

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA NO.294 OF 2013

From the judgment and order of sentence dated 11.01.2013 passed by the learned Additional Sessions Judge, Fast Track Court Athagarh in S.T. Case No.199 of 2012.

Minza Naik :: *Appellant.*

-versus-

State of Odisha :: *Respondent.*

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

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For Appellant :::: Mr. Chitta Ranjan Sahu,
Advocate.

For Respondent :::: Mr. Saubhagya Kumar Nayak,
Addl. Government Advocate.

CORAM:

MR. JUSTICE D.DASH

DR. JUSTICE S.K.PANIGRAHI

DATE OF HEARING:: 27.10.2022, DATE OF JUDGMENT:: 01.11.2022

D.Dash, J. The Appellant by filing this Appeal has assailed the judgment of conviction and order of sentence dated 11.01.2013 passed by the learned Additional Sessions Judge, Fast Track Court, Athagarh in S.T. Case No.199 of 2012 arising from C.T. Case No.116 of 2012 on the file of learned S.D.J.M., Athagarh. The Appellant (accused) by the said judgment having been found guilty for commission of offence under section-376(2)(f) of the Indian Penal Code, 1960 (for short 'the IPC') has

been convicted thereunder and accordingly, he has been sentenced to undergo imprisonment for life and pay fine of Rs.2,000/- with the default stipulation to further undergo rigorous imprisonment for a period of six months.

2. Prosecution Case:-

On 15.02.2012 at 5 pm, the mother of the Victim appearing before the Officer-in-Charge, Tigiria Police Station submitted a written report stating therein that during the noon-hour of the day, when her five year old daughter(Victim) was playing with other minor girls outside the house, she left for the grocery shop of the village to purchase some grocery articles.

It is submitted that on her return from the grocery shop, she found her daughter missing. One Kusha Jena (P.W.1), a boy of the village aged about 10 years having gone to the nearby tank found the Victim lying by the side of embankment of the said tank in an unconscious state. He then sprinkled water over the face of the Victim and brought her to the house when the mother of the Victim saw her in that physical and mental condition. The Victim having regained her sense then told before her mother-informant and others that while she was playing with her friends, the accused on the pretext of providing sugarcane took her to the field near the tank and committed rape on her. The Informant (P.W.5) also at

that time noticed the oozing of the blood from the vagina of her Victim daughter (P.W.4).

The above information being received at the Police Station, immediately Tigiria P.S. Case No. 24 of 2012 was registered and the Officer-in-Charge of the Police Station took up investigation. In course of the same, he examined the Informant who happens to be the Victim's mother, the Victim and other witnesses. Soon thereafter, the Victim was sent for medical examination. The Investigating Officer then searched for the accused but did not find him. The vaginal swab collected by the Doctor after medical examination was seized with the wearing apparels of the Victim. The Victim was then sent to the SCB Medical College and Hospital, Cuttack for ossification test and to the Sub-Divisional Hospital, Athagarh for ascertainment of her blood group. During this period, the accused was not seen in the locality and it was only on 22.02.2012, he was apprehended, arrested and then accused was also medically examined. The incriminating materials were sent to the State Forensic Science Laboratory (SFSL), for chemical examination through the learned Sub-Divisional Magistrate, Athagarh. The reports were received and the written requisition to inform the date of birth of the victim was sent to the Headmistress of the concerned Primary School, where she was

reading. The admission register being seized was left in the custody of the School Authority.

Finally, on 05.05.2012, on completion of investigation, charge-sheet was submitted placing the accused to trial for commission of offence under section-376(2)(f) of the IPC.

3. On receipt of the charge-sheet, learned Sub-Divisional Magistrate, Athagarh took cognizance of the said offence as above and committed the case to the Court of Session for trial. That is how the trial commenced by framing of charge against the accused for commission of offence under section-376(2)(f) of the IPC.

4. In the trial, the prosecution in total examined eleven (11) witnesses. Besides the above oral evidence being placed from the side of the prosecution, several documents have been admitted in evidence and marked exhibits; more importantly, the F.I.R., Ext.1; the medical reports, Exts. 4 & 5; other reports, seizure lists etc.

5. The accused in his defence has neither examined any witness nor proved any document in support of his plea of complete denial.

6. The Trial Court as it appears upon extensive analysis of evidence let in by the prosecution at its level and their evaluation from all possible angles has arrived at a finding that the prosecution case against the accused as to commission of rape upon the Victim, the minor girl of five

(5) years of age has been proved beyond reasonable doubt. Having held as above, the accused has been visited with the sentence as aforestated.

7. Mr. C.R. Sahoo, learned Counsel for the Appellant (accused) submitted that the Trial Court ought not to have believed the version of P.W.4 in implicating the accused to have raped her. According to him, the evidence of P.W.4 (Victim) being properly appreciated with other evidence, the same ought to have been held as unsafe to be relied upon. He submitted that the evidence of P.W.4 and other prosecution witnesses being read together do not inspire confidence in mind that it is the accused who had committed the aggravated penetrative sexual assault upon the victim. He further submitted that the version of P.W.4 who is within the aged group of 5-10 years ought not to have been relied upon being accepted as such without corroboration on material from other sources which in the case is completely absent. He, therefore, submitted that the Trial Court has erred in holding the accused guilty for commission of offence under section-376(2)(n) of the IPC.

