

(2023) 11 PAT CK 0011

In the Patna High Court

Case No : Criminal Appeal (DB) No. 587 Of 2021

Radheshyam Sah @ Radhe Shyam Sah

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 08-11-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 376, 506

Code of Criminal Procedure, 1973 — Section 164, 313, 374(2)

Protection of Children from Sexual Offences Act, 2012 — Section 2(1)(d), 4, 29, 30, 34(2)

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 3(xii)

Juvenile Justice (Care and Protection of the Children) Act, 2015 — Section 94

Citation : (2023) 11 PAT CK 0011

Hon'ble Judges : Chakradhari Sharan Singh, J; Nawneet Kumar Pandey, J

Bench : Division Bench

Advocate : Ashok Kumar Chaudhary, Akshansh Ankit, Sujit Kumar Singh

Final Decision : Allowed

Judgement

1. The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction dated 06.04.2021 and order of sentence dated 12.04.2021, passed by the learned Additional Sessions Judge VI-cum-Special POCSO Judge, Madhubani in G.R. No. 48 of 2016, arising out of Mahila P.S. Case No. 76 of 2016, whereby and whereunder the appellant has been convicted and sentenced as under:-

Conviction under Section

Sentence

Imprisonment

Fine (Rs.)

In default of fine

376 of the Indian Penal Code

Life Imprisonment

10,000/-

Imprisonment for three months

506 of the Indian Penal Code

R.I. for seven years

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4 of the POCSO Act, 2012

Life Imprisonment

10,000/-

Imprisonment for three months

3(xii)/3(2)(V)

SC/ST Act

Life Imprisonment

10,000/-

Imprisonment for three months

All the sentences have been ordered to run concurrently.

2. The victims' names and those of her relatives are not being disclosed in the present judgment and order so as to protect their identities and are being referred to as the prosecutrix/informants/victims/PWs.

3. The prosecutrix/informant of this case claims herself to be a minor girl. Her fard-beyan was recorded by PW 7, ASI, Mahila P.S. Madhubani on 12.08.2016, on the basis whereof Mahila P.S. Case No. 76 of 2016 was registered on 12.08.2016 at 6:30 PM under Section 376/34 of the IPC, Section 4 of the POCSO Act, 2012 and Section 3 (XII) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4. The informant mentioned in her fard-beyan that on 11.08.2016, a dance programme was organized in the house of the appellant at the occasion of birth of his child. The prosecutrix and her cousin sister (the name for the sake of confidentiality cannot be disclosed) went to the house of the appellant for watching dance. At 11.00 PM, they were returning to their homes and when they reached near Tingachiya, the appellant and co-accused Pappu Sah, who is nephew of the appellant, came there. The appellant caught hold of her and

committed rape upon her and when they raised alarm, the accused persons fled away. While fleeing away, co-accused Pappu Sah threatened the cousin sister of the informant from raising alarm and he also gagged her mouth. The duo victims, thereafter, went to their house and narrated the incident to their parents.

5. After registration of the FIR, the investigation was carried out and on 15.11.2016, the investigating authorities submitted charge-sheet no. 121 of 2016 (Ext. 7) against the appellant under Sections 376/506/34 of the IPC and Section 4 of the POCSO Act, 2012 and Section 3 (xii) of the SC/ST Act. The investigation against the co-accused Pappu Sah remained pending. On 31.01.2017, the charges were framed against the appellant for commission of the offences punishable under Sections 376, 506 of the IPC, Section 4 of the POCSO Act and Section 3 (XII) of the SC/ST Act. The charges were read over and explained to the appellant to which he pleaded not guilty and claimed to be tried.

6. The prosecution examined altogether seven witnesses to prove its case. PW 1 is the prosecutrix herself. PW 2 is her mother. PW 3 is her father. PWs 4 and 5 are the doctors, who are the members of the Medical Board, which conducted the medical examination of the prosecutrix. PW 6 is cousin sister (also a victim) and PW 7 is the Investigating Officer.

7. The following documentary evidences have also been adduced by the prosecution:-

Sl.

No.

Description

Exhibit No.

1.

Signature of victim on written application

Exhibit-1

2.

Signature of victim on statement of 164 of the CrPC

Exhibit-1/1

3.

Report of Medical Board

Exhibit-2

4.

Signature of witness on fardbeyan

Exhibit-3

5.

Handwriting and signature of Mathura Das on formal FIR

Exhibit-4

6.

Signature of ASI, Kanchan Kumari on fardbeyan

Exhibit-5

7.

Handwriting and signature of Mathura Das on fardbeyan

Exhibit-6

8.

