 2015 as explained by the Supreme Court in



the case of Jarnail Singh (supra) and Jaya Mala v. Govt. of J & K, reported (1982) 2 SCC 538. This is important also for the reason that the provisions under the POCSO Act are stringent and contain special provision under sections 29 and 30 of the POCSO Act, which cast reverse burden of proof on an accused of the offence of his innocence. There is vast difference between prosecution of a person for an offence punishable under the provisions of the POCSO Act and for those other offences punishable under Indian Penal Code or other penal provisions, which require no reverse burden of proof. A person charged of offence punishable under the provisions of the POCSO Act act is presumed to have committed or abated or attempted to commit the offence under section 29 of the POCSO Act contrary to the general principle of presumption of innocence of an accused under criminal jurisprudence. Culpable mental state of the person facing trial in respect of an offence is presumed under section 30 of the POCSO Act, which is not the general rule.

26. In the light of the aforementioned observations, we hold that it is mandatory for the prosecution to prove and the Special Courts under the POCSO Act to determine the age of the victim as



prescribed by the law, in a proceeding dealing with offences punishable under the POCSO Act.

27. We further hold that age determination based only on radiological examination is impermissible under section 34(2) of the POCSO Act read with Section 94 of the J.J. Act, 2015. There is no gainsaying that the provision under section 34(2) of the POCSO Act is mandatory in character.”

19. In the present case, the prosecution cannot be said to have proved in accordance with law that the victim was a ‘child’ within the meaning of Section 2(1)(d) of the Act and, therefore, the appellant’s conviction for the offence punishable under Section 4 of the POCSO Act cannot be sustained and is accordingly set aside.

20. Coming on the point of the appellant’s conviction for the offence punishable under Sections 366-A and 376 of the IPC, we find major lacunae in the prosecution’s case. Surprisingly, the victim’s statement was not recorded by the Investigating Officer at any stage of the trial under Section 161 of the CrPC. The statement of the victim under Section 164 of the CrPC and the facts disclosed in the FIR are conflicting. This aspect has been mentioned in the present judgment in the very beginning. It is the victim’s version that she was kidnapped when she was on her way to the coaching centre, meaning thereby that she had not reached



the coaching centre. Her father, the informant, in the FIR has mentioned that in search of the victim he had gone to the coaching centre and the teachers of the coaching centre had informed him that the victim had left the coaching centre much before. Thus, contrary to the statement of the victim, according to the informant, the victim had attended the coaching centre on the date of occurrence. The two conflicting stands taken by the victim and her father (the informant) cannot be reconciled. We are conscious of the fact that neither the First Information Report nor the statement of the victim under Section 164 of the CrPC are substantive piece of evidence. Yet, those being the foundational facts, they cannot be completely overlooked in the background of the nature of evidence adduced at the trial.

21. There is another disturbing aspect of the entire matter. According to the victim, she was taken by the appellant to Delhi and she was made to stay with the appellant in Delhi at a place not known to her, where the appellant forcibly married her and committed rape upon her. No effort at all was made by the investigating agency to locate and prove the place of occurrence in Delhi. The prosecution has completely failed to prove the place from where the victim is said to have been kidnapped by the appellant. It is pertinent to mention at the cost of repetition that the



statement of the victim recorded under Section 164 of the CrPC gives an indication that the victim and the appellant had eloped together. According to the victim, however, the appellant had made her to elope with him. Further, the mode of transport of the journey of the appellant with the victim to Delhi has not been disclosed at any point of time in the evidence. In our considered view, the victim does not appear to be truthful and reliable, based on whose sole testimony, the appellant could have been convicted by the trial court. The conviction of the appellant for the offence punishable under Section 366-A of the IPC is not sustainable also on the ground that the prosecution failed to prove that the victim was a minor, i.e., under the age of 18 years, which is a condition precedent for invoking the said provision.

22. We fail to understand as to why the investigating agency did not resort to the procedure prescribed under Section 24 of the POCSO Act for recording the statement of the victim, if according to it, the victim was a 'child' within the meaning of Section 2(1)(d) of the POCSO Act.

23. For the reasons noted above, the appellant deserves to be given benefit of doubt and, therefore, acquitted of the charge for the offence punishable under Section 366-A and 376 of the IPC.



24. In the result, the impugned judgment of conviction dated 14.02.2022 and the order of sentence dated 22.02.2022, passed by the learned VIth Additional Sessions Judge Cum Special Judge (POCSO), Madhepura, in POCSO Case No. 21/2018/C.I.S. No. - 21/18 of Madhepura P.S. Case No. 297 of 2018 are set aside. The appellant stands acquitted of the charges of commission of offences punishable under Sections 366-A and 376 of the IPC and Section 4 of the POCSO Act by giving him benefit of doubt.

25. This appeal is allowed accordingly.

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

(Chakradhari Sharan Singh, J)

Suraj/Amit-

(G. Anupama Chakravarthy, J)

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.01.2024
Transmission Date	22.01.2024

