IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 37 OF 2019

From judgment and order dated 14.08.2018 passed by the Addl. Sessions Judge -cum- Special Judge, Sundargarh in Special G.R. Case No.15 of 2013.

Santanu Kaudi ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Akhaya Kumar Beura
Amicus Curiae

For Respondent: - Mr. Priyabrata Tripathy
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 05.07.2023

S.K. SAHOO, J. The appellant Santanu Kaudi was initially charged on 14.05.2014 for commission of offences under sections 376(i)/506 of the Indian Penal Code (hereinafter, 'I.P.C.'), section 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter '1989 Act') and section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') by the learned Sessions Judge

-cum- Special Judge, Sundargarh in Special G.R. Case No.15 of 2013. In the midst of trial, the case was transferred to the Court of Additional Sessions Judge -cum- Sessions Judge, Sundargarh where the trial proceeded. After examination of the prosecution witnesses and also recording of the accused statement, charge was re-framed under sections 376(2)(n)/506 of the I.P.C., section 3(2)(v) of 1989 Act and section 6 of the POCSO Act.

The learned trial Court vide impugned judgment and order dated 14.08.2018, while acquitting the appellant of the charges under section 3(2)(v) of the 1989 Act and section 6 of POCSO Act, found him guilty of the offences punishable under sections 376(2)(n)/506 of I.P.C. and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to further undergo rigorous imprisonment for one year for the offence under section 376(2)(n) of the I.P.C. and rigorous imprisonment for a period of two years for the offence under section 506 of the I.P.C. and both the substantive sentences were directed to run concurrently.

2. The father of the victim, namely, Baisakhu Munda (P.W.2) lodged an F.I.R. before the Inspector-in-charge of Sadar police station, Sundargarh on 14.08.2013 stating therein that the victim was aged about seventeen years and she used to go to

the jungle for grazing goats everyday and the appellant, who is a co-villager, also used to visit the jungle for the same purpose every day. By giving threat to the victim and also alluring her, the appellant used to keep physical relationship with the victim for which she became pregnant for seven months as on the date of lodging of the F.I.R. It is also stated in the F.I.R. that the appellant was threatening the victim not to disclose such act before anybody or else she would have to face dire consequences for which she did not disclose about the incident before her family members. She was examined by the Asha Karmi, who found her pregnant and when she was asked about the name of the person who made her pregnant, the victim disclosed the name of the appellant before the Asha Karmi.

On the written report presented by P.W.2, Ms. Iti Das (P.W.14), the Inspector-in-charge registered Sundargarh Sadar P.S. Case No.103 dated 14.08.2013 under sections 376/506 of the I.P.C. and directed Kuni Besra (P.W.16), the S.I. of Police, Sadar P.S., Sundargarh to take up investigation of the case.

During the course of investigation, P.W.16 examined the informant, the victim and other witnesses, seized the wearing apparels of the victim under seizure list Ext.4. On 15.08.2013, she visited the spot, prepared the spot map (Ext.11) and on the same day, sent the victim for her medical

examination. Dr. Mrs. Lipika Dei (P.W.8), who was attached to the District Headquarters Hospital, Sundargarh as Assistant Surgeon examined the victim and prepared the report (Ext.6) wherein she gave a finding that the victim was having pregnancy for thirty to thirty two weeks and possibility of commission of rape on the victim cannot be ruled out. The appellant was arrested on 15.08.2013 and his wearing apparels were seized as per seizure list Ext.8 and then he was also sent for medical examination and P.W.11, the Medical Officer attached to the District Headquarters Hospital, Sundargarh examined the appellant and found that the appellant was capable of having sexual intercourse and accordingly, he prepared the report vide Ext.7.

During the course of investigation, since as per the statement of the victim and other witnesses, it was ascertained that the case is one under sections 376(2)(n)/506 of the I.P.C., section 3(2)(v) of 1989 Act and section 4 of the POCSO Act, as per the order of the Superintendent of Police, Sundargarh, P.W.16 requested Sri P.K. Patel, (P.W.15), D.S.P., HRPC, Sundargarh to take up the charge of investigation on 15.08.2013 and accordingly, P.W.16 handed over the charge of investigation to P.W.15. After taking over charge of investigation, P.W.15 re-examined the informant, the victim and other material

witnesses, seized the biological materials of the appellant collected by the Medical Officer, which were produced before him as per the seizure list (Ext.9) and forwarded the appellant to the Court on 15.08.2013. The biological materials of the victim were also seized on 16.08.2013 as per the seizure list (Ext.5) and those were sent for chemical examination through Court. The admission register of Chakramal Sevashram School, where the victim was prosecuting her studies, was initially seized by P.W.15 and requisition was made to the Tahasildar, Tangarpali to furnish the caste certificate of the informant and also that of the appellant. He received the caste particulars from the Tahasildar, Tangarpali and on completion of investigation, submitted charge sheet under sections 376(1)/506 of the I.P.C., section 3(2)(v) of 1989 Act and section 4 of the POCSO Act against the appellant on 10.10.2013.

