

GAHC040007332023

2024:GAU-AP:914



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/9/2023

Jayaprakash P.D.
S/o Lt. P. D Gopi, former Principal of Silver Hills Public School Daporijo, PO/PS
Daporijo, Arunachal Pradesh.

VERSUS

THE STATE OF AP
through the Public Prosecutor.

Advocate for the Petitioner : S V Darang, Amicus Curiae

Advocate for the Respondent : P P of AP, Legal Aid Counsel, Nikita Danggen

BEFORE
HONOURABLE MR. JUSTICE MANASH RANJAN PATHAK
HONOURABLE MR. JUSTICE BUDI HABUNG

Date : 30-09-2024

:: JUDGMENT AND ORDER ::

[CAV]

(Budi Habung, J)

Heard Ms. S. V. Darang, learned Amicus Curiae for the appellant. Also heard Ms. L. Hage, learned Additional Public Prosecutor for the State respondent No. 1; and Ms. N.

Danggen, learned legal aid counsel for the respondent No. 2.

2. This criminal jail appeal has been registered based on the forwarding of the appeal filed by the convict, Shri Jayaprakash P.D as per the notification No. 32 dated 23.05.2022 issued by the Registrar (Judicial) Gauhati High Court. The Additional Sessions Judge, Basar Leparada in BSR/POCSO-09/19 convicted the appellant Jayaprakash P.D and sentenced him to undergo imprisonment for 10 (ten) years with fine of Rs. 10,000/- (Rupees Ten thousand) for the offence under Section 377 IPC, and 20 (twenty) years rigorous imprisonment and a fine of Rs. 2,000/- (Rupees Two thousand) for the offence under Section 5(f)(l)(m)/6 of POCSO Act, 2012 with default clause under Section 377 of IPC R/w Section 5(f)(l)(m)/6 of POCSO Act, 2012.

FACTS OF THE CASE

3. The brief fact of the case leading to the filling of the present appeal is that on 03.07.2019 at around 21:15 hrs, a written FIR was received from one Shri Tai Mara Leyu, of Poda Mara village, Taliha, Upper Subansiri District, Daporijo to the effect that one Shri Jayaprakash P.D, the principal of Silver Hills Public School, Daporijo has been sexually assaulting his minor son (name withheld to be known as victim hereinafter) aged about 8 (eight) years since last 2 (two) months. The said FIR further alleged that when the informant took the victim out of the hostel to buy him slipper (chappal) the victim was seen limping, on being asked the victim disclosed that the accused/principal did not provide him separate bed and forced him to sleep in his bed to satisfy his lust and sexually assaulted him every night. Basing on the above written FIR, the Officer-In-Charge of Daporijo police station, had registered it as DRJ PS.Case No. 40/2019 under Section 377 of IPC read with section 6 of POCSO Act, 2012 and investigated the matter.

4. On completion of investigation, the Investigating Officer found prima facie case against the accused Jayaprakash P.D and submitted Charge-Sheet No. 24/2019 on dated 25.07.2019 for offence under Section 377 of IPC R/w Section 6 of POCSO Act, 2012. Thereafter, charge was framed against the accused under Section 377 of IPC and under Section 5(f)(l)(m)/6 of POCSO Act on 04.12.2019. The Charge-Sheet so framed was read over and explained to the accused, to

which, he pleaded not guilty and claimed trial.

5. During the trial, the prosecution side has examined altogether 8 (eight) prosecution witnesses and also exhibited some documents and materials exhibit and thereafter, the accused was examined and his statement was recorded under Section 313 of Cr.P.C, in which, the accused has pleaded innocent. The accused also examined 1(one) defense witness i.e., the accused himself and cross examined the prosecution witnesses.

6. On conclusion of trial and on being found the accused guilty of commission of charged offence, the learned Additional Sessions Judge-cum-Special Judge (POCSO) by the impugned judgment dated 28.06.2021 convicted the accused and sentenced him to undergo imprisonment for 10 (ten) years and a fine of Rs. 10,000/- (Rupees Ten thousand) for the offence under Section 377 IPC and 20 (twenty) years rigorous imprisonment and a fine of Rs. 2,000/- (Rupees Two thousand) for offence under Section 5(f)(l)(m)/6 of POCSO Act, 2012 only with default stipulation which is under challenge in the instant criminal jail appeal.

