

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.541 of 2023

Arising Out of PS. Case No.-23 Year-2019 Thana- SATHI District- West Champaran

BANARASI SAH S/O LATE JAMUNA SAH R/O Village Bhabhta, P.S.
Sathi, Dist. West Champaran

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Adv.
	:	Ms. Vaishnavi Singh, Adv.
For the Respondent/s	:	Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 18-12-2024

1. Heard Mr. Ajay Kumar Thakur, the learned Advocate for the appellant and Mr. Abhimanyu Sharma, the learned APP for the State.
2. The appellant has been convicted for the offences under Sections 376(3) of the IPC and Sections 4 & 6 of the POCSO Act, 2012 by judgment dated 27.03.2023 passed by the learned Additional District & Sessions Judge-VII-cum-Special Judge, POCSO, Bettiah (West Champaran)



in POCSO Case No. 28 of 2019 arising out of Sathi P.S. Case No. 23 of 2019. By order dated 03.04.2023, he has been sentenced to undergo R.I. for 20 years for the offence under Section 376(3) of the IPC; R.I. for 10 years for the offence under Section 4 of the POCSO Act, 2012 and R.I. for 10 years for the offence under Section 6 of the POCSO Act, 2012. Apart from that a fine of Rs. 20,000/- has been imposed, which has been directed to be paid to the victim. The sentences, however, have been directed to run concurrently.

3. The victim of the case, a 14 years old girl was allegedly raped and impregnated by the appellant for which a case was lodged when the victim was carrying a pregnancy of 26 weeks.

4. The father of the victim, namely, Lal Babu Sah (PW3) lodged the written report on 02.03.2019 alleging that when he and his son, namely, Rajesh Sah (PW2) came back home from their business



trips on 25.02.2019, he learnt that his daughter (the victim) had become pregnant. When he enquired further, the victim disclosed that the appellant, his neighbour who is also distantly related, had committed rape on her. When PW3 went to the house of the appellant to enquire about it, the appellant is said to have run away. All efforts at catching hold of the appellant failed. Thereafter the F.I.R. was lodged.

5. Based on the aforementioned written report, a case vide Sathi P.S. Case No. 23 of 2019 dated 02.03.2019 was registered for investigation for the offences under Sections 376 and 506 of the Indian Penal Code and Sections 04 and 06 of the POCSO Act, 2012.

6. The appellant was chargesheeted and tried.

7. At the Trial, PW3 though supported the accusation but revealed certain facts which make the accusation against the appellant doubtful. He



had admitted that the appellant was his agnate and that he was in the same business of selling spices and dry-fruits as a vendor like him and his son. He was informed about the occurrence by his wife and then he came back home. He lodged the case only after a week of his learning about his daughter having become pregnant because of the rape perpetrated upon her by the appellant. The written report was drafted by someone else about whom PW3 had no idea. However, he was absolutely sanguine that the scribe would not come before the court to depose. Even his further statement was not taken by the Investigator.

8. Though no further questions were asked from him but his laconic version smacks of a deliberate attempt to name the appellant as an accused of this case. We say so for the reason that by the time he had discovered that his daughter had become pregnant, it was already a very late stage of



pregnancy. That having gone unnoticed by the family members appears to be rather surprising. The wife of PW3 i.e. the mother of the victim stayed back at the village along with her daughter. It was only after the wife of PW3 informed him about the occurrence, he came back home. However, in his written report, the narration is somewhat different. On casual visit to his home, PW3 could discover that his daughter has become pregnant and that was the first time that such fact was revealed by the victim herself that she was raped by the appellant a number of times.

9. In order to test the credibility of PW3, we have gone through the deposition of his son (PW2) who though was more expressive before the Trial Court but his evidence also casts some doubt over the correctness of the prosecution version. According to him, after coming to know about the pregnancy of the victim, a panchayati was convened



after about eight days. Sometimes before this case, one Yogendra Singh of the same village had filed a case of assault and battery against him and the appellant and others, which case was still pending when PW2 deposed before the Trial Court.

