

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.640 of 2023

Arising Out of PS. Case No.-214 Year-2019 Thana- BIHTA District- Patna

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Amit Kumar, S/o Shri Awadhesh Singh, Resident of Village- Bisarpur, P.S.-
Naubatpur, District- Patna (Bihar). Appellant/s

Versus

The State of Bihar. Respondent/s

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Appearance :

For the Appellant/s : Mr. Dhananjay Kumar, Advocate
Mr. Abhinav Pandey, Advocate
For the Respondent/s : Mr. Ramchandra Singh, APP

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CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
CAV JUDGMENT

Date : 30.10.2024

The present appeal preferred by appellant/
convict Amit Kumar against judgment of conviction dated
02.12.2022 and the impugned order of sentence dated
05.12.2022 passed by the learned Additional District and
Sessions Judge VII-cum-Exclusive Special Judge (POCSO
Act), Patna, in CIS No. Special (POCSO) Case No. 30 of
2019, arising out of Bihta P.S. Case No. 214 of 2019
whereby and whereunder the appellant/convict has been
convicted for the offences under Section 376(2)(f) of the
Indian Penal Code and Section 6 of the POCSO Act and
sentenced him to undergo R.I. for ten years and fine of
Rs. 30,000/- (Rupees thirty thousand only) for the
offence under Section 6 of the POCSO Act and in default



of payment of fine, he shall further undergo two months of R.I.

2. The crux of prosecution case, as it appears from the written information of the informant, namely, Pinki Devi (PW-3) that the accused/appellant was giving tuition to her daughter aged about 6 years since last three years usually between 4-5 P.M. at her house. On 23.02.2019 appellant was teaching to her daughter and son alongwith three other childrens of locality as usual. In due course of teaching, he asked her son and other childrens to go out from the room. She thought that the teacher/appellant had left her house but when she went to room, she saw that the accused/appellant has made her daughter naked by taking her in the corner of the room and was committing rape upon her, she raised cry. Upon her cry her sister-in-law, namely Punam Devi and her Gotni came running there and caught the accused/appellant. In the meantime, neighboring people also arrived there. Thereafter, she informed to police,



upon which police arrived there and arrested the accused/appellant. Thereafter, she submitted her written application before the police and this case was instituted.

3. With aforesaid written information of PW-3/informant, Bihta P.S. Case No. 214/2019 was lodged for the offences under section 376(2)(f) of the Indian Penal Code and Section 6 of the POCSO Act.

4. After investigation, police submitted charge sheet No. 151 of 2019 on 21.05.2019 under Section 376(2)(f) of the Indian Penal Code and Section 6 of the POCSO Act. Thereafter, learned trial court took cognizance against the appellant for the offence under Section 376(2)(f) of the Indian Penal Code and Section 6 of the POCSO Act for trial and disposal.

5. To established its case before the learned trial court, the prosecution altogether examined total of six witnesses, namely, **PW-1** Kumari Usha Sinha (I.O. of this case) **PW-2** Sanjay Kumar Yadav (father of the victim), **PW-3** Pinki Devi (mother of the



victim/informant), **PW-4** Victim herself, **PW-5** Poonam Kumari (Aunty of the victim) and **PW-6** Dr. Prema Singh, who examined the victim.

6. The prosecution also exhibited following documents during the trial to substantiate its case which are as:-

Exhibit-P1 -The endorsement made over the informant written report dated 23.02.2019 by the officer-in-charge of the Bihta Police Station.

Exhibit-P-2 The formal FIR.

Exhibit-P-3 (PW-3) The written report dated 23.02.2019.

Exhibit-P-4 (PW-4) The statement recorded under Section 164 Cr.P.C.

Exhibit -P-5 (PW-6) The Medical Report.

7. On the basis of evidences, as surfaced during the trial, the appellant/convict was examined under Section 313 of the Cr.P.C., where he denied all the evidences as surfaced against him during trial and claimed his complete innocence and false implication.



8. No defence witnesses/documents were examined on behalf of accused/appellant during the trial.

9. On the basis of aforesaid evidences, learned trial court convicted the appellant and passed order of sentence, as aforesaid, being aggrieved with, appellant/convict preferred the present appeal.

