

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.414 of 2022

Arising Out of PS. Case No.-162 Year-2016 Thana- SULTANGANJ District- Patna

Laldeo Sah @ Laldev Saw S/o Late Bhajju Sah Resident of H/o Niraj Kumar,
Shahganj, Professor Colony, P.S.- Sultanganj, District- Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. Niraj Kumar, Advocate

For the Respondent : Mr. Binod Bihar Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 12-01-2024

This appeal has been preferred by the appellant under
Section 374(2) of the Code of Criminal Procedure, putting to
challenge the judgment of conviction dated 21.04.2022 and the
order of sentence dated 27.04.2022, passed by learned Additional
District and Sessions Judge-VII-cum-Special (POCSO) Judge,
Patna, arising out of Sultanganj P.S. Case No. 162 of 2016, Special
(POCSO) Case No. 113 of 2016, whereby the appellant has been
convicted and sentenced as under:

Cr. Appeal (DB) No. 414 of 2022				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Laldeo Sah @ Laldev Saw	Under Section 376 of the IPC	R.I. for 20 years	50,000/-	S.I. for one year
	Under Section 6 of the POCSO Act	R.I. for 20 years	50,000/-	S.I. for one year



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

3. The informant (PW 3) claims to be the uncle of the victim (PW 1). The statement of PW 3, recorded by a Sub Inspector of Sultanganj (Patna) Police Station on 12.08.2016 at 1 PM, is the basis for registration of the concerned Sultanganj P.S. Case No. 162 of 2016 disclosing commission of the offences punishable under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act. The period of the occurrence of the offence was for 15 days, from before the date of registration of the FIR. According to the aforesaid statement of the informant, said to have been recorded by the Police Officer, the victim, aged 12 years, was studying in Class-5 in a school. On the date of registration of the FIR, i.e., 12.08.2016, the victim is said to have narrated to the informant that the appellant, a neighbour, aged 55 years, would under some allurements, take the victim to his house located at Mithapur on a bicycle and sexually exploit her (बुरा काम). After having learnt it, the informant (PW 3) and his friend (PW 4) furtively followed her when the victim started for school at 9 am, to observe covertly the movement of the appellant. They saw, in that course, that at a place, called *Nahar Par*, the appellant was forcibly making the victim sit on his cycle. Right after that, the



informant rushed there, apprehended the appellant and took him to Bahadurpur Police Station. Later, with a female police officer, he came to Sultanganj Police Station with the victim (PW 1) and the informant's sister (PW 2). The victim is said to have disclosed that for last 10-15 days, the appellant would take her to his house at Mithapur and would do dirty things with her. Nearly ten days ago, the victim had told the appellant that she would be complaining to her family members; the appellant in response had threatened her of serious consequences. The last sentence of the statement refers to the informant having put his left thumb impression below his statement, which was read over to him and was understood by him. It is not in dispute, however, that there is no thumb impression available on the FIR.

4. The police, upon completion of the investigation, submitted charge-sheet for the offences punishable under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act. Upon taking cognizance of the said offences, the appellant denied the charge and claimed to be tried.

5. At the trial, the prosecution examined six witnesses, namely; the victim (PW 1), the victim's aunt and the informant's sister (PW 2), the informant (PW 3), Shankar Mahato, the informant's friend (PW 4), the IO (PW 5) and the Doctor, who had



examined the victim, (PW 6). In addition to the aforesaid oral evidence, as noted above, the prosecution also brought on record three documentary evidence at the trial, namely, the statement of the victim recorded under Section 164 of the CrPC (Ext. P/1), *Fard-beyan* of the informant (Ext.-P/2) and the medical report (Ext. P/3) of the victim's examination.

6. On behalf of the defence, two witnesses, namely, Urmila Devi (DW 1) and Putul Devi (DW 2) came to be examined. It was the defence taken on behalf of the appellant that he was falsely implicated by the informant because the appellant would object to the informant's habit of consuming alcohol regularly. The defence brought on record four photographs marked 'X-1', 'X-2', 'X-3' and 'X-4' apparently to make out a case that the victim was a married lady.

