

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.641 of 2021

Arising Out of PS. Case No.-56 Year-2015 Thana- MAHILA P.S. District- Banka

MD KAINOOL Son of Late Md. Wahid Resident of Village- Katiyama, P.S.-
Rajoun, in the district of Banka.

... .. Appellant
Versus
The State of Bihar
... .. Respondent

Appearance :
For the Appellant : Mr. Shashank Shekhar Sinha, Advocate
Mr. Braj Nandan Kumar Tiwary, Advocate
For the Respondent : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE KHATIM REZA
CAV JUDGMENT
(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date : 22-02-2023

The sole appellant has preferred this appeal under
Section 374(2) of the CrPC putting to challenge the judgment of
conviction dated 02.09.2021 and the order of sentence dated
03.09.2021, passed by the learned Additional Sessions Judge 6th-
cum-Special Judge (POCSO), Banka in G.R. No. 2642 of 2015
arising out of Banka Mahila Police Station Case No. 56 of 2015,
whereby the sole appellant has been convicted and sentenced as
under: -

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
Section 4 POCSO Act	R.I. for 10 years	25,000/-	R.I. for 1 year
Section 6 POCSO Act	R.I. for 20 years	50,000/-	R.I. for 2 years
Section 376(2) of the IPC	R.I. for 10 years	25,000/-	R.I. for 1 year



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

3. So as to conceal identity of the victim, her name does not figure in the present judgment and order and has been referred to as 'the victim'.

4. A written report of the victim's mother (PW-4), dated 08.12.2015, is the basis for registration of the First Information Report, i.e., Banka Mahila P.S. Case No. 56 of 2015, for the offences punishable under Section 376(2)(i) of the IPC and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 ('the Act' for short). The occurrence had taken place, according to the written report, on the previous day, i.e., on 07.12.2015. The informant, the mother of the victim, disclosed in her written report that this appellant was engaged by her for milking her cow on the payment of Rs. 200 per month. On the date of occurrence, at about 6:30 P.M., after having milked the cow, he had entered into the informant's house and cajoled her eight years old minor daughter, the victim, and had taken her to a cot and after bolting the door from inside, sexually exploited her. When the informant heard the victim crying, she rushed towards her house and the moment she reached there, the appellant, after opening the door, escaped. When the husband of the informant returned, the victim explained the occurrence which had happened with her.



Subsequently, after consulting the co-villagers and near relatives, the informant went to the police station with the victim for registration of the FIR.

5. We consider it apposite to note, at this juncture, that the victim was subjected to medical examination on 08.12.2015 at 04:30 P.M.. During the course of medical examination, no internal or external injury was found on the body of the victim, except dark coloured bruise around her vulva. Further, the statement of the victim was recorded under Section 164 of the CrPC on 10.12.2015. She disclosed in her statement under Section 164 of the CrPC that the appellant had kissed her and made her lay on the cot after removing her panty. Thereafter, he had put off his pants, which he was wearing and lay with her under a blanket and was rubbing his penis with her vagina. She clearly stated that the appellant had not inserted his penis in to her vagina. The appellant, thereafter, lay over her and left the house thereafter. After the appellant had left the house, the grandmother of the victim, who lived in a nearby house came, to whom she explained about the occurrence.

6. The police, upon completion of the investigation, submitted charge-sheet, whereafter, cognizance was taken of the offence punishable under Section 376(2)(i) of the IPC and Sections



4 and 6 of the Act. The appellant, upon execution of process under Section 83 of the CrPC, was declared as an absconder, who, subsequently, turned up on 19.05.2016 and faced trial.

7. The charges were framed for commission of the offences punishable under Section 376(2)(i) of the IPC and Sections 4 and 6 of the Act. The appellant pleaded not guilty and, thus, claimed to face trial.

8. The prosecution examined at the trial altogether seven witnesses, including Dr. Amitabh Arun (PW-6), who had examined the victim. He, however, did not appear for his cross examination. The mother of the victim came to be examined as PW-4 and grandmother as PW-2. The victim was examined at the trial as PW-5.

