

IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.

Cr. Appeal No. 31 of 2017.

Reserved on: 10.7.2017.

Decided on: 22.9.2017.

Vivek Singh

.....Appellant.

Versus

State of H.P.

.....Respondent.

Coram

The Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹. Yes.

For the appellant: Mr. Sat Prakash, Advocate.

For the respondent: Mr. D.S,Nainta, Addl. AG with Mr. Virender Verma, Addl. AG.

Justice Dharam Chand Chaudhary, J

In this appeal, judgment dated 12.04.2016, passed by learned Special Judge, Chamba (H.P.), in Sessions Trial No.21 of 2015, whereby the appellant (hereinafter referred to as the accused) has been convicted for commission of offence punishable under Section 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act (hereinafter referred to as POCSO Act in short) and sentenced to undergo rigorous imprisonment for ten years and also to pay Rs.5,000/- as fine, has been challenged on the grounds, inter-alia, that the evidence available on record has not been appreciated in its right perspective. The highly interesting evidence produced by the prosecution has been given undue weightage and the evidence produced by the

¹ Whether reporters of the local papers may be allowed to see the judgment?

accused has been erroneously brushed aside and to the contrary the impugned judgment has been based upon surmises and conjectures.

2. The inconsistencies and contradictions in the prosecution evidence which have rendered the prosecution story highly doubtful were erroneously ignored and the findings of conviction recorded against the accused were passed on the story which was engineered and concocted. The accused had not committed the alleged offence. On the other hand, the child already suffering from infection, was under treatment in NHPC Hospital at Karian, District Chamba. The complainant, none-else but the wife of accused as well as her mother were not in cordial relations with him and other members of his family as she (complainant) even had implicated his brother with the allegations that he raped her. The testimony of DW-3 Rajesh Kumar that the complainant PW-1 Anju was previously married to his brother and when he went to bring her to matrimonial home, she got him beaten up from 5-6 hired *Gundas* and after that he expired within 10-15 days, has not at all been taken into consideration. Therefore, the involvement of the accused in the alleged offence is not at all established and the impugned judgment has been sought to be quashed.

Facts of the Case:

3. If coming to the factual matrix, the prosecution case discloses a sorrow state of affairs because PW-1 Anju, the complainant, none-else but the wife of accused has levelled

allegations against him in the application Ext.PW-1/B to the Deputy Commissioner, Chamba, that her husband, the accused, has committed sexual intercourse with her daughter less than two years of age. The complainant PW-1 Anju, has levelled the allegations in Ext.PW-1/B that her husband, the accused, has subjected her minor daughter below two years of age to sexual intercourse while under the influence of liquor about 1 ½ months ago. This fact came to her notice when the victim child was got medically examined in the hospital from a lady doctor. The doctor disclosed that her daughter was subjected to sexual intercourse. The Additional District Magistrate, Chamba, District Chamba, H.P., had forwarded the application Ext.PW-1/B to S.H.O. Police Station Sadar, Chamba, for necessary action. Consequently, FIR Ext.PW-1/A came to be registered on 10.02.2015 under Section 376 of the Indian Penal Code and under Section 4 of POCSO Act.

4. The police swung into action. The investigation was conducted by PW-10 Inspector/SHO Tilak Raj of Police Station Sadar, Chamba. The application Ext.PW-7/B was made to Medical Officer, Regional Hospital, Chamba, for medical examination of the victim. The MLC is Ext.PW-7/A. The application Ext.PW-4/A was made to the Executive Officer, Municipal Committee, Chamba, for obtaining date of birth certificate Ext.PW-4/B of the prosecutrix. The statement of the complainant Ext.PW-1/C was got recorded under Section 164 of the Code of Criminal Procedure. The application Ext.PW-8/A for medical examination of the accused, was

made to Medical Officer, Regional Hospital, Chamba. The MLC is Ext.PW-8/B. The site plan Ext.PW-10/B was also prepared by the Investigating Officer.

The Outcome of the Investigation Conducted:

5. On completion of the investigation, it transpired that it is somewhere in the month of December, 2014, the accused subjected his own minor daughter (name withheld), aged one year eight months, to sexual intercourse. The victim child was born to her in April, 2013. She gave birth to her second child (son) in the year 2014. At the time of delivery, she shifted to the house (rented accommodation) of her mother PW-2 Chino Devi at village Karian and started residing there. She used to sleep with her newly born son and her mother on the bed, whereas the accused and the victim child used to sleep on floor by spreading mattress thereon. In December, 2014, in the midnight, on hearing cries of the victim child she asked from the accused as to what happened to her. He allegedly told that his arm got struck against the victim child. However, the child cried again on the next night also and came to her on the bed. When she asked her husband, the accused as to what had happened, he told that the child is searching for her. She made the victim child to sleep with her. On the following morning when her mother (PW-2) was getting the child bathed, noticed blood stains and white stains on her thigh. She asked the accused about it, who told that child was suffering from some infection. However,

when the complainant Smt. Anju (PW-1) asked him, he told that he committed a mistake and will not repeat the same in future.

