

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1120 of 2023**

Arising Out of PS. Case No.-346 Year-2018 Thana- KAMTAUL District- Darbhanga

Vijay Das Son of Ganesh Das Resident Of Village - Madhupur, Ps- Kamtaul,
Dist- Darbhanga

... .. Appellant/s

Versus

1. The State of Bihar
2. Mrs. XXX NA NA

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Rakesh Kumar Srivastava, Advocate
Mr. Jitendra Kumar, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE JITENDRA KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 07-08-2024

Heard Mr. Rakesh Kumar Srivastava, learned

Advocate for the sole appellant and Mr. Abhimanyu
Sharma, learned APP for the State.

2. The appellant has been convicted under Sections 376 (AB) and 341 of the IPC and Section 6 of the POCSO Act *vide* judgment dated 25.08.2023 passed by the learned Special Judge, POCSO Act, Darbhanga in POCSO G.R. No. 57 of 2018/Registration No. 57/2018, arising out of Kamtaul P.S. Case No. 346 of 2018. By order dated 29.08.2023, he has been sentenced to undergo R.I. for 20



years, to pay a fine of Rs. 10,000/- and in default of payment of fine, to further suffer S.I. for six months for the offence under Sections 376 (AB) of the IPC. For the offence under Section 341 of the IPC, the appellant has been sentenced to undergo S.I. for one month, to pay a fine of Rs. 500/- and in default of payment of fine, to further undergo S.I. for one week. For the offence under Section 6 of the POCSO Act, 2012, the appellant has again been sentenced to undergo R.I. for 20 years, to pay a fine of Rs. 10,000/- and in default of payment of fine, to further suffer S.I. for six months.

3. All the aforementioned sentences have been directed to run concurrently.

4. It may not be out of place here in this context to state that along with the appellant, his mother Kaushalya Devi also was put on Trial but she has been acquitted.

5. The FIR was lodged by the mother of the victim (P.W. 2), who in her written report addressed to the officer-in-charge of Kamtaul Police Station, Darbhanga had alleged



that her neighbour *viz.* the appellant while taking tuition of the victim/her daughter and other pupils on her rooftop in the night of 03.12.2018, tried to outrage the modesty of the victim.

6. It was alleged by her that on some pretext, the other pupils were allowed to go and the victim was asked to stay back. It was then that the appellant sexually misbehaved with the victim. When the victim narrated about the incident to P.W. 2 in the evening, she went to the house of the appellant where she was ill-treated by the appellant and her mother/Kaushalya Devi. She was also assaulted and was told to do whatever they could, as nothing would happen to the appellant.

7. On the basis of the aforementioned written report referred to above Kamtaul P.S. Case No. 346 of 2018 dated 04.12.2018, initially was registered for investigation under Sections 341, 323, 354, 354(B), 504, 506 and 34 of the IPC read with Sections 8 and 12 of the POCSO Act, 2012.



8. The learned Advocate for the appellant has drawn special attention to the aforementioned fact that when the written report was lodged, the only allegation against the appellant was of having made some sexual overtures, bordering on sexual misdemeanor. There was no allegation of any sexual assault, attracting the offences under Sections 4 or 6 of the POCSO Act, 2012. The victim was spoken of by her mother/P.W. 2 as a girl of seven years.

9. The police after investigation submitted chargesheet, whereupon cognizance was taken and the appellant was tried.

10. The Trial Court after having examined eight witnesses on behalf of the prosecution and two on behalf of the defence, convicted the appellant but acquitted his mother of the charges referred above.

11. Out of the eight prosecution witnesses, Kamlesh Das and Ram Sristha Das (P.Ws. 1 and 5) have been declared hostile.



12. It is also worthwhile to mention here that with respect to the occurrence which had taken place in the night of 03.12.2018 and for which the FIR was lodged on 04.12.2018, the victim was taken to the Magistrate on 13.12.2018, when her statement under Section 164 Cr.P.C. was recorded. The victim was subjected to medical examination only on 18.02.2019 *i.e.* after a delay of 1½ months approximately.

13. It would be appropriate in our estimation to first refer to the medical evidence, even being conscious of the fact that medical testimony would not be the surest test for finding the truthfulness of the allegations.

14. Dr. Sangeeta Singh (P.W. 6) had examined the victim on 18.02.2019 as referred to above. She did not see any sign of internal injury but noticed that the hymen was partially torn. In the genital examination, except for presence of RBC, epithelial cells and some pus cells, nothing substantive was found. There was no spermatozoa present in the vaginal swab. On the basis of radiological



examination, the victim was found to be between 8 to 9 years of age.

15. What is relevant to note is the disclosure of P.W. 6 in her cross-examination. She has stated before the Court that hymen gets fully developed in a girl at her 12th or 13th year. From the clinical examination, she found the torn hymen of the victim to be of recent past. She has specifically averred that the torn hymen could be only one or two days earlier from the date of examination, which could have happened also due to itching of vaginal cavity or fingering. This declaration of P.W. 6 was not taken lightly and she was subjected to further cross-examination and was asked as to the basis for her disclosure that the torn hymen was only one or two days old. The answer of P.W. 6 was that such deduction was on the basis of the colour of the torn hymen.

16. In this context, it would be apposite to refer to the deposition of the victim herself, who has been examined as P.W. 3. The Trial Court tested her competence



to depose in the *voir dire*. She narrated about the incident and disclosed before the Trial Court that the appellant allowed the other pupils to leave the class. She was asked to recite the table of three which she could not. Later, the appellant is said to have mounted upon her and committed rape.

17. In her cross-examination, however, she has admitted that the appellant would stand in the relation of a cousin to her and that his house is situated next to her house.

