

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.764 of 2019

Arising Out of PS. Case No.-71 Year-2017 Thana- MAHILA P.S. District- Kaimur (Bhabua)

LALU SHARMA Son of Ram Dular Sharma Resident of Village -
Machiawan, P.S.- Bhabua, Dist.- Kaimur (Bhabua.)

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. Baidyanath Thakur, Advocate
Mr. Praveen Kumar, Advocate
For the Respondent : Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 16-01-2023

The appellant has preferred this appeal under Section 374(2) of the Cr.P.C. putting to challenge the judgment of conviction dated 27.04.2019 and the order of sentence dated 30.04.2019, passed by the learned Additional Sessions Judge 1st-cum-Special Judge, Kaimur at Bhabhua, in POCSO Trial No. 46 of 2017 arising out of Bhabhua Mahila Police Station Case No. 71 of 2017, whereby the sole appellant has been convicted and sentenced as under: -

Convicted under Sections	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376(2) of the Indian Penal Code	15 years	50,000/-	RI for six months

2. The victim's name has been concealed in the present judgment and order.

3. A written report of the informant 04.12.2017, which bears his LTI, is the basis for registration of the concerned Mahila (Bhabhua) Police Station Case No. 71 of 2017 disclosing commission of the offence punishable under Section 376 of the IPC and Section 6 of the POCSO Act. It was his allegation that on 03.12.2017, at 3 PM, his daughter (hereinafter referred to as 'the victim') had gone for guarding his potato field. In the meanwhile, the appellant, a co-villager, came and taking advantage of her solitude forcibly took her towards Durgawati river and committed rape on her. After the victim started screaming, the appellant fled away. Thereafter, the victim returned to her house and narrated the entire occurrence in the family. The informant and the informant's wife had seen blood stains on her leg. The victim was thereafter taken by him to the Sadar Hospital, Mohania, for treatment whereafter they came to the police station to get the case registered.

4. It is worthwhile mentioning here that the statement of the victim was recorded by the learned Magistrate under Section 164 of the Cr.P.C. on 08.12.2017 (Exhibit-9), which has been proved by the learned Magistrate by whom the said statement was

recorded. In her statement under Section 164 of the Cr.P.C., the victim stated that she had gone in her agricultural field to uproot radishes, where the appellant too was uprooting radishes. She asserted that the appellant lifted her and forcibly took her to the river, where he put her undergarments (pants), off in course of which he tore off the victim's undergarment. Thereafter, she had returned to her house and explained the entire occurrence to her grandmother and maternal grandmother. When she explained the incident to her father, he immediately rushed and caught hold of the appellant. The family members of the appellant, however, got him released from the clutches of the victim's father.

5. The victim was subjected to medical examination. The medical Officer, posted at Sadar Hospital, Bhabhua, recorded following findings:-

“No marks of violence found over her body except external genital area and neighbourhood area. Secondary sexual character not developed. No foreign hair found over any part of her body. Examination of external genital area and neighbourhood area – one lacerated wound, size about $\frac{1}{4}$ cm x $\frac{1}{4}$ cm x $\frac{1}{8}$ cm. Smeared with blood clot present right side of urethra. One lacerated wound present over perineum size about $\frac{1}{2}$ cm x $\frac{1}{4}$ cm x $\frac{1}{8}$ cm. Smeared with blood clot. Said victim already catheterized some where else.

Internal Examination- First of all vaginal swab is taken and sent for pathological examination report of which shows that no spermatozoa was found either dead or alive, only epithelial and pus cell and RBC are present. Original copy of the report duly signed and attached herewith. Hymen membrane found intact. No internal bleeding found. Ultra-sound of whole abdomen advised and done at Sadar Hospital, Bhabhua. Report of ultra-sound shows that uterus is not visualise and rest are normal. Original copy of the report is attached herewith.

Opinion-Above mentioned injuries are simple in nature caused by hard blunt object and approx. time within 24 hrs.

There is no sign suggestive of vaginal intercourse but there is evidence of genital assault present.”

6. The police, upon completion of investigation, submitted charge-sheet whereafter cognizance was taken for commission of the offences punishable under Section 376 of the IPC and Section 6 of the POCSO Act. Subsequently, the appellant was charged of the commission of offence punishable under Section 376(2) of the IPC and Section 6 of the POCSO Act. As the appellant denied the charges against him, he was put to trial.

7. At the trial, altogether eight witnesses were examined including the Doctor (PW 1), who had conducted the medical examination. PW 7, (Doctor), based on the finding of medical examination deposed that the age of the victim was found to be between 7-9 years approximately. Investigating Officer was examined as PW 6. The rest four witnesses are: the maternal grandmother of the victim (PW 2), mother of the victim (PW 3), father of the victim (PW 4) and the victim herself (PW 5).

