

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.75 of 2023

Arising Out of PS. Case No.-170 Year-2017 Thana- MAHILA P.S. District- Nalanda

Rakesh Kumar Paswan @Rakesh Kumar s/o ramuchit paswan r/o mohalla-
chero thana, p.s.- Harnaut, District- Nalanda, Bihar

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ashutosh Nath, Adv. Mr. Nishant Kumar Sinha, Adv. Mr. Arvind Kumar, Adv.
For the Respondent/s	:	Mr. Amritanshu Dangi, Adv. Mr. Ramchandra Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 21-08-2024

1. Heard learned counsel appearing on behalf
of the parties.

2. The present appeal preferred by
appellant/convict, namely, Rakesh Kumar Paswan @
Rakesh Kumar against judgment of conviction dated
20.09.2022 and order of sentence dated 28.09.2022
rendered by learned Additional Sessions Judge-VI-cum-
Special Judge, POCSO Court, Nalanda at Biharsharif in
POCSO/G.R. No. 21 of 2017 in connection with Mahila
Police Station Case No. 170 of 2017, whereby and



where under appellant/convict has been convicted for the offence punishable under Section 376 of the Indian Penal Code and Section 4/8 of the POCSO Act and sentenced to undergo rigorous imprisonment for 10 (Ten) years and fine of Rs. 10,000/- (Rupees Ten Thousand) under Section 4 of POCSO Act and in default of payment of fine, he shall further undergo imprisonment for a period of three months. The appellant has also been sentenced to undergo R.I. for one year each under Sections- 342 and 506 of I.P.C. It has also been ordered that all the above said sentences shall run concurrently.

3. Case of prosecution in brief, as it is available from written information of informant/PW-4 (Father of victim/PW/3), that on 17.09.2017 at 1.30 P.M., his daughter, left home for a coaching test. She came back at 5.30 P.M. on the same day but started being lost and silent. On 21.09.2017, after inquiry, she disclosed that Rakesh Kumar (appellant), who was also



the Mukhiya of Chero Panchayat, having a rented room, near her coaching center, on 17.09.2017, took her to his said rented room and raped her and also threatened her that if she disclosed to anyone about the alleged incident, then he would murder her father (informant/PW-4) and brothers.

4. On the basis of aforesaid written information, FIR No. 170 of 2017 was lodged under sections 376 of I.P.C. and also under Section 4/8 of the POCSO Act dated 21.09.2017, by police station (Mahila Thana), Nalanda, against the appellant.

5. To established its case before the learned trial court, the prosecution altogether examined total of ten witnesses, namely, PW-1 Ashok Singh (grandfather of the victim), PW-2 Uma Devi (Mother of the victim), PW-3 (Victim), PW-4 Sanjeev Kumar (Father of the victim/informant), PW-5 Awdesb Yadav (Witness), PW-6 Pinki Prasad (I.O.) and PW-7 Prabha Kumari (I.O.), PW-8 Dr. Kumkum Kumari (Medical Officer), PW-9 Dr. N.K.



Baryar (Medical Officer) and PW-10 Mrs. Shefali Narayan, the then A.C.J.M, who recorded the statement of victim/PW-3, under Section 164 of the Criminal Procedure Code (in short Cr.P.C.).

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

Exhibit 1 -Signature of the victim in the written report.

Exhibit 2 – Signature of the victim Medico Report.

Exhibit 3- Seizure List

Exhibit 4 – Medico legal report

Exhibit 5- Signature of P.W.-9 on Medico Legal Report.

Exhibit 6- Original Mark sheet of the victim issued by BSEB, Patna

Exhibit 7- F.S.L. Report.



Exhibit 8- Statement of victim
recorded under section 376 of the IPC
and Section 4/8 of POCSO Act.

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 incriminative evidences as surfaced against him during trial and claimed his complete innocence and false implication.

8. To establish his innocence before the learned trial court, appellant altogether examined total of two witnesses, DW-1 Ajay Kumar and DW-2 Sujeet Kumar in his defence.

9. Upon the basis of evidences as surfaced during the trial and also by taking note of the argument as advanced by the learned counsel appearing on behalf of the parties, the learned trial court convicted appellant/convict and passed order of sentence, as stated hereinabove.



