



2025:CGHC:15162

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 1381 of 2022

Judgment Reserved on : 29.01.2025

Judgment Delivered on : 01.04.2025

- Kundan Kumar, S/o Lalit Narayan Bhumihar, Aged About 22 Years, R/o Gopalpur, P.S. Parasbigha, District Jahanabad, Bihar Presently R/o Shubhash Block, MD 39, Korba, Chowki Manikpur, P.S. Kotwali, District Korba (C.G.)

... Appellant

versus

- State Of Chhattisgarh Through Police Station Kotwali, District Korba (C.G.)

... Respondent

For Appellant : Mr. T.K. Jha, Advocate

For Respondent : Ms. Nand Kumari Kashyap, P.L.

(Hon'ble Smt. Justice Rajani Dubey)

CAV Judgment

1. This appeal arise out of the judgment of conviction and order of sentence dated 11.07.2022 passed by the Additional Sessions Judge, (F.T.S.C.) (POCSO), Korba, District Korba (C.G.), in

Special Case (POCSO) No. 38/2020, whereby the appellant have been convicted and sentenced in the following manner :

Sl. No.	Conviction	Sentence
1	Under Section 377 of the IPC	Rigorous Imprisonment for 10 years and fine of amount of Rs.500/-, in default of payment of fine further rigorous imprisonment for 06 months.
2	Under Section 4 of Protection of Children from Sexual Offences Act, 2012	Rigorous Imprisonment for 10 years and fine of amount of Rs.500/- in default of payment of fine further rigorous imprisonment for 06 months.

2. The prosecution story, in brief, is that on 15.10.2020, the victim/complainant filed a report at Police Station - Manikpuri to the effect that on 15.10.2020 at around 11.00 AM, he had gone to visit the quarter of his neighbour Kundan Kumar (appellant). The appellant was watching his mobile in his room. The victim/complainant being a friend also sat on the bed of the appellant and started watching the appellant's mobile. The appellant was watching pornographic movie/clips by putting a pen drive in the mobile. Thereafter, when the victim/complainant was leaving the appellant's room to go to his quarter, the appellant caught hold of his hand and forcefully laid him down on his (appellant's) bed, pulled down his (victim) pant and committed

unnatural sex inserting his (appellant's) penis in victim's anus which caused immense pain to the victim. The victim/complainant somehow managed to flee from there and went to his quarter and narrated the incident to his parents. Based on this report, dehati nalsi (Ex.P-2) was register followed by registration of FIR (Ex.P-22). Inquest was prepared under Ex.P-3. The consent of victim/complainant for examination of his private part was obtained under Ex.P-4. Consent of father of victim/complainant was also obtained under Ex.P-5. Thereafter, the victim/complainant was sent for medical examination to District Hospital, Korba, where he was examined by Dr. V.S. Rathore (PW-6) and gave his report under Ex.P-12 noticing multiple fissure in anus region at 12 O'clock position at vertical linear present in mucosa just above anal opening, which were indicating that the victim/complainant was sexually abused. The Doctor has also opined that the injuries around anal region confirms unnatural sexual offence. The appellant was also sent for medical examination to District Hospital, Korba, where he was examined by Dr. V.S. Rathore (PW-6) and opined that the appellant is capable of performing sexual intercourse. Birth certificate and mark list of class 6 of victim were seized under Ex.P/6. School admission register was also seized under Ex.P-8A(C). Nazri naksha was prepared under Ex.P/9. After medical examination of victim, two slides of anal, sample of perianal hairs and clothes sealed by doctor were sent to FSL for its chemical examination.

3. After completion of usual investigation, charge-sheet under Sections 377 IPC and 4 of POCSO Act against the appellant was filed before the jurisdictional Court.
4. The trial court framed charges against the appellant Kamlesh under Sections 377 of IPC and 4 of POCSO Act. The appellant abjured his guilt, pleaded innocence and prayed for trial.
5. In order to establish the charge against the appellant the prosecution examined 07 witnesses. The statement of the appellant under Section 313 of CrPC was also recorded in which he denied the material appearing against him and stated that he is innocent and has been falsely implicated in the case. After appreciation of evidence available on record, the learned trial court has convicted the appellant and sentenced him as mentioned in para 1 of the judgment. Hence, this appeal.
6. Learned counsel for the appellant submits that the impugned judgment and order passed by the learned trial Court is illegal, erroneous and contrary to law and the same is liable to be quashed. The learned trial Court while passing the impugned judgment has failed to appreciate the material available on record in its correct perspective. Learned counsel further submits that the learned trial Court has failed to appreciate the testimony of Dr. V.S. Rathore (PW-6) who stated that no injury was found on the exterior part of the anus of the victim and gave his report under Ex.P/11. The learned trial Court has failed to appreciate that there

