

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.981 of 2023

Arising Out of PS. Case No.-147 Year-2022 Thana- SAKURABAD District- Jehanabad

Bishundev Singh, Son of Late Chanderdeep Singh, Resident of Village-
Saidichak, Police Station- Shakurabad, District- Jehanabad

... .. Appellant/s

Versus

1. The State of Bihar
2. Mother of the Victim N/A

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Birendra Kumar, Advocate Mrs. Shaweata Verma, Advocate
For the Respondent/s	:	Mr. Parmeshwar Mehta, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 26-07-2024

We have heard Mr. Birendra Kumar, the learned Advocate for the sole appellant and Mr. Parmeshwar Mehta, the learned APP for the State.

2. The appellant has been convicted under Sections 376 and 376(AB) of the Indian Penal Code and Sections 4, 6 and 8 of the POCSO Act, 2012 *vide* judgment dated 31.08.2023 passed by learned Additional District and Sessions Judge-VI-cum-Special Judge, POCSO, Jehanabad in Special POCSO Case No.



66 of 2022. By order dated 01.09.2023, the appellant has been sentenced to undergo rigorous imprisonment for 20 years, to pay a fine of Rs. 10,000/- and in default of payment of fine to further suffer simple imprisonment for six months under Section 376(AB) of the IPC; rigorous imprisonment for 20 years, to pay a fine of Rs. 10,000/- and in default of payment of fine to further suffer simple imprisonment for six months under Section 376 of the IPC; RI for ten years, to pay a fine of Rs. 5000/- and in default of payment of fine to further suffer SI for three months; RI for ten years, to pay a fine of Rs. 5,000/- and in default of payment of fine to further suffer SI for three months under Section 4 of the POCSO Act; RI for 20 years, to pay a fine of Rs. 10,000/- and in default of payment of fine to further suffer SI for six months under Section 6 of the POCSO Act; RI for three years, to pay a fine of Rs. 1,000/- and in default of payment of fine to further suffer SI for 15 days under Section 8 of the POCSO Act.



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

4. The Court has also directed for the compensation of Rs. 5 lakhs to the victim through the District Legal Services Authority, Jehanabad in three installments.

5. The appellant, a 71 years old man, who stands in the relationship of grandfather of the victim, is alleged to have raped her. The victim is said to be of eight years when this act was committed.

6. The FIR has been lodged by the mother of the victim who has been examined as PW-4. She had lodged a written report addressed to the Officer-in-Charge of Shakurabad Police Station on 07.07.2022 alleging that while the victim was playing at about 4 O'clock in the village, the appellant forcibly lifted the victim and brought her to his home where he attempted to subject her to sexual intercourse. He had undressed the victim. When the victim cried, it attracted the



attention of many other villagers including her. She ran to the house of the appellant only to find that the victim was lying naked. She was then made to wear a dress and brought to the police station.

7. On the basis of the aforementioned written report, Shakurabad P.S. Case No. 147 of 2022 dated 07.07.2022 was registered for investigation for the offence under Section 376/511 of the IPC.

8. It appears that the police submitted charge-sheet under Sections 376(AB) and Sections 4, 6, 8 and 10 of the POCSO Act, 2012. The charges were also framed against the appellant under the aforementioned sections.

9. At the trial, eight witnesses were examined including the two doctors and the victim herself.

10. The Trial Court after having assessed the age of the victim to be less than ten years, convicted and sentenced the appellant as aforesaid.

11. The mother of the victim had seen her lying



naked in the house of the appellant. The victim gave her statement under Section 164 Cr.P.C. on 08.07.2022 in which her age has been shown to be six years. While recording her statement, the learned Magistrate was satisfied that the victim was able to understand the general questions put to her regarding her name and family etc. and that she was in a position to give rational answers to all the questions.

12. In the aforementioned statement, the victim has said that while she was playing, one old person, viz., the appellant brought her to his house and undressed her. He undressed himself also. Thereafter he touched her private parts and had also slapped her. The victim has further gone on to state that she was kissed by the appellant on her cheeks and on her private parts. Later, the appellant is said to have fled away.

13. However, during the trial, the victim (PW-5) has alleged penetrative sexual assault.

14. We have examined her deposition in some



detail. She has alleged that after undressing her, the appellant also tried to rape her. Later, she was given water by the appellant to wash her private parts and was offered biscuits. She was confronted with the earlier statement made by her before the Magistrate that she had not talked about any penetrative sexual attack but she denied not to have made such statement before the Magistrate as well.

