

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1173 of 2019

Arising Out of PS. Case No.-53 Year-2017 Thana- LAUKAHI District- Madhubani

Rajendra Yadav, Son of Late Harilal Yadav, Resident of Village - Sananpatti,
P.S.- Laukahi, Distt - Madhubani.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Rama Kant Sharma, Sr. Advocate
Mr. Lakshmi Kant Sharma, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE JITENDRA KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 09-09-2024

We have heard Mr. Rama Kant Sharma, the learned Senior Advocate for the appellant and Mr. Abhimanyu Sharma, the learned APP for the State.

2. The sole appellant has been convicted under Section 376 of the Indian Penal Code and Sections 4



and 6 of the POCSO Act, 2012 *vide* judgment dated 01.08.2019. By order dated 06.08.2019, he has been sentenced to undergo imprisonment for life, to pay a fine of Rs. 1,00,000/- and in default of payment of fine to further suffer SI for one year under Section 376 of the IPC; RI for 20 years each, to pay a fine of Rs. 10,000/- each and in default of payment of fine to further suffer SI for six months each under Sections 4 and 6 of the POCSO Act, 2012.

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

4. The victim, an eight year old girl, is said to have been raped by the appellant on 30.03.2017 while she had gone to his house for watching television programmes. The FIR has been lodged by the victim herself on 31.03.2017 which was recorded at Sadar Hospital, Madhubani by the SI of police, viz., Kanchan Kumari, who at the relevant time was posted in the Women Police Station, Madhubani. She has alleged in



her *fardebayan* that when she had visited the house of the appellant in the evening of 30.03.2017 to watch television, other children of the neighbourhood were also present there. It was then alleged by her that thereafter appellant called her to his room and committed rape on her. When she started bleeding from her private parts, she started shouting. Her friends started banging at the door. Appellant then opened the door and she came out and proceeded for her home. She met her mother (PW-3) on the way. She has also alleged to have become unconscious on the road and when she recovered her consciousness, she found herself in the hospital.

5. On the basis of the aforementioned *fardebayan* of the victim, Laukahi P.S. Case No. 53 of 2017 dated 31.03.2017 was registered for investigation under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act, 2012.

6. The police after investigation submitted charge-sheet against the appellant whereupon he was



put on Trial.

7. The Trial Court, after examining eight witnesses on behalf of the prosecution and three on behalf of the defence, convicted and sentenced the appellant as aforesaid.

8. The primary contention of the appellant is that he stands in the relation of grandfather to the victim and he has been framed in this false case only because of some dispute having erupted out of a property conveyed by the appellant to the uncles of the victim. In that parcel of land, which was sold by the appellant, there were cluster of bamboo trees which the appellant wanted to cut and take it away but was not allowed to do so by the vendees.

9. The other contention of the appellant is that he has wrongly been stated to be a person of 45 years at the time of the occurrence. The fact of the matter is that even the Trial Court has assessed his age to be 65 years.



10. That apart, it has been argued that though the Medical Board which had examined the victim, found only laceration on her private parts, however, the Trial Court appears to have been swayed by the fact that the wearing apparel of the appellant, on forensic examination, displayed semen signs. Without contesting the correctness of the forensic report, Mr. Sharma has drawn the attention of this Court to the lack of any material to read that forensic report co-referentially with the wearing apparel, which apparently was seized by the police. In that context, he has also drawn the attention of this Court to the deposition of the investigator who claims to have been given that wearing apparel of the appellant to him by one Sundar Devi, whose relationship with the appellant has not been disclosed anywhere in the records of this case.

11. He has further argued that the evidence clearly suggests that the appellant was arrested, not from his home but on the next day of the occurrence



and, therefore, there was a pressing requirement of the prosecution to have subjected him to medical examination under Section 53 of the Cr.P.C. Though the provisions contained in Section 53 of the Cr.P.C. may not be mandatory, but times without number, the Supreme Court, it has been argued, has cautioned that the prosecution will have to explain as to why such a provision in the Code was not resorted to. This definitely weakens the prosecution case.

