

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.5040 of 2023

Arising Out of PS. Case No.-69 Year-2021 Thana- KHARIK District- Bhagalpur

MD. AMIN, Son of Late Chulo Phakeer Resident of Village - Kharik
Usmanpur Tola, P.S.- Kharik, District – Bhagalpur. Appellant/s

Versus

1. The State of Bihar.
2. Manoj Thakur, Son of Late Ram Thakur Resident of Village - Kharik Bazar,
Ward No.10, P.S.- Kharik, District – Bhagalpur.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Ranjan Kumar Jha, Advocate Mr. Sanjeev Kumar, Advocate Mr. Mritunjay Kumar, Advocate Mr. Vikash Kumar, Advocate Mr. Rana Pratap Singh, Advocate
For the Respondent/s	:	Mr. A.M.P. Mehta, APP
For the Informant	:	Mr. Rajesh Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 20-11-2024

The present appeal preferred by appellant/convict Md. Amin against judgment of conviction dated 18.09.2023 and the impugned order of sentence dated 22.09.2023 passed by the learned Exclusive Special Judge (POCSO Act)-cum-Addl. District & Sessions Judge-VII, Bhagalpur, in POCSO Case No. 86 of 2021 arising out of Kharik P.S. Case No. 69 of 2021, whereby and whereunder the appellant/convict has been convicted for the offences under Sections 363 and 376 of the Indian Penal Code and Section 4 of the POCSO Act and ordered to undergo sentence for R.I. of ten years and



fine of Rs. 20,000/- (Rupees twenty thousand only) for the offence under Section 4 of the POCSO Act and in default of payment of fine, he shall further undergo six months of S.I. Further sentenced him to undergo R.I. for five years and fine of Rs. 10,000/- (Rupees ten thousand only) for the offence under Section 363 of the Indian Penal Code and in default of payment of fine, he shall further undergo three months of S.I.

2. The crux of prosecution case, as it appears from the written information of the informant, namely, Manoj Thakur (PW-1) that on 08.04.2021 at about 9:00 AM, his minor daughter went on missing, so he began to search. During course of search, he came to know that Md. Amin (appellant) enticed his minor daughter. Further alleged that his minor daughter has also taken away Rs. 16000/- and golden chain alongwith her. It was also alleged that when he asked brother of Amin about this, then he abused him, so he suspect that Md. Irshad and Md. Iliyas and Amin all having common intention have



enticed away her for the purpose of marriage with his minor daughter.

3. With aforesaid written information of informant/PW-1, Kharik P.S. Case No. 69/2021 dated 9.4.2021 was lodged for the offences under Sections 363,366(A),379/34 of the Indian Penal Code.

4. After investigation, police submitted charge sheet No. 151/21 on 07.08.2021 for the offences under Sections 363,366(A)/34 of the Indian Penal Code. Thereafter, learned trial court took cognizance against the appellant for the offences under Sections 363, 366A, 376 of the Indian Penal Code and Section 4 of the POCSO Act for trial and disposal.

5. To established its case before the learned trial court, the prosecution altogether examined total of seven witnesses, namely, **PW-1** Manoj Thakur (informant and father of the victim) **PW-2** Funia Devi (mother of the victim), **PW-3** victim, **PW-4** Prabhat Kumar (1st I.O.), **PW-5** Mausam Kumar, **PW-6** Praveen Kumar Yadav and



PW-7 Manoj Kumar (2nd I.O. of the case).

6. Total of two court witnesses were also examined as **C.W.-1** Dr. A.K. Murarka and **C.W. 2** Dr. Anju Turir.

7. The prosecution also exhibited following documents during the trial to substantiate its case which are as:-

Exhibit no. I -Signature of victim on statement under Section 161 of Cr.P.C.

Exhibit-P-2 The formal FIR.

Exhibit-2- Signature of victim on statement under Section 164 of Cr.P.C.

Exhibit-3- Writing and signature on FIR.

Exhibit-1/1- Writing and signature on statement under Section 161 of Cr.P.C.

Exhibit-4- Writing on search-Cum-Seizure list.

Exhibit-5- Entire charge sheet.

C.I- Entire Radiological report of Doctor.

C.2- Entire Medical Report.