10. Hence the present appeal.

11. It is submitted by Mr. Dhananjay Kumar learned counsel appearing on behalf of the appellant/convict that the false implication of appellant can be easily gathered that the mother of victim mentioned the age of victim child as six years in her written information, whereas upon her medical examination she was found between the age group of 12-13 years. Such gap of age was mentioned intentionally as to aggravate the allegation to bring the case within the frame work of "aggravated penetrative sexual assault". It is submitted that the statement of victim appears different what she recorded under Section 164 of Cr.P.C.



and testified during trial as PW-4. It is submitted that major contradictions amongst testimony of witnesses regarding occurrence was overlooked by learned trial court, which is sufficient to suggest that appellant was implicated falsely with mala fide intent due to neighbourhood dispute. It is submitted that all witnesses are family members and no independent witnesses were examined in this case. Considering the age of the victim, it was submitted that child witness must be examined more carefully and with greater circumspection because there is strong probability of tutoring and therefore, a child witness must find adequate corroboration before acting upon it. In support of his submission, learned counsel relied upon the legal report of Hon'ble Supreme Court as available through ***Panchhi & Ors. Vs. State of U.P.*** reported as ***1998 (7) SCC 177.***

12. Learned counsel further submitted that "finger testing" is not a scientific test as held by Hon'ble Supreme Court through its land mark judgment available



through ***State of Jharkhand Vs Shailendra Kumar Rai & Pandav Rai, Criminal Appeal 1441 of 2022 dated 31st October, 2022***, reported in ***(2022) 14 SCC 299***.

It is also submitted that if the medical report i.e. regarding "blood stained vulva" be believed than certainly clothes of victim or appellant must stained with blood but none of the prosecution witnesses found that any blood spot was found on the clothes of the victim, which makes the case highly improbable particularly, when the fact of case suggest that appellant caught by mother of the victim/PW-3, while committing penetrative sexual assault upon victim. In support of his submission, learned counsel submitted that the medical experts opinion is not a conclusive proof of any fact in existence and it is only of advisory/corroborative character.

13. In support of his aforesaid submission, he relied upon the legal report of Hon'ble Supreme Court as available through ***Vishnu Vs State of Maharashtra*** reported as ***(2006)1 SCC 283***.



14. Learned counsel further submitted that the clothes of victim and accused/appellant was seized by the police but was not sent for forensic examination. Appellant was also not examined in view of Section 53A of Cr.P.C., despite of arrest, while committing offence. It is also submitted that victim was also not examined medically in view of Section 164 A of Cr.P.C., particularly when medical examination was conducted on same very day within six hours of occurrence. Non-scientific examination as discussed above, creates a serious doubt *qua* crime in question.

15. It is further submitted by learned counsel that the learned trial court while examining the victim did not put any preliminary questions to her before oath as to assess her capability to understand the questions regarding crime in question, and, therefore, the testimony of victim should not be accepted, as tutoring cannot be ruled out. In support of this submission, learned trial court relied upon the legal report of Hon'ble Supreme



Court as available through ***Pradeep Vs. State of Haryana*** reported in ***2023 SCC OnLine SC 777***. It is submitted that false implication can be gathered from the deposition of PW-3 and PW-5 itself, who was none but the mother and aunt of the victim. It is pointed out that both these witnesses projected themselves to be an eye-witness of the occurrence. It appears that crime in question was first noticed by PW-3/mother of victim, where she found accused/appellant only standing besides victim and victim found naked. The clothe of victim was found opened. The pant of appellant was also found opened by PW-3 and he was found doing wrong work, thereafter, she raised alarm. It is submitted that the victim started to shout after seeing PW-3. Upon alarm, PW-5 came and she found that the appellant was in penetrative position with victim, which is almost impossible. It is submitted that if the testimony of victim be taken into consideration, it appears that the act of appellant was forcible but upon medical examination, no



injury was found on any other body part, which was conducted immediately after 4-5 hours of the occurrence. It is submitted that in view of aforesaid false implication cannot be ruled out and, therefore, conclusion of doctor that finding confirms assault is appears doubtful.

