IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.357 of 2022

Arising Out of PS. Case No.-385 Year-2014 Thana- TILAUTHU District- Rohtas

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Md. Mahmood Alam, son of late Majid Sabri, R/O village- Tilauthu, P.S.- Tilauthu, District- Rohtas

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :

For the Appellant : Mr. Md. Ataul Haque, Advocate

For the State : Mr. Abhimanyu Sharma, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)

Date : 30-10-2024

The present appeal has been preferred against the judgment of conviction and order of sentence dated 25.03.2022 and 29.03.2022 respectively passed by learned Additional District & Sessions Judge-VII,-cum-Exclusive Special Court (POCSO) Act, Sasaram, Rohtas in POCSO Case No. 25 of 2015, arising out of Tilauthu P.S. Case No. 385 of 2014, whereby the sole Appellant has been found guilty of offence punishable under Section 376 I.P.C. and Section 5/6 of the

POCSO Act, 2012. However, the appellant has not been sentenced under Section 376 of the Indian Penal Code and instead he has been sentenced to undergo rigorous imprisonment for the remainder of natural life and to pay a fine of Rs.50,000/- under Section 6 of the POCSO Act and in case of default to pay the fine, to further undergo additional simple imprisonment for one year. The victim has been also awarded compensation of Rs.4,00,000/- towards her rehabilitation to be paid by DLSA Rohtas at Sasaram.

Prosecution case.

2. The prosecution case as emerging from the written report of the informant given to the Officer-in-Charge of Tilauthu Police Station on 6.5.2014 is that on 04.05.2014, his 10 year old niece was taken by the appellant, who is his agnate, to Banaras on the pretext of serving his daughter who was expecting a child. At Banaras, his niece was subjected to rape by the appellant after administration of intoxicant. When she came with him at home on 6.5.2014, she told him about the occurrence.

Factual background.

3. On the basis of the written report, formal F.I.R. was lodged for the offence punishable under Sections 376 of I.P.C.

on 06.05.2014 at 23 O' clock against the sole accused Md. Mahmood Alam. After investigation, charge sheet bearing no. 29 of 2014 dated 22.06.2014 was submitted against the Appellant for offence punishable under Secstions 365, 366(A) and 376 of the Indian Penal Code and Section 6 of the POCSO Act. After cognizance of the offence by learned Magistrate on 11.07.2014 against the appellant, the case was committed to the Court of Sessions. The charges were framed against the appellant under Sections 365, 366(A) and 376 of the Indian Penal Code and Section 6 of the POCSO Act and the same were read over and explained to the accused to which he pleaded not guilty and claimed to be tried. Hence, the trial commenced.

4. During trial, the following ten witnesses were examined on behalf of the prosecution:

(i) P.W. 1 :- Mother of the victim
(ii) P.W. 2 :- Grand-mother of the victim
(iii) P.W.3 :- Uncle of the victim/informant.
(iv) P.W. 4 :- Father of the victim.
(v) P.W. 5 :- Victim
(vi) P.W. 6 :- Dr. Richa Chaudhary
(vii) P.W. 7 :-Dr. Piyush Kumar Pushkar
(viii) P.W. 8 :- Abhinandan Kumar Singh
(ix) P.W. 9 :- Dr. Vijay Kumar Singh
(x) P.W. 10 :- Dhirendra Yadav

5. The prosecution also brought on record the following documentary evidence:

(i) Ext. 1 :- Signature of the informant on the fardbeyan
(ii) Ext. 2 :- Signature upon the statement under Section 164 Cr.PC of the victim
(iii) Ext. 3 :- Medical report
(iv) Ext. 4 :- Report of the Medical Board
(v) Ext. 4 /1:- Signature of Dr. Vijay Kumar Singh on the report of the Medical Board.

Statement under Section 313 Cr.PC

6. After closure of the prosecution evidence, the accused was examined under Section 313 Cr.PC confronting him with incriminating circumstances which came in the prosecution evidence, so as to afford him opportunity to explain those circumstances. During this examination, he admitted that he had heard the evidence of prosecution witnesses against him. But he did not explain any circumstance, though he claimed that the prosecution evidence is false and he is innocent and has been falsely implicated because he got his son married with another girl.

