



IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.144 OF 2022

Nawabuddin

..Appellant(S)

Versus

State of Uttarakhand

..Respondent(S)

J U D G M E N T

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 22.08.2019 passed by the High Court of Uttarakhand at Nainital in Criminal Appeal No. 280 of 2018 by which the High Court has dismissed the said appeal preferred by the accused – appellant herein and has confirmed the conviction of the accused for the offences punishable under Sections 376(2)(i) of IPC and Section 5/6 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as “POCSO

Act”), the original accused has preferred the present appeal.

2. That as per the case of the prosecution on 17.06.2016 at about 5:00 pm, the first informant (PW-1) had gone to fetch water and her husband was out for work. At that time, her daughter (victim girl) aged four years was all alone in the house. The accused – appellant herein who was a neighbour of PW-1, enticed and took the victim girl in the bushes to rape her. However, at that time the accused was spotted by some persons naked in the process of raping the victim girl. The accused and the victim girl were disrobed. The people who had gathered around caught the accused red handed and handed him over to the police. That a first information report was lodged by PW-1 – mother of the victim girl for the offences punishable under Sections 376 read with 511 of IPC and Section 3/4 of the POCSO Act. The victim girl was medically examined by PW-10 – Dr. Vandana Sundriyal on 17.06.2016. During the course of investigation the statement of the victim girl as well as the witnesses were recorded. After conclusion of the investigation the

investigating officer filed the chargesheet against the accused for the offences punishable under Section 376(2)(F) of IPC and Section 3/4 of the POCSO Act. The charges were framed against the accused for the offences punishable under Section 376(2)(i) of IPC and Section 5/6 of the POCSO Act. The accused denied the charges and claimed to be tried. Therefore, he was tried by the learned Special Judge (POCSO Act) for the aforesaid offences.

2.1 To prove the charges against the accused and to prove the case, the prosecution examined as many as thirteen witnesses including PW-1 – mother of the victim girl and PW-10 – Dr. Vandana Sundriyal who examined the victim girl on 17.06.2016. After closure of the prosecution evidence, statement of the accused under Section 313 of Cr.PC was recorded. His case was of total denial. On appreciation of evidence and more particularly relying upon the deposition of PW-10 - Dr. Vandana Sundriyal before whom the victim girl narrated the entire incident, the Trial Court held the accused guilty for the offences punishable under Section 376(2)(i) of IPC and Section 6 of the POCSO Act, 2012. The Trial Court sentenced the

accused to undergo life imprisonment and also directed to pay monetary fine of Rs.50,000/-. The Trial Court also passed an order that out of the amount of fine of Rs.50,000/-, Rs.30,000/- shall be paid to the victim girl as compensation.

3. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned Trial Court/Special Judge (POCSO Act), the accused preferred an appeal before the High Court. Before the High Court, amongst other grounds, one of the grounds was that the case would not fall under Section 5/6 of the POCSO Act and at the most the case may fall under Section 7/8 of the POCSO Act as there was no penetration and at the most and even as per the case of the prosecution the accused had tried to commit the rape. By the detailed impugned judgment and order, the High Court has dismissed the said appeal and has confirmed the conviction of the accused and the sentence of life imprisonment. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the accused has preferred the present appeal.

4. Shri Saju Jacob, learned counsel appearing on behalf of the accused – appellant has vehemently submitted that in the facts and circumstances of the case the High Court has committed a grave error in dismissing the appeal and confirming the judgment and order of conviction passed by the learned Trial Court convicting the accused for the offences punishable under Section 5/6 of the POCSO Act.
 - 4.1 It is submitted that in fact the witnesses have not supported the case of the prosecution. It is submitted that the accused could not have been convicted on the sole testimony of PW-10 - Dr. Vandana Sundriyal.
 - 4.2 It is further submitted by learned counsel appearing on behalf of the accused that even in the present case so called recording of the incident in the mobile has not been established and proved by the prosecution by leading any cogent evidence.
 - 4.3 It is further submitted by learned counsel appearing on behalf of the accused that even as per the prosecution case, it was only an attempt of aggravated sexual assault. It is submitted that in absence of penetration and

aggravated penetrative sexual assault, the appellant could not have been convicted for the offences punishable under Section 5/6 of the POCSO Act.

4.4 It is vehemently contended by learned counsel appearing on behalf of the accused that even considering the prosecution case as it is, at the most the case would fall under sexual assault punishable under Section 8 of the POCSO Act. It is urged that in any case the case would not fall under aggravated penetrative sexual assault.