Alternatively, it was submitted that keeping in view the age of the accused, who was then 20 years old and now 30 years as also the fact that he hails from the rural background, the punishment imposed needs to be revisited and instead of award of maximum punishment of imprisonment

for life in putting an end to the future of the accused for all times to come; the same be appropriately reduced.

8. Mr. S.K. Nayak, learned Additional Government Advocate submitted that the version of P.W.4 has been very rightly accepted in entirety, which is free from any such basic infirmity and as here no such material has come to surface that she had any axe to grind against the accused and in fact, it is also not expected even for a moment that a girl of five years old would be falsely implicating the accused then aged around 20 years with whom she and her family members were not having any strained relationship even no corroboration is needed for the Court as the said evidence of P.W.4 can safely be relied upon. He further submitted that the prosecution witnesses i.e. P.Ws.4 and 5 are wholly reliable and the evidence of P.Ws.4 and 5 also receive full corroboration from various other sources including the medical evidence. He thus submitted that the finding of the Trial Court that the accused has committed rape upon P.W.4 and as such is liable for commission of offence under section-376(2)(f) of the IPC is unassailable.

Responding to the alternative submission of the learned Counsel for the Appellant (accused), he submitted that taking the totality of the facts and circumstances of the case as those emanate from the evidence and keeping in view the manner in which the offence has been committed

upon a completely helpless minor female child who had not even attained her age of discretion, keeping in view the objecting sought to be achieved by the amendment as to enhancement of sentence in these special category of rape; it is the appropriate case for awarding the maximum sentence for imprisonment for life. According to him, the trial Court being alive to all those relevant factors and weighing the pros and cons of all those facets as well as the societal impact has rightly awarded the sentence which is just and proper and commensurate with the offence as established to have been committed by the accused.

9. Keeping in view the submissions made, We have carefully read the judgment passed by the Trial Court. We have also extensively travelled through the depositions of the witnesses examined from the side of the prosecution and the documents proved in the trial and for bestow our due attention to all those.

10. The Victim in the case is 5 years old girl child and has been examined as P.W.4 whereafter her mother has been examined as P.W.5, who too is the Informant of the case. There is practically no such challenge from the side of the accused as on the projected age of the Victim and that is also coming to be so from the medical reports and school admission register. The boy who has rescued the Victim has come to the witness box as P.W.1. The other important witness for the

prosecution is P.W.6; whose cousin sister is the Victim and who then at the relevant time was the playmate of the Victim, when the accused promising to provide the Victim with the sugarcane is said to have taken the Victim with him.

11. The Trial Court as it appears from the noting on the deposition having found the Victim-P.W.4 to be having sufficient understanding and as such successful in giving rational answers to the questions put has proceeded to record her evidence holding her to be competent to testify. The Victim while identifying the accused in the Court has stated that on that day, she was playing with P.W.6 and the accused came and told her to go with him as he would give sugarcane and 'chhuin' and he then took her near the sugarcane field. She has stated that at that point of time, she was wearing Chadi (under pant). Her further version is that the accused there undressed her and thereafter she could not know what was done to her which part in the given case is quite obvious for a girl of five years to say and rather greater detail would have faced the criticism of exaggeration and little unnatural too. It has been also stated that blood oozed from her vagina and she was lying on the paddy field, when she regained her sense by the touch of the water sprinkled on her face by P.W.1. The Trial Court has noted the fact that at the time of recording of evidence, the Victim (P.W.4) was crying which is indicative of the fact as

to how the incident's severity and other sufferings including disturbance of her mental set up when she is forced to recollect and depose. This Victim has also stated to have told all those to her mother, P.W.5 that the accused had inserted his penis into her vagina by using the local word for said private parts. It has also been stated that the Doctor has seen the Victim in that condition and had washed her private parts. The evidence when read do not even give any hint that there was any torturing. Rather her version appears to be natural and as the expression of the inhumane conduct causing sufferings which is continuing in carrying the societal stigma as in our society. On all the important facts as to the objectionable activities of the accused upon the minor girl child, P.W.4 there has been no challenge and in fact nothing surfaces on record to entertain doubt even remotely on the veracity of her evidence or to say that she is not truthful. During cross-examination, the only discrepancy appears in her evidence is to the place where she regained sense. But that in view of her categorical evidence implicating the accused to have gone for aggravated penetrative sexual assault upon her is of absolutely no significance to be taken note of to discard her version or in shaking the basic structure and hold her evidence to be unsafe and unreliable to fasten the guilt upon the accused. There is no material on record to suggest that even the members of the family of the P.W.4 had any dispute differences with the accused

so as to even remotely think that as the reason for false implication or that there was any such instinct. More so, the evidence of this witness finds full corroboration from the evidence of P.W.1, when he states that he found the victim lying unconscious on the cultivable land of one Kshirod Sahoo and then sprinkling water on her face, she was brought home. It has also been stated by this witness that P.W.4 being asked by her mother, divulged everything that had happened with her and what the accused did with her by taking her to the sugarcane field alluring her to provide sugarcane. This witness has also stated to have seen oozing of blood from the vagina of the P.W.4(Victim). P.W.1 has also disclosed all these facts before P.W.2.