SUBMISSION OF THE LEARNED AMICUS CURIAE FOR THE APPELLANT:

7. Ms. S. V. Darang, learned Amicus Curiae for the appellant submits that although as per the evidence there were other children who were also sleeping in the same room where the accused/principal and the victim were sleeping but none of them has seen the alleged incident of sexual assault on the victim. It is further submitted that no rough sketch map was also drawn to show the place of occurrence and the distances where the other students used to sleep in the room. She further argued that the Medical Legal Certificate of the victim was forwarded to the Investigating Officer after 3 (three) days of examination and there is no report of Forensic Laboratory Test reporting that any semen of the accused was found present in the rectal swab collected from the victim. Thus, the learned Amicus Curiae submits that there is a reasonable doubt regarding the veracity of the prosecution's evidence, and the accused is entitled for acquittal at least on the ground of benefit of doubt. However, the learned Amicus Curiae fairly submits that other than the above facts she did not find any other infirmities in the impugned judgment and order passed by the learned Additional District and Sessions Judge-cum-Special

Judge (POCSO), Basar.

SUBMISSION OF THE LEARNED ADDITIONAL PUBLIC PROSECUTOR FOR THE RESPONDENT NO. 1

8. Ms. T. Jini, learned Additional Public Prosecutor appearing on behalf of the state respondent on the other hand submitted that the age of the victim has not been disputed. She submitted that from the very beginning the conduct of the accused/appellant was clear that he had an intention to commit sexual assault on the victim. It could be seen from the fact that the accused/appellant (principal of the school) not only allowed the victim and other few children to sleep in the main room where he used to sleep but also made the victim to sleep with him. And with sexual intent the accused had committed an offence of unnatural penetrative sexual assault on the victim on regular basis. The learned Public Prosecutor further submitted that after disclosure of the commission of sexual assault on him, the victim gave his statement before the Investigating Officer of the case implicating the accused for commission of penetrative sexual assault on him. Thereafter, he gave the same statement before the Magistrate under Section 164 of Cr.P.C. The victim has been consistent in his stance and gave evidence similar to his earlier statement. Further, the statement and deposition of the victim has well corroborated by the medical examination report where the doctor has opined that there has been a sexual assault on the victim. The above evidence of the victim and the doctors are also corroborated by the evidence of other witnesses.

9. The learned Addl PP also submitted that the above evidences of the victim, the doctor and the other relevant witnesses have not been rebutted by the defense side during the entire trial period. Under such circumstances, the Court found the accused guilty and convicted for offence under Section 377 of IPC R/w Section 5(f)(l)(m)/6 of POCSO Act, 2012 and sentenced him to undergo rigorous imprisonment for 10 (ten) years and 20 (twenty) years with default stipulation respectively. As such, there is no infirmities in the conviction and sentence order passed by the learned Additional Sessions Judge-cum-Special Judge (POCSO), Basar. Hence, prays for dismissal of the present jail appeal.

THE LEARNED LEGAL AID COUNSEL FOR THE VICTIM RESPONDENT NO. 2 WHILE ENDORSING THE SUBMISSION MADE BY THE LEARNED ADDITIONAL PUBLIC PROSECUTOR HAS MADE THE FOLLOWING SUBMISSIONS.

10. The learned legal Aid Counsel for the victim, while defending the judgment dated 28.06.2021 passed by the learned Additional District & Sessions Judge-cum-Special Judge (POCSO), Basar, has submitted that the victim has been consistent in his statements from the moment he disclosed the sexual assault to his father/informant, which prompted the father to lodge a written FIR against the accused. After registration of the case, on examination by the police, the victim has given the statement before the police and the same has been reiterated before the Magistrate while giving statement under Section 164(5) of Cr.P.C and thereafter, the victim in his evidence before the trial Court had also given the same statement. Thus, the victim has been consistent in his stance. And this clearly shows that the statement and deposition of the victim was true statement of the fact of the case. The said statements and the evidence of the victim are well corroborated by the evidence of the other witnesses as well as the medical evidence. In view of such evidence of the victim which has been well corroborated by the other witnesses, the learned trial Court found the evidences of the victim child to be true and reliable. And basing on the above evidences of the prosecution witnesses being corroborated by the medical evidence and other evidences, the accused was rightly convicted.

11. In the instant case, since the victim was a child aged about 8 (eight) years which is below the age of 18 (eighteen) years, the Special Court (POCSO) presumed that the accused has committed the alleged offence unless the contrary is proved. And as seen above, the defense side could not disprove the evidences of the prosecution side including the evidence of the victim that the accused has committed penetrative sexual assault upon the victim against his will.

12. For the reasons stated above, the learned Legal Aid counsel submits that the charge against the accused person has been proved beyond reasonable doubt and there is no any infirmity in the judgment and order of the learned Special Judge (POCSO) convicting and sentencing the accused for offence under Section 377 of IPC and Section 5(f)(l)(m)/6 of POCSO Act, 2012.