is major contradiction in the testimony of victim given before the police to that of the statement given before Magistrate and trial Court, which itself creates the entire prosecution story suspicious. Learned counsel also submits that even if the entire prosecution case is taken on its face value, no case is made out against the present appellant for the offence under Section 377 of IPC. The learned trial Court has failed to appreciate that the evidence adduced during the trial are weak evidence and cannot be relied upon for basing the conviction of the appellant under Section 377 of IPC. The statement of victim itself revealed that he himself went to the house of appellant when he was alone in the room and he also did such activities with his friends. Further, the victim in his cross-examination, has also supported the suggestion that he also likes such things. Learned counsel also submits that the prosecution has failed to prove its case beyond all reasonable doubts. The prosecution has also failed to prove that the victim is below 18 years of age, as such, Section 4 of POCSO is not attracted in this case. It has been also submitted that the father of victim (PW-2) has stated in his cross-examination that he is not sure about the age of the victim and further stated that the victim took birth in Jamuna, Kotma (M.P.) but his birth certificate has been prepared at Korba Municipal Corporation. So, it is not proved beyond reasonable doubt that at the time to offence, the age of the victim was less than 18 years. Therefore, the impugned judgment is liable to be set aside.

In support of his submission, learned counsel placed reliance on the decisions 11.02.2022 passed by the Hon'ble High Court of Madhya Pradesh in *Writ Appeal No. 120/2021 [Kallu Khan Vs. State of M.P. & Ors.]*

7. On the other hand, learned State counsel supporting the impugned judgment of conviction and order of sentence submits that the commission of unnatural sex with the victim has duly been proved by the evidence of victim (PW-1) which is well corroborated by the medical evidence of PW-6 and his report made under Ex.P/11. He further submits that the prosecution has duly filed documentary evidence - the birth certificate of the victim, which is concrete piece of evidence to establish the fact that the victim at the time of incident was minor. The learned trial Court having minutely appreciated oral and documentary evidence, rightly convicted the appellant and no interference is required by this Court.
8. I have heard learned counsel for the parties and perused the material available on record.
9. It is clear from the record of the learned trial Court that the learned trial Court framed charges under Sections 377 of IPC and 4 of POCSO, and after appreciation of oral and documentary evidence, the learned trial Court convicted the appellant under Section 377 of IPC and Section 4 of POCSO Act & sentenced him as described in para 1 of this judgment.

10. In order to consider the age of the victim, I have examined the evidence available on record produced by the prosecution. The prosecution relied upon the birth certificate (Ex.P-7), mark list (Ex.P-8) and school admission register (Ex.P-8A(C)), which is sought to be proved by PW/2 – father of victim and PW-3 – Rajanigandha Pathak, Principal.
11. To sum up this issue, this Court has gone through documents Ex.P-7 and Ex.P-8, which has been filed by the prosecution. According to birth certificate (Ex.P-7) and mark list (Ex.P-8), the date of birth of victim is 09.03.2003 but it is apparent from the birth certificate (Ex.P-7) that the same has been issued on 31.08.2013 after 10 years of the birth of victim. There is delay of about 10 years in issuing the said certificate.
12. The question which arises before this Court whether the birth certificate issued with delay can be taken into consideration for determination of age of victim in criminal cases.
13. Undoubtedly, the birth certificate is a strong proof for determination of the age of a person and credibility of this document cannot be doubted but for regulating the registration of births and deaths and matters connected therewith, the Parliament has enacted the **Registration of Births and Deaths Act, 1969**. Different procedure were prescribed under Chapter-III- Registration of Births and Deaths and **Section 13** deals with

Delayed Registration of Births and Deaths. For ready reference, Section 13 (3) is reproduced herein as under :-

“13. Delayed registration of births and deaths. - (1)

Any birth or death of which information is given to the Registrar after the expiry of the period specified thereof, but within thirty days of its occurrence, shall be registered on payment of such late fee as may be prescribed.

