

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.458 of 2023

Arising Out of PS. Case No.-347 Year-2019 Thana- GAYA MUFASIL District- Gaya

Chhotu Kumar Yadav Son Of Ramjanam Yadav R/O Ward No.- 53, Bhusunda
Balapar, P.S.- Mufassil, District- Gaya

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur. Advocate Mrs. Vaishnavi Singh, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 11-03-2024

The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Code') challenging the judgment of conviction dated 18.03.2023 and order of sentence dated 29.03.2023 passed by learned Special Judge, Exclusive POCSO Court-cum-Additional District & Sessions Judge-VI, Gaya in POCSO Case No. 77 of 2019, arising out of Muffasil P.S. Case No. 347 of 2019, whereby the concerned Trial Court has convicted the present appellant for the offences punishable under Sections 363, 366(A), 376 DA of the Indian Penal Act and Section 6 of the



POCSO Act and sentenced him to undergo rigorous imprisonment for five years and a fine of Rs. 1,000/- under Section 363 of the Indian Penal Code and rigorous imprisonment for twenty years and fine of Rs. 10,000/- under Section 6 of the POCSO Act and in default of payment of fine, the convict shall suffer further imprisonment for six months. No separate sentence was awarded under Section 376DA of the Indian Penal Code in view of Section 42 of the POCSO Act and it was ordered that all the sentences shall run concurrently and the period of detention undergone by the accused in this case shall be set off against the sentence of imprisonment.

2. The brief facts leading to filing of the present appeal are as under:-

2.1. On 24.07.2019, at about 8 o'clock in the night, the victim went outside for tying a cow. Meanwhile, first Ranjit Yadav, second Chhotu Yadav, both residents of Village-Bhusunda Walapur, Police Station-Muffasil, District-Gaya, came on two wheeler vehicle and forcefully dragged her on that vehicle to station and brought her in a room near the station and both persons did wrongful deeds with her. On 25.07.2019 at 5 o'clock early in the morning, both above mentioned persons dropped her in the street of her house and when there was a noise in the street



then first Ranjit Yadav, second Aneeta Devi and third Surendra Yadav came to her home and hit her family with *lathi-danda*, brick-stone, due to which, her mother got injured on her forehead.

2.2. On the basis of the aforesaid written complaint given by the victim, a formal F.I.R. came to be registered for the alleged offences punishable under Sections 376 DA, 341, 323, 337 of the Indian Penal Code and Sections 4 and 6 of the POCSO Act against the present appellant and other accused.

2.3. After the registration of the F.I.R., the Investigating Officer carried out the investigation. During the course of investigation, the statement of the victim under Section 164 of the Code came to be recorded by the learned Magistrate and the victim girl was sent for Medical Examination. The Investigating Officer recorded the statement of the witnesses and also sent the clothes of the victim to the F.S.L. After the investigation was over, the Investigating Officer filed the charge-sheet against the appellant and another accused before the concerned Court.

2.4. Before the Trial Court, the prosecution had examined seven witnesses and also produced documentary evidence. Thereafter, statement of the accused under Section 313 of the Code came to be recorded. After conclusion of the trial, the Trial Court convicted the appellant for the offences punishable



under Sections 363, 376 DA of the Indian Penal Code and under Sections 4 and 6 of the POCSO Act, whereas two other accused persons Surendra Yadav and Aneeta Devi were charged for the offence punishable under Sections 341, 323, 337 and 504 of the Indian Penal Code have been acquitted. The appellant/convict, therefore, has filed the present appeal.

3. Heard learned counsel Mr. Ajay Kumar Thakur assisted by Mrs. Vaishnavi Singh for the appellant and Mr. Sujit Kumar Singh, learned A.P.P. for the Respondent-State.

4. Learned counsel Mr. Ajay Kumar Thakur appearing for the appellant referred the deposition of the prosecution witnesses and thereafter submitted that the conduct of the victim creates doubt about the story put forward by the victim. It is submitted that, as per the case of the victim, at about 08:00 pm, when she went outside her house to tie the cow, one Ranjit Yadav and the present appellant, both came on a two wheeler vehicle and forcibly took her on that vehicle. She was thereafter kept in one room near the station and thereafter both the accused committed rape upon her. However, while giving statement recorded under Section 164 of the Code, the victim has stated that when she had gone out to the house to attend the call of nature, both the accused came on the motorcycle and forcibly took her on



the motorcycle. It is further submitted that the area in which the victim was residing is a densely populated area and in between the house of the victim and the station, two Police Stations are situated. She has not raised *hulla* when she was taken on motorcycle. Even nobody has seen the accused taking the victim on the motorcycle, though the occurrence took place around 08:00 pm. Thus, the learned counsel submitted that the conduct of the victim creates doubt and the present one is the case of false implication.

