

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.38 OF 2016

From judgment and order dated 27.05.2016 passed by the Sessions Judge -cum- Special Judge, Phulbani in G.R. Case No.47 of 2014/T.R. No.38 of 2014.

Rajesh Mukhi

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Appellant

-Versus-

State of Odisha

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Respondent

For Appellant:

- Mr. Anirudha Das
Amicus Curiae

For Respondent:

- Mrs. Susamarani Sahoo
Addl. Standing Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 07.09.2022

S.K. SAHOO, J. The appellant Rajesh Mukhi faced trial in the Court of learned Sessions Judge -cum- Special Judge, Phulbani in G.R. Case No.47 of 2014/T.R. No.38 of 2014 for commission of offences punishable under sections 376(2)(i)/323/307 of the Indian Penal Code and section 6 of the Protection of Children from

Sexual Offences Act, 2012 (hereafter 'POCSO Act') on the accusation that on 07.08.2014 at about 6.00 p.m. at village Rutungia, he committed rape on the victim, who was a minor girl and voluntarily caused hurt to Gajapati Nayak (P.W.5), the grandfather of the victim and also assaulted P.W.5 with a lathi on his head with intention to commit his murder and that he committed aggravated penetrative sexual assault on the victim.

The learned trial Court vide impugned judgment and order dated 27.05.2016 found that the prosecution has not been established the charge under section 307 of the Indian Penal Code, however, found the appellant guilty under sections 376(2)(i)/323 of the Indian Penal Code and 6 of the POCSO Act and sentenced him to undergo R.I. for twelve years and to pay a fine of Rs.1,000/- (one thousand), in default, to undergo further R.I. for one year for the offence under section 376(2)(i) of the Indian Penal Code and R.I. for one year for the offence under section 323 of the Indian Penal Code and both the sentences were directed to run concurrently. No separate sentence was awarded for the conviction of the appellant under section 6 of the POCSO Act in view of the provision under section 42 of the said Act.

2. The prosecution case, in short, is that the appellant was staying since two weeks prior to the date of occurrence in his in-laws' house in village Rutungia which is also the village of the

victim (P.W.1). On 07.08.2014 at about 6.00 p.m., the victim was playing on a heap of sand along with her friends in her village. The appellant came near the victim, caught hold of her, embraced her body and committed rape on her by inserting finger into her vagina. While the occurrence was going on, P.W.5, the grandfather of the victim came to the place of occurrence and when he tried to rescue the victim, the appellant assaulted him with a lathi for which he sustained injuries. The grandmother of the victim arrived there and the victim was taken to the house where she disclosed about the entire incident. The grandmother wiped out the blood from the thigh of the victim with her pant. At the time of occurrence, the parents of the victim were absent and they had gone for grazing of the cows and when they returned back home and came to know about the occurrence, the victim was taken to the Balliguda police station where the first information report was lodged on 08.08.2014 by the father of the victim Kaira Nayak (P.W.3).

On the basis of such first information report, Balliguda P.S. Case No.102 dated 08.08.2014 was registered under sections 376(2)(f)/325/307 of the Indian Penal Code and section 4 of the POCSO Act.

P.W.13 Sambari Hansdah, S.I. of Police, Balliguda police station took up investigation of the case and during course

of investigation, she examined the informant and the witnesses, issued injury requisition for the injured (P.W.5), the wearing apparels of the victim were seized by P.W.13 on the production of her mother as per seizure list Ext.3, one lathi and two outdoor tickets were seized on the production of the informant as per seizure list Ext.2 and on the date of lodging of the first information report itself, the victim was sent to S.D.H., Balliguda for her medical examination and the doctor after examining the victim submitted the medical examination report (Ext.4/1). The I.O. visited the spot and prepared the spot map (Ext.16) and the appellant was taken into custody on the date of lodging of F.I.R. and he was also examined medically at S.D.H., Balliguda. The statement of the victim was recorded under section 164 Cr.P.C. on the prayer of the Investigating Officer by the learned S.D.J.M., Balliguda as per direction of the learned Special Judge, Phulbani and the exhibits were forwarded to S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination. The I.O. received the medical examination report and ossification test report of the victim from M.K.C.G. Medical College and Hospital, Berhampur. She also seized the admission register of Rutungia Anganwadi center as per seizure list Ext.22 and gave the admission register in the zima of one of the employees of the Anganwadi centre as per zimanama Ext.23. The I.O. also received the injury report of