7. The appellant has also examined the following three witnesses in his defence:

(i) **D.W.1-** Shahbuban Bibi
(ii) **D.W.2-** Najroon Khatoon
(iii) **D.W. 3-** Saibun Nisha

Findings of the Trial Court.

8. Learned Trial Court after appreciating the evidence on record and considering the submissions of the parties, passed the impugned judgment of conviction and order of sentence whereby the sole appellant has been found guilty and sentenced accordingly.

Submissions of the parties.

9. We have heard learned counsel for the appellant and learned APP for the State.

10. Learned counsel for the appellant has submitted that the impugned judgment of conviction and the order of sentence passed by learned Trial Court are not sustainable in the eye of law or on facts. The Trial Court has not applied its judicial mind and has failed to appreciate the evidence on record properly leading to the erroneous impugned judgment and order.

11. Non-official prosecution witnesses are the prosecutrix or her close family members like father, mother, uncle and grand-mother and hence, they are not trustworthy and reliable. Their testimony cannot be the basis for conviction of the appellant.

12. He has further submitted that the prosecutrix (P.W.-5) is only eye-witness and she is not reliable or trustworthy witness, because her testimony is full of major

discrepancies and contradictions.

13. He has further submitted that learned Trial Court has committed serious error of law by applying wrong statutory provisions of the POCSO Act for conviction and sentence. He has not taken notice of the fact that there was no such punishment provided under Section 6 of the POCSO Act as it existed prior to its amendment in the year 2019. He has further submitted that as per the prosecution case, at most Section 4 of the POCSO Act and Section 376(1) of the I.P.C. would be applicable. As per Section 4 as existed at the time of alleged occurrence provides for minimum imprisonment for 7 years only though the sentence may extend to life imprisonment.

14. However, learned A.P.P. for the State defended the impugned judgment of conviction and the order of sentence and submitted that there is no illegality or infirmity in the impugned judgment and appellant has been appropriately sentenced.

15. We have thoroughly perused the relevant materials on record and given thoughtful consideration to the submissions advanced by both the parties.

Requirement of the prosecution to prove minority of the victim for Application of the POCSO Act.

16. The POCSO Act, 2012 deals with offences

committed against children as is apparent from the provisions of the Act, and as per Section 2(d) of the Act, child means a person below the age of 18 years. Hence, the first and foremost requirement for application of the POCSO Act is that the alleged victim was a child i.e. below 18 years of age, on the date of the occurrence and it is the prosecution which is required to prove the minority of the victim for application of the POCSO Act against the accused/appellant.

Requirement of the prosecution to prove foundational facts of the alleged offence to raise presumption under Sections 29 and 30 of the POCSO Act, 2012.

17. It is also settled position of law that the foundational facts of the alleged offence are also required to be proved by the prosecution before the Court raises the presumption under Sections 29 and 30 of the POCSO Act against the accused. Lodgement of F.I.R. or submission of charge-sheet under the POCSO Act does not automatically lead to presumption of guilt of the accused during trial. The presumption of innocence of the accused is a fundamental tenet of our criminal jurisprudence enshrined in Article 14 and 21 of the our Constitution.

18. In **Babu Vs. State of Kerala, (2010) 9 SCC 189,** Hon’ble Supreme Court has held that presumption of innocence

is a human right, though the exception may be created by statutory provisions. But even such statutory presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution.

19. In **Navin Dhaniram Baraiye Vs. State of Maharashtra, 2018 SCC Online Bom 1281, Bombay High Court** has held that the presumption under Section 29 of the POCSO Act, 2012 operates against the accused only when the prosecution proves the foundational facts against him beyond reasonable doubts, in the context of the allegation under the Act and the accused has a right to rebut the presumption, either by discrediting prosecution witnesses through cross-examination or by leading evidence to prove his defence. Rebuttal of the presumption would be on the touchstone of preponderance of probability.

