

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3671 of 2024

Arising Out of PS. Case No.-29 Year-2019 Thana- ISHUPUR BARAHAT District- Bhagalpur

1. Monu Kumar @ Abhishek Kumar S/o Bindeshwari Singh R/o village - Aurangabad, P.S. - Kahalgaon, Distt. - Bhagalpur
2. Sonu Kumar @ Himanshu Kumar S/o Bindeshwari Singh R/o village - Aurangabad, P.S. - Kahalgaon, Distt. - Bhagalpur
3. Sanjay Kumar Mahto, S/o Mukhram Mahto, R/o village - Gokul Mathura, P.S. - Ishipur Barahat, Distt. - Bhagalpur
4. Arbind Kumar Mahto, S/o Mukhram Mahto, R/o village - Gokul Mathura, P.S. - Ishipur Barahat, Distt. - Bhagalpur

... .. Appellants

Versus

1. The State of Bihar
2. Ajay Kumar Mahto, S/o Late Dwarika Prasad Mahto, R/o village-Gokul Mathura, P.S. - Ishipur Barahat, Distt. - Bhagalpur

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ranjan Kumar Jha, Advocate Mr. Rana Pratap Singh, Advocate
For the Respondent-State:	:	Mrs. Anita Kumari Singh, APP
For the Informant	:	Mr. Dharamveer, Advocate Mr. Sanjay Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 19-11-2024

At the outset, it is important to mention that this appeal was taken on board under the caption **"For Orders"** where initially prayer of bail and suspension of sentence under Section 389(1) of the Code of Criminal Procedure (for short 'Cr.P.C'). on behalf of appellant no.1, namely, Sonu Kumar @ Abhishek Kumar was raised through memo of appeal itself, where learned counsel for the appellant after short argument



submitted as not to press the prayer of bail and suspension of sentence, accordingly, same stands dismissed for the present. However, learned counsel for the appellants requested for final hearing of the appeal, which was not objected by learned APP for the State and learned counsel for the informant and, therefore, this appeal was finally heard under aforesaid caption in view of Section 374(4) of the Cr.P.C., as the appellant no.1 convicted under Section 4 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act') along with Section 376 of the Indian Penal Code (for short 'I.P.C.').

2. 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 04.07.2024 and order of sentence dated 10.07.2024 passed by learned Exclusive Special Court (POCSO Act)-cum-7th Additional District and Sessions Judge, Bhagalpur in POCSO Case No.29 of 2019 arising out of Ishipur Barahat P.S. Case No.29 of 2019, whereby the concerned Trial Court has convicted the appellant no.1 for the offences punishable



under Section 376 of the I.P.C. and Section 4 of the POCSO Act and sentenced to undergo rigorous imprisonment for seven years with fine of Rs.20,000/- and in default of payment of fine, to further undergo simple imprisonment for one year under Section 4 of the POCSO Act. Appellant nos. 2 to 4 have been sentenced to undergo rigorous imprisonment for three years with fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for six months under Section 366-A read with 34 of the I.P.C.

3. Brief case of prosecution, as per written report of informant/PW-1, namely, Ajay Kumar Mahto that on 26.03.2019 at 09.00 hours, his daughter/PW-3 had gone to doctor for taking medicine but, she did not return upto 11.00 hours. Thereafter, the informant along with his family members started search but, she was not traced out. In the evening, when the informant returned home, he came to know that *Bhanja* and his neighbour, namely, Sanjay, Arbind, Monu Kumar @ Abhishek Kumar, son of Bindeshwari Singh were absconding for some time. The informant further stated that he suspected that Monu with his associates has



kidnapped his minor daughter for some wrong purpose. When he enquired from Sanjay and Arbind then, both told to give one hour, they will hand over the boy and victim girl but, after passing of time, his daughter was not returned. It is further stated that on 27.03.2019 his mother, namely, Sarita Devi and father Bindeshwari Singh came in morning and told not to lodge the case, they will return his daughter today but, till date, the daughter of informant has not returned and told him that his daughter has fled away and they are not responsible. The informant has suspected the hands of appellants/accused in kidnapping of his daughter for wrong purpose.