4.1. Learned counsel would further submit that even the medical evidence does not support the case of the victim. Even F.S.L. Report with regard to the clothe of the victim does not support the case of the prosecution.

5. Learned counsel would further submit that the present appellant was not examined by the Doctor as per the provisions contained in Section 53A of the Code. It is further submitted that the Investigating Officer had not gone to the place of occurrence where the alleged rape has been committed by the accused. Thus, the place of occurrence is not established. Learned counsel also contended that the prosecution has failed to prove the age of the victim by producing any documentary evidence. Even the Aadhar Card produced by the victim at the time of



giving examination-in-chief is not exhibited. It is also contended that the Doctor who had examined the victim has specifically stated, on general examination of the victim girl, that she is 16-18 years old. The Doctor has further stated that, based on the physical and radiological findings, the age of the victim is between 16-17 years. At this stage, learned counsel has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of **Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir and Others**, reported in **(1982) 2 SCC 538**.

6. Learned counsel has also placed reliance on the decision in **Rajak Mohammad Vs. State of Himachal Pradesh**, reported in **(2018) 9 SCC 248**. It is submitted that sufficient margin either way has to be allowed when the age has been determined on the basis of radiological examination. Learned counsel, therefore, urged that when prosecution has failed to prove the case against the appellant/accused beyond reasonable doubt, the present appeal be allowed and the impugned order passed by the Trial Court be quashed and set aside.

7. On the other hand, learned A.P.P. has submitted that when the victim herself has given the complaint against the appellant wherein specific allegations with regard to the rape has



been levelled against the appellant, the learned Trial Court has not committed any error while relying upon the deposition given by the victim. It is further submitted that the victim was a minor girl and with a view to prove the age of the victim she herself has produced her Aadhar Card wherein her birth date has been shown as 01.01.2006. Thus, the prosecution has proved the case against the appellant beyond reasonable doubt and, therefore, the Trial Court has rightly recorded the order of conviction against the present appellant. Learned A.P.P., therefore, urged that the present appeal be dismissed.

8. We have considered the submissions canvassed by the learned counsels appearing for the parties. We have also gone through the material placed on record and re-appreciated the entire evidence laid by the prosecution before the Trial Court. It would emerge from the record that PW-6 (victim) has alleged that, on 24.07.2019 at about 08:00 pm, when she had gone out of her house for tying the cow, the appellant and one Ranjit Kumar came on the motorcycle. They were carrying a pistol in their hand and they tied her mouth with a towel and also gave threat and thereafter she was taken to the room near the station and at that place, both the accused committed rape on her. However, in the written complaint the victim has not stated that the accused were



armed with a pistol and her mouth was tied with a towel. Further, in the statement given by her under Section 164 of the Code before the Magistrate, the victim has put forward a different story and said that, at about 08:00 pm, when she had gone out of her house to attend nature's call, both the accused came on the motorcycle and forcibly took her near the station. Thus, in the said statement also, there is no reference with regard to a pistol or towel. Thus, there are major discrepancies in the deposition given by the victim. Further, the conduct of the victim is also required to be examined carefully. It is the case of the victim, in the written complaint given by her, that at about 08:00 pm, she was taken on a motorcycle by two accused persons. However, it has come to record that the said area was a densely populated area and between the house and the station there are two police stations. The prosecution has not examined any independent witness who had seen the victim in company with the accused going towards the station on the motorcycle. Even the victim has not raised any *hulla* at any time.

9. It also transpires from the record that PW-1 is the mother of the victim and PW-2 is the father of the victim. They have stated that they lodged the case when their daughter was missing during night hours. However, the said complaint was not



produced before the Court. Thus, it appears that the prosecution has suppressed the said complaint and thereby correct facts are not brought on record.

