

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.09 OF 2021

From judgment and order dated 14.10.2020 passed by the Addl. Sessions Judge -cum- Special Judge (POCSO), Nuapada in S.A. Case No.53 of 2018/T.R. No.24/2019.

Duryodhan Majhi

@ Durja

.....

Appellant

-Versus-

State of Odisha

.....

Respondent

For Appellant:

-
Ms. Minati Behera
(Amicus Curiae)

For Respondent:

-
Mr. Priyabrata Tripathy
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 12.07.2023

S.K. SAHOO, J. The appellant Duryodhan Majhi @ Durja faced trial in the Court of learned Addl. Sessions Judge -cum- Special Judge (POCSO), Nuapada in S.A. Case No.53 of 2018/T.R. No.24/2019 for commission of offences punishable under sections 376(2)(n)/ 376(3) of the Indian Penal Code (hereinafter 'I.P.C.') read with section 6 of the Protection of Children from Sexual Offences Act,

2012 (hereinafter 'POCSO Act') on the accusation that on 27.12.2018 at Jhanjimunda forest, he committed rape on the victim repeatedly against her will and without her consent and that the victim was under sixteen years of age by then and that he had committed aggravated penetrative sexual assault on the victim.

The learned trial Court vide impugned judgment and order dated 14.10.2020 found the appellant guilty under section 376(3) of the I.P.C. and section 6 of the POCSO Act, however acquitted him of the charge under section 376(2)(n) of the I.P.C. The learned Court sentenced him to undergo rigorous imprisonment for twenty years and to pay a fine of Rs.15,000/- (rupees fifteen thousand), in default of payment of fine, to suffer rigorous imprisonment for a further period of six months, for the offence under section 376(3) of the I.P.C. However, no separate sentence was imposed for his conviction under section 6 of the POCSO Act in view of the provision under section 42 of the POCSO Act.

2. The prosecution case, in short, is that one Kamal Majhi (P.W.1), the father of the victim lodged the first information report on 28.12.2018 before the Inspector in-charge of Nuapada police station stating therein that the victim was fourteen years of age and she was prosecuting her studies in

Class-IX while staying in the house of her grandfather. On 27.12.2018, the appellant who is a co-villager of the informant, approached the victim in the house of her maternal grandfather at about 10.00 a.m. and told her that her parents have sent him to take her to them to village Chanamunda. He further alleged that the appellant told the victim that after he returned from Nuapada, he would take her with him and after sometime around 1.00 p.m., the appellant came back and in spite of reluctance of the victim to accompany him, he took her on a motorcycle. The appellant took the victim inside the Jhanjimunda jungle road and after going some distance in the said jungle, he stopped his motorcycle and pulled the victim inside the bushes, made her lie on the ground, removed her wearing apparels and committed rape on her. The victim shouted during the occurrence which attracted the attention of one Tulsiram Majhi (P.W.4) and Fade Majhi (P.W.5) to the spot and they rescued the victim and left her in her parental home. The victim was crying and she disclosed before the informant about the commission of rape by the appellant.

On the oral version of P.W.1 the father of the victim, P.W.12 Dhaniram Majhi scribed the written report and accordingly, it was presented before the Inspector in-charge of Nuapada police station who registered as Nuapada P.S. Case

No.184 dated 28.12.2018 under section 376(3) of the I.P.C. and section 6 of the POCSO Act.

Initially, the case was investigated by one B. Mohanta, Inspector of Police but subsequently, Babitarani Puhan (P.W.26), S.I. of Police attached to Nuapada police station took over the charge of investigation. During course of investigation, she re-examined the informant and other witnesses, seized the school admission register of Panchayat High School, Darlimunda where the victim was prosecuting her studies to determine the age of the victim, wearing apparels of both the appellant and the victim were also seized. Thereafter the victim and the appellant were sent to District Headquarters Hospital, Nuapada for their medical examination and their biological samples were collected and seized. The statement of the victim was recorded under section 164 Cr.P.C. by the S.D.J.M., Nuapada on the prayer being made by the I.O. (P.W.26). The exhibits were sent to Deputy Director, State Forensic Science Laboratory, Rasulgarh, Bhubaneswar for chemical examination and on completion of investigation, on 25.04.2019, P.W.26 submitted charge sheet against the appellant under sections 376(2)(n)/376(3) of the I.P.C. read with section 6 of the POCSO Act.

