

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr. Appeal (DB) No.1013 of 2024

Sulendra Singh @ Guddu Singh @ Surendra Singh aged about 25 years, S/o Nilambar Singh, resident of village Kalyanpur Road No.2, P.O. Hatia, P.S.

Jagarnathpur, District- Ranchi

.....

Appellant

Versus

The State of Jharkhand

....

Respondent

CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE NAVNEET KUMAR

For the Appellant

:

Mr. Anil Kr. Ganjhu, Advocate

For the State

:

Mr. Rajneesh Vardhan, A.P.P.

Order No.5: 23st January 2025

I.A. No.12652 of 2024

This instant interlocutory application has been filed under Section 430 of BNSS for suspension of sentence, against the Judgment of conviction dated 13.06.2024 and order of sentence dated 21.06.2024 passed by learned A.J.C.-IVcum Special Judge-POCSO, Ranchi, in connection with POCSO Case No.32 of 2021, arising out of Jagarnathpur P.S. Case No.456 of 2020, whereby and whereunder the appellant has been convicted for the offence u/s 376(D) of Indian Penal Code & under Section 6 of POCSO Act and sentenced to undergo R.I. for 20 years and fine Rs.10,000/- and in default of fine, S.I. for six months for the offence under Section 6 of the POCSO Act. There is no separate sentence u/s 376 (D) of Indian Penal Code in light of section 42 of POCSO Act.

2. Mr. Anil Kr. Ganjhu, learned counsel appearing for the appellant has contended that it is case where the prosecution has miserably failed in establishing the charge beyond all reasonable doubt. The basis for making such submission is that if the testimony of the victim will be taken into consideration, she has not supported the prosecution version, particularly while recording the statement under Section 164 of Cr.P.C., where she has stated that she was not subjected to any penetration and hence the contention has been raised that there cannot be conviction under Section 6 of the POCSO Act.

3. It has further been contended that even the DNA profile has not matched, since, the DNA has not been generated of the sample which is sent to the FSL.
4. Based upon such submissions, learned counsel appearing for appellant has submitted that it is fit a case for suspension of sentence.
5. While on the other hand, Mr. Rajneesh Vardhan, learned Additional Public Prosecutor appearing for State has vehemently opposed the prayer for suspension of sentence.
6. It has been contended by learned State counsel by referring the testimony of PW-1, victim, who has fully supported the prosecution version. It has been submitted that it cannot be said that the DNA profile does not support the prosecution version, rather the DNA profile could not be generated. The ground therefore has been raised that due to non-generation of the DNA profile, the testimony of PW-1, victim, cannot be said to be washed away.
7. Learned State counsel based upon the aforesaid submissions submitted that it is not a fit case for suspension of sentence.
8. We have heard the learned counsel for the parties and gone across the findings recorded by the learned trial court in the impugned Judgment and the testimony as available in the lower court records and the other material exhibits available therein.
9. This Court has gone through the testimony of PW-1, victim, who has fully supported the prosecution version. However, the statement as recorded under Section 164 of Cr.P.C., it has been stated by her that there was no penetration, but in the matter of POCSO, the issue of penetration is to be taken into consideration in the broader aspect.
10. Section 3(c) of the POCSO Act states that a person is said to commit "penetrative sexual assault" if he manipulates any part of the child's body so as to cause penetration into the vagina, urethra, anus or any other body part or makes the child to do so with him or any other person. Section 3 of the POCSO Act is reproduced below :

3. Penetrative sexual assault.—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.

11. Thus, it is evident from the aforesaid provision that the said provisions include within the ambit of penetrative sexual assault, the insertion of any object or body-part; or the manipulation of any body part of a child to cause penetration; or the application of the mouth. It would therefore be completely illogical to say that the offence contemplated in those provisions refers only to penetration by a penis.

12. It is pertinent to note that subsequent to Nirbhaya's case, the Criminal Law (Amendment Bill) received the Presidential Assent on 02.04.2013 and came into force from 03.04.2013 which introduced major amendments to the Indian Penal Code, the Code of Criminal Procedure, the Indian Evidence Act and the Protection of Children from Sexual Offences Act. Sections 375, 376 and 376-A to 376-D came to be substituted by Act 13 of 2013 with effect from 03.02.2013. In the earlier provision under Section 375, penetration with male organ was shown to be the main ingredient to constitute sexual intercourse necessary to the offence of rape, but the amended Section 375 reads as follows:-

[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,”

13. Thus, the amended Section 375 broadens the definition, making it clear that penetration with male organ is not at all necessary and penetration can be with any body part or object and that even attempt to penetrate or manipulate any body part can be considered as rape. As per the amended Section, use of fingers, objects or any body part to penetrate or manipulate is sufficient and that even attempt or manipulate without penetration can constitute rape.

14. Further, the question that the DNA profile having not been matched is one of the grounds, but it is evident from the FSL report that the DNA profile, from the sample at source could not be generated. The non-generation of the DNA profile therefore cannot be allowed to prevail upon the testimony of the victim, who has fully supported the prosecution version.

15. It is settled position of law that a medical or scientific opinion holds significant importance, however, medical or scientific opinion is not considered conclusive evidence in itself, and it does not solely determine whether a crime has been committed. Medical reports, while extremely important in the realm of jurisprudence, may occasionally fall short of complete accuracy. It is ultimately the Court which has to weigh the medical evidence alongside other factual and circumstantial evidence to arrive at a conclusion.

16. The Hon’ble Supreme Court in "***Pantangi Balarama Venkata Ganesh v. State of A.P.***," [(2009) 14 SCC 607] held that the consistent and reliable statements of the victim and her mother regarding the incident of penetrative sexual assault cannot be disregarded merely on the ground that FSL records that "DNA of male organ could not be generated, for ready reference the relevant paragraph of the aforesaid Judgment is being quoted as under:

"44...For the purpose of this case it may not be of much consequence as this Court has not taken into consideration the evidence of DNA experts

alone for the purpose of recording a judgment of conviction. It has been considered along with the other evidence. The prosecution case has been considered as a whole. Cumulative effect of the evidences adduced before the learned trial Judge have been taken into consideration for the purpose of arriving at a finding of guilt against the appellant."

17. Thus, it is imperative that all the evidence surrounding the case is taken as a whole. Consistent and reliable statements of the victim cannot be disregarded merely on the ground that the DNA profile, from the sample at source could not be generated. Further, the presence of the appellant has not been denied, since, no question has been put by the appellant denying the presence at the place of occurrence.

18. This Court considering the aforesaid facts and taking into consideration the testimony of PW-1, victim, who has fully supported the prosecution case is of the view that it is not a fit case for suspension of sentence during pendency of the instant appeal.

19. In consequence thereof, the interlocutory application, being I.A. No. 12652 of 2024 filed for suspension of sentence is hereby dismissed and disposed of.

20. It is made clear that any observation made herein will not prejudice the issue on merit as the appeal is lying pending for its consideration.

(Sujit Narayan Prasad, J.)

(Navneet Kumar, J.)

R.Kumar