16. It is submitted that as per map shown *qua* place of occurrence submitted through charge sheet, it appears an open room as it was an open terrace (*dalan*) and, therefore, the entire prosecution story appears false on its face on this ground alone. It is pointed out that the father of victim/PW-2 is a habitual offender and involved in many criminal cases, and, therefore, as appellant was in financial disputes with uncle of victim, namely, Mukesh, he was falsely implicated with present case. It is submitted that the appellant categorically stated in her examination under Section 313 of the Cr.P.C. that he was implicated falsely due to financial dispute. While concluding the argument, learned counsel submitted that the age of child victim was not proved during trial in view



of Section 94(2) of Juvenile Justice Act, 2015 and as also approved by Hon'ble Supreme Court through ***Jarnail Singh v. State of Haryana, (2013) 7 SCC 263,*** and in that case the only option is to accept her age as per her medical finding, which is based upon radiological examination, and if it is so then her age must be above than 12 years and, therefore, the conviction as recorded under Section 6 of the POCSO Act by taking aggravation as available under Section 5(m) of the POCSO Act is bad in eye of law, as victim cannot be said below 12 years on the date of occurrence. It is also submitted by learned counsel that when the trustworthiness of prosecution witnesses appears doubtful then in such case non-examination of accused/appellant under Section 53A of Cr.P.C. becomes fatal to the prosecution. In support of his submission, learned counsel relied upon the report of Hon'ble Supreme Court as available through ***Chotkau Vs State of Uttar Pradesh*** as reported through ***AIR 2022 SC 4688.***



17. In view of aforesaid, it can be said safely that the prosecution failed to established the **“penetrative sexual assault”** upon victim, which is an essential ingredient as to convict appellant either under Section 4 or 6 of the POCSO Act, and, therefore, the impugned judgment is fit to be quashed/set aside. It is also submitted that above discussion of factual aspects of this case did not allow to import the provision of presumption as available under Sections 29 and 30 of the POCSO Act regarding presumption.

18. Mr. Ramchandra Singh, learned APP while arguing on behalf of the State submitted that beside victim, this occurrence is supported by two other prosecution witnesses i.e. PW-3 and PW-5, who are none but the mother and aunt of the victim. It is submitted that the medical report of victim, appears in full corroboration as her vulva was found bleeding. The doctor clearly opined that finding confirms assault. While concluding argument, it is pointed that considering the



rural background of the witnesses, certain minor contradictions are bound to be surfaced and on this score alone, the conviction of appellant cannot be quashed/set aside particularly when it appears fully corroborated with medical finding and also supported by eye-witness of the occurrence.

19. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by the learned counsel appearing on behalf of the parties.

20. As to re-appreciate the evidence, while disposing the present appeal, it is apposite to discuss the evidences available on record, which are as under:-

21. PW-4/victim is appearing the most important witness of crime in question. It appears from the record that no preliminary questions was asked to ascertain her understanding *qua* crime in issue before entering oath which *prima facie* appears in contrary to



established principle of law, as available through **Pradeep Case's (*supra*)**. It appears from her deposition that she entered into oath directly and deposed in her examination-in-chief that she was the student of class 4th of Bright Kids School, Bihta. It was deposed that occurrence was of 23.02.2019, which took place at about 5:00 PM. She was taking tuition from appellant alongwith 4-5 childrens. The appellant was her home tutor, where appellant usually did bad work with her and said her not to disclose the same to her parents. On the date of occurrence, she was asked to open her pant by appellant and when she refused to do so, she was taken to the corner of room, where her mouth was pressed by appellant. Thereafter, appellant also opened his pant and started to do some indecent work forcefully. She was also threatened as not to disclose the incident to anyone, failing which he might kill her. It was categorically stated by her that she know the meaning



of forcible indecent work and also of rape. Thereafter, she deposed categorically that she was raped by the appellant. She also identified her signature on her statement recorded under Section 164 of the Cr.P.C., which upon her identification exhibited as **Exhibit-P4/PW-4**. She also identified appellant during the trial. She was examined medically.

21.1 Upon cross-examination, it was stated by her that one Pinki, Anu, Ritika and Saumya together studied with her. Her family is a joint family, where she lived with her aunty Poonam, uncle Ajay Kumar, uncle Mukesh, grandmother Surya Devi and grandfather Suresh Rai. It was stated by her that her father is doing the business of property dealing/land broker. It was stated that her nick name is Sakshi, whereas, as per school register, her name is Aprajita Singh. She stated that occurrence was narrated by her to police but it was not reported in her writing.



