

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.951 of 2015

Arising Out of PS. Case No.-75 Year-2014 Thana- KOILWAR District- Bhojpur

Manoj Sao @ Manoj Sah son of Krishna Sah @ Krishna Sao, resident of
Village- Mahuli Balha P.S.- Koilwar District- Bhojpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Ms. Surya Nilambari *Amicus Curiae*

For the Respondent/s : Mr.Ajay Mishra, APP

**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date : 09-05-2023

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C for short) against the judgment of conviction dated 28.07.2015 and the order of sentence dated 31.07.2015 passed by the learned 1st Additional Sessions Judge cum Special Judge, Bhojpur, Arrah in POCSO Case No. 07 of 2014 arising out of Koilwar P.S. Case No. 75 of 2014, whereby and whereunder the appellant has been convicted and sentenced as under :-



Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
under Section 376 of the IPC &	Imprisonment for life	2,00,000/-	R.I. for 6 months
Section 6 of the POCSO Act	-----	-----	-----

2. Section 29 of the Protection of Children from Sexual Offences Act, 2012 (‘Act’ in short) casts a reverse burden on a person being prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, to prove that he has not committed such offence as the said provision presumes commission of such offence by the person so being prosecuted. Sections 3, 5, 7 and 9 of the Act defines penetrative sexual assault, aggravated penetrative sexual assault, sexual assault and aggravated sexual assault, respectively. To attract the reverse burden of proof under Section 29 of the Act, it is incumbent upon the prosecution to establish primary facts to constitute either of the four acts, namely penetrative sexual assault, aggravated penetrative sexual assault, sexual assault or aggravated sexual assault. In other words, unless the prosecution proves the basic ingredients of an act/acts falling within the definition(s) under



Sections 3, 5, 7 or 9, the presumption under Section 29 of the Act shall not be attracted. With this principle in mind, we proceed to consider the present appeal.

3. It is worthwhile mentioning that the appellant, who is in custody remained unrepresented before this Court and, therefore, by an order dated 03.04.2023, we had requested Ms. Surya Nilambari to assist this Court and present the case of the appellant before this Court. She has assisted this Court by placing the case of the appellant as an *Amicus Curiae* with her usual vehemence and tenacity. We have also heard Mr. Ajay Mishra learned Additional Public Prosecutor representing the State of Bihar.

4. The prosecution's case as disclosed in the *fardbeyan* of the victim's mother, which is the basis for registration of the concerned FIR is that in the evening of 07.05.2014, she had gone to attend a marriage function leaving behind the victim, aged about 11 years, at the door of her house. When she returned at about 8.30-9 PM, she found the victim crying and on having been asked, she disclosed to her that her neighbour (this appellant) had hit the victim in her stomach. In the night, however, the victim started weeping and disclosed to the informant that finding the victim alone, the appellant had



snatched her mobile phone and as the victim chased him to take her mobile phone back, the appellant took the victim to his *hut* and raped her. When the victim raised alarm, the appellant escaped and the appellant's sister took the victim to her house. Based on the aforesaid *fardbeyan*, Koilwar P.S. Case No. 75 of 2014 was registered for the offences punishable under Sections 376 and 506 of the Indian Penal Code and Sections 4 and 6 of the POCSO Act. It is noteworthy that an act falling under Section 3 of the POCSO Act is punishable under Section 4 of the POCSO Act whereas that under Section 5 of the Act is punishable under Section 6 of the Act.

5. The police, upon completion of investigation submitted chargesheet for the offences punishable under Sections 376 and 506 of IPC and Sections 4 and 6 of the POCSO Act, whereafter cognizance was taken and subsequently charges were framed against the appellant.

6. The appellant denied the charges and claimed to be tried.

7. At the trial, altogether seven witnesses were examined including the I.O. (PW7), the Doctor (PW6), the victim (PW1), victim's brothers (PW2 and PW4), victim's uncle (P.W. 5) and the victim's mother, (the informant) as PW3.



8. The prosecution adduced following documentary evidence at the trial :-

- (i) Signature of the victim on the statement under Section 164 of Cr.P.C (Exhibit-1)
- (ii) Signature of PW-2 on the *fardbeyan* (Exhibit-2)
- (iii) Medical report of the victim (Exhibit-3),
- (iv) Fardbeyan (Exhibit-4)
- (v) Formal FIR (Exhibit-5)
- (vi) Statement of the victim recorded under Section 164 of the Cr.P.C (Exhibit-6).

9. After closure of the evidence of the prosecution's witnesses, the statement of the appellant under Section 313 of the CrPC was recorded. Thereafter, the defence got examined two witnesses, DW-1 and DW-2.

10. The trial court upon appreciation and analysis of the evidence adduced at the trial Court has held the appellant guilty of the offences punishable under Section 376 of the IPC and under Section 6 of the POCSO Act by the impugned judgment of conviction dated 28.07.2015. Following the mandate of section 42 of the POCSO Act, the learned trial Court has sentenced him to undergo imprisonment for life for the offence punishable under section 376 of the IPC with a fine of Rs. Two



lacs and has not awarded separate punishment for the proved offence punishable under Section 6 of the POCSO Act.

