

(2023) 11 PAT CK 0032

In the Patna High Court

Case No : Criminal Appeal (DB) No. 212 Of 2022

Indrajeet Paswan @ Indrajeet Rai @ Indrajeet Kumar

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 10-11-2023

Acts Referred:

Indian Penal Code, 1860 — Section 363, 365, 376, 506

Code of Criminal Procedure, 1973 — Section 161, 164, 313

Protection of Children from Sexual Offences Act, 2012 — Section 4, 29

Citation : (2023) 11 PAT CK 0032

Hon'ble Judges : Chakradhari Sharan Singh, J; Gunnu Anupama Chakravarthy, J

Bench : Division Bench

Advocate : Sharda Nand Mishra, Manish Kumar No. 2

Final Decision : Allowed

Judgement

1. This criminal appeal has been preferred against Judgment of conviction dated 14.02.2022 and order of sentence dated 16.02.2022 passed by the learned Additional Sessions Judge VI – cum – Special Judge POCSO, Jehanabad, in POCSO Case No. 24 of 2020 (arising out of Barabar Paryatan P.S. Case No. 41 of 2020. By the judgment and order aforesaid, the appellant has been convicted and sentenced as under: -

Convicted under Sections

Sentence

Indrajeet Paswan @ Indrajeet Rai @ Indrajeet Kumar

Imprisonment

Fine (Rs.)

In default of fine

376 of the IPC

R.I. for Life

10,000/-

R.I. for one year

4 of the POCSO Act

R.I. for Life

10,000/-

R.I. for one year

363 of the IPC

R.I. for Life

10,000/-

R.I. for one year

365 of the IPC

R.I. for Life

10,000/-

R.I. for one year

506 of the IPC

R.I. for Life

5,000/-

R.I. for one year

All the sentences have been directed to run concurrently.

2. As the matter relates to Section 376 of the Indian Penal Code and section 4 of the POCSO Act, we are of the considered view that the names of the victim or the parents of the victim shall not be disclosed in the judgment in order to safeguard the identity of the victim girl as per the directions of the Hon'ble Supreme Court.

3. We have heard Mr. Sharda Nand Mishra, learned counsel for the appellant and Mr. Manish Kumar No. 2, learned APP for the State.

4. The criminal case was set into motion basing on the written information dated 10.06.2020 given by the father of the victim, who is the informant (P.W.-9), to the Director General of Police, Patna, for which an F.I.R. was registered as Barabar Paryatan P.S. Case No. 41 of 2020.

5. The brief contents culled out of the written application are that the minor daughter of the informant has been eloped from the window of the semi-

furnished house by the appellant, who happens to be the tuition teacher for his children. On 7.5.2020, the appellant was hiding himself near the bathroom. The victim went out for natural call at around 12.00 in the midnight. The appellant covered her mouth with a cloth, took her to the corridor, continued to rape her and also threatened her to kill. The wife of the informant woke up at 3.00 A.M. for attending a natural call and started shouting on seeing the victim in half naked condition. On hearing the noise, the informant got up and the people nearby also woke up, came to the place of occurrence saw the appellant. Further, the informant hit the appellant 2-4 blows and in the meantime the appellant escaped jumping over the semi constructed wall, but the shirt, slipper and mobile of the appellant were left in the corridor. Later the appellant called the informant and threatened him that he would kill the family members in the event of informing the said incident to the police and that due to fear he did not inform about the incident to any one. Further, the contents of the written application disclose that on 08.06.2020, the appellant eloped the victim girl and she was traceless. The appellant as a teacher used to teach the victim in the 9th and 10th standard and that the appellant has been sexually exploiting her and threatened to kill her in the event of revealing the facts to others. Therefore, they prayed to take an action against the appellant.

6. Basing on the report / written application, the SHO, Barabar Paryatan Police Station registered the case, against the appellant vide FIR bearing Case No. 41 of 2020 dated 10.06.2020 for the alleged offences punishable under sections 363, 365, 376 and 506 of the IPC and under Section 4 of the POCSO Act.

7. During the course of investigation, the Investigating Officer has recorded the statement of witnesses under Section 161 of the Cr.P.C., and also got examined the victim under Section 164 of the Cr.P.C.. Further the victim was refused to medical examination. The Investigation Officer arrested the appellant and produced before the Court for judicial remand. On completion of the investigation and after receiving of the documents, the Investigating Officer laid charge-sheet against the appellant for the aforesaid offences.

