

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 55 of 2016

From the judgment and order dated 16.07.2016 passed by the Special Judge, Sundargarh in Special. G.R. Case No.306 of 2013.

Basanta Das

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Appellant

-Versus-

State of Odisha

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Respondent

For Appellant:

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Mr. Nityananda Mohapatra

For Respondent:

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Mr. A.K. Beura

Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 24.02.2022

S.K. SAHOO, J. The appellant Basanta Das faced trial in the Court of learned Special Judge, Sundargarh in Special G.R. Case No.306 of 2013 for commission of offences punishable under section 354 of the Indian Penal Code as well as section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter referred to as 'POCSO Act') on the accusation that on 10.02.2013, he

assaulted the victim girl, who was aged about four years with an intention to outrage her modesty and also committed aggravated penetrative sexual assault on her.

The learned trial Court vide impugned judgment and order dated 16.07.2016 found the appellant guilty under both the offences and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for two years under section 6 of the POCSO Act but no separate sentence was awarded for the offence under section 354 of the Indian Penal Code in view of section 42 of the POCSO Act.

2. The prosecution case, as per the first information report (Ext.1) lodged by P.W.3 Sashi Tanty before the Inspector in-charge of Bondamunda police station on 10.02.2013 is that on that day in the evening hours at about 7 O' Clock, his mother Gouri Tanty (P.W.2) and his daughter (victim), the appellant as well as two others were watching T.V. and at that time, the victim went out of the house to attend the call of nature and the appellant also followed her. It is further stated in the first information report that the victim was taken towards the field without the knowledge of her family members by the appellant

and since there was electricity failure, P.W.2 and other persons, who were watching T.V. came outside and P.W.2 found the victim was not there and while P.W.2 was searching for the victim, at that time, the appellant returned back and told that the victim was standing in the field and was not coming despite repeated calls. Hearing this, P.W.2 went to the field and brought the victim back to the house and the victim told her crying that the appellant had touched her vagina for which she was feeling pain. P.W.2 checked the private part of the victim and she found that there was swelling. From this, P.W.2 came to know that the appellant had sexually assaulted the victim but meanwhile the appellant had already left the place. When the co-villagers were informed, they caught hold of the appellant and the appellant confessed his guilt before the villagers and P.W.3 went to the police station and lodged the first information report.

On the basis of such first information report, Bondamunda P.S. Case No.18 dated 10.02.2013 was registered under section 354 of the Indian Penal Code and section 6 of the POCSO Act against the appellant.

P.W.8 Prabhat Kumar Biswal, the Inspector in-charge of Bondamunda police station after registration of the F.I.R., took up investigation of the case and during the course of

investigation, he examined the informant and also the scribe of the F.I.R. and recorded their statements. He visited the spot and prepared the spot map (Ext.3). When he returned to the police station with the appellant, whom the Basti people had already apprehended, he sent both the appellant as well as the victim girl to Rourkela Government Hospital for their medical examination. The statement of the victim was recorded. The nail clippings of the appellant were seized and it was sent for chemical examination to the R.F.S.L., Sambalpur. On completion of investigation, charge sheet was submitted against the appellant under section 354 of the Indian Penal Code and section 6 of the POCSO Act on 10.03.2013.

3. After submission of charge sheet and commitment of the case to the Court of Session, the learned trial Court on 12.11.2015 framed charges against the appellant as already stated 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. The defence plea of the appellant is one of denial.

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

P.W.1 Subash Chandra Panda is the scribe of the F.I.R. (Ext.1).

P.W.2 Gouri Tanty is the grandmother of the victim (P.W.6), who stated about the feeling of pain in the genital of the victim by the act of the appellant. P.W.3 Sashi Tanty is the father of the victim (P.W.6) and he is also the informant of the case. He partly supported the prosecution case for which he was declared hostile by the prosecution and cross-examined.

P.W.4 Padma Tanty is the neighbour of the victim who is a post-occurrence witness.

P.W.5 Dr.(Mrs.) Sunita Samal was the O & G Specialist at Rourkela Government Hospital, Rourkela, who medically examined the victim (P.W.6) on police requisition and proved the medical examination report vide Ext.2.

