

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLA No. 479 Of 2016

From the Judgment and Order dated 23.08.2016 passed by the Sessions Judge -cum- Special Judge, Kandhamal, Phulbani in G.R. Case No.25 of 2014.

Rajkishore Nayak @ Raju

Appellant

-Versus-

State of Odisha

Respondent

For Appellant:

Mr. Anirudha Das, Advocate

For Respondent:

Mr. Manoranjan Mishra
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 28.07.2022

S.K. SAHOO, J.

The appellant Rajkishore Nayak @ Raju faced trial in the Court of learned Sessions Judge -cum- Special Judge, Kandhamal, Phulbani in G.R. Case No.25 of 2014 for the offences punishable under sections 366/376/506 of the Indian Penal Code read with section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter the 'POCSO Act') on the

accusation that on 04.04.2014 at about 6.00 a.m. at village Padasahi, he kidnapped the victim 'R.D' who was a minor girl and committed rape on her and also threatened her not to disclose about the incident otherwise she would be killed.

The learned trial Court vide impugned judgment and order dated 23.03.2016 found the appellant guilty of the offences charged and sentenced him to undergo rigorous imprisonment for a period of eight years on each count for the offence under section 376(1) of the Indian Penal Code and section 4 of the POCSO Act and further sentenced to undergo R.I. for a period of one year on each count for the offences under sections 363 and 506 of the Indian Penal Code.

2. The prosecution case, as per the first information report, in short, is that on 04.04.2014 in the early morning, the victim had been to the field of Padasahi to attend the call of nature and while she was returning home, the appellant forcibly took her away from the place of occurrence on his motorcycle and committed rape on her inside a jungle and threatened her not to disclose about the incident, otherwise she would be killed and then the appellant took the victim to his relation's house and then left her in her house on 06.04.2014.

The first information report was lodged by the father of the victim, namely, Lal Mohan Digal (P.W.2) before the Inspector-in-charge of G. Udayagiri police station on 16.04.2014 and accordingly, G. Udayagiri P.S. Case No.50 dated 16.04.2014 was registered under sections 363/376/506 of the Indian Penal Code and section 4 of the POCSO Act.

P.W.7 Sukumar Hansda, S.I. of police of G. Udayagiri police station investigated the case. He examined the informant and other witnesses, visited the spot and prepared spot map marked as Ext.9 and on 24.04.2014 the victim was sent for medical examination and P.W.6 Dr. Sudipa Das, Associate professor of F.M and T Department of M.K.C.G. Medical College, Berhampur examined her and submitted the report marked as Ext.2/1. The appellant was arrested on 24.05.2014 and he was also sent for medical examination and P.W.4 Dr. Jyotiranjana Jena examined him and submitted the report vide Ext.5. The statement of the victim under section 164 of Cr.P.C. was recorded by the learned S.D.J.M., Phulbani. The wearing apparels of the appellant were seized after the medical examination as per seizure list Ext.14. The nail clipping, pubic hair, blood sample, semen of the appellant were also collected by the doctor and it was seized as per seizure list Ext.15 and the

seized exhibits were forwarded to S.F.S.L., Rasulgarh, Bhubaneswar through Special Judge, Phulbani for chemical examination and on completion of investigation, charge sheet was submitted against the appellant for commission of offences under sections 363/376/506 of the Indian Penal Code and section 4 of the POCSO Act.

3. The defence plea of the appellant is one of denial and it is pleaded that there was previous enmity between the family of the informant with the family of the victim, for which a false case has been foisted against him.

4. In order to prove its case, the prosecution examined seven witnesses.

P.W.1, the victim stated as to how she was forcibly taken by the appellant and raped and then kept in the relation's house of the appellant and how she was left by the appellant in her house. She stated her age to be sixteen years at the time of occurrence.

P.W.2 Lal Mohan Digal is the father of the victim and he is the informant in the case. He stated that the victim disclosed about the incident before him. He is also a witness to the seizure of wearing apparels of the victim.

P.W.3 Nirada Digal is the mother of the victim and she stated about the disclosure made by the victim about the occurrence before her.

P.W.4 Dr. Jyotiranjana Jena was the Medical Officer, C.H.C., G. Udayagiri who examined the appellant on police requisition on 24.05.2014 and proved his report vide Ext.5.

