

**A.F.R.**

Reserved on: 7.9.2021

Delivered on: 3.3.2022

**Court No. - 88**

**Case :-** CRIMINAL APPEAL No. - 3169 of 2020

**Appellant :-** Amrita Nand @ Tribhuvan Arjariya @ Baba

**Respondent :-** State of U.P. and Another

**Counsel for Appellant :-** Ram Krishna Chaurasia

**Counsel for Respondent :-** G.A.

**Hon'ble Mohd. Aslam,J.**

1. Heard Sri Brijesh Sahai, Senior Counsel assisted by Sri Ram Krishna Chaurasia, learned counsel for the accused-appellant, learned A.G.A. for the State and perused the record.

2. The instant appeal has been moved by accused-appellant under Section 374(2) of Cr.P.C. against the impugned judgment of conviction and order of sentence dated 21.10.2020 passed by Additional Sessions Judge-IV/Special Judge (POCSO Act), Banda in Special Case No.68 of 2015 (State Vs. Amrita Nand @ Tribhuvan Arjariya), arising out of Crime No.617 of 2015, under Sections 376, 511 I.P.C. & Sections 8, 10 of POCSO Act, P.S. Kotwali Nagar, Banda, by which the accused-appellant has been convicted under Section 10 of POCSO Act and was sentenced to undergo rigorous imprisonment for 7 years with a fine of Rs.10,000/- under Section 10 of POCSO Act, in default thereof, to further undergo simple imprisonment for two months.

3. The brief facts necessary for disposal of this appeal is that informant Avadhesh Kumar Soni son of Raja Ram Soni resident of Chhoti Bazar, Thatharahi, Police Station Kotwali Nagar, District Banda has lodged a first information report on 23.8.2015 at 20:50 p.m. at Police Station Kotwali Nagar on the basis of written complaint with the allegation that on 22.8.2015 at 05:00 p.m., his daughter victim X aged about 4 years was playing in front of the house. The accused Amrita Nand @ Tribhuvan Arjariya aged about 60 years, who is his neighbourer called Baba by the people of the locality, called his daughter victim X

and gave her toffee and took her inside his house and tried to commit bad act with her. On being called by the mother of the victim X in high pitch, she was driven out by the accused from his house and the victim X after coming to her mother narrated the entire incident to her mother. After that Smt. Khusbu wife of the informant visited the accused and asked him that what you have done uncle with her daughter, thereafter, he locked his house and went somewhere else and did not return back to his house. The informant requested that his first information report be lodged and necessary action be taken against the accused.

4. Head Constable Moharrir Ram Prasad Pal has scribed the check of Crime No.617 of 2015 against the accused Amrita Nand @ Tribhuvan Arjariya for offence punishable under Section 376, 511 I.P.C. and Section 4 of POCSO Act. The investigation was given to S.I. Ram Babu Yadav. He went to Lucknow on account of Government work, therefore, the investigation was conducted by S.S.I. Pankaj Kumar Pandey on behalf of S.I. Ram Babu Yadav and the case was registered on 23.8.2015. He copied the check report and GD entry no.64 at 20:50 p.m. in CD on 23.8.2015 and has recorded the statement of check scriber and GD writer Head Constable Moharrir Ram Prasad Pal and also recorded the statement of Ct. Shashank/Computer Operator, who scribed the check at the direction of Head Constable Moharrir Ram Prasad Pal. The statement of victim X was recorded by S.O. Reeta Singh under the videography. On the same day, he recorded the statement of informant Avadhesh Kumar Soni and has taken the *Chaddhi* (underwear) of cream colour in police custody and prepared memo of the same in presence of the witnesses Rajan Sen and Kalpana Singh. He also copied the memo of taking *Chaddhi* in police possession in CD on the same day.

5. The victim X was medically examined by Dr. Usha Singh (PW-5) at District Women Hospital, Banda on 23.8.2015, where she has stated to the doctor that on 22.8.2015 at 05:00 p.m. the accused by giving allurements of toffee took her inside his house and tried to commit bad deed with her. No mark of any injury was found on the body of the victim X and her clothes were sealed and sent to the police station. Dr.

