

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2124 of 2023**

Arising Out of PS. Case No.-30 Year-2020 Thana- NAUGACHIA MAHILA P.S. District-
Bhagalpur

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Md. Daulat Baitha @ Md. Daulat @ Daulat Son Of Late Birbal Baitha
Resident Of Village- Tulsipur, Ps- Kharik, Distt- Bhagalpur

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

For the Appellant/s : Mr.Rajesh Kumar, Advocate

For the Respondent/s : Mr.Zeyaul Hoda, Addl.PP

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**CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT**

Date : 23-10-2024

Heard learned counsel for the appellant and learned
Additional Public Prosecutor for the State.

3. This appeal has been preferred by the
appellant/convict under Section 374(2) of the Cr.P.C.
challenging the impugned judgment of conviction dated
13.02.2023 and order of sentence dated 28.02.2023 passed
by learned Additional District & Sessions Judge-VII-cum-
Exclusive Special Judge, POCSO Act, Bhagalpur, in
connection with POCSO Case No. 127/2020, arising out of
Naugachia Mahila P.S. Case No. 30 of 2020 whereby and
whereunder learned trial court has been pleased to convict



the appellant for the offence punishable under Section 4 of the POCSO Act and sentenced him to undergo imprisonment for ten (10) years with a fine of Rs. 10,000/-, in default of payment of fine, ordered to undergo further simple imprisonment for six months. Learned trial court has not awarded separate sentence for the offence under Section 376(3) of the I.P.C. in the light of the provisions as contained in section 42(2) of the POCSO Act.

4. The brief facts of this case as it appears from the written information of the informant/victim (PW-10) that on 03.11.2020, while she was going to market for purchasing vegetables, her neighbour namely, Daulat Baitha (the appellant) caught her, tied her with dupatta and after closing her mouth took away her in the nearby banana orchard where he committed rape upon her. She further alleged that when she raised alarm, the appellant ran away in south direction. She stated that when she narrated the occurrence to nearby people as well as parents and family members of the appellant, she was beaten by them. The victim/informant further stated that the reason of delay in lodging the F.I.R.



is that the Mukhiya and Sarpanch and also the parents of the appellant promised her to solemnize marriage with the appellant and to keep her with him but it when it was denied, she lodged the present case.

5. On the basis of aforesaid *fardbeyan*/written information Naugachia Mahila P.S. Case No. 30 of 2020 under Sections 376(3) of the I.P.C. and Section 4 of the POCSO Act was lodged and police, after investigation submitted charge-sheet against the appellant under Section 376(3) of the I.P.C. and Section 4/18 of the POCSO Act.

6. Learned trial court/special court explained the aforesaid charges to the appellant, which he pleaded "not guilty" and claimed trial.

7. To establish its case before the learned trial court, prosecution has examined altogether ten (10) witnesses namely, PW-1 Sweta Kumari (Investigating Officer), PW-2 Md Raja, PW-3 Sakina Khatoon, PW-4 Md. Manjur, PW-5 Sahid Baitha, PW-6 Santosh Bhagat, PW-7 Md. Nasim, PW-8 Dr. Anju Turiyar (Doctor), PW-9 Diwakar Mishra and PW-10 Victim herself.



8. The prosecution has produced and relied upon following documentary evidences also as to substantiate its case during trial, which are as under:

Number of Exhibits	List of Documents
Exhibit – P-1	Handwriting and signature on formal F.I.R.
Exhibit – P-2	Signature on statement recorded under Section 161 of the Cr.P.C.
Exhibit – P-3	Writing and signature on charge-sheet
Exhibit – P-4	Writing and signature of doctor on the report.

9. After examination of prosecution witnesses and by taking note of evidence and incriminating circumstances as surfaced during trial, statement of accused/appellant was recorded under Section 313 of the Cr.P.C., which was denied by the appellant in totality by claiming his complete innocence and false implication.