4.5 In the alternative, it is submitted by learned counsel appearing on behalf of the accused that at the time of the alleged incident accused was aged approximately 65 years of age and as on today he is 75 years of age. It is submitted that as per Section 6 of the POCSO Act as it stood on the date of incident the minimum sentence provided was ten years but which may extend to imprisonment for life. It is therefore submitted that imposing life sentence is too harsh and disproportionate to the offence committed. Therefore, it is prayed to impose a lesser punishment than the life imprisonment.

5. Shri Krishnam Mishara, learned counsel appearing on behalf of the State of Uttarakhand, while opposing the present appeal has vehemently submitted that in the present case as such the prosecution has proved the case beyond doubt. It is submitted that PW-10 - Dr. Vandana Sundriyal who is an independent witness has fully supported the case of the prosecution.

5.1 It is further contended by learned counsel appearing on behalf of the State that this is a case of penetrative sexual assault as defined under Section 3(b) of the POCSO Act. It is submitted that as per Section 5(m) whoever commits penetrative sexual assault on a child below twelve years, it can be said to be an aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act.

5.2 It is urged by learned counsel appearing on behalf of the State that the accused in the present case was a neighbour of the victim girl; he misused his position as a neighbour and tried to penetrate his finger and then tried to commit rape on the minor girl. However, before he could succeed in committing rape, he was caught red handed by the local persons. It is submitted that the entire incident was

narrated by the victim girl to Dr. Vandana Sundriyal – PW-10. It is therefore submitted that when the accused misused his position as a neighbour and committed the offence under the POCSO Act upon a girl aged four years and looking to the object and purpose for which the POCSO Act has been enacted, no leniency should be shown to the accused. It is submitted that in the facts and circumstances of the case the accused does not deserve any sympathy or any leniency.

- 5.3 Making the above submissions it is prayed to dismiss the present appeal.
6. We have heard the learned counsel appearing on behalf of the respective parties at length.
7. At the outset it is required to be noted that there are concurrent findings recorded by both the Courts below, recorded on appreciation of evidence on record to the effect that the accused tried to commit the offence of rape on the victim girl aged four years. It has been established and proved by the prosecution that the victim girl was lured by the appellant – accused; she was taken to the bushes; accused removed his own clothes as well as the clothes of

the victim girl and fondled her private parts and penetrated his finger into the vagina of the victim girl. The same is fully supported by Dr. Vandana Sundriyal – PW-10, who examined the victim girl on 17.06.2016 and before whom the victim girl narrated the entire incident to her which was recorded in exhibit A-6 – medical examination report. As per Dr. Vandana Sundriyal – PW-10 who is an independent witness, the victim girl told her that the accused tried to penetrate his finger and therefore she felt pain and irritation in urination as well as she also felt pain in her body. As per PW-10 there was redness and swelling around the vagina. Though the other witnesses who seem to have been won over might not have supported the case of the prosecution, we see no reason to doubt the deposition of PW-10 - Dr. Vandana Sundriyal, who is an independent witness. There are no allegations on behalf of the accused that there was any enmity with Dr. Vandana Sundriyal. Therefore, we are of the opinion that it is safe to convict the accused relying upon the deposition of PW-10 - Dr. Vandana Sundriyal before whom the victim girl narrated the entire incident which was recorded in the

medical examination report namely exhibit A-6. Thus, it has been established and proved by the prosecution that the accused took the victim girl away from the house; took her deep into the bushes; disrobed her and removed his clothes as well; penetrated his finger in the vagina, due to which the victim girl felt pain and irritation in urination and he was about to force himself upon her and commit the offence of rape when he was caught red handed.

7.1 Now the next question which is posed for the consideration of this Court is, what offence the accused had committed. The Trial Court convicted the accused for the offences punishable under Sections 376(2)(i) of IPC and Section 5/6 of the POCSO Act. It is the case on behalf of the accused that at the most it can be said to be an attempt to commit penetrative sexual assault and therefore at the most it can be said to be the case of sexual assault under Section 7 of the POCSO Act punishable under Section 8 of the POCSO Act. Therefore, it is the case on behalf of the accused that as it is neither a case of penetrative sexual assault nor aggravated penetrative sexual assault, therefore the punishment of life imprisonment imposed was not

warranted and at the highest he could have been punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