the injured (P.W.5), made some query to the doctor regarding possibility of injury on P.W.5 with such weapon and received the query report. On 10.09.2014, P.W.13 handed over charge of investigation to the Inspector in-charge of Balliguda police station Ashutosh Mishra (P.W.10), who completed the investigation and submitted charge sheet on 20.09.2014 against the appellant under sections 376(2)(f)/323/307 of the Indian Penal Code and section 6 of the POCSO Act.

3. After submission of charge sheet, the learned trial Court framed charges against the appellant 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.

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

P.W.1 is the victim. She supported the prosecution case and stated about the commission of rape on her by the appellant.

P.W.2 Laibeni Nayak is the mother of the victim and she stated that on the date of occurrence, she and her husband returned home after grazing the cows and came to know about the incident from her parents-in-laws and they took the injured (P.W.5) and the victim for medical examination. She has

specifically answered to the question put by the Court that the appellant 'Jakila' on the private part of the victim and 'Jakila' means in the local language 'intercourse'.

P.W.3 Kaira Nayak is the informant of the case and he is the father of the victim (P.W.1). He stated that on the date of occurrence, he along with his wife had been to graze cows in the nearby jungle and on their return, he heard commotion in her village and thereafter, he went to his house and noticed the blood was coming out from the vagina of the victim and her chadi was soaked with blood. He also noticed that his injured father (P.W.5) sustained bleeding injury on his head and blood was coming out from his wound. He enquired about the alleged incident from his parents and came to know from P.W.5 about the commission of rape on the victim and the appellant assaulting P.W.5 on his head by means of a thenga and his mother told him that she had brought the victim from the place of occurrence and she made her blood clean. He further stated that he took the victim to the hospital and the victim was five years at the time of occurrence.

P.W.4 Bhagirathi Baliarsingh is the scribe of the F.I.R. (Ext.1).

P.W.5 Gajapati Nayak is an eye witness so also injured in the case and he is the grandfather of the victim (P.W.1). He stated that on the alleged date of occurrence, the

parents of the victim had gone to graze cows in the nearby jungle and when he returned home from the nearby shop carrying some grocery articles, he enquired about the victim from his wife and came to know that the victim was playing. He proceeded to the place of occurrence and saw the appellant had opened his pant and torn the pant of the victim and he also saw the appellant committing intercourse with the victim and when he asked the appellant about the incident, the appellant all on a sudden inflicted lathi blow on his head for which he fell down on the ground and thereafter, his wife came there and took the victim to their house and he narrated the entire incident before the parents of the victim. He further stated that the blood was coming out from his injuries and on the next day of occurrence, he went to the hospital for treatment.

P.W.6 Dr. Smita Marandi was the O. & G. Specialist of S.D.H., Balliguda, who medically examined the injured (P.W.5) on police requisition and proved the injury report and query report vide Exts.5 and 7 respectively.

P.W.7 Dr. Subarna Kumar Mallick was the Assistant Surgeon of S.D.H. Balliguda, who medically examined the appellant on police requisition and proved the medical examination report vide Ext.9.

P.W.8 Paul Naik was the Havildar attached to Balliguda police station and also a witness to the seizure. He stated that on 08.08.2014, as per the direction of the Inspector in-charge of Balliguda police station, he accompanied with the appellant for his medical examination to S.D.H., Balliguda and after examination of the appellant, he collected three sealed bottles from the treating doctor and handed over the same to the I.O. (P.W.13) and she seized the same along with his command certificate vide seizure lists Exts.11 and 12 respectively.