8. The trial court took cognizance for the said offences and during the course of trial charges were framed against the appellant for the offences punishable under Sections 363, 365, 376 and 506 of the IPC and Section 4 of the POCSO Act on 18.12.2019, which were read over and explained to him and the appellant pleaded not guilty and claimed to be tried.

9. In order to prove the case against the appellant beyond the reasonable doubt, the prosecution has examined nine witnesses i.e. PW1 - Sanjay Singh, P.W.2 - the mother of the victim, PW 3 - Ashok Prasad (Co-villager), P.W. 4 - Pramod Kumar Paswan (Constable No. 413), P.W. 5 - the victim herself, P.W. 6 - Suresh Singh (Co-villager), P.W. 7 - doctors of Sadar Hospital Jehanabad, P.W. 8 - the Investigating Officer and P.W. 9 - the father of the victim (Informant).

10. In addition to the oral evidence of the prosecution's witness, the prosecution

also brought on record documentary evidence i.e., Exhibits 1 to 8 viz. signature of the victim on her statement under section 164 Cr.P.C. Ext. 1, Medical Report Ext. 2, Forwarding on the written petition of the informant for registering the case Ext. 3, Endorsement regarding registration of the case on the written petition of the informant Ext. 4, Formal F.I.R. Ext 5, Arrest memo of the accused Ext. 6, Written petition of the informant Ext 8, Statement of the victim under section 164 Cr.P.C. Ext 7, Sealed bag containing a pair of Chappal and cloths material Ext I, Shirt material Ext II and Chappal material Ext. III. The accused was examined under section 313 of the Cr.P.C. for the incriminating evidence of the prosecution which was denied by the appellant.

11. The trial court after considering entire material on record has convicted the appellant for the above said offences as stated supra.

12. It is contended by Learned counsel appearing on behalf of the appellant that 164 Cr.P.C. statement of the victim clearly disclose that the appellant and the victim had a love affair and pursuant to it, they had made physical relationship several times and at the instance of the victim they fled away from the house on 09.06.2020, which was not at all considered by the trial court. It is further contended that the medical evidence do not support the oral evidence of the prosecution witnesses and in any manner to show that the rape was committed against the victim girl by the appellant. It is also the contention of the counsel for the appellant that there is delay in lodging the FIR and no reasons have been assigned as to why, the report was not given to the police at the first instance, when the alleged offence took place on 07.05.2020 and as to why there is delay in lodging the complaint on 08.06.2020 though the victim was said to be eloped with the appellant on 06.06.2020. It is further contended that there is no documentary evidence to prove that the victim was aged below 18 years, in order to attract the offences punishable under the POCSO Act. It is also contended by learned counsel for the appellant that the evidence of PW-8 / Investigating Officer, reveal that the date of birth of the victim is 10.12.2003 but no documents was filed to prove the said fact and, therefore, contended that the judgment passed in POCSO Case No. 24 of 2020 (arising out of Barabar Paryatan P.S. Case No. 41 of 2020) is unsustainable and deserves to be set aside.

13. On the other hand it is contended by learned Additional Public Prosecutor for the State of Bihar that there is no error or irregularity in the order passed by the trial court and the victim herself has deposed that she has been sexually assaulted and kidnapped by the appellant, therefore, the judgment of the trial court need no interference and prayed to confirm the judgment.

14. We have given a thoughtful consideration of the submissions made by the rival parties and on re-appreciation of the evidence, the points that arose for determination is that:-

(i) "whether the prosecution is able to prove the guilt of the appellant beyond reasonable doubt for the alleged offences punishable under Sections 363, 365,

376 and 506 of the IPC and Section 4 of the POCSO Act?

(ii) whether the appellant is able to reverse the burden of proof under section 29 of the POCSO Act?

(iii) whether the trial court has rightly convicted the appellant for the above said offences?

15. P.Ws.1 and 3 are the uncles of the victim. Their evidence disclose, on hearing the noise, they went to the house of the victim and saw her in a naked condition, near the door inside the house and they were informed by the family members that the appellant forcibly raped the victim. They further testified that the victim used to take tuition from the appellant, further he came to the victim's house in the mid-night and committed rape against the victim. They also found the shirt and mobile of the appellant which were left over by him. In the cross-examination, it is admitted by both of them that written application was not given at the time of the incident and the said incident took place on 07.05.2020. They also testified that do not know whether the victim stated in her statement about the love-affair between her and the accused.

