

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1100 of 2018

Arising Out of PS. Case No.-8 Year-2018 Thana- MAHILA P.S. District- Munger

Md. Khurshid @ Md. Khurshid Rayeen Son of Md. Amanat, Resident of
Mohalla- Murgiya Chak, P.S. Kotwali, District- Munger.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Praveen Kumar Agrawal, Adv
	:	Mr. Santosh Kumar Singh, Adv
For the Respondent/s	:	Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI

and

HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA)

Date : 24-04-2026

Heard learned counsel appearing on behalf of
petitioner and learned A.P.P. for the State.

2. The present appeal has been preferred by aforesaid appellant-convict under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') challenging the impugned judgment of conviction dated 02.08.2018 and order of sentence dated 03.08.2018 respectively passed by learned A.D.J. 1 cum Special Judge (POCSO), Munger in Mahila P.S. Case No. 08 of 2018/POCSO 24 of 2018, whereby and where under the learned Trial Court has convicted the appellant for the offences punishable under Section 376 (i) of the Indian Penal Code (hereinafter referred to as 'I.P.C.') and



Sections 4, 8 and 12 of the POCSO Act. Appellant has been sentenced to undergo rigorous imprisonment for life alongwith fine of Rs. 25,000/- under Section 376 (i) of the I.P.C., sentenced to undergo rigorous imprisonment for ten years alongwith fine of Rs. 10,000/- under Section 4 of the POCSO Act, sentenced to undergo rigorous imprisonment for five years alongwith fine of Rs. 5,000/- under Section 8 of the POCSO Act and further sentenced to undergo rigorous imprisonment for three years alongwith fine of Rs. 5,000/- under Section 12 of the POCSO Act. In default of payment of fine, convict shall undergo simple imprisonment for six months. All the aforesaid sentences have been ordered to run concurrently.

Case of prosecution

3. The brief case of prosecution as it appears from the written report of the Shahjahan Khatoon (P.W. 3) to the SHO Mahila Police Station that on 17.06.2018 she had gone to Saharsa to see her sick sister and came at home on 19.06.2018 upon which her daughter Tasarun Najrin aged about 8 years told her that on 18.06.2018 at about 4:00 PM, when she was alone at her home appellant-accused Md. Khurshid came to her house. He laid her down on surface and opened her pants and rubbed his penis and fled away. He also threatened to not tell anyone



about this occurrence.

4. On the basis of aforesaid written report, Mahila P.S. Case No. 08 of 2018 was lodged for the offences punishable under Section 376(i) of the I.P.C. and Sections 4, 8 and 12 of the POCSO Act.

5. After completion of investigation, the police submitted charge sheet against the sole appellant-accused Md. Khurshid for the offences punishable under Section 376(i) of the I.P.C. and Sections 4, 8 and 12 of the POCSO Act. Considering materials available on record cognizance of the offence was taken against the sole accused-appellant before the learned Special Judge (POCSO), on 25.06.2018.

6. To substantiate its case before learned trial court (Special Court), the prosecution has, in total, examined eight witnesses, which are:-

Sr. No(s).	Prosecution Witnesses
P.W. 1	Tasarrun Nazrin (victim)
P.W. 2	Rozida Khatoon (neighbor)
P.W. 3	Shahjahan Khatoon (mother of the victim)
P.W. 4	Dr. Niranjana Kumar
P.W. 5	Md. Zulfikar (father of the victim)
P.W. 6	Shahnaj Begum (sister of informant)
P.W. 7	Dr. Manjula Rani Mandal
P.W. 8	Punam Sinha (Investigating Officer)

7. The prosecution has also relied upon the following



documents as to substantiate its case, which are as under:-

Sr. No.	Exhibit No(s).	List of documents.
1.	Exhibit -1	Signature on seizure list.
2.	Exhibit-2	Signature on seizure U/s 164 of the Cr.P.C.
3.	Exhibit-3	Signature on written report.
4.	Exhibit-4	Signature on seizure list.
5.	Exhibit-5 & 6	Medical report.
6.	Exhibit-7	Endorsement.
7.	Exhibit-8	Formal FIR.
8.	Exhibit-9	Seizure List.
9.	Exhibit-10	Petition for examination.
10.	Exhibit-11	Petition for statement U/s 164 of the Cr.P.C.
11.	Exhibit-12	Petition for sending FSL.
12.	Exhibit-13	Statement U/s 164 of the Cr.P.C.
13.	Exhibit-14	FSL Report.

