

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.306 of 2015

Arising Out of PS.Case No. -20 Year- 2004 Thana -THAWE District- GOPALGANJ

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Mritunjay Ram Son of Nand Kishore Ram, resident of village - Chanawe, P.S.
Thawe, Distt. – Gopalganj.

.... Appellant/s

Versus

The State of Bihar.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Yogendra Pd. Sinha, Advocate

For the Respondent/s : Mr. Abhay Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 04-08-2017

Heard learned counsel for the appellant as well as
learned Additional Public Prosecutor.

2. This appeal has been preferred against the judgment of conviction dated 7th May 2015 and order of sentence dated 12th May 2015 passed by learned 1st Additional Sessions Judge-cum-Special Judge POCSO in Trial No. 1 of 2014, arising out of Thawe P.S. Case No. 20 of 2014, G.R. No. 596 of 2014 whereby and whereunder appellant Mritunjay Ram has been found guilty for an offence punishable under section 4 of the POCSO Act and sentenced to undergo rigorous imprisonment for 7 years, to pay fine of Rs.10,000/- and in default thereof, to undergo simple imprisonment of six months additionally though no separate finding has been recorded relating to section 377 of the Indian Penal Code in the background of finding. In case of deposit of fine, the half of the same would be



payable to the victim.

3. Indu Devi (P.W.4) gave her fard-beyan on 02.03.2014 while she was at Sadar Hospital where victim Tapeswar Ram aged about 5 years was undergoing treatment alleging *inter alia* that Tapeswar Ram had gone to grocery shop. As he was late, so she proceeded in search of him and during course thereof, she heard sound of weeping coming out from premises of Indian School, which is adjacent to her house whereupon, she went inside the school, entered into a room and found her co-villager, Mritunjay Ram was committing sodomy with her son, Tapeswar Ram. Mritunjay Ram, on seeing her ran away from there. She had also seen blood coming out from anus of her son, Tapeswar Ram, who after sometime, became unconscious. Then thereafter, she called her other children and with whose assistance brought Tapeswar Ram to Sadar Hospital, Gopalganj where he was being treated.

4. On the basis of aforesaid fard-beyan, Thawe P.S. Case No. 20 of 2014 was registered under section 377 of the Indian Penal Code and investigation commenced and proceeded, which ultimately culminated by way of filing charge sheet, facilitating the trial having the conclusion, as referred above subject matter of instant appeal.

5. The defence of the appellant happens to be complete denial of occurrence however neither any D.W. nor any chit



of paper exhibited.

6. In order to substantiate his case, prosecution had examined altogether 07 witnesses, out of whom, P.W.1 Yogendra Ram, P.W.2 Mahajan Ram, P.W. 3 Kamal Kishore Ram (P.W.1), P.W. 4 Indu Devi, P.W. 5 Dr. Mithilesh Kumar, P.W. 6 Surya Deo Yadav and P.W. 7 victim Tapeswar Ram. Side by side exhibited the documents as Exhibit-1 signature of Kamal Kishore Ram (PW 3) over fard-beyan, Exhibit-2 Injury Report, Exhibit -3 Fard-beyan, Exhibit 3/1 Formal F.I.R.

7. Considering the tender age of victim, who was produced by her mother/informant (P.W. 4) in her lap, P.W. 7 victim was not examined so, the case of prosecution based upon the evidence of remaining six prosecution witnesses.

8. From perusal of the evidences of the material witnesses, it is apparent that all the witnesses have turned hostile. P.W. 1, P.W. 2 and P.W. 3 had completely negated their status disowning to have seen the occurrence and in likewise manner, they shown ignorance with regard to any account of occurrence having been committed with the victim Tapeswar Ram by the appellant, Mritunjay Ram.

9. Indu Devi, informant (P.W. 4) became volte face prosecution, as she had not deposed substantiating her earlier version, identifying the appellant to be person who had committed sodomy



with her son. The material witnesses have not supported the case of the prosecution.

10. However, it has been perceived that P.W.5, Dr. Mithilesh Kumar had found following injuries over the person of the victim Tapeswar Ram:-

(1) Two perianul abrasion each size 1.5 cm x 0.5 cm Skin deep. 3 O'clock and 9 O'clock (Anatomical position). No active bleeding.

(2) Anul swab taken and send for microscopic examination vide no. 4272 dated 2-3-2014 which did not reveal any spermatozoa or foreign body.

Anul spheriter tone present

Opinion – sign of Anul Sexual assault present.

M.I. A mole on over the chest

(4) Age of injury – within six hours, and so, Doctor opined that there was sign of anul sexual assault.

11. P.W. 6 is the Investigating Officer, who after being entrusted with the investigation of Thawe P.S. Case No. 20 of 2014, proceeded therewith, took up statement of the witnesses, inspected the P.O., got Injury Report and then, after completing the same, submitted charge sheet.

12. His attention has been drawn towards previous statement of the prosecution witnesses more particularly P.W. 1, P.W. 2 and P.W. 3.

13. From the judgment impugned, it is evident that



learned court below while drawing inference against the appellant irrespective of the fact that there happens to be complete absence of substantial evidence on record against him took into notice the principle decided by the Hon'ble Apex Court in Bhagwan Dass Vs. State (NCT of Delhi), (2011) 6 SCC 396 as well as section 29 of the POCSO Act.

