

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3440 of 2023

Arising Out of PS. Case No.-421 Year-2021 Thana- MUFFASIL District- West Champaran

Sarfaraz Khan, Son of Azmuddin Khan, Resident of Village-Dariyapur, P.S.-
Paharpur, District - East Champaran

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr. Rajeev Ranjan, Advocate

Mr. Vikas Kumar, Advocate

Ms. Nishi Priya, Advocate

For the Respondent/s : Mr. Mukeshwar Dayal, Advocate

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 24-10-2024

This appeal has been preferred by the appellant/convict under Section 374(2) of the Cr.P.C. challenging the impugned judgment of conviction dated 21.06.2023 and order of sentence dated 28.06.2023 passed by learned Additional Sessions Judge-VI-cum-Special Judge, POCSO, West Champaran at Bettiah in connection with POCSO Case No. 167/2021 arising out of Bettiah Muffasil P.S. Case No. 421 of 2021, whereby and whereunder learned trial court has convicted the appellant for the offences punishable under Section 376 of the Indian Penal



Code (for the short the "I.P.C.") and Sections 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") and sentenced him to undergo rigorous imprisonment for ten (10) years with fine of Rs. 50,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year either for commission of offence under Section 376 of the IPC or for offence under Section 4 of the POCSO Act and rigorous imprisonment for five years with fine of Rs. 25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months for the offence under Section 8 of the POCSO Act.

4. The case of the prosecution in brief as it appears from written information dated 10.07.2021 of PW-2/victim given to the S.H.O. Bettiah Muffasil Police Station, stating therein that on 09.07.2021 at about 1:30 P.M., when she was going to bring firewood, in the way, Sarfaraz Khan (appellant), who was residing in a rented room, caught her, pressed her mouth and brought her inside the room and threw her on the bed. Thereafter, opened her lower (salwar)



and start committing rape upon her. She further stated that she started crying and on hearing her cry, neighbours reached there and caught the appellant/accused. She further stated that her aunt and uncles came there and started quarreling and they took away the appellant with them. The father of appellant came and abused her and her parents tried to take appellant to his house, for which family of the informant/victim protested and tried to go to the police then all of them threatened her and her family for appropriate action. Thereafter, the persons of the locality assembled there and informed the police.

5. On the basis of aforesaid written statement, a formal FIR was drawn, being Bettiah Muffasil P.S. Case No. 421/2021 registered under Sections 341, 323, 376, 504 and 506 read with 34 of the I.P.C. and Section 8 of the POCSO Act against the appellant and investigation of the case was taken up. The police after completion of investigation, submitted charge-sheet against the appellant vide charge-sheet no. 381/2021 dated 07.09.2021 under Sections 376 of the I.P.C, Sections 4 and 6 of the POCSO



Act against the appellant.

6. Learned trial court explained the aforesaid charges to appellant, to which, he pleaded “not guilty” and claimed for trial.

7. To establish its case before the learned trial court, the prosecution has examined altogether eight witnesses namely, PW-1 Salamun Nesa; PW-2 victim, who is informant of this case; PW-3 mother of the victim, PW-4 sister of the victim of this case; PW-5 Madan Kumar Manjhi, who is S.I. of Bettiah Muffasil; PW-6 Dr. Madhu Priya, PW-7 Brijkishore Das, who is also the Investigating Officer of this case; and PW-8 Manoj Kumar Dubey, who is clerk of Bipin High School, Bettiah respectively.

8. The prosecution has produced and relied upon following documentary evidences also as to substantiate its case during trial, which are as under:

Number of Exhibits	List of Documents
Exhibit – P-1	Signature of victim girl over the written application.
Exhibit – P-2	Signature of victim on her statement recorded under Section 164 of the Cr.P.C.
Exhibit – P-3	Photocopy of mark-sheet issued by Bihar School Examination Board, Patna showing her date of birth as 01.01.2004.
Exhibit – P-4	Medical report of the victim girl.



Exhibit – P-5	Signature of the S.H.O. Ugranath Jha of Bettiah Muffasil over the endorsement on the written application.
Exhibit – P-6	Signature of the S.H.O. Ugranath Jha of Bettiah Muffasil over the formal FIR.
Exhibit-P-7	Photocopy of the admission register in which the date of birth of the victim is mentioned as 01.01.2004.
Exhibit-P-8	Photocopy of the School Transfer Certificate in which date of birth of the victim is mentioned as 01.01.2004.

