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IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.20 Of 2020

From judgment and order dated 13.01.2020 passed by the learned Addl. Sessions Judge -cum- Special Judge, Gajapati, Paralakhemundi in G.R. No.4 of 2019/T.R. No.12 of 2019.

Barika Pradhan	....	Appellant
	-Versus-	
State of Odisha	....	Respondent

For Appellant:	-	Mrs. Padmaja Pattnaik Amicus Curiae
For Respondent:	-	Mrs. Susamarani Sahoo Addl. Standing Advocate

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P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 19.04.2023

S.K. SAHOO, J. The appellant Barika Pradhan faced trial in the Court of learned Additional Sessions Judge -cum- Special Judge, Gajapati, Paralakhemundi in G.R. No.4/2019/T.R. No.12/2019 for commission of offences punishable under section 376(2)(n) of the Indian Penal Code and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter referred to as 'POCSO

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Act') on the accusation that on 10.03.2019 at Kampa Sahi-2, Paralakhemundi, the appellant called the victim who was a minor girl child aged about seven years to his house and committed aggravated penetrative sexual assault on her by inserting his finger in her vagina causing pain on her private part.

The learned trial Court vide judgment and order dated 13.01.2020, found the appellant guilty under both the offences and sentenced him to undergo R.I. for a period of ten years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo R.I. for a further period of six months.

2. The prosecution case, as per the first information report lodged by Balaga Umasankar (P.W.9), father of the victim before the Inspector in-charge of Model Police Station, Paralakhemundi on 11.03.2019 is that the victim was aged about seven years at the time of occurrence and the appellant was his neighbour and he called the victim to his house and when the victim returned back home, she was feeling pain in her vagina and when her mother asked her about the reason for such pain, she disclosed that the appellant inserted finger in her vagina.

On the basis of written report submitted by P.W.9, Paralakhemundi Model P.S. Case No.57 dated 11.03.2019 was registered against the appellant under sections 376-AB/506/34

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of the Indian Penal Code read with section 6 of the POCSO Act. In absence of Inspector in-charge, Sri Niranjan Das (P.W.16), S.I. of Police, who was in-charge of Inspector in-charge, took up investigation of the case.

During course of investigation, the Investigating Officer visited the spot, prepared the spot map (Ext.16), examined the parents of the victim, sent the victim for her medical examination to District Headquarters Hospital, Paralakhemundi, arrested the appellant and forwarded him to Court on 12.03.2019 after his medical examination and then as per the order of Superintendent of Police, Gajapati, P.W.16 handed over the investigation to P.W.14 Ahalya Maharana, W.S.I. of Police, Paralakhemundi Police Station. During course of investigation, P.W.14 re-examined the informant and other material witnesses so also the victim. Thereafter, she seized the biological samples of the victim so also the appellant which were collected during medical examination. Thereafter she made prayer before the Court for recording of the statement of the victim under section 164 Cr.P.C. and also for passing necessary orders to dispatch the exhibits to R.F.S.L., Berhampur for chemical examination and opinion and also made prayer to D.C.P.O., Paralakhemundi to provide necessary financial

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assistance to the victim girl. On completion of investigation, P.W.14 submitted charge sheet against the appellant under sections 376-AB/376(2)(n) of the Indian Penal Code read with section 6 of the POCSO Act.

3. After submission of charge sheet, the learned trial Court framed charges against the appellant and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. During course of trial, in order to prove its case, the prosecution has examined as many as sixteen witnesses.

P.W.1 Dr. Santanu Kumar Padhi was the Consultant, Orthopedics, D.H.H., Paralakhemundi who on police requisition examined the appellant and found that there was no erection of penis even after several attempts and accordingly he prepared the medical examination report which is marked as Ext.1.