20. Similar view has been expressed by other High Courts also. Here, one may refer to the following judicial precedents:-

(i) Joy V. S. Vs. **State of Kerala, (2019) SCC Online Ker 783**
(ii) Sahid Hossain Biswas Vs. **State of West Bengal, 2017 SCC Online Cal 5023**
(iii) Dharmender Singh Vs. **State (Govt. of NCT of Delhi) (2020 SCC Online Del 1267)**

(iv)Latu Das Vs. **State of Assam, 2019 SCC OnLine Gau 5947**

21. Now, we are required to examine the evidence on record to see whether the prosecution has proved the minority of the informant/victim and foundational facts of the alleged offence.

Prosecution Evidence

22. Coming to the evidence on record, we find that the **victim** has been examined as P.W.-5. She has supported the prosecution case by deposing in her **examination-in-chief** that occurrence had taken place at 12:00 O'clock at night on 04.05.2014. Her uncle Mahmood Sabri who is appellant herein came to her house and stated to her mother that his daughter is expecting child and requested her to send her (the victim) to take care of his daughter. On asking of her mother, she went to Banaras along with the appellant. She was stayed in a lodge at Banaras. She asked the appellant to take her to his daughter, but the appellant stated that it was his business to deceptively call a girl and his daughter had no business with her. He administered intoxicant to her. She became unconscious. During the period of unconsciousness, she was raped by the appellant. When she regained consciousness at 12 O'clock in the night, she found no

clothes on her body. She was feeling pain. The room was closed. She tried to raise voice but she was gagged. She was kept confined in the room for two nights and she was raped after intoxication. When she stated about the occurrence to the neighbour, he inquired from the appellant about the occurrence. The appellant beat her and took her to Station by rikshaw and en route she was made to hang from a bridge and she was threatened to be killed. She was saved by him only when she assured him that she would not tell about the occurrence to anybody. Then she was taken to Dehri-On-Sone by train and came out to Tilauthu by Tempo along with the appellant. Even at Tilauthu, the appellant asked her to accompany him in jungle but she refused to go and after cutting the appellant by tooth on his hand, she fled away. En route, she got unconscious. One man took her to her home. She told about the occurrence to her grand-mother. She has also given her statement under Section 164 Cr.PC.

23. In her **cross-examination**, she has deposed that the appellant is her uncle (chachera Chacha) who is 60-70 years old and has children. He has eight sons and two daughters. Seven sons are already married. She had reached Banaras at 8 O'clock in the night. She could not tell the name of the lodge.

He told that daughter of the appellant is at Banaras. She was given intoxicant in the name of medicine. The rape was committed when she was unconscious. In conscious condition, she was not raped. On getting consciousness, she doubted that some wrong has been committed with her. When she found no clothes on her body, she enquired from the appellant. She does not know the name of person to whom she had made complaint at the lodge at Banaras. Food was brought in the lodge itself. She could not tell the place where the Bridge was located and where she was made to hang. However, she has deposed that it was made of cement. When she came out from the lodge, she was in unconscious condition. This condition continued for two months. After getting consciousness, she told about the occurrence to her grand-mother, mother, uncle and father. She has three sisters and one brother. The sisters are elder to her and they are unmarried. Her father is a vendor of bed-sheets. In the lodge, the toilet was situated separately at the distance of 10 feet from the room. The water pipe was outside the room. She had stayed in the lodge for two days, but she had not gone outside the room to get water. She also could not go to the toilet because she was unconscious. After two days, she reached her home and regained consciousness. She was unable to move because she

was having pain and bleeding. There was even signs of bite on her left breast. There were also 4-5 abrasion on her stomach and back. She is unmarried. Son of Mahmood is unmarried. Marriage between her family and that of the appellant takes place. No marriage talk was going on regarding her marriage with the son of the appellant. She studies in class Vth. She has denied the suggestion that her family members wanted her to get married with the son of the appellant for which the appellant was not ready and that is why the appellant has been falsely implicated in this case.

24. **P.W.-1** is **mother** of the victim. She has supported the prosecution case by deposing in her **examination-in-chief** in consonance with the written report. In her **cross-examination**, she has deposed that she had not seen the occurrence but she has deposed as per hear-say from her daughter regarding the occurrence taken place.

