

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-S-2839-SB-2016 (O&M)

Date of decision : 24.07.2019

Pardeep

...Appellant

Versus

State of UT, Chandigarh

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. P.B.S. Goraya, Advocate for the appellant.

Mr. Amit Kumar Goyal, APP for UT, Chandigarh.

ANIL KSHETARPAL, J. (ORAL)

Appellant challenges the judgment passed by the learned Additional Sessions Judge, Chandigarh delivered in FIR No.150 dated 01.06.2015 registered under Sections 377, 363, 367 of the Indian Penal Code and 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter to be referred as “the POCSO Act, 2012”) at Police Station Industrial Area, Chandigarh, convicting the appellant under Section 6 of the POCSO Act, 2012 as well as offences punishable under Sections 367 and 377 of the Indian Penal Code, sentenced to undergo rigorous imprisonment for a period of 10 years. The sentence awarded under various provisions in detail is as under:-

“Under Section 367 IPC:-

To undergo rigorous imprisonment for 7 years and also to

pay fine of Rs.5000/- and in default of payment of fine, to further undergo 3 months simple imprisonment.

Under Section 6 of POCSO Act

To undergo rigorous imprisonment for 10 years and also to pay fine of Rs.10,000/- and in default of payment of fine, to further undergo 6 months simple imprisonment.

No separate sentence is being passed for the offence punishable under Section 377 IPC as the same act i.e. penetrative sexual assault also falls within the ambit of Section 377 IPC.

It is ordered that all the sentences shall run concurrently.”

The facts noticed by the learned trial Court are extracted as under in order to avoid repetition:-

“As it emerges from the final report under Section 173 Cr.P.C, the case of the prosecution is that on 1.6.2015 ASI Krishan Kumar along with other officials were present in the area of police station on patrolling duty, when Arun Kumar s/o Ram Briksh Shah. H.No.21, Sanjay Labour Colony met him at the gate of the police station, who got recorded his statement he is residing at the aforesaid address with his family and works as Mason. On that day when he returned from his work at about 7.00 pm, at that time his nephew (sister's son) the victim aged 8 years (name of the victim is being withheld and he shall hereinafter, be referred to as 'the victim') told him that few hours before a boy of their colony committed wrong act with him. Upon his asking the victim took him along and showed the house of the said boy, whom he knows before hand. The name of said boy is Pardeep s/o Ram Raj. He further got recorded that Ram Raj while leaving Prince at home had gone out with his family. He (complainant) again enquired from victim,

whereupon the victim told that he had gone to the jungle for passing stools when the said boy allured him and took him to his house where he committed wrong act with him and asked not to disclose about the incident to anyone. The complainant further got recorded in his stated that he surely know that Pardeep has committed wrong act with his nephew (victim). The complainant sought legal action against the culprit. After recording of the statement of the complainant, formal FIR was registered. Thereafter, further investigation was ensued, accused was arrested, statements of witnesses were recorded and on completion of investigation, challan was presented against the accused before this Court, being the special court to deal with the offence under Protection of Children from Sexual Offences Act, 2012.

2 Upon appearance of the accused in the court, he was supplied with the copy of challan free of costs as provided under section 207 Cr.PC.

3 On finding a prima facie case against the accused under Sections 366, 377 of IPC and under section 6 of Protection of Children from Sexual Offences Act, 2012, he was charged thereunder, to which the accused pleaded not guilty and claimed trial.

4 To substantiate its case, the prosecution examined the child victim as PW1, HC Jaimal Singh MMHC as PW2, C Deepak as PW3, HC Moti Lal as PW4, Aslam Mohammed, DEO as PW5, the complainant Arun Kumar as PW6, investigating officer ASI Krishan Kumar as PW7, Dr. Bhara Kumar as PW8, Dr. Harvinder Singh as PW9. Thereafter, learned Addl. PP closed the prosecution evidence after tendering documents.

