

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 37 OF 2018

From judgment and order dated 17.02.2018 passed by the Addl. Sessions Judge -cum- Special Judge, Balasore in Special Case No.649 of 2016.

Lilu @ Ashok Kumar
Das Adhikari

.....

Appellant

-Versus-

State of Odisha

.....

Respondent

For Appellant:



Ms. Anima Kumari Dei
(Amicus Curiae)

For Respondent:

Mr. Deepak Kumar Pani
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 12.08.2021

S.K. SAHOO, J. After a few days, we will be celebrating 75th Independence Day with usual pride to mark our freedom from two hundred years of British rule. The father of nation Mohandas Karamchand Gandhi, who led Indian independence movement with great sons of soil like Jawaharlal Nehru, Sardar Vallabhbhai

Patel, Bhagat Singh, Chandra Sekhar Azad, Subhas Chandra Bose and many more has once said, "India will be free when the women feel safe to walk in the streets of India in the midnight". In spite of socio-economic development all corners, Bapuji's dreams is still falling short of reality because the human race, which he loved so much, could not rise to the standard he set. The case at hand depicts the bitter experience of an innocent teen aged helpless victim girl while returning from school in the broad day light on the public road, when the vulture like appellant committed the most ghastliest crime known under the sky on her in presence of her minor sister.

The appellant Lilu @ Ashok Kumar Das Adhikari faced trial in the Court of learned Addl. Sessions Judge -cum- Special Judge, Balasore in Special Case No.649 of 2018 for commission of offences punishable under sections 341/376(2)(i) of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter 'POCSO Act').

The learned trial Court vide impugned judgment and order dated 17.02.2018 while acquitting the appellant of the charge under section 376(2)(i) of the Indian Penal Code, found the appellant guilty under section 341 of the Indian Penal Code and 4 of the POCSO Act and sentenced him to undergo S.I. for a

period of one month and to pay a fine of Rs.500/- (rupees five hundred), in default, to undergo S.I. for a period of seven days for the offence punishable under section 341 of the Indian Penal Code and R.I. for seven years and to pay a fine of Rs.5000/- (five thousand), in default, to undergo R.I. for a period of three months for the offence punishable under section 4 of the POCSO Act and both the sentences were directed to run concurrently.

2. The prosecution case, as per the F.I.R. lodged by one Kanakalata Barik (P.W.2), who is the aunt of the victim is that on 24.11.2016 at about 12.00 noon, when the victim, who was a student of Class-VII was returning home from the school in her bicycle along with her younger sister Kumari Sasmita Barik (P.W.5), aged about ten years, on the way the appellant wrongfully restrained the victim near a tank of village Renupada and dragged her to a nearby field and made her lie on the ground and committed rape on her. When the younger sister of the victim shouted, the co-villagers arrived at the scene of the occurrence for which the appellant left the place. The victim returned home crying and told about the occurrence before the informant. The father of the victim was staying in Coimbatore and engaged in some occupation to maintain his family and since the victim fell ill after the incident, it was not possible on the

part of the informant to come to the police station to report the matter immediately. It is further stated in the F.I.R. that the appellant is an unsocial and rowdy person and he is indulged in various criminal activities.

On the first information report presented by P.W.2 before the Inspector in-charge of Basta police station, Basta P.S. Case No.326 dated 25.11.2016 was registered under sections 341/376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act.

3. Mr. Krushna Chandra Palei (P.W.2), who was the Inspector in-charge of Basta police station after registering the case, took up investigation. During course of investigation, he examined the informant and other witnesses including the victim, seized the wearing apparels of the victim under seizure list Ext.4. The victim was sent for medical examination to C.H.C., Basta where P.W.1 Dr. Manikratan Pradhan examined her and submitted the medical examination report (Ext.1). The I.O. visited the spot and prepared the spot map (Ext.13), examined the scribe of the F.I.R. and made prayer before the learned Magistrate to record the 164 Cr.P.C. statement of the victim. On 28.11.2016, the Investigating Officer (P.W.12) arrested the appellant and seized his wearing apparels under seizure list Ext.5