Usha Singh (PW-5) has prepared medical report at the time of medical examination. On 25.8.2015, the medical report of the victim X was copied and on return of S.I. Ram Babu Yadav from Lucknow the investigation was resumed on 27.8.2015. He recorded the statement of Smt. Khusbu mother of the victim X and inspected the place of occurrence and prepared site plan Ex.Ka-5 on 27.8.2015 and recorded the statement of witnesses Ajay Kumar Gupta and Atul Soni on 12.9.2015. He visited the house of accused where he found the lock on the door of his house and came to know that after the day of occurrence he is absconding. He received information from the informer that accused is standing at the shop of *Bapu Misthan Bhandar* station road having white beard wearing red colour clothes. On receiving the information of the informer, he along with S.I. Rakesh Kumar Saroj, Ct. Shiv Kumar Yadav and informant visited the place at Station Road Tiraha where Bapu written illegible in CD and on seeing the police party, accused tried to run here and there and was apprehended by the police at 07:30 p.m. and on inquiry he told his name as Amrita Nand @ Tribhuvan Arjariya son of Laxmi Narayan Arjariya resident of Mohalla Thathrahi, Chhoti Bazar, Police Station Kotwali Nagar, District Banda and after informing him the ground of arrest, the police party arrested him. The Investigating Officer has recorded the statement of the accused, wherein he has denied the occurrence and stated that he will produce the defence through counsel in the court. Later on victim X was produced before the court by L/Ct. Sandhya Sahu for recording her statement under Section 164 Cr.P.C. The statement of the victim X under Section 164 Cr.P.C. was recorded by Additional Civil Judge (Junior Division)/Judicial Magistrate, Banda on 7.10.2015, who has also attested the photographs of the victim X on the statement under Section 164 Cr.P.C. In statements under Sections 161 & 164 Cr.P.C., the victim X has supported the prosecution case. After arrest of the accused, he was medically examined by EMO, District Hospital, Banda on 1.10.2015 where no visible injury was found on his body. After completing the investigation, S.I. Ram Babu has submitted charge-sheet under Sections 376, 511 I.P.C. and Section 4 of POCSO Act against the accused.

6. The cognizance was taken by learned Additional Sessions Judge, Fast Track Court, Banda on 21.12.2015 and the copy of the police papers were given to the accused. After hearing the learned counsel for the accused, charges under Sections 376, 511 I.P.C. and Section 8 of the POCSO Act were framed against the accused by learned Additional Sessions Judge, Fast Track Court, Banda on 18.2.2016 to which accused has not pleaded guilty and claimed to be tried. Later on the charge was amended by learned Special Judge/Additional Sessions Judge, Court No.4, Banda on 1.9.2016 and the charge under Section 10 of the POCSO Act was framed against the accused to which he has also not pleaded guilty and claimed to be tried.

7. In order to prove its case, prosecution has examined informant Avadhesh Kumar Soni as PW-1 (father of the victim X), who has also proved the *tahriri* report Ex.Ka-1, Smt. Khusbu (mother of the victim X) as PW-2, victim X as PW-3, witness Ajay Kumar as PW-4, who has turned hostile in cross examination, as witnesses of the fact. Prosecution has also examined Dr. Usha Singh as PW-5 to prove medical report and Ct. Anup Kumar Sachan to prove the charge-sheet Ex.Ka-4 and site plan Ex.Ka-5 in secondary evidence and has closed its evidence.

8. The statement of the accused under Section 313 Cr.P.C. was recorded to which he has denied the prosecution case and has stated that the victim X was deposing falsely against him under the influence of her mother. He has also stated that the case was wrongly investigated and the wrong charge-sheet was submitted against him. He has further stated that no occurrence has taken place and due to enmity he has been falsely implicated.

9. Learned lower court after hearing the argument of learned counsel for the accused-appellant and learned Additional Public Prosecutor has held that delay in lodging the first information report has been explained by prosecution from the depositions of Avadhesh Kumar Soni (PW-1) and Smt. Khusbu (PW-2). It has further held that the victim X is a child witness and she was found to be competent witness and her statement

has not been shaken in cross examination. Her statement was found to be truthful and inspires confidence and also held that in sexual offences the accused can be convicted on the basis of statement of the victim. It has also held that the prosecution has proved its case beyond reasonable doubt and has presumed that accused has committed the offence and has convicted and sentenced him to undergo rigorous imprisonment for 7 years with a fine of Rs.10,000/-, in default thereof, to further undergo imprisonment for two months by impugned judgment.