15. The learned Magistrate, who had recorded the statement of the victim, has not been examined at the trial.

16. The other witnesses, viz., Tujiya Devi (PW-1), Babita Devi (PW-2) and Mandri Devi (PW-3), who are in some way or the other related to the victim, have supported the prosecution story to the extent that they had heard *hulla* at about 4:00 P.M. on the day of the occurrence and had gone to the house of the appellant where they had seen the victim lying in a state of complete dishabille.



17. All the aforementioned witnesses were suggested that no such occurrence had ever taken place and that they had gone in collusion with the victim's family. However, such suggestions were vehemently denied by the aforementioned witnesses.

18. The mother of the victim (PW-4), as noted above, has stated before the Trial Court that when she went to the house of the appellant, she saw her daughter/ victim completely naked. Seeing her, the appellant fled away from the house.

19. The Investigator/ Satya Swarupa (PW-6) has narrated the efforts taken by her to investigate the case. She had recorded the statements of PWs. 1, 2 and 3 as well as of the victim and her mother/ informant(PW-4). On 13.07.2022, she got secret information that the appellant is camping in Arwal. The appellant was arrested at Arwal from the house of his brother-in-law. She had never asked the persons with whom he had inquired whether there was any enmity



between the family of the victim and the appellant.

20. These background facts then take us to the evidence of the doctors regarding the age of the victim and the opinion regarding sexual assault on her.

21. Dr. Renu Singh (PW-7) had examined the victim on 08.07.2022. No pregnancy test was done on her. Her secondary sexual characters were not found to have been developed. The hymen was ruptured. There was laceration on the inner side of right *labia minora*. Redness on the posterior part of vagina was also seen. No foreign body could be detected. The vaginal swab was examined by one Dr. Amar Kumar who had not found any spermatozoa or white or red blood cells. Even epithelial cells were not found.

22. In her cross-examination, PW-7 has asserted that except redness on *labia minora*, no other injury was found on the person of the victim. On being specifically questioned, she replied that the hymen rupture could be due to other reasons like cycling,



weight lifting etc.

23. Dr. Anshu Anand (PW-8) had examined the victim on 08.07.2022 for assessing her age. On the basis of the radiological examination, the age of the victim was assessed to be nine years approximately.

24. The undergarments of the victim was sent for forensic examination *vide* memo No. 1118/22 dated 25.08.2022. The same was received in the laboratory on 07.09.2022. The undergarments were marked '1' and '2'. The undergarments, which were washed, bore reddish brown stains over small area. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white florescence and ultraviolet light. The sample marked '2', viz., an old blue coloured shirt, was also found to be washed but it bore brownish stains. Greyish stains were also found on the shirt which were neither stiff to feel nor did it test positive in the chromatography test.

25. In the forensic examination, blood was



detected over small area in the undergarment. No blood was detected in the shirt marked Ext. 2. No semen could be detected in anyone of the exhibits. The serological report indicated that the blood was of a human and of group 'A'.

26. What has perplexed us is that both the garments were washed but still they bore reddish brown and greyish stains. However, the laboratory has reported that blood was detected on the undergarment.

27. This does not appear to be in consonance with the samples of clothes, both of which were washed and bore reddish and greyish stains.

28. This has also attracted our attention for the reason that the doctor (PW-7) though had found laceration on inner side of the right *labia minora*, but in his cross-examination has answered that except for redness on *labia minora*, he did not find any other injury on the victim.

29. From the evidence on record, it is



absolutely clear that the victim was less than 10 years old. We say so, also for the reason that the Trial Court rightly appears to have assessed the age of the victim to be less than 10 years.

30. The Trial Court has taken note of the fact that for assessing the age of the victim, there are fixed criteria but in the absence of any birth certificate or educational certificate, the Trial Court relied upon the determination based on radiological examination and there was no rebuttal of the aforementioned assessment of the victim being less than 10 years of age.

31. In the written report, the mother of the victim has projected the age of the victim to be eight years but while the victim was getting her statement recorded before the learned Magistrate under Section 164, her age was shown to be six years.

32. In any view of the matter, we endorse the view of the Trial Court that the victim was a minor and less than 10 years of age.



