

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (SJ) No.1169 of 2023

Arising Out of PS. Case No.-21 Year-2016 Thana- KRITYANAND NAGAR District- Purnia

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MD. SABIR HUSSAIN @ MD. SABIR Son of Md. Khairul Hussain @ Md. Khairul Resident of Village - Chimani Bazar Ward No.- 33, P.S.- Sadar, District - Purnea

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Indian Penal Code-Sec.376, POCSO Act-Sec.4- contradictory statement made by victim regarding her age- documentary evidence as educational certificate withheld by prosecution- age of victim no determined as per POCSO provision- victim not treated child- conviction of appellant u/s 4 bad in law. (Para-11)

IPC- Sec.363 and 376- victim's own evidence important- ingredients not attracted – victim remained silent despite several opportunities to resist against appellant's acts- appellant and victim resided together in well manner- no any complaint raised against appellant- victim a consented party- Avinash Kumar Ranjan Vs The State of Bihar, Cr. App. (DB) No. 244/2022- relied on. (Para- 12,13,14)

CrPC- Sec.164, Evidence Act- Sec.145- victim statement contradictory to evidence- statement not substantive piece of evidence- serious doubt in prosecution's allegation- no injury of physical assault found by doctor- victim a consented party in sexual relation- victim's age major as per Medical Board's opinion- conviction of appellant not proper and legal- judgement and order of conviction set aside. (Para-15,16,17,18)

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Appearance :

For the Appellant/s : Mr.Amit Kumar Jha, Adv.

For the Respondent/s : Mrs. Anita Kumari Singh, APP

CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT

Date : 24-01-2024

1. Heard learned counsel for the appellant and learned APP for the State.

2. The present appeal has been filed against the Judgement of Conviction dated 09.01.2021 and Order of Sentence dated 16.01.2021 passed by learned Additional Sessions Judge-VI-cum- Special Judge, POCSO Act, Purnea in Special Case No. 76/ 2016, C.I.S- 346/2017, arising out of K Nagar PS case No. 21/ 2016, whereby and whereunder the appellant has been convicted for the offence punishable under Section 4 of Protection of Children from Sexual Offences Act (in short POCSO Act) and sentenced to undergo rigorous imprisonment for 7 years with a fine of Rs. 50,000/- and in case of default of payment of fine, to



further undergo simple imprisonment for six months. The appellant has been further convicted and sentenced to undergo rigorous imprisonment for five years with a fine of Rs. 25,000/- for the offence punishable under Section 363 of the Indian Penal Code (in short IPC) and in case of default of payment of fine, to further undergo simple imprisonment for three months. No separate sentence has been awarded to the appellant under Section 376 of the IPC on account of he being convicted under Section 4 of POCSO Act and all the sentences of imprisonment have been directed to run concurrently.

3. The substance of the prosecution's story is that the informant, Rahul Kumar Rai, who is said to be father of the victim, filed a written application (Exhibit-1/A) at K. Nagar P.S. on 23.01. 2016 with this allegation that his daughter (hereinafter referred to as the victim), who was a student of Purnea Inter College at Purnea, at that time, left her house for college on 15.01.2016 at about 11 AM but thereafter she did not return back to home and after that he and others began to search for the victim and in that course they came to know that one person, namely, Neeraj Kumar Yadav, had kidnapped the victim with ill intention and some other unknown persons were also involved in the said crime.



4. On the basis of said written application filed by the informant, the formal F.I.R. bearing K. Nagar P.S. case No. 21/2016 was lodged at K. Nagar P.S. for the alleged offences under Sections 363, 366A read with Section 34 of the Indian Penal Code against Neeraj Kumar Yadav and after investigation, police submitted charge sheet against the appellant for the offences punishable under Sections 363, 366A, 376 of the IPC and under Section 4 of POCSO Act and thereafter the concerned court took cognizance of the alleged offences.

5. The appellant stood charged for the offences punishable under Sections 363, 366A, 376 of the IPC and under Section 4 of POCSO Act.

6. During trial, the prosecution examined following witnesses:-(i). PW. 1- Lakhan Kumar Lal;

(ii). PW. 2- Manoj Sah;

(iii).PW. 3- Vandana Devi;

(iv).PW.4- Jaitun Nisha;

(v). PW.5- Victim;

(vi). PW.6.- Rahul Kumar Rai;

(vii).PW.7- Dr. Shivani Singh;

(viii).PW.8-Md. Salim; and

(ix). PW 9- Subhash Chandra Mandal



7. In documentary evidence, the prosecution produced and proved following documents and got them marked as exhibits which are as under:-

(i). Exhibit-1- Victim's signature upon her statement recorded under Section 164 of the Code of Criminal Procedure (hereinafter referred to as CrPC);

(ii) Exhibit-1/A- Informant's signature upon his written application on which basis F.I.R. was registered;

(iii) Exhibit-2- Medical examination report of the victim;

(iv) Exhibit-3- Statement of victim recorded under Section 164 of the CrPC.

