

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3293 of 2023

Arising Out of PS. Case No.-16 Year-2019 Thana- NATWAR District- Rohtas

Vivek Tiwari, son of Dhanjee Tiwari, resident of Gopalpur, P.S.-
Kargahar, District- Rohtas.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr.Ajay Kumar Thakur, Advocate Mr.Rajeev Ranjan, Advocate Mr.Prince Kumar Mishra, Advocate Ms.Vaishnavi Singh, Advocate
For the State	:	Mr.Anand Mohan Prasad Mehta, APP
For the Informant	:	Mr.Ravi Shankar Sahay, Advocate Mr.Rakesh Kumar Mishra, Advocate

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 08-02-2024

Heard Mr. Ajay Kumar Thakur, learned counsel duly assisted by Mr. Rajeev Ranjan, learned counsel for the appellant/convict and Mr. A.M.P. Mehta, learned A.P.P. for the State duly assisted by Mr. Ravi Shankar Sahay, learned counsel for the informant.

2. The instant memo of appeal has been filed on behalf of the appellant/convict under section 374(2) of the Code of Criminal Procedure (in short the “Cr.P.C.”) against the judgment of conviction dated 12.04.2023 and order of sentence dated 18.04.2023 passed by learned 7th Additional District & Sessions Judge-cum-Exclusive Special Judge (POCSO), Sasaram, Bihar in connection with POCSO Case No. 13/2019 arising out of



Natwar P.S. Case No. 16 of 2019, whereby and whereunder the appellant/convict has been found guilty for offences under Section 506 of the Indian Penal Code (in short the 'I.P.C.') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the "POCSO Act") and sentenced to undergo rigorous imprisonment for 10 years and fine of Rs. 10,000/- payable to victim for offences punishable under Section 4 of POCSO Act and in default of payment of fine, further to undergo simple imprisonment of three (3) months.

3. The case of the prosecution registered on the basis of written information of the informant namely 'X' (PW-4) that on 10th of April, 2017 her cousin brother namely, Vivek Tiwari (appellant/convict) came to her house situated at village – Karmani at about 2:00 P.M., while she was alone, where he after pressing her mouth committed rape upon her. It further appears from narration that the occurrence was videographed and certain nude photographs were also taken by the appellant/convict. Subsequently, a threat was advanced by appellant/convict to make it viral and on the basis of said threat, informant was blackmailed on several occasions to establish physical relations with her. It further appears from the narrations that



appellant/convict on last occasion i.e. 13th November, 2018 at about 11:30 P.M. established physical relation with her and threatened to make all photographs and video viral by uploading it to social media platform including Facebook. A threat was also advanced to kill the family members. As per written information, soon before lodging of F.I.R. appellant/convict also made an attempt to establish physical relation but same was denied by informant/PW-4, consequent upon objectionable photographs were uploaded on Facebook and when said uploading was objected by her on 10.02.2019, she was threatened to kill.

4. On the basis of aforesaid information police registered Natwar P.S. Case No. 16 of 2019 dated 10.02.2019 under Section 376/354(C)/506 of the I.P.C. and Section 4/8/12 of the POCSO Act along with offence under Section 67-B of the I.T. Act. against appellant/convict, where after investigation police submitted the charge-sheet. The learned trial court/POCSO Court, which is the special court having original jurisdiction took cognizance of the offence on the basis of materials collected during investigation. Charges were explained to the appellant/convict, which he denied and claimed trial by pleaded '**not guilty**'.



5. In support of case, prosecution examined altogether eight witnesses, who are PW-1 Meera Devi, PW-2 Kamalkant Tiwari, PW-3 Banarsi Tiwari (father of victim), PW-4 (informant/victim), PW-5 Shivji Singh, PW-6 Rampravesh Kumar, PW-7 Dr. Ajay Kumar Singh and PW-8 Dr. Bina Rani. Prosecution also relied upon written information signed by victim/informant as **Exhibit 'P-1'** and statement under Section 164 Cr.P.C. as **Exhibit 'P-2'** respectively. **Exhibit 'P-1/1'**, **Exhibit 'P-3'** and **'P-4'** are the medical reports.

6. The statement of appellant/convict was recorded under Section 313 Cr.P.C., where he denied the occurrence and all incriminating evidences/circumstances explained to him as surfaced during course of trial. Appellant/convict further shows his complete innocence.

7. The appellant/convict in his defence examined three witnesses, who are DW-1 Ramkeshwar Tiwari, DW-2 Ramakant Tiwari and DW-3 Sunil Tiwari.

