

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3599 of 2017**

Arising Out of PS. Case No.-151 Year-2013 Thana- RAJAOLI District- Nawada

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Vikesh Kumar @ Bhalu Son of Shri Vinod Singh, Resident of village-
Karigawn, P.S.- Rajauli, District- Nawada.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : None

For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

CAV JUDGMENT

Date : 28-07-2022

By this appeal, the appellant/accused is challenging the judgment and order dated 14.11.2017 and 24.11.2017 respectively passed by the learned 1st Additional Sessions Judge-cum-Special Judge, Nawada, in POCSO Case No.1 of 2013, thereby convicting him of the offences punishable under Section 376(2) of the Indian Penal Code as well as under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (For the sake of brevity hereinafter referred to as the 'POCSO Act') and sentencing him to undergo rigorous imprisonment for ten years apart from imposition of fine of rupees one lac for the offence punishable under Section 6 of the POCSO Act. No separate sentence was awarded for the offence punishable under Section 376(2) of the Indian Penal Code. For the sake of



convenience, the appellant shall be referred to in his original capacity as an accused.

2. Facts in brief leading to the prosecution of the accused, projected from the police report, can be summarized thus:

(A). According to the prosecution case, the accused, at about 2:30 PM of 19.07.2013, had committed penetrative sexual assault on PW 8 the victim female child who at the relevant time was aged about three and half years.

(B). PW 8 the victim female child to whom I shall be referring as 'X' along with her family members were residing at her house situated at Karigawn village in the jurisdiction of Police Station Rajauli of District- Nawada. The accused is her neighbour. On 19.07.2013 she went out for playing and visited the house of the accused. There at about 2:30 PM of 19.07.2013, the accused had committed penetrative sexual assault on the victim female child. In the meanwhile, 'X' - the victim female child could not be located. Her family members started her search in the vicinity. During the course of that search, PW 7 Bachchan Singh traced her out at the house of the accused. The victim female child was bleeding and was unconscious. PW 7 Bachchan Singh brought her back to her



house. Upon noticing her condition, her family members immediately took her to the Primary Health Centre, Rajauli, from where she was referred to Sadar Hospital Nawada. During the course of her medical treatment, on 22.04.2013, PW 8 the victim female child 'X' regained consciousness and informed her parental relative that the accused had committed penetrative sexual assault on her. Then on 23.07.2013 PW 3 Birendra Singh, grandfather of the victim female child lodged the First Information Report of the incident with the Police Station Rajauli which has resulted in registration of Crime No.151 of 2013 for the offences punishable under Section 376 of the Indian Penal Code as well as under Section 6 of the POCSO Act. The victim female child was then got examined from PW 4 Dr. Neelam Kumari, the Medical Officer of the Sadar Hospital, Nawada.

(C). The statement of the witnesses came to be recorded and on completion of the routine investigation, the accused came to be charge sheeted.

(D). The learned trial Court framed and explained the charges for the offences under Section 376 of the Indian Penal Code as well as under Section 6 of the POCSO Act against the accused. He pleaded not guilty and claimed trial.



(E). In order to bring home the guilt to the accused, the prosecution has examined in all ten witnesses. PW 1 Arvind Singh is grandfather of the victim female child. PW 2 Pramod Singh is a co-villager. PW 3 Birendra Singh is the First Informant. PW 4 Dr. Neelam Kumari is the Medical Officer of Sadar Hospital, Nawada. PW 5 to which I shall be referring as 'M' is the mother of the victim female child. PW 6 to which I shall be referring as 'G' is the grandmother of the victim female child. PW 7 Bachchan Singh is a person who had brought back the victim female child from the house of the accused after the incident. The victim female child 'X' is examined as PW 8. Mahendra Singh is examined as PW 9 and Investigating Officer Sudama Prasad Singh is examined as PW 10.

(F). The defence of the accused as gathered from the line of cross-examination of the prosecution witnesses as well as from his statement under Section 313 Cr.P.C. was that of total denial and false implication due to old enmity between the parties. According to the defence, the victim female child had climbed on the Guava tree and she slipped from that tree and due to this accident, her private part came to be injured causing bleeding. The defence has examined in all five witnesses. DW 1 Uday Singh is neighbour of the accused. DW 2 Tara Singh is



another neighbour. DW 3 Nawal Singh @ Nawal Kishore Singh is uncle of the accused. DW 4 Bipin Singh is neighbour of the accused. DW 5 Sunita Devi is mother of the accused.

