

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.600 of 2021

Arising Out of PS. Case No.-26 Year-2018 Thana- MAHILA PS District- Aurangabad

ANZAR ANSARI @ MD. ANZAR HUSSAIN S/o LATE ZAMIR HASAN
R/o VILLAGE-KARA, P.S-OBRA, DISTRICT-AURANGABAD.

... .. Appellant/s

Versus

THE STATE OF BIHAR

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Pushpendra Priyadarshi
Mr. Surya Prakash Singh
Mr. Anand Prakash

For the State : Mrs. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY

Date : 14.12.2023

This appeal has been preferred by the appellant under Section 374 (2) of the Code of Criminal Procedure, 1973 for setting aside the judgment dated 26.07.2021 and order of sentence dated 30.07.2021 passed by the learned Additional Sessions Judge-VI-cum-Special Judge, POCSO, Aurangabad, in G.R.Case No. 62/2018, CIS No.62/2018, arising out of Mahila P.S.Case No. 26 of 2018, whereby the appellant has been convicted and sentenced as under:-

Conviction under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
376(AB) IPC and 4 of the POCSO Act	R.I. for 20 years	20,000/-	SI for one year



342 IPC	-	1,000/-	S.I. for three months
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2. For the sake of confidentiality as well as to avoid the possibility of disclosure of the identity of the victim, who is a child about four years, her name is not being disclosed.

3. The mother of the victim (a child of 3-4 years) lodged her *fardbayan*, stating therein that on 05.09.2018 at about 11.00 A.M., the appellant brought the victim in his bathroom for giving her a bath and in that course inserted his finger into her vagina. The appellant left the victim when she started crying. The victim came to her house and narrated the occurrence to the informant. The informant went to the house of the appellant to inquire about the occurrence, where his three sons, namely, Gufran, Rizwan and Faizan threatened her to kill. They also did not allow the informant to go out from the house and she she got an opportunity, she went to the police station and narrated the occurrence. It has also been mentioned in the *fardbayan* that co-accused Gufran, one of the sons of the appellant, a man of criminal disposition, and he is an accused in a murder case.

4. On the basis of *fardbayan* of the informant, Mahila P.S.Case No. 26 of 2018 was registered under Sections 342, 376, 506 and 120(B) of the IPC and Section 4 of the



POCSO Act on 09.09.2018. After registration of the FIR, the investigation was carried out and after completion of the investigation, the investigating authorities submitted charge sheet no. 02/19 on 10.03.2019 against the appellant and his three sons, namely, Gufran, Rizwan and Faizan. The charges were framed against all the four accused persons on 05.08.2019 for the offences punishable under Sections 342, 376 and 506/120(B) of the IPC and Section 4 of the POCSO Act. The charges were read over and explained to the accused persons in Hindi, to which they pleaded not guilty and claimed to be tried.

It is pertinent to mention here that the other three accused persons, namely, Gufran, Rizwan and Faizan, who are the three sons of the appellant, have been acquitted by the learned trial court.

5. Altogether eight witnesses, including the doctor and the I.O., were examined by the prosecution to substantiate the charges against the accused persons. P.W.1 is the victim herself. P.W.2 (the informant) is the mother of the victim. P.W.3 is the grandmother of the victim. P.W.4 Farida Naz is the sister-in-law (*bhawa*) of the appellant. P.W.5 is the cousin of the victim, whereas P.W.6 is the sister of the victim. P.W.7 is the I.O. and P.W.8 is Doctor, who had medically examined the



victim girl.

6. After examination of the prosecution witnesses, the appellant and other accused persons were questioned under Section 313 of the Cr.P.C. to enable them to explain the circumstances appearing in the evidence against them. The appellant and co-accused persons answered those questions in negative and their defence is complete innocence and false implication due to dispute relating to the drainage of water.

7. The following documentary evidences have been exhibited by the prosecution.:-

Exhibit-1	Signatures of victim and her mother on 164 statement
Exhibit-2	Signature of the informant on <i>fardebayan</i>
Exhibit-2/1	<i>Fardebayan</i>
Exhibit-3	Letter to examine the victim and signature of informant on it.
Exhibit-4	Formal FIR
Exhibit-5	Medical report of the victim

8. One defence witness was also examined on behalf of the defence.

9. P.W.2, the informant and mother of the victim, stated during her deposition that the age of her daughter



is more than three years. When she was playing outside her house, the appellant came there and asked her to accompany him for taking a bath and thereafter the appellant committed the said misdeed with her daughter. The sister-in-law (*Bhawaz*) P.W.4, of the appellant came to this witness and asked her to take her daughter back to her house. The victim came to this witness crying and apprised this witness that the appellant (uncle) had inserted his hand. When the informant complained to the sister-in-law of the appellant (P.W.4), she asked this witness to complain the matter to the mother of the appellant. When she made complaint to the mother of the appellant, she sided with her son and did not pay heed to this witness. This witness came to her house and informed her husband over phone, who was in Delhi at the time of occurrence. Her husband came to the village after 2-3 days and then the FIR was lodged in Mahila police station. After lodging of the FIR, the medical examination of the victim was conducted and the statement of this witness was recorded under Section 164 of the CrPC. She deposed that except this witness, none had rendered the statement before the Magistrate under Section 164 of the CrPC. This witness identified her signature on her statement recorded under Section 164 of the CrPC. She also identified her



signature on the *fardbayan* (Exhibit-2). This witness identified the appellant, who was present in the dock at the time of recording of her evidence.