8. On the basis of evidence as surfaced during course of trial, learned trial court convicted the appellant/convict under Section 376/506 of the I.P.C. and under Section 4 of the POCSO Act, where he was sentenced for the offence under Section 4 of the POCSO Act for the period of 10 years rigorous



imprisonment along with fine of Rs. 10,000/- but no separate sentence was passed for the offence under Sections 376 & 506 of the I.P.C. Being aggrieved thereof, the appellant/convict preferred the present appeal.

9. Hence, the present appeal.

10. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant/convict submitted that finding of conviction as recorded by the learned trial court is apparently bad in the eye of law for several reasons. In support of his submission, he submitted that prosecution failed to establish the victim as a child within the meaning of section 2(1)(d) of the POCSO Act, 2012 as no matriculation certificate, despite of the fact that victim passed her matriculation examination was collected during the course of investigation, nor it was produced during the trial.

11. It is further submitted that the entire allegation which is roaming around threat out of uploading of nude photographs and video clips of private moment to social media, but during investigation, no any such photographs or video clips were collected by Investigating Officer or produced during the trial. It is submitted that in fact victim solemnized her marriage out of her own sweet-will with appellant/convict and lived with



him for a considerable period of time, which is apparent from her testimony and when her matrimonial life disturbed due to certain matrimonial discord, the present false case under the rigorous provisions of POCSO Act was lodged. This is a classical case, to indicate, the misuse of POCSO Act, which otherwise intended and enacted with view to protect the childrens of the society from sexual abuse/assault.

12. It is further pointed out by learned counsel that no case of divorce out of cruelty was lodged by victim, against appellant/convict. It is further submitted that the continuity of threat for such a long period i.e. near about two years, while the victim was admittedly with appellant/convict, is not appearing convincing on it's face.

13. Mr. Thakur further submitted that the father of the victim who examined as PW-3 supported the factum of marriage. It is submitted that there are several contradictions on the point of rape from very inception of the occurrence, which can gathered early from the statement of victim as recorded under Section 164 Cr.P.C., her *fardbeyan* (written information) and her testimony as PW-4 and having all such material contradictions, certainly victim cannot be treated as 'sterling witness' because in the present case the conviction for



penetrative sexual assault appears to be made on her sole testimony.

14. It is submitted that conviction in the present case is made upon sole testimony of the victim, where oral testimony of victim not appears corroborated with the medical reports also as to believe her “sterling witness”.

15. It is further submitted by Mr. Thakur that entering in any corporeal relationship on the pretext of marriage cannot be termed as rape, which is apparent as per testimony of victim during the course of her examination. In support of his submission learned counsel relied upon the report of Hon’ble Supreme Court in the case of **Ansaar Mohammad Vs. State of Rajasthan** reported in **2022 SCC Online SC 886**.

16. While concluding his argument, Mr. Thakur further relied upon the reports of Hon’ble Supreme Court in the case of **P.Yuvaprakash Vs. State Rep. By Inspector of Police** as reported in **AIR 2023 SC 3525 = 2023 SCC Online SC 846** and in the case of **Manak Chand @ Mani Vs. The State of Haryana** reported in **2023 SCC Online SC 1397**.

17. Learned A.P.P. duly assisted by learned counsel appearing on behalf of the informant submitted that the victim has categorically stated through her deposition that rape was



committed upon her. It is submitted that this is the fault of investigating authority as it could not collected the matriculation certificate of victim and for the said reasons, justice cannot be denied to the victim. It is submitted that from the testimony of victim itself, it can be gathered safely that marriage was solemnized under threat.

18. Learned counsel appearing on behalf of the informant submitted that there is no apparent reasons to disbelieve the victim being ‘sterling witness’ and, therefore, the conviction as recorded by learned trial court cannot be said bad in the eye of law. In support of his submission he relied upon the report of Hon’ble Supreme Court in the case of **Ramdas and Others Vs. State of Maharashtra** reported in **(2007) 2 SCC 170**.

19. Learned counsel appearing for the informant further submitted that “misconception of fact” and “breach of trust” both are different things. It is submitted that it is the case of “misconception of fact” as appellant/convict never intended to be acted upon his promise of marriage, which is sufficient to constitute the offence, as rape.

20. Learned counsel further submitted that non-finding of any injuries in and around the private parts of the victim does



not lead to a conclusion *ipso facto* that rape was not committed upon particularly in view of testimony of victim/PW-4 which cannot be viewed with doubt.