P.W.5 Sri Sukanta Nayak did not support the prosecution case and he was declared hostile by the prosecution.

P.W.6 Dr. Sudipa Das was the Associate Professor of Dept. of F.M. and T, M.K.C.G. Medical College, Berhampur and she examined the victim on police requisition on 24.04.2014 and proved the medical examination report marked as Ext.2/1.

P.W.7 Sukumar Hansda was the Sub-Inspector of Police of G. Udayagiri Police Station who is also the Investigating Officer in the case.

The prosecution exhibited as many as sixteen documents. Exts.1 is the 164 Cr.P.C. statement of the victim, Ext.2/1 is the Medical examination report of the victim, Exts.3, 11, 14 and 15 are the seizure lists, Ext.4 is the first information report, Exts.5 is the medical examination report of the appellant, Exts.6 and 13 are the police requisitions for medical examination of the appellant, Ext.7 is the police requisition for medical

examination of the victim, Ext.8 is the Original High School certificate of the victim, Ext.9 is the spot map, Ext.10 and 12 are the requisitions for recording 164 Cr.P.C. statement of the victim, Ext.16 is the written prayer to send the seized exhibits to SFSL, Rasulgarh, Bhubaneswar for chemical examination.

5. The learned trial Court after assessing the oral and documentary evidence on record has been pleased to hold that there are no such contradictions to disbelieve the evidence of the victim (P.W.1) and the minor contradiction does not affect the veracity of the witness. It was further held that since the victim was examined medically after about three weeks of the occurrence, therefore, absence of any injury on her person or back does not affect her testimony. Learned trial Court further held that in a case of this nature, delay in lodging the F.I.R. cannot be a ground to discard the prosecution evidence. It was further held that implicit reliance can be placed on the evidence of P.W.1, the victim. The learned trial Court further held that the victim's date of birth as mentioned in Ext.8 was 03.03.1998 and it can be safely accepted and thus she was just over 16 years of age as on the date of occurrence. It was further held that since the victim was minor as on the date of occurrence, therefore, her consent if any, is inconsequential and it is clear from the

prosecution evidence that the accused took away the victim, a minor girl from keeping of her parents without the consent and thus the offence under section 363 of the Indian Penal Code is accordingly established. It was further held that the prosecution has also successfully proved the offences under sections 376 (1) and 506 of the Indian Penal Code. It was further held that the plea of false implication is absurd and fanciful in the least. No parent more so in the rural community would embroil his minor daughter in such an unsavoury allegation in order to settle a score.

6. Mr. Anirudha Das, learned counsel appearing for the appellant contended that in the F.I.R. lodged by P.W.2, it is mentioned that on 05.04.2014 in the evening hours a report was presented by him in the police station but such report has not seen the light of the day. The F.I.R. that has been proved in this case and marked as Ext.4 was lodged twelve days after the occurrence i.e. on 16.04.2014 which was ten days after the victim returned to her home and no satisfactory explanation has been offered by the prosecution regarding delay in lodging of the first information report. Learned counsel for the petitioner further submitted that from the statement of the victim as was recorded by police, at the first instance, she did not state about

the commission of rape on her by the appellant, any threat given by the appellant to her not to disclose the incident before anybody or that the appellant opened her dress and pant. It is contended that when more than a month after the statement of the victim was recorded by the learned Magistrate, she disclosed about the commission of rape on her by the appellant. The explanation given by the victim regarding delayed disclosure about the incident is not acceptable. It is further submitted that the victim has stated that when she stayed in the house of the 'Kaka' of the appellant, there was no sexual assault on her there by the appellant and there is no corroboration from the medical evidence and therefore, there is no clinching material available on record to make out a case under section 376(1) of the Indian Penal Code and section 4 of the POCSO Act.

Learned counsel for the petitioner further submitted that though from the H.S.C. certificate proved by the prosecution, it appears that the victim was sixteen years and one month of age as on the date of occurrence but the doctor who examined her on police requisition stated that on the basis of her physical findings, dental examination, secondary sexual characters and radiological findings that the age of the victim girl would be in between seventeen and nineteen years. It is also

argued that the conduct of the victim in not attending the call of nature in the place which is nearer to her house and going to a distant place crossing three Sahies and while sitting in the motor cycle of the appellant as a pillion rider, not raising any shout or protest during course of her journey for about distance of fifteen to twenty kilometers which was a busy road to draw the attention of others indicates that she on her own volition left her lawful guardianship and returned back and therefore, the ingredients of the offence of kidnapping would also not be attracted and it is a fit case where benefit of doubt should be extended in favour of the appellant.