25. **P.W.-2** is **grand-mother** of the victim. She has also supported the prosecution case by deposing in her **examination-in-chief** in consonance with the written report. In her **examination-in-chief,** she has deposed that she had seen the blood on the front part of Shalwar of the victim and abrasion and swelling on her person when she had come back to her

home.

26. **P.W.-3** is **informant** who is uncle of the victim. He has supported the prosecution case deposing in his **examination-in-chief** in consonance with the written report. In his **examination-in-chief**, he has deposed about the occurrence. He was informed for the first time by the mother of the victim. He had also seen injury and abrasion on breast and cheek of the victim. The victim was sent to Tilauthu hospital by the Police for treatment.

27. **P.W.-4** is **father** of the victim. He has also supported the prosecution case by deposing in her **examination-in-chief** in consonance with the written report. He has further deposed that when her daughter came to his home after two days, she fell down after getting unconscious. He also knew about the occurrence from his daughter/victim. The appellant is his cousin who is 60 years old. He has denied the suggestion that he wanted to get his daughter married with the son of the appellant, and on his refusal, he has been falsely implicated in this case.

28. **P.W.-6** is **Dr. Richa Chaudhary** who had conducted medico legal examination on the victim on 07.05.2014 and she found as follows on her examination:-

"Axillary and pubic hairs present in black colour.

> Breast developed till linear stage-II. There is no abnormal stain or foreign particles on private part. There is abrasion 3x1 cm on left breast. Hymen ruptured & admit 2 fingers. Vaginal swab taken and sent pathological examination. Urine was sent for pregnancy test. Report received and attached. Age determination done by medical board by Dr. S.B. Singh, Dr. B.K. Pushker and B.K. Singh…….
> ……..
> On the basis of clinical and pathological examination- No significant finally deducted exact abrasion over left breast. However it is difficult to say that rape has been done or not but it cannot be ruled out. The medical board was assessed her age between 12 to 14 years."

29. In her **cross-examination**, she has deposed that she has not mentioned regarding colour and timing of the abrasion found on the person of the victim. Such abrasion cannot be caused by sleeping on one side.

30. P.W.-7 is **Dr. Piyush Kumar Pushkar**. As per this witness, he had examined the victim as a member of the medical board for determination of her age. As per the test, she was found to be 12-14 years old.

31. **P.W.-8** is **Abhinandan Kumar Singh**, who was second I.O. of the case and had taken charge of investigation from first I.O. Dhirendra Yadav. In his **examination-in-chief**, he has deposed that the place of occurrence at Varanasi is room no. 46 of Anjuman Muslim Musafir Khana situated at Kajipura Kalan (Dalmandi), Varanasi, House No. D-50/229, 230, Ward No. 61, P.S.- Dashaswamedh, Distt.- Varanasi. He had also inspected the register kept with the said Musafir Khana and

found that the appellant had booked the room No. 46 at the said Musafir Khana and had boarded there along with the victim on 04.05.2014 and had checked out on 06.05.2014 at about 5:40 am. The room was situated on the 1st floor of the said Musafir Khana.

32. **P.W.-9** is **Dr. Vijay Kumar Singh** who was also posted at Sadar Hospital, Sasaram at the relevant time and he was the member of the medical board which was constituted for determination of the age of the victim. He has deposed that the test report was prepared by Dr. Piyush Kumar Pushkar (P.W.-7) and he has also signed on the test report.

33. **P.W.-10** is **Dhirendra Yadav, S.I.** who was first I.O. of the case. He has deposed in his **examination-in-chief** that the victim was medically examined and her statement under Section 164 Cr.PC was also recorded. He had found abrasion on the body of the victim, but he has not mentioned it in the diary. He has also stated that the victim had not stated to him that the appellant had stated to her that it is business of the appellant to deceptively call a girl.

Defence Evidence

34. Three defence witnesses have been examined. D.W.-1 Shahbuban Bibi is wife of the appellant, whereas D.W.-

2 is Najroon Khatoon and D.W.-3 is Saibun Nisha, a co-villager of the appellant. All of them have deposed that the parents of the victim wanted to marry his daughter with the son of the appellant for which the appellant was not ready and hence, he has been falsely implicated.