8. On the basis of evidences, as surfaced during the trial, the appellant/convict was examined



under Section 313 of the Cr.P.C., where he denied all the evidences as surfaced against him during trial and claimed his complete innocence and false implication.

9. Total of two defence witnesses were examined on behalf of accused/appellant during the trial.

10. On the basis of aforesaid evidences, learned trial court convicted the appellant and passed order of sentence, as aforesaid, being aggrieved with, appellant/convict preferred the present appeal.

11. Hence the present appeal.

12. Learned counsel appearing on behalf of the appellant submitted that the fact of love affairs as appears out of testimony of PW-5 and PW-6 and further land dispute out of testimony of victim/PW-3 herself was completely ignored by the learned trial court while recording the judgment of conviction for appellant. It is pointed out that victim could not proved “child” within the meaning of Section 2(1)(d) of the POCSO Act, as her age was not proved during trial in terms of Section 94(2) of



the Juvenile Justice Act, 2015 as approved by Hon'ble Supreme Court through ***Jarnail Singh v. State of Haryana, (2013) 7 SCC 263.*** In this context, it is further submitted that though victim testified that she passed her matriculation examination with 3rd division, where her date of birth mentioned as 15.05.2005 but no any document was produced during the trial. It is submitted that in such circumstances the only option in view of Section 94(2) of J.J. Act, as to ascertain date of birth is radiological examination report of the victim. It appears that from the radiological examination of PW-3, the age of victim was found between 16 to 18 years, where after giving a marginal benefit of ± 2 years in the terms of the legal ratio in terms of Hon'ble Supreme Court legal report as available through ***Rajak Mohammad Vs. State of Himachal Pradesh,*** reported in ***(2018) 9 SCC 248,*** the victim appears major on the date of occurrence and, therefore, the provision of POCSO Act and the conviction secured there appearing



bad in eye of law.

13. Learned counsel further submitted that if the deposition of PW-5 and PW-6 be relied upon then certainly, it is a case of love affairs, which suggest that victim went with appellant out of her sweet will and, therefore, the allegation of kidnapping and conviction thereto by learned trial court is also appearing bad in eye of law.

14. Finally, as far allegation of rape/penetrative sexual assault is concerned, it is pointed out that the conviction was secured on the sole testimony of victim/PW-3 herself. It is submitted that by taking note of statement of victim as recorded under Section 164 of the Cr.P.C. and also upon perusal of her testimony as she deposed before the Court being PW-3, lot of major contradictions *qua* crime in question and also *qua* manner of occurrence surfaced, out of which it can be said safely that the victim cannot be said “Sterling witness” so as to secure the conviction on her sole testimony. While



concluding argument, it is submitted that the medical report of victim also suggest that no internal or external injury was found upon her, *prima facie* negating allegation of gang rape at Delhi. Beside above, it is submitted that investigating officer of this case/PW-4 never visited place of occurrence at Delhi to ascertain the trustworthiness of victim/PW-3.

15. While concluding the argument, it is submitted that having all such discrepancies and major contradictions, it can be said safely that balance of appeal is in favour of appellant and, therefore, the impugned judgment of conviction be quashed/set aside.

16. The learned APP duly assisted by learned counsel appearing for the informant Mr. Rajesh Kumar while opposing the appeal submitted that the victim was eloped by appellant whereas he could not disputed the fact of land dispute. It is submitted that non-finding of any injury upon victim does not lead to conclusion *ipso facto* that rape was not committed upon her as rape is a



legal finding not a medical one. It is also pointed out that the minor contradictions correctly overlooked by the learned trial court considering the rustic and rural background of victim. It is submitted that doctor found victim within the age group of 16-18 years and, as such, she was minor on the date of occurrence and, therefore, the learned trial court correctly import the provision of presumption as available under Sections 29 and 30 of the POCSO Act. Considering aforesaid, the impugned judgment did not require any interference at appellate stage.

17. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by the learned counsel appearing on behalf of the parties.