7. Mr. Manoranjan Mishra, learned Addl. Standing counsel, on the other hand supported the impugned judgment and contended that as per the H.S.C. certificate, the victim was minor and she was aged about sixteen years and one month. The plea of consent is immaterial and delay in reporting the incident before police in a case of this nature is not a ground to discard the prosecution version. It is argued that when the victim returned home, she disclosed before her parents about the occurrence and the parents decided to lodge the F.I.R. on 16.04.2014 and in such a scenario as rightly held by the learned trial Court that delay in lodging the F.I.R. cannot be a ground to

discard the prosecution case. The learned counsel further submitted that the doctor examined the victim much after the date of occurrence and therefore, at that stage, it would not have been possible to find any sign or symptom of sexual intercourse with the victim or any injury on her person and therefore, it cannot be said that on account of non-corroboration from the medical evidence, the evidence of the victim is to be discarded.

8. Considering the submission made by the learned counsel for the respective parties and after going through the evidence on record, it appears that the victim who is the star witness on behalf of the prosecution has stated that on the date of occurrence i.e. 04.04.2014, she had gone to the field of Padasahi to attend the call of nature which is at a distance of about one kilometer away from her house. She further stated that the place of call of nature is situated towards Kalinga and in order to reach the place of call of nature, one has to cross three Sahies and she was attending call of nature fifty meters away distance from the last Sahi. The father of the victim being examined as P.W.2 stated that in their Sahi, there was a field for the purpose of attending call of nature and a small pond situates there and generally, the people of his Sahi attend call of nature

in the said field and take bath in the small pond. In such a scenario, when a field was available nearer to the house of the victim for the purpose of attending call of nature, it is not conceivable that the victim would go to a distant place which is one kilometer away for attending call of nature crossing three villages alone in the early morning.

The victim stated that the appellant forcibly took her away from the place of occurrence on his motor cycle and committed rape on her inside a jungle by opening her dress and pant and also threatened her to kill, if she disclosed the incident to anybody. The victim admits in her cross-examination that she has not stated before the I.O. that the appellant committed rape on her inside the jungle and that the appellant opened her dress and pant and that the appellant threatened her as well as her parents to kill, if she would disclose the incident before anybody. No doubt, the victim has offered an explanation that the appellant threatened her to kill her and her parents and for that reason, she did not disclose the fact before the I.O., but when the victim in spite of such threat, if any, had disclosed the incident before her parents and when the family has decided to lodge the F.I.R. and thereafter the victim was examined, it is strange that nothing has been stated against the appellant by

the victim relating to commission of rape on her or opening of her dress or giving any threat to her. It is no doubt true that in the 164 Cr.P.C. statement which was recorded on 23.05.2014 i.e. more than a month after the lodging of the F.I.R., the victim has stated about commission of rape on her but in view of the delayed disclosure of such aspect before the Magistrate, particularly when the same has not been stated before the I.O. and when there is nothing in such statement recorded under section 164 of Cr.P.C. that any threat was given by the appellant to her not to disclose the incident, the evidence of the victim relating to commission of rape becomes suspicious.

The victim has stated that the appellant took her to the house of his 'Kaka' where she stayed with the family members of the 'Kaka' and during her stay at Kaka's house, the appellant had not sexually assaulted her and the appellant even did not reside in that relation's house.

The doctor (P.W.6) who examined the victim on 24.04.2014 found that the vaginal canal admits two fingers with resistance and there are no sign of recent sexual intercourse and that she was accustomed to penetrative sex act and there were no injuries detected on her person or in and around of her private parts to suggest forcible sexual intercourse.

