

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.764 of 2023

Arising Out of PS. Case No.-48 Year-2019 Thana- MAHILA P.S. District- Bhagalpur

Arvind Choudhary Son Of Vijay Choudhary Resident Of Village- Sakrulla
Chak, Bagbari, Ps- Babarganj, Distt- Bhagalpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Rajive Ranjan Singh, Advocate Mr. Shanti Bhushan 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 : 29-02-2024

The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as the 'Code') challenging the order of conviction dated 27.04.2022 and order of sentence dated 28.04.2022 passed by learned Exclusive Special Court (POCSO)-cum-6th Additional Sessions Judge, Bhagalpur, in POCSO Case No. 144A/2019 (10144/2019), arising out of Mahila P.S. Case No. 48 of 2019, whereby the concerned Trial Court has convicted the present appellant for the offences punishable under Section 376D of I.P.C. and under Section 4 of the POCSO Act and sentenced him to undergo rigorous imprisonment for life and fine of Rs.



20,000/- (Twenty Thousand) for the offence under Section 376D of I.P.C. and in default of payment of fine, he shall undergo further simple imprisonment of six months.

2. Heard learned counsel Mr. Rajive Ranjan Singh for the appellant assisted by Mr. Shanti Bhushan Singh and Mr. Sujit Kumar Singh, learned A.P.P. for the Respondent-State.

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

3.1. The *fardbeyan* of the victim came to be recorded on 17.10.2019 at 23:05 hours at Babarganj Police Station, Bhagalpur, in which the informant/victim has stated that when the victim was going to take milk, one Md. Faijan said to her that he wanted to talk to her and took her to some jungle like area where there were three more boys namely, Ravin Kumar, Soniya Goswami and Arvind Choudhary. They took her along with Md. Faijan towards jungle and forced him to do wrong things with the victim, otherwise they will kill her. Then Md. Faijan made physical relationship with her and after that, the rest of the three boys including the appellant committed rape with the victim one after another. The victim raised the alarm, but no one came to save her and somehow the victim rescued



herself.

4. On the basis of the said *fardbeyan*, formal F.I.R. came to be registered on 18.10.2019 at about 12:30 hours and the Investigating Officer thereafter proceeded with the investigation. During the course of investigation, the victim was sent to the concerned hospital for medical examination and the statement of the victim girl was recorded under Section 164 of the Code by the concerned Magistrate. The Investigating Officer has also recorded the statement of the witnesses and thereafter filed the charge-sheet against the present appellant and other accused.

5. Before the Trial Court, the prosecution had examined four witnesses and also produced the documentary evidence. On the other hand, defence has also examined the defence witnesses. The statement of the accused under Section 313 of the Code came to be recorded.

6. The learned Trial Court thereafter passed the impugned order whereby the present appellant has been convicted for the offences and sentenced him to suffer rigorous imprisonment as stated hereinabove.

7. The present appeal has been filed by the accused/appellant.



8. Learned counsel for the appellant mainly contended that there are major contradictions in the statement given by the victim in the *fardbeyan*, under Section 161 of the Code and the statement recorded under Section 164 of the Code. It is further submitted that in the statement given by the victim under Section 164 of the Code, she has not referred the name of the present appellant. It is further submitted that the present appellant has been falsely implicated in the occurrence in question. Learned counsel would thereafter submit that even the prosecution has failed to prove the age of the victim by producing any documentary evidence though the victim has studied up to Standard-V in the concerned school. It is further submitted that even, as per the deposition given by PW-1, the Doctor, who had examined the victim, that her age is stated to be between 14-16 years on the basis of the X-ray report. Learned counsel at this stage 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**.

9. Learned counsel for the appellant further submits that, as per the statement given by the victim under Section 164 of the Code, four accused persons have committed



rape on her one after another and the same was continued for approximately one hour. However, from the medical evidence of the Doctor, i.e., PW-1, it is revealed that the story put forward by the victim is not correct and no external injury was seen on the face, neck and breast of the victim. A small injury was found on the private part of the victim. Learned counsel, therefore, urged that the medical evidence does not support the version given by the victim, despite which the Trial Court has recorded the order of conviction and, therefore, the same is required to be quashed and set aside.