18. As to re-appreciate the evidence, while disposing the present appeal, it appears apposite to discuss the evidences available on record, which are as



under:-

19. The most important witness of present crime in question is victim/PW-3 herself. It appears from her deposition that on 08.04.2021 she went for bringing water from a near by hand pump, where five boys was already present, who forcibly spread some substance on her mouth, as a result, she loosed her sense and when she regained sense, she found herself at Delhi. It was deposed that appellant alongwith co-accused Pintu Thakur, Kunal Thakur committed rape upon her. They were also said to be accompanied by Vijay Thakur and Domi Thakur. Appellant also took away her golden chain and cash of Rs. 16,000/-. It was deposed that she also signed on her statement given before the police under Section 161 of the Cr.P.C. She identified the signature, which was exhibited during the trial as **Exhibit P-1**. She also identified her signature upon her statement recorded under Section 164 of the Cr.P.C., which upon her identification, exhibited as **Exhibit-P-2**.



20. Upon cross-examination, she denied the suggestion that she never disclosed to police that appellant committed rape upon her or took away her golden chain and cash of Rs. 16,000/-. She also denied that she was not medically examined. Her statement was recorded before the Magistrate after 5-6 months of the occurrence. She denied suggestion that she did not disclose before Magistrate that appellant not taken away cash of Rs. 16,000/- and golden chain. She testified as to pass class 10th with 3rd division, where her date of birth was mentioned as 15.05.2005. Her date of birth as per Aadhar Card is also 15.05.2005. She approved the land dispute between her father, Manoj Thakur and Vijay Thakur and also stated that a title suit for said dispute is pending before the court concerned. She denied that out of said land dispute, implicated appellant falsely.

21. PW-1 is Manoj Thakur, who is the father of the victim/PW-3. He also supported the occurrence as same took place on 08.04.2021. It appears from his



examination-in-chief that he only supported the occurrence by saying that his daughter was eloped by appellant after offering some adulterated food. It appears from his examination-in-chief that the police recovered his daughter from Saharsa Police Station, whereafter, she was medically examined.

22. Upon cross-examination, it was stated by him that he lodged this case after 36 hours of the occurrence. He appears failed to disclose the date of birth/age of his daughter. He came to know about the occurrence from the victim. It was stated that now the victim is married. He also denied false implication due to land dispute.

23. PW-2 is Funia Devi, who is the mother of the victim. She almost deposed on the same line as of her husband/PW-1 as discussed above. She is also not appearing the eye-witness of the occurrence. She also denied false implication due to land dispute. It was stated by her that golden chain was given to victim by her but



the receipt of said purchase is not available.

24. PW-4 is Prabhat Kumar, who is the investigating officer of this case. Upon the information of PW-1, who is the father of the victim, who reported the occurrence to police as Exhibit-P-1 (who is nothing but his fardbeyan), PW-4 on 09.04.2021 lodged the present case as Kharik P.S. Case No. 69/2021 as per instruction of SHO Pankaj Kumar and assumed the charge of investigation. He identified the handwriting of Pankaj Kumar, which upon his identification exhibited as **Exhibit-P-3.** He visited the place of occurrence, which is the house of informant/PW-1 but it appears from his testimony that at no point of time, he visited Delhi where victim after alleged kidnapping was kept for long days where alleged rape was committed upon her on several occasions. He arrested appellant from Saharsa railway station. He also got recorded the statement of victim through lady SHO under Section 161 of the Cr.P.C. and also got recorded the statement of victim under Section



164 of the Cr.P.C. It was stated that he never looked for people related with age or date of birth of the victim. It was neither produced before him during investigation by victim or her family members.

25. PW- 5 and PW-6 are Mausam Kumar and Praveen Kumar Yadav respectively. Both appears co-villagers. From their depositions, it appears that the appellant was in love affair with victim and, therefore, appellant fled away with daughter of informant. It was started by PW-5 that now victim solemnized her marriage with other person. Both these witnesses were not cross-examined by appellant during the trial.

26. PW-7 is Manoj Kumar, who is also investigating officer of this case, he appears only to submit charge sheet regarding present case after completion of investigation. He submitted charge sheet bearing no. 151/2021 dated 07.08.2021 for the offences under Sections 363, 366A/34 of the Indian Penal Code against the appellant. He identified his handwriting and



signature over there, which upon his identification exhibited as **Exhibit No. P-5/PW-7.**

27. Appellant also examined two witnesses in his defence, who are DW-1 Md. Kyum and DW-2 Md. Riyaz. Both of these two defence witnesses supported the factum of land dispute between the informant and father of victim and out of said dispute, the present false implication was raised.

