

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.727 of 2019**

Arising Out of PS. Case No.-30 Year-2017 Thana- MAHILA P.S. District- Munger

RAJIV KUMAR Son of Late Batoran Choudhary Resident of Maa Ambe
Chowk, P.S.- Kasim Bazar, Distt – Munger. Appellant/s
Versus

THE STATE OF BIHAR Respondent/s

Appearance :

For the Appellant/s : Mr.Manoj Kumar Jha, Adv.
For the Respondent/s : Mr.Zeyaul Hoda, APP

**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT**

29-08-2019

Appellant, Rajiv Kumar has been found guilty

for an offence punishable under Section 8 of the POCSO Act and sentenced to undergo SI for three years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for one month, additionally, vide judgment of conviction dated 11.12.2018 and order of sentence dated 02.01.2019 passed by Additional Sessions Judge-1st-cum-Special Judge, POCSO Act, Munger in Mahila PS Case No. 30/2017 (G.R. No. 2820/2017).

2. Guria Devi (PW 1) gave her Fardbeyan while she was at Sadar Hospital, Munger where her daughter, victim aged about four years (name withheld), PW-1 was admitted on 07.11.2017 disclosing therein that on the same day at about 5.30 PM, while her daughter was playing outside her house, came trembling weeping and began to wipe her thigh, private part with a handkerchief. She out of anxiety inquired as to what has



happened over which, she disclosed that Rajiv Kaka got some adhesive fallen over her thigh as well as genital. She is also feeling pain. Thereafter, she consoled her and then, she detailed on query that while she was playing, Rajiv came, allured her away to his house, got closed in a room and then directed her to lie over a Chowki, where he after undressing himself came, rubbed his penis over her genital and then tried to penetrate over which, she began to cry. Till then, he got the adhesive substance fallen over her genital as well as over her thigh. Thereafter, as she was released, came to house and engaged herself in wiping the aforesaid adhesive substance. After hearing all these things, she has gone to the house of Rajiv in order to make a complaint over which, his family members engaged in quarrel attracting so many persons including her husband, whom she disclosed the incident. After seeing the condition of the victim, they took her to hospital where police and got her Fardbeyan.

3. After registration of Mahila PS Case No. 30/2017, investigation commenced followed with submission of the charge-sheet facilitating the trial, meeting with ultimate result, subject matter of the instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section



313 of the CrPC is that of complete denial. It has further specifically been pleaded that houses of both i.e. prosecution party as well as that of accused are contiguous to each other and during course of construction of double storey, certain projection of house of prosecution party was towards the house of the accused and for that, the prosecution party was directed to remove and during course thereof, there was an altercation and in the aforesaid background, this false case has been instituted. However, nothing has been adduced in defence.

5. In order to substantiate its case, prosecution has examined altogether 8 PWs out of whom PW-1, Victim, PW-2, Guria Devi, mother of victim, PW-3 Narain Chaubey, PW-4, Chulhai Rajak, PW-5, Chandrashekar Pd. Sah, PW-6, Shanta Suman, PW-7, Dr. Nishi and PW-8, Dr. Niranjana Kumar as well as has also exhibited Ext-1, Fardbeyan, Ext-1/1, Signature of attesting witnesses, Ext-2, Seizure list relating to Panty, blue half pant and a dirty handkerchief, Ext-3, another seizure list relating to undergarments of coca-cola colour, Ext-4, Medical report, Ext-5, Statement of victim under Section 164 CrPC, Ext-6, Medical report relating to ascertainment of age of the victim and Ext-7, FSL report. As stated above, nothing has been adduced in defence.



6. Learned counsel for the appellant while assailing the judgment of conviction and sentence has submitted that the finding recorded by the learned lower court is non sustainable in the eye of law. To substantiate the same, it has been submitted that none is an eyewitness to the occurrence. Medical evidence is worthless as completely ruled out the initial version, and so will give an adverse impact over the genuineness of the prosecution case.

7. The only evidence, now remains is that of victim. The status of the victim being of so tender age inspires a clear-cut picturisation on two scores. The first one, vulnerable to tutoring and the second one, she would not be able to recall the memory after a lapse of such a long duration from the alleged date of occurrence. If the status of the victim is taken together with the evidence of PW-2, she at paras-8, 9 has admitted that projection of her house was towards the land of the accused but, she has stated that at the time of construction of the house, she on her own removed the projection but that was not the real picture so, she was suggested otherwise being aggrieved thereby, cause of false implication. In the aforesaid facts and circumstances of the case, the evidence of the victim could not be relied upon as her mother has taken all possible effort to take



revenge.

8. Per contra, learned APP while supporting the findings, has submitted that the appellant was charged for an offence punishable under Section 376 IPC as well as Section 4 of the POCSO Act but, the evidence having been available on the record, does not substantiate the same, on the other hand, substantiated the case to be punishable under Section 8 of the POCSO Act, whereupon, appellant has been convicted and sentenced. So, the learned lower court after appreciating the materials available on the record in its right perspective laid down the judgment by holding the appellant to be guilty for an offence punishable under Section 8 of the POCSO Act which does not require interference.

