

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3465 of 2017**

Arising Out of PS. Case No.-100 Year-2016 Thana- MAHILA P.S. District- Muzaffarpur

Vikash Kumar Chaudhary @ Vijay Chaudhary S/o Radheshyam Chaudhary
Resident of Village Mahamadpur Patahi, P.S. Sadar District Muzaffarpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mrs. Vaishnavi Singh (Amicus Curiae)
For the Respondent/s : Mr. A.M.P. Mehta, APP

**CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT**

Date : 04-12-2023

1. Nobody appears on behalf of the appellant despite repeated calls and on the last date it was revealed that Mr. Ajay Kumar Thakur, learned counsel, was engaged in this matter but today it is informed to this court that he has not been engaged in this matter. The instant appeal is an old one hence, learned advocate, Mrs. Vaishnavi Singh is appointed as an *Amicus Curiae* to assist this court.

2. The present appeal has been filed against the judgement of conviction dated 24.11.2017 and order of sentence dated 30.11.2017 passed by learned Additional Sessions Judge-I-cum- Special Judge, POCSO Act, Muzaffarpur in Trial No. 441/ 2016 in connection with Mahila PS case No. 100/ 2016 whereby



and whereunder the appellant has been convicted for the offence punishable under Section 8 of POCSO Act and sentenced him to undergo rigorous imprisonment for three years with a fine of Rs. 2000/- and further the appellant has also been directed to undergo additional imprisonment for two months in case of non payment of fine amount by him.

3. The prosecution's story, in brief, is that on 10.08.2016 at about 2.45 PM the informant, who is said to be the victim herself, was returning to her home by a bicycle from her school and when she reached near Patahi Middle School then the accused, appellant, came by a four wheeler vehicle and dashed it against her bicycle due to which the bicycle fell into a ditch and thereafter she was forcefully taken inside the said vehicle, after that the accused started teasing her near a Shiv temple and held her hand and thereafter he took her in an orchard and started kissing her and clicked her photographs and thereafter undressed her and raped her and also put his private part into her mouth and discharged semen in her mouth and thereafter threatened her to not disclose the incidence otherwise she would be killed by him.

4. The so called victim herself lodged the F.I.R. by filing a written application, exhibit-1 written by herself in which she described the allegations on that basis the formal F.I.R. bearing



Mahila P.S. case No. 100/ 2016 was lodged for the offences punishable under Sections 376, 377 of the Indian Penal Code (in short IPC) and also for the offences punishable under Sections 4, 8 and 12 of the POCSO Act, which set the criminal law in motion. Here it is important to mention that after the completion of investigation, the police submitted police report concluding the matter having no sufficient evidence and consequently the appellant was not sent up by the police but thereafter the learned concerned Magistrate took cognizance of the alleged offence.

5. The appellant stood charged for the offences punishable under Sections 376, 377 of the IPC and Section 4 of POCSO Act. As the appellant did not plead guilty hence he was put on trial.

6. During trial, altogether nine witnesses were examined by the prosecution and in documentary evidence, the written F.I.R., formal F.I.R., signature of the informant on the written F.I.R. and her statement recorded under Section 164 of Cr. P. C., the victim's medical examination report and her pathological examination report were proved and marked as exhibit in following manner:-

Exhibit 1- Signature of victim on written F.I.R



Exhibit 1/1- Signature of victim on her statement recorded under Section 164 of Cr. P. C.

Exhibit 2- Medical report

Exhibit 2/1- Pathological report

Exhibit 3- formal F.I.R.

7. After the completion of prosecution's evidence the statement of the appellant was recorded in which the main circumstances relevant to the alleged offences appearing against him from the prosecution's evidences were explained to him, which were denied by him and he claimed himself to be an innocent person and he took the defence that there was a dispute in between him and one Dipu Thakur, a person belonging to the prosecution's side, regarding purchase of a house, owing to that reason a false case was lodged against him and the said Dipu Thakur had also given his evidence against him in this case. The appellant did not give any type of evidence in his defence.