10. Learned counsel for the accused-appellant has contended that the witnesses Avadhesh Kumar Soni and Smt. Khusbu are not eye witnesses and the witness Ajay Kumar (PW-4) also not eye witness, who in his cross examination has stated that he has not given any statement to the Investigating Officer and has further stated that he could not remember whether on the day of occurrence he was at his house or not and has admitted that he has not seen the occurrence. He has further stated that he has no knowledge whether Smt. Khusbu told her husband regarding the occurrence. He has further stated that he could not tell how his name has been mentioned in the charge-sheet as eye witness. Learned counsel for the accused-appellant has further contended that no injury was found on the body or on the private part of the victim X as per the statement of Dr. Usha Singh (PW-5). He has further contended that statement of the witness victim X was not recorded in compliance of legal provisions. He has further contended that the lower court has not given any certificate regarding competency of the witness victim X, who is a child witness, therefore, her statement cannot be relied on and in support of his contention he placed reliance on the law laid down by Hon'ble Supreme Court in "***P. Ramesh Vs. State represented by Inspector of Police (2019) 20 SCC 598***" and has referred paras 13, 14 & 16 of the aforesaid ruling. He has further contended that the victim X has admitted in her cross examination that she was tutored by her parents and counsel to give statement whatever they told her, therefore, she is tutored witness and no reliance can be placed on her testimony. He has further contended that the first information report was lodged after delay of more than 26

hours of the occurrence. He has further contended that the occurrence has taken place on 22.8.2015 at 17:00 p.m. and the first information report was lodged on the next day i.e. on 23.8.2015 at about 20:50 p.m. i.e. after a gap of 26 hours and the delay in lodging the report has not been explained by prosecution. He has further contended that the ground put forward by the prosecution for delay that on the day of occurrence the informant went to Kanpur and returned on the next day is after thought. Alternatively he has further contended that as per statement of victim X recorded under Section 164 Cr.P.C. she has stated that accused called her and told her to put off her clothes and thereafter the accused has also put off his clothes and told her to show her private parts and then he went to take rope, meanwhile she fled away from there. Learned counsel for the accused has further contended that the entire statement shows that he has not touched the private part of the victim X and it cannot be said that he has committed sexual assault on child below 12 years of age and this act will not come within the purview of Section 9(m) of the POCSO Act, maximum this act goes up to the offence of sexual harassment, which is punishable under Section 12 of the Act with imprisonment of either description which may extend up to three years and fine also.

11. Learned A.G.A. has supported the prosecution case and has contended that from the evidence of informant Avadhesh Kumar Soni (PW-1), it is proved that he was doing the work of goldsmith and went to Kanpur for taking raw material of gold and silver to which he after preparing the ornaments returns the same to the jewellers. He has further contended that the informant Avadhesh Kumar Soni (PW-1) has stated that on 22.8.2015 he went to Kanpur for taking raw material of gold in the evening and returned on the same day at 09:30 p.m. and proceeded to the police station for lodging the first information report along with his wife Smt. Khusbu (PW-2) and daughter victim X. He has further contended that the informant has given a written complaint to the police and thereafter returned from there and his statement has been recorded by the police on 23.8.2015. He has further contended that there is no