8. The statement of the appellant-accused was recorded under Section 313 of the Code after stating to him incriminating evidence/circumstances as surfaced during the trial, which he denied and showed his complete innocence.

9. On the basis of evidences as surfaced during the trial, the learned trial court convicted and sentenced the appellant/convict, in aforesaid terms. Being aggrieved of which present appeal was preferred.

10. Hence, the present appeal.

Argument on behalf of appellant

11. Learned counsel appearing for appellant



submitted that appellant-accused is a next door neighbor of the victim and out of neighborhood disputes and differences he was implicated falsely with this case. It is submitted that ocular evidence is not corroborating with the medical evidence and merely on the basis of presumption and assumption taking meaning of “**bad work**” impliedly “**insertion of penis into vagina to some extent**”, the conviction of the appellant was recorded under Section 4 of the POCSO Act. It is also submitted that semen was detected on the pant of the victim as per FSL report without having any blood and, therefore, it was presumed by the learned Trial Court that the appellant tried to insert his penis into the vagina. In support of his submissions learned counsel relied upon the legal reports of Hon’ble Supreme Court as held in the matters of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra and Another, [(2006) 10 SCC 92]** & **Wahid Khan Vs. State of Madhya Pradesh, [(2010) 2 SCC 9]**.

12. In view of aforesaid, it is submitted that finding of the learned Trial Court as per victim to the appellant under Section 4 of the POCSO Act is completely perverse. It is submitted that to convict the appellant for sexual assault and sexual harassment within the meaning of Sections 7 and 11 of the POCSO Act, “**sexual intent**” is the essential criteria, and



thus prosecution failed to establish foundational aspects during the trial as to import presumption within the meaning of Section 29 of the POCSO Act, therefore, on this score alone the conviction as recorded by learned Trial Court is appearing bad in the eyes of law and deserves to be set aside.

Argument on behalf of State

13. Learned A.P.P. appearing on behalf of State, while opposing the appeal submitted that statement of victim is consistent *qua* occurrence, where she categorically stated that appellant committed wrong work upon her after removing her pant, while she was alone at her house. It is submitted that upon forensic examination, semen was detected on the pant of the victim. It is also submitted that the victim also testified the occurrence *qua* wrong work and also touching her private part by the appellant-accused during the occurrence and, therefore, her testimony is consistent on this aspect. It is further submitted that learned Trial Court rightly held that after touching the private part “bad work” was committed upon her, meaning thereby the penetration was up to some extent and, therefore, the conviction of appellant as recorded under Section 4 of the POCSO Act cannot be viewed with doubt. It is submitted that in actual this is a case of “aggravated penetrative sexual assault”,



as victim was below 12 years, within the meaning of Section of 5(m) of the POCSO Act. In support of his submissions learned APP relied upon the legal report of Hon'ble Supreme Court as held in the matter of **Attorney General for India Vs. Satish and Another, [(2022) 5 SCC 545]**.

Deposition of witnesses

14. PW-1 (victim), herself deposed during the trial through her examination-in-chief that occurrence took place at about 4:00 PM on 18.06.2018, when she was alone in her house. Appellant came suddenly to her house and pulled her red pant up to her knee and touched her genital and private part, thereafter committed bad work with her. It is deposed that at the time of occurrence her mother was not in the house and when she returned back on the next day she narrated occurrence to her. She went to Mahila Police Station with her mother/P.W. 3, where after the present case was lodged. It was also deposed that the police seized her red pant and made its seizure, upon which she put her signature, which upon her identification before Court, was exhibited as **Exhibit-1**. She further identified her signature on her statement recorded under Section 164 of the Cr.P.C., which upon her identification during trial exhibited as **Exhibit-2**. She has also stated that her medical test was done in



hospital. It was deposed by her during cross-examination that she has no relation with accused-appellant, though she failed to say about the month and year of the occurrence, but she categorically deposed that it took place on the 18th. It was stated that she narrated the occurrence only to her mother and denied false implication of the accused-appellant.