8. We have considered it apt to refer first to the evidence of the victim (PW 5) and the informant (PW 4) read conjointly with the statements of the victim recorded under Section 164 of the Cr.P.C., which has been proved by the learned Magistrate (PW 7). On careful reading of the victim's statement under Section 164 of the Cr.P.C., it can be easily discerned that she did not make any allegation of rape. Her statement under Section 164 of the Cr.P.C. is only to the effect that the appellant had lifted the victim, taken her to the nearby river and had forcibly removed her undergarment (*chaddhi*). After the said occurrence, she had returned to her house and narrated the incident to her grandmother and the mother. Her father, having learnt about the occurrence, had captured the appellant, but the family members of the appellant had got him released. The allegation of the informant in

the FIR is materially different from the statement of the victim herself recorded under Section 164 of the Cr.P.C., a couple of days after registration of the FIR. It is significant to note that whereas the victim disclosed that the informant had captured the appellant, who was extricated with the intervention of his family members; the informant, however, had not mentioned in the written report that the appellant was captured by him. There is apparent improvement in the narration of the occurrence by the victim in her evidence at the trial. She added that after removing her undergarment (*chaddhi*), the appellant had ravished her (*izzat loot liya*) and she was bleeding too. Thereafter, she deposed, she returned to her house weeping and narrated the entire story to her mother and grandmother about the occurrence. Subsequent thereto the mother of the victim started searching for victim's father. When her father returned in the evening, she told him about the occurrence. She came to the police station with her parents. From the police station, she was taken to the Doctor, where she was examined. Narration of the informant (PW 4), the father of the victim, is apparently inconsistent with the evidence of the victim (PW 5). According to him, he was at his house when the victim had returned weeping from the potato field. In his deposition at the trial, he stated that thereafter he and his wife had gone to the police

station for registration of the FIR. The written report was prepared by one Kanhaiya Ram, who has not been examined. It is noteworthy that it was the specific case of the prosecution, as narrated by the informant in his FIR that the informant had gone first to the Sadar Hospital Mohania, for treatment and thereafter to the police station; in his evidence at the trial, the informant did not depose that the victim was taken to the hospital first before going to the police station. PW 4 also deposed that he had seen blood stains on the legs of the victim. PW 1, the Doctor, who was posted as Medical Officer, proved the injury report and the findings regarding the injuries on the person of the victim recorded therein, which have been noted hereinabove. The said report does not support the prosecution's case of penetrative sexual assault made by the appellant on the victim within the meaning of Section 3 of the POCSO Act. Similarly, it does not corroborate the accusation of the charge of commission of rape within the meaning of Section 375 of the IPC.

9. In the given circumstance at hand as noted hereinabove the Court is not inclined to uphold the appellant's conviction recorded by the learned Trial Court for the offence punishable under Section 376(2) of the IPC and Section 6 of the POCSO Act for the following reasons: -

(i) There is no assertion of commission of any penetrative sexual assault by the appellant in the statement of the victim recorded under Section 164 of the Cr. PC.. The allegation in the said statement is only to the extent of forcibly removing the victim's undergarment (pants). Her subsequent improvement in her evidence at the trial that rape was committed on her does not appear to be fully reliable and trustworthy. In any case, it creates a reasonable doubt as regards the accusation of commission of rape within the meaning of Section 375 of the IPC punishable under Section 376(2) thereof and/or penetrative sexual assault within the meaning of Section 5 of the POCSO Act punishable under Section 6 thereof.

(ii) There is contradiction in the evidence of father of the victim (PW 4) and the victim (PW 5) on several counts. According to PW 4, he was at the residence when the victim had returned, whereas, according to the victim, PW 4 was not in the house when she had returned from the field after the occurrence and her mother (PW 3) had started searching for him after learning about the occurrence.

(iii) The evidence of the PWs 4 and 5 regarding penetrative sexual assault is not corroborated by the medical evidence inasmuch as no mark of violence was found over her

body except the external genital area and neighbourhood area. No internal bleeding was found. The Doctor concluded that there was no sign suggestive of vaginal intercourse, but there was evidence of genital assault present.

10. However, upon close scrutiny of the evidence adduced at the trial, we are of the view that a case of sexual assault on the victim, within the meaning of Section 7 of the POCSO Act, stands proved, taking into account the consistent evidence of the prosecution's witnesses to the extent the same stands corroborated by the medical evidence. Section 7 of the POCSO Act reads as under: -

*“7. **Sexual assault.**—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.”*

11. It is the consistent case of the prosecution that the victim (PW 5) was lifted by the appellant and taken to the nearby river, and after that, he removed her undergarment (pants). Though the case of penetrative sexual assault is not proved, the evidence of the victim read with the medical evidence proves the appellant's

act of touching the victim or assaulting the victim with sexual intent, involving physical contact without penetration.

12. Because of the above, the conviction of the appellant under Section 376(2) of the IPC and Section 6 of the POCSO Act is set aside and accordingly, the impugned judgment of the trial court is modified by holding the appellant guilty of commission of the offence of sexual assault within the meaning of Section 7 of the POCSO Act, punishable under Section 8 thereof.

13. Consequently, the order of the sentence is also modified. Considering the age of the victim of the crime, we deem it proper to impose maximum punishment for the offence punishable under section 8 of the POCSO Act by imposing a sentence of rigorous imprisonment for a term of five years with a fine of Rs.20,000/-.

14. In the facts and circumstances of the case, the amount of compensation awarded by the trial court under Section 33(8) of the POCSO Act is reduced to Rs. fifty thousand, payable in the manner as directed by the trial court in its order dated 30.04.2019.

15. This appeal is partly allowed to the extent mentioned above.

16. It has been stated at the bar, which is evident from the trial court’s records (LCR), that the appellant has already spent more than five years in custody, taking into account his pre-conviction and post-conviction period together, since 04.12.2017. In such view of the matter, he is directed to be released forthwith as he has already completed the term of more than five years in custody, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Rajesh Kumar Verma, J)

Pawan/-

AFR/NAFR	NAFR
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