

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.706 of 2023

Arising Out of PS. Case No.-135 Year-2019 Thana- MAJHAULIA District- West Champaran

Sunil Kumar, S/o Yogendra Prasad, R/o Village- Karamva, Ward No. 8,
Kushwaha Toli, P.S- Majhauliya, Distt.- West Champaran(Bettiah).

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Lokesh Kumar Singh, Advocate.

For the Respondent/s : Mr. Dilip Kumar Singh, APP.

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE NANI TAGIA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 12-12-2023

1. We have heard the learned Advocate for the appellant and Mr. Dilip Kumar Sinha, learned APP for the State.

2. The appellant has been convicted under Sections 4 and 6 of the Protection of Children from Sexual Offence Act, 2012, *vide* judgment dated 08.05.2023 passed by the learned Additional District & Sessions Judge-VI-cum-Special Judge POCSO Act, Bettiah (West Champaran) in S.G.R. No. 40 of 2019



(C.I.S. POCSO No. 41 of 2019) arising out of Majhauriya P.S. Case No. 135 of 2019. By order dated 16.05.2023, he has been sentenced to undergo imprisonment for life each, to pay a fine of Rs.1,50,000/- and in default of payment of fine, to further suffer imprisonment for nine months for the offence under Sections 4 and 6 of the POCSO Act, 2012.

3. The sentences have been ordered to run concurrently.

4. The appellant is said to have sexually assaulted the victim (P.W. 2).

5. The mother of the victim (P.W. 1) had lodged the FIR on 29.03.2019, alleging that on that the same day, the victim, a girl of seven years, had gone to the shop of the appellant for purchasing *mehandi*, a coloring material. The appellant is said to have given her chocolates and had asked her to wait for him in the maize field, where he would himself come with



mehandi. Later, the appellant came to the field and started sexually harassing her. Her lower garment was opened. The victim started crying, when the people of the neighbourhood arrived. Seeing them, the appellant ran away. The victim came back home sobbing and narrated about the incident to her.

6. It has further been stated in the FIR that the appellant was accused of similar offence in the past. When a complaint was made before the family members of the appellant, his parents and brother, all of whom have been made accused in this case, misbehaved with her and threw her out of the house.

7. Hence, the case.

8. On the basis of the written report lodged by mother of victim (P.W. 1), a case vide Majhauriya P.S. Case No. 135 of 2019, dated 29.03.2019, was registered for investigation under Sections 376/511/34 of the IPC and Sections 7/8/18 of the POCSO Act, 2012.



9. It appears from the records that the appellant was arrested on 30.03.2019, but was not kept in custody. Later, all the accused persons of this case, except the appellant and his mother, surrendered to the process of law. The appellant surrendered on 08.02.2022 and since then, he is in custody.

10. Charges were framed against the appellant, his parents and brother, but the Trial Court has convicted only the appellant and has acquitted all others.

11. The Trial Court has examined six witnesses on behalf of the prosecution and one on behalf of the defence for holding the appellant to be guilty under Sections 4 and 6 of the POCSO Act, 2012 and sentencing him to undergo imprisonment for life and to pay a fine of Rs.1,50,000/-, as noted above.

12. From the bare reading of the FIR, it has been urged before us, it would appear that the victim did not talk about any penetrative sexual assault



on her. If she had, the mother (P.W. 1) would surely have alleged it in the written report.

13. All that P.W. 1 has alleged in the FIR is that the victim was sexually harassed and her lower garment was opened. Before the appellant could do anything to her, people of the neighbourhood, especially workers in field arrived and the appellant had to run away.

14. There is nothing in the written report which would indicate about the names of the persons who had come on the cries of the victim. That may not be important but at the Trial, one Raj Kishore Prasad (P.W. 3), who stands in relation of maternal grandfather to the victim has claimed that he had reached the place of occurrence on the cries of his grand-daughter. He found that many other persons of the village had also assembled there. The clothes of the victim were disorganized and there were blood stains. On asking the victim, she told him that she had gone to



purchase *mehandi* from the shop of the appellant, who had asked her to come to the maize field. Thereafter, the occurrence had taken place. He had not visited the house of the appellant along with the other members of the family for complaining against the act of the appellant. He had seen the victim and not the appellant at about 2 O'clock in the afternoon.

15. Had the victim been sexually assaulted, she would have said so before so many persons of the village, who had come to the P.O.