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

11. Hence the present appeal.

12. It is submitted by learned counsel arguing on behalf of the appellant/convict, that the findings of conviction as recorded by Id. trial court is completely illegal, perverse and against the materials as available on record, therefore same is fit to be quashed and set aside. In support of his submission, it is submitted by learned counsel that the Id. court below failed to appreciate that there is an unexplained delay of 5 days in registering of FIR, as for the alleged occurrence dated 17.09.2017, it was lodged on 21.09.2017. It is also pointed out that there are major contradictions surfaced between the statement of victim as recorded under Section 164 of the Cr.P.C., *qua* her depositions as made before the learned court as PW-3. It is submitted that as per the deposition of victim



herself and also from the deposition of her mother (PW-2) and father (informant/PW-4), it appears that at the time of occurrence she was aged about 13 years and was a school going child but no evidence in support of her date of birth was brought on record from her first attending school and her matriculation certificate was only placed on record, when trial was almost to conclude which was read as evidence, not in the manner as prescribed under Section 294 of the Cr.P.C.. It is submitted that even municipal birth certificate was not made available before submitting charge-sheet. It is submitted that in absence of all such documents the age of victim could only be ascertained from radiological examination.

13. In view of Section 94(2) of Juvenile Justice Act which is also affirmed by Hon'ble Apex Court through its judgment in the matter of **Jarnail Singh vs. State of Haryana** as reported in **2013 (7) SCC 263**, only prescribed documents are taken into consideration while



ascertaining victim as a "child" within the meaning of Section 2(1)(d) of the POCSO Act.

14. It would be apposite to reproduce para nos. 22 and 23 of the ***Jarnail Singh's case (supra)***, which reads as under:-

"22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

"12. Procedure to be followed in determination of age.- (1) *In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the



court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be



the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

"23. *Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed*



in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

15. In this context, it is further submitted that the victim was examined medically by PW-8, who is Dr. KumKum Kumari, where her age was ascertained on the basis of radiological examination between 15 to 16 and if benefit of $\pm$ 2 years be given then certainly it can be said that victim on the date of occurrence was major



and therefore convictions as recorded for the offence under Section 4 of the POCSO Act by Id. trial court is appearing questionable and doubtful.

16. It is also submitted by learned counsel that from the statement of victim it appears that when she was physically abused by her parents, present incident, came to their knowledge (i.e., PW-3 and PW-4) as disclosed by her and thereafter she called up the appellant and finally under pressure of her parents the present case was lodged, otherwise the narration of her statement as recorded under Section 164 of the Cr.P.C. and also from her depositions it appears that she went on her own to the rented house of the appellant, which was near to her coaching center, suggesting that she was the consenting party and therefore the basic ingredients of rape i.e., "against her will" not appears to be approved and in such circumstances the conviction of the appellant for the offence under Section 376 of the IPC is also appearing bad in eyes of law. It is submitted



that considering the nature of contradictions as available from the statement/testimony of victim, conviction of appellant on her sole testimony as recorded in present case is not appearing convincing, as victim failed to qualify the test of "sterling witness".

17. In this context, it would be apposite to take a guiding note *qua* "**sterling witness**", as per ratio laid down by Hon'ble Supreme Court in the case of ***Santosh Prasad vs. State of Bihar, (2020) 3 SCC 443*** where the Hon'ble Apex Court held in paragraph 5.4.2 and 5.4.3 categorically held that who can be said to be a "**sterling witness**". It is observed and held as under:

5.4.2. *In Rai Sandeep [Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21 : (2012) 3 SCC (Cri) 750] , this Court had an occasion to consider who can be said to be a "sterling witness". In para 22, it is observed and held as under: (SCC p. 29)*

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test



the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the



core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

5.4.3. *In Krishan Kumar Malik v. State of Haryana [Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130 : (2011) 3 SCC (Cri) 61] , it is observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.*

18. Learned counsel also submitted that during the course of investigation the cloth of multi-color printed bed-sheet was seized from the rented house of the appellant, upon which the rape was alleged to be committed upon but nothing incriminating detected, upon its forensic examination like blood, semen or vaginal fluid, which is sufficient to doubt alleged crime in question. It is also submitted that appellant was an elected representative i.e., *Mukhiya* of same locality and if the statement of PW-5, made during cross-examination be taken into consideration, though he was declared hostile it appears that the mother of the victim



approached appellant on several occasions in search of job prior to this occurrence which was denied by the appellant, whereupon she threatened him to implicate in false case. It is sufficient to suggest that the present implication is nothing but a malicious prosecution out of previous enmity. While concluding argument it is submitted by learned counsel that the Id. trial court considered all aforesaid facts *qua* rape in favour of appellant but found him "guilty" for the only reason that victim was below the age of 18 years on the date of occurrence as per her matriculation examination and therefore her consent was not accepted as a valid consent under the law, being a minor. While concluding the argument it is submitted that surprisingly with the same set of evidence the Id. trial court convicted the appellant under Section 376 of the IPC and under Section 4 of the POCSO Act but hold that prosecution could not succeed to prove charge leveled against the accused under Section 8 of the POCSO Act. It is