8. While appreciating the aforesaid submissions the relevant provisions of the POCSO Act are required to be referred to and considered. Section 3 of the POCSO Act defines 'penetrative sexual assault'. As per Section 3 of the Act, a person is said to commit 'penetrative sexual assault' if-(b) he inserts, to any extent, any object of a part of the body, not being the penis, into the vagina..... Section 4 provides 'punishment for penetrative sexual assault'. Section 5 of the Act defines 'aggravated penetrative sexual assault' and as per Section 5(m) whoever commits penetrative sexual assault on a child below twelve years it is aggravated penetrative sexual assault. Section 6 provides 'punishment for aggravated penetrative sexual assault.' In the present case, it has been established and proved that the accused penetrated his finger in the vagina and because of that the victim girl felt pain and irritation in urination as well as pain on her body and there was

redness and swelling around the vagina found by the doctor. We are of the opinion that therefore the case would fall under Section 3(b) of the POCSO Act and it can be said to be penetrative sexual assault and considering Section 5(m) of the POCSO Act as such penetrative sexual assault was committed on a girl child aged four years (below twelve years) the same can be said to be 'aggravated penetrative sexual assault' punishable under Section 6 of the POCSO Act. Therefore, both, the Trial Court as well as the High Court have rightly convicted the accused for the offences under Section 5 of the POCSO Act punishable under Section 6 of the POCSO Act.

9. Now in so far as the prayer on behalf of the accused – appellant herein to take a lenient view in the matter by considering mitigating circumstances of old age of the accused and to alter the life imprisonment to any other punishment is concerned, the same has to be considered in light of the object and purpose of enactment of the POCSO Act.

9.1 In the case of **Eera Vs. State (NCT of Delhi)**, (2017) 15 SCC 133, this Court has observed on the Statement and

Objects and Reasons of POCSO Act in para 20 as under: -

“20. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the Pocso Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the Preamble, it is manifest that it recognises the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well-being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The Statement of Objects and Reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the Pocso Act.”

9.2 In the case of **Alakh Alok Srivastava Vs. Union of India**

& Ors. (2018) 17 SCC 291, in para 14 and 20, it is

observed as under: -

“14. At the very outset, it has to be stated with authority that the Pocso Act is a gender neutral legislation. This Act has been divided into various chapters and parts therein. Chapter II of the Act titled “Sexual Offences Against Children” is segregated into five parts. Part A of the said Chapter contains two sections, namely, Section 3 and Section 4. Section 3 defines the offence of “Penetrative Sexual Assault”

whereas Section 4 lays down the punishment for the said offence. Likewise, Part B of the said Chapter titled “Aggravated Penetrative Sexual Assault and Punishment therefor” contains two sections, namely, Section 5 and Section 6. The various sub-sections of Section 5 copiously deal with various situations, circumstances and categories of persons where the offence of penetrative sexual assault would take the character of the offence of aggravated penetrative sexual assault. Section 5(k), in particular, while laying emphasis on the mental stability of a child stipulates that where an offender commits penetrative sexual assault on a child, by taking advantage of the child's mental or physical disability, it shall amount to an offence of aggravated penetrative sexual assault.”

“**20.** Speaking about the child, a three-Judge Bench in **M.C. Mehta v. State of T.N.** (1996) 6 SCC 756

“1. ... “child is the father of man”. To enable fathering of a valiant and vibrant man, the child must be groomed well in the formative years of his life. He must receive education, acquire knowledge of man and materials and blossom in such an atmosphere that on reaching age, he is found to be a man with a mission, a man who matters so far as the society is concerned.”

9.3 As it can be seen from the Statement of objects and reasons of the POCSO Act since the sexual offences against children were not adequately addressed by the existing laws and a large number of such offences were neither specifically provided for nor were they adequately penalised, the POCSO Act has been enacted to protect the children from the offences of sexual assault, sexual harassment and pornography and to provide for establishment of special courts for trial of such offences

and for matters connected therewith and incidental thereto.

9.4 At this stage, it is required to be noted that the POCSO Act has been enacted keeping in mind Article 15 and 39 of the Constitution of India. Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. To achieve the goal as per Article 15 and 39 of the Constitution, the legislature has enacted the Protection of Children from Sexual Offences Act, 2012.

