(2021) 07 PAT CK 0086

Patna High Court

Case No: Criminal Appeal (SJ) No. 2662 Of 2018

Bipin Rajvanshi		APPELLANT
	Vs	
State Of Bihar		RESPONDENT

Date of Decision: July 28, 2021

Acts Referred:

- Juvenile Justice (Care And Protection Of Children) Rules, 2007 - Rule 12, 12(3), 19
- Indian Penal Code, 1860 - Section 363, 376
- Protection Of Children From Sexual Offences (POCSO) Act, 2012 - Section 6, 42
- Code Of Criminal Procedure, 1973 - Section 164
- Juvenile Justice (Care And Protection Of Children) Act, 2015 - Section 94

Hon'ble Judges: Birendra Kumar, J

Bench: Single Bench

Advocate: Ajay Kumar Thakur, Imteyaz Ahmad, Bipin Kumar

Final Decision: Allowed

Judgement

1. The sole appellant Bipin Rajvanshi got conviction for offences under Sections 363 and 376 of the Indian Penal Code as well as under Section 6 of

the POCSO Act by learned 1st Additional Sessions Judge-cum-Special Judge (POCSO), Nawada, in POCSO Case No. 4 of 2016, arising out of

Nardiganj P.S. Case No.173 of 2015. The learned trial Judge awarded rigorous imprisonment for five years for offence under Section 363 of the

Indian Penal Code. A fine of rupees ten thousand and in default of payment of fine three months simple imprisonment was also ordered. No separate

sentence was awarded under Section 376 of the Indian Penal Code considering the provisions of Section 42 of the POCSO Act; rather ten years

rigorous imprisonment and a fine of rupees fifty thousand was awarded under Section 6 of the POCSO Act and in default of payment of fine six

months rigorous imprisonment was ordered. The judgment of conviction dated 18.04.2018 and order of sentence dated 20.04.2018 are under challenge

in this appeal.

2. The prosecution case as disclosed in the written report dated 10.12.2015 of Gaya Mistri (PW 3) is that on 04.12.2015, at about 12:00 Noon, Shabo

Kumari and Manoj Kumar Rajvanshi, both daughter and son of Nande Rajvanshi, came to the house of the informant and asked the minor daughter of

the informant to accompany for village Sobhiya where marriage of the appellant was to be solemnized. They further promised that they would return

after solemnization of the marriage. Nande Rajvanshi and his wife were also present at that time. The appellant is Dewar of the daughter of Nande

Rajvanshi. It is further disclosed that the appellant, who is disabled from one leg, was residing since last 2 to 3 months in village Nardidih, i.e., village

of the informant, and was doing contract work at brick kiln in the village. After two days, the family members of Nande Rajvanshi returned but the

daughter of the informant (PW 10) did not return. Then informant got suspicion that all have kidnapped to his daughter for the purpose of marriage.

Thereafter informant and others started search out of the victim but did not succeed to get her traced out. Thereafter, FIR was lodged on 10.12.2015.

During investigation the appellant and the daughter of the informant were recovered by the police from the house of Naresh Rajvanshi in village

Simarpole, P.S. Rujauli, District-Nawada vide evidence of Investigating Officer (PW 12) at para-

6. Then the statement of the victim was recorded under Section 164 Cr.P.C. before the Magistrate. The victim has admitted about her statement

before the Magistrate, while being examined as PW 10. According to the statement of the victim under Section 164 Cr.P.C., on 04.12.2015 at about

10:00 AM, she was going to school when she reached at the bridge near Nardiganj P.S. the appellant was already standing there. The appellant

caught her hand and forcefully took her in a bus. Both reached Patna and from Patna they took train for Mumbai. At Mumbai the appellant and the

victim remained in the rented house for three days and the appellant was in physical relation with her. Thereafter, appellant came along with the victim

to the village.

After investigation the police submitted charge sheet and accordingly the appellant was put on trial.