Handwriting and signature of Mathura Das on charge sheet No. 121/16

Exhibit-7

9.

Signature of the victim on compromise petition

Exhibit-A

10.

Signature of father of the victim on compromise petition

Exhibit-A/1

8. The appellant was questioned by the trial court under Section 313 of the CrPC for enabling him to explain the incriminating circumstances appearing in evidence against him. The appellant answered all those questions in negative and pleaded his complete innocence.

9. Three witnesses have also been examined on behalf of the defense who deposed about false implication of the appellant due to Panchayat election rivalry.

10. PW 1 is the informant herself. She deposed that on the day of occurrence, she along with her cousin sister, had gone to the house of the appellant to watch dance and when they were returning to their home, the appellant and his nephew, having seen them in the way, the appellant caught hold of the prosecutrix whereas co-accused Pappu Sah caught hold of the cousin sister of the informant. The appellant committed rape upon the prosecutrix whereas co-accused Pappu Sah committed rape upon her cousin sister. When they raised

alarm, both the accused persons fled away. Thereafter, the matter was reported to the police station. In Paragraph No. 6 of her cross-examination, this witness deposed that she had studied up to 7th standard and in paragraph no. 13, she deposed that she did not see whether the rape was committed with her cousin sister or not.

11. PW 2 is the mother of the victim. She deposed that when the prosecutrix and her cousin sister were returning to the house after watching dance, the appellant and co-accused Pappu Sah brought them to the forest. The appellant and co-accused Pappu Sah committed rape upon the prosecutrix. The prosecutrix, after coming home, narrated the entire occurrence.

12. PW 3 is the father of the prosecutrix. This witness has also stated that when the prosecutrix, after watching dance, was returning to her home along with her cousin sister, the appellant and co-accused Pappu Sah committed rape upon her and both the accused persons fled away. Her daughter came to the house and narrated the entire incident. This witness identified his signature on fard-beyan which has been marked as Exhibit-3.

13. PWs 4 and 5, as discussed above, are the doctors and the members of the Medical Board which conducted the medical examination of the prosecutrix on 13.08.2016. It is pertinent to mention here that there is no evidence on the record which shows that the cousin sister of the prosecutrix was also medically examined. The depositions of the PWs 4 and 5 are exactly similar. As per their deposition the Medical Board, on the basis of radiological as well as ossification tests, found the age of the prosecutrix about 16 years. No sign of rape was found on the person of the prosecutrix.

14. PW 6 is the cousin sister of the prosecutrix who is also alleged to be a victim of rape and sexual assaults. She deposed that when she and prosecutrix, were returning to their homes after watching dance from the house of the appellant, in the way, the appellant and Pappu Sah came there. The appellant gagged the mouth of the prosecutrix and co-accused Pappu Sah gagged the mouth of this witness. The appellant brought the victim down to the dam and committed misdeed with her. Thereafter, the appellant and Pappu Sah fled away. The persons belonging to the caste of the victims assaulted the victims. Thereafter, the case was lodged.

15. PW 7 is the Investigating Officer. During investigation, she got the victim medically examined and also got her statement recorded under Section 164 of the CrPC. After completion of the investigation, she submitted charge-sheet, as noted above.

16. Exhibit 1/1 is the statement of the prosecutrix recorded under Section 164 of the CrPC. In that statement, the prosecutrix stated that when she and her cousin sister were returning in that night at 11 P.M., the appellant and co-accused caught hold of them, thereafter, the appellant brought the victim far from that place and committed rape upon her, after gagging her mouth. Her uncle came

there and flashed torchlight. Thereafter, the appellant fled away, leaving the victim alone. The victim, due to shyness, also fled therefrom.

17. We have heard the submissions made by Mr. Ashok Kumar Chaudhary, learned senior counsel on behalf of the appellant assisted by Mr. Akshansh Ankit through virtual mode as well as submissions of Mr. Sujit Kumar Singh, learned Additional Public Prosecutor who argued in physical mode.

18. Learned senior counsel, Mr. Chaudhary has submitted that the prosecution failed to prove that the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act. The learned trial court did not take efforts to determine the age of the victim, as per requirement of Section 34(2) of the POCSO Act as well as Section 94 of the Juvenile Justice (Care and Protection of the Children) Act, 2015. He has submitted that the language of Section 34(2) of the POCSO Act shows that it is a mandatory provision. It is imperative on the trial court to determine the age of the victim if the question arises in any proceeding before it, whether the victim is a child or not. He has submitted that since the prosecution failed to determine the age of the victim, the presumption of guilt of the accused or his culpable mental state as envisaged under Sections 29 and 30 of the POCSO Act will not attract. The further submission of the learned counsel is that the Medical Board, which examined the victim, has found her age about 16 years on the basis of radiological as well as ossification test. He submitted that the ossification test or other test is not the conclusive proof of age of a person.