15. P.W. 2 is Rozida Khatoon, who stated in her chief that she is the neighbour of the informant/P.W.3 and on 18.06.2018 at about 4:00 PM, while she was on roof of her house, she saw appellant coming out from the house of the informant, noticing the same she asked him that what he was doing there ?, but instead of replying he fled away. Subsequently she went to the house of informant and found the victim in fearful condition whereafter she asked her about, but she told nothing. It is further deposed by her that on the very next day mother of the victim came back and victim told her about the occurrence, thereafter mother/P.W. 3 narrated the occurrence to her. She also said that appellant had done such shameful act to others of the locality, but none lodged case due to fear. In her cross-examination she stated that she gave her statement to police after two days of the occurrence. She has no dispute with the accused.



16. P.W. 3 is Shahjahan Khatoun, who is mother of the victim and informant of this case. She supported date and time of the occurrence. She was told about the occurrence on 19.06.2018 by her daughter/victim when she came back from Saharsa. She also informed about that appellant rubbed his penis on her vagina and did bad work. He also threatened victim as not to disclose the occurrence to anyone. It was deposed that she went to police station along with her victim daughter and sister. Application was written by Md. Shahjad as per her instruction, which upon her identification was exhibited as **Exhibit-3/1**. She identified her signature over there, which has been exhibited as **Exhibit-3**. She also identified her signature on seizure list, which upon her identification was exhibited as **Exhibit-4**. In her cross-examination she stated that accused is her neighbor and red pant which was worn by her daughter was handed over to the police.

17. P.W. 4 is Dr. Niranjan Kumar & P.W. 7 is Dr. Manjula Rani Mandal. P.W. 4 Dr. Niranjan Kumar stated in his chief that victim was brought before the medical board in which he was one of the member and determined her age between 9-10 years. He identified the writing and signature on medical report which was exhibited as **Exhibit-5**. He denied



suggestion *qua* wrong preparation of medical report. P.W. 7 is Dr. Manjula Rani Mandal who examined victim on 20.06.2018 and upon medical examination she found no mark of injury either in external or private part of the body, no vaginal laceration, no perineal tear, secondary sex characters not developed and upon histopathological examination of vaginal swab- neither motile or non-motile spermatozoa was found, epithelial cells- 1-2/hpf, RBC-nil, WBC-0-1hpf. Upon cross-examination it was stated that cloth of victim was seized by IO. She identified the medical report prepared by her, which upon her identification was exhibited as **Exhibit-6**.

18. P.W. 5 is Md. Zulfikar, who is father of the victim. He supported the date and time of the occurrence and after knowing the occurrence he went to police station along with his wife/P.W. 3, victim daughter/P.W. 1 and relatives.

19. P.W. 6 is Shahnaj Begum, who is the sister of informant. She also testified that she came to her sister's house in Munger on 19.06.2018. She came to know about the occurrence and also went to police station along with victim. She also put her signature on seizure list of red pant, which she identified during trial.

20. P.W. 8 is Punam Sinha, who is an Investigating



Officer of this case and deposed that on 19.06.2018 the informant and her victim daughter came to police station and on the basis of the written application she lodged an FIR against the accused and started investigation. Upon her identification of endorsement, FIR signature on it same were exhibited as **Exhibit-7, 8 & 8/1**, respectively. She also identified the seizure list, which has been exhibited as **Exhibit-9**. She has further stated that she took statement of victim, P.W. 3/informant and P.W. 6. She has sent the victim for medical examination and visited the place of occurrence. She also identified the petition dated 20.06.2018 in which victim was sent for medical examination which has been exhibited as **Exhibit-10**. Petition for recording statement of victim under Section 164 of Cr.P.C. was exhibited as **Exhibit-11**. She has stated that on 22.06.2018 she has obtained order from the court for sending seized cloth to FSL, she identified the said petition, which upon her identification exhibited as **Exhibit-12**. It was deposed further that after completion of investigation, charge-sheet was submitted. Upon cross-examination it was stated by her that victim came to police station wearing seized pant. She also stated that upon medical examination of the victim, rape was not confirmed by the doctors.



