IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.109 of 2018

From judgment and order dated 21.08.2018 passed by the Additional Sessions Judge-cum-Special Judge, Sundargarh, Camp at Bonai in Special G.R. Case No.52 of 2015/Trial No.54 of 2017.

Dilu Jojo ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Malaya Kumar Swain
Advocate

For Respondent: - Mrs. Susamarani Sahoo
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 28.06.2023

S.K. SAHOO, J. The appellant Dilu Jojo faced trial in the Court of learned Additional Sessions Judge –cum- Special Judge, Sundargarh, Camp at Bonai in connection with Special G.R. Case No.52 of 2015/Trial No.54 of 2017 for the offence under section 376(2)(i) of the Indian Penal Code (hereinafter, 'I.P.C.') and

section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') on the accusation that on 08.05.2015 in between 5 p.m. to 12 a.m. midnight at 'C' Zone, Jhumpudi playground, Tensa, the appellant committed rape on the victim girl, who was under 10 years of age.

The learned trial Court vide impugned judgment and order dated 21.08.2018 found the appellant guilty of both the charges and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- (Rupees five thousand), in default, to undergo Rigorous Imprisonment for a further period of one year under section 376(2)(i) of the I.P.C., however, no separate sentence was awarded for his conviction under section 6 of the 'POCSO Act' in view of section 42 of the said Act.

2. The prosecution case, as per the first information report (Ext.2) lodged by Asha Kamal (P.W.2), the mother of the victim on 09.05.2015 before the Inspector-in-Charge of Lahunipada Police Station is that the victim was five years of age at the time of occurrence and at about 5 p.m. while she had gone to play in 'C' Zone Jhumpudi playground, Tensa, she did not return home. P.W.2 searched for the victim, but could not locate her. At about midnight, P.W.2 found the victim in a naked

condition and on being confronted; the victim disclosed that the appellant had committed rape on her.

On the basis of such First Information Report, Lahunipada P.S. Case No.51 dated 09.05.2015 was registered under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act. After registration of the case, the Inspector -in-charge, Lahunipada entrusted the case for investigation to P.W.5 Champabati Soren, the Sub-Inspector of Lahunipada Police Station, who during course of investigation, examined the informant, the victim and also victim's father. The victim was sent for medical examination on police requisition. P.W.5 visited the spot along with the victim and her parents and prepared the spot map (Ext.4). The panty and frock of the victim in torn condition was recovered during the spot visit, which were seized under the seizure list Ext.5. A prayer was made by P.W.5 to the Court for recording the 164 Cr.P.C. statement of the victim, which was accordingly done on 12.05.2015. The appellant was apprehended on 20.05.2015 and sent for medical examination. The biological samples of the appellant were collected by the Medical Officer and the Investigating Officer seized the same under seizure list Ext.7. After the appellant was forwarded to the Court, the Investigating Officer also made a prayer to the Court

for sending the biological objects for chemical examination and accordingly, the same was done. The school admission register of the victim, where the victim was prosecuting her study, was seized under seizure list Ext.13 from which it reveals that the date of birth of the victim was 24.03.2008. The school admission register was given in the zima of Headmaster under zimanama Ext.14 and on completion of investigation on 25.06.2015, charge sheet was placed against the appellant under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act.

3. The defence plea was one of denial and it was pleaded that on account of previous dispute, the appellant has been falsely implicated in the case.

4. During course of trial, in order to prove its case, the prosecution examined eight witnesses.

P.W.1 is the victim and she supported the prosecution case.

P.W.2 is the mother of the victim, who is the informant in the case and P.W.3 is the father of the victim. Both P.W.2 and P.W.3 stated about the disclosure made by the victim about the overt act committed by the appellant on her.

P.W.4 Dr. Abanindra Mishra was the Medical Officer attached to C.H.C., Lahunipada, who examined the victim on police requisition and proved the report marked as Ext.1.

