IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.14 of 2019

Arising Out of PS. Case No.-171 Year-2016 Thana- SULTANGANJ District- Patna

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Md. Pappu @ Md. Saba Uddin Son of Late Md. Sirajuddin Resident of Village - Malaria Office, Baksariya Tola, Sultanganj, P.S.- Sultanganj, District - Patna

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

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Appearance :

For the Appellant :	Mr.Madhav Raj, Advocate Mr.Vikash Kumar Jha, Advocate Mr.Abhinav Kumar, Advocate Mr.Kumar Ashish, Advocate
For the Respondent-State:	Mr.Abhimanyu Sharma, APP

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CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI
and
HONOURABLE MR. JUSTICE ANSUL

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI)

Date : 03-02-2026

1. The correctness of the judgement of conviction and order of sentence, dated 29th of September, 2018 and 5th of October, 2018, respectively, is under challenge in the instant appeal.

2. It is necessary to mention that by passing the impugned order the learned Additional Sessions Judge, 1st Court at Patna-cum-Special Judge under POCSO Act held the appellant guilty for committing offence under Section 376 of the Indian Penal Code and Section 6 of the POCSO Act in Special Case No. 122 of 2016, arising out of Sultanganj P.S.

Case No. 171 of 2016, dated 22nd of August, 2016.

3. It is pertinent to mention, at the outset, that the learned Trial Judge recorded sentence of imprisonment for life for the offence under Section 6 of the POCSO Act with fine of Rs. 10,000/- against the appellant. Further, it was directed that if the fine amount is recovered, 80 per cent of the same shall be paid to the victim.

4. In view of such punishment the Trial Court did not pass separate sentence under Section 376 of the IPC in compliance of Section 4 of the POCSO Act against the appellant.

5. <u>Brief facts of the case: -</u>

Sultanganj P.S. Case No. 171 of 2016, dated 22nd of August, 2016, was registered on the basis of a *farde bayan* submitted by the father of the victim (we are consciously not stating the name of the informant and the victim in order to conceal their identity). It is stated by the informant in his statement that his daughter, aged about 13 years, at the relevant point of time, used to stay at Sultanganj in the house of Guddun Ji. She used to perform small household work. While she was stayed in the house of Guddun Ji, one day about five months before the date of lodging *farde bayan*, she

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left the said house from some unknown place and returned on the next morning. When the informant came to know about her leaving away from the house of Guddun Ji for one night, he repeatedly asked his daughter about her whereabouts on that fateful date. But she did not say anything to her father. About one month before the date of lodging FIR, the informant noticed some physical changes in her daughter. Initially, she did not disclose anything on being asked about her physical changes. But, on the date of lodging farde bayan, she disclosed that she was pregnant. She also disclosed that one Md. Pappu took her to Darbhanga by a motor-cycle about five months before the date of lodging F.I.R. and forcibly established physical relationship with her. On the next morning, she was returned back by the accused to the house of the said Guddun Ji. The daughter of the informant did not disclose anything to her father out of fear, and there was no occasion for her to disclose the same to her mother, as her mother is mentally ill. The informant also disclosed that even after Darbhanga incident, the accused committed physical intercourse with her putting her under fear. One Thakur (Nai) (barber), namely, Chhotu Thakur saw such physical relationship between Pappu and the victim and taking

advantage of the said incident, he also committed penetrative sexual assault upon the victim. On the basis of the said information, police registered Sultanganj P.S. Case No. 171 of 2016 and investigation was entrusted to one Bharti Kumari, S.I. of Mahila Police Station–Patna. In course of investigation, she visited the place of occurrence, recorded the statement of the available witnesses, got the statement of the victim recorded under Section 164 of the Cr.P.C. Medical examination of the victim was also done and medical report was obtained by the I.O. and on completion of investigation, she has submitted charge-sheet against the appellant under Section 376 of the Indian Penal Code read with Section 4 / 6 of the POCSO Act.

6. **Process of the Court: -**Charge-sheet was filed before the learned Chief Judicial Magistrate at Patna. When the learned Chief Judicial Magistrate found that the case is exclusively triable by the learned Special Judge, POCSO Act, the case was committed to the Court of the learned Special Judge-cum-Additional Sessions Judge 1st Court at Patna for trial and disposal.