18. What has struck our attention is her disclosure that she was raped by the appellant, while he had mounted himself on her back and in presence of her mother. The victim claims to have shouted immediately on the appellant having attempted to molest her and on such cries, her mother (P.W. 2) had arrived. The appellant never ran away even on seeing her mother. On further questioning, she has stated that the appellant continued to rape her for about an hour and her mother did not make any attempt to remove



her from the clutches of the appellant nor did she make any attempt to stop the appellant or to apprehend him.

19. She has further disclosed that she had told the police that when the appellant tried to molest her, she had shouted whereafter the appellant left her and fled away.

20. The suggestions to her about there being inimical relationship between the families was but denied.

21. The mother of the victim (P.W. 2) again does not appear to be very truthful. All her effort was to deny about any dispute over any portion of land. She has wrongly denied that the appellant does not hail from the same stock of family. From the tenor of her deposition, it appears that she was badly assaulted on 04.12.2018, *i.e.*, a day after the occurrence and that she had got herself treated at D.M.C.H. There is incidentally no report substantiating the aforementioned accusation.

22. Admittedly, the victim was medically examined after two months and fifteen days. She denied that the



appellant was himself a person of young age, who was prosecuting his studies at Pupri.

23. What is remarkably noticeable in her deposition is that according to her and the victim also, the appellant was teaching the pupils, including the victim, at about 7.00 P.M. on the rooftop in the month of December. This does not appear to be probable as by that time, winter descends and it is not expected that classes would be taken on the rooftop.

24. Dukhni Devi (P.W. 4) is the grand-mother of the victim who though has supported the accusation but was very ambivalent with respect to the relationship of the appellant with the family of the victim. However, from the family tree and genealogy given by her, it stood established that the appellant came from the same stock of family.

25. This takes us to the evidence of the investigator *viz.* Sudarshan Kumar Yadav (P.W. 8). He was posted as ASI in Kamtaul Police Station at the relevant time, who was handed over the investigation of this case.



He had taken the statement of the mother of the victim on 04.12.2018 and had also inspected the place of occurrence.

26. The only thing which he could find of consequence was that the roof of the house of the appellant and that of the informant was contiguous. He did not take care to examine persons of the neighbourhood, but claims to have examined few of the villagers, none of whom have been examined at the Trial. He also did not care to find out the age of the victim nor did he inquire about the school where the victim went for studies. The statement of the father of the victim also was not taken by him, without there being any explanation whether he was present in the village or had gone somewhere else to earn his livelihood.

27. The latter part of the investigation was conducted by Anil Kumar (P.W. 7), who only seems to have got the victim medically examined on 18.02.2019.

28. Apart from this, he was candid enough to disclose before the Trial Court that he had no idea about



the case as he had not recorded the statement of anyone of the witnesses.

29. On the contrary, the two defence witnesses, viz., Md. Jaki Ahmad (D.W. 1) and Malkiniya Devi (D.W. 2) have stated that the appellant never took tuitions and had been prosecuting his studies in the house of his maternal grand-father at Pupri, far away from the village of the occurrence. Both of them also disclosed that there was a land dispute between P.W. 2 and the mother of the appellant. Since the houses of the appellant and the victim are located side by side, very frequently they used to be fight over the issue of disposal of garbage. They have thus stated that the appellant has falsely been implicated.

30. True it is that in a case of rape, there may not be any need for corroboration but only if the victim's statement is truthful and trustworthy.

31. A victim and that also an 8 to 9 years old girl is never to be treated as an accomplice in the crime. However, it would be a travesty of justice, if the allegations



are not analyzed appropriately and seen in the correct perceptive.

32. The evidence on record has to be scrutinized with great care and circumspection.

33. On perusing the records in detail and on hearing the parties, we have found that initially the case was lodged only with the accusation of attempt at molestation. The victim was examined medically after a long time. In the medical examination, the torn hymen was opined to have been caused a couple of days earlier. That apart, we have taken due notice of the fact that the allegation of the appellant having committed sexual misdemeanor with the victim on the rooftop in the night of a winter month. The victim herself has stated something which makes her entire deposition untrustworthy.

34. According to her, the mother was present all through when she was subjected to sexual intercourse. This does not appear to be possible, especially when the appellant is related to the victim and the informant. If the



victim is to be believed, then perhaps the mother did not make any attempt to stop the appellant or to apprehend him for his having committed such an offence with her minor daughter.

35. It thus appears that the accusation have been levelled for some ulterior purposes. Though it could not be deciphered during Trial but from a close look at the deposition, it appears that there was some dispute with respect to a parcel of land near the temple and graveyard in the village.

36. Was this allegation because of that is the question which has been bothering us all this while.

37. The victim definitely is a minor, as it appears from the assessment of her age on the basis of radiological examination and also the date of birth in the school which she attended.

38. This, itself, would not be sufficient to invoke the mischief of Sections 29 and 30 of the POCSO Act, 2012, unless it were proved by the prosecution that the



offence had taken place and that appellant had committed sexual intercourse with the victim.

39. We have also noticed that the other pupils who were named by the victim and their mothers were not examined. We do not find fault with the Trial Court not taking any notice of the aforementioned non-examination as it may not have been all that essential.

40. However, non-examination of one Jivesh Das, who is said to have drafted the written report assumes importance, especially when the victim was not subjected to any medical examination for about more than a month. The appellant also was not subjected to any medical examination as mandated under Section 54A of the Cr.P.C. All these, cumulatively, make the case doubtful against the appellant.

41. Giving benefit of doubt to him, the appellant is thus acquitted of the charges.

42. The appeal succeeds.



43. The appellant is in jail. He is directed to be released from jail forthwith, if not wanted or detained in any other case.

44. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

45. The records of this case be returned to the Trial Court forthwith.

46. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

krishna/ravi

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	08.08.2024
Transmission Date	08.08.2024