Hence, submitted for dismissal of the present jail appeal.

POINTS FOR DETERMINATION

13. In view of the rival submission made by the learned counsel for the parties, the point that so arises for determination in the present appeal are: -

(i) Whether the learned Special Judge (POCSO) has justified in convicting the accused for the offences under Section 377 of IPC and sentencing him to undergo rigorous imprisonment for 10 (ten) years with fine of Rs. 10,000/- (Rupees ten thousand) with default clause.

(ii) Whether the learned Special Judge (POCSO) has justified in convicting the accused for the offences under Section 5(f)(l)(m)/6 of POCSO Act and sentencing him to undergo rigorous imprisonment for 20 (twenty) years with fine of Rs. 2,000/- (Rupees two thousand) with default clause.

FINDING AND REASON

14. We have given our anxious thoughts and considered the argument advanced by the learned counsels for the parties. We have carefully perused the entire material including the trial Court records.

15. Since, this Court being the first appellate Court and it is a fact-finding Court, in order to find out the truth, we are of the view that it has to appreciate the evidence on record. For the proper appreciation of the fact, we may now refer back to the evidences and statements especially the evidence of the victim and the other material witnesses which are crucial evidences in the case.

16. In the instant case, it is discernable from the records that the age of the victim has not been disputed. In view of the admitted fact that the victim was minor child aged about 8 (eight) years

being born on 24.12.2010 and the same being corroborated by the statement of the witnesses and the birth certificate produced, we hold that the victim in the present case was a child at the time of incident as defined under the POCSO Act.

EVIDENCES OF THE VICTIM:

17. On being found by the trial Court that the victim was intelligent enough to give deposition, the victim in his evidence stated that he knows the accused Jayprakash P.D but he does not like him because while he was in hostel of Silver Hills Public School, Daporijo in class-III, the accused opened his half pant and underwear and put his penis into his anus at night many times. He further deposed that the accused also made him to touch and hold his private part with his hand at night many times and this dirty act was done to him by the accused while other co-hostellers/students were sleeping on the floor due to which no one was aware of the incident. He also deposed that he could not resist to the unwanted act of the accused due to fear of him. The statement of the victim also was recorded by the police and the Magistrate and proved his statement made before the Magistrate as P.Ext.1. The record reveals that the Ex.1, the statement of the victim before the Magistrate was recorded after assessing the capacity of the victim. On perusal of the statement, it appears that the statement of the victim before the Magistrate and his deposition before the Court are same. The victim in his evidence stated that the accused did not provide him separate bed and the accused made him to sleep in his room with him. And when other 2 (two) in the same room sleeps, the accused starts molesting him physically. The accused used to undress his half pant leaving him completely naked and forcefully made him to hold his penis with his hand and the accused inserted his penis inside his anus. The accused also used to climb on him and make a contact with his penis to the penis of the victim and starts to shake. During the cross-examination, the victim further deposed that after vacation he was not provided with separate bed in the hostel and it was re-arranged making him to sleep in the bedroom of the accused. The victim also reiterated that the accused started molesting him at night when the co-hostellers were already sleeping on the floor.

18. From the above evidences of the victim, it clearly reveals that after vacation, the accused did not provide separate bed to the victim in the hostel and it was re-arranged in such a way that

the victim was compelled to sleep in his room with him. Thereafter, at night the victim was subjected to sexual assault by making him naked then compel the victim to touch and hold his penis with his hands and then committed penetrative sexual assault by penetrating his penis in the anus of the victim on many occasions.

19. Section 377 of IPC provides for the punishment for unnatural offences, whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with (imprisonment for life), or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

20. Likewise, the offence of penetration of sexual assault under Section 3 of POCSO Act has defined as under:

Penetrative Sexual Assault- A person is said to commit “penetrative sexual assault” if-

- (a) *he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or*
- (b) *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; or*
- (c) *he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*
- (d) *he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.*

21. The offence of sexual assault under Section 5 defines the aggravated penetrative sexual assault, the Section relevant to the present case is reproduced below:

- “(f) *whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or*

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below 12 years.”

22. In the instant case, the accused has been charged and convicted under Section 377 of IPC for unnatural offence. Section 6 of POCSO Act will be applicable when there is aggravated penetrative sexual assault as defined under Section 5(f)(l)(m)/6 of POCSO Act; noted above.