21. In view of aforesaid discussed evidence the first and foremost important question which appears to us as to whether the available evidence justified the conviction of appellant for the offence punishable under Section 4 of the POCSO Act. To examine the aforesaid issue it would be apposite to reproduce Section 3 of the POCSO Act, which is as under :-

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.

22. It would also be apposite to reproduce Section 7 of the POCSO Act, which defines sexual assault & also Section 11 of the POCSO Act, which defines sexual harassment, under conviction of appellant was recorded by learned Trial Court which are as under :-



7. Sexual assault.—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.

11. Sexual harassment.—A person is said to commit sexual harassment upon a child when such person with sexual intent,—

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
- (iii) shows any object to a child in any form or media for pornographic purposes; or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- (vi) entices a child for pornographic purposes or gives gratification therefore.

23. It would be apposite to reproduce paragraph no(s).

7 to 14 of the **Sadashiv Ramrao Hadbe Case (supra)**, which



are as under:-

7. The doctor, who examined the prosecutrix at about 3 p.m., did not find any injury on her body. There was only swelling on the upper lip but the prosecutrix had no case that this swelling on the upper lip was caused during the course of the incident. There were no injuries on her private parts and the doctor who had examined her was unable to give any opinion about the sexual intercourse allegedly taken place. It is important to note that vaginal swab was collected by the doctor and it was sent for chemical examination. Exhibit 43 is the pathological report and it shows that microscopic examination of the vaginal swab showed desquamated cervical cells and few co-oxalate crystals and fluid but no spermatozoa was found. The swab of vagina was taken on the same day and if any sexual intercourse had taken place in all probabilities, the vaginal swab would have contained some spermatozoa. The absence of these sperm casts a serious doubt on the prosecution version.

8. It may also be noticed that the appellant was medically examined on the same day by PW 10. In his evidence, he stated that smegma was present around the corona glandis. He further deposed that his examination negated sexual intercourse and for collection of smegma around corona glandis a period of 24 hours is required. This scientific evidence also did not support the prosecution. Had there been a vigorous sexual act as alleged by the prosecutrix there could not have been the presence of smegma on his private part.

9. It is true that in a rape case the accused could be



convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

10. In the present case there were so many persons in the clinic and it is highly improbable that the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able-bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbabilise the prosecution version.

11. The counsel who appeared for the State submitted that the presence of semen stains on the undergarments of the appellant and also semen stains found on her petticoat and her sari would probabalise the prosecution version that there could have been a sexual intercourse with the prosecutrix.

12. It is true that the petticoat and the underwear allegedly worn by the a appellant had some semen but that by itself is not sufficient to treat that the appellant had sexual intercourse with the prosecutrix. That would only cause some



suspicion on the conduct of the appellant but not sufficient to prove the case, as alleged by the prosecution.

13. The Sessions Court as well as the High Court had not taken into consideration the absence of spermatozoa in the vaginal swab of the prosecutrix. It may also be noticed in the FI statement. In this case the prosecutrix had not given the full description of the incident allegedly taken place but when she was examined in court she had improved her version.

14. On a consideration of the entire evidence in this case, we are of the view that there is a serious doubt regarding the sexual intercourse allegedly committed by the appellant on the prosecutrix. The appellant is entitled to the benefit of those doubts and we are of the view that the High Court and the Sessions Court erred in finding the appellant guilty. We set aside the conviction and sentence of the appellant. The appellant, who is in jail, is directed to be released forthwith, if not required in any other case.