No doubt, the victim's examination took place much after the alleged date of occurrence (04.04.2014) but when the first information report was lodged on 16.04.2014, it is not understood as to why there was eight days delay in the examination of the victim by the doctor. It is true that there are decisions of the Hon'ble Supreme Court and of this Court that delay in lodging of F.I.R. in sexual offences can be due to variety of reasons particularly, on account of the reluctance of the victim and her family members to go to the police to disclose about the incident which concerned the reputation of the victim and the honour of the family and they used to take time as to whether to give such report or not, but in a case of this nature when the decision has already been taken and the F.I.R. was lodged after twelve days of the occurrence and ten days after the victim returned home, the non-disclosure of the victim about the occurrence before the Investigating Officer at the first instance and disclosing the same before the Magistrate a month after the lodging of the F.I.R. creates suspicion about the truthfulness of her version. Therefore, when the evidence of the star witness of the prosecution is shaky in nature, it cannot be said that the prosecution has successfully established the charge under section 376(1) of the Indian Penal Code so also section 4 of the

POCSO Act against the appellant which deals with punishment for penetrative sexual assault. At this stage, it would be proper to mention that the learned trial Court has imposed sentence for both the offences i.e. under section 376(1) of the Indian Penal Code so also section 4 of the POCSO Act which was not proper and justified in view of section 42 of the POCSO Act.

9. So far as the offence under section 363 of the Indian Penal Code is concerned, the victim has stated that she sat on the motor cycle of the appellant as a pillion rider and the accused took her towards Kuruminga road and then he took her to village Bakingia and it took two hours to reach the village Bakingia. The evidence of the father of the victim who was examined as P.W.2 indicates that the accused was their neighbour and the accused and his family members were having visiting terms to his house. He further stated that village Katidingia is about 15 to 20 Kms. away from his village and if somebody would go to village Katidingia, he had to go through G. Udayagiri to Raikia road and G. Udayagiri to Raikia road is a busy road and some villages are situated both side of the road and villages, namely Kuruminga, Suheli, Bitingia, Kumbharakupa and other villages fall on the side of the road which leads to Padasahi to G. Udayagiri via Kalinga.

There is no material that while the victim was moving with the appellant as a pillion rider, she raised any shout to draw the attention of anyone or protested to the appellant and tried to stop the motor cycle. Her conduct in remaining silent throughout even while moving in busy locality speaks a lot about her willingness, volition to move with the appellant in the motor cycle.

In case of **S. Vardarajan –Vrs.- State of Madras reported in AIR 1965 Supreme Court 942**, it is held that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. When a girl who though a minor had attained the age of discretion moves with the accused from place to place and there is no evidence of any force by the accused, by no stretch of imagination, it can be said that she was taken away. The accused stated to have been taken her out of her keeping of her lawful guardianship. There is a distinction between 'taking' and allowing a minor to accompany of a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same for the purpose of section 361 of the Indian Penal Code. When the minor leaves her father's protection knowing

and having capacity to know the full import of what she is doing voluntarily joins the accused, the accused cannot be said to have taken her away from the keeping of her lawful guardianship. Something more has to be shown in a case of this kind and that is some kind of inducement laid down and that is some kind of inducement held out by the accused or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

In view of the factual scenario in the case and the manner in which the victim accompanied with the appellant in his motor cycle and absence of any material that she raised any protest before anybody on the way or while staying in the house of the Kaka of the appellant, I am of the humble view that the prosecution has failed to establish the charge under section 363 of the Indian Penal Code.

10. So far as the offence under section 506 of the Indian Penal Code is concerned, no doubt the victim has stated that the appellant threatened her as well as her parents to kill, if she would disclose the incident to anybody after commission of rape but the victim admits that she has not stated so before the police in her 161 of Cr.P.C. statement. Such statement is also not there in the statement recorded under section 164 of Cr.P.C..

Therefore, the charge under section 506 of the Indian Penal Code is not sustainable in the eye of law.

11. In view of the foregoing discussions, I am of the humble view that the prosecution has utterly failed to establish any of the charges against the appellant and accordingly, the impugned judgment and order of conviction and sentence passed by the learned trial Court is not sustainable in the eye of law and hereby set aside. The appellant is acquitted of the charges under sections 363/376/506 of the Indian Penal Code read with section 4 of the 'POCSO Act'.

Accordingly, the Criminal Appeal is allowed. The appellant who is in jail custody shall be released forthwith if his detention is otherwise not required in any other case.

The trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

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S. K. Sahoo, J.