

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.193 of 2021**

Arising Out of PS. Case No.-15 Year-2018 Thana- MAHILA P.S. District- Saharsa

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KUMOD MANDAL SON OF BACHNESHWAR MANDAL, RESIDENT
OF VILLAGE- RAGHUNATHPUR, SANTHALI TOLA, P.S.- BASNAHI,
DISTRICT-SAHARSA. Appellant/s

Versus

THE STATE OF BIHAR. Respondent/s

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Appearance :

For the Appellant/s : Mr. Pramod Mishra, Adv.
Mr. Suraj Kumar, Adv.
For the Respondent/s : Mr. Sujit Kumar Singh, APP

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

**HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

Date : 05-09-2023

This appeal has been preferred by the appellant under Section 374 (2) of the Code of Criminal Procedure for setting aside the judgment of conviction dated 25.01.2021 and the order of sentence dated 29.01.2021 passed by Sri Motish Kumar Singh, the learned Additional Sessions Judge-I-cum-Special Judge, (POCSO), Saharsa in POCSO Case No. 20 of 2018, arising out of Saharsa Mahila P.S. Case No. 15 of 2018, whereby he has been convicted and sentenced as under:-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376 of the IPC	RI for 20 years	50,000/-	SI for three months



341 of the IPC	SI for 1 month	xxx	xxx
4 of the POCSO Act	RI for 20 years	50,000/-	SI for three months

2. All sentences have been ordered to run concurrently and benefit of Section 428 of Cr.P.C. has been ordered to be given.

3. The victim (PW-8), who is a minor girl of 12 years of the age (as per prosecution version), has given her *Fardbeyan* before S.H.O., Simri police station on 01.03.2008 at about 10:30 P.M. stating therein that on 27.02.2018 at about 3:00 P.M., she was scraping grass in the maize field situated towards western side of her house. Meanwhile, the appellant aged about 28 years came there and he forcibly put off her pant, gagged her mouth, pointed a *Kachiya* (a sharp edged weapon) on her neck and threatened her to kill, had she raised hue and cry. Thereafter, he committed rape upon her. The victim started writhing due to pain and hearing the sound of writhing, Tetri Devi (PW 7), who was also scraping grass at some distance, rushed there. She tried to save the victim, but the appellant scuffled with P.W. 7 and after twisting her hands, he fled away. The victim also stated further that due to rape committed by the appellant, she started profusely bleeding. P.W. 7 started shouting whereupon the mother of the victim (PW-1), her father (PW-2) and villagers



Shashidhar Mandal (PW-4), Varun Mandal (not examined), Siromani Patel (PW-6), Triveni Mandal (not examined) and other villagers rushed there. Having seen the persons coming, the appellant fled away towards eastern direction. The persons, who came there, saw the prosecutrix in nude condition and after changing her clothes (pant and frock), they brought her to Basnahi police station where the written report was given, but the S.H.O., Basnahi police station did not register the FIR. Having no option, the victim along with her parents and villagers went to Mahila police station, Saharsa and thereafter, the F.I.R. was registered.

4. On the basis of *Fardbeyan* of the victim, Simri (Mahila) P.S. Case No. 15 of 2018 was registered against the appellant, for the commission of offences punishable under Sections 341, 323, 376, 506 of the Indian Penal Code and Section 4 of the POCSO Act.

5. After investigation, the charge-sheet was submitted against the appellant under the same sections and the cognizance was taken on 05.10.2018 under Sections 341, 323, 376, 506 of the Indian Penal Code and Section 4 of the POCSO Act. Thereafter, the charges were framed against the appellant on 28.10.2019 under Sections 376, 323, 341 of the Indian Penal



Code and Section 6 read with Section 5 (r) of the POCSO Act.

6. In order to substantiate the charges levelled against the appellant, the prosecution examined ten witnesses, including the Investigating Officer (I.O.). During the investigation, the statement of the victim was recorded under Section 164 of the CrPC, which is Exhibit-3.