24. It would be apposite to reproduce paragraph no. 36 of the **Attorney General of India Case (supra)**, which is as under:-

36. There cannot be any disagreement with the submission made by Mr. Luthra for the accused that the expression “sexual intent” having not been explained in Section 7, it cannot be confined to any predetermined format or structure and that it would be a question of fact, however, the submission of Mr Luthra that the expression “physical contact” used in Section 7 has to be



construed as “skin-to-skin” contact cannot be accepted. As per the rule of construction contained in the maxim “*ut res magis valeat quam pereat*”, the construction of a rule should give effect to the rule rather than destroying it. Any narrow and pedantic interpretation of the provision which would defeat the object of the provision, cannot be accepted. It is also needless to say that where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. Restricting the interpretation of the words “touch” or “physical contact” to “skin-to-skin contact” would not only be a narrow and pedantic interpretation of the provision contained in Section 7 of the POCSO Act, but it would lead to an absurd interpretation of the said provision. “Skin to skin contact” for constituting an offence of “sexual assault” could not have been intended or contemplated by the legislature. The very object of enacting the POCSO Act is to protect the children from sexual abuse, and if such a narrow interpretation is accepted, it would lead to a very detrimental situation, frustrating the very object of the Act, inasmuch as in that case touching the sexual or non-sexual parts of the body of a child with gloves, condoms, sheets or with cloth, though done with sexual intent would not amount to an offence of sexual assault under Section 7 of the POCSO Act. The most important ingredient for constituting the offence of sexual assault under Section 7 of the Act is the “sexual intent” and not the “skin-to-skin” contact with the child.

25. It would be apposite to reproduce paragraph no(s).



8 and 19 to 22 of the **Wahid Khan Case (supra)**, which are as under:-

8. The conviction of the appellant is founded on the evidence of PW 1 prosecutrix as also the evidence of PW 3, B.B. Subba Rao, Sub-Inspector who had caught him red-handed while he was committing rape. The medical report dated 15-10-1988 of the prosecutrix is on record. It records that her hymen was found to be intact whereas her private part admitted only the tip of little finger with difficulty. In the opinion of Dr. B. Biswas who had examined her, no intercourse was done with her. But, for determination of her age, she was sent to the Forensic Department of Hamidia Hospital. Dr. B. Biswas has not been examined by the prosecution. At the time of medical examination of the prosecutrix, her medical history was recorded, marked at Ext. P-9 which categorically records the manner in which the appellant had committed rape on her.

19. It was also contended by learned counsel for the appellant that since hymen of the prosecutrix was found to be intact, therefore, it cannot be said that an offence of rape was committed on her by the appellant. This contention cannot be accepted as the offence of rape has been defined in Section 375 IPC. Explanation to Section 375 reads thus:

“Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

It has been a consistent view of this Court that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.



20. It is appropriate in this context to reproduce the opinion expressed by Modi in *Medical Jurisprudence and Toxicology* (22nd Edn.) at p. 495 which reads thus:

“Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. *Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.*”

21. Similarly in Parikh's *Textbook of Medical Jurisprudence and Toxicology*, “sexual intercourse” has been defined as under:

“*Sexual intercourse.*—In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.”



22. If the aforesaid facts are kept in mind, it cannot be disputed that the act of the appellant would certainly constitute an offence of rape and leaves no amount of doubt in our mind.

Discussion & Conclusion

26. Now coming to the factual scenario of the present case. It transpires to us that house of the victim/P.W. 1 was visited by P.W. 2, immediately after the occurrence, but nothing was stated to her, and she only observed victim fearful. She came to know about the occurrence only on the next day of the occurrence i.e., on 19.06.2018, when mother of the victim returned to the home. As per testimony of P.W. 3 she was informed by victim that appellant-accused pulled down her pant upto knee and rubbed his penis on vagina and did “bad work”. To examine this aspect it would be apposite to visit the statement of victim as recorded under Section 164 of the Cr.P.C. (**Exhibit-13**), which was recorded on 21.06.2018 on the third day of the occurrence, where she stated that appellant after entering into the house pulled her pant down and stroke and caress her body part (without specifying private part) and thereafter, committed wrong work with her. Further during the trial while recording her testimony as P.W. 1 she deposed that appellant after removing her red pant stroke and caress her private part and committed wrong work with her.