3. The defence plea of the appellant was one of denial and it was pleaded that he was falsely implicated in the case and that no such occurrence had actually taken place.

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

P.W.1 Kamal Majhi is the father of the victim, who is also the informant of this case. He stated that one year back, the appellant had committed rape on her in the Jhanjimunda village. Thereafter he lodged the F.I.R. at the police station.

P.W.2 Ujjali Majhi is the mother of the victim. The victim disclosed before her that the appellant called her and took her to nearby Jhanjimunda village jungle and committed rape on her.

P.W.3 is the victim and she stated that while she was prosecuting her studies staying in her maternal grandfather's house, the appellant came to her and asked her to accompany him to village Chanamunda to the house of her parents as they have requested him to take her with him. Though initially she expressed her reluctance to accompany the appellant but subsequently she went with him and was raped by him.

P.W.4 Tulsiram Majhi who is a relative grandfather of the victim, stated that while he was grazing cows with his

brother Fade Majhi (P.W.5) in the Jhanjimunda jungle, he heard the shouting of a girl and proceeded towards the spot and found both the victim and the appellant in nude condition. Thereafter when he raised his voice, the victim rushed towards him and the appellant fled away from the spot and then the accused came to the spot with his motorcycle and asked her to go with him but the victim denied.

P.W.5 Fade Majhi who is also a relative grandfather of the victim, stated that while he along with his brother (P.W.4) were grazing cows in Jhanjimunda jungle, he found the victim rushing towards his brother in a nude condition and then the accused came to the spot with his motorcycle and asked her to go with him but the victim denied.

P.W.6 Tengnu Majhi and P.W.7 Balabanta Majhi are the witnesses to the seizure vide seizure list Ext.7.

P.W.8 Kuldeep Majhi and P.W.9 Sopsingh Majhi are the witnesses to the seizure vide seizure list Ext.8.

P.W.10 Pareswar Majhi was the Sarapanch of Mundapala G.P. and he stated about seizure of mobile phone from the possession of the appellant by police and preparation of seizure list vide Ext.9 and he also proved his signature on the

seizure list of wearing clothes and the Aadhaar card of the victim on her production.

P.W.11 Harchan Majhi is a witness to the seizure vide seizure list Ext.10.

P.W.12 Dhaniram Majhi is the scribe of the F.I.R. (Ext.1).

P.W.13 Lalmohan Majhi is a witness to the seizure vide seizure lists Exts. 4 & Ext.9.

P.W.14 Hari Rana is a witness to the seizure vide seizure list Ext.8.

P.W.15 Somnath Majhi is the cousin brother of the victim.

P.W.16 Dr. Binita Jagat is the Medical Officer posted at D.H.H., Nuapada. She medically examined the victim on 29.12.2018 on police requisition and proved the medical examination report vide Ext.12.

P.W.17 Dr. Aman Mishra is also a Medical Officer posted at D.H.H., Nuapada. He medically examined the appellant on police requisition and proved the medical examination report vide Ext.13.

P.W.18 Fargana Begum who was working as Constable at Nuapada police station, is a witness to the seizure vide seizure lists Ext.14 & Ext.15.

P.W.19 Lalmohan Majhi is a witness to the seizure vide seizure list Ext.11/1.

P.W.20 Radheshyam Saha and P.W.21 Bedram Patel are the two teachers working at Darlimunda High School and witnesses to the seizure vide seizure list Ext.16.