12. Lastly, it has been submitted that there are discrepant statements of the witnesses, if seen in the context of what was first disclosed by the victim in her *fardbeyan* and later in her 164 statement and her deposition before the Trial Court.

13. It has also been argued that none of the friends of the victim, who allegedly had banged the door of the appellant when it was locked from inside, have been examined at the Trial. The witnesses are noneelse but relatives of the victim. Curiously, the father of the



victim has not been examined.

14. As opposed to the aforementioned contentions, Mr. Abhimanyu Sharma, the learned APP has argued that there has not been any delay in reporting the matter. A child's dictionary is limited. Anything said by her has to be understood in the context of a statement made by a child with her limited knowledge and expression. The version of the victim, especially that of a child victim, is not required to be subjected to any nitpicking on the issue of consistency.

15. He has further argued that without wasting any time, the prosecution brought the victim before a Medical Board of which Dr. Rama Jha and Dr. Gargi Sinha (PWs. 6 and 7 respectively) were the members. They though found the hymen intact but were very clear in their observation that the vagina was bruised. He has further submitted that the defence of the appellant of his having been falsely implicated because of the post-purchase dispute is not worth believing and the main



reason for it is that the father of the victim was not one of the vendees. For any dispute of the appellant with the uncles of the victim, the victim would not be put on the sacrificial altar, especially in a village where people of all communities reside. There could be myriad reasons, the learned APP contends, of locals not coming to the witness-stand for supporting the case. It could be because of confraternity or association with the appellant. That by itself would not render the prosecution version so doubtful so as to reject it in its entirety.

16. After having perused the entire records and having heard the learned counsel for the parties, we have found that the victim though was only eight years old but she was very forthcoming in her accusation. Of course, with her limited vocabulary, she has alleged that she was subjected to a "bad act" by the appellant. However, she has explained the circumstance under which she was present in the house of the appellant



along with other children of the neighbourhood. It was a regular affair for the children of the village to converge at the house of the appellant for watching television programmes. Out of so many children including girls, the appellant's gaze had fallen on the victim of this case, who stands in the relationship of grand-daughter to him. She was taken to his room where she was subjected to such shameless and dastardly act. The victim was immediately subjected to medical examination by a Medical Board of four doctors, out of whom, two have been examined as PWs. 6 and 7. This further lends credence to the prosecution version that the victim had fallen prey to the carnal lust of the appellant in which she was bruised and had also been bleeding. There was an emergent necessity of her immediate medical check up.

17. Dr. Rama Jha (PW-6) has found that the victim's sexual characters had not developed. There was no external injury present over her body. There were



injuries only on her private parts. However, the hymen was found to be intact. Laceration was present over hymen all around. There was no bleeding even on touch. The margins of the bruises were not defined. Laceration was present on labia minora as well. There was no bleeding from there also. The age of the injuries was reported to be 24 hours from the time of the examination.

18. PW-6 also has also referred to the pathological examination of vaginal swab which was conducted by Dr. P.Mishra, the Medical Officer, Sadar Hospital, Madhubani, which did not show any positive result for spermatozoa. The vaginal smear did not disclose anything.

19. The age of the victim based on physical and radiological examination was assessed to be between 7 to 8 years. PW-6, therefore, concluded that the injury on the private part of the victim could be due to an attempt to rape.



20. However in cross-examination, she was more specific that she did not find any sign of rape and that laceration could be caused over hymen all around if the victim fell on a rough and hard substance.

21. Similar observations were made by Dr. Gargi Sinha, another member of the Board who has been examined as PW-7.

22. There was no loss of time in bringing the victim to the Medical Board. Nonetheless, there does not appear to be any definite sign of rape. However from the medical examination, it becomes very clear that the victim was subjected to rape as defined under Section 375 of the IPC, which is evident from the bruises on her private parts.

