Sikandar Patel Vs State Of Bihar

Court: Patna High Court

Date of Decision: Dec. 20, 2021

Acts Referred: Juvenile Justice (Care And Protection Of Children) Rules, 2007 â€" Rule 12, 12(3)
Code Of Criminal Procedure, 1973 â€" Section 164
Indian Penal Code, 1860 â€" Section 376
Protection Of Children From Sexual Offences Act, 2012 â€" Section 4, 29, 30
Evidence Act, 1872 â€" Section 80
Juvenile Justice (Care And Protection Of Children) Act, 2015 â€" Section 94

Hon'ble Judges: Birendra Kumar, J

Bench: Single Bench

Advocate: Umesh Chandra Verma, Syed Ashfaque Ahmad

Final Decision: Allowed

Judgement

1. The sole appellant Sikandar Patel faced trial before the learned 1st Additional Sessions Judge-cum-Special Judge, West Champaran, Bettiah, in

connection with Bettiah Muffasil P.S. Case No.626 of 2013, corresponding to CIS No.10914 of 2014. By judgment dated 07.01.2020 the learned trial

Judge found the appellant guilty for offences under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act. By order of sentence

dated 28.01.2020 ten years rigorous imprisonment besides fine of rupees fifteen thousand and in default of payment of fine two years rigorous

imprisonment was awarded under both the heads. The sentences have been ordered to run concurrently.

The appellant has challenged the judgment of conviction and order of sentence above in this appeal.

2. The prosecution case, as disclosed in the first information report of the victim girl (PW 4), is that the victim, aged about 12 years, had gone to ease

towards the field side at 8:00 PM on 28.09.2013. Near the field of one Nand Kishore Prasad the appellant caught her and dragged inside the paddy

crop in the field of Nand Kishore Prasad and forcefully opened her lower garments and ravished her. The appellant threatened her not to disclose the

occurrence to anyone and fled away. Thereafter, the victim went to her house but did not disclose about the occurrence to anyone due to fear.

However, the family members realized some incident and took her to the police station where the FIR was lodged. After investigation the police

submitted charge sheet against the appellant and appellant was put on trial.

3. During trial the prosecution examined five witnesses. PW 1 Suresh Raut and PW 2 Bipin Patel are co-villagers of the informant. However, they

have deposed that they know nothing about the occurrence. These witnesses have been declared hostile by the prosecution. PW 3 Sudama Patel is

father of the prosecutrix. Sudama Patel deposed that on the date of occurrence he was not in the village. After return the prosecutrix disclosed that

the appellant had caught her arm. That much is the evidence of PW 3 who is not a hostile witness. PW 4, the prosecutrix, in her examination-in-chief

supported what is stated in the first information report. However, on cross-examination she deposed that neither she nor her father had given any

written report to the police. The report was penned down by Darogaji whose name she does not know. The written report was not read over to her.

She further deposed that due to darkness at the time of occurrence and no light thereat she could not identify anyone by face. The villagers had also

gone to the police station at the time of institution of FIR and they had got written name of the appellant. She had never any complain against the

appellant nor she has. The appellant treats her as sister. Since appellant was her brother, she identified him in the Court.

4. PW 5 Dr. Rashmi Nand Kuliyar deposed that on 30.09.2013 she had examined the prosecutrix and found secondary sex character developed. Both

breast developed, auxiliary and pubic hair present and no injury on her private parts. The hymen was old ruptured. On radiological report the victim

was of around 15 years of age. No spermatozoa was there on pathological examination.

5. While recording the judgment of conviction what weighed in the mind of the trial Judge was that:

(a) Though no evidence of date of birth of the prosecutrix was brought by the prosecution but the medical evidence suggests her age as 15 years.

There was no cross-examination by the defence even making suggestion that the prosecutrix was a major on the date of occurrence. Hence, she was

a minor. The people belonging to the rural background and in poverty seldom brings on record any document in proof of date of birth.

(b) Since the victim had supported in her statement under Section 164 Cr.P.C. what she disclosed in the FIR the Court can look on that for proper

appreciation of evidence in view of the provisions of Section 80 of the Indian Evidence Act. Even though the statement under Section 164 Cr.P.C.

was not brought on the record.

(c) The cross-examination of the victim as noted was not to make her examination-in-chief unacceptable as examination-in-chief was consistent with

the police report as well as statement under Section 164 Cr.P.C.

(d) Though the Investigating Officer was not examined; the defence had not shown any prejudice due to non-examination of the Investigating Officer.

(e) The presumption under Sections 29 and 30 of the Protection of Children from Sexaul Offences Act, 2012, is attracted in the facts and

circumstances of this case and defence has failed to rebut that presumption.

6. Mr. Umesh Chandra Verma, learned counsel for the appellant, contends that the learned trial Judge misconstrued the criminal jurisprudence

inasmuch as the initial burden of proof of criminal charges always rests with the prosecution and the prosecution is bound to prove the charges beyond

all reasonable doubts. The prosecution cannot take benefit of the lapses on the part of the defence. Even in cases where there is provision for adverse

burden of proof that would attract only on discharge of initial burden by the prosecution.

Learned counsel submits that the prosecutrix has disowned any written report to the police. She has not whispered about any statement under Section

164 Cr.P.C. before the Magistrate nor any other witness has come forward to support the aforesaid fact. In the aforesaid circumstance, the

examination of the police officer who had recorded the statement or the Investigating Officer to substantiate the genuineness of the initial information

to the police was imperative. Hence, due to non-examination of the Investigating Officer the defence has seriously prejudiced.

