

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3573 of 2023**

Arising Out of PS. Case No.-176 Year-2018 Thana- MATIHANI District- Begusarai

Vivek Kumar, S/o Dilip Rai @ Dilip Kumar Roy R/o Village- Rachiyahi
Purana Tola, P.S- Matihani, Distt.- Begusarai.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

with

CRIMINAL APPEAL (SJ) No. 3597 of 2023

Arising Out of PS. Case No.-176 Year-2018 Thana- MATIHANI District-Begusarai

Santosh Kumar, son of Ram Pukar Tanti, resident of Village-Pannapur P.S.-
Matihani Dist- Begusarai

... ... Appellant

Versus

The State of Bihar

... ... Respondent

with

CRIMINAL APPEAL (SJ) No. 3667 of 2023

Arising Out of PS. Case No.-176 Year-2018 Thana- MATIHANI District-Begusarai

Sumit Kumar, Son Dilip Rai @ Dilip Kumar Roy, resident of Village-
Rachiyahi Purana Tola, P.S-Matihani, Distt.- Begusarai.

... ... Appellant

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... ... Respondent

- ***The Code of Criminal Procedure, 1973 – Section 374(2) – Appeal Against Conviction and Order of Sentence – Contradictions in Witness Testimonies – Identification Issues - Victim claims abduction later admits knowing the appellant beforehand contradicting her earlier statement - Contradictions Regarding Place of Occurrence - The court found this inconsistency crucial in determining the credibility of the victim's testimony. (Para-17) Failure to Declare Key Witness Hostile - PW-5 did not support the prosecution but was not declared hostile, meaning her testimony stood unchallenged. (Para 19).***
- ***Procedural Violations Under Section 313 CrPC - Failure to Properly Examine the Accused - The role of Vivek Kumar was not adequately put***

to him during his Section 313 statement violating the fair trial principle (relied on:- Sukhjit Singh v. State of Punjab [(2014) 10 SCC 270]) (Para-19)

- ***Lack of Medical & Forensic Corroboration - No injuries were found in or around the victim's private parts - No evidence of penetrative sexual assault found – (Reliance on Nand Lal v. State of Chhattisgarh [(2023) 10 SCC 470]). (Para- 14 & 20)***
- ***Questionable Applicability of Section 366-A IPC - Absence of Intent to Force Illicit Intercourse - (relied on:- Sat Prakash v. State of Haryana [(2015) 16 SCC 475]). (Para 18)***
- ***No Evidence of Force or Threat – no allegation use of force during the motorcycle ride or while being taken away – held, that ‘sexual intent’ is a primary requirement for conviction under Section 7 of the POCSO Act, which was not proven. (Para 21).***
- ***Conviction Set Aside - The prosecution failed to establish beyond a reasonable doubt the elements of abduction, confinement, or sexual assault - Appellants Acquitted. (Para 24 – 27)***

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Appearance :

(In CRIMINAL APPEAL (SJ) No. 3573 of 2023)

For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mrs.Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate

For the Respondent-State: Mr. B.M.P. Sinha, APP

(In CRIMINAL APPEAL (SJ) No. 3597 of 2023)

For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate

For the Respondent-State: Mr. Anand Mohan Prasad Mehta, APP



(In CRIMINAL APPEAL (SJ) No. 3667 of 2023)

For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate
For the Respondent-State: Mrs. Anita Kumari Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT
Date : 18-07-2024

Since all these three appeals arising out of same P.S. case and common judgment, they are being disposed of with common judgment.

2. These appeals have been preferred by the appellants-convicts under Section-374(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Cr.P.C.') challenging the impugned judgment of conviction dated 15.07.2023 and order of sentence dated 18.07.2023 respectively passed by learned Exclusive Special Judge, POCSO Act-cum-Additional Sessions Judge-VI, Begusarai in POCSO Case No.96 of 2018 arising out of Matihani P.S. Case No.176 of 2018, whereby the concerned Trial Court has convicted all above-named appellants/convicts under Sections 366-A, 354-B, 342 read with 34 of the Indian Penal Code (for short 'IPC') and Section 8 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act')



and sentenced to undergo rigorous imprisonment for ten years with fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for three months under Section 366-A read with 34 of the IPC, simple imprisonment for one year with fine of Rs.1000/- and in default of payment of fine, to further undergo simple imprisonment for one month under Section 342 read with 34 of the IPC, and rigorous imprisonment for four years with fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for three months under Section 7/8 of the POCSO Act. No separate sentence was passed under Section 354-B of the IPC in view of Section 42 of the POCSO Act. All the sentences have been ordered to run concurrently.