P.W.22 Pantobai Naik, who was working as Constable at Nuapada police station, is a witness to the seizure vide seizure lists Ext.17 & Ext.18.

P.W.23 Kumari Majhi and P.W.24 are the relative grandmothers of the victim and they stated that the appellant came to their house and took the victim in a motor cycle.

P.W.25 Narayan Singh Majhi who was working as Constable at Nuapada police station, is a witness to the seizure vide seizure lists Ext.14 & Ext.15.

P.W.26 Babitarani Puhan was the Sub-Inspector of Police of Nuapada police station, who stated that on 15.02.2019 she took over the charge of investigation of the case from B. Mahanta, Inspector of Police and examined the informant and

other witnesses, visited the spot and on completion of investigation, submitted the charge sheet against the appellant.

P.W.27 Upendra Sahu who was working as the in-charge Headmaster in Darlimunda High School and stated that on 03.01.2019, the I.O. seized the school admission register for the year 1997 onwards and prepared the seizure list which he proved vide Ext.16. Thereafter he took the seized register on zima by executing a proper zimanama vide Ext.28. He also proved the school admission register vide Ext.29.

P.W.28 Arakhit Pandey, who was working as a Constable at Nuapada police station, is a witness to the seizure of some sealed vials containing the biological clue of the appellant and the victim vide seizure lists Ext.17 and Ext.18.

The prosecution exhibited twenty nine numbers of documents. Ext.1 is the F.I.R., Ext.2 is the zimanama, Ext.3 is the statement recorded by the Magistrate, Ext.4 is the seizure list relating to wearing apparels of the victim, Ext.5 is the statement recorded by the Magistrate, Ext.6 is the statement of P.W.5 recorded by the Magistrate, Ext.7 is the seizure list relating to ladies chapal, spectacle, Ext.8 is the seizure list relating to seizure of motor cycle, Ext.9 is the seizure list relating to seizure of mobile phone, Ext.10 is the seizure list relating to

wearing clothes and Aadhaar card, Ext.11 is the signature of P.W.12 on a paper, Ext.12 is the medical examination report of the victim, Ext.13 is the medical examination report of the appellant, Ext.14 is the seizure list of one envelope containing blood sample of the appellant, Ext.15 is the seizure list of one envelope blood sample of victim, Ext.16 is the seizure list of admission register, Ext.17 is the seizure list of biological sample of the appellant, Ext.18 is the seizure list of biological sample of the appellant, Ext.19 is the medical requisition of the victim, Ext.20 is the report of S.F.S.L. Specialist, Bhubaneswar, Ext.21 is the requisition for the medical examination of the appellant, Ext.22 is the certificate given by the headmaster, Ext.23 is the letter of P.W.27 dated 18.03.2019, Ext.24 is the letter of the R.T.O., Nuapada, Ext.25 is the letter received from Airtel company, Ext.26 is the forwarding report of the blood sample of the appellant and the victim, Ext.27 is the spot map, Ext.28 is the zimanama of school admission register and Ext.29 is the admission register.

The defence neither examined any witness nor proved any document on behalf of the accused.

Finding of the Trial Court:

5. The learned trial Court, on analyzing the oral as well as documentary evidence on record, came to hold that since the

date of birth of the victim mentioned in the school admission register is 16.11.2003 and the occurrence occurred on 27.12.2018, the victim was aged about 15 years on the date of occurrence and therefore, the provisions of the POCSO Act are well attracted in the case. The learned trial Court further held that the prosecution is successful in proving the victim to be a minor and less than sixteen years of age at the relevant time and it also held that the prosecution was able to prove its case beyond all reasonable doubts against the appellant for commission of offence under section 376(3) of the I.P.C. and section 6 of the POCSO Act. However, the trial Court acquitted the accused for commission of offence under section 376(2)(n) since committing rape repeatedly on the same woman is a necessary ingredient to attract culpability under that provision, which could not be proved by the prosecution against the appellant.