Whether the informant/victim was a child on the date of occurrence.

35. The **first and foremost question** is whether the prosecution has proved that the alleged victim was child i.e. below 18 years of age on the date of occurrence in terms of Section 2(1)(d) of the POCSO Act. It is a prerequisite for application of the POCSO Act against the Appellant.

36. Now question is what is the procedure to determine the age of the alleged victim? In the POCSO Act, there is no such procedure provided under Section 34 (2) of the POCSO Act only provides that if any question arises whether a person is a child or not, such question is required to be determined by the Special Court after satisfying itself about the age of such person and to record in writing its reason for such determination.

37. However in landmark judgment of **Jarnail Singh Vs. State of Haryana, (2013) 7 SCC 263**, which is still holding the field and being followed by all Courts, Hon’ble Apex Court

has held that procedure provided for determination of age of a juvenile in conflict with law should be adopted for determination of the age of the victim of a crime also, because there is hardly any difference, in so far as issue of minority is concerned, between the child in conflict with law and the child who is the victim of a crime.

38. Similar view has been expressed by Hon'ble Apex Court in recent case of **P. Yuvaprakash Vs. State, 2023 SCC onLine SC 846** referring to Section 34 of the POCSO Act and Section 94 of the J.J. Act, 2015.

39. Section 94 of the J.J. Act, 2015, which deals with presumption and determination of age, reads as follows:

> "**94. Presumption and determination of age.-** (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.
>
> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—
>
> (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
>
> (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of *(i)* and *(ii)* above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

40. Hon'ble Apex Court in **P. Yuvaprakash Case (supra),** has held as follows:

"13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

"(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board".

(Emphasis supplied)

41. As such, the age of the victim is determined on the basis of birth certificate from the school or matriculation or equivalent certificate, if available. In other words, if the victim was a student of school, the aforesaid certificates have

precedence over other mode of proof regarding the age. In the absence of such certificate, birth certificate given by Municipal Authorities or Panchayat is required to be considered for determination of the age of the victim. In the absence of the aforesaid certificates, the age of the victim is required to be determined by ossification test or any other latest medical test. Any other proof like oral evidence is impliedly excluded from consideration for determination of the age of the victim.

42. Now, coming to the prosecution evidence, we find that out of ten prosecution witnesses, five witnesses (P.W.-1 to P.W.-5) are non-official witnesses, out of whom, one is victim herself and rest are her mother, father, uncle and grandmother. P.W.-6, P.W.-7 and P.W.-8 are doctors. P.W.-6 had conducted medico legal examination of the victim whereas P.W.-7 and P.W.-9 are members of Medical Board which was constituted for determination of the age of the victim and as per their evidence, the victim was found to be 12-14 years old on the basis of radiological test. P.W.-8 and P.W.-10 were Investigating Officers of the case.

43. We further find that the victim was a school student of Class-Vth, but no school certificate or any other certificate issued by Panchayat or Municipal authority has been

brought on record by the prosecution. However, as per medical test, the victim has been found to be 12-14 years of age. As per Section 94 of the Juvenile Justice Act, 2015, in the absence of school certificate or any certificate from Panchayat or Municipal authority, the age of the victim is required to be determined by ossification test or any other latest medical test.

44. As such, we find that there is only medical opinion in regard to the age of the victim.

45. However, it is a settled position of law that medical opinion regarding age of a person is not conclusive evidence, because exact assessment of the age cannot be done on the basis of medical test as there is always possibility of errors on both- higher and lower sides. However, medical opinions can be very useful guiding factors to be considered in the absence of the documents as mentioned in Section 94 (2) of the J.J. Act, 2015. Reliance is placed on the following authorities:

(i) **Rishipal Singh Solanki Vs. State of U.P., (2022) 8 SCC 602**
(ii) **Mukarrab v. State of U.P., (2017) 2 SCC 210;**
(iii) **State of M.P. v. Anoop Singh, (2015) 7 SCC 773**
(iv) **Abuzar Hossain v. State of W.B., (2012) 10 SCC 489;**

