

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.338 of 2023

Arising Out of PS. Case No.-34 Year-2021 Thana- MAHILA P.S BAGHA District- West
Champaran

=====

Zahid Ali S/o Sheikh Arsul @ Sheikh Asul Resident of Village- Bardgo Ghus
Tola, P.S.- Ram Nagar, District- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

For the Appellant/s	:	Mr. Abdul Mannan Khan, Advocate
		Mr. Md. Harun Quareshi, Advocate
For the Respondent/s	:	Mr. Binod Bihari Singh, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE A. ABHISHEK REDDY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 15-02-2024

We have heard Mr. Abdul Mannan Khan, learned
Advocate for the sole appellant and Mr. Binod Bihari Singh,
learned APP for the State.

2. The appellant has been convicted under
Sections 363, 366A and 376 of the IPC and Section 4 of
the POCSO Act, 2012 *vide* judgment dated 13.02.2023
passed by the learned VII Additional Sessions Judge-cum-
Special Judge, POCSO, Bagha, West Champaran in
Sessions Trial No. (Case No. Bagha Mahila P.S. Case No.



34 of 2021)/G.R. No. 719/2021 (CIS Criminal Case POCSO 174 of 2021). By order dated 15.02.2023, he has been sentenced to undergo R.I. for seven years for the offence under Section 363 of the IPC; R.I. for ten years for the offence under Section 366A of the IPC and R.I. for twenty years for the offence under Section 376 of the IPC. The Trial Court has sentenced the appellant also under Section 4 of the POCSO Act, 2012 also for twenty years. The appellant has also been slapped with a fine of Rs. 20,000/- and in default of the same imprisonment for one month.

3. All the sentences have been directed to run concurrently.

4. The victim of this case claimed to be less than eighteen years of age but in the FIR and in the statement lodged by her under Section 164 Cr.P.C., she has expressed her age to be twenty years.

5. The FIR by the victim (P.W. 2) states that she was married two years ago to one Mainullah Mian. The



appellant was on visiting terms and he often visited the parental home of the victim. On 26.03.2021, when there was nobody at home, the appellant is said to have enticed away the victim to Gorakhpur, where she was subjected sexual intercourse. Whenever she insisted for marriage, the appellant evaded to give any specific reply. After staying for some time at Gorakhpur, the victim was taken to Gujarat, where she became pregnant. She was brought back home on 16.05.2021. The appellant thereafter ran away. He refused to marry the victim and when a complaint was lodged by her father before the parents of the appellant, he was ill-treated and was assaulted also.

6. On the basis of the aforementioned written report addressed to the officer-in-charge of Mahila Town Police District West Champaran, a case *vide* Mahila P.S. (Bagha) Case No. 34 of 2021 dated 04.06.2021 was registered for investigation under Sections 366, 376, 447 and 448 of the IPC.



7. The police after investigation submitted charge sheet against the appellant under the aforementioned Sections and the appellant was put on trial.

8. The Trial Court, after having examined six witnesses on behalf of the prosecution, convicted and sentenced the appellant as aforesaid.

9. It has been urged on behalf of the appellant that the Trial Court has completely thrown to the winds the accepted cannons of appreciating the evidence and the judgment of guilt arrived at by the Court below is against the weight of overwhelming evidence.

10. Mr. Abdul Mannan Khan has further argued that from the deposition of the victim as also her mother, it would become very clear that the victim had eloped with the appellant, of her own choice and volition and had stayed with her at some place about which there was no definite disclosure.

11. He has further argued that the entire allegation of the victim having been made pregnant and



she having suffered abortion because of the assault perpetrated on her, is false. The medical evidence does not testify to any such recent pregnancy or abortion of the victim.

12. He has further argued that even the determination of age of the victim is not in accordance with the provisions contained in Section 34 of the POCSO Act, 2012. The Special POCSO Court did not have the jurisdiction to try the appellant as the victim of her own showing was twenty years of age.

13. The other surprising element in the evidence is that the husband of the victim was never examined nor any investigation was made with regard to the subsistence of marital relationship between the victim and her husband or that whether the victim had been staying in her parental home without maintaining any connection with her husband.

14. It has thus been urged that from a plain reading of the deposition of the witnesses, it would be



apparent that the appellant and the victim are neighbours and the victim wanted to marry the appellant for which he was not ready.

15. This perhaps, it has been argued, is the reason for such false implication of the appellant.

16. As opposed to the aforementioned contentions, Mr. Binod Bihari Singh, learned APP has submitted that in accordance with Section 34 of the POCSO Act, 2012 it may not be necessary for a Special Court to first decide the age of the victim in accordance with the provisions contained in *Juvenile Justice (Care and Protection of Children) Act, 2015*. The Court is under an obligation to do so once an issue with respect to age of the child (offender or victim) is raised during trial.

17. In any view of the matter, Mr. Singh has argued that in view of the School Register Certificate and the deposition of Ram Narayan Ram (P.W. 6), an employee of the School, having been brought on record, it is beyond cavil that the victim was less than 16 years of



age, as her date of birth in the School Register is shown as 30.09.2005. He has also drawn the attention of this Court to the Register which bears no evidence of any interpolation.

18. Having said that, it has been argued on behalf of the State that notwithstanding the desire of the victim to marry the appellant and lead a life of man and wife with him, the allegation of impregnating her without marrying her but giving false assurances of marriage, the offence under Section 376 of the IPC is squarely made out.

19. That the appellant reneged from his promise makes it very evident that the victim was enticed away with deceit and with a culpable mental state of forcing her into sexual subjugation and then not keeping up the promise of marriage.