23. In this context, we have also examined the depositions of Shobha Kumari (PW-2), Ful Kumari Devi (PW-3) and Nirsi Devi (PW-4) who are the aunt, mother and the grandmother of the victim respectively.

24. Shobha Kumari (PW-2), who is the second



wife of her husband, has supported the prosecution version to the extent that she had learnt about the appellant having raped the victim. However, she was not in a position to give any further details about the appellant, notwithstanding his relationship with the family of PW-2. She was also not aware of any transfer of land by the appellant to her husband and his brothers and that there had been a dispute over cutting of bamboo trees.

25. In her cross-examination, she has admitted that she learnt about the occurrence only through the mouth of the victim and her mother (PW-3).

26. In this context, we have taken notice of the deposition of the Investigator (PW-5) who has certified that PW-2 had never said that such an occurrence had taken place in the evening of 30.03.2017 and that the victim was firstly treated at Phulparas and thereafter at Madhubani. She had also not spoken about the blood-stained undergarments of the victim.



27. The mother of the victim (PW-3) has supported the prosecution case in its entirety. When the victim had not come back home, PW-3 had come out of her house to look for her and on way, she found that other children were bringing the victim home. By the time the victim reached near PW-3, she became unconscious. She was then taken to Laukahi Hospital and from there to Sadar Hospital, Madhubani. When the victim regained her senses in Madhubani Hospital, she narrated about the occurrence to her. According to her version, the house of the appellant is situated next doors. The victim was first brought to Laukahi Hospital and along with her Manisha, PW-2, PW-3 and Dinesh Yadav had also visited the hospital. The victim had remained unconscious for about 4 to 5 hours. It was only after her medication that she had regained her sense. She has denied the suggestion that because the appellant was prevented from cutting the bamboo trees over his land which he had sold to the uncles of the



victim, this case was lodged.

28. The Investigator, however, denies that PW-3 had given any details about the appellant having taken the victim to his room and having committed sexual act with her. She had also not disclosed before the Investigator that the victim was bleeding from her private parts. She had not stated that the victim was accompanied by other children of the village.

29. We have also found that the grandmother of the victim (PW-4) has also supported the prosecution case but not to the extent that she has deposed before the Trial Court as the Investigator's deposition clearly reveals that no details were given by PW-4 as well. PW-4 has also denied of there being any dispute between the two families which could have been the motivating factor for falsely implicating the appellant in this case.

30. The Investigator (PW-5) is not the person who had recorded the *fardebayan* of the victim. He had seized the wearing apparels of the appellant which was



given to him by one Sundar Devi. Though he had prepared the seizure-list (Ext.-3), but in the absence of any further clarification as to who Sunder Devi was and whose apparels had been handed over to the Investigator, the prosecution cannot draw any mileage out of that. He had also seized the undergarments of the victim (Ext.-2). The appellant was arrested by him at Sanan Patti Chowk, whereafter he was brought to the police station.

31. There is nothing in the evidence of the Investigator (PW-5) or in the entire records which would indicate that the appellant was subjected to any medical treatment even though shortly after the occurrence, he was arrested. PW-5 had taken the victim to the Magistrate for recording of her statement under Section 164 Cr.P.C.

32. Beyond this and his recollection of what Pws.-2, 3 and 4 had spoken before him, he had nothing special to offer to the Trial Court.



33. On an analysis of the entire evidence which we have just discussed, few facts stand established. The victim was subjected to rape in which she received injuries on her private parts. It was in the nature of laceration and bruises. None of the members of the Medical Board, however, spoke about the gravity of such injury. The impact assessment is almost non-existent in the Medical Board's opinion.

34. There also does not appear to be any good ground, on record, to believe the defence of the appellant that he has been falsely implicated. If the appellant was prevented from cutting the bamboo trees, it was he who was aggrieved. It is not the case of the prosecution that because of this, he wanted to take revenge from the family.