9. The trial court, in compliance with the requirement under Section 313 of the CrPC, put questions to the appellant based on the prosecution's evidence, which had emerged against him and gave him an opportunity to explain the circumstances. The appellant, however, denied the circumstances. Thereafter, three defense witnesses were examined. From the evidence of the defense witnesses, it appears that the defense attempted to develop a case that it was because of some dispute in relation to payments



by the informant to the appellant for milking her cow that a false case came to be registered.

10. The Investigating Officer was examined as PW-7. Father of the victim was examined as PW-3. From the deposition of PW-1, in paragraph 5, it appears that she was related to the victim's father.

11. As has been noted above, the trial court, after having scanned the evidence of the prosecution as well as the defense, has held the appellant guilty of the offences for which he was charged and sentenced him to imprisonment and fine, as has been noted at the outset, by the judgment and order under challenge in the present appeal.

12. Mr. Shashank Shekhar Sinha, learned counsel appearing on behalf of the appellant has argued that the victim does not appear to be a sterling witness on whose evidence only the trial court could have recorded finding of conviction. He has submitted that she is a child witness, whose deposition is required to be seen by this Court with much care, caution and circumspection in the wake of clear evidence of the defense witnesses that there was dispute between the family of the victim and the appellant in respect of payment of wages to the appellant for milking cow. He has further argued that allegation made in the



FIR does not constitute an offence punishable under Section 376 of the IPC and Sections 4 and 6 of the Act in the absence of any accusation of penetrative sexual assault. He has also argued that as the Doctor, who had conducted the medical examination of the victim, was not available for cross examination, the accusation of sexual assault cannot be said to have been proved beyond all reasonable doubts. It is his contention that the victim, a child, in no circumstance, can be said to be a sterling witness, there being patent contradictions in her statement recorded under Section 164 of the CrPC and in her deposition at the trial. In such view of the matter, he has submitted that in the absence of corroboration of evidence of the victim, the charge of commission of the offence punishable under Section 376(2) and Sections 4 and 6 of the Act cannot be said to have been proved. He has argued that the appellant deserves to be given benefit of doubt as the prosecution miserably failed to establish the charge of commission of offence punishable under Section 376 of the IPC and Section 4 and 6 of the Act.

13. The learned Magistrate, by whom the statement of the victim was recorded under Section 164 of the CrPC, was not examined at the trial and, in that backdrop, a submission has been made on behalf of the State that the appellant cannot rely on the



said statement, which was not duly proved at the trial. In response to the said submission, learned counsel for the appellant has relied on Supreme Court's decision in case of ***Madi Ganga v. State of Orissa***, (AIR 1981 SC 1165).

14. An alternative submission has been made on behalf of the appellant to the effect that in any event, no case of penetrative sexual assault or aggravated penetrative sexual assault is made out, even if the depositions of the prosecution's witnesses are taken to be true, read with the medical evidence. He has argued that no act of the appellant, said to have been proved by the prosecution at the trial, constitutes penetrative sexual assault or aggravated penetrative sexual assault within the meaning of Sections 3 and 5 of the Act, punishable under Sections 4 and 6 of the Act. At the utmost, he contends that the alleged act of the appellant constitutes an offence punishable under Section 8 of the Act. Heavy reliance has been placed in this regard on a recent decision of the Supreme Court rendered on 18.11.2021, in the case of ***Attorney General For India vs. Satish and Another***. He has argued that the prosecution's witnesses do not appear to be trustworthy and their depositions are full of contradictions. Referring to the evidence of PW 2, the grandmother of the victim, he has submitted that, according to her, she had seen the victim in