20. We have examined the records of the case and the deposition of the witnesses in some detail.

21. We have found that at all places before the Trial viz. while the FIR was lodged and when the statement



under Section 164 of the Cr.P.C. was given by the victim, she disclosed her age to be twenty years. She admittedly was married to one Mainullah (not examined) some two years ago.

22. In this background, it becomes very difficult to accept the veracity of the School certificate, wherein her date of birth is shown as of the year 2005. The sole entry in the Admission Register, showing the victim to have been admitted in Class-6 has been accepted as a correct disclosure about the age of the victim by the court. The School Register otherwise is a document which could be relied upon for coming to a definitive finding about the age of the victim but in this background facts, especially when nothing is known as to when the victim began her education and where did she study before she was admitted in Class-6 in the aforementioned School, placing implicit reliance on School Admission Register and ignoring the self-disclosure of the age of the victim to be twenty



years which was corroborated by the disclosure by the mother of the victim, the Trial Court perhaps went wrong.

23. Even otherwise, we have found that the prosecution has not been able to make out any case of either kidnapping or enticement, abduction or of rape.

24. We say so for the reason that the victim is admittedly a married woman. The appellant stayed in the neighbourhood. The victim was taken away from the house on 26.03.2021. No case was registered against the appellant for all this while till she came back home, carrying a pregnancy of two months on 16.05.2021. Though the mother of the victim (P.W. 1) has stated before the Trial Court that she had filed a complaint before the police about the appellant having taken away the victim, but there is nothing on record to test the correctness of her statement regarding the filing of any case of the kidnapping of the victim from the lawful guardianship of her parents.



25. There was no reason for the prosecution to have not brought over the husband of the victim to the witness-stand. The mother of the victim, for reasons best known to her, expressed before the Trial Court that she would not get her son-in-law examined as a P.W.

26. Was this affair between the victim and the appellant under stealth?

27. The mother of the victim knew about her having gone along with the appellant. This appears to be a complete acquiescence on the part of the family members of the victim. They did not seem to have any objection to the victim having gone in the company of the appellant from her parental house. In her cross-examination, P.W. 1 has further stated that she could know about the appellant and his having taken away his daughter only when the brother of the appellant doled out some imprecatory words. She has admitted before the Trial Court that the victim and the appellant went together voluntarily. However the suggestion to P.W. 1 that a false case has



been instituted against the appellant for his refusal to marry the victim has been vehemently denied. The circumstances but reveal that the truth is not what meets the eye so far as evidence is concerned.

28. Even with respect to filing of the criminal case, P.W. 1 has admitted that there was consultation in the family before lodging the case. She has also denied the suggestion that nobody would like to marry an already married woman, which relationship was being thrust upon the appellant and that the case was lodged on his refusal to accede to such a request by the family members of the victim and the victim herself.

29. We have not found any evidence with respect to the victim having gone to Gorakhpur and from there to Gujarat. Had she been kept in confinement beyond her wishes, there were ample opportunities for her to have asked for succour from the neighbourhood. This further demonstrates that the stay of the victim with the appellant for all this while was with her consent and willingness.



30. The victim has admitted that she never visited the house of her husband but maintained good relationship with her husband. This appears to be an aporia and an unresolvable conundrum. Simultaneously, she has admitted that she wanted to marry the appellant. The two statements, juxtaposed, reveal a totally different story.

31. The investigation of this case also appears to us to be absolutely shoddy. The investigating officer (P.W. 3) did not inquire into any specific details about the relationship of the victim with her husband, or that the victim and the appellant lived in the neighbourhood or that the victim had really gone to Gorakhpur and Gujarat and had become pregnant.

32. These were the issues which needed unravelling at the time of investigation only.

33. This not having been done, the basis of the prosecution case gets damned. To further confound the issue, to our surprise, we have found the medical evidence



to be completely in dissonance with the prosecution version.

34. The victim was examined medically on 07.06.2021 by P.W. 4/Doctor. No injury, external or internal was found on her body or private parts. According to the Pathologist, spermatozoa also was not found in the vaginal swab. There was no recent sign of any sexual assault.

35. The doctor/P.W. 4 also did not assess the age of the victim. Had she been a minor, that would have been the starting point of medical examination by the doctor. That apart, even though the rupture of the hymen was old and there was an old scar on the private part, it was completely unrelatable to the offence for which the appellant has been charged. Had the appellant aborted in recent past, there would have been traceable signs of such abortion.



36. Thus, the entire story of the victim having been impregnated by the appellant and the later made to abort is imaginary and therefore unbelievable.

37. We have also noticed that when P.W. 4 did not find any recent sign of injury, suggesting any sexual intercourse or abortion and there was no assessment of age, P.W. 4 in her report (Ext. 7) had suggested for an alternative opinion by a Medical Board. No Medical Board was constituted for assessment of age as also for assessment of the fact of recent sexual intercourse and abortion. This further brings the prosecution case in a complete grey area with respect to the accusation and the jurisdiction of the Special Court to try the appellant.

38. For the aforementioned reasons, we do not approve of the opinion rendered by the Trial Court and per force, the judgment and order of conviction is required to be set aside.

39. We order accordingly.



40. The judgment and order of conviction and sentence is set aside.

41. The appellant is acquitted of all the charges.

42. The appellant is in jail. He is directed to be released from jail forthwith if not wanted in any other case.

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

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

45. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(A. Abhishek Reddy , J)

krishna/bhardwaj

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	16.02.2024
Transmission Date	16.02.2024