Learned counsel contends that the cross-examination of the prosecutrix would show that she is not a Ã¢â‚¬Å“sterling witnessÃ¢â‚¬. Though, conviction is

possible on the sole testimony of the prosecutrix, however, before acceptance of her testimony the Court must be satisfied that the witness is

consistent in her statement and withstands the test of cross-examination. The father of the prosecutrix, i.e., PW 3, deposed that the prosecutrix had

only disclosed that the appellant had caught her arm. The prosecutrix was examined as PW 4 but does not confront the statement of her father. The

aforesaid conflict in the prosecution evidence goes to the root of the prosecution case.

Learned counsel next contends that prosecution is bound to prove the exact age of the prosecutrix and on mere approximate age conviction cannot be

sustained for any offence committed against a child.

7. Mr. Syed Ashfaque Ahmad, learned Additional Public Prosecutor for the State, has strenuously supported the conviction of the appellant on the

ground that the law is well settled that once a prosecutrix says that she was ravished by the appellant that cannot be lightly brushed-aside only for non-

corroboration by other witnesses, especially for the reason that such offences are committed taking pre-cautions of non-availability of any person.

FINDINGS

8. Testimony of PW 3 or PW 4 does not show that who had written the first written information to the police. They have simply identified their

signature on the first written report. None of the prosecution witnesses including the prosecutrix have deposed that there was any statement under

Section 164 Cr.P.C. before the Magistrate. The aforesaid lapses cannot be filled up by conjectures and surmises. Hence, non-examination of the

Investigating Officer was serious lapse on the part of the prosecution.

As referred above, the prosecutrix does not appear to be an Ã¢â‚¬Å“sterling witnessÃ¢â‚¬. In the cross-examination she said that she could not identify the

miscreant as there was darkness in night. She had not named the appellant in the first written report; rather villagers who had accompanied had

named him. No villager turned up to support that they had seen the appellant committing the crime. The prosecutrix further clarifies that she had never

any complaint against the appellant nor she has now.

The appellant treats her as sister.

Should the trial-court have lightly ignored these statements of the victim and accepted what she deposed in the examination-in-chief to convict the

appellant? The answer would be emphatic no. The statement of a witness is to be read as a whole and not in a piecemeal unless it is separable and

ignorable. Father of the prosecutrix, i.e., PW 3, deposes that the prosecutrix had disclosed that the appellant had caught her hand. The prosecutrix

does not controvert nor PW 3 is a hostile witness.

In Raja Ram V. The State of Rajasthan reported in (2005) 5 SCC 272, the HonÃ¢â‚¬â„¢ble Supreme Court said that if a witness is not declared hostile by

the prosecution, the defence can rely upon the evidence of such witness and it would be binding on the prosecution. The aforesaid conflict between

statement of the prosecutrix and her father cannot be overlooked which creates further doubt on the trustworthiness of the prosecutrix.

In the case of Sunil V. The State of Haryana reported in AIR 2010 SC 392, the HonÃ¢â‚¬â„¢ble Supreme Court said that conviction cannot be based on

an approximate age of the victim.

In State of Madhya Pradesh V. Munna @ Shambhoo Nath reported in (2016) 1 SCC 696, the HonÃ¢â‚¬â„¢ble Supreme Court held that the evidence on

approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.

The prosecutrix was a literate girl as she has signed everywhere. Therefore, she must have been getting education somewhere. It is not the

prosecution case or evidence that prosecutrix did not attend any school.

In the case of Jarnail Singh V. State of Haryana reported in 2013 CRI. L. J. 3976, the HonÃ¢â‚¬â„¢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, as 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 and only in absence of the school documents, opinion of the medical expert is

permissible.

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

Ã¢â‚¬Å“12. 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.Ã¢â‚¬‹

10. 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. However, in the present case Rule 12 of Rules 2007 was applicable.

11. Thus, it was bounded duty of the prosecution to bring evidence of the exact age which the prosecution has failed to do. The evidence of

approximate age of the doctor (PW 5) is not wholly reliable in absence of the evidence of the expert who had performed the radiological examination,

or in absence of the report of the radiological examination. PW 5 had not performed the radiological examination. Hence, her testimony is worthless to

prove the age of the prosecutrix.

12. The presumption under Sections 29 and 30 of the POCSO Act is attracted only after discharge of initial burden by the prosecution which the

prosecution has completely failed to discharge in the present case.

Sections 29 and 30 of the POCSO Act reads as follows:

Ã¢â‚¬Å“29. presumption as to certain offences.- where a person is prosecuted for committing or abetting or attempting to commit any offence under

sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the

offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state.-(1) In any prosecution for any offence under this act which requires a culpable mental state on the part

of the accused, the special court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he

had no such mental state with respect to the act charged as an offence in that prosecution. (2) for the purposes of this section, a fact is said to be

proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance

of probability. Ã¢â‚¬‹

13. It is evident that the presumptions under Sections 29 and 30 above are rebuttable presumptions and would arise only on proof of the charges by the

prosecution. In the case on hand, the sole testimony of prosecutrix is not wholly reliable in view of her turnabout while being cross-examined during

trial as noticed above. Since the victim disowned the first information report and she did not speak anything about her statement before the Magistrate

under Section 164 Cr.P.C. the Court-below could not have stretched its wisdom to corroborate the examination-in-chief with the unsabstantive

statements. The father of the victim does not corroborate what the victim stated in examination-in-chief. Nor the victim confronted that father was

making wrong statement to the extent that the appellant had only caught arm of the victim. Since the prosecution has failed to prove the exact age of

the victim, conviction under Section 4 of the POCSO Act was not sustainable in law.

14. In the result, in my view, the prosecution case suffers from several infirmities, as noticed above, and it was not a fit case wherein conviction could

have been recorded. The learned trial Judge fell in error of law as well as appreciation of facts of the case in view of settled criminal jurisprudence.

Hence, the impugned judgment and order are hereby set aside and this appeal is allowed.

Let the appellant be set free at once.