submitted that Section 8 of the POCSO Act is a penal provision for the offence committed under Section 7 of the POCSO Act which is for "sexual assault". It is submitted that if prosecution with same set of evidence failed to establish that there was no "sexual intent" to touch the private parts of the victim or makes the victim touch the private parts of the person as defined under Section 7 of the POCSO Act, how it would be possible to commit penetrative sexual assault. It is submitted that offence under Section 7 of the POCSO Act, with same set of evidence, is bound to prove, if charge is available to prove the guilt further in view of Section 3/4 of the POCSO Act, and therefore the finding of Id. trial court is completely perverse and illogical and on this ground alone the judgment of convictions as recorded by Id. trial court can be quashed or set aside.

19. Learned counsel for the appellant also submitted that the conviction under Section 342 of IPC is also not convincing when Id. trial court held that victim



was the consenting party, and accompanied appellant out of her own will to his rented room, near her coaching center. In this context it is submitted that threat as advanced to cause death to brother of victim appears contradictory out of statement of victim. It is also submitted that out of depositions of prosecution witnesses no offence under Section 506 of the IPC is made out and therefore convictions as recorded under Section 506 is also bad in eyes of law.

20. Learned APP while opposing the appeal submitted that Id. trial court rightly convicted the appellant for the offences under Section 376 of the IPC and Section 4 of the POCSO Act and beside that also for the offence committed under Sections 342 and 506 of the IPC, as victim was found minor on the date of occurrence as per her matriculation certificate, where her date of birth is mentioned as 12.06.2005. It is submitted that said document was brought on record during the trial and being public document it was rightly



read in view of Section 294 of Cr.P.C. by Id. trial court. It is also submitted that Id. trial court rightly held that consent of minor is not a valid consent under law. Learned APP also pointed out that matriculation certificate is a valid document which may be considered for ascertaining the age of victim of crime in question in view of Section 94(1)(2)(i) of Juvenile Justice (Care and Protection of Children) Act, 2015. It is further pointed out that the physical condition as deposed by victim/PW-3 when she regained her sense was sufficient to presume that a penetrative sexual assault was committed upon her and therefore same cannot be viewed with doubt. It is also pointed out that previous enmity *qua* false implications as deposed by PW-5 cannot be taken into consideration as he was declared hostile by the prosecution.

21. 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.

22. It would be apposite to reproduce Section 3 of the POCSO Act alongwith Section 375, 340 and 503 of the I.P.C., which reads as follows:-

"3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

375. Rape.--A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.-Against her will.

Secondly.-Without her consent.



Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.-With or without her consent, when she is under sixteen years of age.

340. *Wrongful confinement.-- Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.*

503. *Criminal intimidation.-- Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.*

23. The fact of this case to be appreciate in
the background, that FIR of the occurrence dated



17.09.2017 was lodged after five days i.e., 21.09.2017, when victim was found lost and silent by informant/PW-4. According to narration as available under Section 164 of the Cr.P.C., as stated by victim, that she disclosed about the occurrence to her parents when corporeal punishment was given to her for her late coming to house on the alleged date of occurrence i.e., 17.09.2017.

24. It appears from the impugned judgment that Id. trial court out of depositions of PW-3/victim, PW-4/ informant and other prosecution witnesses held that the physical relationship between the appellant and victim was out of their consent. In this context, a detailed and elaborate discussions was made in impugned judgment itself but the entire discussion appears missing with most important legal ingredients i.e., "penetration", which is necessary legal ingredients as to constitute offences, either under Section 3 of the POCSO Act or Section 375 of the IPC. Until and unless



“penetration to any extent” as mentioned in Section 3 of POCSO Act not appears established, the convictions could not be recorded either under Section 4 of POCSO Act or also under Section 376 of the IPC.