7. The appellant was questioned under Section 313 of the CrPC so as to give him an opportunity to explain the circumstances emerging against him based on the evidence of the prosecution's witnesses. The appellant denied the circumstance and asserted that he was falsely implicated by the informant (PW 3).

8. The trial court, after having appreciated the evidence adduced at the trial, has held that the prosecution succeeded to



prove the charge against the appellant of commission of offence punishable under Section 376 of the IPC and Section 6 of the POCSO Act and sentenced him to imprisonment and fine as has been noted above by the judgment of conviction dated 21.04.2022 and the order of sentence dated 27.04.2022.

9. Assailing the finding of conviction recorded by the trial court, Mr. Niraj Kumar, learned counsel appearing on behalf of the appellant, has argued that absence of the Left-Thumb Impression ('LTI' in short) of the informant over his written report, which is the basis for registration of the FIR, makes the entire prosecution's case suspicious. He has submitted that the said statement of the informant, which is the basis for registration of the FIR, cannot be said to have been proved at the trial as the same did not bear the LTI of the informant. Further, the prosecution has not been able to establish, in accordance with law, at the trial, that the victim was less than 18 years old and was, therefore, a 'child' within the meaning of Section 2(1)(d) of the POCSO Act so as to attract the provisions of the said Act. He has argued that determination of the victim's age by the trial court based on the opinion of the Doctor (PW 6) to the effect that the victim was 15-16.5 years old, is erroneous, as such opinion cannot be considered to be accurate. He argues that it is settled legal position that margin



of two years on the both sides (minimum and maximum) will have to be given when the age determination is based on radiological examination. He has thirdly submitted that the prosecution's witnesses have contradicted themselves by their respective depositions and they do not appear to be reliable at all, on certain significant facts. He has referred to the evidence of the victim (PW 1) and her aunt (PW 2), who denied the factum that the victim was married, whereas, the informant in his deposition accepted that the victim was married. Whereas the victim and her aunt denied to identify the photographs of the victim with her husband, the informant in his deposition accepted that the said photographs were of the victim and her husband. He has further argued that the deposition of the prosecution's witnesses create doubt as regards the relationship of the informant and the victim, who, according to them, was adopted child of the informant's brother, who was not alive and the wife of the said brother of the informant was also not alive.

10. Mr. Binod Bihari Singh, learned Additional Public Prosecutor appearing on behalf of the State, defending the finding of the trial court, has submitted that the absence of the informant's LTI over his statement before the police, which is the basis for registration of the FIR, is insignificant. He submits that the



statement of the victim was recorded by a Magistrate subsequently on 16.08.2016, wherein she clearly mentioned that the appellant had sexually exploited her regularly for five days and threatened her of serious consequences in case she disclosed his misdeeds to anyone. He submits that the accusation in the FIR was found to be true by the police during the course of investigation, whereupon the charge-sheet was submitted. Based on the evidence of the prosecution's witnesses, the trial court has rightly convicted the appellant of the charges framed against him. At this stage, the correctness of the finding of conviction should not be questioned on a technical ground that the statement of the informant does not bear his LTI. He has further argued that the victim has been consistent in her deposition about the acts of the appellant and the minor contradictions in the depositions of the prosecution's witnesses are natural, which do not adversely affect the finding of conviction, correctly recorded by the trial court, he argues.

11. We have gone through the impugned judgment and order of the trial court as well as the lower court's records carefully and we have given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

12. One of the seminal issues which the present appeal involves is as to whether the prosecution was able to conclusively



establish at the trial that the victim was a 'child' within the meaning of Section 2(1)(d) of the Act, as, on the date of occurrence, or, during the period of occurrence, or not. Though it is the prosecution's consistent case that the victim was studying in a school, no documentary proof relating to the entry of the date of birth of the victim in the admission register of the school was brought on record at the trial. No medical board was constituted to examine the victim for determination of her age. From the medical report of the Doctor (PW 6), who had examined the victim on the date when the case was reported, it appears that the assessment made by the Doctor (PW 6) is based on radiological examination only. The Doctor has assigned 'probable' radiological age of the victim to be between 14-16.5 years as on 12.08.2016. It is trite that a medical report determining the age of a person is not considered by the courts of law to be conclusive in nature. In any view of the matter, Section 34(2) of the POCSO Act casts an obligation upon the special court to determine the age of a victim. The Supreme Court in case of *Jarnail Singh v. State of Haryana*, reported in **(2013) 7 SCC 263**, has laid down the procedure to be followed for determination of age of a victim of sexual assault for bringing the case within the purview of the provisions of the POCSO Act. Paragraphs 22 and 23 of the said decision read as under: -