46. Here, it would be relevant to refer to **Mukarrab Case (supra)**, wherein **Hon’ble Supreme Court** has held as

follows in regard to evidentiary value of medical opinion:

> "26. Having regard to the circumstances of this case, a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At p. 31 of *Modi's Textbook of Medical Jurisprudence and Toxicology*, 20th Edn., it has been stated as follows:
>
> > "In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following Table, but it must be remembered that too much reliance should not be placed on this Table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development."
>
> Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances.
>
> 27. In a recent judgment, *State of M.P.* v. *Anoop Singh*, (2015) 7 SCC 773, it was held that the ossification test is not the sole criteria for age determination. Following *Babloo Pasi* v. *State of Jharkhand*, (2008) 13 SCC 133 and *State of M.P.* v. *Anoop Singh*, (2015) 7 SCC 773 , we hold that ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, the appellants herein have certainly crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. In fact in the medical report of the appellants, it is stated that there was no indication for dental x-rays since both the accused were beyond 25 years of age.
>
> 28. At this juncture, we may usefully refer to an article "A study of wrist ossification for age estimation in paediatric group in Central Rajasthan", which reads as under:
>
> > "There are various criteria for age

> determination of an individual, of which eruption of teeth and ossification activities of bones are important. Nevertheless age can usually be assessed more accurately in younger age group by dentition and ossification along with epiphyseal fusion.
>
> [Ref. : *Gray H. Gray's Anatomy*, 37th Edn., Churchill Livingstone Edinburgh London Melbourne and New York : 1996; 341-342];
>
> A careful examination of teeth and ossification at wrist joint provide valuable data for age estimation in children.
>
> [Ref. : *Parikh C.K. Parikh's Textbook of Medical Jurisprudence and Toxicology*, 5th Edn., Mumbai Medico-Legal Centre Colaba : 1990; 44-45];
>
> ***
>
> Variations in the appearance of centre of ossification at wrist joint shows influence of race, climate, diet and regional factors. Ossification centres for the distal ends of radius and ulna consistent with present study vide article "*A study of wrist ossification for age estimation in paediatric group in Central Rajasthan*" by Dr Ashutosh Srivastav, Senior Demonstrator and a team of other doctors, Journal of Indian Academy of Forensic Medicine (JIAFM), 2004; 26(4). ISSN 0971-0973]."

47. Hence, the medical opinion has to be always considered along with the attending circumstances. As per the evidence on record, only attending circumstance is the oral testimony of the father of the victim who has deposed in his **examination-in-chief** that the victim was 12 years of age at the time of alleged occurrence. However, despite legal requirement, he has not brought on record any school certificate or Panchayat or Municipal authority certificate regarding age of the victim. As such, in view of the oral testimony of the father of the victim and the medical opinion, the victim is found to be above 12 years of age on the date of alleged

occurrence. Hence, the victim was a child and the provisions of POCSO Act is applicable against the appellant.

Whether the prosecution has proved foundational facts of the alleged offence beyond reasonable doubts against the appellant.

48. However, before we discuss and appreciate the evidence on record in this regard, it would be pertinent to mention few principles of appreciation of the evidence, in view of the submissions of the parties.

49. It is a settled position of law that prosecution cannot be thrown out or doubted on the sole ground that the independent witnesses have not been examined because as per experience, civilized people are generally insensitive when a crime is committed in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. The Court is therefore required to appreciate the evidence of even related witnesses on its own merit, instead of doubting the prosecution case for want of independent witnesses. [Refer to **Appabhai and another Vs. State of Gujarat, 1988 Supp SCC 241].**

50. It is also a settled position of law that the evidence of any relative or family members cannot be discarded only on account of his or her relationship with the deceased. The

evidence of such witnesses has to be weighed on the touchstone of truth and at most the court is required to take care and caution while appreciating their evidence. In this regard, one may refer to the following judicial precedents:

(i) **Abhishek Sharma Vs. State (NCT of Delhi)**, 2023 SCC OnLine SC 1358;
(ii) **Yogesh Singh Vs Mahabeer Singh & Ors**; (2017) 11 SCC 195;
(iii) **Mano Dutt and another Vs. State of UP**; (2012) 4 SCC 79;
(iv) **Daulatram Vs. State of Chhattisgarh**, 2009 (1) JIJ 1;
(v) **State Vs. Saravanan**, (AIR 2009 SC 152);
(vi) **State of U.P. v. Kishanpal**, (2008) 16 SCC 73;
(vii) **Namdeo Vs. State of Maharashtra**, (2007) 14 SCC 150;
(viii) **State of A.P. Vs. S. Rayappa**,. (2006) 4 SCC 512;
(ix) **Pulicherla Nagaraju Vs. State of A.P**., (2006) 11 SCC 444;
(x) **Harbans Kaur Vs. State of Haryana**; (2005) 9 SCC 195;
(xi) **Hari Obula Reddy and Ors. Vs. State of AP**, (1981) 3 SCC 675
(xii) **Piara Singh and Ors. Vs. State of Punjab**, (1977) 4 SCC 452

51. This is also a settled position of law that minor discrepancies, contradictions, improvements, embellishments or omissions on trivial matters not going to the root of the prosecution case should not be given undue importance. But if they relate to material particulars of the prosecution case, the testimony of such witnesses is liable to be discarded. In this regard, one may refer to the following judicial precedents:

(i) **C. Muniappan & others Vs. State of T.N.**, (2010) 9 SCC 567;

(ii) **State of U.P. Vs. Krishan Master**,
(AIR 2010 SC 3071);
(iii) **Appabhai & Anr. Vs. State of Gujrat**,
AIR 1988 SC 696;
(iv)**Shivaji S. Bobade & Anr Vs. State Of Maharashtra**, (1973 AIR 2622);
(v) **Sanjay Kumar Vs. State of Bihar**,
2019 SCC OnLine Pat 1077;
(vi) **State of Madhya Pradesh Vs. Dal Singh**,
(2013) 14 SCC 159;
(vii) **Smt. Shamim Vs. State (GNCT of Delhi)**,
2018 (4) PLJR 160;
(viii) **S. Govidaarju Vs. State of Karnataka**,
2013 (10) SCALE 454
(ix) **Narotam Singh vs. State Of Punjab And Anr**.
(AIR 1978 SC 1542)
(x) **Leela Ram Vs. State of Haryana**,
(1999) 9 SCC 525;
(xi) **Subal Ghorai and Ors. Vs. State of WB**,
(2013) 4 SCC 607;
(xii) **Yogesh Singh Vs. Mahabeer Singh & Ors.**,
(2017) 11 SCC 195.

52. Now coming to the prosecution evidence on record, we find that victim (P.W.-5) is only eye-witness to the alleged occurrence and other non-official witnesses (P.W.-1 to P.W.-4) are witnesses only to pre and post occurrence facts and circumstances. As such, P.W.-5 is star witness of the prosecution. It is also settled position of law that on the basis of sole testimony of prosecutrix, accused may be convicted without corroboration of her testimony, because she is not an accomplice and she stands on the footing of an injured witness. For such conviction, only requirement is that the prosecutrix must be trustworthy, inspiring confidence of the Court. In other words, she must be a sterling witness.

53. From perusal of the above evidence on record, we find

that the testimony of the prosecutrix (P.W.-5) is consistent and truthful. There is no major contradictions in her statements going to root of the prosecution case. Some minor discrepancies may be found here and there on trivial matters. But over all, her testimony is truthful and reliable.