P.W.9 Namita Ghantal was the constable attached to Balliguda police station and also a witness to the seizure of one brown colour pant of the victim, one wooden stick and grey colour pant of the appellant, three numbers of glass bottles and sealed envelope and one command certificate vide seizure lists Exts.3, 2, 13, 11 and 14 respectively.

P.W.10 Asutosh Mishra was the Inspector in-charge of Balliguda police station, who on the direction of D.I. (S.R.), took up charge of investigation of the case from P.W.13 and on completion of investigation, submitted the charge sheet.

P.W.11 Dr. Sudeepa Das was the Associate Professor of M.K.C.G. Medical College and Hospital, Berhampur, who medically examined the victim (P.W.1) on police requisition and proved the medical examination report vide Ext.4/1.

P.W.12 Ganeswar Digal is an eye witness to the occurrence. He stated that at the time of incident, he was standing near the Katrikia chhak and saw the appellant inflicted stick blow on the head of the injured (P.W.5) as a result of which he fell down. He further stated that he enquired about the incident from the appellant but he ran away.

P.W.13 Sambari Hansdah was the S.I. of Police attached to Balliguda police station and she is the Investigating Officer of the case and on being transferred, she handed over the charge to the Inspector in-charge of Balliguda police station (P.W.10).

The prosecution exhibited twenty three numbers of documents. Ext.1 is the F.I.R., Ext.2 is the seizure list of one lathi and two outdoor tickets, Ext.3 is the seizure list of the wearing apparels of the victim, Ext.4/1 is the medical examination report of the victim, Ext.5 is the injury report of injured (P.W.5), Ext.6 is the police requisition of P.W.6, Ext.7 is the query report prepared by P.W.6, Ext.8 is the query requisition, Ext.9 is the medical examination report of the appellant, Ext.10 is the requisition of the appellant, Ext.11 is the seizure list of one sealed vial containing semen, one sealed vial containing saliva and one sealed vial containing pubic hair of the appellant, Ext.12 is the command certificate, Ext.13 is the seizure list of one grey colour

full jean pant of the appellant, Ext.14 is the seizure list of one sealed envelope containing soak dried perineal swab and one command certificate of P.W.8, Ext.15 is the medical requisition of victim, Ext.16 is the spot map, Ext.17 is the prayer for recording of 164 Cr.P.C. statement of victim, Ext.18 is the command certificate, Ext.19 is the prayer for sending the seized exhibits to S.F.S.L., Rasulgarh, Bhubaneswar, Ext.20 is the forwarding report, Ext.21 is the acknowledgment of forwarding of seized exhibits, Ext.22 is the seizure list of admission register of Rutungia Anganwadi centre and Ext.23 is the zimanama.

5. The defence plea of the appellant is one of denial and it was pleaded that on account of land dispute, he has been falsely entangled in the case.

No witness was examined on behalf of the defence.

6. The learned trial Court while assessing the oral as well as documentary evidence on record has been pleased to formulate the following points for determination:

- (i) Whether on 07.08.2014 at about 6.00 p.m. at village Rutungia, on a heap of sand, the accused committed rape on the victim who is under sixteen years of age?

(ii) Whether on the aforesaid date, time and place, the accused voluntarily caused hurt to Gajapati Nayak?

(iii) Whether on the aforesaid date, time and place, the accused dealt a thenga blow on the head of Gajapati Naik with intent to cause his death?

(iv) Whether on the aforesaid date, time and place, the accused committed aggravated penetrative sexual assault on victim who is a child below the age of twelve years?