(G). After hearing the parties, the learned trial Court by the impugned judgment and order was pleased to convict the appellant/accused and to sentence him as indicated in the opening para of the judgment.

3. None appeared either for the appellant or for the State in this old appeal of the year 2017. Therefore, this Court is left no alternative but to decide the same by going through the record and proceedings meticulously.

4. The case in hand is a case of rape/penetrative sexual assault on a minor female child/PW 8 'X' who, according to the prosecution case, was just three and half years of age at the time of the alleged incident. It hardly needs to be mentioned that rape is a ghastly act which leaves the victim shattered for the life as it causes not only physical but emotional and psychological trauma to the victim. Sexual activities with young girls of immature age have a traumatic effect on them, which persists throughout their life and often destruct whole personality of the victim. The victim of a sexual assault is not an accomplice, but she is a victim of lust of another person. Her



evidence stands at a higher pedestal than that of an injured witness. Evidence of victim of rape case is required to receive same weight as is attached to evidence of an injured witness. If totality of circumstances emerging on record discloses that the victim of such crime does not have any motive to falsely implicate the accused, then, it is not required to seek corroboration to her evidence and the Court generally needs to accept her evidence. While dealing with cases of sexual assault on females of tender ages, the Court is expected to shoulder great responsibility and is required to deal with such cases sensibly. Broader probabilities of the prosecution case are required to be examined in such crimes and the Court is not expected to get swayed by minor contradictions or insignificant discrepancies in evidence of prosecution which does not go to the core of the prosecution case. It is well settled that if the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the accused, the Court should not be hesitant in accepting her evidence. It is said that the rape often destroys the whole personality of the victim.

5. In the case in hand, the victim of the crime in question is a tiny tot. She is examined by the prosecution as



PW 8, after getting her statement (Exhibit-5) recorded under Section 164 Cr.P.C. through the concerned Magistrate. On perusal of the record I have noted that the learned trial Court has not shown requisite sensitivity while recording deposition of the victim female child. Her evidence was recorded on 30.03.2017 and while in the witness box she has stated her age as seven and half year. The alleged incident took place on 19.07.2013 when she was three and half years of age according to the prosecution case. Undoubtedly therefore, the victim was a child witness. As such, it is incumbent on the part of the learned trial Court to put some preliminary questions to this child witness to test the capacity of this witness to testify and to ascertain by questioning her as to her capacity to understand the occurrence and her duty to speak truth before the Court. A child of tender age can be allowed to testify if such child has the intellectual capacity to understand questions put to her and to give rational answers thereto. No such precaution was taken by the learned trial Court. However, merely because such precaution was not taken, her evidence cannot be efface from the record. Now this Court will have to evaluate the evidence of the PW 8 more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell



her and can get tutored easily. On this backdrop it is seen from the version of the PW 8 i.e., minor female child that on the day of the incident she had gone to the house of Bhalu Baba for playing and for watching TV. She further deposed that then Bhalu Baba removed her pant and committed penetrative sexual assault on her. She was then given a Guava fruit and thereafter she fell down. The victim female child further deposed that what happened thereafter is not known to her but she was being treated at the Hospital at Nawada. She has spoken that thereafter her statement was recorded. While in the dock, the victim female child has duly identified the accused as Bhalu Baba. This witness was subjected to the searching cross-examination. In cross-examination, she stated that after returning to her house she has informed the incident to her parental relatives. She denied the suggestion that her parental relatives had tutored her. She clarified that she was even treated at Patna also. She was unable to disclose the period of time during which she was at the house of the accused. As per her version, there were other people in the house of the accused. The victim female child denied the suggestion that no such incident of the penetrative sexual assault took place with her.