9. After examination of prosecution witnesses and by taking note of evidences and incriminating circumstances as surfaced during trial, statement of accused/appellant was recorded under Section 313 of the Cr.P.C., which was denied by the appellant in totality by claiming his complete innocence and false implication.

10. On the basis of evidences, as surfaced during the trial, the learned trial court convicted and sentenced the appellant/convict, in aforesaid terms as indicated above.

11. Being aggrieved with the impugned judgment of conviction and order of sentence, the appellant has preferred the present appeal.

12. Hence, the present appeal.

Argument on behalf of the appellant/convict:

13. Learned counsel appearing on behalf of the



appellant/convict submitted that the victim was not proved "child" within the meaning of Section 2(1)(d) of the POCSO Act. In this context, it is submitted that prior to taking admission in Bipin High School, Bettiah, the victim was the student of Upgraded Middle School Urdu, Beldari, Bettiah and on the basis of transfer certificate issued from her first attending school, she was admitted in Bipin High School, Bettiah. It is further submitted that the record of her first attending school was not produced during the trial and same was also not proved in accordance with law, which was first attending school of the victim and, therefore, it cannot be said that victim was proved "child" within the meaning of Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, as approved by Hon'ble Supreme Court in the matter of **Jarnail Singh vs. State of Haryana [(2013) 7 SCC 263]**. It is pointed out that on the basis of Exhibit Nos. P-7 and P-8, it cannot be said that victim was proved "child" within the meaning of Section 2(1)(d) of the POCSO Act, where her age was shown as 01.01.2004. It is also submitted that the age of victim out of her radiological



examination was also not brought on record during the trial.

13.1. Learned counsel further submitted that the statement of victim *qua* occurrence as stated through her statement recorded under Section 164 of the CrPC is completely different to that of her testimony, as she deposed during trial as PW-2 and on this score alone, she cannot be said to qualify the test of "sterling witness". It is also submitted that there are major contradictions surfaced amongst the testimony of different prosecution witnesses *qua* crime in question. It is also pointed out that the doctor, namely Manoranjan Kumar, who examined as PW-6 during trial categorically stated that there was no sign of recent sexual assault upon victim/PW-2, who was examined medically within 48 hours of incident in issue and, therefore, on this score also, the conviction as recorded by learned trial court appears bad in eyes of law.

13.3. It is submitted that having all such evidences available in hand, the balance of appeal is in favour of appellant/convict and, therefore, the impugned judgment of conviction is fit to be quashed and set aside.



Argument on behalf of the State:

14. Mr. Mukeshwar Dayal, learned APP while arguing on behalf of the State submitted that the victim has categorically stated as PW-2 that appellant/convict committed rape/penetrative sexual assault upon her. It is submitted that occurrence was witnessed by PW-1. It is further submitted that PW-4, who is none but the cousin sister of the victim also found victim in naked condition in alleged room, where present occurrence took place. It is submitted that PW-8 has proved the age of victim by producing school register, where the date of birth of victim was mentioned as 01.01.2004 and, as such, she was below 18 years of age on the date of occurrence, which took place on 09.07.2021. It is submitted that in view of aforesaid facts, learned trial court has rightly imported the provisions of presumption as available under Sections 29 and 30 of the POCSO Act and, therefore, the judgment under appeal as passed by learned trial court is not required to be interfered.

15. I have perused the trial court records carefully and gone through the evidences available on record as also



considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

16. After hearing the arguments and upon perusal of records, it appears to this Court that the evidence as surfaced during the trial is required to be discussed for the purpose of its re-appreciation, which appears essential for the just and proper disposal of the present appeal.

17. The most important witness of the crime in question is victim herself, who has been examined as PW-2. It appears from her statement recorded under Section 164 of the CrPC that while she was going to collect fire-wood from nearby field, the appellant pressed her mouth and pulled her in a room, where after closing the room from inside, he did indecent behaviour and also committed rape upon her, whereupon she shouted and, thereafter, nearby people came over there. She stated that a *panchayati* was convened in this connection, where the proposal of marriage was also discussed. She identified her signature on FIR, which upon her identification was exhibited as **Exhibit No. P-1**, where she also stated that the rape was committed



upon her. She also identified her signature on her statement recorded under Section 164 of the CrPC, which upon her identification, was exhibited as **Exhibit No.P-2**.