and he also sent the appellant for medical examination to C.H.C., Basta where Dr. Arun Kumar Bhuyan (P.W.9), Medical Officer of C.H.C., Basta examined him and submitted the medical examination report (Ext.9). The appellant was forwarded to Court on the very day i.e. 28.11.2016. On 15.12.2016 P.W.12 handed over the charge of investigation to his successor P.W.13 Dheneswar Sahu, who re-examined the witnesses, seized the biological samples of the victim so also of the appellant and made a prayer to the Court to send the exhibits to R.F.S.L., Balasore. He also seized the school admission register where the victim was prosecuting her studies under seizure list Ext.6 and left the same in zima of the Headmaster under zimanama Ext.7. He made a query to the doctor regarding opinion about the injury sustained by the victim and received the report under Ext.18 and on completion of investigation, charge sheet was submitted on 15.03.2017 under sections 341/376(2)(i) of the Indian Penal Code and section 4 of the POCSO Act.

4. After submission of charge sheet, the learned trial Court on 19.05.2017 framed the charges against the appellant as already stated and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

5. The defence plea of the appellant is one of denial and it is pleaded that there was a minor accident with the victim but the family members of the victim without ascertaining the correctness foisted a false case against him.

6. During course of trial, in order to prove its case, the prosecution has examined as many as thirteen witnesses.

P.W.1 Dr. Manik Ratan Pradhan, who was the Medical Officer at C.H.C., Basta medically examined the victim on police requisition and proved the medical examination report vide Ext.1.

P.W.2 Smt. Kanakalata Barik is the informant and she supported the prosecution case and stated about the commission of rape on the victim by the appellant.

P.W.3 Smt. Manjulata Barik is the younger sister-in-law of P.W.2 and the mother of the victim and she supported the prosecution case.

P.W.4 is the victim who proved her signature in her 164 Cr.P.C. statement. She supported the prosecution case and stated about the commission of rape on her by the appellant.

P.W.5 Sasmita Barik is the younger sister of the victim (P.W.4) and she supported the prosecution case and

stated about the commission of rape on the victim by the appellant.

P.W.6 Kartik Chandra Das Adhikari is the scribe of the F.I.R. (Ext.2) and an eye witness to the occurrence and he stated that hearing hulla, he went to the spot and found the appellant had gagged the face of the victim in a nala and embraced her and P.W.5 was raising hulla. He also stated that he separated the appellant from the victim by dragging him and the appellant pushed him and fled away from the spot. He further stated that he accompanied P.W.2 and P.W.4 to the police station.

P.W.7 Ananta Kumar Jena is a co-villager of the informant, who is a witness to the seizure of wearing apparels of the victim vide seizure list Ext.4.

P.W.8 Gadadhar Pradhan, who was working as Headmaster in Vivekananda Siksha Kendra, Mukulishi, is a witness to the seizure of school admission register vide seizure list Ext.6 which he took in zima vide zimanama Ext.7.

P.W.9 Dr. Arun Kumar Bhuyan, who was the Medical Officer at C.H.C., Basta, medically examined the appellant on police requisition and proved the medical examination report vide Ext.9.

P.W.10 Sisu Kumari Patel, who was the A.S.I. of Basta police station, recorded the statement of P.W.4 as per the direction of the Inspector in-charge of Basta police station and reduced the same into writing.

P.W.11 Aresh Kumar Das, who was working as Constable of Basta police station, is a witness to the seizure of biological samples of the victim and the appellant vide seizure lists Exts.10 and 11.

P.W.12 Krushna Chandra Palei and P.W.13 Dhaneswar Sahu are the Inspector in-charge of Basta police station, who are the Investigating Officers.

The prosecution exhibited eighteen numbers of documents. Ext.1 is the medical examination report, Ext.2 is the written F.I.R., Ext.3 is the statement of P.W.3 under section 164 Cr.P.C., Exts.4, 5, 6, 10 and 11 are the seizure lists, Ext.7 is zimanama, Ext.8 is the admission register, Ext.9 is the medical examination report of appellant, Ext.12 is the medical requisition of the victim, Ext.13 is the spot map, Ext.14 is the prayer of Investigating Officer for recording 164 Cr.P.C. statement of victim, Ext.15 is the medical requisition of the appellant, Ext.16 is the prayer for sending exhibits to R.F.S.L., Ext.17 is the

forwarding letter of sending exhibits to R.F.S.L. and Ext.18 is the medical opinion of the victim.