P.W.2 Dr. Umasankar Dalai who was the O.S.I.G. Specialist, Kashinagar C.H.C., examined the victim and found that she was not capable to have sexual intercourse, however one abrasion was noticed on her hymen suggestive of recent forcible intercourse but no foreign body was found present in her private part and there was no stain, no saliva, no semen found

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on her body and she was sent to Niddan Patholab for VDRL, blood grouping and ossification test. He further stated to have prepared the medical examination report which is marked as Ext.2.

P.W.3 Biswanath Nayak was the constable attached to Model police station, Paralakhemundi and he accompanied the appellant to the hospital for his medical examination and received the biological samples from the doctor.

P.W.4 Bijay Kumar Gouda was another constable of Model plice station, Paralakhemundi who is a witness to the seizure of the wearing apparels of the minor victim vide seizure list Ext.5.

P.W.5 Karnam Vasu is a co-villager of the informant and the appellant who stated about mother of the victim disclosing before him about the occurrence.

P.W.6 Gampa Santosh and P.W.7 Gorlla Dharma are the co-villagers of the appellant and they have stated that the mother of the minor victim came crying to them and intimated that the appellant took the victim, made her naked and then slept over her body. They accompanied the informant to the police station where the report was lodged.

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P.W.8 Balapa Hemalata is the mother of the victim and wife of the informant and she stated about the disclosure made by the victim about the occurrence.

P.W.9 B. Umasankar is the father of the victim, who is the informant of the case.

P.W.10 is the victim and she has supported the prosecution case and stated about the appellant undressing her applying his finger inside her vagina.

P.W.11 K. Somesh was an auto-rickshaw driver who stated that the mother of the victim called the villagers and disclosed before them that the appellant alluring her minor child did the act of fingering by inserting his finger inside her vagina and he went to police station with her to lodge the F.I.R.

P.W.12 Bharat Palei is the scribe of the F.I.R. (Ext.8).

P.W.13 A. Minakhi translated the statements of the victim, her mother and stated that as per the direction of DCPO, Gajapati, he had gone to the police station and in her presence, their statements were recorded in exact verbatim being transcribed by her.

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P.W.14 Ahalya Moharana was the W.S.I, Model Police Station, Paralakhemundi who took over charge of investigation from P.W.16 and submitted charge sheet.

P.W.15 Jayalaxmi Prasanna Sirla was working as constable in Model police station, Paralakhemundi and she accompanied the victim for her medical examination and she is also witness to the seizure of biological samples of the victim as per seizure list Ext.12.

P.W.16 Niranjan Das was S.I. of Police who was in-charge of I.I.C., Model police station, Paralakhemundi who received the written report from P.W.9, registered the case and conducted investigation of the case till he handed over the charge of investigation to P.W.14.

The prosecution exhibited sixteen numbers of documents. Ext.1 is the medical examination report of the appellant, Ext.2 is the medical examination report of the victim, Ext.3 is x-ray report of Niddan Patholab, Ext.4 to 7 and Ext.12 are the seizure lists, Ext.8 is the plain paper F.I.R., Ext.9 to 11 are the endorsement with signature of P.W.13 on the statements of informant, the victim and her mother, Ext.13 is the acknowledgement receipt of R.F.S.L., Ext.14 is the chemical

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examination report, Ext.15 is the R.I. Report and Ext.16 is the spot map.

5. The defence plea of the appellant was one of denial and it is pleaded that he has been falsely implicated in the case. No witness has been examined on behalf of the defence.

6. The learned trial Court after analyzing the oral and documentary evidence on record came to hold that the victim was seven years of age at the time of occurrence and her evidence was found to be reliable and trustworthy. It also gets support from her parents. It was further held that the injury noticed on the hymen of the victim is another feature to prove the act of rape and accordingly, the learned trial Court held that the prosecution has been able to prove its case beyond all reasonable doubt.

