

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.5420 of 2019**

Arising Out of PS. Case No.-168 Year-2016 Thana- JAYNAGAR District- Madhubani

Shonu Kumar Paswan Son of Shivji Paswan Resident of Village - Khutauna,
P.S. - Khutauna, District - Madhubani.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Vikas Kumar Sharma, Advocate
Mr. Subhash Kumar Jha, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

C.A.V JUDGMENT

Date : 01-12-2021

The sole appellant has questioned his conviction for offences under Sections 366A and 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act, recorded by the learned Special Judge, Madhubani, in Jaynagar P.S. Case No.168 of 2016, corresponding to G.R. No.1548 of 2016. The judgment of conviction was passed on 24.09.2019 and by order of sentence dated 25.09.2019 the learned trial Judge awarded ten years rigorous imprisonment and a fine of rupees ten thousand for each of the three offences. Sentences are to run concurrently.

2. The prosecution case as disclosed in the written report of PW 7, Ashok Paswan, is that his daughter, aged about



12 years, had gone to the market on 09.07.2016, at about 5 PM, along with her elder sister Chanda Kumari (PW 3) and a friend Sarita Kumari (PW 2). Sarita and Chanda went inside a shop whereas the daughter of the informant stayed on the road alone. In the meantime, the appellant came on a motorcycle and got the daughter of the informant seated on rear and kidnapped her. The two girls made alarm, however, the appellant had already fled away from there. The parents of the appellant were also alleged to be involved in the said kidnapping. The informant kept persuading the family members to bring back the girl, even panchaity was convened but it proved futile.

3. Thereafter, the written report was lodged on 23.07.2016. The victim suo motu appeared before the Mahila P.S. Madhubani and her medical examination was done on 27.08.2016 vide medical report as Exhibit-5 and her statement under Section 164 Cr.P.C. was recorded on 29.08.2016 before the Magistrate vide Exhibit-1.

4. During trial prosecution examined altogether ten witnesses which are fully referred in the trial Court Judgment.

5. Mr. Vikas Kumar Sharma, learned counsel for the appellant, contends that it is consistent version of the defence and it would be evident from the testimony of the



prosecution witnesses especially PW 1 the victim girl that the matter was of affairs between the appellant and the victim. That is the reason that the so called victim never made any protest or alarm while travelling on public conveyances, such as, bus or train to different places along with the appellant. It would further appear that she stayed along with the appellant in Nepal for one month and, thereafter, at Delhi for one month. During the period she had sufficient opportunity to meet other people but she never made any complaint of any act of the appellant. Only interested witnesses have been produced and no independent witness has come to support the case of the prosecution though the alleged kidnapping took place in the market area. In fact, the victim was a minor and the prosecution deliberately did not produce her school document in support of her date of birth nor her parents, who were examined as PW 5 Anila Devi and PW 7 Ashok Paswan, stated about her actual date of birth. The doctor has found secondary sexual character well developed vide evidence of PW 8 Dr. Gargi Singh and PW 9 Dr. Rama Jha. Though the medical Board opined that the victim was in between 16 to 17 years but the finding is based on radiological examination. Neither the radiological report was produced before the Court nor the expert who had performed the



radiological examination was produced by the prosecution. The delay in FIR is deliberate one and chances of concoction cannot be ruled out because PW 7 in para-6 denied that he had ever convened any panchayat whereas he has stated in the written report (Exhibit-4) that the delay in lodging the FIR was due to Panchayat of the occurrence convened by him.

Learned counsel contends that PW 3 vide paragraph-6 has admitted that the victim was a student of Class-VII. Therefore, the prosecution should have brought the best evidence in support of date of birth of the victim to prove that the victim was a minor on the date of occurrence.

Reliance has been placed on the judgment of this Court in **Arjun Kumar @ Prince V. State of Bihar** reported in **2021(4) BLJ 260**.

6. To contra, Mr. Sujit Kumar Singh, learned Additional Public Prosecution, contends that if the victim of sexual assault claims that she was ravished without her consent. The Court will presume that she had not consented and the burden of proof lies on the accused to prove consent which the accused has completely failed. Therefore, conviction requires no interference. Moreover, testimony of the prosecutrix is corroborated by eyewitnesses PW 2 Sarita Kumari, PW 3



Chanda Kumari, PW 4 Bechan Paswan and PW 6 Dayaram Paswan, who had deposed that they saw the appellant taking away the victim girl. Victim has consistently deposed that she was ravished by the appellant. The prosecution witnesses who deposed that the victim was a minor were not cross-examined that they were making wrong statement regarding age of the victim. Moreover, the medical evidence also says that the victim was between 16 to 17 years. Therefore, the trial Court judgment is consistent with the evidence on record and requires no interference.

7. PW 1 the victim girl has deposed that when the appellant took her on the motorcycle her sister and friend had gone inside the shop and the victim was alone on the road. The victim says that she had nothing to purchase in the market. The appellant had come alone on the motorcycle and got her seated at the back by putting her in fear to not to make any alarm. She is specific that the appellant took her to Nepal from Madhubani on a bus. Other passengers were also there in the bus. Later on, the appellant took her from Madhubani to Delhi on a train the appellant had purchased the tickets for both. Several passengers were there on the platform as well as travelling on the train but due to fear the victim did not make any protest. At Delhi she



remained for a month. She was along with the appellant for two months in Nepal as well in Delhi and the appellant used to ravish her in spite of her protest. From Delhi the appellant took back the victim to Madhubani on a train and near Madhubani police station the appellant left the victim and went away.