She stated her name to police as Aprajita. Her statement was recorded at her home. She also went to police station alongwith her parents. Police visited her home at about 7:00 PM. She went police station after police visit at her home, where she was inquired by police for ten minutes, which was reduced in writing by police. Police did not seized her clothes. She was taking tuition from appellant since last four months. It was stated that at the time of occurrence, her mother and aunty was available at home. At the time of occurrence, she was wearing long frock and pant. Her pant was completely opened by appellant, who was wearing jeans at that time. Appellant opened only chain. Her cloth was not stained with blood. In the background of aforesaid depositions of victim, it would be apposite to discuss her statement recorded under Section 164 of Cr.P.C., where it was stated by her that appellant made an attempt to commit



penetrative sexual assault/rape upon her and whenever it was attempted, she felt pain. The occurrence was witnessed by her mother and thereafter, she said it to her aunty that appellant making attempt to commit penetrative sexual assault/rape upon her since last three days. She also stated in her statement recorded under Section 164 of the Cr.P.C. that appellant ejaculated some substance in her urethra after opening his chain.

21.2 Making a comparative analysis of aforesaid testimony and statement of victim under Section 164 of Cr.P.C., it appears that several major contradictions surfaced *qua* crime in question. **Firstly**, the allegation of ejaculation is absent in her testimony, while she deposed before the court as PW-4 as she stated under Section 164 of the Cr.P.C. **Secondly**, she stated that crime in question was noticed first by her mother/PW-3 and, thereafter,



three days she stated the occurrence to her *aunty/fua*, who examined as PW-5. This fact also not stated before court while deposing as PW-2. **Thirdly**, she stated in her examination-in-chief itself that the appellant opened his pant also but subsequently, she stated that appellant opened his chain of jeans only. The **fourth** and major contradictions, which appears out of these two narration is that the victim as PW-4 categorically stated that appellant committed rape upon her but as per her statement recorded under Section 164 of the Cr.P.C. it appears that appellant only made an attempt to commit penetrative sexual assault and whenever, it was made, she felt pain.

21.3 The victim was examined medically on same day at about 11:15 PM i.e. within six hours of the occurrence. Doctor upon medical examination, found hymen torn and also found vulva stained with blood, whereas no other injury was found upon any



part of the body. As per medical examination, she was found between age group of 12-13 years. If the version of the victim be accepted on its face, there must be some spermatozoa, as she categorically stated through her statement recorded under Section 164 of the Cr.P.C. that appellant ejaculated inside her urethra but upon medical examination, no spermatozoa was seen. Having aforesaid evidence in hand, it would further apposite to discuss the deposition of PW-2 and PW-3, who are none but the father and mother of the victim respectively. It appears from the deposition of PW-2 that occurrence took place on 23.02.2019, somewhere between 4-5:00 PM, at that point of time he was in Bihta Market, where he was informed by her wife on phone as to come home, whereafter he came to his home and, thereafter, told by his wife/PW-3 that appellant during tuition class opened pant of their daughter/victim and



his chain of pant was also opened. Taking note of their conditions, she slapped appellant, whereafter nearby relatives came over there knowing the occurrence. PW-2 called Bihta Police, who arrived and arrested appellant. It was deposed by him that at the time of occurrence, the age of her daughter was six years old.

21.4 Upon cross-examination, it was deposed that he is working as a land broker in Bihta, though he is not a registered property dealer. It was stated that occurrence did not took place before him and he came to know about the occurrence on his mobile phone. It was stated that his wife/PW-3 is not carrying any mobile, whereas he disclosed his mobile phone as 9905665787. He informed police somewhere between 5:10-5:15 PM and, thereafter, ten minutes police arrived. Occurrence was narrated to police by his wife/PW-3. Police remains there for



five minutes and, thereafter, took away accused/appellant with them. Police did not seized the cloth of either victim or of appellant. He denied to implicate appellant due to bad village politics.

22. PW-3, is Pinki Devi, who is the mother of the victim and claimed herself to be an eye-witness of the occurrence. She supported the date and time of occurrence as 23.02.2019, where occurrence took place between 4:00 to 5:00 PM. It was deposed by her that when tuition class become over, the other students left the room but the cycle of appellant was remain parked there. Upon which, she got some suspicion and went up to the room, where she found that her daughter was standing in room beside wall and was in naked conditions. When victim saw her, victim started to shout, whereafter her both sisters-in-law (*Gotani and Nanad*) came over there and after holding appellant started to slap appellant. It was



deposed that the pant of appellant was opened and pant of victim was also opened and appellant found doing wrong work, thereafter she called police, whereafter several people gathered there. It was deposed that present case was lodged by her. Written information was recorded by the police, which was explained to her and found it correct, she signed on it, which upon her identification exhibited as **Exhibit-P3/PW-3**. She identified appellant during trial.