7. **Trial of the Case: -** The learned Sessions Judge framed charge against the accused under Section 376 of the

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IPC as well as 4/6 of the POCSO Act. When the charge was read over and explained to the appellant, he pleaded not guilty.

8. Accordingly, the trial of the case commenced.

9. During trial of the case, prosecution examined as many as five witnesses. The victim girl was further examined to prove her statement under Section 164 of the Cr.P.C.

10. The defence case as disclosed from the trend of cross examination of the witnesses on behalf of the prosecution as well as examination of the accused under Section 313 of the Cr.P.C. and the averments made by the witnesses on behalf of defence (three in numbers), it is ascertained that the appellant completely denied the allegation made against him by the prosecution. It is specifically pleaded that the victim had illicit relationship with one Chhotu Thakur, who is a barber by profession. Seeing such illicit relationship, the accused assaulted Chhotu. Out of the said grudge, the victim in collusion with his father implicated the appellant falsely in this case.

11. **Evidence on record: -** Out of the five witnesses, who were examined on behalf of the prosecution, P.W. 1 Gullu @ Bullu is a Manager of one Saddam Marriage

Hall at Sultanganj. The appellant used to work as an Electrician in the said marriage hall. Adjacent to the marriage hall, the house of the informant is situated. He stated that he does not know the daughter of the informant. He also denied making any statement to the police. Thus, P.W.1 would not throw any light about the incident. It is important to note that during trial the prosecution did not declare P.W.1 as a hostile witness.

12. P.W. 2 is the informant himself. It is stated by him that at the time of alleged incident, his daughter was aged about 13 years. It is found from his evidence that he heard from his daughter that the appellant committed some illicit act (galat kaam) with his daughter. Hearing the said incident, he went to Sultanganj Police Station and made his statement and put his LTI thereon. His daughter was medically examined by a Medical Officer in the local hospital. The witness also stated that her daughter gave birth to a baby, who died five days after her birth. In his cross examination, he clearly admitted that he does not know any person, namely, Chhotu Thakur. He denied his statement made before the Police that Chhotu Thakur committed illicit act (nazayaz kaam) with his daughter. In cross examination, it is admitted by the informant that he did

not lodge any complaint against one Kammu, who allegedly committed some illicit act with his wife. It is sufficient to note that the evidence of P.W.2 is hearsay in nature because he deposed what he heard from his daughter.

13. P.W. 3 is the victim. She deposed in this case on 03.02.2018.

14. At the outset, we are of the view that we should record that the noting made by the learned Trial Judge at the very initiation of the evidence of the victim is in the following words: -

> "साक्षी के समझने की शक्ति का परीक्षण किया गया। उसके सोचने समझने की शक्ति को सही पाकर उसका बयान अंकित किया गया।"

15. We are constrained to note that the above-noting does not suggest due compliance of Section 118 of the Evidence Act. Section 118 of the Evidence Act states as follows: -

> *"118. Who may testify. — All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by*

tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind"

16. Thus, it is the duty of the Trial Court to examine a witness having tender age to ascertain whether he/she is prevented from understanding the questions and give reasonable answer thereto. The deposition of a child witness must contain the questions which a Trial Judge asks in order to find out his mental capability and rationality and understanding of question.

17. In the instant case, the learned Special Judge did not record the questions or interrogatories after which he was ascertained that the victim had the capability to understand and give reasonable answer regarding the incident. On this aspect, the evidence of P.W. 3 is found to be irregularly recorded, though not completely illegal.

18. From her evidence, it is found that the incident took place about one and a half years before the date of her deposition. The appellant took her to Darbhanga and did illicit act with her (ganda ganda kaam), as a result of which, she became pregnant. It is further stated by the victim in her deposition that her father works as a Painter. In her house, her

mother and her elder sister stay. During cross-examination, she stated that she does not know any person namely Chhotu Thakur. Her father did not lodge any complaint against Chhotu. Chhotu did not commit any illicit act with her. At the relevant point time, the victim used to stay in a house, adjacent to the marriage hall. The appellant used to work as Electrician in the said marriage hall. Chhotu Thakur has a barber shop at the vicinity. After the institution of the Case, Chhotu closed his shop and fled away. The victim came to know Pappu as he used to stay in the same locality. She denied the suggestion that Pappu did not commit any wrongful act upon the victim.

