

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.337 of 2022**

Arising Out of PS. Case No.-140 Year-2017 Thana- DHANARUA District- Patna

SUJEET KUMAR @ CHHOTANI S/O SHRI PRAMOD KUMAR R/o
Village- Patharhat, P.S.- Dhanarua, District- Patna

... .. Appellant/s

Versus

The State of Bihar

.. ... Respondent/s

Appearance :

For the Appellant/s : Mr.Rajendra Narain, Sr. Adv. With
Mr. Bhola Kumar, Adv.

For the Respondent/s : Mr. Abhimanyu Sharma, APP

**CORAM: HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA)**

Date : 02-04-2024

Heard learned counsel for the appellant and
learned Addl. P.P. appearing for the State.

2. This appeal is directed against the judgment of
conviction dated 22.03.2022 and order of sentence dated
23.03.2022 passed by the Additional Sessions Judge-VII-cum-
Special Judge, POCSO, Patna in Special (POCSO) Case No. 47



of 2017 arising out of Dhanarua P.S. Case No. 140 of 2017, whereby and whereunder the appellant has been convicted for the offence punishable under section 376 of the Indian Penal Code and sentenced for 20 years with fine of Rs. 50,000/- and in default of payment of fine, simple imprisonment for one year. He has further been sentenced for 20 years with fine of Rs. 50,000/- for the offence under section 4 of the POCSO Act and in default of payment of fine simple imprisonment for one year. Amount of fine will be paid to the victim. Both the sentences shall run concurrently. The period already undergone in custody by convict, shall be set off against the period of sentence as per section 428 of the Code of Criminal Procedure.

3. The prosecution case, in brief, is that on 27.03.2017 at about 8.00 pm informant(victim) had gone for attending nature's call in north direction from her house in the meantime accused Sujeet Kumar @ Chhotani came from behind and gagged her mouth with his gamachha and also tied her hands with her Dupatta and committed rape on her till half an hour. Thereafter he took his Gamchha removing from her mouth and fled away from there. After that she raised alarm and hearing the alarm her mother came and saw fleeing the accused. When her parents went to the house of accused to complaint



then accused Rajeev Kumar, Pramod Kumar @ Bhola Yadav, Saroj Devi and Pushpa Kumar assaulted and abused them.

4. The victim's name has been concealed in the present judgment and she has been referred to as the victim for maintaining privacy of her identity to protect her dignity.

5. On the basis of the written application submitted by the informant (victim) the police lodged first information report against five named persons vide Dhanarua P.S. Case No. 140 of 2017 for alleged offences under sections 341, 376, 504 of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act.

6. After investigation, charge-sheet was submitted under section 341, 323, 376 and 504 of the Indian Penal Code against the appellant on 25.11.2017 and under section 323, 341, 504 of the Indian Penal Code against accused Rajeev Kumar, Pramod Kumar @ Bhola Yadav, Saroj Devi and Pushpa Devi. After taking cognizance, the case was committed to the court of Sessions wherein charges were framed under section 376 of the Indian Penal Code and Section 4 of the POCSO Act against appellant and under sections 341 and 504 of the Indian Penal Code against other accused persons.

7. During trial, the prosecution examined



altogether 5 witnesses. P.W. 1 is the victim and also the informant of the case, P.W. 2 is the father of the informant, P.W. 3 is the mother of the informant, P.W. 4 Kavita Kumari (investigating officer), P.W. 5 Dr. Premlata Verma (Doctor).

8. In order to establish the charge, the prosecution has examined following documents as Exhibits:-

Exhibit-1	Signature of informant on written report.
Exhibit-1/1	Endorsement made by S.H.O. on F.I.R.
Exhibit-2	Signature of the victim on her statement under Section 164 Cr. P.C.
Exhibit-3	Signature of S.H.O., Rohan Singh on the first information report.
Exhibit-4	Writing and signature of the Doctor on Medical Examination Report.

9. The defence has also produced two witnesses. D.W. 1 Vijendra Prasad and D.W. 2 Yugeshwar Prasad.

10. The statement of the accused persons recorded under section 313 of the Code of Criminal Procedure is of complete denial.