6. With such allegations, the final report came to be filed against the accused in the Court. Learned Special Judge on appreciation of the record and finding a prima-facie case having been made out against the accused, framed charge against him for the offence punishable under Section 376 of the Indian Penal Code and Section 4 of POCSO Act. The accused, however, pleaded not guilty and claimed trial.

Evidence in a nut shell:

7. The prosecution in order to sustain the charge against him, has examined 10 witnesses in all. The material prosecution witnesses are PW-1 Anju, the complainant, her mother Smt. Chino Devi (PW-2) and Dr. Minakshi (PW-7). The remaining prosecution witnesses are formal. According to PW-3 Darshan Kumar, PW-2 Chino Devi had hired one room accommodation from one Mushafir at Karian and PW-4 Yogesh Sharma has proved the date of birth certificate Ext.PW-4/B of the prosecutrix. PW-5 Satish Kumar, Peon in the office of Deputy Commissioner, Chamba, has delivered the complaint Ext.PW-1/B in Police Station Sadar, Chamba, whereas PW-6 Constable Vinod Kumar, has videographed the proceedings qua recording of statement of complainant in the Police Station. PW-8 Dr. Kamaljeet has examined the accused and proved the MLC Ext.PW-8/B. PW-9 ASI Ashok Kumar, the then SHO Police Station Sadar, Chamba, had taken the photographs of the spot on the

demarcation given by the complainant. PW-10 Inspector Tilak Raj is the Investigating Officer.

8. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C., has denied the entire prosecution case either being wrong or for want of knowledge. His medical examination was got conducted by the police. It is pleaded in his defence that he has been falsely implicated by the complainant in this case. Earlier also, she had implicated his brother in a false case of commission of rape by him with her. The complainant and her mother (PW-2), according to him, are the ladies of easy virtue. He has also examined DW-1 Smt. Usha Devi, real sister of complainant and DW-2 Rajesh Kumar, his brother, to prove that the complainant and her mother, both are ladies of easy virtue and the complainant is in habit of making such false complaints. DW-3 Sh. Pritam is brother of deceased Narian Singh to whom the complainant was earlier married, whereas DW-4 Baljinder Singh is former Vice President of Gram Panchayat, Baror.

9. As already stated, learned trial Judge on appreciation of the evidence available on record, has convicted and sentenced the accused for the commission of offence punishable under Section 376 of the Indian Penal Code and Section 4 of POCSO Act.

Rival Submissions:

10. Mr. Sat Prakash, Advocate learned counsel has argued with all vehemence that learned trial Judge in a case of no evidence has not only held a father (the accused) guilty of the commission of

sexual intercourse with his own daughter aged less than 2 years, but also convicted him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 5,000/-. The highly interested evidence as has come on record by way of testimony of the complainant PW-1 (wife of the accused), who in view of the evidence available on record was inimical to the accused has erroneously been relied upon. The overall conduct of the complainant and that of her mother PW-2, the so called star prosecution witnesses itself speaks in plenty about their *modus operandi* to involve the accused in a false case so that not only his property may be grabbed by them but he being only hurdle in her way could also be removed. The evidence on record i.e. own admission of the complainant that Rajesh (DW-2), the brother of accused and his wife used to quarrel with her and that she had lodged false complaint qua her alleged molestation and having assaulted sexually by said Rajesh, goes to show that she is in the habit of making false complaints. Therefore, according to learned counsel, the accused has also been implicated by the complainant falsely in this case. Learned trial Court, while brushing aside the cogent and reliable evidence having come on record by way of testimony of DWs 1 to 4, has not assigned any plausible reason and to the contrary disbelieved the same at its whims and fancies. The accused, as such, has been sought to be acquitted of the charge framed against him.

11. On the other hand, Sh. D.S.Nainta, learned Addl. Advocate General has supported the impugned judgment while

arguing that the same is well reasoned and based upon proper appreciation of the evidence available on record.

Our findings:

12. The present is a case where the allegations against the accused if proved are not only grievous and heinous in nature but constitute a gruesome and brutal act attributed to none else but father of the victim child. Looking to the sensitivity of the matter and the gravity as well as seriousness of the allegations as leveled, the law casts an onerous duty upon this Court to separate grain from the chaff and find out the truth with the help of evidence available on record.