19. The Investigating Officer was examined during trial as P.W. 5. There is nothing remarkable in the evidence of the Investigating Officer to be noted in the instant appeal.

20. In her statement recorded under Section 164 of the Cr.P.C., the victim stated that the appellant took her to Gandhi Maidan for walking on 14th of August, 2016. Once, he took her to Darbhanga and committed some wrongful act (ganda kaam). She raised alarm but nobody heard it. Initial incident at Darbhanga took place at about 9 / 10 P.M at night and after that the appellant left her to her house. She could not

recollect when she returned to the house. She stated that she was pregnant for about 5 months. She used to discharge household work in the house of one Gudan Didi. Presently, she does not perform any work. In her statement under Section 164 of the Cr.P.C., the victim further stated that whenever her father was not present in the house, the appellant used to come to her house and committed Ganda Kaam.

21. P.W. 4 is Dr. Premlata Verma. who was posted at Medical Officer at Guru Govind Singh Hospital, Patna City on 23rd of August, 2016. She medically examined the victim girl and recorded the following findings in her report:-

> *"Mark of Identification*
>
> *1. A black til on left collar bone*
>
> *2. A black til on right arm on lateral side average built Height 144 cm, Weight 40 kg and dentition upper 14, Lower 14 total 28 teeth.*
>
> *Secondary sex characteristic Auxiliary hair, pubic hair and breast are well developed. Last menstrual period is unknown.*
>
> *Abdominal swelling three fingers above umbilicous is present.*
>
> *There is no mark of any injury on any part of body including private parts.*
>
> *P/V examination- Vagina admits two fingers easily.*

Investigation 1 X-ray wrist Ap.Lateral

X-ray elbow Ap,Lat

X-ray chest Ap

X-ray hip Ap

Above examination is for determination of age.

2 Sealed vaginal smear for microscopic examination to see any semen or foreign body.

3 Ultrasonography of whole abdomen_ the report was awaited on 23.0816

On 06.09.16, Report no. 158/24.08.16 of dept of microbiology.PMCH shows spermatozoa not found.

Report no. 1064/24.08.16 of dept of radiology, PMCH shows complete fusion of epiphysis of medial epicondyle of humerous and head of radius which fuses at 14 years. There is incomplete fusion of distal radial epiphysis which fuses at 16.5 years.

Conclusion of age of the pt. is between 14-16.5 years.

Ultrasound report no. 33/24.08.16 of dept of radiology, PMCH shows single foetus (intrauterine) with cardiac activity of composite age 23 weeks and 2 days.

This report is written in my pen and signature on 06.09.2016, mark exhibit – 2."

22. **Submission made by the learned Advocate for the Appellant:-** It is submitted by the learned Advocate for

the appellant that the Trial Court held the appellant guilty for the offence punishable under Section 376 of the IPC read with Section 4 / 6 of the POCSO Act, mainly, relying on the evidence of victim girl and the Medical Officer. The learned Trial Court held that the victim girl specifically deposed implicating the appellant as perpetrator of the offence. Relying on a judgment in the case of ***State of Punjab v. Ramdev Singh,*** reported in ***(2004) 1 SCC 421,*** the Trial Court held that even if the victims' evidence is not corroborated by other witness, the same cannot be thrown away for the lack of corroboration because in an offence of penetrative sexual assault or sexual assault, the evidence of the victim is important more than the evidence of an injured person. In an offence of sexual assault, the victim is not an accomplice but she is more than an injured and the best witness in the case. A minor girl who was made pregnant taking advantage of her tender age ought not be disbelieved for want of corroboration or certain discrepancies in her evidence.

23. The learned Trial Judge also relied on the decision of the Hon'ble Supreme Court in the case of ***Rafiq v. State of U.P.,*** reported in ***AIR 1981 SCC 559,*** wherein it is held that if the evidence of the victim is found to be

trustworthy, cogent and reliable, conviction can be based on the sole testimony of the victim.

24. The learned Advocate on behalf of the Appellant further submits that there cannot be any disagreement against the ratio laid down by the Hon'ble Supreme Court in the aforesaid decisions, but the Trial Court did not consider that the evidence of the victim as well as her father is surrounded by a dark cloud of suspicion and under such circumstances, their evidence cannot be considered as reliable, trustworthy and cogent. In order to substantiate his contention, he refers to the FIR where the informant clearly stated that one Chhotu Thakur also sexually assaulted the victim. The Trial Court did not notice that immediately after lodging of the FIR, Chhotu Thakur fled away from the locality keeping his shop under lock and key. During evidence, both the informant and victim refused to implicate Chhotu Thakur. The victim even stated that Chhotu did not commit any wrong upon her. It was only the appellant who committed wrong upon her.