The learned trial Court mainly relied upon the evidence of the victim (P.W.1), her parents P.W.2 and P.W.3 and the injured P.W.5 to come to a conclusion that the appellant inserted finger into the vagina of P.W.1 and the evidence of her has not been discredited. The learned trial Court also placed reliance on the evidence of the doctor, who examined the victim and has been pleased to hold that the evidence of the P.Ws.1, 2, 3 and 5 are found to be natural, trustworthy and worthy of being relied upon and from such evidence, the prosecution has brought out the charge under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act home beyond all reasonable doubt.

So far as charges under sections 307 and 323 of the Indian Penal Code are concerned, taking into account the evidence of the injured (P.W.5) and the evidence of the doctor, who noticed three simple injuries on the person of P.W.5, it was held that there is no justification to convict the appellant under section 307 of the Indian Penal Code on the basis of existing material, however, the Court found sufficient material for the offence under section 323 of the Indian Penal Code and accordingly, while acquitting the appellant of the charge under section 307 of the Indian Penal Code, he was found guilty under sections 376(2)(i)/323 of the Indian Penal Code and section 6 of the POCSO Act.

7. Mr. Anirudha Das, learned Amicus Curiae appearing for the appellant contended that the evidence of the victim (P.W.1) indicates that at the time of occurrence, she was playing with her three friends, namely, Madhaba, Bikash and Indu in the evening hours but none of them have been examined to corroborate the evidence of the victim. Though the victim stated that the appellant came and embraced her, laid her down over the sand and inserted his finger into her vagina but the mother of the victim being examined as P.W.2 has stated that when they returned home and enquired from her parents-in-laws, they stated that the appellant inserted his penis into the vagina of the

victim. It is further submitted that in the 164 Cr.P.C. statement, the victim has specifically stated that the appellant embraced her and in the Odia, she has stated it is 'Jakila'. She has not stated that the appellant either inserted any finger or penis into her vagina and moreover, the doctor, who examined the victim, has stated that the medical examination report of the victim revealed recent sign of attempted but incomplete penetrative sexual assault. It is further submitted that in view of the evidence of the doctor, the alleged offence, if any, does not come within the purview of penetrative sexual assault as defined under section 3 of the POCSO Act or rape as defined under section 375 of the Indian Penal Code, which came into force by the Criminal Law (Amendment) Act, 2013. The learned counsel for the appellant further submitted that the doctor, who examined P.W.5 noticed three injuries on his person stated that the duration of injury was within two to three hours of her examination and P.W.5 was examined on 08.08.2014 and therefore, such injury does not correlate to the time of occurrence which took place on 07.08.2014 and thus, the presence of the P.W.5 at the spot is a doubtful feature. It is further submitted that in view of the glaring discrepancies in the evidence of the witnesses, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mrs. Susamarani Sahoo, learned Additional Standing Counsel for the State of Odisha, on the other hand, supported the impugned judgment and submitted that the mother of the victim was examined as P.W.2 and she has stated that 'Jakila' on the private part of the victim means 'intercourse' in their local language and therefore, merely because the victim has used such word in her 164 Cr.P.C. statement, it cannot be said that she has not stated about sexual intercourse committed on her by the appellant. It is further contended that the victim was a girl aged about five to six years and she has specifically stated that the appellant inserted his finger into her vagina and further stated about the presence of eye witness, who is none else than her grandfather, who has been examined as P.W.5 and supported the prosecution case. It is further submitted that nothing has been brought out in the cross-examination of either P.W.1 or P.W.5 to discard their version. It is further submitted that the occurrence took place in the evening hours on 07.08.2014 and at that time, the parents of the victim were not present in their house and they had taken the cows for grazing and when they returned home, they came to know about the incident from the grandparents of the victim and accordingly, on the next day, the first information report was lodged at Balliguda police station and therefore, there is no delay in the lodging of the F.I.R. The doctor, who has

examined the victim, from her physical findings, dental examination, secondary sexual characters (not developed) and radiological findings, opined the age of the victim to be in between five to six years. She further stated that the medical examination report of the victim revealed that there was recent sign of an attempted but incomplete penetrative sexual assault and that the external injuries detected on the person of the victim would be possible due to the dragging effect of long, pointed finger nail and the duration of the injuries were forty eight hours. It is argued that in view of the available material on record, it cannot be said that there is any perversity or illegality in the impugned judgment passed by the learned trial Court and therefore, the appeal should be dismissed.

