

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.313 of 2022

Arising Out of PS. Case No.-15 Year-2021 Thana- MAHILA PS District- Jehanabad

Rajnandan Yadav @ Guruji Son Of Late Butai Yadav R/O Village- Orebigha,
P.S.- Makhdumpur, District- Jehanabad

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. Rajendra Narain, Sr. Advocate
Mr. Arvind Prasad Singh, Advocate
For the Respondent : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 20-12-2023

This appeal has been preferred by the appellant under
Section 374(2) of the Code of Criminal Procedure, putting to
challenge the judgment of conviction dated 22.03.2022 and the
order of sentence dated 29.03.2022, passed by learned Additional
Sessions Judge-VI-cum-Special Judge POCSO, Jehanabad arising
out of Jehanabad Mahila P.S. Case No. 15 of 2021, POCSO Case
No. 18 of 2021, whereby the appellant has been convicted and
sentenced as under:

Cr. Appeal (DB) No. 313 of 2022				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Rajnandan Yadav @ Guruji	Under Section 376AB of the IPC	R.I. for life	25,000/-	R.I. for one year
	Under Section 6 of the POCSO Act	R.I. for life	25,000/-	R.I. for one year



2. All the sentences have been ordered to run concurrently.

3. We have heard Mr. Rajendra Narain, learned senior counsel assisted by Mr. Arvind Prasad Singh, learned counsel appearing on behalf of the appellant and Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State.

4. We must indicate at the outset that there is no controversy at all on the point that the victim is a child within the meaning of Section 2(1)(d) of the POCSO Act, aged below 12 years. The victim's father (PW-3) is the informant, whose written report addressed to the Station House Officer, Mahila Police Station, Jehanabad, is the basis for registration of Mahila P.S. Case No. 15 of 2021 for the offences punishable under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act. He alleged in his written report that on 10.03.2021, the informant's wife, i.e., victim's mother (PW-2), informed that the appellant, aged 66 years, took their 5-6 years daughter into his semi-constructed private school building and rubbed the vagina of the victim with his penis. The victim was subjected to medical examination on 13.03.2021 by a Medical Board of four doctors. The medical board assessed the victim's age to be between 5-6 years. The Board further found that the victim's hymen was ruptured and that there



was no internal injuries. The Medical Board further opined that though there was no sign of sexual contact, but possibility of rape could not be ruled out. It is also pertinent to mention that the victim's statement under Section 164 of the CrPC was recorded by the learned Magistrate on 15.03.2021. It is evident from her statement under Section 164 of the CrPC that according to her the appellant had rubbed the victim's private part (vagina) with his penis. The statement of the victim's mother (PW-2) was also recorded under Section 164 of the CrPC. According her statement under Section 164 of the CrPC, the victim had disclosed to her about the act of the appellant of rubbing the victim's vagina with his penis. The said misdeeds of the appellant were disclosed to the mother of the victim by the victim only when the parents noticed the feeling of discomfort which the victim displayed when they were cleaning her posteriors after defecating.

5. The police, upon completion of investigation, submitted chargesheet against the appellant for the offences punishable under Sections 376AB and Sections 4, 6, 8 and 10 of the POCSO Act. Cognizance was subsequently taken of the aforesaid offences. The appellant was charged by the learned Special Court, POCSO, for commission of the offences punishable under Section 376AB of the IPC and Section 6 of the POCSO Act.



As the appellant denied the charge and claimed to be tried, he was put to trial.

6. At the trial, the prosecution examined altogether 7 witnesses to establish the charge against the appellant including the victim (PW-5), mother of the victim (PW-2), father of the victim and the informant (PW-3), two doctors, who had examined the victim and were members of the Medical Board (PW-1 & PW-6), and the Investigating Officer (PW-7). In addition to the oral evidences, the prosecution brought on record at the trial following documentary evidence:-

S. No.	Exhibit No.	Description
1.	Exhibit-1	Column No. 1 to 4 of the medical report of the victim.
2.	Exhibit-1/A	Column No. 5 to 10 of the medical report of the victim.
3.	Exhibit-2	Signature of the mother of the victim on her statement u/s 164 CrPC.
4.	Exhibit-3	Written petition of the informant cum father of the victim.
5.	Exhibit-4	Statement of the victim u/s 164 of the CrPC.
6.	Exhibit-5	Statement of the mother of the victim u/s 164 of the CrPC
7.	Exhibit-6	Endorsement regarding registration of the case on the written petition of the informant.
8.	Exhibit-7	Formal FIR.

7. After closure of the prosecution's evidence, the appellant was questioned under Section 313 of the CrPC. Following were the question put by the trial court to the appellant while examining him under Section 313 of the CrPC and the appellant's response thereto



प्रश्न: आपके विरुद्ध साक्ष्य है की दिनांक 10.03.2021 को 12 बजे दिन में प्राथमिकी में दर्ज घटनास्थल पर पांच साल की बच्ची के साथ गुरुतर प्रवेशन लैंगिक हमला किय। क्या कहना है?