8. After completion of prosecution's evidence, the appellant's statement was recorded under Section 313 of the CrPC, in which he denied the circumstances appearing against him from the prosecution's evidences and claimed himself to be an innocent person and mainly took the defence that he had been falsely implicated. The appellant/ convict did not give any evidence in his defence.

9. Learned trial court convicted the appellant for the offences punishable under Sections 363, 376 of the IPC and under



Section 4 of POCSO Act but acquitted the appellant of the offence punishable under Section 366A of the IPC.

10. In order to attract the offence under Section 363 of the IPC and under Section 4 of POCSO Act, the victim's age is considered to be very crucial when it is alleged that the victim was below 18 years of age at the time of commission of the alleged occurrence. In the present matter the victim's father disclosed the victim's age as 16 years in his written FIR. The victim herself disclosed her age as 18 years before learned Judicial Magistrate while recording her statement under Section 164 of the CrPC. Before the trial court, the victim disclosed her age as 16 years and in this way, contradictory statements were made by the victim regarding her age. PW.7, who medically examined the victim, opined the victim's age about 17-18 years on the basis of radiological report. Admittedly, the so- called victim was a college going girl when the alleged occurrence was committed with her as per FIR as well as her evidence. So in such a situation, the best proof in respect of victim's age, in the form of documentary evidence was the victim's educational certificates but in this regard, no attempt was made by the prosecution to produce any of the educational certificates of the so-called victim to prove the victim's age and it appears that the said documentary evidence was



withheld by the prosecution intentionally to conceal the victim's actual age and this circumstance completely goes against the prosecution particularly with regard to the offence punishable under Section 4 of the POCSO Act.

11. In order to attract the offence punishable under Section 4 of POCSO Act, it must be proved that victim is a child in view of the definition given in the POCSO Act and as per the said definition, a child means a person who is below the age of 18 years. As per Section 34 of POCSO Act the age of the victim must be determined by the trial court. In the opinion of this court, such provision must be complied with when there is some doubt or objection by a party regarding the victim's age and particularly when documentary evidence in the form of educational certificate, which can be easily produced, is withheld by the prosecution. In the instant matter contradictory statements were made by the victim regarding her age, hence the trial court ought to have ascertained the victim's age as per procedure prescribed in Section 94 of Juvenile Justice Act and flexibility of two years always remains in upper side as well as lower side in the age of a child which is determined with the help of medical opinion. Hence, in the present matter, on account of victim's age not being proved by the prosecution and also due to withholding the victim's



educational certificates by not producing the same before the trial court, an adverse inference should be drawn against the prosecution. Accordingly, this court is of the opinion that the victim should not be treated as a child in view of the definition given in POCSO Act, at the time, when the alleged occurrence is stated to have been committed with her. Therefore, the conviction of the appellant for the offence punishable under Section 4 of the POCSO Act is completely bad in the eyes of law.

12. In respect of the offence of kidnapping or abduction and rape as alleged in the present matter, the victim's own evidence is the most important. In order to see whether the ingredients of the offences of Sections 363 and 376 of the IPC are attracted in this case or not, at first, I would like to discuss the evidence of the victim given by her before the trial court.

13. According to victim's evidence, she was alone when the alleged occurrence took place with her, hence, the prosecution's case completely depends upon her evidence. The victim was examined as PW 5. She deposed that on 15.01.2016 at about 11 AM, when she was going from her house to college then suddenly a white coloured Bolero vehicle which was passing near her stopped and thereafter the appellant forcefully caught her and got her inside the said vehicle and after that glasses of the



windows of the said vehicle were closed and music was started in loud sound. The victim further deposed that the appellant assaulted and threatened her and brought her at Purnea bus stand and from there she was taken by the appellant to Katihar by a bus and from there she travelled in a train for three days with the appellant and she was brought at some place where she was locked in a room and she lived there for one month and thereafter she was brought at Purnea. The victim further deposed that the appellant took a room on rent in the house of one Md. Salim at Mirza Hata in Purnea and there also the appellant assaulted and threatened her and on one day she got the mobile phone of the appellant then she informed her mother by using the said mobile phone and thereafter her parents came at the said place with the police and recovered her. The victim stated in her cross-examination that she talked to the wife of the house owner where the appellant took a room on rent and regarding rent the appellant talked before her. She further deposed in the cross-examination that she lived with the appellant in rented room for about five months and during that period she did not say anything to the house owner or his wife about the wrongs which were committed with her by the appellant. From these statements, it is clearly evident that the so-called victim got several opportunities to resist against the appellant's acts but she



remained silent and did not disclose the conduct of the appellant to the several persons of public and she also remained silent for five months in the house where she admittedly resided with the appellant for five months despite having got several opportunities to raise her grievance before the house owner or his wife.