11. Ms. Surya Nilambari learned *Amicus Curiae*, has submitted, with reference to the oral evidence of the prosecution's witnesses that there is no evidence at all adduced at the trial by the prosecution to constitute an offence of sexual assault let alone, penetrative sexual assault. She has drawn the court's attention to the evidence of PW-1 the victim herself, to submit that there is nothing in her deposition to suggest any act of penetrative sexual assault committed by the appellant. Her testimony, in this regard is confined only to a vague statement that the appellant had done *Ganda Kaam*. She contends that such evidence of her cannot be stretched to mean penetrative sexual assault, as penal provisions need to be applied strictly, as they exist in the statute book. She has contended that any attempt to scribe a precise nature of act to this expression '*Ganda Kaam*' (*bad behaviour*) would result in attributing to the victim, words/oral testimony not in fact spoken by her during her examination as a witness. She has also argued that much credence cannot be given to the evidence of the victim (PW-1) which suffers from inherent contradictions rendering her an unreliable witness.



12. She has further argued that it is clearly evincible from the evidence of PW-1 that PW-1 and the appellant had quarreled over the alleged snatching of mobile by the appellant from the victim. Ms. Nilambari has specifically referred to the victim's evidence in paragraph no. 6, wherein, she has deposed that the appellant had hit her in her stomach with his fist and beyond that she had not received any injury and because of that pain, she was weeping and that was what she had disclosed to her mother. She contends that this deposition of the victim herself falsifies the entire prosecution case of commission of any act attracting penal provisions under Sections 4 and 6 of the POCSO Act and Section 376 of the Indian Penal Code.

13. She has thereafter taken us to the evidence of PW5, the uncle of the victim, to contend that from this evidence also it would appear that a false case was lodged because of the dispute arising out of snatching of mobile phone. Relying on the evidence of the doctor (PW-6) she has submitted that no sign of sexual assault was found during the medical examination of the victim. Our attention has also been drawn to the evidence of Investigating Officer to submit that the place where the occurrence was alleged to have taken



place was a *hut*, open from all the sides. She would argue that it is highly improbable that the act, as alleged by the prosecution could have been committed at a place, open from all sides. Further, I.O. did not find any incriminating material at the place of occurrence.

14. Mr. Mishra, learned Additional Public Prosecutor appearing for the State has on the other hand has argued that the deposition of minor rustic girl should be read by this Court in the social perspective. Though the victim did not explicitly say anything in her deposition to suggest that there was a penetrative sexual assault, the expression, *ganda kaam* used by her in her deposition should be interpreted by this Court to mean sexual assault. He has also submitted that the victim (PW-1) cannot be said to be unreliable witness and that the appellant does not deserve acquittal on the sole ground that the charge of rape framed against him could not be corroborated by medical evidence. He has submitted that the victim has fully supported the prosecution's case in her statement recorded under Section 164 of the Cr.P.C and, therefore, the finding of conviction recorded by the trial court does not require interference by this Court.

15. We have perused the lower court's records and



impugned judgment and order of the trial court, under challenge, in the present appeal. We have given our anxious consideration to the rival submissions advanced by the learned *Amicus Curiae* and learned Additional Public Prosecutor for the State.

16. It is settled legal principle that commission of offence of rape can be proved based on the sole oral evidence of the victim, if she appears to be reliable and her evidence creditworthy, without corroboration by the medical evidence. In the present case, we notice that the victim in her examination-in-chief deposed that the appellant after having snatched her mobile phone had taken her to the *hut* and had done something which was bad (*Ganda Kaam*). From her deposition itself, it appears that the place where the occurrence according to the prosecution's case had taken place was open from all sides which was being used by the villagers as thoroughfare. Further, we find substance in the submission made by the learned *Amicus Curiae* that the victim's deposition in paragraph no. 6 of her evidence at the trial demolishes the entire prosecution's case, wherein, she deposed in no uncertain terms that the appellant had given a fist blow in her stomach beyond which she had not received



any injury and that she was crying out of the pain caused by the said injury. That was what she had disclosed to her mother (PW-3) as also to the Doctor to whom she was taken for medical examination. With the abovenoted evidence of the victim, read with the medical evidence, in our considered view, the prosecution cannot be said to have established primary facts at the trial to constitute an offence of sexual assault, within the meaning of Section 7 of the Act or penetrative sexual assault within the meaning of Section 3 of the Act.

17. As the prosecution failed to prove the charge of commission of penetrative sexual assault punishable under Section 4 of the POCSO Act, no question of proof of the offence of aggravated penetrative sexual assault punishable under Section 6 of the Act arises, in our opinion. This is moreso for the reason that it is not the prosecution's case that the victim's age was less than 12 years as on the date of occurrence. Furthermore, Section-5(n) of the POCSO Act is also not attracted in the present case in the absence of any evidence that the appellant was a relative of the victim through blood, adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of



the victim or living in the same or shared household with the victim.

18. The evidence of the other prosecution's witnesses at the trial, other than the official witnesses, is apparently based on the disclosure which was made by the victim to them. As the victim herself has not supported the prosecution's case of sexual assault much less penetrative sexual assault, nor does the medical evidence support the prosecution's case, we do not consider it safe to uphold the conviction recorded by trial court.

19. We accordingly, set aside the finding recorded by the trial court of the appellant's conviction for the offences punishable under Sections 376 of the IPC and Section 6 of the POCSO Act by giving him benefit of doubt.

20 Accordingly, the impugned judgment of conviction dated 28.07.2015 is hereby set aside. Consequently, the order of sentence dated 31.07.2015 is also set aside.

21. This appeal is allowed.

22. Since the appellant is in custody, let him be released from jail forthwith, if not required in any other case.

23. Before we part with the present judgment, we record our appreciation for the able assistance extended by



Ms. Surya Nilambari, learned *amicus curiae*. The Patna High Court Legal Services Committee is directed to pay to her a sum of Rs. 20,000 as a token amount for the assistance extended by her to this Court in the present appeal.

(Chakradhari Sharan Singh, J)

(Rajiv Roy, J)

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Uploading Date	
Transmission Date	