Contentions of parties:

6. Ms. Minati Behera, learned Amicus Curiae appearing for the appellant contended that even though the learned trial Court accepted date of birth of the victim basing upon the entry made in the school admission register of Panchayat High School, Darlimunda, the evidence of the headmaster of the said school, however, indicates that basing on the date of birth mentioned in

the School Leaving Certificate (S.L.C.), the victim took admission in Class-IX. Thus, she argued that as no S.L.C. has been seized or proved in this case and since the Investigating Officer has also not tried to ascertain the date of birth of the victim from the school admission register where the victim was earlier prosecuting her studies, it is unsafe to accept the age as mentioned in the school admission register of the High School. Learned counsel further submitted that since no document of the previous school has been seized, it is too difficult to come to the finding that the victim was below sixteen years of age. Learned counsel further argued that neither the victim stated about her date of birth nor her parents, being examined as P.W.1 & P.W.2, have stated anything in that respect so also no other witness has stated about the date of birth of the victim. It appears from the evidence of the doctor (P.W.16) that ossification test was conducted on the victim for determination of her age, but such test report has not been proved in this case and therefore, it cannot be said with certainty that as on the date of occurrence, the victim was under sixteen years of age, which is one of the essential ingredients to be proved by the prosecution in the charge under section 376(3) of the I.P.C. Learned counsel further submitted that during absence of any male family members, the victim accompanied the appellant on his

motorcycle, did not object to him and both of them were found in nude condition in the jungle and thus, she can be said to be a consenting party and therefore, the appellant may be acquitted of all the charges.

Mr. Priyabrata Tripathy, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that the victim, being examined as P.W.3 on 18th July 2019, stated her age to be fifteen years and she further stated that the occurrence in question took place four to five months back and the doctor (P.W.16) has also mentioned the age of the victim to be fourteen years in his report (Ext.12) and the same has also been recorded in the school admission register (Ext.29), as proved by P.W.27. Therefore, he contended that a cumulative assessment of all the evidences on record would justify the conclusion arrived at by the learned trial Court that at the time of occurrence, the victim was under sixteen years of age to be correct. Learned counsel further submitted that as the victim was staying in the house of her maternal grandfather for prosecuting her studies, false information was given to her by the appellant on the date of occurrence that he had been requested by her parents to bring her to village Chanamunda, where they were residing. Despite of reluctance shown by the

victim to accompany the appellant, he persuaded her, for which she accompanied. On the way, inside the jungle, the appellant committed rape on the victim and the statement of the victim (P.W.3) gets corroboration from the evidence of P.W.4 and P.W.5 who stated to have found the victim in nude condition and about the appellant's presence on the spot of occurrence and his insistence to take her to her parents' house, which the victim denied. Learned counsel further argued that P.W.23 and P.W.24 have also stated that the appellant took the victim on a motorcycle at about 1.00 p.m. which also corroborates the evidence of the victim. Learned counsel argued that the doctor (P.W.16), who examined the victim on 29.12.2018, noticed two scratch marks present on her right breast and also found stain and dried semen present on her under garment. He highlighted that the doctor found the labia majora of the victim to be swollen and her hymen was ruptured which strengthens the prosecution case and corroborates the evidence of the victim. Having regard for the abovementioned evidences, the learned counsel argued that the learned trial Court has rightly found the appellant guilty under section 376(3) of the I.P.C. and section 6 of the POCSO Act and therefore, the appeal should be dismissed being devoid of merits.

Age of the victim:

7. Adverting to the contentions raised by the learned counsel for the respective parties, since much argument has been advanced by both the parties relating to the age of the victim and the learned trial Court has held the victim to be under sixteen years of age, let me analyze the oral as well as documentary evidence available on record to prove the age of the victim (P.W.3) as on the date of occurrence.