19. The learned counsel has relied upon a decision of Hon'ble the Apex Court reported in (2008) 15 Supreme Court Cases 223 Jyoti Prakash Rai @ Jyoti Prakash versus State of Bihar. Paragraph No. 13 of the above-noted decision is being quoted hereinbelow:-

"A medical report determining the age of a person has never been considered by the courts of law as also by the medical scientists to be conclusive in nature. After a certain age it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. This Court in Vishnu v. State of Maharashtra [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] opined : (SCC p. 290, para 20)"

"20. It is urged before us by Mr. Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact."

In the aforementioned situation, this Court in a number of judgments has held that the age determined by the doctors should be given flexibility of two years on either side."

He has further submitted that the benefit in giving flexibility of two years on either side should be given to the accused since the accused deserves the benefit of doubt.

20. The second submission of the learned counsel is that there are material contradictions in the depositions of the witnesses which make the prosecution case as doubtful. The prosecutrix, in her statement, has stated that the appellant committed rape upon her whereas co-accused Pappu Sah committed rape on her cousin sister (PW 6), but in her statement under Section 164 of the CrPC, she did not state that Pappu Sah committed rape with her cousin sister. In her cross-examination also, she has stated that she did not see whether the rape was committed with her cousin sister (PW 6) or not. The mother and father (PWs 2 and 3) of the prosecutrix deposed that the appellant and co-accused committed rape upon the prosecutrix, whereas the prosecutrix did not take the name of co-accused Pappu Sah as one of her rapist. He has submitted further that PW 6, the cousin sister of the prosecutrix, deposed that persons belonging to their caste assaulted them which shows that the persons belonging to the caste of the victim, being infuriated due to their involvement in consensual sexual activities with the appellant and co-accused Pappu Sah, had assaulted both the victims. It has also been submitted by the learned counsel that as per medical report, no sign of rape was found.

21. On the other hand, the learned Additional Public Prosecutor Mr. Sujit Kumar Singh has submitted that the victim is a member of Scheduled Caste and she along with her cousin sister was sexually assaulted by the appellant and his nephew. The witnesses including the prosecutrix and her cousin sister (also a victim) have fully corroborated the prosecution version. It is settled principle of law that the conviction can be made even on the basis of solitary evidence of the prosecutrix if it is found above board. There is nothing in the evidence of the prosecutrix or her parents which makes this witness uncreditworthy. He has submitted further that the victim was medically examined after two days of the occurrence and due to delay in medical examination, no sign of rape could be detected.

22. We have perused the impugned judgment and order of the trial court as well as the lower court's records. We have given our thoughtful consideration to the rival submissions advanced on behalf of the parties.

23. As per Section 34(2) of the POCSO Act, the age of the victim must be determined by the trial court. This mandatory provision was not adhered to by the learned trial court. The relevant portion of Section 34(2) of the POCSO Act is being extracted hereinbelow:-

"If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination."

The prosecutrix in her statement, has stated that she had studied up to 7th standard but no effort was made by the learned trial court to ascertain the age of the victim on the basis of the educational certificates as required under Section 94 of the Juvenile Justice Act. The observation made by Hon'ble Supreme Court in the case of Jyoti Prakash (*supra*) makes it clear that ossification or other test is not the exact proof of age of a person and two years flexibility may be given either side by the court. The prosecution, as discussed above, has failed to prove that the victim was a child within the meaning of Section 2(d) of the POCSO Act, as such, the presumption under Sections 29 and 30 of the POCSO Act will not attract. The victim, in her statement under Section 164 of the CrPC, has stated that when the appellant was committing rape upon her, her uncle came there and when he flashed torchlight, the appellant fled away therefrom and the victim herself after being ashamed, also fled away but this statement does not find place in her deposition recorded during the trial or in her fard-beyan given by PW 7. This fact alone makes the prosecution case doubtful.

24. The finding of conviction recorded by the trial court is unsustainable and deserves to be set aside. The appellant deserves to be acquitted by giving him benefit of doubt.

25. Accordingly, the impugned judgment of conviction dated 06.04.2021 and order of sentence dated 12.04.2021, passed by the learned Additional Sessions Judge VI-cum-Special POCSO Judge, Madhubani in G.R. No. 48 of 2016, arising out of Mahila P.S. Case No. 76 of 2016, are set aside.

26. Consequently, the appeal is allowed.

27. The appellant is in custody. Let him be released forthwith, if not required in any other case.