10. It is a specific case of the victim that the two accused have committed rape on her during night hours in one room near station. However, from the deposition given by the Investigating Officer, it is revealed that the victim has not shown the said place to the Investigating Officer nor he has inquired about the place of occurrence where the alleged rape was committed by the accused on the victim. Thus, the place of occurrence is not also established by the prosecution.

11. At this stage, the medical evidence given by the Doctor (PW-5), namely Dr. Shakuntala Nag, who had examined the victim, is also required to be discussed. The said Doctor has specifically stated, on general examination, that the age of the girl was 16-18 years and in paragraph 15 of conclusions, the Doctor has stated that, based on physical and radiological findings, the age of the victim is between 15-17 years. It is pertinent to note that the prosecution has not produced any documentary evidence with a view to prove the age of the victim. Though, the victim has produced photocopy of her Aadhar card, the said document has not been duly exhibited. Thus, with a view to determine the age



of the victim, the evidence given by the doctor on the basis of the radiological finding is required to be kept in view.

12. At this stage, we would like to refer to the case of **Jaya Mala (supra)**, wherein the Hon'ble Supreme Court has observed in **Paragraph-9** as under:-

“9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention. Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert, in October 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school-going boy. It equally appears that there was some upheaval in the educational institutions. This young school-going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed.”



13. In the case of **Rajak Mohammad (supra)**, the Hon'ble Supreme Court observed in **Paragraph-9** as under:-

“9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.”

14. Thus, from the aforesaid decisions, it can be said that sufficient margin either way has to be allowed while determining the age on the basis of the radiological examination. In the present case, the age of the victim can be said to be in between 17-18 years and the benefit of the same is required to be given to the accused.

15. It is also relevant to note, at this stage, that the Doctor (PW-5) who had examined the victim has specifically stated in Paragraph 10 that Hymen lacerated but laceration are radial old and healed. In Paragraph-15, it has been specifically stated that there is no sign and symptoms of present sexual intercourse.

15.1. Further, during cross-examination, the Doctor has specifically stated that if two persons have committed rape on victim then, within 24 hours of her examination, there must be



spermatozoa, injury would have been on the person of the victim. In reply, the said witness has said yes. It has been further submitted that there is no injury or spermatozoa found in the inner or outer part of the victim. She has further specifically admitted that she has found hymen lacerated old and, in the present case, she has not found any spermatozoa or any violence on any part of the victim's body.

15.2. Thus, from the aforesaid deposition of the Doctor, it can be said that the medical evidence does not support the allegations levelled by the victim with regard to the gang-rape committed by the accused upon her.

16. We have also gone through the F.S.L. Report. *Salwar* of the victim was sent for necessary analysis to the F.S.L. and, after the examination, the concerned expert has stated that blood could not be detected in the Exhibit Mark-A. Semen could not be detected in the Exhibit Mark-A. No any foreign material like hair found adhered with Exhibit Mark-A. Thus, we are of the view that the aforesaid F.S.L. Report also does not support the version given by the victim.

17. It is pertinent to note that, at this stage, that the version of the prosecution with regard to the assault made by the other two accused i.e., father and mother of the accused Ranjit



Yadav on the mother of the victim has not been believed by the Trial Court and, therefore, the two other accused, namely Surendra Yadav and Aneeta Devi, against whom charge of offences punishable under Sections 341, 337, 504 was levelled against them have been acquitted by the Trial Court. Thus, it appears that the trial court has believed the part of the story of the prosecution *qua* the appellant whereas the story of the prosecution *qua* the aforesaid two accused has not been believed.

18. Looking to the aforesaid facts and circumstances of the present case, we are of the view that the prosecution has failed to prove the case against the appellant/accused beyond reasonable doubt, despite which, the Trial Court has passed the impugned order. Hence, the impugned order requires to be quashed and set aside.

19. The impugned judgment of conviction dated 18.03.2023 and order of sentence dated 29.03.2023 passed by learned Special Judge, Exclusive POCSO Court-cum-Additional District and Sessions Judge-VI, Gaya in POCSO Case No. 77 of 2019, arising out of Muffasil P.S. Case No. 347 of 2019 is quashed and set aside. The appellant, namely, Chhotu Kumar Yadav, is acquitted of the charges levelled against him the learned



Trial Court. He is directed to be released forthwith, if not required in any other case.

20. The appeal stands allowed.

(Vipul M. Pancholi, J)

(Sunil Dutta Mishra, J)

Sachin/Gaurav/-

AFR/NAFR	
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