3. The prosecution examined altogether 12 witnesses. No defence evidence was produced. PW 1 Dinesh Prasad Singh, PW 2 Rekha Devi, the

mother of the prosecutrix, PW 3 Gaya Mistri, the father of the victim girl, have consistently supported the manner of occurrence as disclosed in the

FIR which is inconsistent with the statement of PW 10 regarding the place and manner of kidnapping of the victim. PW 4-Upendra Paswan, PW 5-

Raj Kumar Rajvanshi, PW 6-Ratan Manjhi, PW 7-Nablesh Rajvanshi and PW 8-Shiv Rajvanshi have supported the prosecution case as hearsay

witnesses. PW 9 Dr. Raj Kishore Prasad is a member of the Medical Board which had examined the victim along with PW 11 Dr. Sudha Kumari

Sharma.

PW 10 the victim girl deposed that her father had lodged this case. She was at Rajauli. However, she corrected herself by saying that she was going

to school. From near the bridge the appellant took her to Patna and from Patna to Mumbai and kept there for three days. At Mumbai the appellant

forcefully established physical relation. From Mumbai the appellant took her to the house of maternal uncle at Rajauli and the police recovered her

from there and the appellant was also arrested thereat. The witness admitted that she was medically examined and her statement was recorded under

Section 164 Cr.P.C. During cross-examination, the witness stated that she was a student of Class-IX at the time of occurrence. However, she could

not remember her date of birth. The witness deposed that she has proposed to return back to village from Mumbai. Thereafter, appellant took her to

the house of his maternal uncle where the police came and took both to its custody. The suggestion of the defence is that PW 10 had voluntarily

accompanied the appellant with her sweet-will and under the pressure of the parents made concocted statement.

PW 9 Dr. Raj Kishore Prasad simply stated that he was a member of the Medical Board which had examined the victim girl and medical report was

prepared by Dr. Sudha Kumari Sharma (PW 11). PW 11 Dr. Sudha Kumari Sharma deposed that on 16.12.2015 she had examined the victim girl. On

the basis of pathological and radiological examination the age of the victim was found in between 17 to 18 years. The hymen of the victim was found

ruptured and was in process of healing. No spermatozoa was noticed. The pathological or radiological report was not before the witness at the time of

her examination nor those experts who had performed pathological or radiological examination appeared before the Court.

4. Mr. Ajay Kumar Thakur, learned counsel for the appellant, contends that there is serious contradiction between the testimony of PW 1 to PW 3

and PW 10 as regards manner of occurrence. According to PW 1 to PW 3, the family members of the appellant had taken PW 10 on the pretext of

participation in marriage ceremony whereas according to PW 10 the appellant had forcefully taken her inside the bus when she was on the way to her

school. None of the aforesaid prosecution witnesses are hostile witnesses. Hence, the accused would be entitled to have benefit of contradiction

appearing in the prosecution evidence regarding manner of occurrence.

Learned counsel next contends that the conduct of the prosecutrix in not making any protest or alarm while traveling along with the appellant in a bus

to Patna and thereafter in a train to Mumbai and residing thereat for three days. She simply proposed to the appellant to return back and both returned

back to the house of the maternal uncle of the appellant. The conduct of the victim apparently shows that she was in consent with the appellant

throughout.

Learned counsel next contends that the prosecution has failed to prove the exact age of the prosecutrix to bring the case within mischief of law which

provides for minimum age for giving valid consent. Learned counsel submits that the prosecution has brought on the record only approximate age and

has not brought the evidence of exact age which was available with them as prosecutrix has admitted that she was a school going girl and was a

student of Class-IX at the time of occurrence. For the aforesaid reason, the prosecutrix cannot be said to be a â€˜sterling witnessâ€™ and the

prosecution miserably failed to prove the charges against the appellant. The learned trial judge ignored the aforesaid infirmities in the prosecution case.

5. Mr. Bipin Kumar, learned Additional Public Prosecutor, contends that once the victim deposed that she was physically exploited by the appellant

without her consent, the Court would presume that she had not consented. The burden was on the defence to show that the victim was in consensual

relationship. Minor infirmities cannot come in the way of conviction of the appellant when facing such a serious charge of committing penetrating

sexual assault upon a minor girl. If the doctor has not found any spermatozoa that was obvious for the reason that the victim was examined after

about 12 days of the alleged act of the appellant and in that period there is no evidence that the victim had not taken bath or had not washed her

clothes. Hence, observation of the doctor was natural and for that reason only the victim cannot be disbelieved.