11. The Trial Court, considering the contradictions in the evidence of witnesses, acquitted the other accused persons from the charges under Sections 341 and 504 of



the Indian Penal Code and convicted the appellant as mentioned above.

12. The judgment of the Trial Court has been assailed on the following grounds :-

i. All the witnesses have contradicted each other.

ii. There is no mark of any injury around the private part and as per report received from the pathology department, spermatozoa is not found in the vaginal swab of the victim and signs of sexual assault are not seen by the doctor.

iii. The victim in her examination stated her age about 15 years but during the course of trial, no document regarding proof of age has been submitted before the Trial Court, however the said victim was examined by the Doctor (P.W. 5) and the Doctor found her age about 17 to 19 years. Hence, the conviction under POCSO Act is unwarranted.

iv. The time of occurrence as stated by the prosecution witnesses is different. As per the First Information Report the time of occurrence was 08:00 pm. but during the course of examination in chief, the victim has stated the time of occurrence at about 08:00 am.

v. When the charge itself says that the time of



occurrence was at 08:00 am. then the Trial Court can not say that the time of occurrence has been proved at 08:00 pm.

vi. No independent witness has been examined by the prosecution.

13. Learned Additional Public Prosecutor appearing on behalf of the State opposed the prayer of the appellant and contended that the victim's evidence is sufficient for conviction of the appellant and the trial Court, after minutely examining the evidence, has passed a logical decision.

14. Before reaching to any conclusion, it is necessary to reappraise the evidence of the witnesses.

15. P.W. 1, who is the victim, in her evidence has repeated the same things as stated in the first information report, which need not be reiterated. She proved her signature on the written report given at the police station and her signature on the statements given before the Magistrate under section 164 of the Code of Criminal Procedure, which is marked respectively as Exhibit 1 and Exhibit 2. She identified the accused persons. In her cross-examination, she stated that the appellant's house is two kilometer away from her house. They are not on visiting terms. She studied up to Class-2. She has stated about her medical examination. Contrary to the first information report,



the time of the incident was given as 8:00 am.

16. P.W. 2 is the father of the victim. His evidence also repeats same things as stated in the first information report. On victim's screaming, he reached at the place of occurrence and saw the accused running away. He gave information to the Police Station on mobile. Police came to the house at 10:00 pm. and recorded their evidence.

17. P.W. 3 is the mother of the victim. In her statement, she also repeated the same things. In cross-examination, she stated that she did not see the occurrence, rather her daughter (victim) told her about the occurrence. She is not on visiting terms with the accused. She does not know who are the family members of the accused. She has also stated that her daughter was studying in class VIII at the time of occurrence.

18. Kavita Kumari (P.W. 4), investigating officer of the case, in her evidence, has proved the endorsement on the written application (Exhibit 1/1) and signature of S.H.O. Rohan Kumar (Exhibit-3) on the formal F.I.R. She has stated about the recording of the statement of victim under Section 164 Cr. P.C. She has also proved the place of occurrence. She stated about conducting of the medical examination of the victim. In her



cross-examination, she stated that there is no mention of the place of occurrence in the written complaint, who described the place of occurrence is not mentioned in the case diary. Statements of the persons residing around the place of occurrence were not recorded. Cloths of the victim were not seized. She is not aware that medical examination report was submitted before filing of charge sheet in which no sign of rape was detected and, in the opinion of the doctor, the victim was aged 17-19 years. She does not know what is section 4 of the POCSO Act.

19. Dr. Premlata Verma (P.W. 5) is the doctor, who had conducted the medical examination of the victim. She has stated in her evidence that on 22.03.2017, she conducted medical examination of the victim and found the following injuries on the person of the victim:-

- i. A bruise approx 2 cm x 5.5 cm right arm over deltoid region.*
- ii. A bruise approx 5 cm x 2 cm. on left side of back near shoulder.*
- iii. A bruise approx 1.5 cm. X 5 cm. over left cheek.*
- iv) A bruise approx 1 cm. X 5 cm. over right upper lip.*
- v) A bruise approx 2 cm. X 5 cm on left elbow.*



There is no mark of any injury around the private part of the victim. She found the age of the victim to be between 17-19 years. On the basis of the report of the Department of Pathology, P.M.C.H., she stated that spermatozoa was not found. She has proved her report as Exhibit-4.