PW 2 deposed that though she had seen the appellant taking away the victim but she did not see that the victim was crying. PW 4 Bechan Paswan deposed that he saw that the appellant had got the victim seated at the back of the motorcycle.

8. A closure scrutiny of the testimony of eyewitnesses including the victim would make it clear that the victim had gone along with the appellant with her freewill. The victim got seated on the motorcycle of the appellant as pillion and no one was there to prevent her from jumping of the motorcycle or to make alarm. Other eyewitnesses were there to make alarm but they did not choose nor the victim made any alarm, goes to show that she was not taken away by force. Moreover, she traveled and stayed with the appellant for two months at different places but she did not make any protest or alarm in spite of the fact that she had sufficient opportunity while travelling in a bus along with co-passengers or travelling



in a train along with co-passengers or staying in a room where others were there in the vicinity. Only after institution of the criminal case she appeared and levelled allegation against the appellant. Therefore, in my view, the victim was in consensual relationship with the appellant and unless it is proved that she was a minor on the date of occurrence her consent assumes importance to negate the charges against the appellant.

9. The prosecution evidence on the point would reveal that the prosecution has relied only on approximate age of the prosecutrix to prove that she was a minor. Though the evidence of exact age, i.e., the school document and testimony of the parents was available but school documents were not brought on record nor the parents deposed, though examined, about the exact date of birth of the victim. The medical opinion would show that the doctor found secondary sexual character well developed, both breast developed, auxiliary and pubic hair present. However, opined that the victim was in between 16 to 17 years. This was mere opinion of approximate age and that cannot be relied upon in absence of evidence or report of the radiologist.

10. In **Sunil V. State of Haryana** reported in **AIR 2010 SC 392**, the radiologist who had examined the victim was



not produced before the Court. The Hon'ble Supreme Court said that it was a serious lapse on the part of the prosecution which would have been helpful in arriving at the conclusion regarding the age of the prosecutrix. The prosecution had failed to produce any school admission form which would have been the primary evidence regarding the age of the prosecutrix. Though school leaving certificate was produced in that case which was obtained subsequent to the institution of the FIR.

In the case on hand, the prosecution has not brought on the record the school document in support of the age of the victim though the victim was a school going student as claimed by her elder sister.

In the **State of Madhya Pradesh V. Munna @ Shambhoo Nath** reported in **(2016) 1 SCC 696**, the Hon'ble Supreme Court relied on the judgment of **Sunil** (supra) and held that evidence on approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.

In the matter of how to prove the age of the victim, the Hon'ble Supreme Court in **Jarnail Singh V. State of Haryana** reported in **2013 CRI. L.J. 3976** said that "the age of the victim of rape should be determined in the manner provided under Rule 12 of the Juvenile Justice (Care and Protection of



Children) Rules, 2007, there is no difference as regards minority between the child in conflict with law and the child who is victim of crime.” A similar provision is there in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which came into effect from 15.01.2016 which is being reproduced below:

“94. Presumption and determination of age.- (1) *Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*

(2) *In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-*

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence



thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

11. Thus, it is evident that the prosecution failed to prove the exact age of the victim to substantiate that on the date of occurrence the victim was a minor girl. The conduct of the victim, as noticed above, would lead to only irresistible conclusion that she was in consensual relationship with the appellant. Therefore, none of the charges stand proved against the appellant.



12. Promptness, in lodging the First Information Report is assurance regarding truthfulness of the informants' version. If there is delay in lodging the FIR and there is no reasonable explanation for the same it loses advantage of spontaneity.

13. **Tulshidas Kanolkar V. The State of Goa** reported in **AIR 2004 SC 978**, was a case of sexual assault and the matter of delayed information, the Hon'ble Supreme Court said as follows:-

“..... In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the Court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is waity enough to reject the plea of



false implication or vulnerability of the prosecution case.”

14. In the case on hand, the first informant stated in the written report that delay is due to the fact that there was a panchaity of the occurrence going on; whereas in his evidence as PW 7 he completely denied that he had convened any panchaity. Moreover, if other witnesses of the occurrence are believed they have claimed that they saw the appellant kidnapping the victim, in that situation no room was left for the prosecution to go for panchayat or wait for the result of the panchayat because cognizable offences cannot be settled by panchayat. Therefore, conduct of the informant leads to infer that he was aware that the victim had left the house due to some previous affairs. When the family members could not manage her production the FIR was lodged.

15. To conclude, the learned trial Judge ignored the following serious infirmities in the prosecution case and evidence which leaves a lot of room to doubt the prosecution case.

(a) The delayed information to the police is not satisfactorily explained;

(b) The victim appears to have left along with the



appellant due to some affairs with the appellant as she remained with the appellant for two months without making any protest though she had sufficient opportunity before the public at large. As such, she was in consensual relationship.

(c) The prosecution has failed to prove the exact age of the victim to substantiate that she was a minor on the date of occurrence;

16. In the result, the prosecution miserably failed to establish any of the charges against the appellant. Hence, the appellant deserves acquittal.

Accordingly, the impugned judgment and order are hereby set aside and the appellant is directed to be set free at once.

(Birendra Kumar, J)

Mkr./-

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