10. Learned counsel for the appellant lastly contended that though the F.S.L. Report has been produced before the Court, the blood-group of the victim or the concerned accused is not determined and there is no reference with regard to the blood-group of the victim as well as the accused in the said report. Though the semen is stated to be of human, however, the same is also not determined and, therefore, the said F.S.L. Report would also not be helpful to the case of the prosecution.

11. Learned counsel, therefore, urged that the impugned order passed by the learned Trial Court be quashed and set aside.



12. On the other hand, learned A.P.P. has opposed the present appeal. It has been contended by learned A.P.P. that in the *fardbeyan* itself, the victim has given the name of the present appellant with the allegation that the present appellant and the three other accused have committed rape on her and the said version of the victim has been supported by the medical evidence in the form of PW-1. It is further submitted that in the F.S.L. Report also blood as well as the semen were found from the clothes of the victim. Learned A.P.P. would thereafter submit that from the medical evidence, i.e., the deposition given by PW-1, it can be said that the victim was a minor and on the basis of the X-ray report, her age is stated to be between 14-16 years. Learned A.P.P., therefore, urged that when the Trial Court has, on the basis of the evidence led before it, convicted the appellant herein, no error is committed by the Trial Court as the prosecution has proved the guilt of the accused beyond reasonable doubt. Learned A.P.P. would, therefore, urge that the present appeal be dismissed.

13. We have considered the submissions canvassed by the learned counsels appearing for the parties. We have also perused the paper-book as well as the Lower Court Record. From the evidence led before the Trial Court, it would



emerge that the victim herself has given the *fardbeyan* on 17.10.2019 at about 23:05 hours. However, formal F.I.R. was registered on 18.10.2019 at about 12:30 hours. It is true that, in the *fardbeyan*, the informant has narrated the manner in which the occurrence took place and the role played by each of the accused. However, if the statement given by the victim before the learned Magistrate is carefully examined, it transpires that the victim has not given the name of the present appellant while giving her statement before the learned Magistrate. It has been stated by the victim in the said statement that when Md. Faijan, i.e., the co-accused, and other three boys committed the rape on her one after another and the said incident continued for approximately one hour.

14. PW-2 is the victim, who has deposed before the Court that after having seeing the statement under Section 164, she had deposed that the evidence she has given today is the same which she has given in her statement under Section 164 and she had put her signature and her mother also put her signature which has been marked as Exhibit-P3/PW2. Her statement was also recorded in Mahila P.S. under Section 161. She has also stated that she had no prior knowledge about the place where the occurrence took place. Her statement was



recorded at Mahila P.S. on the very same day when the occurrence took place. Her statement was recorded at Mahila P.S. as well as Babarganj P.S. The case was registered at Babarganj P.S. She has further stated that the place of occurrence was a jungle. She did not know Md. Faijan and the other co-convicts from before. She later stated that Md. Faijan was from her locality, but she did not know him by his name. Her *nikah* was also not solemnized. She had further stated that she had not filed such a case against others before.

15. At this stage, we would like to refer the deposition given by PW-1 Dr. Aabha Sinha. She has stated in her examination-in-chief as under:-

“I examined Victim, D/o- Md. Minsar Ansari, Village- Sakrullahchak, P.S.- Babarganj, Dist.- Bhagalpur and found following points:-

(A) No external injury was seen on face, neck and breast.

(B) There was blood stained discharge on her clothing, so clothes were preserved and sent for examination.

(C) On examination of private part there was small (about 1 cm) tear in labia minora on both sides (left and right).

(D) Two sealed vaginal swabs were sent to Pathology Department of JLNMC for detection of Spermatozoa.

(E) She was referred to Radiology Department, JLNMC, Bhagalpur for X-ray, Pelvis &



Forearm for age determination.

Mark of Identification:- Mole on face below left eye.

Mole below left collar bone.

LMP-10 days back.

R. No. 141 dated 18-10-19 (2:10 AM).

She received all the reports from J.L.N.M.C.H. Bhagalpur on 19-11-2019.

According to Patho report (Sl. No. 484 dated 18-10-19) showed no spermatozoa in vaginal swab report.