22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as “the 2007 Rules”). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12.Procedure to be followed in determination of age.—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(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;



(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be



conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be



relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.

13. It is pertinent to note that the Act of 2007 has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 ('Act of 2015' for short) Sub-Section (2) of Section 94 of the Act of 2015 lays down the provision for determining the age of a person in conflict with law. Procedure for age determination now laid down under Section 94 (2) of the Act of 2015 is substantially the same as was prescribed under 2007 Rules, which reads as under:

"94. Presumption and determination of age.—(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence)



that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

14. In the present case, no exercise was carried out by the court or the prosecution to establish that the victim was below 18 years by following the procedure prescribed under the Act of 2015. In case of ***Rajak Mohammad v. State of H.P.***, reported in



(2018) 9 SCC 248, the Supreme Court has held that the age determination on the basis of radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. The prosecution having failed to conclusively prove that the victim was a 'child' as on the date of occurrence, the benefit of doubt on the point of his conviction under the provisions of the POCSO Act must go in the favour of the appellant.

15. We are accordingly of the view that the prosecution having failed to prove that the victim was a 'child' within the meaning of Section 2(1)(d) of the POCSO Act, the appellant's conviction for the offences punishable under Section 6 of the POCSO Act is unsustainable. The said finding of the trial court stands set aside accordingly.

16. We are now coming to the question as to whether the prosecution can be said to have proved beyond all reasonable doubts commission of an offence by this appellant punishable under Section 376 of the IPC. It is noteworthy that the FIR does not disclose even the approximate date of the first occurrence when the appellant had taken the victim to his house and committed rape upon her. Further, according to the FIR, the appellant, under some inducement, had taken the victim from her way to school, to his (appellant's) house in Mithapur. The victim is



said to have disclosed the informant, however, that it was happening for last 10-15 days, when the appellant had committed rape upon the victim five times. In her evidence at the trial, she disclosed first day of occurrence as 16.06.2016, i.e., nearly two months before the date of registration of FIR, when she was 12 years old. According to her deposition, she was going in an auto-rickshaw to her school and when the auto-rickshaw reached *Bhikhna Pahari*, the appellant made her sit on his bi-cycle on an assurance that he would reach her school, but instead he took her to his house and committed rape upon her. In her cross-examination, she deposed that the appellant had forcibly dragged the victim out of the auto-rickshaw, which was not objected to even by the auto-rickshaw driver, rather he facilitated the appellant do that. It had taken one hour on the bi-cycle for them to reach the appellant's house, from the place where the victim was forcibly made to sit on the bi-cycle by the appellant. She also deposed, in response to a question in her cross-examination, that she could not raise her voice or scream because the appellant had tied her mouth. She denied in her cross-examination that she was married. Five photographs were shown to her by the defence, but she declined to identify the persons, who were there in the photographs. She declined to identify one person in the photograph as her husband



and even her own photograph. She denied that she got married on 07.11.2017. She denied a situation that because the appellant had informed family members of the victim about her association with a boy, the false case was instituted.

17. The sister of the informant and thus claiming to be the aunt of the victim, while supporting the prosecution's case, deposed at the trial that the victim was an adopted child not born of any of her brothers/sisters-in-law. She further deposed that the victim was 'purchased' and that she was not purchased for adoption. She, however, did not know the transaction amount. She also deposed, furthermore, that there was no paper work done for her adoption. She testified that the victim was unmarried. She too declined to identify the persons, who were there in the said five photographs.