P.W.6 is the victim of the case, who has not stated anything about the overt act committed by the appellant.

P.W.7 Amit Tanty, who is the nephew of P.W.3, is a post-occurrence witness.

P.W.8 Pravat Kumar Biswal was the Inspector in-charge of Bondamunda police station and he is the Investigating Officer of the case.

The prosecution exhibited seven numbers of documents. Ext.1 is the F.I.R., Ext.2 is the medical examination report of the victim, Ext.3 is the spot map, Exts. 4 and 5 are the seizure lists, Ext.6 is the office copy of the forwarding letter of the S.D.J.M., Panposh for sending the material objects to R.F.S.L., Sambalpur for chemical examination and Ext.7 is the medical examination report of the appellant.

No witness was examined on behalf of the defence.

6. The learned trial Court after assessing the evidence on record came to hold that the evidence of P.W.2 clearly establishes that the appellant had got close acquaintance with the victim girl having a position of authority and it further establishes that the appellant had pressed the private part of the victim. Learned trial Court further held that the evidence of the doctor (P.W.5) that there was congestion around periurethral area and both the sides of labia minora of the victim found on the fateful evening was the result of any external hard pressure. Learned trial Court further held that the appellant being a male, used force on the private part of the victim by pressing and the same reflects culpable intention against the modesty of the victim girl. It was further held that since the appellant touched the vulva of the victim girl with such pressure that the above

injury was detected in her labia minora, it indicates that the same comes under the definition of section 3 read with section 5(m) of the POCSO Act. Accordingly, the learned trial Court found the appellant guilty under section 6 of the POCSO Act so also under section 354 of the Indian Penal Code.

7. Mr. Nityananda Mohapatra, learned counsel appearing for the appellant contended that the victim being examined as P.W.6, who is a child witness has stated nothing relating to the prosecution case. The version of P.W.2 and P.W.3 are contradictory to each other. The doctor's evidence also clearly does not indicate about the commission of aggravated penetrative sexual assault on the victim and the overt act committed by the appellant as per the version of the witnesses does not come within the definition of section 3 and section 5(m) of the POCSO Act. Learned counsel further submitted that though in the first information report, all the details of the occurrence has been narrated but the informant (P.W.3) stated that he has simply put his signature on the first information report on the direction of the police and further stated that he did not know, who scribed the F.I.R. whereas the scribe (P.W.1) has stated that the F.I.R. was scribed as per the instruction and version of P.W.3. Learned counsel further submitted that as per

the evidence of P.W.2, the appellant and the victim shared a close relationship like a father and daughter and therefore, the commission of offence by the appellant on the victim is an improbable feature and the learned trial Court was not justified in convicting the appellant of the offences charged.

Mr. A.K. Beura, learned Additional Standing Counsel, on the other hand, supported the impugned judgment and submitted that even though the victim has not stated anything about the prosecution case in view of the fact that she was just four to five years of age at the time of her deposition but the learned trial Court basing on the evidence of P.W.2, the grandmother of the victim as well as the doctor (P.W.5) has rightly found the appellant guilty and since the reasons assigned by the learned trial Court cannot be said to be perverse, the appeal should be dismissed.

8. So far as the first information report is concerned, the informant Sashi Tanty (P.W.3) has stated that he along with his friends took the appellant to the police station and there he lodged the written report, which has been marked as Ext.1. In the cross-examination, P.W.3 has categorically stated that he did not know who scribed the F.I.R. but he simply signed on Ext.1 on the direction of the police and after signing on Ext.1, the police

had not asked him anything. The scribe of the F.I.R. has been examined as P.W.1 who has stated to have scribed the same as per the instructions and versions of P.W.3 on 10.02.2013 but he has stated that he had got no personal knowledge about the occurrence. Doubt crops up in view of the contradictory statements made by P.W.3 as well as P.W.1 as to how narration in details of the occurrence has been mentioned in the F.I.R. particularly, when P.W.1 has no personal knowledge about the occurrence and P.W.3 has no such information about the details that has been narrated therein.