3. The prosecution case is based upon written information of the informant, namely, G.M./PW-3, submitted before the Officer Incharge of Matihani Police Station stating therein *inter alia* that his daughter 'X' aged about 10 years along with her friend 'Y' had gone to her *Nanihal* on 07.12.2018 at Rachiahi Kachahari Tol. She did not return



back till late in the night then, he and other family members started searching for his daughter. On 08.12.2018, in the evening his daughter came and disclosed that on 07.12.2018 while she was returning from her *Nanihal*, at a lonely place at Lucho Chowk, the appellants-convicts namely Sumit Kumar, Vivek Kumar, Santosh Kumar and one another got her seated on motorcycle and took her at the house of Awadhesh Rai at Richiahi Purana Tol and kept her for the whole night and committed rape with her one after another. Awadhesh Rai and her wife threatened her. The informant further disclosed that the appellant Sumit Kumar dropped informant's daughter at his village and fled away from there, who provided his daughter one mobile in which a SIM bearing no. 8969667468 was in use and a suit. On 09.12.2018, in the morning, a boy namely, Golu Kumar came at his house and asked to return said mobile and suit as same was demanded by the appellant namely, Sumit Kumar. At that time, Golu Kumar was apprehended and handed over to the police.

4. On the basis of aforesaid written report,



Matihani police drew up a formal FIR and registered a case being Matihani P.S. Case No.176 of 2018 for the offences punishable under Sections 376-A/34, 120-B, 366-A of the IPC and Sections 4/8 of the POCSO Act.

5. After completion of investigation, the investigating officer has submitted charge-sheet vide charge-sheet No. 24 of 2019 dated 06.03.2019 under Sections 366-A, 354-B, 342 read with 34 of the IPC and Section 12 of the POCSO Act against appellant, Sumit Kumar, co-accused Bibha Devi, appellant Vivek Kumar and co-accused Golu Kumar and investigation against other accused persons remained in progress and on completion thereof, the Investigating Officer submitted supplementary charge-sheet No.186 of 2019 on 31.12.2019 under Section 366-A, 376-DA, 342 read with 34 of IPC and Section 6 of the POCSO Act against the appellant Santosh Kumar and another accused namely, Awdhesh Rai. As the trial of the accused Golu Kumar was separated because he was juvenile at the time of occurrence, hence, his trial was conducted by Juvenile Justice Board. After considering the materials



available on record during investigation, the learned Jurisdictional Magistrate took cognizance against the appellants-convicts accordingly and committed the case to the court of Sessions for trial.

6. In order to substantiate its case, the prosecution has examined altogether nine witnesses. They are- (I) PW-1 Victim (X); (ii) PW-2 Mother of the Victim; (iii) PW-3 Father of the Victim; (iv) PW-4 Dhirendra Kumar Pathak (I.O.); (v) PW-5 Jyoti Kumari (Friend of the Victim); (vi) PW-6 Urni Devi; (vii) PW-7 Dr. Ram Pravesh Prasad (Medical Officer); (viii) PW-8 Dr. Arun Kumar (Medical Officer) and (ix) PW-9 Dr. Shashi Prabha (Medical Officer).

7. The prosecution has also relied upon the following documents as to substantiate its case:-

Sl. No.	Exhibit Nos.	List of the documents
1	Exhibit-P1	Signature of victim over her statement u/s-164 of Cr.P.C.
2	Exhibit-P2	Signature of informant over written report.
3	Exhibit-P3	Formal FIR
4	Exhibit-P4	Statement of victim recorded u/s-161 of Cr.P.C.
5	Exhibit-P5	First Charge-sheet.
6	Exhibit-P5/1	Second Charge-sheet.
7	Exhibit-P6	Signature of Dr. Ram



		Pravesh Prasad over attested medical report.
8	Exhibit-P6/1	Signature of Dr. Arun Kumar over attested copy of medical report.
9	Exhibit-P6/2	Signature of Dr. Shashi Prabha over medical report.

8. The defence has also produced one witness as DW-1, namely, Sulendra Tanti in support of their case.

9. The learned Trial Court explained the incriminating circumstances/evidences as surfaced during the trial to the appellants/accused while examining them under Section 313 of the CrPC to which, they denied the evidence as surfaced during trial and shows their complete innocence.

10. After perusal of evidence and considering the arguments, the learned Trial Court convicted the appellants/accused for the offences under Sections 366-A, 354, 342 read with 34 of the IPC by acquitting for the offence under section 376 of the IPC. Being aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeal has been preferred.