The victim being examined as P.W.3, no doubt stated her age to be fifteen years and that she was a student of Class-IX on the date of recording of her deposition, however, her evidence is totally silent about her date of birth. Her father being examined as P.W.1 could not state even the approximate age of the victim at the time of occurrence, much less the exact date of birth. The mother of the victim (P.W.2) has also maintained silence about the date of birth or age of the victim, rather she expressed her inability to recall the year of birth of the victim. The headmaster in-charge (P.W.27) of Panchayat High School, Darlimunda proved the school admission register (Ext.29) in which the date of birth has been recorded as 16.11.2003. However, the evidence of P.W.27 indicates that the victim took admission in that school only in Class-IX on production of S.L.C. obtained from her previous school, on the basis of which the

date of birth of the victim was mentioned in the school admission register. He further stated that he was not in-charge of admission at that time. The S.L.C., basing on which the entry of date of birth has been made in the school admission register of Darlimunda High School, has not been seized by the I.O. nor proved during the trial. The I.O. has also not visited the previous school where the victim was prosecuting her studies to verify the date of birth entry made in the school admission register nor seized any document of her previous school.

It is apposite on my part to clear the clutter as far as the position of law regarding proof of date of birth through S.L.C. is concerned. S.L.C. has no independent evidentiary value which can be solely put to use to prove someone's date of birth. This holds true even more when a student moves out of her original school, takes admission in another school and seeks to record her date of birth in the admission register of the new school on the sole basis of the S.L.C. obtained from the previous school. Any tampering in original date of birth, as recorded in the previous school register, cannot be ruled out in S.L.C. While discussing the evidentiary value of school admission register for proving date of birth, the Hon'ble Supreme Court in the case of **Birad Mal Singhvi -Vrs.- Anand Purohit reported in 1988 Supp Supreme Court Cases 604** held as follows:

"14....The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value, but if it is given by a stranger or someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value....The truth or otherwise of the facts in issue, namely, the date of birth of the candidate mentioned in the documents must be proved by admissible evidence, i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue."

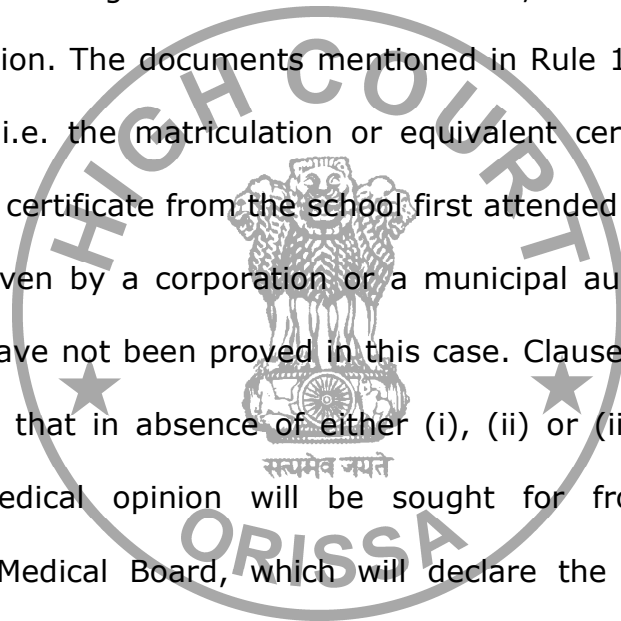
In the present case, the victim had taken admission in Darlimunda High School while she was pursuing her studies in Class-IX. Significantly, her date of birth was recorded in the new school admission register only on the basis of the S.L.C. that she had obtained from her previous school. The parents of the victim are also oblivious of the date of birth of their daughter. Against this backdrop, it is unclear as to who provided her date of birth

while she took admission in her previous school and that to on what basis. Further, the admission register of the previous school of the victim was neither seized nor it is proved as to what was her date of birth recorded in that register. No birth certificate of the victim has been seized. Therefore, having regard the ratio arrived at by the Hon'ble Apex Court in **Birad Mal Singhvi** (supra), it is quite unsafe to rely on the admission register of the subsequent school or the S.L.C. to determine the accurate age of the victim.