P.W.5 Champabati Soren is the Investigating Officer.

P.W.6 Gabriel Kamal @ Etual and P.W.7 Julias Surin did not say anything about the occurrence.

P.W.8 Dr. Saroj Ranjan Nanda, Medical Officer, Art CHC, Lahunipada, who on police requisition examined the appellant and proved his report marked as Ext.11.

The prosecution exhibited sixteen documents. Ext.1 is the Medical examination report of the victim, Ext.2 is the plain paper F.I.R., Ext.3 is the formal F.I.R., Ext.4 is the sport map, Ext.5 is the seizure list, Ext.6 is the requisition for medical examination of the accused, Ext.7 is the seizure list of biological objects of the appellant, Ext.8 is the seizure list of wearing apparels of the apparels, Ext.9 is the payer made by the I.O. for sending biological objects and wearing apparels for chemical examination, Ext.10 is the copy of forwarding report for sending exhibits, P.W.11 is the medical report in relation to the appellant, P.W.12 is the true copy of school admission register, P.W.13 is the seizure list of school admission register, Ext.14 is the

Zimanama, Ext.15 is the chemical examination report and Ext.16 is the statement of the victim recorded under section 164 Cr.P.C.

5. No witness was examined on behalf of the defence.

6. The learned trial Court after assessing the evidence on record, came to hold that the victim was a minor girl and she was below twelve years of age at the time of occurrence and the appellant had committed sexual assault on her and there is nothing to disbelieve the evidence of the victim and her parents and that the prosecution has successfully proved the charges against the appellant.

7. Mr. Malaya Kumar Swain, leaned counsel, who was engaged for the appellant through Legal Aid, contended that the evidence of the victim (P.W.1) runs contrary to the evidence of her parents (P.W.2 & P.W.3) and since the medical evidence adduced by P.W.4 does not corroborate the ocular evidence regarding commission rape on the victim and even though the victim was held to be below twelve years of age at the time of occurrence, it cannot be said that the prosecution has successfully established the charges against the appellant and therefore, benefit of doubt should be extended in favour of the appellant.

Mrs. Susamarani Sahoo, learned Additional Standing Counsel, on the other hand supported the impugned judgment and argued that in view of the documentary evidence as well as ocular evidence, it has been established that the victim was seven years of age at the time of occurrence. The victim has stated about commission of rape on her by the appellant and disclosed about the same before her parents (P.Ws.2 & 3) immediately after the occurrence. Even though the evidence of the doctor does not indicate any bodily injury on the victim or any physical clue of sexual assault on her, however, the same cannot be a ground to disbelieve the prosecution case. Therefore, the learned trial Court has rightly held the appellant guilty under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act.

Age of the victim:

8. Adverting to the contentions raised by the learned counsel for the respective parties, let me first discuss about the age of the victim (P.W.1) on the date of occurrence.

The Investigating Officer (P.W.5) has stated that during course of investigation on 21.06.2015, she seized the school admission register of the victim to ascertain her date of birth. She has proved true copy of the school admission register

with seal and signature of the Headmaster of the school and the same has been marked as Ext.12 and the concerned seizure list has been marked as Ext.13. She further stated that as per the entry made in the school admission register, the date of birth of the victim is 24.03.2008. The victim was examined in Court on 11.09.2017 as P.W.1 and she stated her age to be eight years. Her statement under section 164 Cr.P.C. was recorded on 12.05.2015 when she stated her age to be five years. No challenge has been made to the evidence of the victim regarding her age in the cross-examination by the learned defence counsel.

Therefore, I am of the humble view that from the evidence of the victim and the entry made in her school admission register, it has been established that when the occurrence in question took place, i.e., on 08.05.2015, the victim was below twelve years of age.

Evidence of the victim:

9. The victim being examined as P.W.1 was put some formal questions by the learned trial Court and the answers given by the victim to such questions have been noted down. On the basis of answers given by the victim, the learned trial Court having come to the conclusion that she is competent to give evidence and accordingly her statement was recorded.