25. Coming back to the fact of this case, a cursory examination of evidences are required to be done to ascertain, whether “penetration” within meaning of Section 3 of the POCSO Act or within the meaning of section 375 of IPC was committed upon or not. The most important and relevant witness in this context is victim/PW-3 herself. It appears from examination-in-chief of PW-3 that she lost her sense after taking cold-drinks and regain to her self only at about 5 P.M., whereafter she found that her leggings (*payjama*) was pulled down and blood was oozing out of her private part and it was paining also. Whereafter she asked appellant that what happened with her, where he said not to disclose to anyone otherwise he will kill her brothers and father, who is not in a position to do anything being



blind. Only thereafter she presumed that appellant had committed rape/penetrative sexual assault upon her. This version of victim only suggest that her presumption regarding penetrative sexual assault/rape was the threat of appellant as not to disclose the incident to her parents and it was not her physical condition, what she noticed immediately after regaining to herself. After dressing up, she came out from the room and on way back to her home, when she again met with appellant, with whom she accompanied on his motorcycle, who dropped her near Khwara bridge. Interestingly all these statements appearing absent from statement of victim as made under Section 164 of the Cr.P.C. which is exhibit-8, and appears to be supported by PW-10, who is Mrs. Shefali Narayan (the then ACJM) who recorded said statement. It appears that the allegation of rape/penetrative sexual assault on the basis of presumption by noticing her physical condition was raised first time during the trial. She appears to be examined by a lady doctor, namely,



Dr. Kumkum Kumari/PW-8 on 22.04.2017, where no such physical injury was noticed which may suggest that any penetrative sexual assault was committed upon her.

26. In view of deposition of victim/PW-3, there is all probability that bed-sheet which was seized by Investigating Officer must contain either of blood, semen, or vaginal swabs, which upon forensic examination negated the presence of anything like that in view of exhibit- P/7 (FSL report of bed sheet). Hence the foundational aspect as to constitute "penetrative sexual assault" not appears convincing in view of aforesaid discussion. It is settled position of law that presumption as available under Section 29 of the POCSO Act can only be imported, when prosecution succeed to establish foundational aspect of alleged offence.

27. Conviction cannot be secured merely by importing the presumptions as available under any law including POCSO Act, as per settled principles of criminal



jurisprudence. Hence, this Court do not find any ground to believe that prosecution established legal ingredients of "penetration", in view of above discussion and in such circumstances the conviction as recorded by Id. trial court on the sole reason that victim was minor at the time of occurrence on the basis of her matriculation certificate, which was not even appears to be taken on record as prescribed under Section 294 of Cr.P.C. occurrence as a consensual physical relation is not a valid finding. The victim further deposed that she didn't appears to receive injury in any other part, except her private part, from where she noticed heavy bleeding, her clothes was found stained with blood but she deposed as not to handover her blood-stained cloth to investigating officer, creating a further doubt *qua* penetrative sexual assault.

28. In this context, it is further important to discuss the facts which appears out of depositions of PW-6 i.e., Investigating Officer of this case, namely,



Pinki Prasad. During her cross-examinations, an attention was drawn to her to earlier statement of PW-2/mother of victim, namely, Uma Devi, where she categorically stated that the statement of PW-2 was recorded on 24.09.2017, where she didn't stated before her that on 19.09.2017 she went to market along with her daughter (victim). She also stated that PW-3/victim never stated before her that on 17.09.2017 appellant committed rape upon her. She also stated that no cold-drink bottles etc. were recovered from the place of occurrence. She affirmed that victim stated before her that when she came out from the shop, appellant asked her to follow him and she started to follow. This witness further stated that victim never made statement before her that the appellant came to her on motorcycle and threatened her to kill her brother and father, whereafter out of said threat, she accompanied him on motorcycle. This witness further stated that victim never made statement before her that she regained to her self by 5



P.M. and when she came to her sense, found her leggings(*payjama*) pulled down and also found blood oozing out of her private part. In view of all such contradictions, occurrence of rape/penetrative sexual assault further became doubtful and therefore findings of Id. trial court *qua* "consensual physical relation" was nothing but imaginary finding, where Id. trial court appears exceeding beyond all available evidences on record. PW-1 is grandfather, PW-2 is mother and PW-4 is father of the victim, who deposed *qua* penetrative sexual assault on the basis of hearsay input as given to them by PW-3/victim herself and therefore appears not relevant *qua* finding that whether any penetrative sexual assault was committed upon victim.

Finding *qua* false implications:

29. It appears from the impugned judgment that Id. trial court did not believe the submission of false implication as nothing available on record, which can suggest that the mother of victim approached the



accused for getting job or to get benefit of welfare scheme being run by the government as appellant was elected representative. Admittedly, appellant was a local Mukhiya (village head). It is settled position of law that the evidence of hostile prosecution witness cannot be outrightly rejected and relevant part of testimony be taken into consideration, if it appears relevant.