उत्तर: जी नहीं।

8. The appellant pleaded his innocence and claimed that he was falsely implicated because of land dispute. Four witnesses were examined for the defense including the appellant's son (DW-3). A doctor, who claimed to have treated the victim on 11.02.2021, was examined as DW-4. His evidence is to the effect that the victim was found infected with *E-coli*, because of which she had feeling of itching and burning sensation in her private parts. The trial court, after having analyzed and evaluated the evidence adduced at the trial, reached a conclusion by its impugned judgment dated 22.03.2022 that the prosecution was able to substantiate the charge against the appellant of commission of offence punishable under Section 376AB and Section 6 of the POCSO Act and accordingly sentenced him to imprisonment and fine as has been noted hereinabove.

9. Mr. Rajendra Narain, learned senior counsel appearing on behalf of the appellant, has submitted that it was the specific case of the prosecution that the alleged sexual misdeeds were committed by the appellant in a semi-constructed school building. He has referred to the depositions of the grandfather of



the victim (PW-4), wherein he testified that there was no semi-constructed school in his village. He has argued that the place of occurrence having not been proved, no credence can be given to the evidence of the prosecution's witnesses. He has given much emphasis on the aspect that because of existing land dispute between the appellant and the informant, a false case was registered. Referring to the deposition of DW-3, he has submitted that in respect of the said land dispute, there was a panchayat held on 08.05.2008 and a panchanama was prepared, a copy of which came to be marked as exhibit-A at the trial, though with objection. DW-3, a son of the appellant, deposed *inter alia* that on the alleged date of occurrence, i.e., 10.02.2021, he was there with his father in the semi-constructed house and with him his uncle was also there. Further, 10-15 other persons would always sit in the said semi-constructed house. He submits that the trial court has not duly appreciated the evidence of the appellant's son (DW-3). He has made an alternative submission and has argued that in any event no case is made out of penetrative sexual assault within the meaning of Section 3 of the POCSO Act. In the absence of any evidence to the effect that there was any penetration to any extent by the appellant of his penis or any part of his body into the victim's vagina, mouth, urethra or anus, no case of penetrative



assault is made out. He submits that even from the evidence of the victim adduced at the trial, it can not be inferred that the act of the appellant comes within the meaning of penetrative sexual assault under Section 3 of the POCSO Act punishable under Section 5 of the said Act, on the ground of the victim being less than 12 years. He accordingly submits that the finding of the trial court convicting the appellant for the offence punishable under Section 376AB of the IPC and Section 6 of the POCSO Act is unsustainable and requires this Court's interference.

10. The learned Additional Public Prosecutor representing the State of Bihar, *per contra*, has argued that the victim girl was 5-6 years old in respect of which there is no controversy. In her statement recorded under Section 164 of the CrPC, the victim and her mother clearly mentioned the circumstance in which the occurrence had taken place and could subsequently be detected, upon enquiry made by the victim's mother. She contends that based on the evidence collected during the course of investigation, the police rightly submitted charge-sheet against the appellant for commission of the offences punishable under Section 376AB and Sections 4, 6, 8 and 10 of the POCSO Act. Upon due application of mind, the learned Special Court, POCSO, framed the charge against the appellant of



commission of offence punishable under Sections 376AB of the Indian Penal Code and Section 6 of the POCSO Act. She contends that in view of the framing of charge against the appellant for commission of offences punishable under Section 376AB of the Indian Penal Code and Section 6 of the POCSO Act, in the given facts and circumstances of the case, Section 29 of the POCSO Act applies with full force. Further, the prosecution in the present case, was able to establish the primary facts constituting an offence under the provisions of the POCSO Act. She contends that the submission made on behalf of the appellant that there was no semi-constructed house or school in the village is defeated by the evidence of son of the appellant (DW-3), who himself deposed at the trial that he was there with his father (the appellant) in a semi-constructed house on the alleged date of occurrence, i.e., on 10.03.2021. She, accordingly, contends that the place of occurrence cannot be doubted. She has, however, not been able to counter the alternative submission advanced on behalf of the appellant that based on the evidence of the prosecution's witnesses, no case of penetrative sexual assault is made out, in the absence of any evidence to the effect that the appellant had penetrated his penis or inserted any object or part of his body into the vagina, urethra or anus of the victim.



11. We have perused the impugned judgment and order of the Trial Court as well as the Trial Court's records. We have considered rival submissions advanced on behalf of the parties. After having gone through the materials on record, including the evidence of the prosecution's witnesses, we find substance in the submission advanced on behalf of the appellant that there is no evidence adduced at the trial to suggest the commission of penetrative sexual assault by the appellant on the victim. Section 3 of the POCSO Act defines penetrative sexual assault as under:-

*"3. 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.”