substance in the arguments of the learned counsel for the accused-appellant that the informant was unemployed while he was doing the job of goldsmith and preparing the ornaments, therefore, his going to Kanpur for taking raw material for preparing ornaments is natural and, therefore, the delay has been explained by prosecution satisfactorily. He has further contended that in this case the informant Avadhesh Kumar Soni (PW-1), Smt. Khusbu (PW-2) and witness Ajay Kumar (PW-4) are not eye witnesses, the only eye witness is victim X, who has given detailed description at the time of recording of her statement by S.O. Reeta Singh and the victim X was produced before the court of Magistrate for recording her statement under Section 164 Cr.P.C., where she has narrated the entire story and has also given the details of the occurrence in her statement as PW-3. He has further contended that the accused has only touched her private part and got touched his private part from her and thereafter went to take rope, meanwhile, the victim X escaped herself from there, therefore, non finding of any injury at the time of medical examination is of no consequence. He has further contended that the age of the victim X was shown in the first information report as four years. He has further contended that the victim X has stated to Dr. Usha Singh at the time of medical examination that on 22.8.2015 at 05:00 p.m. accused called her by alluring to give her toffee and tried to commit bad deed with her and she has also supported the prosecution case in her statement given under Section 164 Cr.P.C. which is Ex.Ka-2. He has further contended that in above circumstances, it is proved beyond reasonable doubt that the sexual assault was committed by the accused-appellant to a child of about four years, which according to Section 9(m) of POCSO Act comes within the definition of aggravated sexual assault.

12. I have gone through the file. Before appreciating the evidence on record, I find it necessary to reproduce Section 7 of the POCSO Act, which defines sexual assault, Section 7 of POCSO Act reads as follows:-

*“7. Sexual Assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any*

*other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”*

13. Aggravated sexual assault is defined in Section 9 of POCSO Act.

The relevant portion of Section 9 of POCSO Act is reproduced below:-

*“9. Aggravated Sexual Assault.- (a) Whoever, being a police officer commits sexual assault on a child-*

*.....(m) whoever commits sexual assault on a child below twelve years of age, meaning thereby if any sexual assault is defined in Section 6 of the POCSO Act, whoever commits sexual assault from the point of reading of the Section 7 of the POCSO Act and Section 9(m) of the POCSO Act, it is abundantly clear that whoever commits sexual assault on a child below twelve years is said to have committed sexual assault for which punishment is provided under Section 10 of the POCSO Act.”*

14. Section 10 of the POCSO Act reads as follows:-

*“10. The punishment for the aggravated sexual assault.- Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”*

15. Here it is also pertinent to mention that special provision has been made for recording of statement of a child. Section 25 of the POCSO Act provides for recording of statement of a child by Magistrate which reads as follows:-

*“25. Recording of statement of a child by Magistrate.- (1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (2 of 1974), (hereinafter referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:*

*Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.*

*(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.”*

16. Section 26 of POCSO Act also provides additional provision regarding recording of the statement of a child witness, which are as follows:-

*“(1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the*



*parents of the child or any other person in whom the child has trust or confidence.*

*(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.*

*(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.*

*(4) Wherever possible, he Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.”*

17. Section 36 of the POCSO Act provides that child not to see accused at the time of testifying, which are as follow:-

*“(1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.*

*(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.”*

From above provision, it is clear that some departure by law has been made regarding the child witness in POCSO Act and even her statement shall be recorded in presence of her parents or any other person in whom the child has trust or confidence. As per section 26 additional safeguard has been given.

18. Section 33(2) & (3) provides special protection to the child which speaks as follows:-

*“(2). The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.*

*(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.”*

From the above provision, it is clear that some departure has been made in law regarding recording of the evidence of a child witness so he or she can give fair and formal evidence before the court.

19. The procedure for recording of the deposition under 164 Cr.P.C. is provided in the POCSO Act, therefore, that procedure will *mutatis mutandis* apply at the time of the recording of the evidence of the child witness at the time of trial also.

20. At this juncture, I find it necessary to discuss the law regarding proof of the criminal case. Section 3 of the Indian Evidence Act, 1872 defines 'Proved', 'Disproved' and 'Not Proved' as under:-

**“Proved”**. –A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of particular case, to act upon the supposition that it exists.”

**“Disproved”**.-A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.”

**“Not Proved”**.-A fact is said not to be proved when it is neither proved nor disproved.”

21. The required standard of proof in criminal case is beyond reasonable doubt and in civil cases, it is preponderance of probabilities. This distinction is basically made through judicial pronouncement in **“Woolmington Vs. Director of Public Prosecutor (1935 UKHL1), Rex Vs. Abramovitch (1914 11 Cr. App. R 45)”**.