21. Having heard the argument as canvassed by learned counsel for the parties and on perusal of the records, it would be apposite to discuss the evidence as available on record as to re-appreciate the evidences for just disposal of the present appeal, which is as under:

22. PW-4 is the victim 'X' herself who stated that occurrence is of 10.04.2017 at about 2:00 P.M., when she was alone at her home, the appellant/convict namely, Vivek Tiwari entered into her house and forcibly established physical relation with her and took objectionable photographs and video clips of the occurrence. She stated that a threat was advanced to make these video clips and photographs viral. It is stated that on said threat physical relations was established by appellant/convict on several occasions. It is stated that appellant/convict established physical relation with her on 13.11.2018 at about 11:30 P.M. and when he again made an attempt to meet with her, it was denied, consequent upon her nude photographs were made viral on Facebook (social media), thereafter she lodged the present case on 10.02.2019, where she identified her signature on her written



information which on her identification exhibited as **Exhibit '1'**. She identified her signature over statement as recorded under Section 164 Cr.P.C., which on her identification exhibited as **Exhibit '2'**. She stated categorically that her date of birth is 13.11.2002 and she provided copy of said certificate to investigating officer which was issued by Bihar School Examination Board. It is stated that after uploading her nude photographs on Facebook, accused/appellant threatened her to solemnized marriage with him, otherwise threatened to make video clips viral on Facebook. She stated to succumb to said threat and solemnized marriage with the appellant/convict on 21.07.2019 in court. It is stated that her uncle namely, Kamlakant Tiwari (PW-2) participated in said marriage ceremony out of threat. It is stated by her that after marriage appellant/convict started to assault and torture her on regular basis. He also demanded money from her and forced her to brought the same from her parents. She categorically stated that torture and assault was of higher degree and for same she informed the Khargahar Police, where police suggested to call her parents and thereafter she went along with them to join her parental home at Karmani village during the lockdown arises out of Covid-19. She stated that said threat is still existing.



22.1. Upon cross-examination, she failed to state that since how many years she knows appellant/convict. It is stated that her marriage with appellant/convict was solemnized forcibly on 21.06.2019, whereafter she went to her matrimonial home where she resided for two years. She has no issue. She passed her matriculation examination in the year 2021. She did not want to live with her husband namely, Vivek Tiwari (appellant/convict). She did not file divorce case against appellant/convict and not even registered a case for assault and dowry demand. It is stated that she want divorce from appellant/convict. She further stated not to join appellant/convict as wife, even he would keep her with love and dignity. She denied to lodge a false case.

23. PW-3 namely, Banarsi Tiwari, who is the father of the victim 'X'. He stated through his examination-in-chief that occurrence is of 10.04.2017, when the age of his daughter was 16 years. He also stated about the second day of occurrence as 13.11.2018. He also stated that the nude photographs were uploaded on 10.02.2019 on Facebook and only thereafter the present case was lodged. It was stated by him that appellant/convict solemnized marriage with her daughter and she is presently living with him. It was stated by him that he obtained



birth certificate of her daughter (PW-4) from Balia Panchayat, where her date of birth mentioned as 01.01.2001. He stated that his daughter is living with appellant/convict Vivek as wife. He stated that his daughter solemnized marriage with appellant/convict on 21.06.2019 which was registered by Marriage Registrar, Rohtas, a certificate in this connection was also issued thereof. It is submitted that the marriage was solemnized by victim/PW-4 out of her own sweet-will. He is not interested to continue this marriage.

24. PW-1 and PW-2 are Meera Devi and Kamalkant Tiwari respectively. PW-2 is the uncle of the victim. He categorically stated that he is not aware about the occurrence and not made any statement before police during the course of investigation. Both these witnesses turned hostile, where nothing substantial appears from their cross-examination as conducted on behalf of State as to corroborate or contradict the version of other prosecution witnesses, who supported the occurrence by way of their depositions during the trial.

25. PW-5 and PW-6 are Shivji Singh and Rampravesh Kumar respectively, who are the investigating officers of the case. PW-5 identified his signature over forwarding of F.I.R. which on identification exhibited as **Exhibit '1/1'**. He visited



the place of occurrence and recorded statement of victim/PW-4 and prosecution witnesses.