33. What has been troubling us all this while is whether on the given set of facts and the evidence collected, the appellant was liable to be convicted and punished for the offences under Sections 376(AB) of the IPC and Sections 4 and 6 of the POCSO Act, 2012.

34. We have also noted that charges were framed, apart from the aforementioned Sections, under Sections 7 and 8 of the POCSO Act, 2012 as well.

35. The position of law with respect to the offence against child is well-settled. Conviction under Section 376 of the IPC could be based on the sole testimony of the victim. [***State of Rajasthan Vs. Om Prakash, (2002) 5 SCC 745***]. A women or a girl, who is subjected to sexual assault, has not to be treated as an accomplice but a victim of another person's lust.

36. Precisely for this reason, the Supreme Court has observed that it would be improper and undesirable to test the evidence of the victim with suspicion as if she were an accomplice. It has also to be



understood and remembered that a child of less than 10 years has a limited vocabulary and many a times, her expressions may not be apt but if analysed with an open mind, it would convey what she wishes to put across. It is also almost axiomatic that sexual aggressions are more often than not concealed; more so when the offender is related to the victim.

37. In ***Vishnu Vs. State of Maharashtra, (1994) 4 SCC 602***, the Supreme Court elaborated that in the traditional non-permissive bounds of society of India, no girl or person of self respect and dignity would depose falsely against somebody and would accuse that person of ravishing her chastity by sacrificing and jeopardizing the future prospects of getting married with a suitable match.

38. We have also found that there is nothing on record which would indicate that there was any reason for the witnesses and the victim to have falsely implicated the appellant in the present case.



39. There does not appear to be any embellishment or an effort on the part of anyone of the witnesses except the victim to exaggerate the accusation.

40. The mother of the victim (PW-4) in her written report as also in her deposition had stated that on the cries of the victim, she went to the house of the appellant and saw the victim lying naked. The appellant then fled away.

41. Similar statements have been made by other co-villagers. It is only the victim who has made a different statement at the trial.

42. We do not perceive the statement of the victim at the trial to be essentially different from what she had to say before the learned Magistrate, but such difference in her statement would cause the gravity of the allegation being lessened. If the victim before the Magistrate had only talked of the appellant having touched her private parts after undressing her and



undressing himself as well, it would attract the offence under Section 7 punishable under Section 8 of the POCSO Act, 2012.

43. At the trial, we repeat, she has said something which makes the case fall within the mischief of aggravated penetrative sexual assault. However, the medical evidence does not support the later allegation of penetrative sexual offence.

44. The hymen was ruptured. Whether this rupture was of recent past is not known. Had it been so, it would have been reflected in the doctor's report. The doctor (PW-7), in his cross-examination, has clearly asserted that but for redness on the *labia minora*, no other injury was found on the person of the victim.

45. We have already noted the perplexing fact of blood having been spotted in the forensic test when the clothes were found to have been washed and both the samples of clothes bearing the same stains. It appears to be rather strange that in one of those



samples, which too had been washed, blood stains were found.

46. The forensic laboratory report, therefore, does not appear to us to be correct, especially in view of what was seen and observed by PW-7 while examining the victim. We do find that the victim was absolutely conscious of what she was stating before the learned Magistrate and the Trial Court but our anxiety is to ensure that nobody is punished unnecessarily.

47. We have given anxious consideration over the aforementioned aspects of medical report as also the forensic laboratory report and have found that at best, the appellant is guilty of the offence under Section 7 of the POCSO Act, 2012 and Section 376/511 of the IPC.

48. We, therefore, alter the conviction of the appellant into one under Section 376/511 of the IPC and Section 8 of the POCSO Act, 2012.

49. It has been urged on behalf of appellant that he is now 71 years of age which is based on the



Aadhar Card disclosure and he is suffering from illness in jail, for which a communication from the Jail Superintendent, Gaya has also been brought on record.

50. We are of the considered view that a sentence of five years would meet the ends of justice. The appellant shall also be required to pay a fine of Rs. 10,000/- (Ten Thousand), failing which he would suffer simple imprisonment for three more months. No separate sentence would be required under Section 376/511 of the Indian Penal Code.

51. We, however, do not interfere with the direction of the Trial Court to pay compensation to the victim of the amount of Rs. 5 lakhs.

52. The appeal stands partially allowed.

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

54. The records of this case shall also be transmitted to the Trial Court forthwith.



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

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

Rajesh/Shoaib

AFR/NAFR	NAFR
CAV DATE	NA
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