5 Statement of accused U/s 313 Cr.PC was recorded wherein the incriminating evidence appearing against him

was put to him to which he pleaded innocence and false implication. He has further stated that due to enmity between parents of the accused with the parents of the victim, a false FIR has been got registered by the complainant in connivance with the police. He has nothing to do with the alleged offence and he has not committed any sexual intercourse with the victim. He also availed the opportunity to lead evidence in defence but did not examine any witness and closed his defence evidence.”

This Court has heard learned counsel for the parties at length and with their able assistance gone through the record as well as judgment under challenge.

Learned counsel appearing for the appellant has contended that offence under Section 3 of the POCSO Act, 2012 is not made out. He has drawn attention of the Court to the Medico Legal Report of the victim, a child Ex.P10 which shows that there was no fresh external injury visible. For detail analysis of anal area, opinion of surgeon was sought. Opinion of surgeon on injury is extracted as under:-

*“On examination : Genitalia Normal
Digital rectal examination: No scratch marks,
No bleeding seen
No Anal tear is seen
sampling from inside the anus and perianal is done for
semen analysis.”*

He further drew attention of the Court to the statement of surgeon who has appeared as PW8. He has also stated that no anal tear was seen.

On the basis thereof, learned counsel submitted that no doubt

child victim has alleged penetration in his anus but the aforesaid allegation is not corroborated by medical evidence. Hence, he prayed that conviction under Section 3 of the POCSO Act, 2012 should be set aside.

On the other hand, learned counsel for the Union Territory has submitted that although medical evidence does not support the case of prosecution, however, child has been examined as PW1 and has specifically stated that appellant had penetrated his penis in his anus. Hence, he submitted that such evidence is sufficient to convict the appellant under Section 3 of the POCSO Act, 2012.

It may be noted here that the appellant has already undergone 4 years, 1 month and 23 days as stated by counsel appearing for the Union Territory.

Section 3 of the POCSO Act, 2012 provides for an offence which is penetrative sexual assault. Section 3 is extracted as under:-

“3. 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.”

In the present case, appellant has been convicted for aggravated penetrative sexual assault as provided in Section 5(m) of the POCSO Act, 2012 which is applicable when child is below 12 years. Section 6 of the POCSO Act, 2012, provides for punishment for aggravated penetrative sexual assault. However, the basic features of penetrative sexual assault are provided in Section 3 of the POCSO Act, 2012 which has been extracted above. As per the case of counsel for the Union Territory, Chandigarh, the case of the appellant would fall within Section 3(a) of the POCSO Act, 2012. As per Section 3(a) of the POCSO Act, 2012, there has to be a penetration penis into vagina, mouth, urethra or anus of a child. So, the basic question is whether penetration stands proved or not. The child was medico legally examined on the same day. From the reading of the Medico Legal Report, it is noticed that child is not complaining of pain. No fresh external injury was visible. As per the opinion of Surgeon, which is Ex.P22 extracted above, there was no anal tear and no injury in the anal part. In view of the overwhelming medical evidence, this Court is of the considered opinion that the appellant has been wrongly convicted under Section 6 of the POCSO Act, 2012.

However, since child has been examined and answered the questions, it is found that the appellant had attempted to commit an offence by abducting a child.

In the considered view of this Court, the offence committed by the appellant would fall within the definition of sexual assault as provided

in Section 7 of the POCSO Act, 2012.

However, since, child was below 12 years, therefore, it will fall in Section 9(m) of the POCSO Act, 2012 which is aggravated sexual assault. The minimum punishment prescribed therein in Section 10 of the POCSO Act, 2012 is 5 years.

Keeping in view the aforesaid facts, conviction of the appellant is converted into Section 10 of the POCSO Act, 2012 , as also under Section 367 IPC. Under both the offences, he is sentenced to undergo rigorous imprisonment for a period of 5 years. Both the sentences shall run concurrently.

In view of the above, present appeal is disposed of.

24.07.2019

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No