35. We have taken notice of the fact that there is an unexplained non-examination of those children and other residents of the village who had banged the locked door of the appellant. There could have been no



explanation for not examining them. In fact, the Investigator also does not state that he had tried to find out from the children of the locality whether such an occurrence had taken place.

36. Notwithstanding that, as also the non-examination of the appellant, which is mandated under Section 53 of the Cr.P.C., it is difficult for us to disbelieve the victim totally.

37. We thus find that the appellant has rightly been convicted under Section 376 of the Indian Penal Code and Sections 4 and 6 of the POCSO Act, 2012. No objection ever was raised by the appellant during Trial about the age of the victim.

38. However, on the point of sentence imposed upon the appellant, we do have some reservations. The occurrence is of the year 2017 when the sentence for 376 IPC and Sections 4 and 6 of the POCSO Act was not a mandatory term of 20 years extendable to imprisonment for life which would mean imprisonment



for the remainder of natural life.

39. It is necessary to advert to the statutory changes that the provisions concerned of IPC and POCSO Act have undergone.

40. Before 03.02.2013, the relevant portions of Sections 375 and 376 of the IPC were as under :-

“375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.— * * *

Fourthly.— * * *

Fifthly.— * * *

Sixthly.—With or without her consent, when she is under sixteen years of age.

Explanation.— * * *

376. Punishment for rape.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever—



(a)-(e) * * *

(f) commits rape on a woman when she is under twelve years of age; or

(g) * * *

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.— * * *

Explanation 2.— * * *

Explanation 3.— * * *

41. On 03.02.2013, the Criminal Law (Amendment) Ordinance, 2013 (3 of 2013), (hereinafter referred to as "the Ordinance") was promulgated by the President of India. Section 8 of the Ordinance, inter alia, substituted Sections 375, 376 and 376-A IPC; the relevant text of the substituted provisions being:

"375. Sexual assault.—A person is said to commit "sexual assault" if that person—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of another person or makes the person to do so with him or any other person; or

(b)-(d) * * *

(e) touches the vagina, penis, anus or breast of the person or makes the person touch the vagina, penis, anus or breast of that person or any other person,

except where such penetration or touching is carried out for



proper hygienic or medical purposes under the circumstances falling under any of the following seven descriptions—

First.—Against the other person’s will.

Secondly.—Without the other person’s consent.

Thirdly.— * * *

Fourthly.— * * *

Fifthly.— * * *

Sixthly.—With or without the other person’s consent, when such other person is under eighteen years of age.

Seventhly.— * * *

Explanation 1.—* * *

Explanation 2.—* * *

Explanation 3.—* * *

Exception.— * * *

376. Punishment for sexual assault.—(1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever—

(a) * * *

(i)-(iii) * * *

(b)-(e) * * *

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards, the person assaulted, commits sexual assault on such person; or

(g) * * *

(h) commits sexual assault on a person when such person is under eighteen years of age; or

(i)-(k) * * *

(l) while committing sexual assault causes grievous bodily harm or maims or disfigures or endangers the life of a person; or

(m) * * *

shall be punished with rigorous imprisonment for a term which



shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

Explanation * * *

Explanation * * *

42. The Criminal Law (Amendment) Act, 2013 (13 of 2013), (hereinafter referred to as "the Amendment Act") received the assent of the President and was published on 02.04.2013 but was given retrospective effect from 03.02.2013. Section 9 of the Amendment Act, *inter alia*, substituted Sections 375, 376 and 376-A IPC as under:

"375. Rape.—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)-(d) * * *

under the circumstances falling under any of the following seven descriptions—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.— * * *