P.W.2 no doubt stated that the victim told her that the appellant pressed her private part while she was sitting to attend the call of nature but P.W.3 stated that P.W.2 disclosed before him 'MORA MAA KAHILA KI BASANTA KANA HATA MARIDEICHHI'. In the cross-examination, P.W.3 has again stated that his mother never informed him that the appellant had touched his daughter rather told him that he had done some 'CHHED-KHANI' and when the Court put a question to P.W.3 what do you mean by 'CHHED-KANI', he replied 'DHARA DHARI KARIBA'. The victim (P.W.6) was asked specifically by the learned trial Court whether the appellant was present when the she went to attend the call of nature, she replied in negative.

The victim was again asked by the learned trial Court whether the appellant did anything to her, she answered in negative. Therefore, whereas the evidence of the victim is completely silent about the commission of any crime by the appellant, her grandmother (P.W.2) stated something regarding disclosure made by the victim about the occurrence, which is contrary to the evidence of the father of the victim (P.W.3). At this stage, the evidence of P.W.2 regarding the previous acquaintance of the appellant with the victim is necessary to be discussed. P.W.2 has stated that the appellant used to visit her house and he used to play with the victim, lift her by his arm, take her for roaming and sometimes the victim used to be left in the company of the appellant when the family members went for marketing. P.W.2 has further stated that the victim used to go with the appellant for strolling and roaming and they were never objecting the intimacy of the appellant with the victim as the appellant was like the father of the victim and at times, on the direction of the family members, the appellant used to help the victim get washed after attending call of nature.

At this juncture, the evidence of the doctor (P.W.5) on whom the learned trial Court has placed reliance is required to be discussed. The doctor found on examination of the victim

on 10.02.2013 at about 10.25 p.m. on police requisition that there was congestion around the periurethral area and both side of labia minora. There was no laceration, tear or bleeding from the genital area. It is further stated by the doctor that the injury would be within twenty four hours by the time of her examination and she further stated that the congestion around the periurethral area and both side of labia minora may be due to the result of any external hard pressure or by rubbing of any semi-hard object. The doctor has stated in her cross-examination that there is possibility of receiving infection by female, if they ease out at any public place and in case of infection, there is every possibility of itching and in case of itching by self, the type of injury which she had noticed on the victim is possible. She has further stated that in case of vaginitis, when frequent itching occurs, at that time by such itching and rubbing to the private part, such type of congestion are also likely to occur.

Learned trial Court while accepting the evidence of the doctor as a corroborative piece of evidence to the evidence of P.W.2 held that the medical examination report did not reflect that the victim was suffering from any infection on her private part and it was further held that the congestion around the periurethral area and both the sides of labia minora of P.W.6

found on the fateful evening was the result of any external hard pressure.

In order to attract the ingredients of the offence under section 6 of the POCSO Act, which deals with punishment for 'aggravated penetrative sexual assault', in a case of this nature, it is required to be proved that the appellant committed penetrative sexual assault on a child below twelve years of age. Penetrative sexual assault has been defined in section 3 of the POCSO Act, which is as follows:

"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.”

There is no dispute that the victim was below the age of twelve years at the time of occurrence. So far as the evidence relating to penetration, insertion or manipulation or as appears from section 3 of the POCSO Act is concerned, when the evidence of the victim is completely silent relating to any kind of overt act committed by the appellant on her on the date of occurrence and when the evidence of the grandmother of the victim regarding disclosure made by the victim about the occurrence is contradicted by the father of the victim; the possibility of swelling as per the doctor's evidence cannot be the sole factor to hold the appellant guilty of the offences charged. Therefore, in my humble view, the prosecution has not successfully established the charge either under section 354 of the Indian Penal Code or under section 6 of the POCSO Act against the appellant.

9. Accordingly, Jail Criminal Appeal is allowed. The impugned judgment and order of conviction of the appellant and the sentence passed thereunder is hereby set aside and the appellant is acquitted of the charges under section 354 of the Indian Penal Code as well as under section 6 of the POCSO Act.

The appellant shall be set at liberty forthwith, if his detention is not otherwise required in any other case.

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.

Orissa High Court, Cuttack
The 24th February 2022/RKMishra

