

Cr. Appeal (S.J.) No. 52 of 2020

(Against the judgment dated 10.12.2019 and the order of sentence dated 12.12.2019 passed by learned Special Judge-(POCSO), Dhanbad in Spl. (POCSO) Case No. 77 of 2018, arising out of Tisra P.S Cae No. 39 of 2018.

Mantosh Kumar Paswan

.....Appellant

Versus
The State of Jharkhand

...Respondent

PRESENT: HON'BLE MR. JUSTICE DEEPAK ROSHAN

For the Appellant

: Mr. Lalit Yadav, Advocate

For the State

: Mr. Rakesh Ranjan, A.P.P

C.A.V ON 14.06.2024

PRONOUNCED ON 28.06.2024

Deepak Roshan, J. This appeal is directed against the judgment dated 10.12.2019 and order of sentence dated 12.12.2019 passed by learned Special Judge-(POCSO), Dhanbad in Spl. (POCSO) Case No. 77 of 2018, arising out of Tisra P.S Cae No. 39 of 2018, whereby the appellant has been convicted for the offence punishable under Sections 341, 354, 354-B I.P.C and under Section 10 of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') and has been sentenced to undergo S.I for one month under Section 341 I.P.C.; R.I. for three years and to pay a fine of Rs. 5,000/- for the offence under Section 354 I.P.C and in default of payment of fine he shall also undergo R.I for one month; R.I for five years and to pay a fine of Rs. 5,000/ for the offence under Section 354-B I.P.C and in default of payment of fine, he shall also undergo R.I for three months and R.I. for five years and to pay a fine of Rs. 25,000/- for the offence under Section 10 of POCSO Act and in default of payment of fine, he shall also undergo R.I for three months; however he has been acquitted from the charge under Section 379 I.P.C and under Section 14 of POCSO Act. All the sentences were directed to run concurrently.

2. The prosecution case is that the victim on 21.04.2018 at 10 p.m. went outside her house to attend the natural call. In the meantime, the appellant along with other co-accused persons gagged the mouth of the victim and molested her and on protest she was threatened of dire consequences. After being emancipated from the clutches of accused persons, she visited her house and narrated the story to her mother.

3. Learned counsel for the appellant has made the following submissions:

- (i) There is no ingredient available against the appellant to hold him liable for the alleged offence under Section 341/354/354(B) of Indian Penal Code and under Section 10 of POCSO Act.
- (ii) P.W. 1 in her cross-examination has stated that there was darkness at the place of occurrence and she identified the accused persons on the basis of their voices which is highly improbable.
- (iii) P.W. 2 Sunita Devi is a hearsay witness.
- (iv) P.W.3 Naresh Bhuiyan in his cross-examination has clearly stated that he deposed before the Court that whatever the victim narrated about the occurrence.
- (v) P.W.4 Hiraman Bhuiyan is also a hearsay witness.
- (vi) P.W.5 Mithun Kumar Bhuiyan in his cross-examination conceded that he has not seen the occurrence of molestation and he deposed whatever victim narrated to him.
- (vii) P.W.6 Santosh Bhuiyan in his cross-examination conceded that he has not seen the occurrence of molestation and he deposed whatever victim narrated to him.
- (viii) P.W.7 Dr. Shobha Kumari in her examination deposed that no external and internal injury was found.
- (ix) P.W.8 Mahendra Tiwary who is the Investigating

Officer of the instant case and in his cross-examination has asserted that he did not seize the garment of the victim and also did not procure the CDR of the Mobile Phone.

Relying upon the aforesaid contentions, learned counsel prays for acquittal.

4. Learned A.P.P opposed the prayer for acquittal. He further contended that the learned trial court has not committed any error either on facts or in law in the background of the heinous crime committed by the appellants; as such no interference is required.

5. Having heard learned counsel for the parties and after going through the impugned judgment and the documents available on L.C.R and looking to the comprehensive facts and circumstances of the case, it appears that the victim on 21.04.2018 at 10 p.m. went outside her house to attend to natures call where the appellant along with other co-accused persons whose cases were separated as they were declared juvenile; gagged the mouth of the victim and molested her and on protest she was threatened of dire consequences.

6. The prosecution has examined altogether 9 witnesses to bring home the charges.

P.W. 1 is the victim and she has narrated the entire place, manner and time of occurrence and no major contradictions could be elicited from her during cross examination and her evidence is flawless.