Fourthly.— * * *

Fifthly.— * * *

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.— * * *

Explanation 1.—* * *



Explanation 2.—* * *

Exception 1.— * * *

Exception 2.— * * *

376. Punishment for rape.—(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever—

(a)-(e) * * *

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g)-(h) * * *

(i) commits rape on a woman when she is under sixteen years of age; or

(j)-(l) * * *

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) * * *

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.— * * *

43. The Criminal Law (Amendment) Act, 2018 (22 of 2018) which came into effect from 21-4-2018, deleted clause (i) of Section 376(2) IPC and added sub-section (3) after Section 376(2) as well as inserted Section 376-AB as under:



"376. (1)-(2) * * *

(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

* * *

376-AB. Punishment for rape on woman under twelve years of age.—Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:"

44. Sections 5 and 6 of the POCSO Act, at the time when the offence was committed in the instant case, provided:

"5. Aggravated penetrative sexual assault.—

(a)-(i) * * *

(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;

(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;

(k)-(l) * * *



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

(n)-(u) * * *

6. Punishment for aggravated penetrative sexual assault.

—Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life and shall also be liable to fine.”

45. By virtue of the Protection of Children from Sexual Offences (Amendment) Act, 2019 (25 of 2019) which came into effect on 16.08.2019, sub-clause (iv) was inserted in clause (j) of Section 5 as under:

“5. (j)(iv) causes death of the child; or”

46. Further, Section 6 was substituted as under:

“6. Punishment for aggravated penetrative sexual assault.

—(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

47. If the abovementioned provisions of IPC are considered in three compartments, that is to say,



(A) The situation obtaining before 3-2-2013;

*(B) The situation in existence during 3-2-2013 to 2-4-2013;
and,*

(C) The situation obtaining after 2-4-2013;

following features emerge:

48. The offence under Section 375, as is clear from the definition of relevant provision in compartment (A), could be committed against a woman. The situation was sought to be changed and made gender neutral in compartment (B). However, the earlier position now stands restored as a result of provisions in compartment (C).

49. Before 3-2-2013 the sentence for an offence under Section 376(1) could not be less than seven years but the maximum sentence could be life imprisonment; and for an offence under Section 376(2) the minimum sentence could not be less than ten years while the maximum sentence could be imprisonment for life. Section 376-A dealt with cases where a man committed non-consensual sexual intercourse with his



wife in certain situations.

50. On arriving at the conclusion that the appellant is liable to be convicted under Section 376 of the IPC and Sections 4 and 6 of the POCSO Act, 2012, the appropriate sentence to be imposed needs consideration.

51. The incident took place in the year 2017 when the sentences for the offences, referred to above, were less.

52. In the instant case, taking into consideration all the facts including that no material is available on record to indicate that the appellant has any criminal antecedent and that he is a family man, it appears that there would be no reason to apprehend that the appellant would indulge in similar acts in future.

53. Even otherwise, a convict has the protection of Article 20(1) of the Constitution of India which mandates that no person shall be convicted of any offence except for violation of a law in force at the time



of commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

54. We have also taken into account the submission on behalf of the appellant that his conduct in jail for the last seven and half years has been exemplary and that he has imparted education to the jail inmates to the complete satisfaction of the Superintendent of the Jail, who has also issued a certificate of appreciation. Apart from this, there is nothing on record also to indicate that the appellant is beyond any reformation for him to be handed over the maximum sentence.

55. Considering the over all conspectus of the case, we find that a sentence of 10 years for the offence under Section 376 IPC and Sections 4 and 6 of the POCSO Act, 2012 would be sufficient and condign.

56. We have said so also for the reason that the appellant at present, according to the assessment of



the Trial Court, would be a septuagenarian by now.

57. Needless to say that the sentences shall run concurrently.

58. Thus, the conviction of the appellant is sustained but the sentences are modified to the extent indicated above.

59. The appeal is dismissed with modification in the sentence.

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

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

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

Rajesh/Ravi

AFR/NAFR	AFR
CAV DATE	NA
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