28. Besides above, two court witnesses were examined, who are none but the doctor, who examined victim medically. These two doctors were examined as court witness CW-1 and CW-2 respectively, where A.K. Murarka was examined as CW-1 and Dr. Anju Turir was examined as CW-2. As per medical report, which was identified by CW-1 and exhibited as Exhibit No. C/CW-1, victim was assessed somewhere between 16-18 years on the basis of her radiological examination, whereas, as per the testimony of CW-2, it appears that no mark of violence, external or internal found upon the victim.



29. Admittedly, the statement of victim as recorded under Section 164 of the Cr.P.C. is not the substantial piece of evidence but its value as a corroborative evidence cannot be ruled out. Considering the same, it would be apposite to take note of the statement of victim as available under Section 164 of the Cr.P.C., where she stated that on 08.04.2021 when she went to attend the call of nature at about 6:00 AM, the five boys were standing on the way alongwith appellant and all five forcibly after pressing and closing her mouth by "*Dupatta*" forcibly dragged her inside the vehicle and took her to Delhi where after keeping at unknown place in a room, they committed rape upon her.

30. Considering the contradiction, as appears out of testimony of victim/PW-3 and her statement as discussed above under Section 164 of Cr.P.C., it would be apposite to say that the victim cannot be accepted as "Sterling witness". The testimony of CW-1 and CW-2 also not appears corroborating with allegation of gang rape.



Hence, having such evidence in hand, the conviction as secured by the learned trial court on the sole testimony of victim appears questionable.

31. It would be apposite to reproduce the relevant paragraph of ***Rai Sandeep @ Deepu, v. State (NCT of Delhi), (2012) 8 SCC 21***, where the Hon'ble Apex Court held in paragraph 22 that who can be said to be a "**sterling witness**". It is observed and held as under:

"22 In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any



doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

32. Admittedly, no documents regarding date of birth/age was brought on record in view of Section 94(2) of the J.J. Act. Victim was accepted minor within the meaning of Section 2(1)(d) of the POCSO Act by the learned trial court on the basis of her radiological age as



she was assessed between 16-18 years.

33. In this context, it would be apposite to reproduce paragraph nos. 9 and 10 of the **Rajak Mohammad(supra)**, which reads as under:

"9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

10. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.

34. By taking note of the legal ratio as available through **Rajak Md (supra)**, if a marginal benefit of ± 2 years be given then certainly on the date of occurrence, victim appears stands major and, therefore, the conviction as recorded under POCSO Act appears questionable. Certainly to import presumption available under any law as per basic principle of criminal



jurisprudence, can be imported only after establishing foundational aspect of crime in question by prosecution, similarly, in the case of POCSO also. With aforesaid discussion, it can be said safely that the prosecution failed to established the foundational aspect *qua* crime in question so as to import the provision of presumption as available under Sections 29 and 30 of POCSO Act.”

35. Hence, taking note of totality of evidences as available on record, where victim/PW-3 not proved “Sterling witness”, where prosecution also failed to established victim/PW-3 as a “child” within the meaning of Section 2(1)(d) of the POCSO Act, the conviction as recorded by the learned trial court cannot be said sustainable in the eye of law.

36. Hence, appeal stands allowed.

37. Accordingly, the impugned judgment dated 18.09.2023 and the impugned order of sentence dated 22.09.2023 passed by the learned Exclusive Special Judge (POCSO Act)-cum-Addl. District &



Sessions Judge-VII, Bhagalpur, in POCSO Case No. 86 of 2021 arising out of Kharik P.S. Case No. 69 of 2021, is hereby set aside/quashed.

38. Appellant namely, Md. Amin is in custody in connection with this case, he is directed to be released forthwith, if not required in any other case.

39. Fine, if any, paid be returned to the appellant immediately.

40. Office is directed to send back the trial court records along with a copy of this judgment to the trial court, forthwith.

(Chandra Shekhar Jha, J)

veena/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.11.2024
Transmission Date	22.11.2024