(2) xxxx

(3) Any birth or death which has not been registered within one year of its occurrence, shall be registered only on an order made by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee.”

14. Now coming to the evidence of PW-2 – father of victim, who has admitted this fact that the victim was born in Jamuna, Kotma, District Anuppur (M.P.) and his birth certificate was issued by the competent authority of Korba in the year 2013. When a question was put to this witness that “जब कोरबा नगर निगम से जन्मप्रमाण पत्र बनवाया था तब आपने बताया था कि बालक का जन्म कोरबा में नहीं हुआ है ? to which this witness answered that, “*he was not asked about this so he did not tell*”.

15. The prosecution did not file any document of Kotwar of Jamuna, Kotma, District Annuppur (M.P.) nor it has filed any documents regarding the inquiry proceeding of competent authority of Korba

regarding delay in registration of date of birth in view of Section 13 (3) of the Registration of Births and Deaths Act, 1969, and on what basis, it has issued the birth certificate of the victim.

16. The another document on which the trial Court relied upon is mark list (Ex.P-8) and school admission register (Ex.P-8A(C)) & to prove these documents, the prosecution examined PW-3 – Rajnigandha Pathak, Principal of Primary School, Korba. She has stated that as per school admission register (Ex.P-8A(C)), the date of birth of victim is 09.03.2003 and the victim was admitted in class 6 on 04.07.2015. In cross-examination, this witness has stated that she did not know that from which school the victim has come after studying 5th class. She has also stated that she cannot tell that what documents were brought by victim at the time of his admission in her school. She has admitted that at the time of admission in class 6, the date of birth was recorded in the Dakhil Kharij Panji on the basis of date of birth written in transfer certificate of class 5th of the victim. She has also admitted that she did not know that till which class the victim had studied in her school. She has also stated that she cannot tell that when the victim left her school or the date on which he took transfer certificate from the school.
17. From the aforesaid testimony of this witness, it transpires that she is not the author of dakhil kharij panji and she did not exactly know that on what basis the date of birth of the victim was recorded.

18. In the matter of **Alamelu and Another Vs. State, represented by Inspector of Police, 2011(2) SCC 385**, the Hon'ble Supreme Court has held that the transfer certificate which is issued by government school and is duly signed by the Headmaster would be admissible in evidence under Section 35 of the Evidence Act 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the prosecutrix in the absence of any material on the basis of which the age was recorded. It was observed as under :-

“40. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded.

48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of

*Ravinder Singh Gorkhi Vs. State of U.P.*⁴ held as follows:-

"The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a (2006) 5 SCC 584 party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."

19. In the light of aforesaid judgment in *Alamelu* (*supra*), admittedly, the base of entry made in school admission register (dakhil kharij panji) is not known to the Rajnigandha Pathak (PW-3), Principal of

Primary School, where the victim had studied, and further the credibility of birth certificate is under suspicion as the same has been issued after about 10 years of the birth of victim and the prosecution has not adduced any documents showing the proceeding of competent authority of Korba in issuing the birth certificate with delay as contemplated under Section 13 (3) of the Registration of Births and Deaths Act, 1969. Therefore, it would be difficult for this Court to arrive at definite conclusion that the victim, at the time of incident, was minor. The prosecution has to prove this fact beyond reasonable doubt that the victim at the time of incident was minor but it has failed to prove the same.

20. The birth certificate being a strong proof of age must be taken in to consideration but if there is delay of more than one year in issuing the birth certificate, the same shall be taken into consideration only after complying the provision of Sub section 3 of Section 13 of Chapter III of the Registration of Births and Deaths Act, 1969, which provides for order of Magistrate of First Class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee. After considering the facts and circumstance of the case and the evidence with regard to the age of the victim, the finding of the learned trial Court to the effect that the victim on the date of incident was minor, is set aside and the appellant is acquitted from the charge under Section 4 of POCSO.