7. The prosecution has also adduced the following documentary evidences in support of the charges:-

Exhibit-1	Signature of Rajendra Mandal on Fardbeyan
Exhibit-1/1	Signature of Siroman Patel on Fardbeyan
Exhibit-1/2	Signature of Barun Mandal on Fardbeyan
Exhibit-1/3	Signature of Shashidhar Mandal on Fardbeyan
Exhibit-2	Entire Fardbeyan
Exhibit-3	Statement of victim u/s 164 of the CrPC
Exhibit-4	Medical Examination Report
Exhibit-5	Endorsement of F.I.R.
Exhibit-6	Charge-sheet

8. The prosecutrix (victim) has been examined as PW-8. She has stated in her deposition that when she was scrapping grass, the appellant came there. He lifted her in his laps and put off her pant. After gagging her mouth, he committed rape upon her. When she was writhing in pain, he threatened to cut her throat by *Kachiya*, which he was carrying. On hearing outcry



raised by the prosecutrix, Tetri Devi (PW 7) came there and she lifted the victim in her laps. At that time, the victim was not conscious. When she regained her consciousness, she fould herself in her house. Her parents brought her to Basnahi police station, but the police did not register the case. Thereafter, they went to Mahila police station where her case was registered. Arti Devi, Investigating Officer (I.O.) had taken down her statement. The victim put her signature on the statement, which was marked as Exhibit-2. After registering the case, the police brought the victim to Bhagalpur for medical examination. The victim claimed to identify the appellant, who was present in dock at the time of recording of her deposition.

9. The next most important witness of this case is PW-7, Tetri Devi. She was scrapping grass near the place of occurrence. In her deposition, this witness has stated that at the time of occurrence, she was also scrapping grass. She saw the victim coming and screaming. Thereafter, this witness came out of her field and the victim embraced her. She was screaming and had stated that the appellant had committed rape upon her. This witness asked the victim to go to her house. Meanwhile, the appellant came there running from maize field and he fled away. Thereafter, the villagers assembled there and brought the



victim to her house.

10. PW-9 is the doctor, who examined the victim on 02.03.2018 at about 12:30 P.M. As per her opinion, the age of the victim was below 16 years. She has mentioned that no injury mark was seen over body of the victim or genitalia. Hymen was ruptured. No evidence of sexual attack although probability cannot be ruled out. The medical report was marked as Exhibit-4.

11. PW-1 is the mother of the victim. She has mentioned the age of the victim as 12 years. The victim, as per statement of this witness, had gone for scrapping grass. The appellant came there. He forcibly put off her pant, gagged her mouth with cloths and committed rape upon her. The victim started writhing in pain. Thereafter, the appellant put *Kachiya* on her neck and threatened to kill, had she raised hue and cry. P.W. 7 attempted to apprehend the appellant, but he fled away after rescuing himself from her hands. P.W. 7 raised hue and cry, whereupon this witness, her husband and the villagers Siromani Patel (PW-6), Shashidhar Mandal (PW-4), Triveni Mandal and Varun Mandal came there. This witness saw her daughter in unconscious and nude state. This witness also noticed blood-stains on the clothes of the victim. They brought the victim to



the village.

12. PW-2 is father of the victim. He has stated the age of his daughter as 12 years. He has stated further that on the day of occurrence, his daughter had gone for scrapping grass. The appellant, noticing her in a lonely place, caught hold of her and when his daughter started shouting, the appellant gagged her mouth with clothes and after putting off her clothes, he committed rape upon her. When the victim became free from his apprehension, she raised hue and cry, hearing which, PW 7 went there. PW 7 also raised hue and cry whereupon, the villagers including PWs 4 and 6 came there. They saw her daughter in pool of blood. Thereafter, they brought his daughter to their house. They went to Basnahi police station, but the police did not register case the case. Thereafter, they went to Mahila police station and lodged the F.I.R.. During his cross-examination, this witness has stated that blood was oozing from private part of the victim and there were also blood stains on her clothes.