12. The mother of the Victim, P.W.5 has stated that on her return from the grocery shop, she found the Victim absent at the place where she was playing and sometime thereafter she was brought by P.W.1 and another to the house where on being asked, P.W. 4 disclosed everything as to what had occurred right from the beginning till she lost sense.

The F.I.R. lodged by this witness has been admitted in evidence and marked Ext.1. The version of the witnesses run at par with the statement contained in the F.I.R. The evidence of P.W.4 also finds full corroboration from the evidence of P.W.6, who was her playmate at that point of time when accused and P.W.4 left the place. She has stated that

the Victim went with the accused from the place where they were playing being allured by the accused to be provided with sugarcane. The other witness P.W.7 has also stated to have seen the Victim being brought by P.W.1 and another from the side of that tank to her house. There also stands no such basic infirmity in the said evidence in order.

13. With such clear, cogent and acceptable evidence falling from the lips of the prosecution witnesses as aforementioned as the evidence of the Medical Officer goes being gone through; it is noticed that he while examining the Victim, P.W.4 has found several injuries on her person more importantly, the vaginal tear with laceration of posterior wall with the bleeding and laceration of posterior commisure with bleeding. That apart, other bodily injuries have also been noticed. The clear and categorical opinion of the Doctor, P.w.8 is that the injuries that he noticed on the person of the Victim, here P.W.4 are suggestive of sexual intercourse which according to him was 5 to 6 hours before the examination and that tallies with the time of the incident as stated. Thus, it is a case where the evidence of the Victim (P.W.4) is not only acceptable being wholly reliable but also her evidence receives corroboration from the evidence of other uninterested witnesses over and above her mother. There surfaces no reason as to why all these witnesses would tend to falsely implicate the accused at the cost of future life of a

budding female child of vulnerable age. The prosecution case is thus found to have been proved beyond reasonable doubt against the accused in establishing the charge that he committed the rape upon P.W.4 by having aggravated penetrative sexual assault. In that view of the matter, the finding of the Trial Court holding accused guilty for commission of offence under section-376(2)(f) of the IPC as it was then receive affirmation.

14. Now coming to the question of sentence, it may be stated that section-376(2)(f) makes it clear that whoever commits rape of a woman who is under twelve years of age shall be punished with rigorous imprisonment which for either description for a term shall not be less than ten years but which may be for life and shall also be liable to fine. The proviso appended to sub-section-2 of section-376 of the IPC says that only with adequate and special reasons to be mentioned, it is permissible to award sentence of imprisonment of either description for a term less than ten years.

15. The relevant facts and circumstances appearing from evidence to be borne in mind for being guided to award the sentence are as follows:-

- (i) The nature and gravity of the crime;
- (ii) The circumstances surrounding the commission of the sexual assault;

- (iii) The position of the person on whom the sexual assault is committed;
- (iv) The role of the accused in relation to the person violated; and
- (v) The possibility of the rehabilitation of the offender.

In the given case, the age of the Victim which has not faced any challenge was five years. The Victim was totally helpless and keeping in view the age of the accused, she had believed him as her elder brother or so and the custodian as totally caring for her without even dreaming for a moment to be a destroyer of her life. The Victim went with him to the place of occurrence being promised to be provided with some sugarcane from the field. The conduct of the accused is that after commission of rape the Victim was left at the place in an unconscious state. The Victim had been taken by the accused taking advantage of the absence of her parents and that too when she was playing with her playmate. The Victim had also by such act of the accused received several injuries on her person including on her private parts which from their nature can be seen to be painful for a child for five years in leaving an everlasting memory for the Victim when the same coming to mind once in a blue moon, is bound to cause serious mental suffering greatly affecting her living in future. The nature and circumstances in which the offence has committed leaves no manner of doubt that the accused had taken advantage of the

position of P.W.4 and her age; he himself being 20 years old not an immature and the faith and confidence reposed by the Victim upon the accused has been grossly abused.

All these being cumulatively viewed with the nature and gravity of the offence which is serious itself, while confirming the conviction of the accused for offence under section-376(2)(f) of the Indian Penal Code; We hereby uphold the sentence of imprisonment for life and fine of Rs.2,000/- with the default stipulation as imposed by the Trial Court.

16. The Appeal is accordingly dismissed.

Dr.S.K.Panigrahi, J.

I Agree.

***(D. Dash),
Judge.***

***(Dr.S.K.Panigrahi),
Judge.***