21. The next question which arises for determination by this Court is whether the appellant has committed the offence under Section 377 of the ICP or not.
22. To sum up this, this Court has gone through the evidence of victim (PW-1) who has specifically stated against the appellant that on the date of incident, appellant told him to go for purchasing nail (Khila) and when he got ready, the appellant told him to bring chilly for preparing vegetable (sabji). He has also stated that he went to the room of appellant for giving chilly and when he was returning to his house, the appellant told him to stay for some time and closed the door. He was sitting on the bed and the appellant after putting pen drive in mobile started watching pornographic movie/clip. Thereafter, the appellant pulled down his (victim's) pant and slept over him. He has also stated that he started screaming and the appellant inserted his penis in his anal. Thereafter, he somehow managed to flee from his room and went to his parents and narrated the incident. Thereafter, on the same day he filed written complaint in police station under Ex.P-1, on the basis of which, dehati nalishi (Ex.P-2) was registered followed by FIR (Ex.P-22) against the appellant. In cross-examination, this witness has remained firmed to what has been stated in his examination-in-chief and denied the suggestion that he is giving false testimony to implicate the appellant.

23. Dr. V.S. Rathore (PW-6) has stated that on 15.10.2020 at around 9.10 PM, the victim was brought for medical examination before him and upon examination he found multiple fissure in anus region at 12 O'clock position at vertical linear present in mucosa just above anal opening, which were indicating that the victim/complainant was sexually abused and gave his report under Ex.P-12. The Doctor has also opined that the injuries around anal region confirms unnatural sexual offence. That apart, FSL report (Ex.P-19) also confirms the presence of semen and human sperm in anal slides of victim.
24. Close scrutiny of the evidence makes it clear that on the date of incident i.e 15.10.2020, when the victim was returning his home after giving chilly to the appellant, the appellant told him to stay for some time and closed the door and after watching pornographic movie/clip in mobile, he pulled down victim's pant & inserted his penis in victim's anal. After the incident, the victim narrated the incident to his parents and on the same day a written complaint (Ex.P-1) was filed by the victim, on the basis of which, dehati nalishi (Ex.P-2) was registered followed by FIR (Ex.P-22) against the appellant. The evidence of victim (PW-1) is well corroborated by the evidence of Dr. V.R. Rathore (PW-6) who noticed multiple fissure in anus region at 12 O'clock position at vertical linear present in mucosa just above anal opening, which were indicating that the victim/complainant was sexually abused and gave his report under Ex.P-12 opining that the injuries around anal region

confirms unnatural sexual offence, and the FSL report (Ex.P-19) also confirmed the presence of semen and sperm in slides of the victim. The defence has cross-examined these witnesses at length but has not been able to elicit anything in their cross-examination to discredit their testimony especially to the fact that the appellant has not committed intercourse with victim against the order of nature. The evidence of victim (PW-1) and Doctor (PW-6) inspire full confidence of this Court and the same is sufficient to hold the appellant guilty for commission of offence under Section 377.

25. This Court does not find any illegality or infirmity in convicting the appellant under Section 377 of IPC and the conviction of the appellant under this section is maintained while acquitting him under Section 4 of POCSO as the prosecution has utterly failed to prove the age of the victim below 18 years of age as discussed above in this judgment.
26. It is the submission of learned counsel for the appellant that the appellant is behind the bar since 15.10.2020 and has served more than 04 years of jail. He has faced the mental agony all these years on account of criminal proceedings pending against him, therefore, some sympathy may be taken and his sentence may be reduced to the period already undergone.
27. Considering the facts and circumstances of the case, overall evidence adduced by the prosecution, the mode and manner in

which the incident had taken place, in my view, some reprieve in the matter of sentence deserves to be given to him.

28. In the result, the conviction of the appellant under Section 4 of POCSO is set aside but for the offence punishable under Section 377 of the IPC, he shall be required to undergo rigorous imprisonment for 07 years. The amount of fine for the offence under Section 377 of IPC as imposed by the learned trial Court will remain the same and in default of payment thereof, he shall be required to undergo six month's rigorous imprisonment.
29. The criminal appeal is allowed in part with the above modification in the sentence.
30. The record of the Trial Court along with the copy of this judgment be sent back immediately to the trial Court concerned for compliance and necessary action.

Sd/-

(Rajani Dubey)
JUDGE