3. The defence plea of the appellant is one of denial.

4. During course of the trial, in order to prove its case, the prosecution examined as many as sixteen witnesses.

P.W.1 Sanjulata Patel is the Asha Karmi who examined the victim after which she came to know that the victim was pregnant.

P.W.2 Baisakhu Munda is the father of the victim and also the informant in the case who lodged the written report at Sadar Police Station, Sudargarh, alleging therein that his daughter was sexually assaulted.

P.W.3 is the victim herself.

P.W.4 Rohit Kumar Patel is a co-villager of the informant, the scribe of the F.I.R.

P.W.5 Kishore Kumar Patel was the Headmaster of the school where the victim was prosecuting her studies.

P.W.6 Sunita Munda is the mother of the victim.

P.W.7 Menaka Patel who was the constable attached to Sadar police station, Sundargarh is a witness to the seizure of wearing apparels vide Ext.4 as well as biological samples of the victim as per the seizure list Ext.5.

P.W.8 Dr. Lipika Dei, who was Assistant Surgeon attached to the District Headquarters Hospital, Sundargarh examined the victim on police requisition and submitted her report vide Ext.6.

P.W.9 Swetalina Patnaik was the teacher of the school where the victim was prosecuting her studies and she is a witness to the seizure of school admission register as per seizure list Ext.2.

P.W.10 Manoj Panda who was the Ward Member of the village of the informant stated that on the request made by the Asha Karmi, he convened a panch meeting whereafter, he advised the parents of the victim to report the matter to the police.

P.W.11 Dr. Sagar Dalei was the Medical Officer attached to the District Headquarters Hospital, Sundargarh, who examined the appellant on police requisition and submitted his report as per Ext.7.

P.W.12 Kalipada Oram who was the police constable attached to Sadar police station, Sundargarh is a witness to the seizure of wearing apparels of the appellant as per seizure list vide Ext.8 and the envelopes containing the biological samples of the appellant as per the seizure list Ext.9.

P.W.13 Niranjan Guria was the retired Havildar of police is a witness to the seizure of envelopes as per seizure list Ext.9.

P.W.14 Iti Das was the Inspector-in-Charge of Sundargarh Police Station who registered the case on the report of P.W.2 and directed P.W.16 to take up the investigation.

P.W.15 Promod Kumar Patel was the D.S.P., H.R.P.C., Sundargarh who was handed over the charge of

investigation from P.W.16 pursuant to the order of the Superintendent of Police, Sundargarh.

P.W.16 Kuni Besra, who was the Sub-Inspector of Police attached to the Sadar Police Station, Sundargarh was the initial Investigating Officer of the case.

The prosecution also proved thirteen documents through exhibits. Ext.1 is the F.I.R., Ext.1/3 is the formal F.I.R., Exts.2, 4, 5, 8, and 9 are the seizure lists, Ext.3 is the zimanama, Exts.6 and 7 are the medical examination reports of the victim and the appellant respectively, Ext.10 is the caste certificate of the victim, Ext.11 is the spot map, Exts.12 and 13 are the medical requisitions of the victim and the appellant respectively.

The appellant neither examined any witness nor proved any document.

5. The learned trial Court after analyzing the oral and documentary evidence on record came to hold that the prosecution evidence clearly revealed that the victim was raped by the appellant many a times while they used to visit jungle for grazing goats and livestock. The learned trial Court further held that the victim's parents were illiterate and the school admission register has not been produced and proved in the Court. No

horoscope or date of birth of the victim was seized and the victim's father (P.W.2) has stated the age of the victim as per his guess and accordingly, it was held that the prosecution has failed to prove the date of birth of the victim. The ossification test disclosed that the age of the victim to be around 16-17 years and if a variation is taken into account in the higher side, the victim would be more than eighteen years of age and as such, it was held that the prosecution has failed to prove that the victim was less than eighteen years of age as on the date of alleged date of rape. Accordingly, the offence under section 6 of the POCSO Act could not be proved against the appellant. It was further held that the victim was an illiterate girl and belonged to labour class scheduled tribe family. The incident took place inside the jungle while she used to graze the goats and as such, the consent of the victim, if any, to the act of the appellant was under misconception of fact and such consent cannot be construed to be a valid consent. The learned trial Court further held that the prosecution has been able to prove the charge under section 376(2)(n) of the I.P.C. as the appellant was committing rape on the victim regularly by which she became pregnant and a male child was born to her. Since the evidence on record indicates that the appellant had committed rape on the victim by giving threat to kill her and her parents if she would