22.1 Upon cross-examination, it was stated by her that victim was the student of St. Josheph School, Bihta. She was a regular student. She named other students, who were taking tuition alongwith victim as Kunal Kumar, Sonu Kumar and Monu Kumar. It was stated that she informed police at about 5:00 PM from her phone. She did not mention her mobile number in FIR as it was not asked by police, whereas she disclosed her mobile number as



9905665787. She narrated occurrence to police herself and by that time also, statement of her both sisters-in law and brother-in-law, namely Mukesh was also recorded by police. After visiting police station, she went to government hospital. The victim was not admitted there. The cloth of victim was not seized by police.

23. PW-5 is sister-in-law of PW-3, namely, Poonam Kumari. She narrated the occurrence in the manner as it was stated by PW-3. She supported the date and time of occurrence. She came to the place of occurrence upon alarm raised by PW-3, where she found that the pant of appellant was opened and the victim was also not in her pant and she saw appellant inserted his penis inside urethra of the victim. She also raised alarm and slapped appellant. The mother of victim went police station and lodged case. Her statement was lodged by police somewhere between



8:00 to 8:30 PM. At the time of occurrence, she was at the house of victim. It was stated that victim did not cry at the time of occurrence. It was stated that police was informed by PW-3. The cloth of victim was not seized during investigation. The appellant was not examined medically, and when she entered into house, the appellant was found establishing physical relation with victim in standing position. She stated that she also made her statement before the police that she saw the pant of victim and appellant was opened and he was found inserting his penis inside the urethra of the victim. An attention was drawn to her that she made statement to police that when she entered into room, she saw appellant closing his chain, which was denied by her.

24. PW-1 Kumari Usha Sinha, who is the investigating Officer of this case, who deposed that he took in-charge of Bihta Police Case No. 214/2019 on



23.02.2019. After taking charge of investigation, he perused the written information of the PW-3. He identified the endorsement of Bihta SHO Manoj Kumar on formal FIR which was in his handwriting and signature, which upon her identification exhibited as **Exhibit-1**. He also identified the signature of the then SHO Manoj Kumar on formal FIR, which upon her identification exhibited as **Exhibit-2**. After taking charge of investigation, she recorded the statement of Sanjay Gop (not examined), Shashank Yadav (not examined), Poonam Devi wife of Ajay Kumar (examined as PW-5). Poonam Devi W/o Ramjivan Rai (not examined), Om Prakash Rai (not examined). She accompanied victim during her medical examination, thereafter she visited the place of occurrence and found that the room was not fitted with door. After investigation, she submitted charge-sheet bearing No. 151/2019 dated 21.05.2019 for the offences under



Section 376(ii)(f) of the Indian Penal Code and Section 4 of the POCSO Act. It was stated by her that the appellant was also examined medically but she could not collect his medical examination report. She did not examine the age of victim during investigation. It was stated by the parents of victim that she studied at home only and is not admitted with any school. She did not find any objectionable material at the place of occurrence.

25. PW-6 Dr. Prema Singh, who was posted as Medical Officer on 15.08.2019 at PHC, Bihta, Patna and examined the victim at about 11.15 AM on 23.02.2019 and found following injuries on her person:-

On examination, Patient was conscious, Wt. 19 Kg., Height- 4 feet, Teeth-upper 13, lower 13.

Marks of identification-

i. An old scar mark over right temporal area.

ii. A til over right hand.

Pelvic Examination- Vagina admits one finger.

Discharge clear. Hymen torn.



5- Vulva- surrounding area blood stained. (Lacerated)- Other parts of body no injury.

6- X-ray report- Department of radiology PMCH, Patna. X-ray no- 272 dated 25-02-2019.

7- X-ray both elbow (AP view)- There is Non fusion of the epiphysis of the medial epicondyle of humerus on both sides. There is Non fusion of the epiphysis of head of radius on both sides. In females the epiphysis of the medial epicondyle of humerus fuses at the age of 14 years. In females the radial head epiphysis fuses at the age of 14 years.

8- X-Ray Both Wrist (A.P. view):- There is Non fusion of the distal ulnar epiphysis on the both sides. There is Non fusion of the distal radial epiphysis on the both sides. In females the distal ulnar epiphysis fuses at the age of 17 years. In females the distal radial epiphysis fuses at the age 16.5 years.