16. The only statement by P.W. 3 is that the victim looked bedraggled with blood stains on her clothes.

17. It has been argued that this is a very casual statement without any details.

18. Be it noted that none of the clothes/wearing apparel of the victim was seized or sent for any chemical/forensic examination. It is also to be



noted that when the members of the family of the victim went to the house of the appellant, the appellant by that time had not run away as the police papers reveal that he was arrested on 30.03.2019, but he was allowed to go by the police.

19. The victim in her statement under Section 164 of Cr.P.C. has though stated about the appellant having raped her, which allegation she has reiterated before the Trial Court, but the issue which requires to be decided is whether the victim was sexually harassed or was subjected to penetrative sexual assault.

20. We have examined the deposition of the mother of the victim, who improving upon her written report has alleged that the victim was raped by the appellant and while doing so, he kept slapping her on cheeks. Seeing the villagers, the appellant is alleged to have run away. When she had seen the victim for the first time, her clothes were torn and blood stained.



She has gone to the extent of saying that she was unconscious.

21. This statement in the examination-in-chief clearly reflects that P.W. 1 had exaggerated the allegation.

22. In the FIR, which by no means is to be taken as an encyclopedia of all events, she has alleged that the victim could any how reach home and tell her about the occurrence. If, she had become unconscious according to P.W. 1, then perhaps P.W. 1 would have seen her only in the village maize field.

23. This does not appear to have happened, as there is no evidence on record which would corroborate the afore-noted statement of P.W. 1.

24. She has also alleged that when she along with her mother-in-law went to the house of the appellant to complain about his conduct, all the family members of the appellant misbehaved with her. The



appellant also threatened that he would not allow her daughter to be married anywhere. It was only then that she had gone to the police station. The victim was taken to hospital, thereafter, where she was subjected to medical treatment.

25. However, in cross-examination, differing from what she had said in the FIR and in the examination-in-chief, she has stated that the victim came back home on her own. Her cheeks were red and her breasts were paining.

26. She had taken the victim to the Doctor for treatment.

27. It again requires to be noted that the consistent case of the prosecution is that the victim was brought to the Doctor for treatment at the instance of the police.

28. Two persons of the village are alleged to have brought back the victim to her home after the sexual assault.



29. This again is a new development.

30. We do not know, who these two persons are as they have not been chosen to be the witnesses in this case. Their names have been stated to be Harindra Prasad and Jalil Miya, both of whom are said to have made statements before the police about the occurrence. They could have been the most important witnesses to the occurrence, if at all, the narration of events given by P.W. 1 were correct. In fact, P.W. 1 had come to the Court to give her testimony along with Harindra Prasad and Raj Kishore Prasad (P.W. 3).

31. On a careful examination of the deposition of victim (a seven year old girl), it appears that she also has hyperventilated about the occurrence. She has alleged that after taking away her lower-body garment, the appellant disrobed himself also and committed rape on her. She was shouting and all the while, he slapped her on her cheeks.

32. After the occurrence, she is said to



have trudged back home and informed her mother.

33. This narration by the victim is not in sync with what her mother (P.W. 1) had told to the Court.

34. The appellant admittedly is a co-villager, who runs a *kirana* shop in the village. So far as the age of the victim is concerned, there cannot be any doubt that she is a minor.

35. The Doctor (P.W. 4) has assessed the age of the victim to be between 6 to 7 years. The victim was subjected to medical examination on 31.03.2019, i.e. after three days of the assault and the FIR. On private part examination, the hymen was found to be ruptured; but there was no visible sign of any injury on any part of the body, including the groin area.

36. The victim, while being examined, did not make any complaint before the Doctor and the Doctor also did not ask as to what had happened to her. No swelling or abrasion was found on the person of the



victim. In his cross-examination, the Doctor has asserted that hymen could be ruptured due to cycling, running, etc. The Doctor was neither a radiologist nor a dentist nor a pathologist.

37. Thus, the aforementioned assessment was only based on clinical examination sans any forensic test which could have been possible.

38. What has struck our attention is that when the appellant was arrested after the occurrence, not only that he was allowed to let go but he was also not subjected to any medical examination as mandated under Section 53A of the Code of Criminal Procedure.

39. One Shyam Kumar was brought to the witness-stand with the admission register of the Government Middle School, Karamwa, in which the date of birth of the victim has been recorded as 01.01.2009. It is then beyond question that the victim was a minor at the time of the occurrence.

40. It further appears that the I.O. had



found some maize plants trampled, suggesting that some occurrence had taken place in the field. The Investigator (P.W. 5) has, however, in cross-examination has stated that no blood was found at the place where the victim is said to have been raped nor did she ever seize any clothes of the victim. The victim was also not taken to the Child Welfare Committee nor did she make any requisition for payment of compensation to the victim. With respect to the criminal antecedents of the appellant also, no inquiry was made by her.