10. The aforesaid fact perhaps suggests that the appellant and PW2 belonged to the same party and perhaps there was no dispute between them.

11. We have referred to this aspect of the deposition of PW2 for the reason that a suggestion was given to all the witnesses that the accusation of the appellant is in the background of the appellant having refused to part with two kathas of homestead land which PW3 wanted for himself. Though such a suggestion was denied vehemently by almost all the witnesses but the fact remains that the Investigator (PW4) who was entrusted with the task of investigation only later, had examined such independent persons who had different stories to



narrate.

12. Brajendra Prasad Singh (PW4) about whom we have just referred to, has stated that he had examined only three witnesses, namely, Rahman Mian, Sumitra Devi and Ajajul @ Reyajul Mian. Rahman Miyan, who has not been examined at the trial told him during the course of investigation that because of the dispute over two kathas of land between the appellant and PW3, this case was lodged. In fact, the appellant resided at Darbhanga to carry on his business and came back home only after four to six months. Similar was the statement of Sumitra Devi who had cast some aspersion on the persona of the victim. Ajajul @ Reyajul Mian, who had been examined at the Trial as PW8 and who has supported his version before the Investigator had told him that there was a dispute between the appellant and PW3 and that was the basis for falsely accusing the appellant.



13. The victim, who has been examined as PW6 has though supported the accusation and has talked about such sexual encounters by the appellant for about three-four times but her deposition also does not appear to be wholly reliable. She obviously knew about the appellant and his vocation but had not spoken about occurrence to anybody including her mother. In paragraph -10 of her cross-examination, she has specifically stated that she had developed illicit liaison with the appellant for about 4 to 5 times which had happened in quick succession. However, she had never narrated about this to anybody in the family. She has also disclosed that after the case was lodged, a superior police officer of the rank of Dy. S.P. had come to the village and had arrested the son of the appellant who was kept in police lock-up for whole of the night.

14. Why had this happened ? Was there an initial



accusation against the son of the appellant ? Was the son arrested by the police to put pressure on the appellant to surrender to the process of law ?

15. It does not appear to reason that even in the absence of the appellant, who for most of the times resided at Darbhanga, the victim could not muster the courage to talk about such illicit alliance or encounter or attack to her mother specially when she had become pregnant. This fact of her developing pregnancy would have been known to her for the changes in her physiognomy.

16. Thus it is difficult to accept the proposition that out of fear, the victim did not speak about the occurrence to anybody.

17. What must have happened ?

18. There could be various explanations, not necessarily the alliance with the appellant. Why then the appellant was chosen to be targeted ?

19. This poser, therefore, makes us doubt that



perhaps because of the refusal of the appellant to part with two kathas of homestead land to PW3, it was thought by PW3 and others to frame him.

20. The appellant has a wife who is younger to him and who also stayed in the village home. The occurrence, say for four times, had taken place in the house of the appellant. This again appears to be improbable. The appellants has many children, some of whom have become majors. Under such circumstances, especially of the local police having arrested the son of the appellant, depict a different story-line or at least it creates doubt whether the version of PW3 is correct.

21. The victim was examined by the Dcotor (PW1) on 03.03.2019. PW1 had not found any evidence of any recent sexual encounter. However, she had found a single live intra-uterine fetus of 26 weeks. The age of the victim was assessed to be between 17 to 19 years.



22. Mr. Thakur, the learned advocate for the appellant has questioned the correctness of the judgment on various grounds apart from the facts of this case.