9- Conclusion- Age of victim 12-13 years Vaginal smear slide (Dept of pathology PMCH Patna) Lab no. 45 dated 25-02-2019.

No spermatozoa seen. above finding confirms assault done.

10- This report has been written and prepared and signed by me. On her identification this report is marked **Exhibit- P5 (PW-6)**.

Cross Examination on behalf of the Defence-

She posted at Bihta Primary Health Center since January 2012 and currently still posted there. The victim was medically examined on 23.02.2019. This report Exhibit-5 is dated 15.08.2019.

12. It is not mentioned in this report Exhibit-5 with whom the victim came to the Primary Health Center.



13. The pathology report is from Patna PMCH, and it is dated 25.02.2019. She was never been posted as a medical officer at PMCH Patna.

14. The pathology report dated 25.02.2019 was prepared by the pathologist at PMCH.

15. It is correct to say that she was not a pathologist. It is true that her Bihta Primary Health Center does not have the laboratory and pathology facilities for spermatozoa testing. It is also correct that this facility was not available on 23.02.2019.

16. Her Bihta Primary Health Center did not have the facilities for an age-related examination by a radiologist. These facilities are still not available.

17. The radiology report dated 25.02.2019 is from PMCH Patna. It is not from her Bihta hospital. This was not prepared in her presence.

18. It is correct that in her **Exhibit 5**, X-ray no. 272 dated 25.02.2019 is mentioned, but that X-ray was not taken by her. The X-ray was taken at PMCH. She was not present at PMCH, and she cannot say who took the X-ray.

Similarly, the Lab No. 45 dated 25.02.2019 mentioned in **Exhibit-5** is also a pathological report that was not prepared in her presence. She cannot say who prepared it at PMCH.

4. No injury was found on other parts of the body. It is not true that her examination report is flawed.

26. It would be apposite to reproduce para nos. 7, 8, 9 and 10 of the ***Pradeep's case (supra)***,



which reads as under:-

"7. We have carefully considered the submissions. The fate of the case depends on the testimony of the minor witness Ajay (PW-1). Under Section 118 of the Evidence Act, 1872 (for short, "the Evidence Act"), a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short "Oaths Act") is relevant. Section 4 reads thus:

"4. Oaths or affirmations to be made by witnesses, interpreters and jurors.—(1) Oaths or affirmations shall be made by the following persons, namely:—

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2)"

8. Under the proviso to sub-Section (1) of Section 4, it



is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW-1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and state why he is of the opinion that the child understands the duty of speaking the truth.

9. *It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.*

10. *Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court."*



27. It would be apposite to reproduce para nos. 11 and 12 of the **Panchhis's case (supra)**, which reads as under:-

"11. Shri R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide Prakash v. State of M.P. Baby Kandayanathil v. State of Kerala; Raja Ram Yadav v. State of Bihar and Dattu Ramrao Sakhare v. State of Maharashtra."

28. For the sake of convenience or for the better understanding of the fact, it is apposite to reproduce the provision of Sections 164A and 53A of the



Cr.P.C., which is as under:-

"Section 164 A Medical Examination of the victim of rape

[1] Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

[2] The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely—

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition



of the woman; and

*(vi) other material particulars
in reasonable detail,*

*[3] The report shall state precisely the
reasons for each conclusion arrived at.*

*[4] The report shall specifically record that
the consent of the woman or of the person
competent, to give such consent on her
behalf to such examination had been
obtained.*

*[5] The exact time of commencement and
completion of the examination shall also be
noted in the report.*

*[6] The registered medical practitioner
shall, without delay forward the report to
the investigating officer who shall forward it
to the Magistrate referred to in section 174
as part of the documents referred to in
clause (a) of Sub-Section (5) of that
section.*

*[7] Nothing in this section shall be
construed as rendering lawful any
examination without the consent of the
woman or of any person competent to give
such consent on her behalf."*

***Section 53 A Examination of person
accused of rape by medical practitioner***

*[1] When a person is arrested on a charge
of committing an offence of rape or an
attempt to commit rape and there are
reasonable grounds for believing that an
examination of his person will afford
evidence as to the commission of such
offence, it shall be lawful for a registered
medical practitioner employed in a hospital
run by the Government or by a local
authority and in the absence of such a
practitioner within the radius of sixteen*



kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

[2] The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

[i] the name and address of the accused and of the person by whom he was brought,

[ii] the age of the accused,

[iii] marks of injury, if any, on the person of the accused,

[iv] the description of material taken from the person of the accused for DNA profiling, and".