11. Hence, the present appeal.



ARGUMENT ON BEHALF OF THE APPELLANTS-**CONVICTS:**

12. It is submitted by Mr. Ajay Kumar Thakur, learned counsel for the appellants-convicts that conviction recorded by the learned trial court under Section 366-A IPC is apparently bad in the eyes of law for the reason that nothing surfaced out of deposition of PW-1/victim and other prosecution witnesses that she was kidnapped to establish sexual intercourse with another persons. In support of his submission, learned counsel relied upon legal report of Hon'ble Supreme Court as passed in the matter of **Sat Prakash vs State of Haryana and Another [(2015) 16 SCC 475)]**. It is also submitted that 'sexual intent' is a prime consideration to establish a case under Section 7 of the POCSO Act. It is pointed out in this context that PW-1/victim has failed to depose that she was outraged while sitting on motorcycle throughout the way and finally taking to the house of aunt (*mausi*) of appellant namely, Santosh Kumar, where she was raped by him on different occasions. It is pointed out that the place of occurrence also appears



disputed in view of deposition of PW-1/victim, as she stated that the same is an isolated place near a bamboo clumps. It is further submitted that there is almost no allegation against appellant-convict namely Vivek Kumar as per deposition of PW-1 rather she stated against appellant-convict namely, Vivek Kumar that he was standing in courtyard and was only watchful during the occurrence. It is also pointed by Mr. Thakur that victim had categorically stated that she was student of Class-5th but, police failed to collect the school register during the investigation as to establish her a child within the meaning of Section 2(1)(d) of the POCSO Act. In support of his submission, learned counsel further relied upon legal report of Hon'ble Supreme Court as passed in the matter of **Jarnail Singh vs State of Haryana [(2013) 7 SCC 263]**, where it has been held by the Hon'ble Supreme Court that the age of minor victim of a sexual offence be decided in view of Section 94 of the Juvenile Justice (Care and Protection of Children) Act.

13. Mr. Thakur further submitted that conviction in this case was secured on the basis of testimony of PW-1,



who is victim of this case only and in view of material contradictions, she cannot be said to be qualified the test of sterling witness. In this context, he further pointed out that PW-3, who is the father of victim, categorically stated that his daughter was acquainted with appellant-convict namely, Santosh Kumar but, he failed to identify him. PW-2 is mother of victim, who also failed to identify the appellants-convicts during the trial. The victim categorically stated that she was not aware about the appellant Santosh Kumar. All such depositions is sufficient to establish that due to enmities, the appellants-convicts were falsely implicated with present case.

14. While concluding argument, it is submitted that PW-5 is Jyoti Kumari and was accompanied victim/PW-1 in terms of her deposition flatly refused to identify the person in dock as to involve in the occurrence. She also failed to depose that she could not identify the boy involved in the occurrence. It is further submitted that PW-7, who examined as doctor did not find any medical injury in or around private part of the victim, which may suggest that any penetrative



sexual assault was committed upon her. It is submitted that in view of aforesaid, it can be said safely that prosecution has failed to establish its case beyond reasonable doubt and, therefore, the judgment of conviction as passed by learned trial court is fit to be quashed and set aside.

ARGUMENT ON BEHALF OF STATE:

15. Learned APP while opposing the submissions as advanced by learned counsel appearing for the appellants-convicts submitted that the allegation of penetrative sexual assault is specifically available against appellants Santosh Kumar and Sumit Kumar as per deposition of PW-1 and there is no reason to disbelieve her version, as her statement found consistent throughout on this point, and same appears corroborated with her statement as recorded under Section 164 of the Cr.P.C, whereas learned APP fairly conceded that kidnapping is not appearing to be taken place out of deposition of PW-1 with object that she would seduced or forced to enter into illicit relation with another person.



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

CONCLUSION:

17. From the deposition of prosecution witnesses, it appears that the conviction is recorded by the trial court on the sole basis of the testimony of PW-1. From the deposition of PW-1, it appears that she was kidnapped by appellants-convicts, namely Sumit Kumar and Santosh Kumar and was taken to the house of her aunt (*mausi*) at village-Ghatwara Tol. It nowhere appears from her deposition that she was forced or seduced to establish illicit intercourse with another person. As per her deposition, the major occurrence of rape alleged to be taken place in the house of aunt of the appellant-convict, namely, Santosh Kumar but, she stated in her cross-examination that place of occurrence is an isolated place near bamboo clumps. From her testimony, it appears that she herself disputed the place of occurrence though, as per deposition of her father PW-3,



it appears that prior to the occurrence, she was acquainted with appellant-convict Santosh Kumar, but, on contrary, she deposed that she was not acquainted with appellant-convict prior to the occurrence and he was completely alien to her.