23. He has drawn the attention of this Court to the deposition of most of the witnesses who gave their depositions in the absence of the appellant. He, therefore, referred to the provisions contained under Section 273 of the Code of Criminal Procedure which provides that except as expressly provided in the code, all evidence taken in the course of the trial or other proceeding has to be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader. The proviso to the Section further declares that where the evidence of a woman below the age of 18 years who is alleged to have been subjected to rape or any other sexual offence is to be recorded, the Court may take



appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

24. In ***Jayendra Vishnu Thakur Vs. State of Maharashtra; AIR 2009 (7) SCC 104***, it was held that the right of an accused to watch the prosecution witnesses deposing before a court of law to be indisputably a valuable right. The exceptions provided under Section 273 are provided under Sections 299 and 317 of the Code of Criminal Procedure.

25. Under such circumstances, it has been argued by Mr. Thakur that the entire trial got vitiated and therefore the conviction cannot be sustained. (also refer to ***Atma Ram & Another Vs. State of Rajashthan; AIR 2019 SC 1961***).

26. The other ground urged on behalf of the appellant is that the mandate under Section 53A of



the Code of Criminal Procedure was blatantly flouted.

27. The appellant had surrendered to the process of law on 24.09.2019 only. He was never subjected to, as it appears from the records, any medical examination. The records further reveal that the victim delivered a baby who has been kept in an orphanage.

28. At the time of framing of charge, a specific plea was taken by the appellant showing his willingness to go for DNA test for testing the paternity of the child whom he is alleged to have fathered.

29. The afore-noted plea was objected on the ground that it would imperil the future of the child whose identity was being purposely concealed in the orphanage and that he was being looked after there.

30. The reasoning given by the trial court to refuse any DNA test may not be questioned but it



does reflect the willingness of the appellant to go to the last mile for proving his innocence, as such a test would have been the surest clincher to prove or disprove the allegation.

31. Lastly, it has been argued that the witnesses other than the father, brother and a neighbour of the victim, have all talked about the purposeful and motivated accusation against the appellant.

32. To tie the strings together, it has been urged that the victim and PW-3 do not appear to be wholly reliable for the reasons of delayed reporting of the matter; refusal of the Court to permit DNA profiling of the appellant and the child; the deposition of the witnesses being recorded behind the back of the appellant in breach of the provisions contained in the Code of Criminal Procedure; and non-observance of the mandate of Section 53A of Code of Criminal Procedure, have made the prosecution story-line susceptible of being suspected



33. That apart, though no real objection was raised by the appellant with respect to the jurisdiction of the POCSO Court on the ground of the victim not being a minor, but then the Trial Court appears to have based its opinion on a certificate by the Head Master of a school who has only provided that certificate regarding the registration of admission showing the victim to be aged about 14 years.

34. The certificate was never issued on any pad of the school but on a plain piece of paper. The certificate of admission and the date of birth is of one Sonapati Kumari with no alias name. PW-3 has referred to his daughter by a different name altogether. Thus even if a decision was made with respect to the age of the victim, the provisions contained under Section 34 of the POCSO Act, 2012 and Section 94 of the Juvenile Justice Act, were completely ignored.



35. This further makes the jurisdiction of the trial court to try the offence doubtful.
36. For all these reasons, we are of the view that the prosecution has not been able to prove the case beyond all reasonable doubts.
37. The presumption under Sections 29 and 30 of the POCSO Act, 2012 would get triggered only if the prosecution is able to discharge the initial burden regarding the appellant having committed the offence.
38. That being so, we have no option but to give benefit of doubt to the appellant, who has remained in Jail for more than five years by now.
39. Thus, we set-aside the judgment of conviction and sentence of the appellant and acquit him of the charges levelled against him.
40. The appellant is in jail. He is directed to be released from jail forthwith, if not required or detained in connection with any other case.



- 41. The appeal is allowed.
- 42. The Interlocutory Application/s, if any, also stands disposed of.
- 43. Let a copy of this judgment be communicated to the Superintendent of concerned jail for record and compliance.
- 44. Let the records of this appeal be also returned to the concerned Trial Court.

(Ashutosh Kumar, J)

(Nawneet Kumar Pandey, J)

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AFR/NAFR	NAFR
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