8. It has been argued by learned *Amicus Curiae* that while convicting the appellant the learned trial court mainly placed reliance upon the statement of the so called victim but major part of her statement attracting the commission of the offence of rape was disbelieved by the trial court mainly taking into account the



medical evidence appearing from the examination of the so called victim but the second part of the allegation levelled by the said victim was deemed by the trial court to be believable and the prosecution did not give any documentary evidence to prove the victim's minority despite the victim being a student of Intermediate class and medical board's opinion given on the basis of clinical, pathological and radio-logical reports regarding the age of the victim, could not be proved by the prosecution. However, the age of victim determined by the said board was between 18-19 years and the same does not show that the victim was below 18 years at the time of commission of alleged offence. It has been argued by learned Amicus Curiae that there is no direct evidence except the victim's statement to prove the allegation of penetrative sexual assault allegedly committed by the appellant with the victim and all other non official witnesses are hearsay witnesses and the doctor concerned, who examined the said victim, did not give any positive finding and evidence to substantiate the allegation of rape.

9. On the contrary, learned APP has vehemently opposed this appeal and submitted that before the trial court the prosecution succeeded to prove the offence of penetrative sexual assault committed by the appellant with the victim and the



evidence given by the said victim is in itself sufficient to prove the offence punishable under Section 8 of POCSO Act for which the appellant has been convicted and the medical evidence given by the doctor concerned, who examined the victim, is not reliable as the victim was medically examined after six days from the commission of alleged occurrence hence, there was less possibility to get any positive evidence by a doctor from examination of the victim.

10. Heard both the sides, perused the judgement impugned and evidences available on the case record of trial court and also gone through the statement of accused.

11. In the present matter the most important facts which are relevant to the alleged offence are that:-

(i) At the time of commission of alleged offence the victim was returning from school on her bicycle to her home;

(ii) The alleged occurrence of forceful pulling the victim inside the four wheeler was first committed by the appellant;

(iii) The victim was taken by the accused/ appellant near a Shiv temple from where she was taken by him to an orchard, thereafter the appellant touched the breast and cheek of the victim and put his private part into mouth of the victim and discharged semen and raped her also.



12. No doubt, in respect of the allegation levelled by the victim in her F.I.R., which is based on her written application, the alleged offence for which the appellant was charged may attract and in such type of offence the victim's evidence can be deemed to be the most important piece of evidence but where the medical evidence does not support the allegation of penetrative sexual assault then the victim's evidence must be beyond reasonable doubt only then in such a situation one can be punished. In the present matter, as per allegation levelled by the victim, the accused forcefully pulled her inside his four wheeler vehicle, thereafter she was taken by him near Shiv temple from where she was taken to an orchard and there the accused sexually assaulted her in the manner mentioned above. Regarding the persons whose presence may be natural near the main place of occurrence the victim was cross-examined and she deposed in the cross-examination that there are houses of several persons near Shiv temple and there are also houses of people near Patahi Middles School. As per prosecution's story, the alleged occurrence took place in the afternoon in day time and as per allegation, the accused committed several acts to complete the occurrence of penetrative sexual assault as firstly, the accused dashed his four wheeler vehicle against the cycle of the victim on which she was



riding, secondly after dashing the victim's cycle she was forcefully pulled inside a four wheeler of the accused/ appellant and thirdly she was taken near a Shiv temple where the accused started misbehaving with her and from that place she was taken to an orchard by the accused/ appellant, where the appellant/accused committed rape with her.

13. It is unbelievable that all these events forming a chain did not come into notice of any of the persons residing near the said Patahi Middle School and Shiv temple while as per victim's own statement, there are houses of several persons near both the places and the alleged occurrence took place in the afternoon. Furthermore, the Investigating Officer did not make any effort to examine any of the persons residing near both the places and during trial, all the private witnesses produced by the prosecution except the victim did not claim to have seen the commission of the alleged occurrence and their evidence appears to be hearsay evidence and amongst the said witnesses PW 3, PW 5, PW 7 are relatives of the victim.