13. The very first version qua the manner in which the occurrence allegedly took place is the application Ext. PW-1/B made by PW-1, the complainant to Dy. Commissioner, Chamba against her husband, the accused. The allegations against him in this document are that her husband, the accused has subjected her daughter less than 2 years of age to sexual intercourse about 1 ½-2 months ago while under the influence of liquor and she came to know about it when the victim child was got medically examined from Gynecologist (lady doctor), who in her opinion found the victim child having been subjected to sexual intercourse. The application Ext. PW-1/B was forwarded by Addl. District Magistrate Chamba to SHO Police Station Sadar, Chamba and it is PW-5 Satish Kumar, Peon in Dy. Commissioner's Office who accompanied by the

complainant delivered the same in the Police Station. The FIR Ext. PW-1/A, therefore, is replica of the application Ext. PW-1/B.

14. The another material piece of evidence is the statement of the complainant Ext. PW-1/C recorded under Section 164 Cr.P.C. She in her statement Ext. PW-1/C has introduced a different story that about 4 months ago when she delivered a male child, she used to sleep along with newly born baby and her mother on the bed whereas her husband, the accused used to sleep with her minor daughter on the floor by spreading a mattress thereon. As per her version, about 2 months ago in the mid-night i.e. 1:30 AM, the victim child cried very loudly. On this, she (the complainant) woke up and enquired from her husband as to what had happened. He told that the arm of the victim got pressed from him. She, however, was made to sleep by them thereafter. However, during the next night also, the victim again cried and on this her mother brought her to the bed and made her to sleep with her. On the following morning when her mother PW-2 was getting the victim child bathed, she noticed blood and whitish stains on her private part. When she (complainant) asked strictly from her husband about it, he confessed the mistake he committed and felt sorry for that. He threatened her that if she got the child medially examined, the reputation of the entire family would be spoiled and when the child would grow up, it would cast a stigma throughout during her lifetime. As per her further version, when the condition of her daughter did not improve, she brought this matter to the notice of

the other family members, including Rajinder, the brother of the accused and his wife Jyoti. They, however, did not believe her and told that in case the matter is reported by her to the police the reputation of the child would be maligned. When the condition of the child deteriorated, she had taken the victim to Govt. Hospital, Chamba on 5.2.2015 where the child was examined by male doctor. The said doctor advised the complainant to get her medically examined from Gynecologist. The child was as such brought to Gynecologist on 10th who told that there was struggle with the child and that firstly a report is to be lodged with the police and it is only thereafter she could be examined. Thereafter, she made an application to Addl. District Magistrate who forwarded the same to PS Sadar Chamba where FIR was registered and ultimately medical examination of the victim was got conducted.

15. Now, if coming to the statement of the complainant while in the witness box as PW-1, she has deviated from her statement Ext. PW-1/C recorded under Section 164 Cr.P.C. on material aspects because instead of 1:30 AM, she has deposed that the child cried during first night around 2- 2:30 AM. On the next night, the child allegedly cried around 1-1:30 AM though it was not found to be recorded so by her in Ext. PW-1/C. In Ext. PW-1/C, nothing has come that on enquiry as to why the child is crying, her husband told that she is looking for her (the complainant), however, while in the witness box as PW-1 has stated so. Not only this, but as per Ext. PW-1/C it is her mother PW-2 who made the child to

sleep with her when cried on the next night, however, while in the witness-box it is stated that it is she (the complainant) who made the child to sleep with her. As per her version in the witness-box, it is her mother who asked the accused about the cause of there being blood stains and whitish coloured stains on thighs of the victim child who in turn told that she is suffering from infection. However, in Ext. PW-1/C, she has stated that the cause of such stains when she strictly asked from her husband, he admitted the mistake and ensured her not to repeat the same. In her statement in the Court, it is stated that lady doctor on examination of the child told that she was subjected to sexual intercourse, however, as per Ext. PW-1/C, the doctor had told PW-1 that force has been applied against her daughter.

16. The critical analysis of the two statements leaves no manner of doubt that the same are inconsistent, discrepant and this witness has improved her version considerably, which goes to the very root of the prosecution case. Though she has denied the suggestion that her statement is inconsistent, however, in view of the above discussion, her version is false. She further improved her version in cross-examination while stating that since her husband used to take medicines and liquor to enhance capacity to have sexual intercourse, she had the reason to believe that he may have done wrong act with the victim. Though the complainant has stated that she did disclose that her daughter cried during two nights to

the police, however, when confronted with her statement Ext. D-1, it was not found to be so recorded therein.

17. Now, if coming to the immediate version qua the manner in which the incident has taken place as recorded in the application Ext. PW-1/B addressed to Deputy Commissioner, Chamba, nothing of the sort as mentioned in Ext. PW-1/C and the statement of the complainant in the witness-box as PW-1 has come there. The story that the victim child used to sleep on the floor of the room with the accused and cried during two successive nights and that the victim child was examined by a male doctor on 5.2.2015, does not find mention in Ext. PW-1/B.