23. The prosecution has examined Shri Tai @Tajum Mara Leyu, who is the father of victim as PW-2. The PW-2 (father) deposed that his son (victim child) was admitted in the hostel of Silver Hills Public School, Daporijo. He was telephonically informed by the accused to bring new slippers for victim as his slipper got damaged. Accordingly, the PW-2 went to hostel and took his victim child to buy slippers for him. But while his victim child was getting up from his chair in the restaurant after having chow, he found the victim not normal as he was getting upon with difficulty. On enquiry the victim child disclosed that the accused used to commit wrong with him by inserting his penis into his anus. The victim also disclosed that the accused used to make him touch his private part with his hand. After having come to know about the said act, the PW-2 took the victim child to the hospital at Daporijo and got him examined. Thereafter, he lodged the written FIR against the accused.

24. The prosecution has also examined Dr. T. Bam as PW-3 who had examined the victim on 03.07.2019. The PW-3 found minor bruises of 1.0 x 1.0 x 0.1 cm approx. on the medical aspect of right and left knee joint and on posterior aspect/back side of left thigh; a circular mark on areola of left and right breast with red ball pen; redness mark on anal and perianal canal with no swelling, no bruising and no discharge. He also found from the anal canal, tenderness mark on one finger insertion with no bleeding, no discharge and no mucosa tear but the victim felt painfulness on the insertion of one finger. The PW-3 deposed that normally insertion of single adult finger does not cause any pain to the child. Upon above findings, PW-3 came to the conclusion that there was an indicative sign of anal penetration due to the fact that such skin infection normally does not disappear without medication whereas in the instant case, above mentioned injury marks were found lighten and disappearing after re-examination of the victim from 3(three) days of first examination. PW-3 clarify that size of injuries on knee joint on thigh

is 1.0 x 1.0 x 0.1cm approx. stands corrected. PW-3 also took photographs showing injury mark on the thigh, read circular mark with red ball pen around the left and right breast, knee joint of left and right leg and anus of the minor victim which was exhibited and identified.

25. During the evidence of the above prosecution witnesses; the witnesses were cross examined by the defense counsel; however, the defense counsel could not rebut the above material evidences adduced by the above witnesses during the cross examination.

26. The prosecution also examined PWs- 4, 5, 6 & 7. The above prosecution witnesses are not the eye witnesses to the incident; however, some of the prosecution witnesses viz., PW-6 deposed that the accused was very close with the victim and as such, the accused made the victim to sleep with him on his bed sometime.

27. After completion of the evidence of the prosecution witnesses, the accused was examined under Section 313 of Cr.P.C and his statement recorded where the accused denied having committed any sexual offence on the victim. However, the accused admitted that during the month of June to July, not only the victim but also other hostellers of his school around 10 (ten) in numbers were sleeping on the floor of his bedroom on the mattress but not on his bed although they used to sit and lie on it while watching T.V. He further deposed that the students/hostellers had to sleep in his room due to hot climate and insufficient air produced by fan in other rooms.

28. We have heard the learned counsel for the parties and carefully examined and considered the evidences on record. It is seen that after disclosure of the victim regarding commission of penetrative sexual assault on him, the father has lodged FIR. Thereafter, the victim gave his police statement under section 161 Cr.P.C where he has stated that the accused had committed a penetrative sexual assault on him. Thereafter, victim gave the same statement before the Magistrate under Section 164 of Cr.P.C. It is also seen that the victim has been consistent in his stance and gave evidence before the Court similar to his earlier statement made before the Magistrate. He has been consistent in his stance. This consistency is significant as it suggests that the victim's account is reliable and supports the overall case presented by the prosecution.

Further, the statement and deposition of the victim has well corroborated by the medical examination report where the doctor has opined that there has been a sexual assault on the victim. The above evidence of the victim and the doctors are also corroborated by the evidence of other witnesses and the defense could not rebut the same in his cross examination. In view of the above evidences on record, we have no reason to disbelieve the evidences adduced by the victim. Hence, we are of the firm view that the accused had committed a penetrative sexual assault with the victim for more than once in the school hostel being run by the accused during the month of June to July, 2019.

29. At this stage, on perusal of the record, we have noticed that at the relevant time of recording, the evidences of prosecution witness Nos. 4, 5, 6, 7 & 8 on 20.03.2020, the accused Jayaprakash P.D was not produced from judicial custody Daporijo. However, the record reveals that by a wt. message dated 13.03.2020 by the In-Charge Jail Superintendent Judicial Custody at Daporijo stating that due to ongoing preparation work of bailey bridge at Daporijo, no vehicle could be crossed from Daporijo to Basar and vise-versa due to which all the UTPs could not be able to produced before the trial Court till the aforesaid preparation work is completed. And in view of the above information, the learned trial Court had dispensed the production of the accused before the Court till the next date. In this regard, the learned counsel for the respective parties fairly submitted that since the prosecution witness No. 4 being the owner of the school building knew the accused and the prosecution witnesses Nos. 5, 6 & 7 being the employees of the said school run by the accused are known to the accused person as such, the identification of the accused before the Court for recording the evidences was not necessary. Accordingly, under the circumstances the learned trial Court had dispensed with the production of the accused. And since the prosecution witness No. 8 being the I.O of the case is an official witness who knew the accused; hence, he did not require the production of accused for identification purpose.