16. P.W.-2 is the mother of the victim girl. Her evidence disclose that the incident took place in the midnight of 08.06.2020 and the victim was aged 16 years on the date of occurrence. She testified that she saw the appellant raping the minor by stuffing a cloth in the mouth of the victim and when she raised an alarm, her husband came and caught hold of the appellant slapped him twice or thrice and the appellant got himself free by jumping over the wall. P.W.-2 was not cross-examined as the defence did not appear on the said date.

17. P.W.-4 is the constable, who has submitted the seized articles before the Court, which is at Exhibit article I. It was testified by him that he has no personal information as to when and from whom the items were recovered. Therefore, much weightage need not be given for appreciating the evidence of P.W.-4.

18. P.W.-5 is the victim. She testified that the incident happened about 7 – 8 months back in the midnight. The accused was hiding himself when she went to the bathroom and that he closed her mouth with a Duppatta and he committed wrongful acts on her. She further testified her mother witnessed the said acts and screamed. On hearing the voice of her mother, her father got up and came to the place of occurrence, slapped the appellant twice and thrice, on that, the appellant fled away by jumping the wall. She further testified that a month later, the appellant came to her house and took her away. Further the appellant tied her mouth and eyes, threatened her with a gun to kill her, if she makes any noise and also threatened her that he would kill her parents. Further the appellant kept her for two days and did wrong things. After coming to know that her father filed a case, the appellant left her at the Police Station's gate and asked her to go to the Police Station otherwise he will beat her. She further testified that she was treated by the doctor and her statement was recorded in the Court. The 164 Cr.P.C. statement of the victim is marked as Exhibit P1. Further the Exhibit

material was opened in the Court, where she identified the shirt and slippers as that of the appellant, which were marked as Exhibits II and III. It is also testified by her that the accused appellant used to come to their house to teach her brothers and sisters and used to talk to her and that their parents lived outside. Further testified that the second incident took one month after the first incident. After the second incident, the appellant took her to Vishnuganj O.P. Gate and she was nervous and do not know whether the Police recorded her statement or not. PW-5 admitted in her cross-examination that she had also said something wrong in her statement in front of the Magistrate because the appellant threatened to kill her and her parents and further she did not inform the Police about the threats and did not make any such application.

19. P.W.-6 is the neighbour. He testified that he heard the noise, woke-up, went out and saw the victim in a naked condition and also saw the appellant running away. Further they came to know about the incident, that the appellant committed rape on the victim girl.

20. P.W.-7 is the Medical Officer. His evidence disclose that he is the member of the Medical Board constituted by the Superintendent of Sadar Hospital for examining the victim on 11.06.2020. He examined the victim along with other doctor of Board at 4:10 P.M. and found the followings :-

“(A) No external injury was present on the person of victim.

(B) Pregnancy test was negative.

(C) Secondly sexual characters were present.

(D) Hymen was ruptured.

(E) No sign of internal injury was present.

(F) No foreign body was present in private part.

(2) On the basis of the aforesaid report the victim was sexually active.

(3) No spermatozoa was found in her private part. A few epithelial cells were present.

W.B.C. – No R.B.C. – No

Other findings – None”

21. It is opined by P.W.-7 that the victim was sexually active and that she cannot say whether rape was committed or not? It is admitted by P.W.-7 that in case of rape of woman, is expected to protest for which there may be external or internal injuries. Further, testified that the hymen of the victim was old ruptured and there are so many reasons of hymen rupture such as cycling, wrestling etc.

22. P.W.-8 is the Investigating Officer. His evidence disclose that he received the written application of the victim’s father, for which he registered a case. During

the course of investigation, he recorded the statements of the witnesses, collected the material objects from the scene of offence got the statement of the victim recorded by the Judicial Officers under Section 164 of Cr.P.C. referred the victim for medical examination. Later he arrested the appellant on 17.06.2020. After completion of the investigation laid charge-sheet against the accused/appellant for the offences punishable under sections 363, 365, 376 and 506 of the IPC and under Section 4 of the POCSO Act. In the cross-examination, it is admitted by P.W.-8 that the written application was addressed to Director General of Police, Patna, dated 10.06.2020 and as per the written application the F.I.R. was registered on 16.06.2020 and the alleged incident of eloping the victim took place on 08.06.2020. Later the victim came to the Police Station with her relatives.

23. P.W.-9 / informant is the father of the victim. His evidence clearly disclose that the first occurrence of the alleged rape took place on 07.05.2020 in the midnight and it was witnessed by his wife at 3:00 P.M., on 08.05.2020. Further, the second occurrence took place on 08.06.2020, where the appellant kidnapped the victim and the victim was traced after two days. In the cross-examination, it is admitted by P.W..9 that he has not filed any case at the time of first occurrence i.e., allege rape by the appellant on the victim. But he filed the written application to the DGP when his daughter was missing.

