

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1554 of 2018**

Arising Out of PS. Case No.-198 Year-2017 Thana- MUZAFFARPUR SADAR District-
Muzaffarpur

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Sunil Kumar Jha son of Bane Lal Jha, resident of Railway Quarters, Bibiganj
P.S.- Sadar, District- Muzaffarpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Aaruni Singh, Advocate
	:	Mr. Sandip Kumar Gautam, Advocate
For the Respondent/s	:	Mrs. Anita Kumari Singh, APP

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**CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT**

Date : 25-07-2024

This appeal has been preferred by the appellant/convict under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') challenging the judgment of conviction dated 27.02.2018 and order of sentence dated 28.02.2018 passed by learned 1st Additional Sessions Judge-cum-Special Judge, POCSO Act Muzaffarpur in Trial No. 37 of 2017 (arising out of Sadar P.S. Case No. 198 of 2017), whereby the concerned Trial Court has convicted the appellant/convict for the offences punishable under Section 377 of the IPC and Section 6 of



the POCSO (in short Protection of Children from Sexual Offences) Act and he has been sentenced to undergo rigorous imprisonment for ten years and fine of Rs. 1,00,000/- and in default of payment of fine, further undergo simple imprisonment for six months for the offence punishable under Section 6 of the POCSO Act.

2. The case of prosecution in brief is that on 13.04.2017 informant/P.W.-3 gave *fardbeyan* before SHO of Sadar Police Station alleging therein that he resides in Railway Quarter No. G270A at Bibiganj with his family. One Sunil Kumar Jha resident of same locality, since couple of months back, was committing unnatural offences with his minor son (11 year old), for which he and his family members had no clue. It is also alleged that in the morning of 11.04.2017 and in the evening of 12.04.2017 his father/P.W.-4 saw aforesaid Sunil Kumar Jha (appellant/convict) committing unnatural sexual activity with his minor son. When he went to enquire into the matter with Sunil Kumar Jha he became furious and thereafter people of society said him to go for legal action and thereafter he



lodged present case.

3. On the basis of aforesaid *fardebayan*, the police registered a case, as Sadar P.S. Case No. 198 of 2017 dated 13.04.2017 for the offence punishable under Sections 377 of the IPC and under Sections 4, 8, 18, 21 of the POCSO Act, where after the investigation, the police submitted charge-sheet.

4. The learned Jurisdictional Magistrate/Special Court, after perusal of record and materials collected during the course of investigation, took cognizance for the offences under Sections 377 of the IPC and Sections 4 & 6 of the POCSO Act.

5. The learned trial court on the basis of materials collected during investigation, framed charges against appellant/convict for the offences under Section 376 of the IPC & Section 6 of the POCSO Act, which he pleaded "not guilty" and claimed trial.

6. To substantiate its case, the prosecution has examined altogether seven witnesses. They are:-

Prosecution Witnesses No(s).	Names
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P.W. 1	Rajeev Jha (nephew of P.W. 4)
P.W. 2	Om Prakash Jha (son-in-law of P.W. 3)
P.W. 3	Vikash Pathak (informant, father of victim)
P.W. 4	Chandeshwar Pathak (grandfather of victim)
P.W. 5	Nishant Kumar (victim)
P.W. 6	Dr. Naveen Kumar
P.W. 7	Uday Kumar Singh (I.O.)

7. Apart from the oral evidence, the prosecution has also relied upon following documents/exhibits in order to prove the charges:-

Exhibit No(s).	List of documents
Exhibit-1	Formal FIR
Exhibit-2	Seizure List signed by informant.
Exhibit-3	Statement of victim recorded under Section 164 of the Cr.P.C.
Exhibit-4	Injury Report of Victim
Exhibit-5	Seizure List
Exhibit-6	Charge-Sheet
Exhibit-7	F.S.L. Report

8. On the basis of evidence as surfaced during the trial, the learned trial court has examined the



appellants/accused under Section 313 of the Code, where he completely denied his involvement by denying the incriminating evidences surfaced during the trial and stated that he was implicated with this case falsely and claimed his innocence. It is further stated by him that he was implicated falsely, when he raised demand to return Rs. 50,000/- which was given to the family of victim as loan by him.