Section 118 of the Evidence Act states that a child is a competent witness provided that he understands the questions put to him and is in a position to give rational answers to such questions. It is the duty of the Court while assessing the evidence of a child witness to see whether the child understands the duty of speaking the truth. The Court should make necessary examination of the child witness by putting a few questions in order to find out whether the witness is intelligent enough to understand what he had seen and afterwards to inform the Court thereof and also give his opinion that why it thinks that the child is a competent witness. The evidence of a child witness should be scanned carefully and if no flaws or infirmities are found therein then there is no impediment in accepting his evidence.

The victim has stated in her examination-in-chief that on the date of occurrence, in the evening hours, while she was in her home and playing, the appellant called her and took her to the nearby bushes of the village and at that time, her parents had been to bring fire wood. The appellant undressed her and made her to sleep on a stone and then he slept over her. Then the appellant gave her to eat and dragged her hand and told her to return home. She further stated to have disclosed the incident to her mother. The learned Special Public Prosecutor

declared the victim as hostile and put some leading questions and she admitted to have stated before police that the appellant had closed her mouth and told her to put his penis inside her mouth and further told her to put his penis in her vagina and the appellant left her at about 12 midnight. She further stated that she had been to the police station with her mother and she was medically examined and she was taken to Court and her statement was recorded under section 164 Cr.P.C. In the cross-examination, she stated her age to be eight years and further stated that her friend Benika and another were playing with her when the appellant called her and took her. She further stated that her elder sister had seen while the appellant took her and though she shouted, but nobody came. It is true that the two friends of the victim and her elder sister have not been examined during trial. However, in my humble view, the non-examination of those witnesses cannot be a ground to disbelieve the victim's evidence. No particular number of witnesses is required for proving a certain fact. It is the quality and not the quantity of the witnesses that matters. Evidence is weighed and not counted. Evidence of victim of rape, if found to be truthful, consistent and inspires confidence, the same is sufficient for maintaining conviction. It is not necessary that all those persons

who had seen a part of occurrence must be examined by the prosecution in order to prove the guilt of the accused. Even if some persons present in the vicinity are not examined, the evidence of victim cannot be discarded.

Corroboration to the evidence of the victim:

10. P.W.2, the informant of the case and the mother of the victim has stated that on the date of occurrence, she and her husband had been to bring fire wood and when they returned home, they could not find the victim and the friends of the victim told that the appellant had taken the victim towards the bush area of Jhumpudi basti. She further stated that at about 12 midnight, the victim returned home and on being asked, she told that the appellant left her in the home and she further disclosed that the appellant undressed her and told her to suck his penis and when the victim shouted, the appellant closed her mouth. The victim also disclosed that the appellant was also touching his penis with her vagina. When the victim shouted and cried, the appellant left her in her house. In the cross-examination, P.W.2 stated that her elder daughter disclosed to her that the appellant had taken away the victim.

The father of the victim being examined as P.W.3 has stated that the victim returned home at about 12 midnight and

on being asked, she told that the appellant had taken her and told her to hold his penis. He was declared hostile by the prosecution and put leading questions.

Even though P.W.2 stated that the victim disclosed before her that the appellant after undressing her asked her to suck his penis and that the appellant was also touching his penis with her vagina but the evidence of the victim is silent in that respect. P.W.3 on the other hand stated that the victim disclosed before him that the appellant told her to hold his penis.

Whether the ingredients of offences are made out:

11. Section 376(2)(i) of the I.P.C. deals with punishment for commission of rape on a women when she is under sixteen years of age. 'Rape' has been defined in section 375 of the I.P.C., wherein it is stated that a man is said to commit 'rape', if he-

> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such

> woman or makes her to do so with him or any other person; or
>
> (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions.