27. In aforesaid context the testimony of P.W. 7 is also important as she examined the victim from point of sexual assault, she *“did not find any injury either in external or in private part of the body, no vaginal laceration, no perineal tear was found. There was no spermatozoa, no RBC and WBC was found”*. As per P.W. 4, who is another doctor who has ascertained the age of the victim categorically stated that age of victim was determined between the age group of 9-10 years and her secondary sexual characters were not even well developed and, therefore, the ocular evidence is in corroboration with the medical evidence, which negate any type of penetration and merely as victim stated that **“some wrong”** work was done with her does not implies that she was subjected to penetrative sexual assault as held by learned Trial Court. The finding of the learned trial court is also questionable on the point as “semen” was found on the seized pant of the victim, therefore, appellant must have attempted to penetrate. We find that for aforesaid findings of the learned trial court is also not convincing and merely on the presence of semen on the pant of the victim and on the basis of the ocular evidence that some **“bad work”** was done, it cannot be presumed that penetrative sexual assault to some extent was committed upon her. We are of the view that word



“bad work” is a genus to which **“penetrative sexual assault”** is an species as to constitute the offence specifically within the meaning of Section 3 of the POCSO Act, therefore, **“bad work”** does not authorise the Court to presume **“penetrative sexual assault”** within the meaning of Section 29 of the POCSO Act, unless it is either corroborated with ocular or medical evidence.

28. Accordingly, the finding of learned Trial Court *qua* conviction of appellant-accused under Section 4 of the POCSO Act is bad in the eyes of law. No doubt the prosecution witnesses consistently said that age of victim is 8 years during the trial and victim also stated her age while recording her statement as 8 years and even the medical board found victim between the age group of 9-10 years. Age of victim was not disputed during the trial, therefore, her age was certainly below 12 years at the time of occurrence.

29. Now, the second issue which requires to be examined is regarding sustainability of conviction of appellant under Section 8 of the POCSO Act. It appears from the testimony of victim that after entering into the house, while she was alone, appellant pulled down her pant and stroke and caress her private part, thereafter, some bad work was committed upon her. The semen was also found present on her pant, which was



seized by the police. It implies that the touch on the private part was with sexual intent within the ambit of Section 7 of the POCSO Act, as to constitute the offence of sexual assault therefore, we have no reason to interfere with the conviction as recorded under Section 8 of the POCSO Act by the learned Trial Court.

30. Considering the nature of occurrence and testimony of victim, we are convinced that it is a case of sexual assault and not of sexual harassment, which is a distinct offence under POCSO Act. Therefore, conviction as recorded under Section 12 of the POCSO Act also not appears convincing.

31. In view of aforesaid, the conviction of appellant-accused as recorded by learned Trial Court under Section 376 (i) of the I.P.C. and Sections 4 and 12 of the POCSO Act appears bad in the eyes of law and, therefore, we are convinced enough to set aside conviction of appellant for aforementioned offences.

32. In view of aforesaid discussion, we uphold the conviction of appellant under Section 8 of the POCSO Act for which the maximum sentence is five years, even its aggravated form it is seven years.

33. Record suggest that appellant remains in custody since 26.06.2018 i.e., 7 years and 7 months.



34. Accordingly, the impugned judgment of conviction dated 02.08.2018 and order of sentence dated 03.08.2018 respectively *qua* offence under Section 376(i) of the IPC and Section 4 and 12 of the POCSO Act, as passed by learned A.D.J.-1, cum Special Judge (POCSO), Munger arising out of Mahila P.S. Case No. 08 of 2018/POCSO Case No. 24 of 2018, is hereby set-aside.

35. Hence, Criminal Appeal (DB) No.1100 of 2018, as preferred by appellant namely, Md. Khurshid @ Md. Khurshid Rayeen stands allowed in part in aforesaid terms.

36. The appellant, namely, Md. Khurshid @ Md. Khurshid Rayeen remains in custody for about 7 years and 7 months, he is directed to be released forthwith.

37. Let a copy of this judgment along with the Trial Court Records be sent to the learned Trial Court forthwith.

(Chandra Shekhar Jha, J.)

S.Tripathi/- Bibek Chaudhuri, J:- I agree.

(Bibek Chaudhuri, J.)

AFR/NAFR	NAFR
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