9.5 As noted in the Statement of objects and reasons, as per the United Nations Convention on the Rights of Children, to which India is a signatory to the treaty, the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual

activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

Article 19 of the Convention states the following: -

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all form/s of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

The general comment No.13 on the Convention specifically dealt with the right of the child to freedom from all forms of violence and it has observed that “no violence against children is justifiable; all violence against children is preventable”

10. Keeping in mind the aforesaid objects and to achieve what has been provided under Article 15 and 39 of the Constitution to protect children from the offences of sexual assault, sexual harassment, the POCSO Act, 2012 has been enacted. Any act of sexual assault or sexual harassment to the children should be viewed very seriously and all such offences of sexual assault, sexual harassment on the children have to be dealt with in a stringent manner and no leniency should be shown to a person who has committed the offence under the POCSO Act. By awarding a suitable punishment commensurate with the act of sexual assault, sexual harassment, a message must be conveyed to the society at large that, if anybody commits any offence under the POCSO Act of sexual assault, sexual harassment or use of children for pornographic purposes they shall be punished suitably and no leniency shall be shown to them. Cases of sexual assault or sexual harassment on the children are instances of perverse lust for sex where even innocent children are not spared in pursuit of such debased sexual pleasure.

Children are precious human resources of our country; they are the country's future. The hope of tomorrow rests on them. But unfortunately, in our country, a girl child is in a very vulnerable position. There are different modes of her exploitation, including sexual assault and/or sexual abuse. In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas. As observed and held by this Court in the case of **State of Rajasthan Vs. Om Prakash**, (2002) 5 SCC 745, children need special care and protection and, in such cases, responsibility on the shoulders of the Courts is more onerous so as to provide proper legal protection to these children. In the case of **Nipun Saxena v. Union of India**, (2019) 2 SCC 703, it is observed by this Court that a minor who is subjected to sexual abuse needs to be protected even more than a major victim because a major victim being an adult may still be able to withstand the social

ostracization and mental harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Therefore, the child needs extra protection. Therefore, no leniency can be shown to an accused who has committed the offences under the POCSO Act, 2012 and particularly when the same is proved by adequate evidence before a court of law.

10.1 In the present case it is to be noted that the accused was aged approximately 65 years of age at the time of commission of offence. He was a neighbour of the victim girl. He took advantage of the absence of her parents, when her mother went to fetch water and her father had gone to work. He is found to have committed aggravated penetrative sexual assault (as observed hereinabove) on a girl child aged four years, which demonstrates the mental state or mindset of the accused. As a neighbour, in fact, it was the duty of the accused to protect the victim girl when alone rather than exploiting her innocence and vulnerability. The victim was barely a four years girl. The

accused – appellant was the neighbour. The accused instead of showing fatherly love, affection and protection to the child against the evils of the society, rather made her the victim of lust. It is a case where trust has been betrayed and social values are impaired. Therefore, the accused as such does not deserve any sympathy and/or any leniency.

However, the punishment provided for the offence under Section 6, as it stood prior to its amendment and at the time of commission of the offence in the instant case for aggravated penetrative sexual assault was 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. Now as per the amended Section 6 with effect from 16.08.2019, the minimum punishment provided is twenty years and 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. Therefore, at the relevant time the minimum punishment provided for the offence under Section 6 of the POCSO Act,

2012 was ten years RI and which may extend to imprisonment for life. It is reported that today the accused is aged 70-75 years of age and it is also reported that he is suffering from Tuberculosis (TB). Therefore, considering such mitigating circumstances we are of the opinion that if the life sentence is converted to fifteen years RI and the fine imposed by the Trial Court confirmed by the High Court to be maintained, it can be said to be an adequate punishment commensurate with the offence committed by the accused.

11. In view of the above discussion the impugned judgment and order passed by the High Court and the learned Special Court convicting the accused for the offences punishable under Sections 376(2)(i) of IPC and Section 5 of the POCSO Act and imposing the punishment under Section 6 of the POCSO Act is hereby upheld. The accused is rightly held guilty for the aforesaid offences. However, for the reasons assigned hereinabove the sentence of life imprisonment is converted to that of fifteen (15) years RI with fine/compensation imposed by the Trial Court confirmed by the High Court. Now the accused shall

undergo fifteen (15) years RI with fine imposed by the Trial Court confirmed by the High Court for the aforesaid offences instead of life imprisonment. The present appeal is partly allowed to the aforesaid extent only.

.....J.
(M. R. SHAH)

.....J.
(B.V. NAGARATHNA)

New Delhi,
February, 08th 2022