14. In the present matter, as per allegation made by the victim, the accused committed sexual intercourse with the victim forcefully for about one hour but the doctor concerned, who examined the victim, found the victim's hymen intact and also, did



not find any type of injury on victim's private part though in the offence of penetrative sexual assault it is not mandatory that in such type of every act the hymen of victim girl is ruptured but where one committed such sexual act of penetration for about an hour then in ordinary course the hymen of a female lady will be ruptured except in some exceptional circumstances. Accordingly in the light of these facts, the medical opinion given by the doctor, who examined the victim, goes against the prosecution. In the present matter, the appellant was charged for the offences punishable under Section 376 of the IPC and Section 4 of POCSO Act but he was convicted under Section 8 of POCSO Act, which is a lesser serious offence than the offences charged and the learned trial court mainly considering the medical evidence concerned to the victim disbelieved the allegation of penetrative sexual assault allegedly committed by the appellant upon the victim but other allegation concerned to the offence under Section 8 of POCSO Act was believed to be made out against the appellant in the present matter. As per prosecution's story, the victim is stated to be sole eye witness of the commission of the alleged crime so, when we deem her evidence to be reliable then merely placing reliance on the medical expert's opinion the important part of her allegation can not be disbelieved and in such a situation, either her complete



allegation may be deemed to be true or to be false particularly when such victim is a sole eye witness of the occurrence of alleged sexual assault and medical evidence does not support her allegation. In the present matter the approach of learned trial court deeming one part of the victim's allegation to be true and second part of her allegation to be false does not appear proper in view of the facts of present matter.

15. In the present matter, the I.O. completely remained careless in collecting the relevant and important evidences during the course of investigation, as firstly the persons residing near the places of occurrences were not examined and secondly no evidence was collected by the I.O. regarding the alleged vehicle which was used by the accused in committing the alleged occurrence and thirdly, the victim's clothes which she wore at the time of alleged occurrence were not seized nor the same were examined by an expert.

16. Here it is relevant to mention that as per F.I.R., the victim was a student of Intermediate class at the time of alleged occurrence so, in such a situation the prosecution could have easily produced the victim's educational certificates or documents to prove her age but this evidence was withheld by the prosecution and as per clinical and radio-logical opinion given by



the Medical Board regarding the victim's age, she was found to be 18-19 years old at the time of examination but such report was also not proved by the prosecution which shows that the prosecution did not remain serious to prove the victim's age and the said situation, goes against the prosecution and merely on this ground the appellant is entitled to be exonerated from the charges under POCSO Act.

17. In view of the evidences available on the case record of the trial court, as discussed above, this court finds that the prosecution did not succeed to prove the allegation made by the victim which is relevant for the offence punishable under Section 8 of POCSO Act for which the appellant has been convicted, beyond reasonable doubt and in view of the medical evidence and other evidences available on the case record this court finds that the learned trial court committed an error in believing a part of the allegation of the victim to be true but other part of the allegation to be false and the investigation made by the police into the allegations completely remained faulty and prosecution withheld the documentary evidence which was the best proof of victim's age so, in such circumstances, the appellant's conviction for the offence punishable under Section 8 of POCSO Act is not sustainable in the eye of law as such the



appellant's conviction for said offence is set aside and the appeal stands allowed.

18. As the appellant was in custody when he was convicted on 30.11.2017 and after filing the present appeal he has not been granted bail under Section 389(1) of the Cr. P.C. hence, the appellant might have served the complete sentence of imprisonment awarded upon him by the trial court. However, let a copy of this judgement be sent to learned trial court as well as Jail Superintendent concerned for needful.

19. Mrs. Vaishnavi Singh, learned *Amicus Curiae* shall be entitled to remuneration, as per notification dated 18.05.2017 issued by the State Government, to be paid by the Patna High Court Legal Services Committee for assisting this court as an *Amicus Curiae*.

(Shailendra Singh, J)

BKS/-

AFR/NAFR	AFR
CAV DATE	N.A.
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