30. In this regard, the learned counsel for the respondents while referring to the Section 273 submits that although under the provision of Section 273, it is provided that all evidence taken in the course of trial or other proceedings shall be taken in the presence of the accused, or, accused, or, when his personal attendance is dispensed with, in the presence of his pleader. In the instant case, due to the damage of the bridge in-between the Daporijo and Basar where the Court is located, the accused could not be produced before the Court at the time of recording the

evidences of the PWs-4 to 8. However, considering that the above prosecution witnesses are known persons to the accused, the learned trial Court dispensed with the appearance of the accused and the accused was duly represented by his learned defense counsel who had cross-examined all the above prosecution witnesses. As such, no prejudice has been caused to the accused. Moreover, the conviction of the accused is based on the evidences of the victim (PW-1), the father (PW-2) and the medical evidence of the doctor (PW-3) and not on the basis of the evidences of the prosecution witnesses Nos. 4 to 8.

31. On perusal of the records, we are of the opinion that no prejudice has been caused to the accused for his non-appearance on the day when the evidence of prosecution witnesses Nos. 4 to 8 were recorded, inasmuch as, the accused was duly represented by his defense counsel who had thoroughly cross-examined the above prosecution witnesses. Moreover, from the record, it appears that the conviction of the accused is largely based on the evidences of the victim (PW-1) and the medical evidence of the doctor (PW-3) and not based on the evidences of the PWs- 4 to 8.

32. In view of the above, the prosecution has been able to prove the case against the accused beyond reasonable doubt for commission of unnatural penetration sexual assault with the victim. And since the victim was a minor child at the time of incident, his consent, if any is immaterial.

33. Upon consideration and appreciation of the above evidences and materials on record, the learned Additional Sessions Judge-cum-Special Judge (POCSO) held that the prosecution has been able to prove the case beyond the reasonable doubt. As such, the accused has been convicted and sentenced for offence under Section 377 IPC RW Section 5(f)(l)(m)/6 of POCSO Act, 2012, and we do not find any infirmity in the above findings of the learned trial Court.

34. In view of the above findings and the reasons stated above, we are of the considered opinion that the prosecution has been able to prove the charges levelled against the appellant/convicted beyond all reasonable doubt. The learned trial Court has appropriately evaluated and appreciated the evidence and thus, convicted the accused/appellant sentencing

him to undergo rigorous imprisonment for 10 (ten) years for offence under Section 377 of IPC with fine of Rs. 1,000/- (Rupees One thousand), and further to undergo rigorous imprisonment for 20 (twenty) years for offence under Sections 5(f)(l)(m)/6 of POCSO Act, 2012 with fine of Rs. 2,000/- (Rupees Two thousand) with default clause. Under the circumstances, we find that there is no need for this Court to intervene with the impugned judgment.

35. Accordingly, this criminal jail appeal is dismissed as it lacks merit. The judgment and order convicting the appellant (accused Jayprakash P.D) on 28.06.2021 and sentencing him to undergo rigorous imprisonment for 10 (ten) years for offence under Section 377 of IPC and rigorous imprisonment for 20 (twenty) years for offence under Section 5(f)(l)(m)/6 of POCSO Act, 2012 with a fine and with default clause by the learned Additional Sessions Judge-cum-Special Judge (POCSO), Basar Leparada in BSR/POCSO-09/19 under Section 319 is hereby uphold and affirmed.

36. Jail Appeal stands disposed of in terms of above.

37. Return the Trial Court Record along with a copy of this order. A copy of this Judgment and order be forwarded to the appellant/convict accused free of cost through the Superintendent of Jail, Yingkiong Sub Jail, Upper Siang District, Arunachal Pradesh.

38. We appreciate the service rendered by the learned Amicus Curiea Ms. S.V. Darang and Ms. N. Dangen in adjudicating this appeal. The Govt of Arunachal Pradesh / the Gauhati High Court, Itanagar Bench, Legal Services Committee shall pay the remuneration at the rate as prescribed on raising their respective Bills.

JUDGE

JUDGE

Comparing Assistant