22. The case relates to the menace of sexual crime against children, therefore, motive plays no role in such crime. Oral testimony of a witness can be appreciated by considering his cross-examination, if he remains uncontroverted in the cross-examination, by weighing his testimony with the testimonies of the other witnesses, whether his testimony gets corroboration from the reliable testimonies of other witnesses and by analysing and evaluating whether his testimony is contradictory or corroborated by the documentary evidence, adduced in the case, then his testimony is reliable.

23. In light of aforesaid, it is necessary to examine the effect of presumption arising under Section 29 POCSO Act. Section 29 of the POCSO Act reads as follows:-

*“Section 29–Presumption as to certain offences –Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of the this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.”*

24. Perusal of the above provision does indicate that it is for the accused to prove the contrary that he has not committed or abetted the commission of an offence under sections 3, 5, 7, and section 9 of the POCSO Act and, in case, he fails to do so, presumption would operate against him leading to his conviction under the provision of the Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be said that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when prosecution is first able to establish the fact and that would form the foundation of the presumption under Section 29 of the POCSO Act to operate. Otherwise, entire burden would be on the accused to prove the contrary. Such position of law or interpretation of presumption under section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate and no person can be deprived of liberty, except in accordance with the procedure established by law.

25. The manner in which such presumption would operate against the accused has been analysed and deliberated upon by the courts, because such a presumption is also provided for in various statutes such as Prevention of Corruption Act, 1988. In the case of **“Babu Vs. State of Kerala, (2010) 9 SCC 189”** held in para 27 and para 28 as follows:-

***(IV) Burden of Proof and Doctrine of Innocence.***

*“27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of the criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely an the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instrument Act, 1881; The Prevention of Corruption Act, 1988, and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However such a presumption can also be raised only when certain foundational*

*facts are established by the prosecution. There may be difficulty in proving a negative fact.*

*28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as of those is statutes as referred to hereinabove, that the burden of proof is on the accused. The statutory provision even for a 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."*

26. Keeping in the aforesaid position of law in mind, evidence of the prosecution witnesses in the present case will have to be examined to find out whether the prosecution has established a presumption under Section 29 of the POCSO Act.

27. Section 118 of the Evidence Act provides 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.*

***Explanation.-** A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."*

28. The principle and scope is enshrined in Section 118 of the Evidence Act regarding who may testify under this section, all persons are competent to testify unless there any information of the court. (a) unable to question put to them or (b) to give rational answer to those questions owing- i) tender age, ii) extreme old age, iii) disease of mind or body or, iv) any other such cause even lunatic, if he is capable of understanding the question put to him and giving rational answer is the competent witness.

29. So far the submission of Sri Brijesh Sahai, learned Senior Counsel is concerned that no certificate was appended after ascertaining her competency regarding competence of the victim X as competent witness, therefore, her evidence cannot be read and he has placed reliance on the law laid down by Hon'ble Supreme Court in "**P. Ramesh Vs. State represented by Inspector of Police.**" The fact in that case was that PW-3 & PW-4 were the child witnesses in that case and it was observed that they were unable to understand before whom they were standing and

even they did not know the judge or lawyer and the statement was not recorded and it was held that they were not competent witnesses, which was challenged before the High Court. Learned lower court came to the conclusion that there was sufficient evidence on record to sustain the charge under Section 302 I.P.C. as well as Section 498 I.P.C. and that the prosecution has brought home guilty of the accused beyond reasonable doubt. Aggrieved by the said judgment of conviction, the accused preferred an appeal before the High Court. The High Court has set aside the judgment of the trial court and remanded the case to the trial court with direction to examine the child witnesses PW-3 and PW-4 after objectively ascertaining their capacity to depose. Thereafter, the same was challenged before the Hon'ble Supreme Court and the Hon'ble Supreme Court had rejected it.