9. Three defence witnesses were also examined by appellant/convict during the trial in defence but no document was exhibited in support. Defence witnesses are:-

Defence Witnesses No(s).	Names
D.W. 1	Sanjay Kumar
D.W. 2	Surendra Sahni
D.W. 3	Mahesh Prasad

10. Taking note of the evidence as surfaced during the trial and the arguments as advanced by the parties, the learned Trial Court has convicted appellant/convict for the offences under Section 377 of IPC and Section 6 of the POCSO Act and sentenced him in the manner as stated above.



11. Being aggrieved with the aforesaid judgment of conviction and order of sentence, the appellant/convict has preferred the present appeal.

12. Hence, the present appeal.

Argument on behalf of the appellant/convict:

13. It is submitted by learned counsel appearing for the appellant/convict that the judgment of conviction as recorded by learned trial court cannot be said within the framework as approved under the law. In support of his submission learned counsel submitted that victim could not established as a "child" within Section 2(1)(d) of POCSO Act, during the trial as his age was not established in terms of provisions as available under Section 94 of Juvenile Justice Act. In support of his submission learned counsel relied upon the report of Hon'ble Supreme Court, as available through **Jarnail Singh Vs. State of Haryana**, reported in **[(2013) 7 SCC 263]**. It is submitted that oath was administered to victim while recording his statement under Section 164 of the Cr.P.C. and also while deposing before the court as P.W. 5 without examining the fact



whether, victim child was in a position to understand the nature of questions put to him. In support of his submission learned counsel relied upon the report of Hon'ble Supreme Court as available through **Pradeep Vs. State of Haryana**, reported in **[2023 SCC Online SC 777]**.

14. It is further submitted by learned counsel that deposition of victim child/P.W. 5, is totally contradictory to that of his statement as recorded under Section 164 of the Cr.P.C. and it appears that certain major incriminating facts were deposed by him first time, during the trial. It is submitted that from the deposition of P.W. 3/informant, it appears that there was enmity related with payment of Rs. 50,000/- for, which a demand was raised by appellant/convict few days before the occurrence. It is submitted that appellant/convict was not examined in view of Section 53 A of the Cr.P.C. and in support of his submissions 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]**.



15. Beside the above, learned counsel also submitted that P.W. 6/doctor stated in his cross-examination that the injury as found in anus of victim can be caused due to constipation and moreover, alleged pant which was seized by investigating officer, upon forensic examination failed to show any blood stain or semen negating allegation on its face.

16. It is further submitted that P.W. 4, who is grandfather of the victim is the eye-witness of the occurrence, on two different occasions, when penetrative sexual assault was committed upon victim/P.W. 5. It is submitted that P.W. 4 remains silent after witnessing first occurrence, which alleged to be committed inside his home. There is no any evidence that victim boy cried or shows any reaction, during the occurrence, which otherwise appearing hard to believe in view of injury report as available on record as proved during trial by P.W. 6, though he deposed that this type of injury may be caused due to constipation or by hard and blunt substance. It is submitted that only on next day of the first occurrence, present case was lodged, which



is nothing but an afterthought, when panchayati to return loan of Rs. 50,000/- was failed. This case is a classic example that how minors are being made instrumental for false implication, to settle disputes like civil and other criminal cases.

17. While concluding the argument it is also pointed out by learned counsel that the statement of appellant/convict recorded under Section 313 of the Cr.P.C. also appears very cryptic and in mechanical manner and on this score alone, the conviction as recorded by learned special court be quashed and set aside.

Argument on behalf of State:

18. Learned APP appearing on behalf of respondent-Stated, while opposing the appeal submitted that victim specifically deposed against appellant/convict as to commit penetrative sexual assault upon him, when his age was below 12 years. It is further submitted that mere penetration is sufficient to established offence for penetrative sexual assault and in support of her submissions learned APP relied upon the report of Hon'ble Supreme Court, as



available through **State of Uttar Pradesh Vs. Sonu Kushwaha**, reported in **[(2023) 7 SCC 475]**.

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 learned counsel appearing on behalf of the parties.

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

21. It appears from the statement of the victim as recorded under Section 164 of the Cr.P.C. that before lodging the present case on several occasions appellant/convict committed penetrative sexual assault upon him where on 11th of May the act of appellant/convict came into knowledge of his family as on the same very day the act committed by appellant/convict was witnessed by his grandfather/P.W. 4. He was also medically examined and categorically stated that his date of birth is 31.12.2005. He is silent about any occurrence which was alleged to be committed on 12th of May, 2017 contrary to the statement



of P.W. 3/informant and P.W. 4.