25. The learned Advocate for the Appellant has pointed out a glaring factual discrepancy between the FIR and the statement made by the victim under Section 164 of the Cr.P.C. and her deposition. In the farde bayan, it is clearly

stated that her daughter was taken to Darbhanga about 5 months before the date of lodging of FIR.

26. We have already recorded that the date of lodging FIR was on 22nd of August, 2016. Therefore, if the FIR is believed, the appellant for the first time took her to Darbhanga some times in the last part of February or March, 2016, but both in her evidence and statement under Section 164 of the Cr.P.C., the victim stated that Darbhanga incident took place away before 5 months of lodging FIR. There is no explanation as to why Chhotu Thakur was left away by the victim and her father.

27. Thus, it is open for the Court to take an adverse presumption that the victim and the informant did not approach the Trial Court with clear picture of the incident. Therefore, their evidence cannot be believed.

28. Learned Advocate for the appellant further submits that the victim's evidence is not of sterling quality and, therefore, her evidence cannot be considered in the light of the observation made by the Hon'ble Supreme Court in ***Rai Sandeep @ Deepu v. State (NCT of Delhi)*** reported in ***(2012) 8 SCC 21.***

29. He also refers to another judgement in the case

of ***Nirmal Premkumar and Anr. v. State Rep. By Inspector of Police*** reported in ***2024 SCC Online SC 260,*** where the Hon'ble Supreme Court reiterated the principle laid down in Rai Sandeep (supra) in the light of a case under Section 376 (2) (g) of the IPC.

30. On the same point, the learned Advocate for the appellant refers to a Division Bench Judgment of this Court in the case of Sukumar Jana v. The State of Bihar (Cr. APP (DB) 304 of 2021) dated 6th of December, 2023. Paragraphs 24, 25 and 26 of the said judgement are relevant and quoted below:-

> *"24. In case of Rai Sandeep v. State (NCT of Delhi) reported in (2012) 8 SCC 21, the Supreme Court elucidated that a sterling witness should be of high quality and caliber and the Court considering the version of such witness should be in a position to accept 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 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, the Supreme Court observed.*

25. The Supreme Court further held in case of Rai Sandeep (supra) that such 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. The said version should constantly 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. The Supreme Court emphasized "...... only if the version of such a witness qualifies the above tests 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". The Supreme Court concluded in case of Rai Sandeep (supra) as under:-

"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."

26. The said decision in case of Rai Sandeep (Supra) has been followed in case of Santosh Prasad v. State of Bihar, reported in (2020) 3 SCC 443"

31. **Submission on behalf of the State/respondents:-** Learned APP has supported the case of the prosecution. It is submitted by him that from the medical evidence, it is conclusively proved that the victim was pregnant for 5 months on the date of her medical examination. There is no challenge on the age of the victim. She was a minor and the provisions of the POCSO Act is squarely applicable for her. The victim in her statement stated that she was subjected to penetrative sexual assault by the appellant. The said fact was corroborated by medical evidence. Therefore, leaving aside all the evidences, this Court ought to hold that the learned Trial Judge rightly held the appellant guilty for committing offence under Section 376 of the IPC and Section 4/6 of the POCSO Act.

32. **Our Conclusion:-** Law regarding probity of charge for sexual atrocities is consistent that :

(i) evidence of prosecutrix if found reliable,

trustworthy and free from blemish can be the sole basis of the conviction;

(ii) the medical examination of the victim is absolutely necessary and forms a piece of very important evidence to ascertain the reliability of the evidence of the victim in a case like nature;

(iii) Medical examination of the accused specially in a case of sexual atrocities is obligatory in view of Section 53A of the Cr.P.C.

33. In the event, a case is required to be proved by DNA profiling, it is the duty of the Medical Officer under Section 53A to collect the samples of the accused for DNA profiling.

34. In the instant case, while we are always mindful about the above-mentioned principle, we like to record, at the outset, that accused had not been examined after his arrest under Section 53A of the Cr.P.C.