8. There is no dispute that the star witness on behalf of the prosecution is the victim herself, who has been examined as P.W.1. Since the victim was a child witness, the learned trial Court put some questions to her and found that she was able to give rational answers and declared her to be competent to give evidence. Law is well settled that even in absence of oath, the evidence of a child witness can be considered under section 118 of the Evidence Act. The Court should bear in mind while assessing the evidence of a child witness that the witness must be a reliable one and his/her demeanour must be like any other

competent witness and there is no likelihood of being tutored. As a rule of prudence, the Court always finds it desirable to have corroboration to such evidence from other dependable evidence on record. **(Ref.: Dattu Ramrao Sakhare -Vrs.- State of Maharashtra reported in (1997) 5 Supreme Court Cases 341)**

The victim stated that while she was playing in the evening hours on the heap of sands with her friends, the appellant came near her, caught hold of her and then embraced her body and 'Jakila'. Then the appellant made her lie on the sands and inserted his finger into her vagina. Learned trial Court has mentioned that by way of gesture, the victim pointed out to her private part. The victim further stated that when her grandfather came to her rescue, the appellant assaulted him and then her grandmother came, wiped out the blood from her thigh with her pant and then she was taken to the police station and medically examined by the doctor. In the cross-examination, a suggestion was given to her by the learned defence counsel that blood was found on her thigh due to fall on the stone but the victim has denied such suggestion. She specifically stated that she told the incident to her parents, who were not present at the time of incident and had been to graze cows and that her grandparents also told the incident to her parents. Nothing further

has been elicited in the cross-examination to create any doubt on the evidence of the victim.

P.W.5, the grandfather of the victim stated that when he returned home from the nearby shop carrying some grocery articles, he enquired about the victim from his wife and came to know that the victim was playing and his wife indicated the place of occurrence and then he proceeded to the place of occurrence and saw the appellant had opened his pant and torn the pant of the victim and he also saw the appellant committing intercourse with the victim and when he confronted the appellant about his conduct, then the appellant all on a sudden inflicted lathi blow on his head for which he fell down on the ground. He stated that the blood was coming out from his injuries.

P.W.2 has also stated that she and her husband returned home after grazing the cows and came to know about the incident from her parents in-law and they took the injured (P.W.5) and the victim for medical examination. The evidence of P.W.3 also corroborates the evidence of P.W.2. P.W.2 has specifically answered to the question put by the Court that the appellant 'Jakila' on the private part of the victim and 'Jakila' means in the local language 'intercourse'. It is true that whereas the victim stated that the appellant inserted his finger into her vagina, her parents stated to have heard from P.W.5 that the

appellant inserted his penis into the vagina of the victim and that P.W.5 has stated that he saw the appellant was making intercourse with the victim, but on that score the evidence of the victim or the prosecution case cannot be disbelieved particularly in view of local language 'Jakila' used during evidence. Nothing has been brought out in the evidence of any of the aforesaid witnesses to disbelieve their version.

The doctor, who has examined the victim, has stated that it revealed to be a case of recent signs of an attempted but incomplete penetrative sexual assault.

'Penetrative sexual assault' as per the definition of section 3 of the POCSO Act includes the act of a person, if he inserts, to any extent, any part of the body, not being the penis, into the vagina. Therefore, the evidence of the victim that the appellant inserted his finger into her vagina would certainly come within the definition of 'penetrative sexual assault'. 'Aggravated penetrative sexual assault' as per section 5 of the POCSO Act would be attracted, inter alia, if someone commits penetrative sexual assault on a child below twelve years of age. Similar is the definition of 'rape' in section 375 of the Indian Penal Code which was substituted by the Criminal Law (Amendment) Act, 2013 which came into force from 03.02.2013. Section 376(2)(i) of the

Indian Penal Code is attracted if rape is committed on a woman when she is under sixteen years of age.