disclose the incident to others, the victim could not disclose the same before her parents out of fear till she became pregnant and her pregnancy was ascertained by the Asha Karmi (P.W.1) and hence, the offence under section 506 of the I.P.C. is established. The learned trial Court further held that even though the victim belonged to S.T. category as per the case particulars furnished by the Tahasildar, Tangarpali and the accused belonged to 'Gouda' by caste, which comes under SEBC category, however, it was held that there is no evidence that the appellant committed rape on the victim as because she was a member of S.T. and accordingly, it was held that the offence under section 3(2)(v) of the 1989 Act is not proved against the appellant.

6. Mr. A.K. Beura, learned Amicus Curiae appearing for the appellant contended that the prosecution has failed to prove that the victim was less than eighteen years of age as on the alleged date of rape for which the appellant was acquitted of the charge under section 6 of the POCSO Act, which has not been challenged before this Court. Since the victim was a major girl as on the date of occurrence, in view of her evidence that even though other persons were grazing the goats and cattle nearby, she did not raise any hue and cry nor offered any resistance to the act of the appellant and her evidence that she was having sexual intercourse with the appellant going deeper into the

jungle almost every day would substantiate that she was a consenting party and being fully aware that the appellant, who was her co-villager, is a married man having wife and four children and the eldest child has already been given in marriage, since she allowed the appellant to have sex with her, it cannot be said that consent of the victim, if any, to the act of the appellant was under misconception of fact and that such consent cannot be construed to be a valid consent in the eye of law as observed by the learned trial Court. Learned counsel further argued that even though the school admission register of the victim was seized by P.W.15, but for the best reasons known to the prosecution, the said register was not proved during trial. He further submitted that the prosecution has not taken any step for conducting the DNA test to determine the paternity aspect of the child of the victim and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Priyabrata Tripathy, learned Additional Standing Counsel, on the other hand, submitted that no appeal has been filed by the State challenging the order of acquittal of the appellant under sections 3(2)(v) of the 1989 Act and section 6 of the POCSO Act. He however, submitted that the victim has specifically stated how she was dragged deeper into the jungle and raped forcefully against her will and without her consent by

the appellant and how the appellant threatened her not to disclose about the incident before anybody. Learned counsel further argued that the reasons given by the victim for non-disclosing the act committed by the appellant before her family members appears to be satisfactory. Further, the act of the appellant came to the fore when she was found to be pregnant and her belly started bulging gradually. Learned counsel further submitted that P.W.1, who was the Asha Karmi with the approved Government supply kits conducted the test known as 'Mixture test' with the urine of the victim and from the result of the test, she came to the conclusion that the victim was pregnant and the victim disclosed before her that the appellant was responsible for her pregnancy. Learned counsel for the State further argued that before her father (P.W.2) and mother (P.W.6), the victim disclosed that the appellant was responsible behind her pregnancy and the doctor (P.W.8) who examined her on 15.08.2013 also stated that the ultrasound examination was conducted and it was found that the victim was pregnant for thirty to thirty-two weeks. It is argued that in view of the available materials on record, it is clear that the appellant not only committed rape on the victim, but also threatened her not to disclose before any one for which the victim became pregnant and delivered a child and therefore, the learned trial Court has

rightly held the appellant guilty under sections 376(2)(n) and 506 of the Indian Penal Code and thus, the appeal being devoid of merits, should be dismissed.

