

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.3567 of 2017

Arising Out of PS. Case No.-71 Year-2013 Thana- BELCHAR District- West Champaran

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Sheikh Shamim S/o Sheikh Najarul, R/o Village- Shekhawa Tola, P.S.-
Balthar, District- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Pritish Kumar Lal
For the Respondent/s : Mr. SRI BIPIN KUMAR

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT
Date : 27-03-2018

Heard the learned counsels for the appellant, the
informant and the State.

2. The appellant/Sheikh Shamim has been
convicted under Sections 376/511 of the Indian Penal
Code and Section 8 of the Protection of Children from
Sexual Offences Act, 2012 by judgment dated
07.11.2017 passed by the learned Additional District
and Sessions Judge-I-cum-Special Judge-POCSO
Court, West Champaran in Belthar P.S. Case No. 71 of
2013/C.I.S. No. 12641 of 2014 and by order dated



09.11.2017, he has been sentenced to undergo R.I. for five years, to pay a fine of Rs. 10,000/- and in default of payment of fine to further suffer S.I. for three months for the offences under Sections 376/511 of the Indian Penal Code and R.I. for five years, to pay a fine of Rs. 10,000/- and in default of payment of fine to further suffer S.I. for a period of three months for the offence under Section 8 of the POCSO Act, 2012, the sentences however having been ordered to run concurrently.

3. The appellant is said to have made attempts to commit rape on the victim who at the relevant time was seven years of age.

4. The father of the victim viz. Sanjay Mahto (P.W. 4) lodged the FIR alleging that his daughter aged about seven years had gone to witness a Mela in the village on 04.09.2013 at about 3 o' clock in the day, when the appellant enticed and took her to a sugar-



cane field near the river and attempted to commit rape upon her. On hearing the cries of his daughter, villagers who were working in the field, rushed to the place of occurrence. No sooner had the villagers assembled there, the appellant ran away. While running away, he was identified by the villagers. The villagers saw the daughter of the informant disrobed and in a frightened state. They also saw cut marks on the cheek of his daughter. A Panchayati was convened for settling the dispute and this was stated to be the reason for delay in lodging the FIR. The report was lodged on 09.09.2013 about the occurrence dated 04.09.2013.

5. On the basis of the aforesaid written report by P.W. 4, a case vide Balthar P.S. Case No. 71 of 2013 dated 09.09.2013 was instituted for offences under Sections 376/511 of the Indian Penal Code and Section 8 of the POCSO Act, 2012.



6. The police, after investigation, submitted charge-sheet whereupon cognizance was taken and the appellant was tried.

7. The trial court after examining six witnesses on behalf of the prosecution convicted and sentenced the appellant as aforesaid.

8. Chhatrapati Chaubey who has been examined as P.W. 1 has deposed before the court that on the day of the occurrence, at about 3 o' clock he was looking for firewood in the field when he heard somebody crying in the sugar-cane field. When he went to the field, he saw the appellant running away. He could not apprehend him. However he claims to have seen the victim who had been disrobed and there was a bite mark on her cheek. The victim was taken to the house of her father (P.W. 4). He has identified the appellant in dock and in his cross-examination has stated that the sugar cane field is at a distance of one kilometer



from his house. The appellant was stated to have run away across the river. The aforesaid witness met the father of the victim at about 3.30 in the day. Thus, the aforesaid prosecution witness has only seen the appellant running away from the place where the victim was found to be standing without her dress. He has not stated that the victim told him that the person who ran away had actually brought her there in the field.

9. Harish Yadav (P.W. 2) claims to have learnt about the occurrence from P.W. 1 only. When he went to the field on halla raised by P.W. 1, he only saw that the P.W. 1 was bringing the daughter of P.W. 4 back home. However he has also stated that the victim was crying and there was a bite mark on her left cheek.

10. Now it would be relevant to see the deposition of the victim herself. At the time of deposing before the trial court, she was eight years old. She has stated that she had gone to see Mela in the village. The



appellant told her that his uncle and aunt had come and then took her towards river. She was thrown on the ground and was bitten by the appellant on her cheek. She has also stated that the appellant removed her underwear and also disrobed himself. At that point, she shouted for help and on that, one Pandit Jee and Mukhiya Jee came. She thereafter came back home and informed about the occurrence to her parents. She had been examined by the police during the course of investigation. In cross-examination, she has stated that in the Mela of the village, there were other persons of the village also. Her grand-mother had come back home. When she was asked by the appellant to come to the river side, there were other persons of the village also available there. The appellant had presented himself before her as a friend of her uncle. On being specifically questioned as to why she did not run away from there, she deposed that she was



brought to the river side by force and was also assaulted and therefore she could not run away. She also alleges to have been gagged by the appellant.

11. It appears from the deposition of P.W. 3 that she was though disrobed but no attempt was made to commit any sexual act on her. Even her private parts were not touched/fondled. The only statement made by the victim before the trial court was that she was disrobed and the appellant opened his clothes also. Thereafter she was bitten in her cheeks by the appellant. P.W. 3 has not stated about any act of the appellant which would come within the category of acts which would make the appellant liable for being prosecuted for an offence under Section 376 of the IPC.