In **Sunil -Vrs.- State of Haryana reported in (2010) 1 Supreme Court Cases 742**, the Hon'ble Apex Court had the occasion to decide a similar case involving charge of rape. Therein, the prosecution sought to prove the date of birth of the victim through an S.L.C. but failed to produce the admission register of the previous school. The Court held that it would be unsafe to rely merely upon the S.L.C. as a conclusive proof of the date of birth of the prosecutrix. Further, much similar to this case, there the father of the victim was unable to give accurate date of birth of her daughter and was providing some wild estimation. Thus, the Court deemed it proper in that case to extend benefit of doubt to the appellant in the absence of concrete proof of age of the victim.

The Supreme Court in the case of **Jarnail Singh -Vrs.- State of Haryana reported in (2013) 7 Supreme Court Cases 263** held that the provisions of the Juvenile Justice Act and Rules would equally apply to determine the age of both a victim of crime as well as child in conflict with law. The Hon'ble Court relied on Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules, 2007. The documents listed in Rule 12(3) become critical to establish the age of the child, including the determination of the age of a victim in POCSO Act case. It was held that under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive,

and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion. The documents mentioned in Rule 12(3) clause (a)(i)(ii)(iii) i.e. the matriculation or equivalent certificate, the date of birth certificate from the school first attended or the birth certificate given by a corporation or a municipal authority or a panchayat have not been proved in this case. Clause (b) of Rule 12(3) states that in absence of either (i), (ii) or (iii) of clause (a), the medical opinion will be sought for from a duly constituted Medical Board, which will declare the age of the juvenile or child. It is pertinent to note that section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter 'JJ Act, 2015") also states that the Child Welfare Committee or the Juvenile Justice Board, in case of reasonable grounds for doubt regarding whether the person brought before it is a child or not, shall undertake the process of age



determination by seeking evidence by obtaining (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board. Keeping in view the ratio laid down in the case of **Jarnail Singh** (supra), the determination of the age of the victim in POCSO Act case can be done on the basis of date of birth mentioned in the documents as referred to in section 94(2) of the JJ Act, 2015 and if none of these documents is available, the age of the victim shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the committee or the Board.

The doctor (P.W.16), who examined the victim on police requisition, stated that for determination of age of the victim, x-ray has been conducted and opinion has been preserved after being finalized by radiology department. Neither the ossification test report nor the x-ray plates has been proved in the case. The doctor further stated that she mentioned the age of the victim to be fourteen years in her report (Ext.12) as

was stated to by her parents. When the parents of the victim are themselves not sure about the accurate date of birth of the victim, even though the doctor has mentioned the age of the victim to be fourteen years, no reliance can be placed on such version. Non-proving the ossification test report, x-ray plates and non-examination of the doctor who prepared the same is certainly a lacuna in the prosecution case.

Since the oral evidence relating to the date of birth of the victim is lacking and relevant documentary evidence has neither been seized by the I.O. nor proved during the trial, it cannot be conclusively said that the prosecution has succeeded in proving that the victim was under sixteen years of age as on the date of occurrence only on the basis of an entry made in a school admission register where the victim took admission only in Class-IX.

Analysis of evidence of the victim girl (P.W.3) and other supporting evidence:

8. The evidence of the victim (P.W.3) indicates that on the date of occurrence, she was present in the house of her maternal grandfather when the appellant came to her and asked her to accompany him to the house of her parents in village Chanamunda as they have requested to bring the victim with him. She further stated that after some time, the appellant again

returned and told her to accompany him and though she initially refused him to go but he persuaded her to accompany him and forcibly made her to sit on his bike and took her towards jungle area of village Jhanjimunda. The victim further stated that she protested but the appellant did not pay any heed to it and stopped the bike in a lonely place and kissed her. When she tried to run away, the appellant followed and took her near a 'Nala', stripped her and after undressing himself, committed rape on her. The victim further stated that she cried and her relative grandfathers, who were grazing cows nearby, came to the spot hearing her shout. Upon seeing them, the appellant put on his dress and fled away.