18. PW 3 in his deposition described the date of occurrence to be 18.06.2016 at 8.30 am. He deposed that the appellant had taken the victim to his house on 10-15 days and committed rape upon her. He had noticed the appellant forcibly making the victim sit on his bi-cycle when he was having tea at a tea stall with his friend Shankar Mahato (PW 4). He thereafter raised cry, whereupon number of students gathered. Thereafter, the victim was taken to the police station where the statement of the



victim and the informant were recorded. He denied the suggestion during his cross-examination that the victim was not the daughter of his own deceased brother. He, however, identified the victim's picture with her husband in the photographs marked 'X-1' to 'X-4'. He also deposed that the victim was married in 2018. The evidence of PW 3 on the point that the victim was married, whose picture was there in the photographs with her husband goes to suggest that the victim (PW 1) and her aunt (PW 2) were not trustworthy in their depositions. PW 4 also deposed at the trial that the victim was married. It is clear from the evidence of PW 2 that the victim was not the daughter of her (PW 2's) brother. There is no evidence that she was adopted by the deceased brother of PW 2 and the informant PW 3. If the deposition of PW 2 is to be taken into account, the victim, according to her, was bought by her brother on consideration. The situation, as regards status of the victim based on the evidence of the witnesses, is that the victim is not biological child of the informant's brother. On the date of occurrence, neither the said informant's brother nor his wife were alive. The victim was not aware of her maternal grandfather's place. The victim apparently lied at the trial in her cross-examination regarding her marriage sometime after the registration of FIR. The victim, in the Court's opinion, is not trustworthy. For



the first time, during the trial, she deposed that she could not raise her voice when the appellant was taking her on his cycle from the place called *Bhikhna Pahari* to the place of occurrence (i.e., Mithapur) because her mouth was tied by the appellant. In the same breath, she deposed that it had taken an hour to reach the appellant's house in Mithapur from the place where she was made to sit on the cycle by the appellant forcibly. In between, the appellant had not stopped the cycle. It is highly improbable that the victim was made to move on cycle by the appellant with her mouth tied in one hour journey from the place where the victim was abducted till the place where she was subjected to sexual assault. In the statement under Section 164 of the CrPC, she had not disclosed this aspect nor in her statement recorded under Section 161 of the CrPC. Situated thus, we are of the considered view that the PWs 1, 2 and 3 do not appear to be reliable witnesses on whose oral evidence it is safe to hold that the prosecution was able to establish beyond doubt the charge of commission of offence punishable under Section 376 of the IPC.

19. The last, but not the least, we find substance in the submission made on behalf of the appellant that the absence of the informant's LTI below his statement recorded by the Sub Inspector of Sultanganj Police Station casts serious doubt on the entire



prosecution's case. It is true that an FIR is not a substantive piece of evidence, but at the same time it cannot be forgotten that it is the foundation of a criminal case. Absence of the LTI of the informant over the FIR has remained unexplained.

20. Considering material contradictions in the evidence of the prosecution's witnesses and patent falsehood in the evidence of the victim herself, we are of the considered opinion that it would be highly unsafe to uphold the appellant's conviction for the offence punishable under Section 376 of the IPC. The appellant deserves to be given benefit of doubt.

21. In result, the appellant's conviction for the offence punishable under Sections 376 of the IPC and Section 6 of the POCSO Act cannot be sustained. The appellant stands acquitted of the charge of commission of the offence punishable under Sections 376 of the IPC and Section 6 of the POCSO Act by giving him benefit of doubt.

22. The impugned judgment of conviction dated 21.04.2022 and the order of sentence dated 27.04.2022, passed by learned Additional District and Sessions Judge-VII-cum-Special (POCSO) Judge, Patna, arising out of Sultanganj P.S. Case No. 162 of 2016, Special (POCSO) Case No. 113 of 2016 are hereby set aside.



23. This appeal is allowed.

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

(Chakradhari Sharan Singh, J)

Khatim Reza, J: I agree.

(Khatim Reza, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	21.12.2023.
Uploading Date	12.01.2024.
Transmission Date	12.01.2024.