According to X-ray No. 367 dated 18-10-19 showed her age between 14-16 years.

Report of her clothing are still awaited and still not available.

Opinion- Final report to be given after the reports of clothings are available.

This medical report is prepared by me in my own writing and my signature which I identified and same is marked as **Ext. P1/PW1.**”

15.1. During the cross-examination, PW-1, the Doctor, has specifically admitted that at the time of examining the victim, she has not examined the said victim with regard to the blood-group.

16. From the aforesaid deposition given by the Doctor, it is revealed that no external injury was seen on the face, neck and breast of the victim. On examination of private part of the victim, the Doctor found that there were small (about 1 cm) tear in *labia minora* on both sides (left and right). Thus,



from the aforesaid evidence, it can be said that the version given by the victim and the manner in which the occurrence took place is not supported by the aforesaid medical evidence given by the Doctor.

17. At this stage, it is also pertinent to note that blood-stained discharge on the clothing of the victim girl were found and, therefore, the clothes were sent for examination to the F.S.L. However, if the F.S.L. Report is carefully examined, it is revealed that the blood-sample of the victim was not taken by the Investigating Officer nor the blood-samples and other necessary samples of the accused were collected by the Investigating Agency and, therefore, the F.S.L. Report is also silent on this aspect.

18. At this stage, the deposition of PW-4, who is the Investigating Officer, is also required to be taken in view. PW-4 has stated before the Court that she had recorded the statement of the victim under Section 164. She has further stated that blood and semen of human were found on the victim's clothes.

18.1. In her cross-examination, she has stated that the victim told the name of the rapist. There were stains on victim's clothes. The victim did not tell her about the physical



injury. She has further stated that the victim has not stated about the injuries and the scars in her statement. She received the F.S.L. Report after the original charge-sheet and supplementary charge-sheet were submitted. She has further stated that apart from victim, victim's mother and victim's sister, statement of any other witness was not taken because no one was ready to give statement.

19. Now, with regard to the age of the victim, it is required to be noted that PW-1 has stated in her examination-in-chief that, on the basis of the X-ray report, the age of the victim can be said to be between 14-16 years.

20. At this stage, we may, once again, refer the statement given by the victim under Section 164 of the Code, wherein she has specifically stated that she has studied up to Standard-Vth in a school. However, the Investigating Officer has not collected any document with regard to the age of the victim. Thus, the prosecution has failed to prove the age of the victim by producing any documentary evidence in the form of School Register or the Birth Certificate of the victim. Therefore, the only evidence, which was available before the Trial Court, was with regard to the deposition given by PW-1 on the basis of the X-ray report.



21. At this stage, we would like to refer to the decision rendered by the Hon'ble Supreme Court in the case of **Jaya Mala (supra)**, wherein the Hon'ble Supreme Court has observed in **Para-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.”

22. From the aforesaid observation made by the Hon'ble Supreme Court, it can be said that the judicial notice can be taken that the margin of error in age ascertained by the



radiological examination is two years on either side.

23. Thus, we are of the view that the prosecution has failed to prove the age with regard to the victim and, therefore, on the basis of the aforesaid report, the margin of error on either side of two years can be considered and, therefore, the age of the victim can be considered between 16-18 years.

24. In view of 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 herein beyond reasonable doubt, despite which the Trial Court has passed the impugned order whereby the appellant has been convicted and, therefore, the impugned order is required to be quashed and set aside.

25. Accordingly, the impugned judgment of conviction dated 27.04.2022 and order of sentence dated 28.04.2022 passed by learned Exclusive Special Court (POCSO)-cum-6th Additional Sessions Judge, Bhagalpur in POCSO Case No. 144A/2019 (10144/2019), arising out of Mahila P.S. Case No. 48 of 2019 is quashed and set aside. The appellant namely, Arvind Choudhary, is acquitted of the charges levelled against him by the learned Trial Court. He is



directed to be released forthwith, if not required in any other case.

26. The appeal stands allowed.

(Vipul M. Pancholi, J)

(Sunil Dutta Mishra, J)

Sachin/-

AFR/NAFR	
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