4. On the basis of aforesaid written report of the informant, a formal FIR, being Ishipur Barahat P.S. Case No.29 of 2019 dated 01.04.2019 was registered under Section 366-A of the I.P.C. and Section 8 of the POCSO Act against the appellants and others.

5. After completion of investigation and on the basis of materials collected thereof, the Investigating Officer of this case has submitted Final Form No.28 of 2019 dated 05.06.2019 for the offence punishable under Section 366-A



of the I.P.C. and Section 8 of the POCSO Act by mentioning 'mistake of facts'.

6. Learned Special Court/trial court after differing with the opinion given by Investigation Office of this case, on the basis of materials available on record including the statement of victim recorded under Section 164 of the Cr.P.C., took cognizance for the offences under Sections 366-A of the I.P.C. and Section 8 of the POCSO Act against the appellants and others on 13.09.2019 and issued summons against the appellants/accused and after supplying the police papers under Section 207 of the Code, framed charges under Section 366-A of I.P.C. and Sections 8 and 18 of the POCSO Act against the appellants and others on 01.04.2022, which was explained to the appellants/convict to which, they pleaded not guilty and claimed to be tried.

7. To substantiate its case, the prosecution has examined altogether five prosecution witnesses. They are:-

(i) PW-1 Ajay Kumar Mahto (Informant); **(ii) PW-2 Rita Devi** (mother of victim); **(iii) PW-3 victim**; **(iv) PW-4 Krishna Kumar Ray** (Investigating Officer of this case); **(v)**



PW-5 Dr. Veena Bharti; (vi) CW-1 Md. Naushad Alam.

8. Apart from the oral evidence, the prosecution has also relied upon following exhibits/documentary evidences, which are as under:-

Sl. No.	List of Exhibits/documents	Name of documents
1.	Exhibit P.1/PW-1	Written application.
2.	Exhibit P.2/PW-2	Signature of victim on the statement recorded u/s 164 of Cr.P.C.
3.	Exhibit P.3/PW-4	Formal F.I.R.
4.	Exhibit P.4/PW-4	Final form.
5.	Exhibit P.5/PW-5	Medical Report.
6.	Exhibit C.1/CW-1	Admit card issued by Bihar School Examination Board.

9. On the basis of evidences/circumstances as surfaced during the trial, the learned trial court has examined the appellant/accused under Section 313 of the Cr.P.C., where they completely denied the evidence surfaced during the trial and claimed their complete innocence.

10. No witness was examined on behalf of the appellants in defence.

11. Taking note of the evidence as surfaced during the trial and after considering the arguments as advanced by



both the parties, the learned Trial Court has convicted the appellants/convicts/accused in the manner as indicated above.

12. Being aggrieved with the aforesaid judgment of conviction and order of sentence, the appellants/convict have preferred the present appeal.

13. Hence, the present appeal.

Argument on behalf of the appellant/convict:

14. Learned counsel appearing for the appellants/convicts submitted that the victim has solemnized marriage out of her own sweet will with appellant no.1 and leading their life happily. It is submitted that the victim has categorically stated in her cross-examination that none of the appellants did any indecent work or wrong work upon her and in view of same, the conviction as recorded by learned trial court appears merely by importing presumption as available under Sections 29 and 30 of the POCSO Act even after prosecution failed to established the foundational aspect of the crime in question. It is submitted that the victim also medically found aged about 18 years as per her radiological



examination. It is also submitted by learned counsel that victim could not prove a child within the meaning of Section 2(1)(d) of the POCSO Act during the trial and, therefore, the provision of POCSO Act is also not applicable in this case and on this score alone, the conviction appears questionable.

