

IN THE HIGH COURT OF ORISSA, CUTTACK.

JCRLA No. 09 Of 2017

From judgment and order dated 03.01.2017 passed by the Additional Sessions Judge & Special Judge, Phulbani in S.T. Case No.90 of 2013.

Laxman Nayak

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Appellant

-Versus-

State of Odisha

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Respondent

For Appellant:

Mr. Akshaya Kumar Beura
(Amicus Curiae)

For State:

Mr. Arupananda Das
Addl. Government Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 12.10.2022

S. K. SAHOO, J. The appellant Laxman Nayak faced trial in the Court of learned Additional Sessions Judge & Special Judge, Phulbani in S.T. Case No.90 of 2013 for the offences punishable under sections 376/506 of the Indian Penal Code and section 4 of the

Protection of Children from Sexual Offences Act, 2012 (hereafter for short 'POCSO Act').

The learned trial Court vide impugned judgment and order dated 03.01.2017 found the appellant guilty of the charges framed and sentenced him to undergo R.I. for eight years and to pay a fine of Rs.5000/- (rupees five thousand), in default of payment of fine to undergo further R.I. for a period of two years for the offence under section 4 of the POCSO Act and to undergo R.I. for one year and to pay a fine of Rs.1000/- (rupees one thousand), in default of payment of fine to undergo further R.I. for a period of three months for the offence under section 506 of the Indian Penal Code and both the sentences were directed to concurrently and no separate sentence was imposed for the offence under section 376 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.9) lodged by P.W.6, the father of the victim girl on 02.01.2013 before the Officer in-charge of Tumudibandh police station in the district of Kandhamal is that on 30.12.2012 at about 6 a.m. the informant along with his wife had been to their relation's house leaving the victim alone in their house. At about 12 noon, the victim had been to the nearby 'Nala' to take her bath and the appellant, who was in the nearby bush hiding

himself, came out all on a sudden and overpowered the victim and carried her to the nearby forest, made her naked, pressed her breast and committed sexual intercourse with her and after commission of the offence, he showed a bhujali to the victim and threatened her that if she discloses about the occurrence before others, she would face dire consequences. The victim was stated to be aged about 15 years.

On the basis such first information report, Tumudibandh P.S. Case No. 01 of 2013 was registered on 02.01.2013 under sections 376/506 of the Indian Penal Code.

3. P.W.9 Rajendra Sial, who was the Officer in-charge of Tumudibandha police station, after registration of the case, took up investigation, examined the informant, the victim and other witnesses. He visited the spot, prepared the spot map (Ext.10) and on the same day, he arrested the appellant and sent him for medical examination to C.H.C., Tumudibandha. P.W.5 Dr. Susanta Kumar Mukhi examined the appellant on 02.01.2013, collected the semen sample, pubic hair, nail clipping etc. of the appellant, which were seized as per seizure list Ext.1. The wearing apparels of the appellant were seized on his own production as per seizure list Ext.2/1. On 03.01.2013 the victim was also produced before P.W.5 for medical examination, some

biological samples of the victim collected by doctor were seized by the I.O. under seizure list Ext.12. The wearing apparels of the victim were also seized on her production under seizure list Ext.3. On 03.01.2013 the I.O. forwarded the appellant to Court. Thereafter, the I.O. sent the victim to M.K.C.G. Medical College and Hospital, Berhampur for ossification test and P.W.10 Dr. Monalisa Sahu examined the victim on 04.01.2013 and submitted her report as per Ext.4/1. The I.O. made a prayer to the Court of learned S.D.J.M., Balliguda to dispatch the exhibits to S.F.S.L., Rasulgarh for chemical examination and on completion of investigation, he submitted charge sheet on 26.03.2013 under sections 376 and 506 of the Indian Penal Code and section 4 of the POCSO Act.

4. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court framed charges against the appellant as aforesaid and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

5. During course of trial, in order to prove its case, the prosecution examined ten witnesses.

P.W.1 is the victim who narrated about the incident in detail as to how she was ravished by the appellant on the date of occurrence.

P.W.2 Chidika Baliarsingh is the mother of the victim, who stated that on the date of occurrence, she along with her husband (P.W.6) had been to a relation's house and on their return at about 5 p.m., the victim narrated about the incident before them that while she had been to the 'Nala' to take bath at about 11 a.m., the appellant suddenly came from the backside and forcibly took her towards a jungle and committed rape on her. She further stated that a village meeting was convened on the next day morning and thereafter, her husband reported the matter before the police station.

P.W.3 Paul Nayak, who was working as Havildar at Tumudibandha police station, is a witness to the seizure of four nos. of sealed bottles containing semen, pubic hair, nail clippings etc., one command certificate and one money receipt as per seizure list Ext.1. He is also a witness to the seizure of the wearing apparels of the appellant as per seizure list Ext.2.

P.W.4 Susama Pradhan was the constable attached to Tumudibandha police station and is a witness to the seizure of clothing of the victim as per the seizure list Ext.3. She also

escorted the victim to M.K.C.G. Medical College and Hospital, Berhampur for medical examination and is a witness to the medical examination report as per Ext.4/1.