30. In this context, it would be apposite to take a guiding note *qua* **"hostile witness"**, as per ratio laid down by Hon'ble Supreme Court, as available through ***Balu Sonba Shinde vs. State of Maharashtra, (2002) 7 SCC 543*** and ***Hari vs. State of U.P., (2021) 17 SCC 111***, where the Hon'ble Apex Court held in paragraph nos. 14 and 15 of ***Balu Sonba Shinde case (supra)*** and paragraph nos. 28 and 29 of ***Hari case (supra)*** as under:

"14. *It is at this juncture the prosecutor declared her a hostile witness and prayed for permission to cross-examine the witness — upon, however, the leave being granted, PW 5 totally decried the factual aspect as contained in the complaint lodged, though,*



however, the thumb impression was admitted — while it is true that declaration of a witness to be hostile does not ipso facto reject the evidence — and it is now well settled that the portion of evidence being advantageous to the parties may be taken advantage of — but the court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance. Reference in this context may be made to the decision of this Court in State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360 : 1996 SCC (Cri) 1278] wherein this Court stated: (SCC p. 363, para 7)

"It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

15. *It is on this backdrop the evidence of PW 5 if analysed, totally negates the prosecution case.*

28. *It is well settled that the evidence of prosecution witnesses cannot be rejected in toto merely because the prosecution chose to treat them as hostile and cross-examined them. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof [Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450 : (2006) 1 SCC (Cri) 661] . It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken,*



he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of testimony which he finds to be creditworthy and act upon it [Syad Akbar v. State of Karnataka, (1980) 1 SCC 30 : 1980 SCC (Cri) 59 : AIR 1979 SC 1848].

29. *Even if the witnesses have turned hostile, their evidence can be accepted, if they are natural and independent witnesses and have no reason to falsely implicate the accused. In Mrinal Das v. State of Tripura [Mrinal Das v. State of Tripura, (2011) 9 SCC 479 : (2011) 3 SCC (Cri) 810] this Court observed that credible evidence even of a hostile witnesses can form the basis for conviction in a criminal trial."*

31. Suggestions was given *qua* false implication to PW nos -1, 2, 3 and 4 but they declined to it which is very obvious being victim/informant and her relatives. Now the PW-5, who is an independent prosecution witness and not related with the victim, though turns hostile during trial, but upon cross-examination stated that the father of victim is blind and much before lodging this case the mother of the victim approached appellant on several occasions for getting a suitable job for her and when it was declined by



appellant she threatened to implicate him in false case.

32. The DW-1 also appears to depose on same line. DW-2 also stated that he is the witness of the fact that mother of victim/PW-2, was in taking terms with appellant since 2017, where she demanded a suitable job for her and also asked for benefit of government scheme from appellant being "Mukhiya". The depositions of defense witnesses cannot be ignored in view of deposition of PW-5 and also in view of settled legal position as available through ***Balu Sonba Shinde case (supra)*** and therefore the probability of false implication of appellant/convict cannot be ruled out straightaway and in this context, the finding of Id. trial court also not appears convincing.

33. Now one of the important aspect which appears to remain consider, that whether it is justified to hold a person "guilty" for the offence committed under Section 3 of the POCSO Act, by acquitting the person from the charges of Section 7/8 of the POCSO Act, with



same set of evidences.

34. In this context it would be appropriate to reproduce the Section 7 of the POCSO Act :-

"7. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

From the aforesaid definition it is clear that penetration is not a thing which is absolutely necessary to constitute "sexual assault" but in any case of penetrative sexual assault, the "sexual assault" is absolutely necessary to constitute the offence, because without having "sexual assault" a "penetrative sexual assault" is impossible to be committed upon. Therefore, the finding of Id. trial court that prosecution failed to establish its case under Section 8 of the POCSO Act, having same set of evidence, only implies that prosecution also fails to established its case under section 3/4 of the POCSO Act.



35. In view of aforesaid discussed, legal ratio and factual aspects, it can be said safely that prosecution failed to established its case during the trial, beyond all reasonable doubts as to convict the appellant/convict for the charges leveled against him.

36. Accordingly, appeal stands allowed.

37. The impugned judgment of conviction dated 20.09.2022 and order of sentence dated 28.09.2022 passed by learned Additional Sessions Judge-VI-cum-Special Judge, POCSO Court, Nalanda at Bihar Sharif in POCSO/G.R. No. 21 of 2017 in connection with Mahila Police Station Case No. 170 of 2017 is hereby set aside/quashed.

38. Appellant namely, Rakesh Kumar Paswan @ Rakesh Kumar is in custody in connection with this case, he is directed to be released forthwith, if not required in any other case. Fine, if any paid, by appellant, be returned to him immediately.

39. Office is directed to send back the trial



court records and proceedings along with a copy of this
judgment to the trial court, forthwith.

(Chandra Shekhar Jha, J)

Sudha/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	31.08.2024
Transmission Date	31.08.2024