41. We, therefore, find that the case was not at all investigated properly.

42. The occurrence is said to have taken place, in the maize field, at about 2 O' clock in the day. Near the maize field is a temple which is frequented by many persons of the village including children who play there. If many persons had come to the place of occurrence on the cries of the victim, then some of them, not related to the victim or P.W. 1, ought to have



come forward to support the case.

43. However, that lapse in the investigation itself would not completely discredit the prosecution version. The victim, a seven year old girl, has made a categorical statement of her having sexually harassed and raped.

44. The story of rape, however, if was narrated by her to her mother, who then went to the police station to lodge the case, it is expected that the allegation in the first instance ought to have been made with respect to penetrative sexual assault.

45. The second aspect of the matter is that the clear version of P.W. 1 initially was that the victim had come back home on her own and had narrated about the occurrence. Later at the trial, the mother of the victim (P.W. 1) gave a complete go by to the original version and stated that the victim had become unconscious after the occurrence. She was brought back home with the help of two persons, whose names were



disclosed before the Trial Court, but the prosecution has chosen not to examine them.

46. Except for Raj Kishore Prasad (P.W. 3), who is related to the victim and her mother, no independent person has come to support the case even with respect to the charge of sexual harassment, much less sexual assault.

47. That the appellant was not examined medically as mandated under Section 53A of the Cr.P.C., would not make the prosecution case completely untrustworthy. However, from the circumstances as also the deposition of the defence witness that the appellant had demanded the money back from the family of the victim, which he had given on credit, it appears that at the trial, the allegation of sexual assault has been over-exaggerated as if to give it a colour of penetrative sexual assault over a seven year old girl, which allegation does not get reflected in the medical testimony or after a detailed scrutiny of the deposition of the witnesses.



48. The victim was but subjected to sexual harassment. Otherwise, there was no reason for the victim to go to the maize field and unnecessarily blame the appellant. The appellant perhaps was prevented by the timely arrival of villagers. Many people, according to the prosecution case had arrived when the victim had started crying on being slapped.

49. The overall circumstances of the case clearly depict that the victim was sexually harassed and an attempt was made to disrobe her. Precisely for this reason, the case was registered under Sections 376/511 of the IPC and Sections 7/8/18 of the POCSO Act, 2012.

50. The learned counsel for the State, however, has submitted that in accordance with Sections 29 and 30 of the POCSO Act, 2012, the principle of reverse burden would be applicable and applying the said principle, the Special Court has rightly convicted the appellant under Sections 4 and 6 of the POCSO Act,



2012.

51. There is also a presumption of culpable mental state on the part of the accused which is statutorily recognized.

52. We find the aforementioned submission to be misplaced as even the principle of reverse burden would apply only if the prosecution proves the case beyond all reasonable doubts.

53. Notwithstanding the reverse burden principle applicable in POCSO cases, the cardinal principle of criminal law that the prosecution has to stand on its own legs and has to prove the case to the hilt, cannot be side-lined or by-passed.

54. We have taken care to adopt the most sensitive approach towards analyzing the deposition of the victim, who is only a seven year old girl.

55. The exaggerated version at the trial makes the allegation of penetrative sexual assault on her by the appellant to be doubtful.



56. We thus disagree with the denouement of the Trial Court and we convert the finding of the Trial Court into one under Section 7 of the POCSO Act, 2012, punishable under Section 8 of the POCSO Act.

57. The conviction of the appellant under Sections 4 and 6 of the POCSO Act, is set aside.

58. Since the appellant is the first offender and there is no record of his having committed any offence in the past as also his impecunious circumstances as and his young age, who is not even married, we are of the view that the course of justice would be met if he is sentenced to undergo R.I. for three years and pay a fine of Rs.50,000/- to the victim.

59. Thus, the conviction and sentence of the appellant is altered.

60. The amount of fine also stands altered, if not already paid. If the fine amount has already been paid, it shall not be interfered with.

61. The appellant is said to be in custody



since 08.02.2022.

62. On his completion of three years in custody, he shall be released from jail as having served out the entire sentence imposed upon him, if not required or detained in any other case.

63. The appeal stands partially allowed.

64. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

65. The records of this case be returned to the Trial Court forthwith.

66. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Nani Tagia, J)

manoj/saurav-

AFR/NAFR	NAFR
CAV DATE	NA
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