14. The house owner, Md. Salim, and his wife were examined as PW 8 and PW 4 respectively. PW 8 deposed that the appellant was known to him as he had worked as mason in his house, hence, he rented a portion of his house to the appellant and at that time the appellant came with the so-called victim and both resided in his house for about six months in well manner and during that period the so-called victim did not raise any complain against the appellant before him. Similar evidence was given by PW 4 (wife of PW 8). The circumstances appearing from the evidence of victim and material witnesses clearly go to show that the victim was never abducted or kept in captivity by the appellant as she remained silent for about six months while on many occasions she got several opportunities to resist against the appellant's acts before the public or some other persons and it shows that the so-called victim was a consented party in going with the appellant and in residing with him for about six months in rented room of a house and in this regard the observation made by



Hon'ble Division Bench of this court in the case of Avinash Kumar Ranjan vs. the State of Bihar in Cr. Appeal (DB) No. 244 of 2022, upon which learned counsel for the appellant has placed reliance, is important. The relevant observation made in paragraph 29 of the judgement is reproduced herein as under:

“29. If this were so, the victim would not have been recovered from the house of the appellant after two months. It would be too much to expect that the victim was only hallucinating about the stay with the appellant at Kanpur in a rented accommodation. It, therefore, is a bygone conclusion that the victim was in the company of the appellant for about two months at a different place. The victim was never kidnapped or kept in captivity which would become very evident from the fact that no hue and cry was raised by the victim while she was being taken to Kanpur and while she stayed in the rented accommodating with the appellant”.

15. The prosecution placed reliance upon the victim's statement recorded under Section 164 of CrPC. The victim stated in the said statement that on 15.01.2016 at about 11 AM, she came out from her house alone and went with appellant at Mirja Chowk, from where she first travelled in a bus and thereafter in a train. The said statement is completely contradictory to the



evidence of victim given by her before the trial court as she deposed in her evidence that she was forcefully pulled by the appellant inside a four-wheeler vehicle when she was going to her college. Though, a statement made under Section 164 of CrPC is not considered as a substantive piece of evidence but such statement can be used for the purpose of contradiction of the statement of deponent under Section 145 of the Indian Evidence Act. The said contradiction appearing in between the victim's statement recorded under Section 164 of the CrPC and her evidence deposed by her before the trial court is a material contradiction and it casts a serious doubt in the prosecution's allegation.

16. As per allegation, the victim was subjected to physical torture when she resided with the appellant but the doctor, who examined the victim, did not find any type of injury on her person. If the appellant had been torturing the victim physically during captivity period then definitely some old sign of physical assault might have been present over the body of victim but such evidence was not found by the doctor and the said circumstance also goes against the prosecution.

17. As per Exhibit-2, which is victim's medical examination report, she was pregnant at the time of medical



examination and the trial court placed reliance upon this report and took into account the said medical finding as a cogent evidence to prove the sexual relationship between the victim and appellant. But merely on account of victim being pregnant at the time of her medical examination, it cannot be deemed that she conceived on account of appellant's sexual relation with her and in this regard, some other scientific examination ought to have been made by the prosecution to establish appellant's paternity with the victim's unborn child but no such step was taken by the police or prosecution. If we deem the victim to have conceived due to appellant's sexual relation with her even then the alleged offence of Section 376 of the IPC does not attract in this matter as from the above discussions it is clearly evident that the victim was a consented party to the alleged sexual relation and the best evidence with regard to the victim's age was victim's educational certificates which were withheld by the prosecution and the victim made contradictory statements regarding her age. Furthermore, the Medical Board's opinion with regard to the victim's age also confirms the victim as being major if two years flexibility is given to upper side of her age, which was opined by the medical board in respect of her age.



18. In the light of the circumstances appearing from the above- discussed evidences of the prosecution, this court finds that the appellant’s conviction under Section 4 of POCSO Act and under Sections 363 and 376 of the IPC is not proper and legal and the same is not sustainable in the eye of law, so it cannot be upheld. Hence, the instant appeal stands allowed and the impugned judgement and order convicting and sentencing the appellant for the said offences are set aside.

19. As per learned counsel for the appellant, the appellant has already completed his sentence, so there is no requirement to pass any direction with regard to his release.

20. Let the Judgement’s copy be sent to the learned trial court for information and needful.

21. Let the L.C.R. be sent back to the learned trial court.

(Shailendra Singh, J)

BKS/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	31.01.2024
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