The prosecution also proved six material objects. M.O.I is the white colour shirt of the victim, M.O.II is the blue colour scott of victim, M.O.III is one torn brown colour chadi of victim, M.O.IV is one tape of victim, M.O.V is one printed green colour lungi of appellant and M.O.VI is one printed red ganji of appellant.

No witness was examined on behalf of the defence.

7. The learned trial Court on analyzing the oral as well as documentary evidence on record, has been pleased to hold that date of birth mentioned in the school admission register as 03.11.2003 is to be taken into account to determine the age of the victim and as such the victim was held to be a minor at the time of commission of offence against her. After analyzing the evidence of P.Ws.2, 3, 4, 5 and 6, the learned trial Court came to hold that the evidence of the victim is clear and cogent regarding sexual assault meted out to her by the appellant and the evidence of the victim is consistent with her 164 Cr.P.C. statement. Taking into account the statement of the victim that the appellant inserted his finger in her private part, the learned trial Court came to hold that such an act would come under the

definition of 'penetrative sexual assault' as per section 3(b) of the POCSO Act and accordingly the appellant was held guilty under section 341 of the Indian Penal Code and section 4 of the POCSO Act, though the Court held that the prosecution has failed to establish the charge under section 376(2)(i) of the Indian Penal Code.

8. Ms. Anima Kumari Dei, learned Amicus Curiae appearing for the appellant contended that in the F.I.R., it is specifically mentioned that when P.W.5 Sasmita Barik raised hullah, co-villagers Kartik Chandra Das Adhikari (P.W.6), Braja Gopal Das Adhikari, Debendra Singh, Laxman Chanda, Harihar Chanda, Upendra Das Adhikari, Minaketan Patra arrived at the scene of occurrence and seeing them, the appellant fled away from the spot but except Kartika Chandra Das Adhikari (P.W.6), no other person has been examined. It is the further contention of the learned counsel that the nature of accusation as per the evidence of the victim (P.W.4) as well as her younger sister (P.W.5) may at best make out an offence of 'sexual assault' as defined under section 7 of the POCSO Act which is punishable under section 8 of the said Act and there is no material on record to satisfy the ingredients of the offence under section 4 of the POCSO Act. It is further submitted that even though it is the

case of the victim and her younger sister that the incident in question took place while they were returning from their school and the Investigating Officer also visited the school and seized the admission register for the purpose of finding out the date of birth of the victim but the attendance register has not been seized to show whether the victim and her sister in fact attended the classes on the date of occurrence or not. The medical evidence does not corroborate the ocular evidence of the victim and her sister (P.W.5) and therefore, it is a fit case where the benefit of doubt should be extended in favour of the appellant or the conviction under section 4 of the POCSO Act be altered to one under section 8 of the POCSO Act and since is in judicial custody since 28.11.2016 and he has already undergone substantive sentence of four years and eight months, the sentence imposed by the learned trial Court.

9. Mr. D.K. Pani, learned Addl. Standing Counsel appearing for the State placed the relevant parts of the impugned judgment and argued that there is no infirmity or illegality in the same. He also argued that the evidence of the victim (P.W.4) and her minor sister (P.W.5) are very clear that the appellant inserted his finger into the private part of the victim which clearly comes within section 3(b) of the POCSO Act

and not under section 7 of the POCSO Act as contended by the learned Amicus curiae. It is further argued that the doctor has noticed some abrasions on the person of the victim as per his report Ext.1, though no injury was noticed on the genital area and there are ample material on record to show that the victim was a minor girl and the case of penetrative sexual assault is clearly made out against the appellant and therefore, the appeal should be dismissed.

10. Coming to the ingredients of the offence under section 4 of the POCSO Act which prescribes punishment for penetrative sexual assault, it appears that the 'penetrative sexual assault' has been defined under section 3 of the POCSO Act. Section 3(b) is relevant for the purpose of this case wherein it is stated that a person is said to commit penetrative sexual assault, if he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person. Thus, inserting a finger into any of the three parts of the child victim i.e., vagina, urethra and anus makes out the offence of 'penetrative sexual assault' as defined under section 3(b) of the POCSO Act. In absence of insertion but touching any of these

parts of the child victim with sexual intent will bring the act within the purview of section 7 of POCSO Act.