blood stained wet clothes, whereas there is no other evidence to the effect that blood stained clothes of the victim were seized. He has contended that the prosecution's witnesses deposed at the trial that they had rushed to the place of occurrence on hearing the screams made by the victim, but the victim had herself not deposed that she had screamed. Referring to the evidence of the IO for establishing contradictions, he has contended that IO specifically deposed that PW-1 had not made any statement during the course of investigation that the victim had cried or rape was committed on her. Further, PW-4 had not stated during the course of investigation that the victim had cried and that she had seen the appellant running away. These major contradictions demonstrate that PWs 1 and 4 are not truthful. The summary of the submissions advanced on behalf of the appellant is that the statement of the victim recorded under Section 164 of the CrPC does not support the prosecution's case of penetrative sexual assault, which has been developed during the course of the trial by improving the prosecution's version. The lodging of the criminal case is an outcome of internal dispute between the parties over payments to the appellant in relation to milking the informant's cow. There is strong likelihood of the victim having been tutored to depose against the appellant, she being a child witness. The accusation of



penetrative sexual assault is not corroborated by medical evidence. Last but not the least, the victim herself does not appear to be trustworthy, he has argued.

15. Ms. Shashi Bala Verma, learned Additional Public Prosecutor representing the State, has, on the other hand, submitted that there are insignificant contradictions in the evidence of the prosecution's witnesses, which are natural and such witnesses do not appear to be tutored witnesses. She has contended that the victim, an innocent child, had candidly explained in her evidence at the trial the manner of occurrence, whose evidence appears to be consistent and truthful. The evidence of the victim does not require any corroboration by medical evidence, she has contended.

16. We have perused the impugned judgment and order of the trial court, the lower court records and we have given our anxious consideration to the rival submissions made on behalf of the parties, as noted above. We, at the outset, point out that for the reasons best known to the prosecution, the Doctor, who had conducted the medical examination of the victim, was not available for his cross-examination at the trial. His testimony at the trial, therefore, cannot be taken into evidence. A question may arise as to whether non-examination of the Doctor, in the present



facts and circumstances of the case, would have an impact on the result of the present appeal. The said aspect, we shall deal with at appropriate stage.

17. As has been noted above, the narrative of the informant in her written report does not specifically disclose an act of penetrative sexual assault though she has used the expression 'यौन शोषण' (sexual exploitation) in her written report, which is the basis for registration of FIR. Two days after registration of the FIR, on 10.12.2015, the victim, in her statement under Section 164 of the CrPC, disclosed unequivocally that there was no penetration, though she asserted that the appellant rubbed his penis with the vagina of the victim. Nearly two years after her statement under Section 164 of the CrPC was recorded, during the course of trial, the victim (PW-5) deposed, for the first time, that she had screamed when the appellant was inserting his penis in her vagina (paragraph 2) and that the penis had entered into her vagina. Further, the medical report does not corroborate the prosecution's case of penetrative sexual assault inasmuch as no mark of injury, corroborating penetration, was found. It is true that no corroboration by medical evidence is essential to establish an offence of sexual assault, if the evidence of the victim is found to be trustworthy and unblemished. It is apparent, however, that the



prosecution has introduced improvement in its case at the stage of trial, which can be noticed from the evidence of the IO also. When his attention was drawn to the evidence of PW-1, the IO deposed in his cross-examination that she had not stated during the course of investigation that the accused had opened the door after hearing noise from outside nor Bibi Haider Khatoon had stated that the victim was crying loud, whereafter when they went inside, the appellant was seen fleeing away. It is pertinent to mention that the victim's father Shabaz (PW-3), in his evidence at the trial, deposed that he had returned in the night on the date of occurrence. He had seen his mother, wife and aunt (*Bua*) weeping and, on being asked, the victim had disclosed about the occurrence. The IO, in his deposition, said that no such statement was made by PW-3 during the course of investigation.

18. We are, thus, of the definite view that the prosecution has introduced improvements in its case at the stage of trial beyond what was disclosed in the FIR and subsequently in the statement of the victim recorded under Section 164 of the CrPC. In such circumstance, this Court is required to be cautious and circumspect while evaluating the evidence of the witnesses.