35. It is needless to say that the provision contained in 53A is a forgotten provision in the State of Bihar because this Court had dealt with number of criminal appeals and found that not in a single appeal, the Investigating Officer took resort of Section 53A.

36. Let us give an example, if in a case of sexual atrocity, where the accused is not examined medically and during trial, takes a plea of impotence, the Court will have no other alternative but to accept such contention in the absence of any report under Section 53A. Moreover, when Section 53A has been specially provided in the statute during trial or in the course of appeal, if in such appeal plea is taken by the accused, the Court probably cannot direct fresh medical examination of the accused because in that case such action by the Court will be in the nature of fishing out of evidence. Time has come to sensitize the police department directing them to have medical examination of the accused immediately after arrest.

37. In the instant case, the appellant was arrested on same day of lodging of FIR. There is no explanation as to why he was not medically examined. At least, some independent evidence should come before the Court to come to a finding that the accused was capable of committing such offence. It is the only medical examination of the accused which can amply prove the capability of the accused.

38. The next point, which we are of the opinion to discuss, is as to whether the evidence of the prosecutrix can be

accepted as an evidence of sterling character.

39. The Hon'ble Supreme Court Rai Sandeep @ Deepu (supra) defines sterling witness in the following words:--

> *"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."

40. In Nirmal Premkumar (supra) such observation

of Rai Sandeep (supra) was recorded with approval.

41. Following the law as aforesaid and in our persuade to answer the question as to whether the evidence of the prosecutrix can be held to be that of sterling witness, we are constrained to note that the following circumstances have the effect of casting a serious doubt with regard to the veracity of the prosecution version. They are summarized below:-

(i) Neither the victim nor the informant would tell even the approximate date and time when the incident first took place at Darbhanga;

(ii) The Investigating Officer did not visit the place of occurrence at Darbhanga;

(iii) The victim was found pregnant for about 5 months when the FIR was lodged. Therefore, it is obvious that victim was conceived any time before 5 months but the victim failed to state when such incident occurred, by whom such incident occurred and where such incident occurred;

(iv) There is no explanation as to why Chhotu Thakur was relieved of his criminal liability by the informant and her daughter;

(v) when there is specific allegation against the said Chhotu Thakur of committing sexual assault upon the victim

and farde bayan was recorded by the police officer on being stated by the father of the victim on the basis of what he heard from the victim and why no step taken by the Investigating Officer to find out as to whether the victim became pregnant either by the appellant or by Chhotu Thakur.

42. Thus, we find, considering such circumstances as stated above, that the evidence of the de facto complainant is not that of a sterling quality.

43. The Trial Court passed the order of conviction and sentence on the basis of rule of presumption laid down in Sections 29 and 30 of the POCSO Act. This rule of presumption has been succinctly discussed in the case of ***Subrata Biswas & Anr. v. State*** reported in ***2019 SCC Online 1815***. It is sufficient to note that the Division Bench of the Calcutta High Court are held in paragraph 22 of the judgement that the statutory presumption applies when a person is prosecuted for committing offence under Sections 5 and 9 of the POCSO Act and a reverse burden is imposed on the accused to prove the contrary. The word "is prosecuted" in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising the primary facts constituting the offence. If that were so then the

prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without the prosecution laying the firm contours thereof by leading reliable and admissible evidence. Such an interpretation not only leads to absurdity but renders the aforesaid provision constitutionally suspect.

44. Thus, it was held by the Division Bench of Calcutta High Court that foundational fact of the prosecution case must be proved beyond any shadow of doubt by the prosecution. Only thereafter the burden will shift upon the accused to prove the contrary.

45. In the instant case, the evidence on record is not sufficient to prove the foundational fact of the prosecution case.

46. For the reasons stated above, we are not agreeable with the findings made by the learned Trial Judge by the Trial Court.

47. Accordingly, the appeal is allowed.

48. The judgement of conviction and order of sentence, dated 29th of September, 2018 and 5th of October, 2018, respectively, passed by the learned Additional Sessions

Judge, 1st Court at Patna-cum-Special Judge under POCSO Act, are set aside.

49. If the appellant is in jail, he shall be released forthwith, if not required in any other case.

50. The lower court records be sent to the concerned court.

(Bibek Chaudhuri, J)

(Ansul, J)

uttam/-

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