25.1. Upon cross-examination, it was stated by PW-5 that he did not made any attempt to obtain registration certificate of marriage. He also stated that he did not made any attempt during the course of investigation as to obtain the educational certificate of victim in support of her date of birth. He stated to investigate the matter of the year 2019 only. He stated that he sent the victim/PW-4 for her medical examination. He did not even made any attempt to find whether victim was married or not.

26. PW-6 namely, Rampravesh Kumar, who is also the investigating officer of the case stated in his examination-in-chief that victim/PW-4 supplied him a copy of certificate issued from Bihar School Examination Board, where her date of birth found endorsed as 13.11.2002. He reproduced the statement of victim in case diary as recorded under section 164 Cr.P.C. He submitted charge-sheet dated 80/2019 dated 22.11.2019 under Section 376/506 of the I.P.C. and under Section 4 of the POCSO Act, after investigation.

26.1. On cross-examination, he stated that in para '70' of the case diary victim stated him during course of



investigation that she solemnized marriage with appellant/convict Vivek Tiwari and living with him as a wife. He did not record the statement of neighbours.

27. PW-7 Dr. Ajay Kumar Singh, who examined the victim/PW-4 has stated in his examination-in-chief that he found following findings which reads as under:

“Spermatozoa not found.
Epithelial Cell – 3.21/high power field.”

He further stated that the report was prepared in his handwriting and it bears his signature and identified the same. The report has been marked as **Exhibit ‘3’**.

27.1. In cross-examination, PW-7 states which reads as under:

“Spermatozoa is responsible for pregnancy and the semen is prostatic juice and it contains spermatozoa.

I had not found any spermatozoa, either alive or dead.

The Gynecologist had provided me vaginal swab.

I have not mentioned the date on which the vaginal swab was taken.

It is not correct to state that the report prepared by me is not scientific.”

He further stated that his evidence was recorded in open court.

28. PW-8 is Dr. Bina Rani, who stated in her examination-in-chief that on 11.02.2019 while she was posted at



Sub-Divisional Hospital, Bikramganj as Medical Officer, she conducted examination of the victim and she found that:

Auxiliary hair present. Breast developed. Pubic hair present.

L.M.P-(20-20 days back from the day of examination)

Per abdominal examination – Nothing abnormal found.

Vaginal orifice admit one finger with difficulty.

No injury is found anywhere over body or private part.

Mark of identification till on neck.

Opinion was reserved till the pathological reports were available. The pathological report as provided by Dr. Ajay Kumar Singh, DS and Pathologist of Sub-Divisional Hospital, Bikramganj has following findings:-

- i. Spermatozoa not found.
- ii. Epithelial cells – 3-4/HPC.

PW-8 has given her final opinion and stated that from the above finding it is very difficult to say whether rape has been committed or not. She stated that the report was prepared in her handwriting and bears her signature. The report has been marked as **Exhibit - '4'**.

28.1. Upon Cross-examination, PW-8 Dr. Bina Rani stated that:

- (i) Whenever any physical assault being made without the consent of victim they are must be consigned over the body of victim.
- (ii) From above finding it is very difficult to say whether rape has been committed or not.
- (iii) After considering and for examined of the victim I



come to the conclusion that the victim could not consent to the sexual intercourse.

29. From the deposition of defence witnesses it appears that no such occurrence took place and marriage was solemnized out of pressure created by the parents of the victim where the victim lived with the appellant/convict for two years in her matrimonial house.

30. In view of aforesaid discussed evidence, it appears that the first and foremost issue, which is to be decided in this case as to whether the victim is child or not, within the meaning of section 2(1)(d) of the POCSO Act. it appears from the deposition of PW-4/victim 'X' that her date of birth as per matriculation examination is 13.11.2002 and she supplied a copy of said certificate to police officer during the course of investigation, which is also supported by PW-6. Father of victim 'X' /PW-3 stated that he obtained the birth certificate of his daughter/PW-4 which was issued from Balia Panchayat, where her date of birth was mentioned as 01.01.2001. It appears that the copy of matriculation certificate, as supplied to the investigating officer, was not brought on record and was not exhibited so as to read the same as an evidence, particularly in the background of fact, when the date of birth of victim was disputed by PW-3, who is none but father of the victim/PW-4. It



is the established principles of law that it is the bounden duty of prosecution to establish the age of child/victim during the course of trial within the meaning of section 2(1)(d) of the POCSO Act.