30. So far observation of para 13 of the aforesaid judgment is concerned, it is mentioned in para 13 that if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation and the rule was stated in **“Dattu Ramrao Sakhare Vs. State of Maharashtra (1997) 5 SCC 341”**, wherein the Hon'ble Supreme Court, in relation to child witnesses, held as under:- (SCC p. 343, para 5)

*“5...A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”*

31. He has also contended that it is mandatory for the court to record the certificate regarding competency of the witness and has relied on para 14 & 16 of the aforesaid judgment, which are as follows:-

*“14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in Wheeler v United States 7, wherein it was held thus:*

*“... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which- will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous...” (emphasis supplied)*

*“16. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. 9 A child becomes incompetent only in case the court considers that the child was unable to understand the 8 (2004) 1 SCC 64. Subsequently, relied upon in Nivrutti Pandurang Kokate v State of Maharashtra (2008) 12 SCC 565 Dalsukhbhai Nayak v State of Gujarat (2004) 1 SCC 64 questions and answer them in a coherent and comprehensible manner. 10 If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.”*

32. From para 16 of the judgment it is clear that judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness and the competency of a child witness can be ascertained by questioning her or him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if he or she had the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the

questions put to her or him and gives rational answers to those questions, it can be taken that she or he is a competent witness to be examined.

33. Para 15 of the aforesaid judgment is as follows:-

*“7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”*  
(emphasis supplied)

34. From the above ruling, nowhere it is provided that certificate regarding the competency of the child witness is mandatory if it is recorded it is so far so good, but if the court has put the question to understand his intellect to understand the question and if he replied the rational answer and thereafter his examination was recorded without recording the certificate regarding the competency of the witness and he was thereafter cross examined by counsel for the accused and had replied satisfactorily and given rational answer, therefore, in above circumstances not appending the certificate by the trial judge regarding the competency of the witness is of no consequence and it will not make his statement inadmissible.

35. Section 29 of the POCSO Act speaks as follows:-

*“29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.”*

36. Hon'ble Supreme Court in the case of **“Dattu Ramrao Sakhare Vs. State of Maharashtra 1997 5 SCC 341”** has observed that if the court is satisfied that the child witness below the age of twelve years is

competent witness, such a witness can be examined without oath or affirmation and the court has further held that as under:-

*“.....Even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions, and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”*

37. In this case, the informant PW-1 is the father of the victim X, who has deposed before the court that incident took place on 22.8.2015 at 05:00 p.m. and he went to Kanpur for taking raw material for preparing the ornaments and his wife informed him on phone regarding the occurrence that victim X was playing in front of the house and his neighbour Amrita Nand @ Trihuvan Arjaria aged about 60 years tempting her for toffee and called her inside his house and closed the door, thereafter, when his wife called her daughter in high pitch, the accused has driven out the victim from his house. The accused has tried to molest the victim X inside his house. The victim X has told the entire story to her mother on which she went to the house of the accused and asked him about his bad act what he did with her daughter. Thereafter, accused locked his door and absconded somewhere and later on the accused was arrested after gap of months. He has also proved the written complaint Ex.Ka-2. PW-2 is the mother of the victim, who has also deposed that the incident has taken place on 22.8.2015 at 05:00 p.m. when her daughter was playing outside the house, the accused offered her *laddoo* as *prasad* and took her inside his house and threatened the victim X not to tell to anyone about the incident. The accused asked the victim to take off her clothes and he also took off his clothes and then asked the victim X to shake his private part and also asked her not to tell to anyone. Her daughter came her and told her the entire incident. PW-2 mother of the victim X thereafter went to the house of the accused and complained about the incident, the accused has denied the incident and thereafter he absconded by locking his house at the time. On the day of occurrence her husband had gone to Kanpur and on his arrival she along



with her husband and victim X went to the police station and lodged the first information report.

38. It is proved that the victim X (PW-3) was about four years at the time of occurrence and has narrated the entire incident to her mother, which is admissible.

39. Section 8 of the Evidence Act states as follow:-

*“8. Motive, preparation and previous or subsequent conduct.- Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.*

*The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.”*

40. Illustrations (i) & (j) of Section 8 of Evidence Act states as follows:-

*(i). A is accused of a crime.*

*The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.*

*(j). The question is, whether A was ravished.*

*The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.*

*The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157.”*

41. From the evidence of PW-1 informant Avadhesh Kumar Soni and PW-2 Smt. Khusbu and from the statement of Investigating Officer that during raid several times at the house of accused, he was found absent, proved that he was absconded after the occurrence.

