

(2022) 06 PAT CK 0007

Patna High Court**Case No:** Criminal Appeal (SJ) No. 713 Of 2019 In Criminal Appeal (DB) No. 1264 Of 2018

Pramod Sahani

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision: June 21, 2022**Acts Referred:**

- Indian Penal Code, 1860 - Section 375, 376, 376(2), 376(2)(f), 376(2)(i)
- Protection of Children from Sexual Offences Act, 2012 - Section 1(f), 3, 6, 7, 9(m), 9(n), 10

Hon'ble Judges: Partha Sarthy, J**Bench:** Single Bench**Advocate:** Bela Singh, Tribhuwan Narayan, Ajay Mishra**Final Decision:** Dismissed

Judgement

Heard learned counsel for the appellant and learned counsel for the respondent.

The instant appeal has been preferred against the judgment of conviction dated 5.7.2018 and order of sentence dated 9.7.2018 passed in Sessions

Case no.538 of 2015 and Sessions Trial no. 33 of 2016 by the learned 1st Additional Sessions Judge-cum-Special Judge, POCSO Act, Muzaffarpur

whereby the sole appellant was convicted under section 376(2) of the Indian Penal Code and section 6 of the POCSO Act, 2012 and sentenced to

undergo RI for 10 years under section 376(2) of the Indian Penal Code as also to pay fine of Rs.25,000/ and in case of default in payment of fine to

undergo RI for 6 months with no further sentence having been passed for conviction under the POCSO Act, 2012.

As per the prosecution case based on the written statement of Lalan Sahani (PW2) addressed to the Officer Incharge of the Bochahan Police Station,

is that on 3.1.2014 at about 3 pm, the sole appellant shut his 6 year old daughter (PW3) in the house and raped her. He further states that his daughter

narrating about the occurrence. The appellant had run away. The informant prayed that an inquiry be conducted and legal action be taken.

On the statement of the informant (P.W.2) FIR being Bochahan P.S. Case No. 3 of 2014 was registered on 3.1.2014 under section 376 of the Indian

Penal Code.

Investigation was taken up and on conclusion of the investigation chargesheet no.122 of 2014 was submitted on 9.9.2014 under section 376 of the

Indian Penal Code. After taking cognizance the case was committed to the Court of Sessions and charge was framed under section 376(2)(i) of the

Indian Penal Code and section 6 of the POCSO Act.

The defence of the accused is that he is innocent and no such occurrence as alleged has taken place. He has been falsely implicated in the case

because of land dispute.

The prosecution examined a total of five witnesses. P.W. 1 Rani Devi is the mother of the victim, P.W. 2 Lalan Sahni is the father of the victim as

also the informant of the case, P.W.3 is the victim herself, P.W.4 is the doctor namely Vijay Kumar Prasad who medically examined the victim and

P.W.5 Siya Ram Singh is the Investigating Officer of the case.

P.W.1 ie the mother of the victim in her statement stated that the occurrence took place about three years back when at about 3 pm her daughter was

playing at the door step of Pramod Sahani. 2-3 other children were also playing there. It is stated that a child namely, Neha Kumari came and

informed P.W.1 that Pramod Sahani had taken her daughter inside his house. On receiving this information P.W.1 as also her husband (P.W.2) went

to the house of Promod Sahani and saw their daughter crying. Pramod Sahani had run away from his house. There was no one else in the house.

P.W.1 further states that her daughter told that Pramod Sahani had opened her pant and as a result of his act of having raped her, she was bleeding

from the urinary passage. Thereafter the case was lodged by her husband and she was medically treated. Their statements were recorded. She

further states in her cross examination that the accused happens to be the elder brother of her husband and his house is nearby.

She did not see him commit rape. Her husband reached there before her and it is not correct to state that she has lodged a false case on account of old dispute.

P.W.2 who happens to be the father of the victim as also the informant in the case states that the occurrence took place in the year 2014, the time being 3 pm. At the relevant time, he was at his home. At this time his niece Neha Kumari came and informed that Pramod Sahani had shut his daughter in his house. On hearing this P.W.2 states that he went to Pramod Sahani's house where he saw that the mouth of his daughter was tied up. Pramod Sahani had run away. On opening the mouth of his daughter, she started to cry. He states that he saw her bleed. He took his daughter to the police station. He identifies his signature which is marked as exhibit. He further states that his daughter was treated by the doctor. The police recorded his daughter's statement. In his cross examination, P.W.2 states that the accused happens to be his 'phuphera' brother who has come and settled down in his village. The accused is a married man having 3-4 children. There has never been any litigation between the parties. This witness did not see the accused commit rape.