[v] other material particulars in reasonable detail.

[3] The report shall state precisely the reasons for each conclusion arrived at.

[4] The exact time of commencement and completion of the examination shall also be noted in the report.

[5] The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that



section."

29. Upon the aforesaid discussed evidence, the most non-convincing fact regarding occurrence, which appears that PW-5, who claims herself to be an eye-witness of the occurrence found appellant inserting his penis inside the urethra of the victim. Prior to her entering to the room, PW-3/mother of victim already came there and seeing her, victim started to shout, and came to her. The deposition of PW-5 appearing false on its face and appears to be stated only to aggravate the allegation to establish assault under the category of penetrative sexual assault. PW-3 entered room before entering of PW-5 but she did not find appellant in the position as it was narrated by PW-5. It appears from the deposition of PW-2, who is none but the father of the victim and a land broker that there is no mobile with her wife and, therefore, the testimony of PW-3 as to



inform the occurrence with her mobile phone is appearing also contradictory. The author of FIR **(Exhibit-1)** is PW-3 herself that when she found appellant doing some wrong work with her daughter, she shouted, whereafter PW-5 came over there and caught appellant while running away from there. This version also cast a doubt over testimony of PW-5, as discussed above.

30. Admittedly, no cloth of victim or appellant was seized. Nothing objectionable was found at place of occurrence by Investigating Officer (PW-1). It appears from the deposition of PW-2 that occurrence was reported to police by him, which further creates a doubt regarding claim of PW-3, as she informed the police regarding occurrence.

31. From the perusal of record, it also appears that the parents of victim including victim herself consistently deposed that on the date of



occurrence, the age of victim was about six years, whereas, she found upon radiological examination somewhere between 12-13 years, almost double to her age. If this version of the victim and prosecution witnesses i.e. PW-2 and PW-3 be accepted regarding age i.e. of six years old, it appears almost impossible to commit a penetrative sexual assault in standing position as deposed by PW-5, where the age of appellant was about 21 years, who was a full grown adult. Height of victim as per medical report, appears 4 ft. where appellant was 21 years old, full grown adult, it appears almost impossible to stand with victim in position by inserting penis in urethra of the victim as deposed by PW-5. Moreover, the appellant was apprehended on spot as per the case of prosecution, he was medically examined as per version of PW-1/I.O. of this case but his medical examination was not brought on record, which may be



a good corroborative piece of evidence. Hence, from the aforesaid discussions of the evidence, it appears that prosecution failed to established the allegation of **"penetration as to any extent"** to bring an offence within the meaning of Section 3 of the POCSO Act. When the **"allegation of "Penetration"** appears doubtful, the conviction under Section 4 or 6 of the POCSO Act cannot be said to be proved, the conviction under Section 6 of the POCSO Act for aggravated penetrative sexual assault also appears doubtful in view of radiological examination of the age of victim, where she found between 12-13 years, contrary to her age six years as deposed by PW-2 and PW-3. No school certificate was brought on record despite of the fact that victim herself claimed to be regular student of a school located at Bihta.

32. Interestingly, son of the informant who was also taking tuition from appellant was not



examined, who could be a best witness otherwise. Moreover, it was stated by PW-3 that appellant was giving tuition to victim since last three years, whereas victim deposed that she was taking tuition since last four months only.

33. In view of above, it can be said safely that prosecution failed to established the foundational aspects of the crime in question as to import the presumption available under Sections 29 and 30 of the POCSO Act.

34. Hence, appeal stands allowed.

35. Accordingly, the impugned judgment dated 02.12.2022 and the impugned order of sentence dated 05.12.2022 passed by the learned Additional District and Sessions Judge VII-cum-Exclusive Special Judge (POCSO Act), Patna, in CIS No. Special (POCSO) Case No. 30 of 2019, arising out of Bihta P.S. Case No. 214 of 2019 is hereby set aside/quashed.



36. Appellant namely, Amit Kumar is in custody in connection with this case, he is directed to be released forthwith, if not required in any other case.

37. Fine, if any, paid be returned to the appellant immediately.

38. Office is directed to send back the trial court records along with a copy of this judgment to the trial court, forthwith.

(Chandra Shekhar Jha, J)

veena/-

AFR/NAFR	AFR
CAV DATE	17.10.2024
Uploading Date	30.10.2024
Transmission Date	30.10.2024