42. The above conducts as mentioned also corroborates the fact that the accused has committed the crime and has got touched his private

parts from her by asking her to take off her clothes and show her private parts.

43. The star witness of this case is victim X (PW-3), her statement was recorded by learned Presiding Officer by asking certain questions, she told her name and also told the name of her mother and told that she was studying in class LKG in Guru Ram Public School. On inquiry, she also disclosed that she prayed the God and she has also clarified that she prayed *Ganesh Ji* and *Laxmi Ji*. She knew that one should not tell a lie. She has further stated that she will tell the fact truly. She has further stated that after taking oath one should not tell a lie. Thereafter, without recording a certificate by the then Presiding Officer of the court below the witness was handed over to the Public Prosecutor for putting questions in examination-in-chief.

44. In view of above, it appears that victim X could understand the question put to her and was able to give rational answer and has sufficient intellect and understanding the question put to her and give rational answer, therefore, in such circumstances in absence of certificate, it cannot be said that she was not competence witness. Here it is also clarified that Section 118 of the Evidence Act is couched in negative words. Therefore, if the court declares anybody as not competent witness, he or she will be incompetent witness. Regarding competence of the witness no certificate is needed as per Section 118 of the Evidence Act. PW-3 victim X in examination-in-chief has deposed that accused Amrita Nand @ Tribhuvan Arjariya, who is present in the court is that Baba who called her in his house and on his calling she entered into his house and, thereafter, he laid her on the bed. She has further stated that at that time she was weeping and accused has given her toffee and taken off her *chaddhi* and also lured for giving *laddoo*. She has further stated that accused has touched her private parts and clarified that accused has touched her urinal place (*susu*) with his finger. She has further stated that accused has also put off her clothes. She has also corroborated the testimony given under Section 164 Cr.P.C. and deposition in cross examination that the police has inquired from her and

her mother and father gave her *pajama* to the police. She has also corroborated in her cross examination that Baba has taken off her clothes and she has not urinated there. Further she has stated that she was told by his father and mother what statement she has given.

45. Keeping in view the facts and circumstances of the case, it is quite apparent that the mother and father and the counsel may, to create confidence in the mind of a child witness, inquire her regarding what evidence she has to give. In such circumstances, it cannot be said that she is tutored witness. She has supported the entire incident and told the entire incident to her mother, which was testified by her mother, which is admissible under Section 8 of the Evidence Act. On the day of occurrence informant was not at his house and has gone to Kanpur to take raw material for preparing the ornaments and when he returned from there, thereafter, on the next day the first information report was lodged, therefore, sufficient explanation has been given by prosecution regarding delay in lodging the first information report.

46. In this case the accused was about 60 years and from the evidence it transpires that he laid victim X on the bed and taken off her clothes and also taken off his clothes and has touched her private parts and he got touched his private part from her and thereafter he has gone to bring the rope, which shows that in meanwhile if the victim did not escape from there, what could would happened to her it cannot be imagined.

47. In view of above, the statement of victim X (PW-3) is believable and corroborated by the evidence of her mother which is admissible under Section 8 of the Evidence Act and her mother has informed her husband on phone in the evening of the same day which is also relevant and thereupon first information report was lodged on the next day.

48. The POCSO Act was legislated to eradicate the menace of the children who becomes the victim of the sexual offence. So in view of above, the provision of the POCSO Act shall be interpreted in such a way so that this menace can be eradicated and in above circumstances

the interpretation of the provision shall be taken with the help of mischief ruling.

49. In above circumstances, it is proved that the accused has committed sexual assault with a girl aged about 4 years, therefore, learned lower court has rightly relied on the testimony of the witness victim X and has rightly held the accused guilty and has convicted him under Section 10 of the POCSO Act and has also rightly sentenced him to undergo rigorous imprisonment for 7 years with a fine of Rs.10,000/- under Section 10 of the POCSO Act.

50. In such circumstances, no interference is required in the impugned judgment of the court below and the appeal is liable to be dismissed, accordingly, the appeal is ***dismissed***.

51. Lower court record be returned back to the concerned court forthwith.

**Order Date :- 3.3.2022**

Anil K. Sharma