10. P.W.1 is the victim herself. On asking of the court, she disclosed her age as four years. While recording her deposition the learned court below has mentioned that the victim appeared to be wise enough in comparison to her age. The learned trial court jotted down the examination-in-chief of the victim in question-answer format. She deposed that uncle inserted his hand. When the court asked as to where the appellant inserted his hand, the witness pointed out the place after lifting her clothes. The victim stated that the appellant did nothing except the act she deposed. She identified the appellant, who was present in the dock. In her cross-examination, the victim accepted before the court that she had made such statements before the court as was told by her mother to make.

11. P.W.3 is the grandmother of the victim. She deposed that on the day of occurrence, the victim had gone for a bath where the appellant inserted finger into her private part. During her cross-examination, she stated that her vision is not good and she is also hard of hearing. She did not see the occurrence and the victim had narrated the occurrence to this



witness.

12. P.W.5 is the cousin of the victim. This witness stated that the appellant inserted his finger into the private part of the victim. During his cross-examination, this witness deposed that he is not an eye-witness to the occurrence. He was not present in his house. His house is adjacent to the house of the appellant. The victim had four sisters and one brother. They all reside in the same house.

13. P.W.6 is the elder sister of the victim. She stated that the occurrence had taken place on 19.09.2018 at about 10.00 a.m. She saw that the victim was taking a bath. She deposed further that the appellant inserted his finger into the private part of the victim. The appellant was present in the dock to whom this witness identified. During her cross-examination, this witness deposed that the appellant was about 75-80 years old. She stated further that she saw the appellant applying shampoo and soap on the person of the victim and except that she did not see anything.

14. P.W.4 is sister-in-law (*bhawa*) of the appellant. She has been declared hostile at the prayer of the prosecution. This witness stated that some altercation had taken place between the parties over drainage of water from the house of the



informant into the house of the appellant. Co-accused Rizwan, the son of the appellant, had asked the informant to refrain from draining the water, due to which the altercation had taken place. This witness expressed her complete ignorance about the occurrence relating to the victim. She deposed further that the informant falsely implicated the appellant and all his three sons.

15. P.W.8 is the doctor, who medically examined the victim. She deposed that she did not find any injury on the person of the victim. No any abrasion, injury was found on the neck, chest, thigh and the leg of the victim. No any injury was found on vulva or her private part. No tears, no bleeding nor any type of abrasion was found. Hymen was totally intact.

As per the opinion of the doctor, no finding on her body or private part was seen suggesting penetration of finger into her private part. This witness identified her signature on medical report, which was marked as Exhibit-5.

16. The I.O. was examined as P.W.7. She deposed that she identified the signature of the then SHO on endorsement of the FIR which is Exhibit-2/1. She also identified the signature and the handwriting of the then SHO on Exhibit-4 which is formal FIR. After taking over the charge of the investigation, she inspected the place of occurrence, recorded



the statements of the witnesses, and after completion of investigation, she submitted the charge sheet on 10.03.2019. The statement of the informant has also been recorded under Section 164 of the CrPC in which she stated the similar thing, as mentioned in her *fardbayan*.

17. The victim was also produced before the Magistrate for recording of her statement under Section 164 of the CrPC. The learned Judicial Magistrate made efforts to record her statement and asked some basic questions like occupation of her father etc, but the learned Magistrate recorded that due to very tender age, the victim could not understand those questions.

18. One witness, namely, Md. Iftekhar was also examined on behalf of the defence. This witness deposed that the informant is the wife of his cousin. The houses of both the parties are situated in front of each other. He stated further that on 01.09.2018, some altercation had taken place between both the parties for the reason that the hen of the informant had entered into the house of the appellant and after that altercation, the informant had blocked the drainage of the appellant and for that again an altercation took place between the parties. On the third day, a conciliation meeting (*Panchayaiti*) was convened,



but the informant and her family members declined to abide by the decision of the *Punches*. This witness along with other *Punches*, went to their houses when the informant and her family members had refused to follow the decision of the *punches*. During his cross-examination, this witness deposed that the appellant did not file any case relating to the dispute of drainage of water.