14.2. In view of aforesaid factual submissions, it was submitted that the balance of appeal is in favour of appellant and, therefore, the impugned judgment is fit to be set aside/quashed.

Argument on behalf of the State/Informant:-

15. Learned APP while opposing the appeal submitted that the offence alleged is not compoundable in nature and, therefore, the learned trial court has rightly convicted the appellants/accused persons by ignoring the factum of marriage, which appears to be solemnized between the victim and main accused/appellant no.1 Monu Kumar @ Abhishek Kumar. It is submitted by learned APP that CW-1 proved the age of victim from school register, where her date of birth was recorded as 23.10.2001. It is submitted that CW-1 was the Incharge Headmaster of the said school and,



therefore, it can be said that the victim correctly held child within the meaning of Section 2(1)(d) of the POCSO Act. It is pointed out that the victim found pregnant as per medical examination and, therefore, the sexual intercourse cannot be denied.

16. Mr. Dharamveer, learned counsel appearing for the informant conceded the factum of marriage and supported the testimony of victim that nothing bad happened with her in terms of allegation.

17. I have considered the submissions canvassed by the learned counsel appearing for the parties. I have also examined the entire evidence produced by the prosecution during trial, before learned trial court.

18. It would be apposite to discuss all evidences, which are available on record as to re-appreciate the same, which is necessary for just disposal of present appeal.

19. It appears that the most important witness of crime in question is PW-3, who herself is victim. It appears from her examination-in-chief that occurrence was of 26.03.2019 and on the date, she was 17 years old. She



disclosed her date of birth as 23.10.2001. Crux of her examination-in-chief appears to suggest that she was kidnapped by appellants/accused persons and was taken to Delhi by closing her eye throughout way and was continuously raped thereof for one month. It also appears that at Delhi upon instruction of Suman Singh, vermilion was put on her head to give the occurrence a colour of marriage as to mitigate the allegation of kidnapping and sexual assault. She also recorded her statement under Section 164 of the Cr.P.C. and also medically examined. Her statement recorded under Section 164 of Cr.P.C. upon her identification was exhibited as **Exhibit No. P2-1-PW-3.**

19.1. Upon her cross-examination, it appears that initially she supported the occurrence of kidnapping and also of sexual assault but, subsequently, upon recall on 31.10.2023, she stated before the court that out of her own sweet will she solemnized her marriage with appellant Sonu Kumar @ Abhishek Kumar and she also deposed that during investigation she disclosed to police that she went with appellant no.1 out of her own sweet will. It was stated that



she was leading her life with appellant no.1 as wife and husband and she has no complaint against appellant no.1, namely, Sonu Kumar @ Abhishek Kumar. It was categorically stated by her upon recall that none of the accused persons committed any wrong or indecent behaviour with her. She stated that her statement was not recorded as per her will under Section 164 of the Cr.P.C., where she supported the occurrence of kidnapping.

20. The same facts appears to be deposed by PW-1, namely, Ajay Kumar Mahto and PW-2, namely, Reeta Devi, who are none but the father and mother of the victim/PW-3. They completely denied the occurrence in their cross-examination and stated that they also stated during investigation before police that their daughter went with appellant no.1, namely, Monu Kumar @ Abhishek Kumar out of own sweet will.

21. PW-4 is Krishna Kumar Ray, who is Investigating Officer of this case. It appears from his deposition that he lodged the present case as Ishipur Barahat P.S. Case No.29 of 2019 dated 01.04.2019 under Section



366-A of the I.P.C. and Section 8 of the POCSO Act. He identified the hand-writing of S.H.O., namely, Pankaj Kumar Jha, who endorsed upon formal FIR, which upon his identification was exhibited as Exhibit No.P-3/PW-4. It was categorically deposed in his examination-in-chief that under the direction of concerned D.S.P, he submitted final form against the appellants by stating “mistake of facts” through Charge-sheet No.28/2019 dated 05.06.2019. It was in his handwriting and bearing his signature, which upon his identification was exhibited as **Exhibit No.P-4/PW-4**. He also stated during his cross-examination that the victim during investigation disclosed to him that no one kidnapped her rather she went with appellant no.1 Sonu Kumar @ Abhishek Kumar out of her own sweet will. He did not found any criminal antecedents against any of appellants during investigation.