14. I have occasioned to go through the aforesaid citation. From perusal of the same it is evident that the aforesaid case relates to honour killing. The father had committed murder of his daughter on account of her incestuous character wherein she after deserting her husband, began to reside with her uncle. Furthermore, it is evident that after committing murder of his daughter, the appellant had disclosed the same, by way of extra judicial inculpatory confession before his mother, Dhillo Devi, whose statement was recorded during course of investigation under section 161 of the Criminal Procedure Code, substantiating the same, however during course of evidence, she resiled and in the aforesaid background, the activity of the appellant was perceived as extra judicial inculpatory confession and in the aforesaid background it has been held as under:-

“The mother of the accused, Smt. Dhillo Devi stated before the police that her son (the accused) had told her that he had killed Seema. No doubt a statement to the police is ordinarily not admissible in evidence in view of [Section 162\(1\)](#)



Cr.PC, but as mentioned in the proviso to [Section 162\(1\) Cr.PC](#) it can be used to contradict the testimony of a witness. Smt. Dhilllo Devi also appeared as a witness before the trial court, and in her cross examination, she was confronted with her statement to the police to whom she had stated that her son (the accused) had told her that he had killed Seema. On being so confronted with her statement to the police she denied that she had made such a statement.

We are of the opinion that the statement of Smt. Dhilllo Devi to the police can be taken into consideration in view of the proviso to [Section 162\(1\) Cr.PC](#), and her subsequent denial in court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was removed from the bed and placed on the floor. When she was confronted with this statement in court she denied that she had made such a statement before the police. We are of the opinion that her statement to the police can be taken into consideration in view of the proviso to [Section 162\(1\) Cr.PC](#).

*In our opinion the statement of the accused to his mother Smt. Dhilllo Devi is an extra judicial confession. In a very recent case this Court in *Kulvinder Singh & Anr. vs. State of Haryana Criminal Appeal No.916 of 2005* decided on*



11.4.2011 referred to the earlier decision of this Court in *State of Rajasthan vs. Raja Ram* (2003) 8 SCC 180, where it was held as under:-

"An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted



by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

In the above decision it was also held that a conviction can be based on circumstantial evidence. Similarly in *B.A. Umesh v. State of Karnataka, (2011) 3 SCC 85*, the Court relied on the extra-judicial confession of the accused.

15. Here the facts of the present case differs therefrom and on account thereof, the principle so decided therein would not be applicable. Here, there happens to be no extra judicial inculpatory confession at the hands of the appellant and so, there happens to be no occasion for consideration of such eventuality.

16. The second event for inferring guilt of the appellant is based upon section 29 of the POCSO Act which the learned lower Court in paragraph 13 of the judgment has held as under:

Para 13- Now I am discussing the evidence of adduced by prosecution. To substantiate the charges two questions arose:-

(1) *"Whether unnatural offence was committed with the victim Tapeswar Ram (P.W.7) In this regard the evidence of P.W. 4 and P.W. 5 are most relevant. P.W. 4 has specifically stated that when he went into room of school, she saw*



that her son was weeping and blood was oozing out from inside of his pant. So she proved that blood was oozing from his anus. The doctor has found two injuries at his anal and opinion of the doctor that there is sign of anal sexual assault, unnatural offence has been committed with him.

(2) Next question arose, who committed anal sexual assault with Tapeswar Ram?

In this regard P.W. 4 claimed to be eye witness of the occurrence before the Police, but she has denied her earlier version and stated that she did not see who what done. But his earlier statement recorded by the Police under section 161 Cr.P.C. has been proved by P.W.6 and P.W. 6 has stated that the informant has deposed before him that when he went into the room of the school, she was that Mritunjay Ram was doing wrong act, (unnatural offence) with her son. This statement of the I.O. has to be taken into consideration in view of the decision noted (supra). Because P.W. 4 has deposed before him that she had seen that Mritunjay Ram was doing wrong act (unnatural offence) with her son. It appears that the mother of the P.W. 4 denied that she has seen that Mritunjay Ram was committing unnatural, offence because the case has been compromised and a compromise petition dated 28-05-14 is on the record and in such type of case compromise has no relevance and the court is duty bound to protect the interest of the child victim.

Beside that section 29 of the Prosecution from Sexual



Offence Act, 2012 gave safe-guard to protect the victim. According to Section 29:-

“Where person is prosecuted for committing or abetting or attempting to commit any offence under sections, 3, 5, 7 and section 9 of this Act, the Special Court shall presume that the person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”.

In the present case accused is prosecuted for committing offence u/s 3 of the POCSO Act. it has been proved that unnatural offence has been committed with the victim Tapeswar Ram aged about 5 years and accused Mritunjay Ram is prosecuted for that offence. Nothing contrary has been proved by the defence against such presumption. As such in view of Section 29 as well as above noted decision of the Apex Court prosecution has brought the sufficient evidence to presume and prove that accused Mritunjay Ram has committed unnatural offence with the victim Tapeswar Ram, a boy of aged about five years as described under section 3 of the POCSO Act.”

17. Certainly, presumption has been allowed against appellant, subject to rebuttal but for that prosecution happens to be under obligation to prima facie place the material to draw an inference that accused is responsible for the same. It is evident from the material on record that factum of sodomy has been proved, but whether, appellant is responsible for the same, on that score there happens to be paucity of the



evidence.

18. Presumption is an additional event giving stress over commission of an occurrence by an accused, in case surfaces on record by way of substantial evidence, otherwise on the basis of merely presumption, conviction would not be recorded. If so, would allow the Court to convict an accused on no evidence that would be against basic theme of criminal jurisprudence.

19. Accordingly, the judgment/impugned order did not justify its prevalence whereupon, same is set aside. The appeal is allowed. The appellant is under custody. Hence, he is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

Mahesh/-

AFR/NAFR	AFR
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