P.W.3 is the minor victim herself who was put questions by the learned Court below and the learned trial Court came to the conclusion that the minor was competent to depose as a witness. In her deposition P.W.3 the victim states that while she was playing in the agriculture field, the accused came on a cycle along with bread and asked her to come along on the promise that he would give her bread to eat. She was taken in the room where the room was shut. It was evening. Her mouth was closed. Her pant was open and the accused did dirty work with her. She claims to identify the accused. In her cross examination P.W.3 states that the accused happens to be her uncle. She has no injuries either on her cheeks or mouth or hand or stomach. She did not bleed from any part of her body. She is not aware of any land dispute between the accused and her father.

The doctor who examined the victim deposed as P.W.4 on behalf of the prosecution. In his deposition he states that on 4.1.2014 he examined the victim P.W.3 and did not find any external injury on the body. On local examination there was a small abrasion of about 5 mm on fourchette (vagina),

however, there was no bleeding nor any spermatozoa was seen in the report dated 4.1.2016 of the pathology department. The doctor identified the report which was in his pen and contained his signature. He further states that he did not find any other mark of scratch on any part of victims body.

P.W.5 the Investigating Officer of the case in his deposition states that he took up the investigation of the case on 15.8.2014 and finding the case to be true against the accused submitted chargesheet under section 376 of the Indian Penal Code. The witness identify the formal FIR, the contents thereof as also the signature of the police station incharge Anirudh Prasad.

Besides the oral examination of the five witnesses on behalf of the prosecution the signature of the Lalan Sahni on the FIR was marked as Ext. 1, the medical examination report as Ext. 2, the chargesheet as Ext. 3, the signature of the officer incharge on the formal FIR as Exhibit 4 and the endorsement on the FIR to register the case as Ext.4/1.

Heard Smt. Bela Singh, learned counsel for the appellant and Sri Ajay Mishra, learned Additional Public Prosecutor for the State of Bihar.

As per the prosecution case, the minor victim P.W.3, daughter of P.W.1 and P.W.2 was shut in his house by the sole appellant who happens to be the cousin (phuphera) brother of P.W.2. Information was given to P.W.1 and P.W. 2 by the niece of P.W.2 namely Neha Kumari and hearing this P.W.2

and P.W.1 rushed to the house of the appellant where the victim P.W.3 narrated about the occurrence. When P.W. 2 and PW 1 went to the house of

the appellant, P.W.2 saw that the mouth of his daughter was tied up and the appellant had run away. On opening her mouth, she started to cry and

narrated about occurrence that the appellant had opened her pant and committed rape. She was bleeding. The victim was medically treated.

In support of the prosecution case five witnesses ie the P.W.1 and P.W. 2 who are the mother and father of the victim, P.W. 3 the minor victim

herself, P.W. 4 the doctor and P.W. 5 the Investigating Officer of the case were examined.

P.W. 3, the 10 year old minor victim, before her examination was put questions by the learned Court below and the learned trial Court came to the

conclusion that the minor was competent to depose as a witness. She has supported the prosecution case and has stated that while she was playing in

the agriculture field, the appellant came on a cycle along with bread and asked her to come along on the promise that he would give her bread to eat.

She was taken to the room, the room was shut, her mouth closed, her pant was opened and the appellant did dirty work on her. P.W. 1 and P.W.2 ie

the mother and father of the victim support the prosecution case. They state that the appellant Pramod Sahani happens to be the cousin brother of

P.W.2. While their daughter along with other children were playing at the door step of the appellant, Neha Kumari informed them that the appellant

had locked their daughter in his house. On receiving this information they went to the house of Pramod Sahani and saw their daughter crying. P.W. 2

states that the mouth of his daughter was tied up. On opening the mouth she started to cry and told them that the appellant had opened her pant and

pointing towards her urinary passage had narrated that he had raped her. They took her to the police station and she was given medical treatment.

The doctor who examined the victim deposed as PW 4. In his examination he states that he did not find any external injury on the body of the victim,

no spermatozoa was seen and she was not bleeding. However on local examination (vagina) there was a small abrasion of about 5 mm on fourchette.

Having gone through the depositions of the prosecution witnesses specially P.W. 3 the victim as also her parents ie P.W. 1 and P.W. 2, the Court

finds consistency in their statements that while P.W.3 was playing along with other children, the appellant reached there with bread and on the pretext

of giving bread to eat had taken the victim P.W.- 3 inside his house. The appellant tied up the mouth of P.W. 3, opened her pant and committed rape

on the 7 year old minor victim. So far as the contradictions in the statements of P.W. 1 and P.W. 2 on one hand and the statement of P.W. 3 and the

doctor P.W. 4 on the other are concerned, with respect to P.W.3 bleeding as a result of occurrence as also P.W. 1 not stating about the mouth of the

victim P.W. 3 being tied up are concerned, in the opinion of the Court, the contradictions are not material and which would lead the Court into

disbelieving the entire prosecution case. Here itself it would be relevant to point out that as per the deposition of the doctor P.W. 4, although no

external injury on the body nor any spermatozoa was seen as per the report of the pathology department nor was the victim bleeding, however he

states that on local examination (vagina) there was a small abrasion of 5 mm at the fourchette.