31. On perusal of these evidences as available on record, it cannot be said that prosecution established the victim/PW-4 as a child within the meaning of the POCSO Act as discussed above. It would be appropriate to reproduce paragraph '9' of the legal report of Hon'ble Supreme Court in the case of **Manak Chand** (supra) on which learned counsel appearing on behalf of the appellant/convict has relied upon, which reads as under:

“9. This Court in *Birad Mal Singhvi v. Anand Purohit, (1988) Supp SCC 604* had observed that the date of birth in the register of a school would not have any evidentiary value without the testimony of the person making the entry or the person who gave the date of birth.

“14. ...The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar's register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no



special means of knowledge of the date of birth, such an entry will have no evidentiary value.”

32. It is further important to mention in this context that PW-7 and PW-8 who are the doctors, nowhere mentioned the age of the victim on the basis of radiological examination/scientific test and as such there is no any further scope to ascertain the age of the victim/PW-4 on the basis of ossification test, as said option was not available before the court in view of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, which also approved under Section 34 of the POCSO Act.

33. It is apparent from the factual testimony of victim/PW-4 that several nude photographs and also video clips of physical relation under threat was created by appellant/convict, where at first instance the nude photographs were uploaded on social media. From the evidence available on record, it nowhere appears that any such materials was brought on record in support of allegation during investigation/trial. No such photographs or video clips were collected during course of investigation as per deposition of PW-7 and PW-8, who are none but the investigating officer of the case.

34. The second important issue which required to be discussed is whether the victim/PW-4 can be treated as ‘sterling



witness'. This court is of the opinion that there are several reasons out of which it is difficult to accept PW-4/victim as 'sterling witness'. The said reasons are:

(1) Firstly, the victim/PW-4 specifically stated regarding photography/videography of the occurrence, but no such photographs or video clips were ever collected during the course of investigation or produced during the trial to make the allegation prima-facie true on its face. In absence of photographs and video clips, statement regarding threat or blackmailing to establish physical relation also appearing doubtful.

(2) Secondly, the victim/PW-4 nowhere stated in her statement as recorded under section 164 of the Cr.P.C. that her marriage was solemnized with the appellant/convict. She is also silent regarding her marriage with appellant/convict in F.I.R. also.

(3) Thirdly, she stated categorically in her cross-examination that she solemnized marriage with appellant/convict and remained with him for two years in her matrimonial home. It is difficult to believe that the threat was existing for such long period of two years, particularly when father of the victim (PW-3)



stated that victim solemnized marriage with appellant out of her own sweet-will.

(4) Fourthly, it appears from deposition of the victim/PW-4 that she was assaulted and tortured on several occasions by the appellant/convict, being husband where demand of money was also raised.

(5) Fifthly, medical examination is also not supporting the occurrence.

(6) Sixthly, the victim/PW-4 stated specifically that PW-2 her uncle participated in her marriage with appellant/convict but PW-2 specifically stated that he is not aware about the occurrence.

35. In view of the aforesaid fact, it appears very difficult to accept victim/PW-4 as ‘sterling witness’ and therefore on her sole testimony conviction as recorded by learned trial court appears bad in the eye of law.

36. It would be apposite to reproduce paragraph ‘5’ of the legal report as reported through **Manak Chand** (supra) which reads as under:

“5. The evidence of a prosecutrix in a case of rape is of the same value as that of an injured witness. It is again true that conviction can be made on the basis of the sole testimony of the prosecutrix. All the same, when a conviction can be based on the



sole testimony of the prosecutrix, the courts also have to be extremely careful while examining this sole testimony as cautioned in ***State of Punjab v. Gurmit Singh, (1996) 2 SCC 384:***

“If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

37. In view of aforesaid factual and legal discussions, it appears that prosecution miserably failed to establish its case where conviction of appellant recorded on the sole testimony of the victim/PW-4 apparently appears bad in the eye of law.

38. Accordingly, the present appeal stands allowed.

39. The impugned judgment of conviction dated 12.04.2023 and order of sentence dated 18.04.2023 passed by learned 7th Additional District & Sessions Judge-cum-Exclusive Special Judge (POCSO), Sasaram, Bihar in connection with POCSO Case No. 13/2019 arising out of Natwar P.S. Case No. 16 of 2019 is quashed and set aside.

40. The appellant/convict is acquitted of the charges levelled against him. He is directed to be set at liberty forthwith unless his detention is required in any other case. Fine, if any,



paid be also returned to appellant-convict immediately.

41. A copy of the judgment alongwith TCR (Trial Court Records) be sent down immediately.

(Chandra Shekhar Jha, J.)

Rajeev/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	13.02.2024
Transmission Date	13.02.2024