13. PW-3 Chunchun Mahto is a co-villager. He has stated that on hearing hue and cry, he went to the place of occurrence and saw the victim in nude state. She was in a pool of blood. Thereafter, after changing her clothes, she was brought to her house and later on, the case was lodged. During her



examination, this witness has stated that when he reached at the place of occurrence, the ladies of entire village and other persons had also assembled there.

14. PW-4 Sashidhar Mandal, a co-villager had also gone there on hearing hue and cry and saw that the blood was oozing from the private part of the victim. The victim disclosed that it was the appellant, who had committed rape upon her. The appellant had absconded from the village.

15. PW 5 is a hearsay witness. He did not go to the place of occurrence. He had heard about the occurrence after three hours of the alleged incident.

16. PW 6 is also a villager, who went to the place of occurrence on hearing hue and cry and saw the victim in nude condition. The blood was oozing from her private part. The victim apprised this witness that the appellant had committed rape upon her.

17. PW 10 is the Investigating Officer. This witness has recorded the statements of the witnesses and visited/inspected the place of occurrence where he found maize crops smashed. He has stated further that after the occurrence, the field, where the rape is alleged to be committed, was irrigated. At the instance of this witness, the statement of the



victim under Section 164 of the CrPC was recorded.

18. After conclusion of the prosecution evidence, the appellant was questioned by the trial court to enable him to explain the incriminating circumstances appeared against him in the trial. The appellant answered those questions in negative and he pleaded his complete innocence.

19. The defense has also examined one witness (DW 1), Bhrigunandan Mandal. This witness has stated that there was some dispute between the father of the victim (PW 2) and Bachneshwar Mandal, the father of the appellant, for some money transactions. In *Panchayat*, the *Punches* directed PW 2 to return that money to the father of the appellant. PW 2, as per statement of this victim, had also taken the land of the appellant on *Batai* (sharing of the field), which was withdrawn by the father of the appellant from the possession of PW 2, due to which, PW 2 had got the false case lodged by his daughter against the appellant. Despite this fact, this witness did not know anything.

20. The learned counsel for the appellant has submitted that the appellant has been implicated due to previous enmity between the parties. He has submitted further that the prosecution has failed to establish its case beyond the



reasonable doubts. The occurrence is alleged to have taken place on 27.02.2018, but the FIR was lodged after two days, i.e. 01.03.2018. There is no explanation as to why the case was lodged after such a long period. The second submission is that the learned trial court did not take efforts to determine the age of the victim as required under Section 34 of the POCSO Act. The doctor (PW 9), on medical examination of the victim, assessed her age to be below 16 years. The victim (PW 8), in paragraph 8 of her deposition, has stated that she was a student of Class-V, at the time of the occurrence, but the learned trial court did not take efforts to examine the Headmaster or the Teacher of the school for determination of age of the victim. The third submission of the learned counsel for the appellant is that there are material contradictions in the depositions of witnesses. The witnesses, including PW 8 (the victim), have stated that after commission of the rape, on the outcry of the victim, Tetri Devi (PW 7), who was scrapping grass nearby the place of occurrence, rushed there whereas she (PW 7) states that the victim came to her screaming after commission of rape. He has submitted further that in her statement under Section 164 of the Cr.PC, the victim did not state that the appellant was having a *Kachiya* (sharp edged weapon) with him and when the victim



started crying, he put *Kachiya* on her neck and threatened not to raise alarm. Learned counsel has also submitted that the doctor, who medically examined the victim, did not find any evidence of sexual attack but despite these facts, the doctor has mentioned that although he did not find evidence of sexual attack, the possibility of sexual assault could not be ruled out. On which basis, there was possibility of commission in the opinion of the doctor, was not explained by him at the trial.