The age of the victim as per the doctor's evidence has been assessed to be five to six years. The entry made in the admission register of Rutungia Anganwadi center which was seized as per the seizure list Ext.22 revealed that the date of birth of the victim is 10.12.2008, which also corroborates the evidence of the doctor that the age of the victim was about six years. Apart from the victim, her parents have also stated the victim was aged about five years at the time of occurrence. Thus, the prosecution has successfully established the age of the victim to be six years.

It has been held by the Hon'ble Supreme Court in the case of **Mukesh and Ors. -Vrs.- State for NCT of Delhi and Ors. reported in (2017) 67 Orissa Criminal Reports (SC) 72** that while dealing with the cases of rape, the Court must act with utmost sensitivity and appreciate the evidence of the prosecutrix in view of settled legal principles and it should not be swayed by minor contradictions in appreciation of evidence of the witnesses which are not of a substantial character. The conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstantial evidence. The evidence of the victim of a sexual assault stands on par with the evidence of an injured witness.

Just as a witness, who has sustained injury is not likely to exculpate the real offender, the evidence of the victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. If the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, there is no reason to insist on corroboration except corroboration by the medical evidence.

In view of the foregoing discussions, I am of the humble view that the prosecution has successfully established that the victim was aged about six years at the time of occurrence. The learned trial Court has rightly placed reliance on the evidence of the victim, her parents and grandfather, who is an injured in this case so also an eye witness and relying on the medical evidence, the Court has come to the conclusion that the ingredients of all the offences under which the charge has been framed except under section 307 of the Indian Penal Code are made out against the appellant. The evidence of the injured witness (P.W.5) regarding his assault gets corroboration from the doctor (P.W.6). The age of injury as given by the doctor does not match with the time of assault as stated by P.W.5, nonetheless, in view of the definition of 'hurt' as per section 319 of the Indian Penal Code which includes bodily pain, it cannot be said that there is any illegality in the order of conviction of the appellant

under section 323 of the Indian Penal Code. I find no infirmity or perversity in the impugned judgment and order of conviction.

The appellant is in judicial custody since 09.08.2014 and therefore, he has already undergone substantive sentence of more than eight years. The minimum punishment prescribed for the offence under section 376(2)(i) of the Indian Penal Code is ten years which may extend to imprisonment for life and the minimum punishment prescribed for the offence under section 6 of the POCSO Act is also ten years which may extend to imprisonment for life. Therefore, while upholding the impugned judgment and order of conviction of the appellant under sections 376(2)(i)/323 of the Indian Penal Code so also under section 6 of the POCSO Act, the sentence imposed under section 376(2)(i) of the Indian Penal Code by the learned trial Court is reduced from twelve years to ten years and the fine amount imposed for the offence under section 376(2)(i) of the Indian Penal Code and the default sentence remains unaltered so also the sentence imposed for the offence under section 323 of the Indian Penal Code. No separate sentence is imposed for the offence under section 6 of the POCSO Act in view of section 42 of the said Act. The sentence imposed now for the offence under section 376(2)(i) of the Indian Penal Code and section 323 of the Indian Penal Code shall run concurrently.

It appears from the impugned judgment that the case of the victim has been referred to Secretary, D.L.S.A., Phulbani to pass compensation for rehabilitation of the child. It is not known as to whether the victim has been compensated or not.

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, Phulbani 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, Phulbani for compliance.

With the aforesaid modification in sentence, the JCRLA stands dismissed.

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

Before parting with the case, I would like to put on record my appreciation to Mr. Anirudha Das, 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).

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 7th September 2022/RKM