22. It appears from deposition of P.W. 5 that appellant/convict committed penetrative sexual assault upon him before 4-5 months i.e., from the date of his deposition, which was recorded on 16.01.2018.

23. If the version of victim be taken into consideration then certainly date of occurrence could not be earlier to the month of August 2014, whereas in actual the occurrence took place on early days of April 2014 i.e., 11 and 12 of April, thus by creating a doubt for entire occurrence. It also appears that before entering into oath while recording the statement under Section 164 of the Cr.P.C. and also before deposition in court as P.W. 5, the learned trial court failed to put questions for its satisfaction, whether victim was able to understand the nature of questions put to him. This satisfaction is a prime consideration in terms of Section 118 of the Indian Evidence Act.

24. It would be apposite to reproduce the para nos. 7, 8, 9 and 10 of the **Pradeep Case (supra)**,



in aforesaid context 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.

25. It appears from the depositions of P.W. 3, who is the father of the victim and informant of this case that he came to know about the occurrence from his father/P.W. 4 and also from his son P.W. 5/victim. Where he categorically stated that the offence of penetrative sexual assault was committed upon his son on 11/12.04.2017. He failed to disclose anything about the date of birth of son/victim/P.W. 5. It also appears that P.W. 4, who is an eye-witness of the occurrence and grand father of victim, stated that occurrence is of 11/12.04.2017. It also appears that he remained silent, even witnessing the first occurrence, which alleged to took place on 11.04.2017, inside his house. He reported the occurrence to the family members only when he witnessed the act on 12.04.2017 and to the police, pursuant to which present FIR was lodged. He is silent on the date of birth of the victim/P.W. 5, doctor/P.W. 6 also failed to depose, whether victim was examined radiologically as to ascertain his age. No efforts appears to be made to declare victim as child in view of settled legal provisions as available under Section 94 of the Juvenile Justice Act, which



appears approved by Hon'ble Supreme Court through its report as available through **Jarnail Singh Case (supra)**. In absence of this fundamental aspect, presumption as available under Section 29 and 30 of POCSO Act, cannot be imported to this case. Having all such backgrounds, it is clear that the prosecution did not make any efforts to established victim as a "child" within the meaning of Section 2(1)(d) of the POCSO Act, during the trial.

26. Beside the above, P.W. 1 & P.W. 2 are hearsay witnesses and their evidence not appears so relevant to discuss. It also appears that appellant/convict was not examined medically in view of Section 53 A of the Cr.P.C., particularly in the circumstances, when he was apprehended immediately after the occurrence by the family members and police on 12.04.2017, moreover, from the perusal of formal FIR it appears that police station is at a distance of 200 meters only but the occurrence was reported on 13.04.2017. The delay part is appearing unexplained.

27. It further appears from the deposition of I.O./P.W. 7 that he contradicts the deposition as made by



P.W. 3, P.W. 4 & P.W. 5 *qua* occurrence before the Court, as same was not disclosed to him through their statements, as recorded under Section 161 of the Cr.P.C. during the course of investigation and, therefore, they appear to depose first time *qua* occurrence regarding certain material aspects, as discussed above. In such circumstances these witnesses cannot be categorised as witness which is "wholly reliable" in nature.

28. Besides above, the manner in which statement of appellant/convict under Section 313 of Cr.P.C. was recorded by learned trial court same appears in very cryptic and mechanical manner without putting incriminating evidences as surfaced during the trial.

29. In view of aforesaid discussions, it is apparent that prosecution failed to established its case during trial, beyond reasonable doubts.

30. Accordingly, the appeal stands allowed.

31. The impugned judgment of conviction dated 27.02.2018 and order of sentence dated 28.02.2018 passed by learned 1st Additional Sessions Judge-cum-Special Judge,



POCSO Act, Muzaffarpur in Trial No. 37 of 2017 (arising out of Sadar P.S. Case No. 198 of 2017) is, hereby, set aside.

32. Accordingly, above named appellant is acquitted from the charges levelled against him.

33. If the appellant is in custody in connection with this case, he is directed to be released forthwith, if not required in any other case.

34. Office is directed to send back the trial court records along with a copy of the judgment to the court below forthwith.

(Chandra Shekhar Jha, J.)

S.Tripathi/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	30.08.2024
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