12. Section 375 of the Indian Penal Code defines rape. It reads as hereunder:



375. Rape. - A man is said to commit "rape" if he—

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and



that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation I.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.



Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

13. Merely disrobing the victim and biting her on her cheek would not come in the category of acts which would attract the offence under Section 375 of the IPC. At best, it could be an offence under Section 354 of the IPC and nothing beyond. If the offence under Section 376 of the IPC cannot be made out, it cannot also be stated that an attempt was made by the appellant to commit such offence thereby making him liable for being prosecuted and convicted for the offences under Sections 376/511 of the Indian Penal Code.

14. So far as the offence under Section 8 of the POCSO Act, 2012 is concerned, it would be necessary to know as to what would constitute a sexual assault



because Section 8 prescribes punishment for sexual assault. Sexual assault has been defined under Section 7 of the Act which reads as hereunder:

7. Sexual Assault. - *Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault.*

15. For the offence to come within the category of sexual assault, a child, must be touched on his/her private parts or the child should be made to touch the private parts of the perpetrator of the crime and the act be done with the sexual intent. Other acts with sexual intent which would involve physical contact with the victim also would constitute sexual assault. In the present case, apart from the allegation of disrobing the victim and disrobing himself, no other act has been attributed to the appellant. The only other physical



contact which has been alleged against the appellant is of biting on the cheeks of the victim.

16. In that connection it would be relevant to examine the deposition of Dr. Manju Jaiswal who has been examined as P.W. 5 in the case. She examined the victim on 10.09.2013 and assessed her age to be six years. She did not find any sign of sexual assault. The hymen was found intact. She has not spoken about any bite mark/wound on the cheek.

17. The father of the victim (P.W. 4) came to learn about the occurrence through the mouth of P.Ws. 1 and 2 as also the victim. He has stated before the trial court that after four or five days of the occurrence, the case was lodged. The reason assigned was that an effort was being made to have the dispute settled in Panchayati. Seen in the aforesaid background, it appears rather doubtful that the appellant had



committed such an offence. This Court says so for the following reasons:

(a) Even though the father of the victim learnt about the occurrence on the day when an attempt to sexually assault his daughter had been committed but on a lame pretext of arranging for a Panchayati, the case was lodged after a delay about four days.

(b) The victim was examined the next day of the occurrence when no injury/sign was found by the doctor (P.W. 5) indicating any recent sexual assault.

(c) No sign of any injury on the cheeks of the victim was found.

(d) It has not been alleged at any place that the private parts of the victim were touched/fondled or the victim was made to touch the private parts of the appellant.

(e) The victim has stated that she was brought to the river side by gagging her and also assaulting her.



This does not inspire confidence as the time of the occurrence is somewhere in the afternoon when there were many persons of the village available in the Mela.

(f) The distance of the place of occurrence from the village is about one kilometer and it does not appear to be probable that if a girl of tender age would be gagged and assaulted while being brought to a destination, it shall not be spotted by other villagers.

(g) The story of the appellant escaping through the river route also appears to be exaggerated and therefore doubtful.

18. P.W. 1 did not see any act being perpetrated upon the victim. He only saw the appellant running away. At that time he was not told by the victim that the person who was running away was the one who had brought her to the sugar-cane field.

19. A perusal of the records reveal that in her 164 statement, the victim had narrated a somewhat



different story. However in that statement also, there is no allegation of any act committed by the appellant which would fall in the category of a "sexual assault" as defined under Section 7 of the POCSO Act or the offence of rape as defined under Section 375 of the Indian Penal Code.

20. Ms. Abha Singh, the learned Public Prosecutor has however stated that even if it is only found that the victim was disrobed and the appellant had also opened his clothes, it would demonstrate the intent, the sexual intent of the appellant thereby making him liable for the offences under Sections 376/511 of the IPC and Section 8 of the POCSO Act.

21. Mere intent of a person which is oriented/geared towards no sexual activity is not punishable under Section 376 of the IPC or Section 8 of the POCSO Act. An act in pursuance of such intent and such acts which have been enumerated and



defined in the concerned sections are necessary for charging/trying any person for the offences referred to above. It appears from the records/testimonies of the witnesses that no such attempt was made by the appellant. That apart, the very story of the appellant having taken the victim to a desolate place i.e. by the river side in the sugar cane field in the afternoon from the Mela which was being staged at a distance about one kilometer appears to be doubtful. Myriad are the reasons for wrong implication of someone. It could be the wrong identification of the person who was spotted as running away from the place of occurrence. There could be a case of false implication also with ulterior motive. Though no effort has been made on behalf of the defence/appellant to establish his innocence but from the prosecution evidence itself, it appears that the case has not been proved beyond all reasonable



doubts. The appellant is thus entitled to the benefit of doubt.

22. For the aforesaid reasons, it is difficult to sustain the conviction and sentence of the appellant. The judgment and order of conviction dated 07.11.2017 and 09.11.2017 respectively passed in Belthar P.S. Case No. 71 of 2013/C.I.S. No. 12641 of 2014 is set aside.

23. The appeal succeeds.

24. The appellant is in custody. He is directed to be released forthwith, if not required in any other case.

25. A copy of the judgment be transmitted to the Superintendent of jail for information, compliance and record.

(Ashutosh Kumar, J)

krishna/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	29/03/2018
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