11. Now, it is to be seen whether materials are there on record to show that the victim was a 'child' at the time of occurrence. The definition of 'child' as per section 2(d) of the POCSO Act means any person who is below the age of eighteen years. During course of investigation, the school admission register was seized which has been marked as Ext.6, which clearly reveals the date of birth of the victim to be 03.11.2003. The occurrence took place on 24.11.2016. Therefore, the victim had just completed thirteen years of age. P.W.8, the Headmaster of Vivekananda Sikshya Kendra, Mukunishi is a witness to the seizure of admission register and he has specifically stated that the Investigating Officer seized the school admission register of the year 2010-11 and prepared the seizure list (Ext.6). He further stated that he took the admission register in zima under zimanama Ext.7. He produced the original admission register during trial which has been marked as Ext.8. Nothing has been elicited in the cross examination of P.W.8 or from any other witness to show that the date of birth as mentioned in the school admission register is not correct. An entry relating to date of birth made in the school register is relevant and admissible

under section 35 of the Evidence Act. The defence has not challenged the age of the victim. The learned trial Court has also discussed about the age of the victim in paragraph nos.6 to 8 and has come to a conclusion that the date of birth mentioned in the admission register as 03.11.2003 is to be taken into consideration to determine the age of the victim at the time of occurrence and as such the victim was found to be minor at the time of commission of offence against her.

Learned Amicus curiae has not challenged the finding of the learned trial Court relating to the age of the victim at the time of occurrence and therefore, I am of the humble view that the prosecution has successfully established that the victim (P.W.4) was a 'child' at the time of occurrence as per the definition under section 2(b) of the POCSO Act.

12. Now, coming to the evidence of the victim (P.W.4), she has specifically stated that on 24.11.2016 at about 12.00 to 12.30 p.m., she along with her younger sister Sasmita (P.W.5) were returning from school in bicycle and during that time, the appellant came to their front and held the handle of her cycle for which she fell down on the ground along with her sister and then the appellant dragged her towards a canal on the road side and took off her school dress and when she tried to resist him then

he made her fall down on the ground and inserted his finger into her private part. He also nabbed his face on the side of her neck and at that time her sister (P.W.5) raised hullah and when people rushed to the spot, the appellant left the spot and thereafter, she along with her sister (P.W.5) came to their house and disclosed about the incident before her elder mother (P.W.2) and her mother (P.W.3) and accordingly, P.W.2 lodged the F.I.R. In the cross-examination, the victim has clarified that she sustained abrasions on her knee and thigh but she had not sustained any bleeding injury on her private part. The medical examination report of the victim which has been marked as Ext.1 indicates that there are one abrasions of size 5cm x 1/2 cm. and 6 cm. x 1/2 cm. over lateral aspect of left thigh. However, the report shows that there was no injury over genital area and no sign and symptom of recent sexual intercourse. Thus the evidence of the victim that she sustained some injuries during course of occurrence is getting corroboration from the medical examination report Ext.1.

P.W.5, the sister of the victim has also stated about the occurrence corroborating the evidence of P.W.4 and she has specifically stated that the appellant made the deceased fall down on the ground and inserted his finger into her private part.

Nothing has been brought out in the cross-examination to disbelieve the evidence of these two witnesses.

Both P.W.4 and P.W.5 have stated that P.W.6 reached at the spot hearing hullah. P.W.6 also stated that when he arrived at the spot hearing hullah of the victim and her sister, he saw the appellant had gagged the face of the victim and embraced her. P.W.5 was raising hullah and he separated the appellant by dragging him and the appellant pushed him and fled away from the spot and the victim and her sister went back to their house. In the cross-examination, P.W.6 has stated that he had seen the frock school dress and the panty of the victim and she had sustained injury on her knee. However, he stated that he had not seen any injury on the person of the appellant. Therefore, the evidence of P.W.6 also corroborates the evidence of the victim (P.W.4) and her sister (P.W.5).