9. PW-7 is the doctor who was one of the members of the Medical Board constituted for determination of the age of the victim and further being a Gynaecologist, she was also directed to examine the victim. In her individual capacity, she had examined the victim on 07.11.2017 itself but, her objective finding happens to be adverse to the prosecution as nothing has been found over the person as well as over the genital of the victim. However, she perceived spot over apparel which the victim was wearing at the time of examination and



accordingly, those clothes were taken out and sealed and handed over to the I.O. for chemical examination.

10. PW-8 is another member of the Medical Board including that of PW-7 who was engaged in ascertainment of the the age of the victim and the same has been ascertained to be 4 to 5 years.

11. PW-6 is the I.O. who has recorded the Fardbeyan of the victim and, also investigated the case. During course thereof, apprehended the accused. Inspected the P.O., seized the undergarments of the victim as well as that of accused, sent to the same for FSL examination. Recorded statement of independent witnesses. Received supervision note and then, after completing the investigation submitted charge-sheet. During course of cross-examination, she at para-14 has admitted that she had not mentioned in the case diary regarding sealing of seized article but she had sealed. Those articles are not present before her during course of deposition. In para-19, she has stated that during course of inspection of the P.O., she had not found spot of semen over the Chowki or at surrounding nearby. At para-24, she has stated that she had not found any spot over undergarment of the accused. Hence, she denied the suggestion that her investigation happens to be a collusive one.



12. Now coming to the remaining witnesses i.e. Pws-3, 4, and 5, they are hearsay and so, their evidences could be seen as corroborative in nature as admitted based upon whatever been disclosed.

13. PW-2 is the informant. During her examination-in-chief, she has reiterated the version. During cross-examination at para-7, 8, 9 as disclosed above is with regard to presence of house of the accused as well as she herself contiguous to each other and further, during course of construction of the house of the accused, she on her own removed the projection of her house having towards land of the accused though, at para-10, she was suggested contrary to it. In para-12, she has stated that they have tried to carry out Rajiv from his house but his family members protested and said that he had not done anything. They did not remain as they carried the victim to the hospital. In para-16, she has stated with regard to statement being given by her as well as by the victim before the police. In para-17, she has disclosed with regard to treatment having been given to the victim at the hospital. Para-18 is virtually, the gist of the occurrence and has stated that she has seen some wound over genital as well as it was swollen. At that very time, her daughter was wearing panty and Ganji. She has



seen the spot of semen over the same. She herself removed the semen from her thigh with handkerchief. Then she has stated that those clothes were given by the doctor to the police. The most surprising suggestion is at para-24 wherein, she was suggested that no occurrence had taken place in the house of Rajiv. Then she denied the suggestion that in the background of land dispute, this case has been instituted.

14. PW-1 is the victim. In examination-in-chief, she has stated that the occurrence took place about eight months ago. It was evening. At that very time, she was playing at her Darwaza. Rajiv took her to his house, closed the door and then after undressing her, lied her down. He also lied upon her and then, he had dropped something over her thigh, then she rushed therefrom shouting. Then thereafter, she was taken to hospital where she was treated. She has also given her statement before the Magistrate.

15. During cross-examination at para-3, she has stated that accused had not bitten her. At para-4, she has stated that none has tutored her to depose. In para-5, she has stated that on the date of occurrence itself, she was taken to the hospital. In para-7, she has stated that at the time of occurrence, she had worn half pant and Ganji. At para-8, she has stated that the



house of Rajiv lies by the side of her house.

16. From the evidence available on the record, it is needless to say with regard to status of PWs-2, 3, 4, 5, being corroborative in nature falling under category of hearsay. Evidence of PW-2, the mother has got additional relevance as she had seen the activity of the victim while after coming to her house, she began to remove the semen having over her thigh, genital from a handkerchief. It is needless to say that from the FSL report, Ext-7, presence of semen has been found over the panty of the victim as well as over handkerchief. So, these events interlink the assertion of the PW-1, the victim to the effect that she was subjected to some sort of lecherous activity and on that very score, she has properly identified the appellant and the most surprising feature is that she was not at all cross-examined over the material aspect.

17. The Hon'ble Apex Court in **Gian Chand & others v. State of Haryana** reported in **2013(4) PLJR 7 (SC)** it has been held:-

“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in **Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.**, AIR



2013 SC 1204 observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

18. So, after having minute observation of the evidence available on the record along with exhibits, it is found and held that the findings so rendered by the learned lower court does not attract interference. Consequent thereupon, instant appeal sans merit and is, accordingly, dismissed.



19. Appellant is under custody which he will remain till saturation of the sentence.

(Aditya Kumar Trivedi, J)

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