Age of the Victim :

7. Adverting to the contentions raised by the learned counsel for both the parties, so far as the age of the victim is concerned, it is no doubt true that when the victim (P.W.3) was examined on 1st May 2015 in the learned trial Court, she stated her age to be seventeen years and further stated that the incident in question took place in the year 2013 and the father of the victim being examined as P.W.2 has stated that P.W.3 was born in the year 1996 and the mother of the victim stated that the victim was aged about sixteen years at the time of the incident, however, it appears that the I.O. (P.W.15) seized the school admission register of Chakramal Sevashram School Vol. IV with effect from 1996 to 2008 in which the victim is shown to have been admitted in Class-I of the Sevashram school on 03.07.2002 vide Sl.No.1/498/2002 and her age has been mentioned to be six years and twenty three days. The Headmaster of Chakramal Sevashram School being examined as P.W.5 also stated about seizure of the school admission register by the police as per seizure list (Ext.2) and further stated to have taken the admission register in zima by executing

zimanama (Ext.3), but the prosecution did not take any step to call for the admission register during the trial of the case to prove the same, particularly the page where the date of birth of the victim has been mentioned. This is, certainly, a lacuna in the prosecution case. Admittedly, the birth certificate of the victim has not been proved. Since one of the charge under which the appellant is being prosecuted at the initial stage was under section 4 of the POCSO Act, which was subsequently altered to one under section 6 of the POCSO Act and for such offence, it was the requirement on the part of the prosecution to prove that the victim was a 'child' as per the definition provided in section 2(1)(d) of the POCSO Act, the date of birth entry in the school admission register would have been the vital factor to be proved. It appears that on account of the laches on the part of the prosecution, the same could not be done even though it was seized and given in the zima of the Headmaster of the School, who was examined as P.W.5.

The learned trial Court while assessing the age of the victim girl has observed that the school admission register was not proved and the victim girl was an illiterate one and neither her horoscope nor her birth certificate was produced in the school while admitting her into the school and also, no horoscope or birth certificate of the victim has been seized by the I.O. The

evidence of the father of the victim as P.W.2 regarding the age of the victim was as per his guess work and the evidence of the doctor revealed that according to the ossification test, the age of the victim was 16-18 years. However, for such test, the error margin of two years on either side is generally taken into consideration. Further, the X-ray plate has not been produced in the Court basing on which the ossification test report was prepared and if the variation would be taken into consideration on the higher side, the victim would be more than eighteen years. Accordingly, the learned trial Court came to hold that the prosecution has failed to prove that the victim was less than eighteen years of age as on the date of commission of rape and therefore, the offence under the POCSO Act has not been proved against the appellant. The prosecution has not challenged the order of acquittal of the appellant under section 6 of the POCSO Act. The conclusion arrived at by the learned trial Court that the victim was more than eighteen years of age at the time of occurrence, according to me, is quite justified.

Evidence of the victim :

8. The victim in her examination-in-chief has stated that she used to graze cattle in the nearby jungle of her village and the appellant, who is a married man was having four children and the eldest one having given in marriage and he was

also grazing his livestock in the same manner in the jungle and that the appellant one day came to her, dragged her deeper into the jungle and raped her against her will and consent. She further stated that the appellant forcibly made her lie down on the ground, removed her chadi and forcibly committed sexual intercourse with her and threatened her not to disclose the incident before anybody or else, he would kill her as well as her parents for which she did not venture to disclose about the incident before anybody till her pregnancy was detected by the Asha Karmi. She further stated that the appellant used to forcibly sexually intercourse with her in the jungle many a times. However, in the cross-examination, she stated that the spot, where she was raped, was inside the jungle which was situated at a distance of half an hour journey from the village locality. She further stated that almost all the cattle grazers of her village took their respective cattle for grazing into the jungle including herself. She further stated that the appellant along with four cattle grazers used to graze their cattle inside that jungle. She further stated that those cattle grazers did not know the overt act committed by the appellant on her inasmuch as he and the appellant were having sexual intercourse going deeper into the jungle and almost all the days, the appellant used to have sexual intercourse with her in the jungle and at no point of time, she

had raised any hue and cry nor offered resistance. She further stated not to have disclosed about the sexual intercourse by the appellant with her to anybody else even before her parents. She further stated that at the Anganwadi Center of her village, she entered her name being the mother of the child but the name of the father of the child was not mentioned.

Thus, the victim being a major girl seems to be going along with the appellant deeper into the jungle and used to have sexual intercourse with him every day knowing full well that the appellant was a married person having four children and the eldest one was given in marriage. She did not raise any objection to the act of the appellant nor even disclosed before anyone against the appellant about the sexual intercourse. The appellant never promised her to marry. She also knew that marriage with the appellant was not possible as the appellant was a married person having been blessed with children. Therefore, in my humble view, she was a consenting party. The learned trial Court held that the consent of the victim, if any, to the act of the appellant was under misconception of fact and such consent obtained cannot be construed to be valid consent. According to Cambridge Dictionary, 'misconception' is an idea that is wrong because it has been based on a failure to understand a situation. Section 90 of the Indian Penal Code