22. PW-5 is Dr. Veena Bharti, who conducted medical examination upon victim and found her age about 18 years. She also found victim pregnant during her medical examination.



23. CW-1 Md. Naushad Alam, who is the Incharge Headmaster of Inter Level Rajkiya Vidyalaya, Ishipur Barahat, who brought the school register of the year 2015 before the court, where the name of victim was mentioned at serial no.80 and her date of birth was shown thereof as 23.10.2001. It appears from his deposition that the victim was admitted in said school on 30.05.2015 in Class-IXth . It also appears from his cross-examination that the transfer certificate of Class-VIII was issued from Middle School, Gokul Mathura, where also, the date of birth of victim was shown as 23.10.2001 and on the basis of same, he issued the certificate on 18.07.2018, which is of his school and bearing his signature.

24. It appears from the aforesaid discussed oral evidences that the victim and her parents during the course of investigation itself stated that she (victim) went Delhi with appellant no.1 out of her own sweet will. This fact was supported by PW-4, who is the Investigating Officer of this case and for the said reason, the final form was submitted by exonerating the appellants/accused for facing the trial. This



fact was also testified before the court by PW-1 and PW-2, who are none but the parents of the victim. PW-3/victim though initially stated that she was kidnapped by the appellants and was continuously raped for one month somewhere at Delhi but, subsequently, stated in her cross-examination after recall that she solemnized marriage with appellant no.1, namely, Monu Kumar @ Abhishek Kumar out of her own sweet will and none of the appellants committed any wrong work and indecent behaviour with her. She also stated that her statement under Section 164 of the Cr.P.C. was not recorded as per her will. However, the statement under Section 164 of the Cr.P.C. is not the substantive piece of evidence.

25. As far status of victim as a “child” within the meaning of Section 2(1)(d) of the POCSO Act is concerned, it appears that her date of birth from school register was not proved from her first attending school in view of Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 as approved by Hon’ble Supreme Court through **Jarnail Singh vs. State of Haryana [(2013) 7 SCC**



263]. As the register was not produced from the first attending school, therefore, it cannot be said that the victim was proved “child” within the meaning of Section 2(1)(d) of the POCSO Act.

26. With the aforesaid evidence in hand, it can be safely said that the prosecution has failed to established the foundational aspect of crime in question and, therefore, the question of importing the provisions under Sections 29 and 30 of the POCSO Act regarding presumption does not arises as per settled principle of law.

27. Accordingly, in view of aforesaid discussed factual aspect and position of law, the appeal stands allowed.

28. The impugned judgment of conviction dated 04.07.2024 and order of sentence dated 10.07.2024 passed by learned Exclusive Special Court (POCSO Act)-cum-7th Additional District and Sessions Judge, Bhagalpur in POCSO Case No.29 of 2019 arising out of Ishipur Barahat P.S. Case No. 29 of 2019 is quashed and set aside.

29. Consequently, the appellants above-named are acquitted of the charges levelled against them by the



learned trial court. Since appellant no.1, namely, Monu Kumar @ Abhishek Kumar is in custody, he is directed to be released forthwith, if his presence is not required in any other case. Appellant nos. 2 to 4, namely, Sonu Kumar @ Himanshu Kumar, Sanjay Kumar Mahto and Arbind Kumar Mahto are on bail, they are discharged from the liabilities of their bail bonds and sureties.

30. Fine, if any paid, be returned to appellant immediately.

31. Office is directed to send back the trial court records along with a copy of the judgment to the learned trial court forthwith.

(Chandra Shekhar Jha, J.)

Sanjeet/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22-11-2024
Transmission Date	22-11-2024