7. Mrs. Padmaja Pattnaik, learned Amicus Curiae appearing for the appellant contended that the conviction of the appellant under section 376(2)(n) of the Indian Penal Code cannot be sustained in the eye of law inasmuch as there is no clinching material on record that rape was committed on the victim (P.W.10) repeatedly by the appellant either on the alleged date of occurrence or prior to that. It is further argued that even though the mother of the victim being examined as P.W.8 stated

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that the appellant took the victim inside his house, made her naked before committing sexual intercourse with her but the victim (P.W.10) has stated that only the appellant applied his finger inside her vagina. It is argued that the appellant after his arrest was examined by the doctor (P.W.1) who found that there was no erection of penis after several attempts and therefore, the commission of sexual intercourse by the appellant to the victim as stated by the mother of the victim is not acceptable. Learned counsel further argued that there is no material as to on which days, such similar offences were committed by the appellant with the victim as stated by the victim and since for such offence, there was no F.I.R. and even the victim has not disclosed about such incident before anybody and there is no indication of such previous incidents in the F.I.R. lodged by P.W.9, therefore, the commission of similar acts prior to the date of occurrence by the appellant with the victim is not acceptable and in its absence, it cannot be said that the appellant had repeatedly committed rape on the victim which is one of the ingredients for the offence under section 376(2)(n) of the Indian Penal Code. Learned counsel further submitted that the medical examination of victim was conducted by P.W.2, a male doctor even though section 27(2) of the POCSO Act specifically states

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that in case the victim is a girl child, the medical examination shall be conducted by woman doctor. She argued that P.W.2 noticed an abrasion over the hymen suggestive of recent forcible intercourse and nothing has been brought out from his evidence by the prosecution that by fingering also such abrasion is possible rather in the cross-examination, the doctor has stated that such injury is possible by scratch. Learned counsel further argued that the chemical examination report (Ext.14) indicates that no blood or semen was detected on the chadi of the victim. Learned counsel for the appellant contended that the appellant was residing in a family and such type of occurrence inside the house in presence of family members is an improbable feature and therefore, even though the defence has not disputed the age of the victim that she was below the age of twelve years but in view of the available material on record, it cannot be said that the prosecution has successfully proved the charges against the appellant and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

8. Mrs. Susamarani Sahoo, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that the evidence of the victim (P.W.10) who is a minor girl aged about

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seven years at the time of occurrence has not been shaken at all in the cross-examination. Her evidence is getting support from her parents before whom disclosure has been made by her and also the doctor (P.W.2). The conduct of the victim in disclosing about the occurrence immediately before her mother (P.W.8) is admissible as res gestae admissible under section 6 of the Evidence Act and there was no earthly reason for the victim to falsely implicate the appellant in a case of this nature. She further argued that since minimum punishment prescribed for the offences has been awarded by the learned trial Court, no interference with the same is called for and thus the appeal should be dismissed.

Age of the victim (P.W.10):

9. The victim being examined as P.W.10 stated her age to be seven years and further stated that she was a student of Class-II. Some formal questions were put to her by the Court and the questions and answers were recorded in the deposition sheet and from the answers given, the learned trial Court came to hold that the victim is a competent witness and she can give rational answers and the victim even asked her mother to go out and she gave her evidence alone which was interpreted by the interpreter as it was given in Telugu language.

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Under section 118 of the Evidence Act, a child witness is a competent witness provided that he/she is able to understand the questions put to him/her and give rational answers to such questions. If the particular child who has appeared in the witness box is intelligent enough to be able to understand as to what evidence he/she was giving and able to understand the questions and able to give rational answers, there is no infirmity in acting upon the evidence of a child witness.

The learned trial Court in this case has conducted some preliminary inquiry to test the intellectual capacity and understanding of the victim to give a rational account of what has been done to her. I have perused the questions put by the learned trial Court and answers given by the victim. I am of the satisfied that the learned trial Court has taken sufficient precautions before recording the evidence of P.W.10, a child witness.

The mother of the victim being examined as P.W.8 so also the father of the victim being examined as P.W.9 stated the age of the victim to be seven years and the defence has not challenged the age of the victim so far as the age is concerned.

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In view of the evidence adduced by the victim and her parents which has remained unchallenged, I am of the humble view that the prosecution has proved that the victim was aged about seven years at the time of occurrence.