P.W.5 Dr. Susanta Kumar Mukhi examined the victim as well as the appellant on police requisition and proved his medical examination reports under Ext.5, Ext.6, Ext.7 and Ext.8.

P.W.6 Mikal Baliarsingh, who is the father of the victim, is the informant in the case. He stated that on the date of occurrence, he along with his wife had been to a relation's house and on their return in the evening, his victim daughter, who was aged about fifteen years, narrated the incident before them how the appellant committed rape on his daughter while she had been to the nearby 'Nala' to take bath. He further stated that a village meeting was convened and since it was unsuccessful, he lodged the report being scribed by P.W.7.

P.W.7 Pratap Kumar Nayak was the scribe of the F.I.R. and he proved the written report marked Ext.9.

P.W.8 Sudam Muthamajhi, who is a co-villager of the informant, has been declared hostile by the prosecution.

P.W.9 Rajendra Sial is the Investigating Officer of the case.

P.W.10 is Dr. Monalisa Sahu was working as Tutor in the Department of FMT, M.K.C.G. Medical College and Hospital and she conducted the ossification test of the victim on police requisition and proved her report Ext.4/1.

The prosecution exhibited seventeen documents. Exts.1, 2/1, 3 and 12 are the seizure lists, Exts. 4/1, 5, and 6 are the medical examination reports of the victim, Exts.7 and 8 are the medical examination reports of the appellant, Ext.9 is the written report, Ext.9/3 is the formal F.I.R., Ext.10 is the spot map, Ext.11 is the requisition for ossification test, Ext.13 is the requisition for recording the 164 Cr.P.C. statement of the victim, Ext.14 is the forwarding report of M.O., Ext.15 is the C.E. report, Ext.16 and Ext.17 are the command certificates issued for medical examination of the victim as well as the appellant.

The prosecution proved no materials objects.

The defence proved the Voter Identity card of the appellant as Ext.A.

6. The defence plea of the appellant was one of denial and he stated that the informant had taken money from him for sale of a land, but since he did not give the land, the appellant asked for return back the money for which this false case has been foisted against him.

7. The learned trial Court after analyzing the evidence on record came to hold that since a rape is ordinarily committed in a lonely place and so presence of a witness, is not expected. Learned trial Court further held that the victim girl has supported the case in full and the age of the victim girl has been medically taken to be 12 to 14 years, which is still four years below to come outside the purview of the POCSO Act and accordingly held that the prosecution case should be believed as reliable. The learned trial Court after taking all the evidence into consideration held that the victim was subjected to forcible sexual intercourse by the appellant on the date of occurrence and that the prosecution has very well proved the charges under sections 376 and 506 of the Indian Penal Code and section 4 of the POCSO Act.

8. Since the engaged counsel for the appellant did not appear to argue the appeal, Mr. Akhaya Kumar Beura was engaged as the counsel for the appellant and he was supplied with the copy of the paper book and granted time to prepare the case properly. He placed the impugned judgment and evidence and submitted that the evidence of the victim regarding commission of rape is not clinching and trustworthy and there is inordinate delay in lodging of the F.I.R. and the Sarpanch

(P.W.8), who was examined as P.W.8 to state about holding of the village meeting in connection with the case, has not supported the prosecution case and therefore, it is fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Arupananda Das, learned Addl. Government Advocate for the State on the other hand supported the impugned judgment and order of conviction and submitted that the victim was minor as on the date of occurrence and her evidence regarding commission of rape is getting corroboration from the evidence of her parents so also the doctor, who has categorically stated that forcible intercourse on the victim cannot be ruled out. Learned counsel further submitted that even though the Sarpanch (P.W.8) has not supported the prosecution case, the parents of the victim so also the victim have stated about holding of the meeting in connection with the incident and the delay of lodging of F.I.R. in such a case is not a ground to disbelieve the prosecution case and therefore, the appeal should be dismissed.

9. Adverting to the contentions raised by the learned counsel for the respective parties, with regard to the age of the victim (P.W.1), it appears that the victim has stated her age to be fourteen years when she gave her evidence in Court as P.W.1

on 18.03.2014. The occurrence took place on 30.12.2012 and nothing has been elicited in the cross-examination to dispute her age. The father of the victim girl has also stated the age of the victim to be fifteen years. The doctor (P.W.10) has stated that on the basis of physical, dental, secondary sexual character and radiological examination, the age of the victim was opined to be more than twelve years and less than fourteen years and the report has been marked as Ext.4/1. There is no challenge to the evidence of the doctor (P.W.10).

In view of the aforesaid oral as well as medical examination report, I am of the humble view that the prosecution has successfully proved that the victim was minor as on the date of occurrence.