24. On the basis of the entire evidence on record, we are of the considered view that P.Ws.1, 3 and 6 are not the eye witnesses to the incident and they came to know about the incident on 08.05.2020 early hours. But no complaint was made by P.W.-9, i.e., the informant on the said day. P.W.-2 and P.W.-9 are the parents of the victim. They too admit that the first occurrence occurred on 07.05.2020 i.e., the alleged commission of rape by the appellant on the victim. The second occurrence took place after a month i.e. on 08.06.2020, where it is alleged that the appellant has kidnapped the victim. It is also admitted by P.Ws. 2 and 9 that they have not preferred any report/written application to the Police when the commission of offence of rape was committed against the victim.

25. As already stated as supra, no weightage can be given for the evidence of P.W.-4 as he has no knowledge about the offence.

26. The crucial point which has to be re-appreciated is that of the evidence of the victim. It is specifically admitted by the victim that she gave statement to the Magistrate under Section 164 of the Cr.P.C.. On perusal of 164 Cr.P.C. statement of the victim it is evident that the victim loved the appellant and had physical relationship with him on several occasion. On 09.06.2020 at around 11:00 A.M. she ran away from the house and asked the appellant to marry her, for which the appellant stated that he will marry her once she attains the age of 18 years. Her statement further disclose that her parents have come home for Holi festival and P.W.-9 i.e., the father, came to know about their love-affair and admonished her not to talk with the appellant. On that she informed everything to the appellant and when one day the appellant came to his house to procure a book, the people

outside saw him and beat the appellant, for which the appellant left the house by leaving his slippers and bag. It is also specifically stated by P.W.-5 i.e., the victim, before the Magistrate that she intends to stay with her parents, but was afraid that the parents might do something to her.

27. On perusal of the entire oral and documentary evidence, this Court is of the considered view that the appellant and the victim are in physical relationship, since long time that too said relationship is with the consent of the victim girl. It can be construed that no incident occurred (committing of rape) in the midnight of 07.05.2019. If at all any such incident took place in the midnight of 07.05.2020, P.W.-2 and P.W.-9 being parents ought to have preferred a complaint against the appellant on the same day. Further the medical evidence also do not support the case of the prosecution in any manner. The evidence of P.W.-7 clearly disclose that no external injuries were found on the victim girl. The pregnancy test was negative, there are no signs of any internal injuries or a foreign bodies and the victim was sexually active. It is specifically opined by the P.W.-7 i.e., the Medical Officer that hymen of the victim was old-ruptured and there are many reasons for hymen rupture and the allegation of rape is not proved as per the medical evidence.

28. Further the 161 Cr.P.C. statement of the witnesses can be used for corroboration or for contradiction. The 164 Cr.P.C. statement of the witness is contradicting with that of the evidence of the testimony of the victim girl. The initial statement of the victim clearly disclose that the appellant had love-affair with the victim and they had physical relationship and even the appellant intends to marry her once she attains the age of 18 years. Further the statement clearly disclose that the victim voluntarily ran away from the house and that the appellant has never kidnapped her and further the victim was caught hold by the Police. The evidence of Investigating Officer reveals that the victim herself came to the Police Station along with the family members. Therefore, we are of the considered view that the evidence of the victim is not trustworthy and reliable as her statement before the Magistrate is completely contradicting with that of her testimony. No reasons have been assigned as to why there was no complaint registered against the appellant when the alleged incident of rape took place on 07.05.2020.

29. Further the age of the victim was also not determined by the Trial Court so as to prove that she is aged below 18 years so as to attract the provisions under POCSO Act and, therefore, the appellant deserves for benefit of doubt.

30. In view of the above said discussions, the conviction and the judgment of conviction and the sentences are not sustainable and are liable to be set aside.

31. Accordingly, the impugned judgment of conviction dated 14.02.2022 and order of sentence dated 16.02.2022 passed by the learned Additional Sessions Judge VI – cum – Special Judge POCSO, Jehanabad, in POCSO Case No. 24 of 2020 (arising out of Barabar Paryatan P.S. Case No. 41 of 2020) is hereby set

aside.

32. Accordingly, the appeal is allowed.

33. The appellant, namely, Indrajeet Paswan @ Indrajeet Rai @ Indrajeet Kumar is in custody. Let him be released forthwith, if not required in any other matter.