6. I have carefully gone through the testimony of



the victim female child. Though the learned trial Court had failed to question her in order to test her competency to depose, I have noted that witness had attained sufficient maturity and was possessing the requisite intelligence to understand the questions put to her during the course of recording of her evidence and she was in a position to answer those questions rationally. Her answers to the questions put to her during the course of recording of her testimony seems to be coherent and comprehensible. She is undoubtedly a competent witness who has narrated the ordeal faced by her at the time of the incident. Neither the traces of falsehood nor the shreds of tutoring can be found in her version. However, as a rule of prudence, one will have to search for corroboration to her version in the evidence adduced by the prosecution.

7. Medical evidence in such offences assumes great importance though as a rule it can not be said that absence thereof is fatal to the prosecution case. In the case in hand, after lodgment of the FIR on 25.07.2013, PW 8- the victim female child 'X' was got examined through PW 4 Dr. Neelam Kumari, Medical Officer of the Sadar Hospital Nawada. This Medical Officer upon general examination found the height of victim female child as two and half feet. The victim female child was



having eleven teeth in upper jaw and twelve in the lower jaw. The Medical Officer during the course of her examination has stated that there were no external injuries on the body of the victim female child as she was treated by the local doctor five days prior to her medical examination. PW 4 Dr. Neelam Kumari testified that there was tear of hymen noted during the course of internal examination of the victim female child and with this, PW 4 Dr. Neelam Kumari opined that the victim female child was subjected to the sexual intercourse. This witness proved the contemporaneous report of medical examination of the victim female child (Exhibit-2). In cross-examination, this witness has admitted that the hymen can be ruptured for several reasons. She stated that she had not found it necessary to seize clothes of the victim.

8. It is defence of the accused that the victim female child had climbed on the Guava tree from which she suffered a fall and because of friction of her body with the trunk of the tree, she suffered bleeding injury to her private part. The Medical Officer had stated in her cross-examination that the hymen can be ruptured because of several reasons. In order to probablize the defence, it was incumbent on the part of the accused to cross-examine the victim female child by putting



necessary questions regarding climbing on the Guava tree and consequential fall from that tree. Perusal of cross-examination of the victim female child makes it clear that not a single such question was put to her during the course of her cross-examination in order to probablize the defence that the hymenal tear of the victim was caused because of her accidental fall from the Guava tree. Thus, medical evidence which unerringly points out that there was hymenal tear suffered by the victim female child recently corroborates her version regarding penetrative sexual assault on her by the accused.

9. PW-7 Bachchan Singh had brought the victim female child from the house of the accused. His evidence shows that on hearing shouts, he went to the house of the accused at about 2:30 PM of 19.07.2013 and noticed that the victim female child/ PW 8 was lying there in unconscious condition with blood oozing from her private part. This witness testified that he had brought back the victim to her house and then the victim was taken to the hospital of Rajauli, thereafter the hospital at Nawada and then to the hospital at Patna. During the course of his cross-examination, PW-7 Bachchan Singh has stated that it was sister-in-law of the accused who was shouting when he had rushed to the house of the accused. It is elicited from the cross-



examination of this witness that the victim was treated in the hospital at Nawada from 19.07.2013 to 20.07.2013 and thereafter she was referred to Patna for treatment on 23.07.2013. The victim was then discharged on 27.07.2013. Exhibit-6 is the discharge card of the victim which is corroborating the version of PW 7 Bachchan Singh coming on record from his cross-examination. This discharge card of Patna Medical College and Hospital shows that the victim female child was admitted at that hospital on 23.07.2013 and was operated on 24.07.2013. The discharge-card mentioned that the case is that of sexual assault prior to five days. As seen from the discharge-card, the investigation from the patient revealed that she was bleeding because of tear at the post vaginal wall. Ultimately, the victim female child came to be discharged from this government hospital on 27.07.2013. It is thus clear from this evidence that evidence of the victim female child is gaining full corroboration from the independent source.