54. The testimony of the prosecutrix is also supported by the medical evidence, as per which the hymen of the victim was found ruptured and P.W.-6 who has examined her has opined that the commission of rape could not be ruled out. From the evidence of the other witnesses, it is proved that the victim was taken to Banaras by the appellant and he stayed with her at a lodge for two days. Even I.O. had verified the register of the lodge and found that the appellant had stayed there in a room along with the victim. We also find no reason for false implication of the appellant by the informant. There is no previous enmity between the appellant and the family of the prosecutrix, though defence witnesses have deposed that parents of the victim wanted to get her married with the son of the appellant and when the appellant refused to get his son married with her, he has been falsely implicated. But in view of the totality of the evidence on record, we find that such defence plea is not persuasive. Had the defence plea be true, even the son of the appellant could have been implicated in the case. But he has not been an accused in the case. Moreover, there are two elder sisters of the victim who are still unmarried and as per social practice, it is not believable that the

parents would offer marriage of a third daughter when their two elder daughters are still unmarried. Moreover, we find that in the defence evidence, there is no details of the offer of the marriage from the parents of the victim, with reference to the date and place. Hence, there is no substance in the defence to say that the appellant has been falsely implicated on his refusal to get his son married with the victim. Moreover, in view of the cogent evidence about the appellant taking victim to Banaras and staying at a lodge there for two days with her corroborates the testimony of the prosecutrix.

55. In view of the aforesaid facts and circumstances, we find that prosecution has successfully proved the foundational facts of the alleged offence and presumption under Sections 29 and 30 of the POCSO Act stands raised against the appellant. But the appellant has not succeeded to rebut this presumption, despite the evidence being adduced in his defence.

56. Hence, we hold that the appellant is guilty of committing penetrative sexual assault against the victim.

57. However, we find that learned Trial Court has applied wrong statutory provisions to punish the convict/appellant by sentencing him under Section 6 of the POCSO Act and sentencing him to rigorous imprisonment for the remainder of natural life. Learned Trial Court has not noticed the facts that the alleged offence has been committed in the year 2014 and at that time there was no such punishment in Section 6 of the Act. Moreover, as per the

provisions of Sections 4 and 6 of the POCSO Act, we find that the present case is covered under Section 4 of the POCSO Act and not under Section 6 of the POCSO Act, because the victim has been found to be above 12 years of age and hence, penetrative sexual assault committed against her does not come under aggravated penetrative sexual assault as defined under Section 5 of the POCSO Act. As per Section 5 of the POCSO Act, penetrative sexual assault only on the child below 12 years of age comes in the category of aggravated penetrative sexual assault. If the victim child is above 12 years of age, the penetrative sexual assault is punishable under Section 4 of the POCSO Act. Moreover, as per Section 4 of the POCSO Act as existed prior to the amendment in 2019, penetrative sexual assault is punishable with imprisonment of either description for a term which shall not be less than 7 years but which may extend to imprisonment for life and shall also be liable to fine. The penetrative sexual assault committed against the victim also comes under Section 376(1) of the I.P.C. which also provides for the same punishment as provided under Section 4 of the POCSO Act, prior to its amendment in 2019.

58. We further find that in view of the total facts and circumstances of the case, particularly the old age of the appellant, imprisonment of the appellant for 10 years would meet the ends of justice whereas the appellant has been already in custody for more than 10 years since 20.05.2014. Hence, he is sentenced to the period

already spent in custody.

59. We further find that learned Trial Court has directed payment of compensation of Rs.4,00,000/- to the victim payable by the District Legal Services Authority, Rohtas at Sasaram. But in view of the age of the victim, we deem it proper to enhance this compensation by Rs.1,00,000/-. Accordingly, the District Legal Services Authority is directed to pay additional compensation amount of Rs. 1,00,000/- within two months from the date of receipt of this order.

60. We also find that the learned Trial Court has rightly imposed a fine of Rs.50,000/- on the convict/appellant. We direct that this amount of the fine would be payable to the victim. In case of default to pay the fine by the appellant to the victim within two months of this order, the appellant would be liable to undergo additional simple imprisonment for one year.

61. Accordingly the appeal stands allowed in part.

62. The appellant is directed to be released forthwith if he is not required in any other case.

63. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

64. The records of the case be returned to the Trial Court forthwith.

65. Interlocutory application/s, if any, also stand disposed of accordingly.

(Jitendra Kumar, J.)

I agree.

(Ashutosh Kumar, J.)

Chandan/S.Ali/
Ravishankar-

AFR/NAFR	AFR
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