17.1. Upon cross-examination, it was stated by her that she passed matriculation examination in the year 2021 and she admitted in present school i.e. Bipin High School in the year 2019 only in Class-9 prior to which, she was student of Middle School of her village. She studied in Urdu School for Class-6, 7 and 8. It also appears from her cross-examination that she was taken to court by her father for recording her statement under Section 164 of the CrPC.

18. The another important witness of crime in question is PW-1, who claimed herself to be an eye-witness of the occurrence. It appears form her deposition that while she was going to bring some grocery items from a nearby grocery shop, she heard some whisper from the room, whereafter, she went there and found Sarfaraz was committing rape upon PW-2 and that time, he was found pressing the mouth of the victim. She went there along with Md. Alam, Shahid Alam, Jamila, Kamila and brought the



victim to her home and whereafter the appellant/convict was brought by them to police station.

18.1. It appears from her cross-examination that victim is the daughter of her brother-in-law (dewar). She never heard about any complaint regarding appellant/convict. She denied to have any negotiation regarding marriage of appellant with victim.

19. PW-3 is the mother of victim (PW-2). As per her examination-in-chief, it appears that she is not the eye-witness of the occurrence and she came to know about the occurrence from PW-1. It appears from her cross-examination that *panchayati* was convened *qua* crime in question from where, police apprehended the appellant.

20. PW-4 is Shahida Khatoon. She is the sister of victim/PW-2. She was also informed by PW-1 regarding occurrence upon which, she went there and after opening the door, found her sister in naked condition whereafter, she dressed up her sister and brought her outside the room. Upon queries, it was stated by victim that appellant after pulling her inside the room committed rape upon her. When



she brought the victim outside room, she found Noorhoda, Jahara and Shaukat present over there and after assaulting them, they took away appellant with them whereafter, panchayati was convened. The matter was informed to police.

20.1. Upon cross-examination, it was stated by her firstly that the room was not closed but, subsequently, she said contradictory to her earlier statement that she along with PW-1 opened the door. Victim was in her sense. It was stated that *salwar* was on her body. She asked her to wear it. She remained there for five minutes and, thereafter, came out from the room. She denied regarding marriage negotiation between appellant with victim. She did not find any injury upon body of victim/PW-2.

21. PW-5 Mohan Kumar Manjhi, who is Investigating Officer of this case, who only appears to be submitted charge-sheet for the offences under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act through charge-sheet No.381 of 2021 dated 07.09.2021.

22. PW-6 is Dr. Madhu Priya, who conducted the



medical examination on 11.07.2021 upon victim at about 12.20 P.M. i.e. just within 48 hours of the occurrence. The victim was brought before her by one A.S.I., Brijkishore Das and lady constable Ranju Kumari No.411 and Aarti Kumari No.300, where, upon her examination, found the following injuries:-

"1. L.M.P. 04.04.2021 according to her statement.

2. Secondary sexual character was present.

3. On P.V. examination, hymen ruptured, old tag present. There is no sign of injury external, internal or on around private parts found on her body.

4. Mark of identification- A mole on the chest between both clavicle. A mole on the right cheek.

5. According to pathology department, G.M.C. Bettiah, spermatozoa not found in vaginal swab".

Opinion:- According to above findings and physical examination, there was no recent sign of sexual assault. Age determination was said to be done by Medical Board, G.M.C. Bettiah.

The medical report of victim was prepared in his handwriting and signature, which upon her identification was exhibited as **Exhibit No. P-4.**



22.1. Upon cross-examination, it was stated that no opinion regarding age of the victim girl was given by her. It was also stated that hymen can be ruptured for several reasons.

23. PW-7 is Brijkishore Das, who is the Investigating Officer of this case. He identified the endorsement of S.H.O. Bettiah, namely, Ugranath Jha on FIR, which upon his identification, exhibited as **Exhibit No. P-5**. He also identified the signature of the then S.H.O. on formal FIR, which upon his identification was exhibited as **Exhibit No. P-6**. He took charge of investigation on 09.07.2021 and, thereafter, he visited the place of occurrence. He recorded the statement of witnesses during course of investigation namely, Sheikh Sah Mohammad, Salamun Nesha (PW-1), Shahida Khatoon (PW-4), Md. Alam, Kalima Khatoon (PW3). It appears from his deposition that appellant/convict was arrested by the villagers and handed over to him. Upon search, nothing objectionable was found from appellant. He got recorded the statement of victim under Section 164 of the CrPC. During course of



investigation, when he asked victim to produce any paper regarding her age, she has given a photocopy of the admit card issued from Bihar School Examination Board where the date of birth of victim was mentioned as 01.01.2004. He also recorded the statement of witnesses, namely, Zamil Akhtar (not examined), Nasimul Haque (not examined), Md. Gulfam (not examined) during investigation, who supported the occurrence.