The aunt of the victim being examined as P.W.2 has stated that on the date of occurrence, after returning from the school, the victim did not take her food and cried and when she asked the victim about the reasons of her crying, she disclosed about the incident that the appellant caused sexual assault on her by putting his finger in her private part. The conduct of the victim in making disclosure about the occurrence before P.W.2 is

admissible as res gestae under section 6 of the Evidence Act. Thus the evidence of the star witnesses of the prosecution i.e. P.W.4 and her sister P.W.5 is getting corroboration from the evidence of P.W.6 as well as P.W.2. The medical evidence also indicates about the presence of the injuries on the person of the victim when she was examined on the next day of the occurrence.

13. The contention of learned Amicus curiae that though some persons were named in the first information report to have arrived at the scene of occurrence on hearing cries of P.W.5 but only one of them has been examined, in my humble view, cannot be a ground to discard the evidence of the victim and her sister and particularly when one of the witnesses named in the F.I.R. namely Kartika Chandra Das Adhikari being examined as P.W.6 has supported the prosecution case. The Court is concerned with the quality of the evidence and not the quantity for proving a fact. Therefore, non-examination of some of the witnesses named in the F.I.R. is not fatal and the prosecution case cannot be discarded on that score.

14. Coming to the next contention of learned Amicus curiae regarding non-seizure of the attendance register of the school, it is true that had that register been seized, it would

have lend corroboration to the evidence of the victim (P.W.4) and her sister (P.W.5) that they had gone to their school on that day and attended the classes but the non-seizure of the attendance register cannot be a ground to disbelieve the ocular testimony of these two witnesses relating to their returning from their school at the time of occurrence. Their aunt being examined as P.W.2 has also stated in that respect.

15. The victim and her sister were returning home in their bicycle and their evidence is that the appellant came to their front and caught hold of the handle of the bicycle for which they fell down on the ground. Section 341 of the Indian Penal Code prescribes punishment for 'wrongful restraint' which has been defined under section 339 of the Indian Penal Code. The ingredients of the offence would be satisfied, if someone voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed. Therefore, the act of the appellant in coming in front of the victim and her sister and catching hold of the handle of the bi-cycle to stop their movement which led them to fall on the ground, in my humble view, clearly makes out the ingredients of the offence and therefore, I find no infirmity in the conviction of the appellant under section 341 of the Indian Penal Code.

Similarly, the evidence of the victim and her sister is very clear that the appellant inserted his finger into the private part of the victim. Even though the doctor (P.W.1) has not noticed any injury over the genital area of the victim and found her hymen intact, in my humble opinion, the same cannot be a factor to disbelieve the evidence of the two witnesses which appear to be clear, cogent and trustworthy. As already discussed, the offence of 'penetrative sexual assault' as defined under section 3(b) of the POCSO Act would be satisfied, if a person inserts his finger into the vagina of any child, therefore, the act of the appellant comes within the same and as such he has been rightly found guilty by the learned trial Court under section 4 of the POCSO Act. The punishment which has been imposed on the appellant for the offence under section 4 of the POCSO Act is seven years which is the minimum punishment prescribed for such offence.

16. In view of the forgoing discussions and on analyzing the evidence on record carefully, I find that there is no illegality in the impugned judgment and order of conviction passed by the learned trial Court and the appellant has been rightly found guilty under section 341 of the Indian Penal Code and section 4 of the POCSO Act. The sentence imposed for the offences is also

quite justified and therefore, the appeal being devoid on merit, stands dismissed.

In view of the enactment of the Odisha Victim Compensation Scheme, 2012 which was revised by Odisha Victim Compensation (Amendment) Scheme, 2018 and keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family background, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Balasore to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation under the aforesaid Schemes.

Let a copy of the judgment be sent to the District Legal Services Authority, Balasore for compliance.

Lower Court's record with a copy of this judgment be communicated to the learned trial Court forthwith for information and necessary action.

17. Before parting with the case, I would like to put on record my appreciation to Ms. Anima Kumari Dei, the learned Amicus Curiae for rendering her valuable help and assistance towards arriving at the decision above mentioned. The learned

Amicus Curiae shall be entitled to her professional fees which is fixed at Rs.5000/- (rupees five thousand only).

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 12th August 2021/Pravakar/RKM