Similarly, section 6 of the POCSO Act prescribes punishment for aggravated penetrative sexual assault. 'Aggravated penetrative sexual assault' has been defined under section 5 of the POCSO Act and it indicates, inter alia, that if any one commits penetrative sexual assault with a child below twelve years of age then it would come under aggravated penetrative sexual assault. Penetrative sexual assault has been defined in section 3 of the POCSO Act which reads as follows;

> "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."

The evidence of the victim (P.W.1) in his examination-in-chief is that the appellant undressed her and made her to sleep on the stone and he slept over her and even her statement before the police which she admitted to have stated is that the appellant closed her mouth and told her to put his penis inside her mouth and further told her to put his penis into her vagina. In my humble view, none of such act of the appellant would come within the definition of 'rape' as defined in section 375 of the I.P.C. or 'penetrative sexual assault' as defined in section 3 of the POCSO Act. The statement of the victim in her examination-in-chief is completely silent that the appellant penetrated his penis, to any extent, into her vagina or any part of her body or made her to do the same with him, or the appellant inserted any object or a part of his body to any extent, not being the penis, into her vagina or any other part of her body. Her evidence is also silent that the appellant manipulated any part of her body so as to cause penetration into her vagina or any part of her body or made her do so with him. Her evidence is also silent that the appellant applied his mouth

to her vagina or anus, urethra or made her to apply her mouth to his penis. Therefore, it is very difficult to hold that the 'rape' as per the definition of section 375 of the I.P.C. or penetrative sexual assault as per definition under Section 3 of the POCSO Act has been committed on the victim by the appellant.

Section 7 of the POCSO Act defines 'sexual assault' and it reads as follows;

> "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."

'Sexual assault' is punishable under section 8 of the POCSO Act. Aggravated sexual assault has been defined under section 9 of the POCSO Act which is punishable under section 10 of the POCSO Act. If any one commits sexual assault on a child below twelve years of age, then as per section 9(m), he can be said to have committed 'aggravated sexual assault'. Since the conduct of the appellant in undressing the victim and making her to sleep on a stone and then the appellant slept over her, even though the victim has not stated that the appellant undressed himself, in my humble view, the same would be an act of the appellant with sexual intent, which involved physical contact with

the victim without penetration and therefore, it would come within the definition of 'sexual assault' as defined under section 7 of the POCSO Act and since the age of the victim has been proved to be below twelve years, thus the prosecution can be said to have established that the appellant committed 'aggravated sexual assault' with the victim (P.W.1). Even though no specific charge has been framed for section 10 of the POCSO Act, but since charge has been framed under section 6 of the POCSO Act, which is a higher offence, it cannot be said that the appellant would claim prejudice if he is convicted under section 10 of the POCSO Act. Section 222 of Cr.P.C. is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said section also make the position clear.

Conclusion:

12. In view of the foregoing discussions, in my humble view, the impugned judgment and order of conviction of the appellant under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act is not sustainable in the eye of law and accordingly, the same is hereby set aside, instead, the appellant is held guilty under section 10 of the POCSO Act and he is

sentenced to undergo R.I. for seven years, which is maximum punishment for such offence. In view of the financial condition of the appellant, no fine is imposed on him. It appears that the appellant was taken into the judicial custody on 20.05.2015 and he was never released on bail during trial of the case and even during pendency of the appeal before this Court. Thus, he has already undergone substantive sentence of seven years, which has been imposed on him for his conviction under section 10 of the POCSO Act. Therefore, the appellant be set at liberty forthwith, if his detention is not otherwise required in any other case.

Accordingly, the JCRLA is partly allowed.

The trial Court records along with a copy of the judgment be sent down to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Malaya Kumar Swain, learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees, which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided

by Mrs. Susamarani Sahoo, learned Additional Standing Counsel.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 28th July 2023/Amit/Sipun

AMIT KUMAR MOHANTY

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HIGH COURT
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