Analysis of victim's evidence:

10. The victim being examined as P.W.10 has stated that the appellant was her adjacent neighbour who was like her grandfather and on the date of occurrence, the appellant called her to his house, undressed her and applied finger inside her vagina. She suffered pain for such conduct of the appellant. She further stated that the appellant had committed similar act twice and when her mother called her, she came out of the house and at that time, she was wearing only a top because the appellant had opened her inner garments and scot and she told before her mother that the appellant had undressed her to commit such act and she narrated the entire incident before her parents. She further stated that after the matter was reported before police, she was taken to Govt. hospital. In the cross-examination, she stated that at the time of incident, on all occasions, she shouted 'Amma' and in spite of her shouting, no one came to her rescue including her mother. Nothing has been brought out in the cross-examination to disbelieve her version. She has faced the cross-

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examination without being bogged down by any of the questions put by the defence.

A child witness, by reason of her tender age, is a pliable witness. She can be tutored easily either by threat, coercion or inducement. The precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and her demeanour must be like any other competent witness and there is no likelihood of being tutored. The Court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon, if the Court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and her evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to her imagination and exaggerate her version or may develop cold feet and not tell the truth or may repeat what she has been asked to say not knowing the consequences of her deposition in the Court. Careful evaluation of the evidence of a child witness in

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the background and context of other evidence on record is a must before the Court decides to rely upon it.

P.W.10 was only aged about seven years and her evidence has remained unshaken, there are no contradictions or discrepancies in her statement and it inspires confidence and I am satisfied that she is a truthful witness and therefore, I find no hesitation to rely upon her evidence.

Analysis of victim's parents' evidence:

11. The mother of the victim being examined as P.W.8 stated that the victim disclosed before her that the appellant made her naked before fingering and prior to the incident, the appellant also attempted and committed similar act twice which was not disclosed by her daughter due to fear. P.W.8 further stated that after return of her husband, she narrated the incident before him who in turn informed the matter to the village gentries and as per their advice, written report was lodged before police station. P.W.8 further stated that the appellant lived along with his five family members in the house but except the appellant, no one was present there at the time of occurrence. She further stated in the cross-examination that though she had advised the victim not to go to anyone's house without proper intimation but the appellant in the pretext of

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offering biscuits, chocolate etc. managed to allure her to go inside his house. Nothing has been brought out in the cross examination of P.W.8 to nullify her evidence rather it appears that when none of the family members of the appellant was present in his house, he called the victim to his house and committed the offence. The submission of the learned counsel for the appellant that the appellant was residing in a family and such type of occurrence inside the house in presence of family members is an improbable feature, is not acceptable as P.W.8 has stated that about absence of other family members of the appellant at the time of incident in the house.

The immediate disclosure of the victim (P.W.10) before her mother after the occurrence is admissible as res gestae under section 6 of the Evidence Act as it is a spontaneous statement connected with the fact in issue and there was no time interval for fabrication. Section 6 is an exception to the general rule where under hearsay evidence becomes admissible.

P.W.9, the father of the victim has also stated that when he returned on the date of occurrence to his house from work, P.W.8 narrated the entire incident before him and accordingly, he took his daughter (P.W.10) to the police station as per the advice of the co-villagers and lodged written report.

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Therefore, the evidence of the victim gets corroboration from the evidence of her parents who have been examined as P.W.8 and P.W.9 respectively.

Analysis of doctor's evidence:

12. The doctor (P.W.2) who examined the victim on the date of lodging of the first information report i.e., on 11.03.2019 stated that he found one abrasion over hymen of the victim suggestive of forcible sexual intercourse but he found no foreign body present over her private part and there was no stain, no saliva, or semen found on her body and he further stated that as per the x-ray report available in the case record, the Radiologist has opined that the victim was six to nine years. Therefore, the fact remains that on the next day of the occurrence when the first information report was lodged in the police station and the victim was sent for medical examination, abrasion was noticed on her private part which strengthens the prosecution case and corroborates the evidence of the victim.