10. The victim (P.W.1) in her statement has stated that on the date of occurrence, she had been to the 'Nala' of her village to take bath and while she was taking bath by wearing a towel, the appellant suddenly came from her backside and forcibly took her away towards the jungle by putting his hands on her mouth, undressed her inside the jungle and made her lie on the ground of the jungle and thereafter, he forcibly committed rape on her. She further stated that during the course of rape, the appellant inserted his penis inside her vagina and after

commission of rape, the appellant threatened her to kill if she would disclose the incident before her parents. The victim also pointed out her private part while deposing in Court regarding commission of rape, which has been noted down by the learned trial Court. The victim has further stated that after she returned home, since her parents had been to her relation's house and on their return to home, she narrated the incident before them. She further stated that a village meeting was convened in connection with the incident and as per the direction of the Sarpanch, written report was lodged by her father. In the cross-examination, nothing has been elicited to disbelieve the evidence of the victim. She admitted in the cross-examination that there was dispute between her father and the appellant concerning sale and purchase of a piece of land, but she denied to the suggestion of the learned defence counsel that on account of such land dispute, false case has been foisted and therefore, the evidence of the victim has remained unshaken and it appears to be clear, clinching and trustworthy.

The mother of the victim being examined as P.W.2 stated that when she and her husband returned from the relation's house on the date of occurrence, the victim narrated about the incident before them and stated how rape was

committed on her by the appellant. She also stated about the village meeting that was convened on the next date of the incident, but the appellant was found absent. The father of the victim being examined as P.W.6 has also stated about the disclosure made by the victim about commission of rape on her by the appellant so also about holding of the village meeting in connection with the incident. Though both the parents have been cross-examined at length, but nothing substantial has been elicited in the cross-examination to disbelieve their evidence rather the victim's evidence is corroborated by her parents.

The doctor (P.W.5) who examined the victim on police requisition has noticed a rough granular reddish patch of size 1"x 1/2" extending to posterior commissure, hymen was not intact, no sign of external injury on external labia majora and labia minora, no hymen is present and one finger is admissible. The doctor (P.W.5) has opined that on the basis of the external injury on the victim and the tenderness of the private part, the forcible intercourse cannot be ruled out. The doctor examined the appellant on 03.01.2013 but found no external injury. The report has been marked as Ext.6. On the basis of the evidence of the doctor, it appears that the victim's evidence regarding

commission of rape on her by the appellant is getting corroboration from the medical evidence.

11. Though the occurrence took place on 30.12.2012 and the F.I.R. was lodged on 02.01.2013, but in view of the consistent evidence given by the victim as well as her parents that village meeting was convened in connection with the occurrence and thereafter on the instruction of the Sarpanch, the F.I.R. was lodged and in a case of this nature, delay in lodging of the F.I.R. usually takes place as time is taken by the family members to decide whether F.I.R. is to be lodged or not because it involves prestige of the family and the future of the victim girl and therefore, I am of the humble view that the prosecution has successfully explained the delay in lodging the F.I.R.

12. In view of the foregoing discussions, the oral as well as documentary evidence available on record, I am of the humble view that there is no illegality or perversity in the finding of the learned trial Court in holding the appellant guilty under section 376 and section 4 of the POCSO Act and imposing the sentence under section 4 of the POCSO Act only in view of section 42 of the said Act.

Similarly, in view of the available materials on record and particularly the evidence of the victim that after commission

of rape on her, the appellant threatened her to kill if she would disclose the fact before her parents, I am of the humble view that holding of the appellant guilty under section 506 of the Indian Penal Code by the learned trial Court is quite justified.

13. Taking into account the old age of the appellant who is by now more than 80 years, since the minimum sentence provided for the offence under section 4 of the POCSO Act is seven years, the sentence imposed by the learned trial Court for the said offence is reduced from R.I. of eight years to R.I. of seven years and the default sentence of two years for non-payment of fine of Rs.5,000/- (rupees five thousand) for such offence is reduced to one month, but the sentence for the offence under section 506 of the Indian Penal Code stands confirmed. The substantive sentences shall run concurrently. No separate sentence for the offence under section 376 of the Indian Penal Code is imposed in view of section 42 of the POCSO Act.

It appears that the appellant was taken into judicial custody in connection with this case on 03.01.2013 and neither he was on bail during trial nor he was granted bail by this Court during pendency of the Jail Criminal Appeal and thus, he has already undergone substantive sentence of seven years but also the default sentences for non-payment of fine amount for both

the offences. Therefore, the appellant be set at liberty forthwith, if his detention is not required in any other case.

14. In view of the enactment of the Odisha Victim Compensation (Amendment) Scheme, 2018 as per the notification dated 20.10.2018 of Government of Odisha, Home Department, keeping in view the age of the victim at the time of occurrence and the manner in which she was ravished and the family background of the victim, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Kandhamal to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation. Let a copy of the order be sent to the District Legal Services Authority, Kandhamal for compliance.

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

Before parting with the case, I would like to put on record my appreciation to Mr. Akshaya Kumar Beura, 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).

15. The Jail Criminal Appeal is disposed of with the above modification of sentence.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 12th October 2022/PKSahoo