10. After the victim female child was brought back to her house after the incident, PW 3 Birendra Singh had noted her condition. He deposed that the victim was bleeding from the vagina and was in unconscious condition. This witness has spoken about taking the victim to the hospitals at Rajauli and



Nawada for medical treatment. He testified that the victim was unconscious till 22.07.2013 and thereafter she has disclosed the incident of commission of penetrative sexual assault on her by accused Vikesh Kumar @ Bhalu. That is how this witness had lodged the FIR of the incident on 23.07.2013. From cross-examination of this witness it is elicited by the defence that the victim was also referred for treatment at the Patna Medical College and Hospital, Patna. The discharge-card of that hospital is at Exhibit-6 which shows history of the patient as sexual assault. The PW 5- 'M'- mother of the victim female child and her grandmother PW-6 have also unanimous in stating that when the victim female child was brought to the house, she was unconscious and the blood was oozing from her private part. As per version of PW 5- 'M', the victim regained consciousness on 22.07.2013 and disclosed the incident to them by stating that the accused had committed 'dirty work' with her.

11. PW 9 Mahendra Singh- a co-villager who had noticed the unconscious condition of the victim after the incident. Similar is the evidence of PW 1 Arvind Singh and PW 2 Pramod Singh who have spoken about unconscious condition of the victim so also regarding bleeding suffered by the victim. The version of these witnesses, as such, is corroborating the



version of the victim female child PW 8 regarding the penetrative sexual assault on her.

12. Now let us advert to the defence version about the incident. DW 1 Uday Singh has deposed that in the house of the accused other family members also used to reside. He has also stated about some dispute between the parties in respect of erection of an electric pole. In cross-examination, this witness candidly admitted that he is deposing as tutored by Vinod Singh who happens to be father of the accused. Thus this evidence is of no assistance to the defence.

13. DW 2 Tara Singh is a villager who has spoken about existence of a Guava tree at the door of the house of the accused. As per his version, the victim female child fell down from that tree and sustained injuries at two or three places including injury in her private parts. His cross-examination shows that he is deposing as per the request made to him by Vinod Singh - father of the accused. Moreover, as stated earlier in absence of such questions regarding accidental fall to the victim herself, such theory can not be propounded by the version of other witnesses.

14. DW 3 Naval Singh has similarly stated that the victim had climbed on the Guava tree and had suffered a fall



causing injuries to her private part. His cross-examination reveals that he is elder brother of the father of the accused. In cross-examination he admitted that height of the tree was about seven to seven and half feet and the children are unable to climb on that tree. His evidence as such is of no assistance to the case of defence.

15. DW 4 Bipin Singh has also toed the line of other defence witnesses by stating that the victim suffered the accidental fall from the tree causing injuries to her. He admitted that he had not disclosed the incident to police. As stated earlier, in absence of questioning the victim on this aspect, such theory can not be accepted.

16. DW 5 Sunita Devi is mother of the victim. She has stated that her family comprises of six to seven members and there was no television set at her house. She stated that the victim suffered a fall from the Guava tree and sustained injuries. In cross-examination this witness admitted that she saw the victim bleeding from her vagina. This witness has not clarified as to why she has not disclosed the incident as happened to the police.

17. It is thus clear that the defence witnesses are propounding the theory of accidental fall of the victim without



questioning the victim female child on that aspect. The defence witnesses are not natural in their version. They have not clarified as to how a child of about three and half years can climb on the Guava tree to attain sufficient height for suffering a fall causing friction of the trunk of the tree with her body leading to the injury to her vagina which is a very well protected part of the female body. The ocular evidence does not show that the victim was having injury to any other place of her body. Hence, this theory of suffering an accidental fall causing injury only to the private part of the victim female child can not be accepted.

18. The net result of foregoing discussion requires me to hold that the prosecution has proved the fact that the accused had committed penetrative sexual assault on the victim female child on 19.07.2013. There is no delay in lodging the FIR of the instant occurrence because the victim, as seen from the material elicited from cross-examination of prosecution witnesses, was unconscious after the incident. She regained consciousness on 22.07.2013 and thereafter disclosed the incident to her parental relatives which resulted in registration of the crime in question on 23.07.2013.

19. In this view of the matter, I see no infirmity in



the impugned judgment and order of conviction as well as resultant sentence. The appeal is devoid of merit and the same is accordingly dismissed.

20. Let the Lower Court Records be sent back to the learned Court below with a copy of this judgment and order.

(A. M. Badar, J)

Mkr./-

AFR/NAFR	AFR
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