The submission of Mrs. Pattnaik, learned Amicus Curiae that the medical examination of victim should not have been conducted by P.W.2, a male doctor is based on section 27(2) of the POCSO Act which states that in case the victim is a girl child, the medical examination shall be conducted by a

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woman doctor. The medical examination of the victim (P.W.10) in the case in hand was conducted by the male doctor after P.W.9, the father of the victim girl gave his consent for the same which would be evident from the consent for examination in Ext.2. There is nothing on record as to how the appellant was prejudiced due to such examination. There is no dispute that the purpose of POCSO Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well being of the children at every stage of judicial proceeding. Section 27(2) of the POCSO Act has been designed to protect the girl child from embarrassment and to ensure that she is comfortable, as it was thought to be in the best interest of the girl child. It is not meant to be a safeguard in favour of the accused. Since the learned counsel for the appellant has not been able to show any prejudice has been caused to the appellant as because the victim was examined by a male doctor like P.W.2 or that P.W.2 has submitted a wrong report, no importance can be attached to such submission.

Similarly, even though the doctor (P.W.1) who examined the appellant has stated that there was no erection of

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the penis of the appellant after several attempts, but in view of the accusation leveled by the victim that it is a case of fingering, the medical evidence of P.W.1 no way helps the appellant.

Whether similar act was committed by the appellant with the victim previously:

13. Even though the victim has stated that similar type of act was committed twice on her by the appellant but since there was no F.I.R., no complain of such act previously by the victim before her parents and there is no specific evidence as to when such occurrence had taken place and in what manner and where, it is very difficult to accept the version of the victim in that respect. Therefore, the prosecution has not successfully established the charge under section 376(2)(n) of the Indian Penal Code against the appellant. However, in the factual scenario, in view of the age of the victim and since it is established that the act committed by the appellant comes within the definition of 'rape' under clause (b) of section 375 of the Indian Penal Code, it can be said that the prosecution has established a case under section 376-AB of the Indian Penal Code against the appellant which prescribes punishment for rape on woman under twelve years of age. However, since in spite of registration of F.I.R. and submission of charge sheet for such

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offence, no charge has been framed for such offence which also carries minimum punishment for twenty years, I am of the humble view that the appellant cannot be convicted for such offence without such charge as a higher punishment is required to be awarded than the punishment imposed by the learned trial Court. However, on careful examination of the oral as well as documentary evidence, I find that the learned trial Court has rightly accepted the evidence of the victim which is corroborated by other evidence and came to conclusion that ingredients of the offence under section 6 of the POCSO Act are made out in the case.

Accordingly, while upholding the conviction of the appellant under section 6 of the POCSO Act and the substantive sentence of R.I. for a period of ten years awarded for such offence, in view of the poor financial condition of the appellant, the fine amount of Rs.10,000/- (fifty thousand) as awarded by the learned trial Court is reduced to 1,000/- (one thousand) and the default sentence of R.I. for a period of six months is reduced to R.I. for a period of one month.

Victim Compensation:

14. In view of the enactment of the Odisha Victim Compensation Scheme, 2012 which was revised by Odisha

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Victim Compensation (Amendment) Scheme, 2018 and keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family background of the victim, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Paralakhemundi, Gajapati to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation under the aforesaid schemes and the compensation is to be assessed taking into account the Odisha Victim Compensation Scheme and payment is to be made immediately to the victim within a period of two months from the date of receipt of a copy of this judgment.

Let a copy of the judgment be sent to the District Legal Services Authority, Paralakhemundi, Gajapati for compliance.

With the aforesaid modification, the JCRLA stands disposed of.

Trial Court's record with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

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Before parting with the case, I would like to put on record my appreciation to Mrs. Padmaja Pattnaik, the learned Amicus Curiae for rendering her valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to her professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

....
S.K. Sahoo, J.

Orissa High Court, Cuttack
The 19th April 2023/Pravakar/Sipun