12. It was alleged in the First Information Report (hereinafter referred to as “the FIR”), which is based on the disclosure made by the victim to her father (informant, PW-3) that the appellant had rubbed the victim’s vagina with his penis. In her statement under Section 164 of the CrPC (Exhibit-4) also, the victim clearly described that the appellant rubbed her vagina with his penis. The statement made by the victim’s mother under Section 164 of the CrPC is apparently based on the disclosure made by the victim to her. Her statement under Section 164 of the CrPC also does not make out a case of penetrative sexual assault within the meaning of Section 3 of the POCSO Act.

13. Evidence of the victim, though a child, at the trial is crucial, she being the most important witness. It can be easily deduced from the evidence of the victim herself that the appellant had rubbed (रगड़ता था) her vagina with his penis. The victim’s mother (PW-2) is the first person, according to the prosecution's case, who had learnt about the occurrence through the victim. From her deposition also, we find that there is no



specific evidence of commission of penetrative sexual assault by the appellant on the victim.

14. We are, accordingly, of the view that the appellant's conviction for the offence punishable under Section 6 of the POCSO Act cannot be sustained in absence of any evidence of penetrative assault/aggravated penetrative sexual assault. We are, however, of the view that the act of the appellant proved at the trial does make out a case of aggravated sexual assault within the meaning of Section 9 of the POCSO Act. Section 7 of the POCSO Act, defines sexual assault as under:-

“7. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

15. Any sexual assault in the nature as defined under Section 7 of the POCSO Act becomes aggravated sexual assault when such act falls in either of categories (a) to (u) under Section 9 of the POCSO Act. An act of sexual assault on a child below 12 years is an aggravated sexual assault within the meaning of Section 9 (m) of the POCSO Act.



16. On careful appraisal of the evidence adduced at the trial by the witnesses, we are of the considered opinion that the offence of aggravated sexual assault punishable under Section 10 of the POCSO Act, is proved against the appellant beyond doubt. We are not inclined to accept the submission advanced on behalf of the appellant that the prosecution was not able to prove the place of occurrence or that a false case was instituted in 2021 against the appellant because of land dispute of the year 2008.

17. Accordingly, we consider it proper to modify the appellant's conviction from Section 6 of the POCSO Act to an offence punishable under Section 10 of the said Act. For the reasons noted above, the act proved against the appellant does not fall within the definition of rape under Section 375 of the Indian Penal Code. The appellant's conviction for the offence punishable under Section 376AB of the Indian Penal Code cannot be sustained.

18. We are, however, of the view that appellant is guilty of the offences punishable under Sections 354, 354A and 354B of the Indian Penal Code. Accordingly, the appellant's conviction for the offence punishable under Section 376AB of the IPC is modified and he is held guilty of the offences



punishable under Sections 354, 354A and 354B of the Indian Penal Code.

19. We, thus, modify the judgment of conviction by holding the appellant guilty of offence punishable under Section 10 of the POCSO Act and Sections 354, 354A and 354B of the Indian Penal Code. Out of these offences, for which the appellant has been held guilty by the present judgment, punishment for the offence punishable under Section 10 of the POCSO Act is maximum which is not less than five years that may extend to seven years with fine. Accordingly, we deem it proper to consider imposition of appropriate sentence applying Section 42 of the POCSO Act for the offence punishable under Section 10 of the said Act only.

20. Mr. Rajendra Narain, learned senior counsel appearing on behalf of the appellant has addressed this Court on the point of sentence also, if in the Court's opinion the appellant was found guilty of offence punishable under Section 10 of the POCSO Act, while making his alternative submission. He has submitted that the appellant is an old person and as on the date of occurrence he was 66 years old, as mentioned in the FIR itself. Advanced age of the appellant, he contends, is a mitigating circumstance and, therefore, the Court taking lenient view of the



matter, should impose the minimum sentence of five years of imprisonment.

21. Learned Additional Public Prosecutor responding to the submission advanced on behalf of the appellant on the point of sentence has submitted that considering the gravity of the offence committed by the appellant on an innocent child of 5-6 years which has serious adverse effects on the mental health of the child, this Court should impose maximum of the sentence stipulated under Section 10 of the POCSO Act.

22. After having heard learned senior counsel for the appellant and learned Additional Public Prosecutor for the State, we are of the opinion that it is a gross case of sexual abuse by an aged person who was known as a Teacher (*Guruji*). The proved guilt of the appellant deserves to be dealt with sternly, while considering the quantum of sentence. The age of the victim and the age of the appellant coupled with the manner in which the offence was committed are aggravating circumstances which, in the Court's view, invite maximum punishment. Accordingly, while setting aside the sentence awarded by the Trial Court for the offences punishable under Sections 376AB of the Indian Penal Code and Section 6 of the POCSO Act, we deem it fit and proper to sentence the appellant to seven years of rigorous



imprisonment with a fine of Rs. 25,000/- (Twenty Five Thousand) for the offence punishable under Section 10 of the POCSO Act.

23. As has been noted above, no separate sentence is being passed for the proved offences punishable under Sections 354, 354A and 354B of the Indian Penal Code.

24. This appeal stands partly allowed, accordingly.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

Shyam/Nishant-

AFR/NAFR	NAFR
CAV DATE	NA
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