21. Per contra, the learned Additional Public Prosecutor has submitted that the victim is a child within the meaning of Section 2 (1) (d) of the POCSO Act, as such, the reverse burden of proof goes on the shoulders of the appellant, as provided under Section 29 of the POCSO Act, and the presumption of culpable mental state of the appellant is also there as per provisions of Section 30 of the POCSO Act. He has submitted further that the appellant, finding the victim in a lonely place, committed penetrative sexual assault on her. The prosecution witnesses have fully supported the case. So far as the delay in lodging of the FIR is concerned, the learned APP has submitted that the delay has been explained in the *Fardbeyan* itself, which shows that the victim was first brought to Basnahi police station but the police personnel refused to



lodge the FIR and thereafter, the victim along with her parents and villagers went to Mahila Police Station, Saharsa and lodged the case against the appellant.

22. We have heard the rival submissions of the learned counsels and also perused the lower court's records. It is the case of the prosecution that when the victim was scrapping grass, the appellant came there. He, after overpowering the victim, committed rape upon her and pointed out *Kachiya* on her neck and threatened to kill, had she raised alarm. The victim and her parents (PW 2 and PW 1) have stated in their depositions that on the outcry raised by the victim, PW 7 went there, whereas PW 7 has stated that the victim herself came to her screaming and embraced her. This is a material contradiction in the depositions of the witnesses. Further the victim, in her statement under Section 164 of the CrPC, did not mention that the appellant was having *Kachiya* with him, nor she stated that he pointed it on the neck of the victim and threatened to kill her, whereas she has stated this fact in her *Fardbeyan* and also in her deposition, which is also a material contradiction, which makes the prosecution case as doubtful.

23. As per provisions of Section 34 (2) of the POCSO Act, 2012, it is imperative on the trial court to



determine the age of the victim, but no effort was taken by the trial court for determination of the age of the victim. Sub-section 2 of Section 34 of the POCSO Act is being referred herein below:-

“34. Procedure in case of commission of offence by child and determination of age by Special Court- (2) 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.”

(24) From bare perusal of this provision, it appears that the trial court was duty bound to determine the age of the victim as the appellant has challenged the age of the victim. As such, the presumptions under Sections 29 and 30 of the POCSO Act do not attract in this case.

25. So far as the charges under Section 376 of the IPC is concerned, the doctor did not find any evidence of sexual assault. This fact coupled with the material contradictions in the depositions of the prosecution witnesses make the prosecution case doubtful.

26. The occurrence is stated to have taken place



on 27.02.2018 at about 3:00 PM, but the FIR was lodged after two days, i.e. 01.03.2018, at about 10:30 PM. The prosecution tried to explain the delay in lodging the FIR by stating that at first, the victim and her parents went to Basnahi police station, but the police personnel refused to register the case and thereafter, they went to Mahila police station, does not appear convincing and trustworthy. When the police of Basnahi police station refused to lodge the FIR, why two days delay occurred in lodging the FIR in Mahila police station has remained explained. It has not been explained as to why the family members of the prosecutrix could not rush to the Mahila police station, just after refusal by the Basnahi police station to register the case.

27. From careful scrutiny of the evidence available with the record, we do not find that the prosecution has proved its case beyond all the reasonable doubts. The above-noted circumstances makes the prosecution case doubtful and the appellant is entitled for the benefit of doubts.

28. On the basis of above-mentioned observations, the judgment of conviction dated 25.01.2021 and the order of sentence dated 29.01.2021 passed by the learned Additional Sessions Judge-I-cum-Special Judge, (POCSO), Saharsa in



POCSO Case No. 20 of 2018, arising out of Saharsa Mahila P.S.

Case No. 15 of 2018 are set-aside.

29. This appeal is allowed.

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

(Nawneet Kumar Pandey, J)

I agree
Chakradhari Sharan Singh, J

(Chakradhari Sharan Singh, J)

Kundan/Mahesh

AFR/NAFR	NAFR
CAV DATE	11.07.2023
Uploading Date	05.09.2023
Transmission Date	05.09.2023