20. On perusal of the aforesaid evidence, following facts become clear: except for victim, there is no eye witness of the occurrence. There are only three witnesses of occurrence, who are the victim, her father and her mother. There is no other independent witness. The victim submitted a written complaint in the night at the police station but who drafted the same is not known. There are vital contradictions in the evidence of the prosecution witnesses. The victim herself discloses different timings of the alleged occurrence. In the first information report, she states that the incident took place at 8:00 pm. whereas in her deposition, she states the timing of the incident to be at 8:00 am. In formal charge, the timing of occurrence has been indicated as 8:00 am. Prosecution side and defence side are not on visiting terms and prosecution side does not know who are the family members of the appellant, but in the first information report and while deposing, the witnesses take the name of each and every members of the family of the



appellant. There is no source of light. If it is assumed that the occurrence is of 8:00 in night, how the parents identified the accused running away in the dark.

21. The Doctor did not find any sign of rape and found the age of the victim to be 17-19 years.

22. The Investigation Officer has not recorded the statement of the important witnesses. She did not seized the important materials and she also stated that she does not know what section 4 of the POCSO Act is under which she has submitted the charge sheet.

23. The prosecution has to prove that the victim is minor. Here, no evidence has been put forward by the prosecution which would show that the victim is minor. On the contrary, the medical evidence shows her age to be 17-19 years.

24. There is contradictions among witnesses regarding the education of the victim. The victim herself says that she has studies up to Class-II whereas her mother's evidence is that she was studying in Class-VIII at the time of occurrence. Probably for this reason the prosecution did not brought on record any school certificate regarding the age of the victim.

25. The prosecution did not bring any evidence



regarding the age of the victim, on the contrary, on the basis of its own evidence showing her age to be 17-19 years, it can be said that the provisions of POCSO Act are not applicable in this case. Hence, the judgment of conviction and order of sentence of the accused under section 4 of the POCSO Act is, hereby, set aside.

26. It is clear from the medical evidence that rape has not been committed upon the victim. Accordingly, the judgment of conviction and order of sentence under section 376 of the Indian Penal Code is, hereby, set aside.

27. The medical examination report shows injury marks on the body of the victim. It is the clear evidence of the victim that the accused committed '*duskarm*' upon her and she also says that the accused is of the same village and she knows her from last 2-3 years. It is not clear what she meant by '*duskarm*' here but there is evidence on the record that the accused tied her hands and mouth and used force on her due to which she also sustained injuries. Hence, ingredients of section 354 of the Indian Penal Code are attracted.

28. So far as submissions of the defence that the occurrence is of night, there is no source of light, in such a situation, how could the accused be identified, is acceptable in



the context of the victim's parents, but the victim has known the accused for 2-3 years, in such a situation, there is no reason as to why she would not identify the accused even in the darkness of night that too when the accused is close to her.

29. The defence has also examined two witnesses on its behalf but they do not bring any evidence which shows that the accused has been falsely implicated due to any previous enmity.

30. Therefore, on the basis of the aforesaid evidence, it can be said that the accused has committed the crime under section 354 of the Indian Penal Code, accordingly, he is found guilty under this section.

31. The accused has been in custody for last two years which is sufficient punishment for his deeds.

32. Accordingly, the appeal is partially allowed. The judgment of conviction dated 22.03.2022 and order of sentence dated 23.03.2022 passed by the Additional Sessions Judge-VII-cum-Special Judge, POCSO, Patna in Special (POCSO) Case No. 47 of 2017 arising out of Dhanarua P.S. Case No. 140 of 2017, are hereby set aside so far as it relates to sections 376 of the Indian Penal Code and section 4 of the POCSO Act. Further, finding him guilty under section 354 of



the Indian Penal Code he is sentenced for the period he has
already served in custody (more than two years).

(Arvind Srivastava, J)

I agree.
Sunil Dutta Mishra, J

(Sunil Dutta Mishra, J)

mcv/-

AFR/NAFR	NAFR
CAV DATE	12.12.2023
Uploading Date	02.04.2024
Transmission Date	02.04.2024