23.1. Upon cross-examination, it was stated by him that none of the witnesses stated that when they arrived at place of occurrence, the door of room was closed. It was stated by him that original copy of the admit card was shown to him but, he never went to concerned school for its verification. He did not seize the clothes of victim wearing at the time of occurrence.

24. PW-8 Manoj Kumar Dubey, who is the clerk of Bipin High School, Bettiah, where the victim was student at the time of occurrence. He produced only a copy of the transfer certificate as issued from Upgraded Middle School (Urdu), Beldari, Bettiah, which was the first attending school



of the victim as per his deposition. He is silent about any admit card issued by Bihar School Examination Board.

25. It appears from the discussion of aforesaid evidences that the victim/PW-2 categorically stated that she studied for only class-6, 7 and 8 in Urdu School of her village from where transfer certificate was obtained for admission in present school from where she appeared in matriculation examination. No register from her first attending school was produced before the court during the trial within the meaning of Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act. Moreover, the photocopy of admit card as issued by Bihar School Examination Board was given to the Investigating Officer of this case/PW-7 during the course of investigation and same was also not brought on record. The age determination of victim as per her radiological examination also not available on record and, therefore, it can be safely said that the victim was not proved "child" within the meaning of Section 2(1)(d) of the POCSO Act and, therefore, there is no occasion as to import the presumption available under Sections 29 and 30



of the POCSO Act regarding crime in question.

26. Now, another important question which required to be determined is whether the victim can be said a sterling witness *qua* crime in question. It appears from the deposition of victim as recorded under Section 164 of the CrPC that upon her cry, the nearby people gathered over there. She supported the factum of marriage negotiation with appellant through her said statement but, PW-1, who claims herself to be an eye-witness of the occurrence narrated something different that she went to the room of appellant only when she heard some whisper and found appellant committing rape upon victim. Both victim and PW-1 have suppressed the marriage negotiation with appellant during trial. It further appears from the deposition of PW-4, who is the sister of PW-2 that she found her sister (PW-2) in naked condition and as she was not in her *salwar*. She did not noticed that whether Sarfaraz was in naked condition at that point of time. She contradicted her own statement that whether door of room was closed or opened. It appears from the deposition of PW-1 that she brought victim immediately



outside the room along with appellant and if this fact be taken into consideration, then the deposition of PW-4 as to notice the victim in naked condition after getting information about the occurrence by PW-1 is not appears convincing. The deposition of almost all prosecution witnesses suggest that arrest of appellant was made by private persons, who are co-villagers.

27. It appears from the deposition of PW-6 that upon medical examination, which was conducted upon victim on 11.07.2021 within 48 hours, she found with ruptured hymen but, it was old. There was no sign of injury external, internal or around private parts of the victim. She categorically opined that there was no recent sign of sexual assault. This medical examination of victim further creates a doubt whether rape/penetrative sexual assault was committed upon her as deposed before the court. Interestingly, PW-2/victim did not said anything about the presence of PW-1 at the place of occurrence contrary to her statement.

28. In view of statements of PW-1, PW-2 and PW-



3, which appears contradictory to each other *qua* crime in question, where doubt further appears intensified in view of medial examination of victim, as discussed above, it can be said safely that the victim cannot be accepted as sterling witness *qua* crime in question, as to convict appellant on her sole testimony.

29. Accordingly, the impugned judgment of conviction dated 21.06.2023 and order of sentence dated 28.06.2023 passed by learned Additional Sessions Judge-VI-cum-Special Judge, POCSO, West Champaran at Bettiah in connection with POCSO Case No. 167/2021 arising out of Bettiah Muffasil P.S. Case No. 421 of 2021 is hereby quashed and set aside. Consequently, the appellant, namely, Sarfaraz Khan is acquitted of the charges levelled against him by the learned trial court. He is directed to be released forthwith, if his presence is not required in any other case. Fine, if any, be returned to the appellant immediately.

30. The appeal stands allowed.

31. Let a copy of this judgment alongwith the Trial



Court Records be sent to the learned Trial Court forthwith.

(Chandra Shekhar Jha, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	30-10-2024
Transmission Date	30-10-2024