As per the medical books dealing with the anatomy of vulva, the vulva is the outer part of the female reproductive system and also part of the external

genitalia. It has two folds of skin. The outer folds are called the labia majora and the inner folds are called labia minora. These skin folds protect the

opening of the urethra and the vagina. At the bottom of the inner fold of the vulva is the fourchette, where the labia minora meet. Thus from the

anatomy of the vulva as gathered from the medical books and narrated herein above it may be stated that while the bottom of the inner folds of the

vulva where the labia minora meet is the fourchette, the outer folds of the vulva is the labia majora.

At this point it would be relevant to quote section 375 of the Indian Penal Code which defines rape:

“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) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so

with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or

makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

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

First.—“Against her will. Secondly.—“Without her consent.

Thirdly.—“With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—“With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another

man to whom she is or believes herself to be lawfully married.

Fifthly.â€"With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

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

Seventhly.â€"When she is unable to communicate consent.

Explanation 1.â€"For the purposes of this section, â€œvaginaâ€ shall also include labia majora.

Explanation 2.â€"Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal

communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.â€"A medical procedure or intervention shall not constitute rape.

Exception 2.â€"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.â€

From reading of the definition of rape as given in section 375 of the Indian Penal Code quoted hereinabove it would clearly be evident that Explanation

1 thereof makes it clear that for the purpose of this section, vagina shall also include labia majora. From the facts of the instant case it would transpire

that the minor victim P.W. 3 states that on the pretext of giving her bread, the appellant took her to the room, shut the door, tied up her mouth, open

her pant and did dirty work on her. Her mother P.W. 1 in her deposition clearly states that her daughter P.W. 3 pointed towards her urinary passage

to narrate that the appellant had inserted his male organ. Further the doctor P.W. 4 on local examination of the vagina found an abrasion (5mm) at the

fourchette.

Thus from a joint reading of the deposition of the witnesses together with the medical definition of fourchette and the definition of rape as defined

under section 375 of the Indian Penal Code, the Court is convinced that the prosecution has been able to prove their case beyond all reasonable doubt

that the appellant committed rape on the 7 year old minor victim.

The appellant being the cousin brother of P.W.2 (father of the victim) was the uncle of the victim P.W. 3. In the opinion of the Court, the appellant

being in a position of "a relative, guardian", the prosecution having proved their case of rape, the case against the appellant is proved

under section 376(2)(f) of the Indian Penal Code.

So far as the case against the appellant under the POCSO Act is concerned, section 1(f) defines "penetrative sexual assault" as having the same

meaning as assigned to it in section 3. Section 3 of the POCSO Act which defines penetrative sexual assault is quoted hereinbelow for ready

reference:

3. A person is said to commit "penetrative sexual assault" if-

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

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to

do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes

the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

From reading of section 3 of the POCSO Act it would transpire that the same does not contain the wordings as provided in Explanation 1 to section

375 of the Indian Penal Code which defines rape. Thus in the facts of the case, in the opinion this Court, in light of evidence of the prosecution

witnesses specially the doctor P.W. 4, the case of penetrative sexual assault would not be made out against the appellant. However, in the facts of the

case the prosecution having proved its case of sexual assault as defined under section 7 of the POCSO Act beyond all reasonable doubt together with

the age of the victim being below 12 years and the appellant being the uncle of the victim, in addition to section 376 (2)(f) of the Indian Penal Court

the appellant would also be punishable for aggravated sexual assault under section 9(m) and (n) of the POCSO Act.

Thus in view of the discussion of the evidence above and the material on record, this Court has no hesitation in holding that the learned trial Court

rightly convicted the appellant. However the conviction of the appellant in view of the facts of the case and the evidence discussed above is modified

from conviction under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act, 2012 to a conviction under section 376(2)(f) of the

Indian Penal Code and sections 9(m) and (n) of the POCSO Act, 2012. The sentence of the appellant shall remain unchanged to RI for 10 years but

the same shall be under section 376(2)(f) of the Indian Penal Code with a further sentence of imprisonment of 7 years under section 10 of the

POCSO Act, with both the sentences directed to run concurrently.

The Court finds no merit in the appeal. The appeal is dismissed.