19. There is no specific allegation in the FIR, which constitutes an offence of penetrative sexual assault or aggravated



penetrative sexual assault. Similarly, if the statement of the victim recorded under Section 164 of the CrPC is taken into account, the case of penetrative sexual assault or aggravated penetrative sexual assault is ruled out in the backdrop of her statement that there was no penetration. We, at this juncture, need to notice the definitions of penetrative sexual assault or aggravated penetrative sexual assault under Sections 3 and 5 of the Act, which read as under: -

"3. Penetrative sexual assault.—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.*



5. Aggravated penetrative sexual assault.—*(a) Whoever, being a police officer, commits penetrative sexual assault on a child—*

(i) within the limits of the police station or premises at which he is appointed; or

(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child—

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or



(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation.—When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which—

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of Section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to



perform regular tasks, temporarily or permanently; 9[* *]*

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; 10[* *]*

11[(iv) causes death of the child; or]

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault



on the child in an institution or home of the child or anywhere else; or

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or

(s) whoever commits penetrative sexual assault on a child in the course of 12[communal or sectarian violence or during any natural calamity or in similar situations]; or

(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.”

20. It would be apt to mention here that according to the prosecution's witnesses, the undergarment of the victim was found blood stained. The said undergarment of the victim was not seized nor sent for medical examination. At the cost of repetition, it is mentioned that the victim in her statement under Section 164 of the CrPC had not complained of penetration. Such being the circumstance, the evidence of the prosecution, to the extent it relates to penetrative sexual assault on the victim, cannot be said to be beyond suspicion particularly in the absence of corroboration



by medical evidence. Situated thus, the conviction of the appellant for commission of the offence punishable under Sections 4 and 6 of the Act cannot be sustained by giving the appellant benefit of doubt.

21. At the same time, on close scrutiny of the evidence of the victim, we find that she cannot be said to be wholly unreliable and tutored. Though the charge of penetrative sexual assault or aggravated penetrative sexual assault punishable under Sections 4 and 6 of the Act is not proved, she appears to be consistent in her evidence that she was subjected to sexual assault by the appellant within the meaning of Section 7 of the Act punishable under Section 8 thereof. Section 7 of the 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."

22. It may be easily culled out from the unambiguous language of Section 7 of the Act that the act of touching any sexual part of the body of a child with sexual intent or any other act involving physical contact with sexual intent amounts to sexual assault punishable under Section 8 of the Act.



23. We notice further that the appellant has not raised any issue as regards the age of the victim to be below 12 years. A sexual assault committed on a child below 12 years falls in the category of aggravated penetrative sexual assault within the meaning of Section 9(m) of the Act. Section 10 prescribes punishment for aggravated penetrative sexual assault for a minimum period of five years extendable to seven years and liable for fine also.

24. For the reasons, as noted above, in the absence of definite proof of penetrative sexual assault, the appellant's conviction for commission of offence under Section 376(2) of the IPC by the trial court is not sustainable. Further, based on the evidence adduced at the trial, more particularly the evidence of the victim herself, commission of offence of aggravated penetrative sexual assault under Section 10 of the Act is proved, beyond all reasonable doubt.

25. Accordingly, we set aside the impugned judgment of conviction dated 02.09.2021 and the order of sentence dated 03.09.2021, passed by the learned Additional Sessions Judge 6th-cum-Special Judge (POCSO), Banka in G.R. No. 2642 of 2015 arising out of Banka Mahila Police Station Case No. 56 of 2015 and modify the same by holding the appellant guilty of the offence



punishable under Section 10 of the Act. Considering the age of the victim and the circumstance in which the appellant committed the offence by taking advantage of the absence of the parents of the victim and her innocence, we deem it fit and proper to sentence him to R.I. for a term of seven years with a fine of Rs.25000. The period undergone in custody stands set off. In default of payment of fine, the appellant is sentenced to undergo R.I. for two years and a fine of Rs.20000.

26. This appeal is partly allowed.

(Chakradhari Sharan Singh, ACJ)

I Agree
Khatim Reza, J:

(Khatim Reza, J)

Pawan/Nishant-

AFR/NAFR	NAFR
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