provides any consent given under a misconception of fact, would not be considered as valid consent so far as the provision under section 375 I.P.C. is concerned and thus, such a physical relationship would tantamount to committing rape. The consent of a woman under section 375 I.P.C. is vitiated on the ground of a misconception of fact where such misconception was the basis for her choosing to engage in the said act. The consent of a woman with respect to section 375 I.P.C. must involve an active and reasoned deliberation towards the proposed act. It must denote an active will in the mind of the woman to permit the doing of an act complained of. In the factual scenario, it cannot be said that the consent that was given by the victim was under misconception of fact for which it cannot be construed to be a valid consent as observed by the learned trial Court. The victim (P.W.3) did not resist to the act committed by the appellant every day. She was freely exercising her choice in accompanying the appellant deep into the jungle to have sexual act being conscious of the fact that their marriage was not possible. All the circumstances lead to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant and her consent was not the consequence of any misconception of fact.

The learned trial Court has also taken into account the provision under section 114-A of the Indian Evidence Act which states about presumption as to the absence of consent in certain prosecution for rape. This presumption is not conclusive but rebuttable and the accused has to rebut the same by proving that his sexual act with the prosecutrix was with her consent. Merely because the victim of rape said that she did not consent to the sexual act is not sufficient to convict the accused. The Court has to assess the entirety of evidence that comes during trial to come to the just conclusion. Consent or absence of it could be gathered from the attendant circumstances. The previous or contemporaneous acts or the subsequent conduct can be legitimate guides. Even in the absence of a specific defence plea of consent being taken by an accused charged with the offence of rape, if the evidence on record indicates that the victim was a consenting party, then the Court can take a view that sexual intercourse with the victim was not against her will but with her consent.

Mr. Beura has rightly pointed out that the prosecution should have taken step for conducting the DNA test to determine the paternity aspect of the child, which would have strengthened the prosecution case that the appellant was the father of the child whom the victim gave birth to.

9. In view of the available materials on record and foregoing discussions, I am of the humble view that the prosecution has failed to establish the charge under section 376(2)(n) of the I.P.C. against the appellant. Though the victim has stated during the first act committed by the appellant, he threatened her not to disclose the same before any one, but when she seems to be voluntarily accompanying the appellant deep into the jungle every day where they used to have sexual intercourse and she was not complaining before anybody nor raising any protest against the overt act committed by the appellant nor disclosed before any one till she was found pregnant for seven months by P.W.1, I am of the view that there is absence of cogent materials that the appellant committed any act of criminal intimidation and therefore, the charge under section 506 of the I.P.C. is also not sustainable in the eye of law.

10. When the matter was taken up for hearing on 15.03.2023 and the evidence of the victim (P.W.3) was placed, this Court directed the learned counsel for the State to obtain instruction through the Inspector in-charge of Sadar Police Station, Sundargarh about the status of the victim and her male child and whether any compensation has been received by any of them and whether the victim has filed any maintenance case for herself and her child against the appellant in any Court.

Accordingly, the learned counsel for the State has produced the written instruction today received from Inspector-in-Charge of Sadar Police Station, Sundargarh wherein it is mentioned that the Inspector-in-charge personally visited the house of the victim and found that she was living with her son and her father in her village and her son is now prosecuting his studies in Class-IV. It also revealed that the victim has received compensation under the Victim Compensation Scheme to the tune of Rs.1,35,000/- (one lakh thirty five thousand) from the office of the District Welfare Officer, Sundargarh and for that the Inspector-in-charge also enquired about the matter of compensation from the office of the District Welfare Officer, Sundargarh and ascertained that the victim has already received compensation amount in three phases i.e. Rs.60,000/-, Rs.15,000/- and Rs.60,000/-. The statement of account of the victim annexed by the Inspector-in-Charge regarding payment of the aforesaid amount has been enclosed. The report is taken on record.

11. In view of the foregoing discussions, I am of the humble view that the prosecution has failed to establish the charges under sections 376(2)(n)/506 of the I.P.C. against the appellant and accordingly, he is acquitted of such charges. The appellant, who is in jail custody, be set at liberty forthwith if his detention is not required in any other case. Even though the

appellant is acquitted, but the compensation amount paid to the victim shall not be recovered from her.

Accordingly, the Jail Criminal Appeal is allowed.

Trial Court Records with a copy of this judgment be sent down to the learned trial Court.

Before parting with the case, I would like to put on record my appreciation to Mr. A.K. Beura, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

.....

S.K. Sahoo, J.

Orissa High Court, Cuttack
The 5th July 2023/PKSahoo