19. The learned counsel for the appellant submitted that the appellant has falsely been implicated in this case with concocted story due to dispute over drainage of water between the parties. He submits that the occurrence is alleged to have taken place on 05.09.2018, but the matter was reported after four days i.e. on 09.09.2018 without explaining the delay in lodging of the FIR. Non-explanation of inordinate delay in lodging of the FIR itself makes the prosecution case doubtful. He also submitted that the informant states the date of occurrence as 05.09.2018, but her daughter (P.W.6) states the date of occurrence as 19.09.2018, as such, the statements of the informant and that of her daughter are contradictory and this contradiction is not a trivial contradiction, but is a material contradiction, which goes to the root of the matter and makes the prosecution case untrustworthy. The learned counsel



submitted further that the victim is admittedly a minor girl of 3-4 years of age and the organs of a girl of tender age are delicate, but no mark of injury was found in medical report corroborating the allegation of insertion of finger. He submitted further that it is very easy to tutor something to a child of tender age and get it be reproduced from the mouth of the child as and when required. He submitted further that due to the vendetta arising out of the dispute of drainage of water, at the behest of her parents, the tutored child (alleged victim) reproduced the things in the court, which were infused by her parents into her brain, with an intention to implicate falsely not only an octogenarian innocent but also all his three sons. He submitted further that there is allegation against the appellant who is admittedly an old man of 75-80 years that he inserted his finger into the private part of the victim, but the doctor did not find even a minor or slightest injury on her private part, and on the basis of medical examination, the doctor (P.W.8) opined that she did not find any evidence of penetration of finger into the private part of the victim. As such, the medical report totally negates the allegation levelled against the appellant. The learned counsel submitted further that even if it is assumed to be true that the appellant was bathing the victim, the intention of



touching her body was not with the sexual intent. Usually, the parents or elderly people of the house facilitate the child in bathing and while bathing they apply shampoo and soap on his/her person, and merely because that, their touch to the child cannot be said to be a bad touch, rather it is only for bathing of the child.

20. On the other hand, the learned Additional Public Prosecution for the State has submitted that the informant, the victim and family members of the informant fully supported the prosecution case and they are unanimous in their statements that the appellant inserted his finger into the private part of the victim, who is a minor girl of tender age and there is nothing on the record to discredit the testimony of the witnesses. She submitted further that the victim was medically examined after five days of the occurrence which was the reason why no evidence of insertion of finger could be detected.

21. We have perused the impugned judgment of the trial court and carefully perused the lower court's records. We have given our thoughtful consideration to the rival submissions advance on behalf of the parties.

22. As discussed above, there is allegation that the appellant took the victim, who is a girl of four years of age, into



his bathroom to give her bath and during bath he inserted finger into her private part. The prosecution witnesses, who are family members of the informant, supported the occurrence and they stated that the appellant while facilitating bath to the victim inserted finger into her private part. The occurrence is alleged to have taken place on 05.09.2018 and the matter was reported on 09.09.2018. There is no plausible explanation for delay in lodging of the FIR. The informant attempted to explain the delay by stating in her *fardbayan* that the sons of the appellant threatened them, due to which the family members of the informant could not come out from their house, but the informant, during her deposition in court, deposed that at the time of occurrence, her husband was in Delhi and after his arrival from Delhi, the case was lodged. In her deposition, she did not depose that due to threatening given by the sons of the appellant, the FIR could not be lodged. Further, the occurrence, as per the informant and other witnesses had taken place on 05.09.2018, but the daughter of the informant (elder sister of the victim) who claims herself to be an eye-witness, stated the occurrence to have taken place on 19.09.2018 and P.W.5, the cousin of the victim, states the occurrence to have taken place on 02.09.2018. As such, there is material contradiction in



depositions of the witnesses in respect of the date of occurrence. Moreover, the ocular evidence is not corroborated by the medical evidence.

23. On a cumulative and broad analysis of the evidence adduced at the trial, it can be easily discerned that according to the prosecution's case itself, it was not unusual for the appellant to have taken the victim, aged less than four years, for a bath. P.W.6 had seen that the appellant had applied soap on the body of the victim while bathing her. From the evidence, it also transpires that the appellant is an elderly person. In course of giving bath to a child less than four years, it is natural that the appellant's finger would have touched different parts of the body of the victim. We, however, do not find any credible and trustworthy evidence to substantiate that the appellant had inserted his finger into the vagina of the victim to make out a case of penetrative sexual assault within the meaning of Section 3 of the POCSO Act or 'rape' within the meaning of Section 375(b) of the IPC.

24. Accordingly, the impugned judgment dated 26.07.2021 and order of sentence dated 30.07.2021 passed by the learned Additional Sessions Judge-VI-cum-Special Judge, POCSO, Aurangabad, in G.R.Case No. 62/2018,CIS



No.62/2018, arising out of Mahila P.S.Case No. 26 of 2018, are set aside.

25. Consequently, the appeal is allowed.

26. Since the appellant Anzar Ansari @ Anzar Hussain is in custody, let him be released forthwith, if not required in any other case.

(Nawneet Kumar Pandey, J)

I agree
(Chakradhari Sharan Singh, J)

(Chakradhari Sharan Singh, J)

HR/-Kundan

AFR/NAFR	NAFR
CAV DATE	10.10.2023
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