10. On the basis of evidences as surfaced during the trial, the learned trial court convicted and sentenced the appellant/convict, in aforesaid terms. Being aggrieved of which present appeal was preferred.

11. Hence, the present appeal.

12. It is submitted by learned counsel appearing on behalf of the appellant/convict that the learned trial court



while convicting the appellant mainly relied upon the statement of victim recorded under Section 164 of the Cr.P.C. and her testimony as PW-10 was completely ignored. It is also pointed out that the victim was not proved 'child' within the meaning of Section 2(1)(d) of the POCSO Act in view of legal parameters as available under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as also approved by Hon'ble Supreme Court in the matter of **Jarnail Singh Vs. State of Haryana [(2013) 7 SCC 263]**. It is submitted that doctors also did not find any external injury upon the victim during her medical examination.

13. Learned counsel while arguing further submitted that the statement of victim, as recorded under Section 164 Cr.P.C. can never be used as substantive evidence qua truth of the fact appears in crime in question and it can only be used for the purpose of contradiction and corroboration of a witness who makes it. In support of his submission, learned counsel relied upon the legal report of Hon'ble Supreme Court as available through **Utpal Das and**



**Another Vs. State of West Bengal reported in (2010)
6 SCC 493.**

14. While concluding argument, it is submitted that the prosecution failed to establish foundational aspect of crime in question as to import the presumption available under Section 29 & 30 of the POCSO Act. It is submitted that none of the prosecution witnesses are eye witness of the occurrence and as such, the balance of appeal is in favour of appellant/convict and, therefore, same is fit to be set-aside/quashed.

15. Learned Additional Public Prosecutor for the State, while opposing the appeal, submitted that the victim was minor aged about 16 years on the date of alleged occurrence and from her testimony, it appears that she compromised this case with the appellant/convict, but crime in question is not compoundable in nature but learned Addl.P.P. could not dispute the fact that statement of victim recorded under Section 164 of the Cr.P.C. was not exhibited during the trial.

16. I have perused the Trial Court Records carefully



and gone through the evidence available on record as also considered the rival submissions canvassed by learned counsel appearing on behalf of the parties.

17. After hearing the arguments and upon perusal of record, it appears that the evidence as surfaced during the trial is required to be discussed for the purpose of its re-appreciation for the just and proper disposal of the present appeal.

18. It appears from the submission as advanced by learned counsel appearing on behalf of the parties that victim/PW-10 is the most important witness of this occurrence. It appears that even in her examination-in-chief, she failed to name the appellant/convict and deposed that some unknown persons closed her mouth from backside and pulled her in a banana orchard and committed rape upon her. Though, she appears to depose that she lodged this case against the appellant/convict, but it appears in her examination-in-chief itself that the written information regarding crime in question was authored by some other person and she put her thumb impression only. She shows



her desire to close this case as appellant/convict compromised her to marry.

18.1. It appears upon her cross-examination that appellant/convict was her relative. She approved that no rape was committed upon her. She also approved the fact that her wearing cloths was not collected either by doctors or police. She categorically stated that under influence of others, she lodged the present case and, in actual, no such occurrence took place with her.

19. PW-2 is Md. Raja, who found the appellant outraging the victim while she was going to market. It was stated by him that appellant refused to marry victim. Almost same facts were deposed by PW-3 Sakina Khatoon. She also appears to be hearsay witness.

20. Md. Manjur (PW-4), Sahid Baitha (PW-5) and Santosh Bhagat (PW-6) are the hearsay witnesses regarding occurrence and, therefore their deposition not appears relevant to discuss as to ascertain the truth *qua* crime in question.

21. PW-7 is Md. Nasim. He categorically stated in



his cross-examination that he did not saw the occurrence.

22. PW-9 is Diwarkar Mishra. He turns hostile during trial. Nothing appears from his cross-examination on behalf of State as to corroborate or contradict the version of other prosecution witnesses, who appears to supported the case of the prosecution.