6. The law is well settled that in criminal trial the prosecution is bound to prove the charges against the accused beyond reasonable doubts and not by

preponderance of probabilities. Even where statues provide for reverse burden of proof on the accused, the prosecution must discharge its initial

burden by producing trustworthy and acceptable evidence. Therefore, it cannot be argued that non-crossexamination of the prosecution witnesses on

the point of age of the victim as disclosed by the witnesses would exonerate the prosecution from burden of proof of exact age of the victim.

In State of Madhya Pradesh v. Munna @ Shambhoo Nath reported in (2016) 1 SCC 696, the consensual relationship was evident and the prosecutrix

had failed to prove the age of the victim, below the statutory requirement of that time, beyond reasonable doubts. In the circumstances, Honâ€™ble

Supeme Court refused to interfere with the judgment of acquittal recorded by the High Court and observed that the evidence on approximate age of

the victim would not be sufficient to any conclusion about the exact age of the victim. In Rajjak Mohd. v. State of Madhya Pradesh reported in (2009)

9 SCC 248, the case was of consensual intercourse but the prosecution had failed to prove that the victim was minor on the date of occurrence. The

Honâ€™ble Supreme Court set aside the conviction recorded by the High Court.

In the case of Jarnail Singh v. State of Haryana reported in 2013 CRI. L.J. 3976, the Honâ€™ble Supreme Court 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. Under Rule 12(3), preference is to be given

to the school documents in determination of age of the victim. Only in absence of the school documents, the opinion of medical expert is permissible.

11. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 reads as follows:-

â€œ12. Procedure to be followed in determination of Age.-

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule

19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of

making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may

be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home

or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as

the case may be, the Committee by seeking evidence by obtaining

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board,

which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be,

the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on

lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may

be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b)

shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the

conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age

and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or

the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further

inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-

rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in

accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate

order in the interest of the juvenile in conflict with law.

The aforesaid Rule was applicable on the date of occurrence of this case. An identical provision is there under Section 94 of the Juvenile Justice

(Care and Protection of Children) Act, 2015 which came into effect from 15.01.2016, admittedly after the date of occurrence of this case. Thus, it is

evident from perusal of Rule 12 above Â that only in absence of the school documents, other evidences are permissible to determine the age of the

juvenile victim. In this case, the victim has said that she was a student of Class-IX. Therefore, school document of age of the victim was there which

was deliberately not brought on the record by the prosecution. Even the report of ossification / radiological test was not produced to have opportunity

to the defence to cross-examine the experts regarding scientific method adopted by them while performing such examination. Therefore, the evidence

of exact date of birth of the victim, which was available with the prosecution, was not brought on the record and the evidence of approximate age

cannot take the place of proof of exact age. Once the prosecution failed to prove that the victim was below 18 years of age, the above discussed

evidence of her consent, assumes importance.

As noticed above, the conduct of the victim depicts that she had voluntarily accompanied the appellant to different places without making any protest,

alarm etc.

7. No doubt it settled proposition that the testimony of the victim of rape stands at par with an injured witness and there is no need for corroboration of

the same if the victim is found to be a â€˜sterling witnessâ€™. The conduct of the victim as discussed above goes to show that she has merely

levelled allegation of use of force by the appellant. She never made any protest or alarm when accompanying with the appellant in a bus or in a train

where other passengers were available and she appeared only when the police raided the house of the maternal uncle of the appellant where the

victim was residing along with the appellant. The prosecution has failed to prove the exact age of the victim to make out a case that the victim was

incapable of making any consent at the time of occurrence. There is serious contradiction as to from where the victim was taken by the appellant as

per the testimony of the victim and testimony of the three prosecution witnesses PW 1 to PW 3. It is not understandable as to which of the witnesses

aforesaid are reliable. The benefit of doubt must go to the accused. The doctor who had performed the radiological examination or pathological

examination of the victim did not appear before the Court nor any such report was there before the trial Judge. The evidence of expert, who had

performed the examination, is relevant and not the evidence of some other person who had no expertise or had not performed the examination.

Therefore, non-production of those doctors or their report tells upon the trustworthiness of the prosecution case.

8. For the aforesaid infirmities in the prosecution evidence, the conviction of the appellant is not sustainable in law. Hence, the impugned judgment of

conviction and order of sentence are hereby set aside and this appeal is allowed.

9. The appellant is in jail since 15.12.2015. Let him be set free at once.