In the cross-examination, she stated that the appellant took her 300 meters inside the jungle from the road and her grandfathers were about 50 meters away from the spot. She further stated that she sustained injury on her back and shown the same to the doctor. Nothing substantial could be elicited from the cross-examination of the victim by the learned defence counsel to disbelieve her evidence relating to the commission of rape on her by the appellant inside the jungle. Further, the testimony of the victim is getting corroboration from the evidence of P.W.4 and P.W.5. P.W.4, who is related to the victim as grandfather stated that while he was grazing cows with

P.W.5, he heard shout of a girl and when he proceeded towards the spot, he found the victim and the appellant in nude condition. Seeing him, the victim rushed towards him and the appellant fled away and after a while, he again returned to the spot on a motorcycle and asked her to go with him, to which the victim denied. P.W.5, who is also a relative grandfather of the victim, stated that he has seen the victim in nude condition and the appellant coming to her on a motorcycle and asking her to accompany him to which the victim denied. P.W.23, the grandmother of the victim has stated that the appellant came to their house at about 1.00 p.m. and asked the victim to accompany him to village Jhanjimunda, and accordingly the victim went with him on his motorcycle. Similar is the statement of P.W.24 who is another grandmother of the victim.

The first information report was lodged on 28.12.2018 and the victim was medically examined on 29.12.2018 at D.H.H., Nuapada and P.W.16 found two scratch marks present on her right breast on lateral side and also found stain and dried semen present on her under garment, the labia majora was swollen and the hymen was ruptured. The appellant was also medically examined on police requisition by P.W.17, Dr. Aman Mishra who found him to be capable of performing sexual intercourse and proved his report vide Ext.13.

Conclusion:

9. In view of the clinching evidence of the victim which is corroborated by the evidence of P.W.4, P.W.5, P.W.23 and P.W.24 so also by the evidence of the doctor (P.W.16), I am of the humble view that the prosecution has successfully proved that on 27.12.2018, the appellant committed rape on the victim in Jhanjimunda forest. However, since the prosecution has failed to prove that the victim was under sixteen years of age at the time of occurrence as already observed by me, the ingredients of the offence under section 376(3) of the I.P.C. are not satisfied which require that the woman must be under sixteen years of age. In absence of concrete proof of the age of the victim and that she was a child as per the definition under section 2(d) of the POCSO Act, the charge under section 6 of the POCSO Act is not proved.

Therefore, the appellant is acquitted of the charge under section 376(3) of the I.P.C., instead he is found guilty under section 376(1) of the I.P.C.

As the result, while acquitting the appellant of the charges under section 376(3) of the I.P.C. and section 6 of the POCSO Act, I hold the appellant guilty under section 376(1) of the I.P.C. and sentence him to undergo R.I. for ten years which is the minimum sentence prescribed for the offence. In view of

the financial condition of the appellant and since he belonged to tribal area and it is a jail criminal appeal, I am not inclined to impose any fine on him.

Accordingly, the Jail Criminal Appeal is partly allowed.

It seems that the learned trial Court has recommended the case of the victim to the District Legal Services Authority, Nuapada for payment of compensation to her. It is not clear whether the compensation amount has been paid to the victim or not in the meantime. If the same has not been paid as yet, it is to be determined in accordance with the Odisha Victim Compensation Scheme, 2018 and immediately be disbursed to the victim within a period of two months from the date of receipt of this judgment.

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

Trial Court records with a copy of this judgment be communicated 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 Ms. Minati Behera, 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).

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 12th July 2023/Sipun