23. PW-8 is Dr. Anju Turiyar. She examined the victim/PW-10 on 24.11.2020 and did not find any external injury upon her.

24. PW-1 is the Investigating Officer of this case namely, Shweta Kumari. She was posted as S.H.O. Naugachia Mahila Police Station on 22.11.2020, the day on which she lodged present Mahila P.S. Case No. 30/2020 and assumed the charge herself for investigation. She identified her handwriting and signature on F.I.R. and on her identification, same was Exhibited as **Exhibit-P-1**. She also identified her handwriting *qua* statement of victim recorded under Section 164 of the Cr.P.C., which upon her identification exhibited as **Exhibit-P-2**. She recorded the statement of witnesses under Section 161 of the Cr.P.C.



during course of investigation and also visited the place of occurrence, where she did not find any relevant materials in support of allegation. She could not collect the cloths of the victim, which she was wearing at the date and time of occurrence, for the reasons, as it was told by the mother of the victim that it was worn by her daughter on so many occasions and thus not found relevant for investigation. It also appears from her statement that the date of birth of victim was 01.01.2005 as per her Aadhar Card. After completion of investigation, she submitted charge-sheet No. 2/2021 dated 22.01.2021 against appellant for the offences under Section 376(3) of the I.P.C. and Section 4 of the POCSO Act. She identified her handwriting and signature on charge-sheet, which upon her identification exhibited as **Exhibit P-3.**

25. It is well-settled law of criminal jurisprudence that any presumption available under law can be imported only after establishing of foundational aspects of crime in question. It appears that in the present case victim could not proved as 'child' within the meaning of Section 2(1)(d) of



the POCSO Act. She categorically stated as PW-10 that no such occurrence took place upon her and on instigation of others, she lodged the present case.

26. It further appears that the statement of victim was not exhibited during the trial, but it was read as evidence by the learned trial court, however, from said statement also it appears that the reason behind lodging this case was refusal of marriage by appellant/convict. Be it so, the settled position of law is that the statement of victim of any crime in question as recorded under Section 164 of the Cr.P.C. can be used only for the purpose of contradiction or corroboration as to ascertain the truth of the facts for a witness, who makes it, it cannot be accepted as a substantive piece of evidence. In this context, it would be apposite to reproduce the relevant part of the legal report of Hon'ble Supreme as available through **Utpal Das' case** (supra) which reads as under:

"16. Likewise, the statement recorded under Section 164 CrPC can never be used as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. The statement made under Section 164 CrPC can be used



to cross-examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness. In the present case it was for the defence to invite the victim's attention as to what she stated in the first information report and the statement made under Section 164 CrPC for the purposes of bringing out the contradictions, if any, in her evidence. In the absence of the same the court cannot read the Section 164 statement and compare the same with her evidence."

27. In view of the aforesaid facts and circumstances and by taking note of the fact as victim completely denied the occurrence before the learned trial court, the conviction of appellant/convict appears non-convincing as recorded by learned trial court.

28. Hence, the impugned judgment of conviction dated 13.02.2023 and order of sentence dated 28.02.2023 as passed by learned Additional District and Sessions Judge-VII-cum-Exclusive Special Judge, POCSO Act, Bhagalpur in connection with POCSO Case No. 127/2020 arising out of Naugachia Mahila P.S. Case No. 30 of 2020 is hereby set-aside and quashed.

29. Accordingly, the appellant namely, Md. Daulat



Baitha @ Md. Daulat @ Daulat, is acquitted of the charges leveled against him by the learned trial court. He is directed to be released forthwith, if his presence is not required in any other case. Fine, if any paid, be returned to appellant immediately.

30. The appeal stands allowed.

31. Let a copy of this judgment alongwith the Trial Court Records be sent to the learned Trial Court forthwith.

(Chandra Shekhar Jha, J.)

Rajeev/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	25.10.2024
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