P.W.2 is the mother of the victim. She has vindicated the genesis of the case and deposed that her daughter was sixteen years when the incident happened and her daughter narrated the story to her. During cross-examination, her veracity remained unassailed. P.W.4 is a hearsay witness.

P.Ws. 3, 5 & 6 are material witnesses because when they visited the place of occurrence they discovered the victim weeping and she narrated the story to them and they also discerned accused persons fleeing from the spot.

7. Now the question arises as to whether the conviction of the appellant for the offence under section 10 of POCSO Act and under section 354,354-B,341 IPC is just and proper or not?

Section 7 of the deals with the *sexual assault*, which reads as under :

*"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."*
(Emphasis supplied)

Section 9 (g) of the POCSO Act deals with the aggravated *sexual assault*, which reads as under:

"9. Aggravated sexual assault :....

(g) whoever commits gang 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 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....."

8. In the present case, the victim was admittedly a minor at the time of alleged incident and from the statement of the victim (PW 1), it is clearly established by her deposition that the appellant along with other miscreants (who were declared juvenile and tried by respective J.J. Board) in furtherance of common intention touched her body with *sexual intent*. For brevity few paragraphs of the deposition is extracted herein below:--

आज मैं अपने माता-पिता के साथ न्यायालय में गवाही देने आई हूँ। घटना 21 अप्रैल, 2018 की है। समय रात दस बजे का था। उस समय मेरी उम्र 17 वर्ष थी। रात को दस बजे घर के पिछवारे में शौच करने गई तो कुछ लड़का लोग जंगल में बैठा हुआ था और मुझे पकड़ लिया और मेरा मुह दुपट्टा से बांध दिया था। उन लड़कों का नाम मंतोष पासवान, शम्भू भुईयां, अरुण कुमार, राजु कुमार, शायबा कुमार, अल्लु पहाड़िया है। मुझे मंदिर तरफ ले गया और मंतोष, शम्भू और अरुण मेरे शरीर में इधर-उधर हाथ लगाया। छाती, गाल, पेट में हाथ लगाया। सभी लोग अपना टी-शर्ट खोल दिया और गंदा-गंदा गाली दे रहा था और बोल रहा था कि हल्ला करोगी तो यही मार कर बींग देंगे। और मेरा मोबाइल ले लिया और दारू दुकान गया, दारू दुकान बंद था। अपना मोबाइल से वीडियो बना रहा था। मेरा मोबाइल वापस नहीं किया।

9. By going through the aforesaid provisions of law coupled with the deposition of the victim, there is no hesitation in holding that the act of the appellant falls within the purview of offence defined under Section 9 (g) and punishable under Section 10 of the POCSO Act, 2012, which provides that whoever, commits aggravated *sexual assault* shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine. Thus, it is clear that there is minimum sentence of 5 years for "aggravated sexual assault" is prescribed, therefore, the trial Court has not committed any error in awarding the sentence of 5 years for the offence punishable under Section 9(g)/10 of the POCSO Act to the appellant; hence the learned trial court has rightly convicted the appellant under section 10 of the POCSO Act.

It further transpires from the deposition of P.W.1 that the appellant along with other co-accused persons sexually touched her and took off their t-shirts and abused her. The appellant used criminal force on the victim intending to outrage her modesty and used such criminal force with the intent to disrobe her which is very clear from the fact that the appellant with the other co-accused persons took off their t-shirts while molesting the victim. Thereby the conduct of the appellant falls within the purview of Section 354 and 354-B IPC, and the fact that the appellant along with other co-accused persons gagged the mouth of the victim and caught hold of her thereby obstructing her so as to prevent her from proceeding towards her home thereby such mischief of appellant falls within the purview of Section 340 punishable under section 341 IPC. As such the Learned Trial Court has rightly convicted the appellant under section 354, 354B and 341 of the IPC.

10. Taking into consideration the age of victim and the time and the manner with which the offence was committed this court does not hesitates in holding that the trial court has not committed any error in convicting the appellant and sentencing him accordingly.

11. Having regard to the aforesaid discussion, this appeal is hereby dismissed.

12. The bail bond is cancelled and the appellant is directed to surrender before the learned trial court to serve rest of the sentence.

It goes without saying that the learned trial court as well as the prosecution shall take all endeavors to ensure that the appellant should serve rest of the sentence.

13. Let the Lower Court Record be sent to the court concerned forthwith.

(Deepak Roshan, J.)

Jharkhand High Court, Ranchi
Dated 28.06.2024
Jk