18. At this juncture, it would be apposite to reproduce para 5 and 6 of **Sat Prakash case** (supra), which are as under:-

"5. The charge with reference to Section 366-A of the Penal Code needs a closer examination. Section 366-A of the Penal Code is extracted hereunder:

***"366-A. Procurement of minor girl.
—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."***

A perusal of the aforesaid section reveals that the inducing of the minor to



constitute an offence under Section 366-A should have been with reference to an intent to force or seduce her "... to illicit intercourse with another person ...". In fact, there is no mention of any other person in the sequence of allegations levelled against the appellant.

6. In the above view of the matter we are satisfied that the charge under Section 366-A IPC was also not sustainable against the appellant. For the reasons recorded hereinabove, we are of the view that the impugned order [Sarla v. State of Haryana, 2011 SCC OnLine P & H 124] passed by the High Court convicting the appellant under Section 366-A of the Penal Code is also liable to be set aside. The same is accordingly hereby set aside."

19. The version of PW-1 also appears doubtful for the reason that she categorically stated that at the time of kidnapping her friend namely, Jyoti Kumari was present with her, who examined as PW-5. She was not declared hostile and, therefore, the prosecution cannot deny to accept her deposition as surfaced during the trial. It appears from her deposition that though she supported the occurrence but, did not name any boys, who were involved in occurrence of



kidnapping and she also failed to name the victim. She categorically said that she is not knowing the boys. She even failed to identify the accused persons available in the dock. In view of her deposition and further in view of deposition of PW-3 who is none but the father of the victim suggesting the previous acquaintance of appellant-convict Santosh Kumar with PW-1, it is sufficient to gather that the victim failed to qualify the test of sterling witness and, therefore, on the basis of her sole testimony the conviction recorded by the learned trial court cannot be accepted.

20. It is further apposite to reproduce Section 7 of the POCSO Act, which is as under:-

"7. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

21. In aforesaid context, it would be apposite to mention that PW-1/victim nowhere suggested that at the



time of alleged kidnapping she was touched by appellants-convicts with 'sexual intent'. She did not raise any alarm or made any resistance on the way. Any threat perception is not available out of her deposition and, therefore, the 'sexual intent' which is the basic ingredient to attract the offence under Section 7 of the POCSO Act is not appears available out of her deposition particularly, when the trial court disbelieved her version regarding penetrative sexual assault and, therefore, the conviction under Section 354-B IPC and Section 8 of the POCSO Act are also appears not convincing.

22. Now, it would be apposite to reproduce the provision of Section 342 of the IPC which as under:-

"342. Whoever wrongfully confines any person shall be punished with simple imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

23. In view of aforesaid context, it is important to mention that PW-1/victim herself disputed the place of occurrence by saying that it was an isolated place near to a bamboo clumps, contradicting her own version as stated



through examination-in-chief that it was the house of aunt of appellant-convict Santosh Kumar. No other prosecution witnesses have supported the occurrence. Moreover, implication of the appellants-accused for committing penetrative sexual assault after confining her in aunt house was not accepted by trial court, where PW-7, being witness of the occurrence failed to identify the victim and appellants before the court, conviction under Section 342 of the IPC also not appears acceptable as recorded by learned trial court.

24. In view of aforesaid factual and legal discussions and upon re-appreciation of evidence, it appears that the prosecution has failed to established its case beyond reasonable doubt.

25. Accordingly, these appeals are allowed.

26. The impugned judgment of conviction dated 15.07.2023 and order of sentence dated 18.07.2023 respectively passed by learned Exclusive Special Judge, POCSO Act-cum-Additional Sessions Judge-VI, Begusarai in POCSO Case No.96 of 2018 arising out of Matihani P.S.



Case No.176 of 2018, is, hereby, quashed and set aside.
The above-named appellants/convicts are acquitted from the
aforesaid charges levelled against them.

27. The appellant-convict, namely, Vivek Kumar is
on bail, he is being discharged from his liabilities of bail
bonds. Since appellants-convicts, namely, Santosh Kumar
and Sumit Kumar are in custody, they are directed to be
released forthwith, if their presence are not required in any
other case.

28. Fine, if any, deposited by the appellants-
convicts be returned to them forthwith.

29. 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	AFR
CAV DATE	NA
Uploading Date	23.07.2024
Transmission Date	23.07.2024