18. It is, thus seen that the three statements made by the complainant at three different occasions do not match at all with each other and as such, it would not be improper to conclude that she has implicated the accused falsely, may be due to their inimical relations with each other, just to wreck vengeance against him forgetting that there exists a pious relation between a father and daughter. We have reason to make such observations as living separately from the accused with her mother that too in one room accommodation taken on rent at Village Karian itself speak in plenty that the complainant was not interested to live in the company of her husband, the accused, of course to the reasons best known to her. The conclusion so drawn by us is supported by the own admission of the complainant in her cross-examination as she has admitted that they used to quarrel off and on. Interestingly enough,

even her mother PW-2, admittedly was residing away from her family i.e. husband and other members of family to the reasons best known to her. The mother of the complainant has admitted that she was residing separately on account of being tortured by her daughter-in-law. We are, however, not satisfied with any such explanation which to our mind is false. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C. has pleaded that the complainant and her mother both were women of easy virtue. The complainant when cross-examined, has admitted that her mother PW-2 was residing separately at Village Karian for the last 5-6 years whereas her father in his own house at Village Gagla.

19. The story that the victim had urinating problem or was not in a position to pass stool as PW-1 has stated in her cross-examination, has neither come in Ext. PW-1/B nor in Ext. PW-1/C and rather has been introduced for the first time in her cross-examination. The enmity of complainant stands established from her own admission while in the witness box that she had lodged the case against the sister of the accused and her husband. Not only this, but as per her own version, her (devar) Rajesh Kumar DW-2 had torn her clothes and on this, she had registered a case against him in PS Sadar Chamba. Though, in the same breath, it is denied that she threatened her father-in-law and Rajesh Kumar to implicate them in false cases, however, as per her own admission that she had registered a case against DW-2 Rajesh Kumar, her denial is nothing

but palpably false. Not only this, as per the version of PW-1 in her cross-examination, the brother of the accused (DW-2) and his wife used to threaten her with dire consequences, therefore, the possibility of she having implicated DW-2 Rajesh Kumar by lodging FIR against him falsely cannot be ruled out. As per the own version of the complainant, she did not lodge any report either against DW-2 or his wife against such threatening advanced to her, therefore, it can be reasonably believed that she has deposed falsely because had there been any threatening given to her by them, she would have definitely lodged the report against them.

20. The complainant has denied her first marriage with someone else at village Mehla, however, DW-3 Pritam while in the witness-box who belongs to Village Mehla, tells us that she was married to his brother Narain. She deserted him and started living with her mother at Karian. When his brother came to Karian to take her back to matrimonial home, she not only refused to do so but hired 5-6 persons who had beaten up his brother said Narain and he died after 10-15 days on account of beatings given to him. Not only this, but the photographs Ext. D-1 & D-2 in which the complainant is in the dress and ornaments of bride, is visible with her husband (deceased Narain).

21. As per version of the complainant, the accused supported his sister and her husband in the case she registered against them. It is also admitted that she is residing with her mother in village Karian for the last 7-8 months. Such evidence

speaks in plenty about her relations with her husband, the accused. She admitted that when the victim child was got medically examined from the doctor in NHPC hospital, the said doctor told that she was suffering from infection. Such evidence on record amply demonstrate the plea raised by the accused in his defence that the victim child was suffering from infection is nearer to the factual position because it is not expected from a father that he would do such a gruesome and brutal act with his own daughter that too below 2 years of age. Otherwise also, we fail to understand that how a fully grown up man like the accused can subject a child below 2 years of age to sexual intercourse. Though, it is denied by the complainant that she has foisted a false case against the accused to grab his property, however, the suggestion so given to her seems to be correct.

22. Therefore, the evidence as has come on record by way of own admission of the complainant and also the application Ext. PW-1/B, she made to Deputy Commissioner, Chamba, her statement Ext. PW-1/C recorded under Section 164 Cr.P.C. and while in the witness box as PW-1 is highly contradictory and inconsistent. On the basis of different statements she made at different occasions, it is crystal clear that the present is a case of no evidence as the complainant has improved her version at each and every stage during the course of enquiry, investigation and trial.

23. The other material prosecution witness is PW-2 Chino Devi, mother of complainant PW-1. The perusal of her statement

makes it crystal clear that she has not uttered even a single word qua the victim child having cried during two successive nights. She has also not stated that when the child cried during second night, she made her to sleep with her. Nothing has also come in her statement that when the child cried on the first night, when asked as to what had happened, the accused told that her arm got pressed from him. She has also not said that blood or whitish stains on thighs of the victim child were noticed by her on the following morning when she was getting the child bathed. Therefore, PW-2 Chino Devi has not supported the testimony of PW-1 on all material aspects.

23. As per further version of PW-2 Chino Devi, the victim child when fell ill and was taken to hospital, the doctor told that the child had infection in her uterine. It is at this occasion, she asked from her daughter (PW-1) to tell truth as to what had happened to the child. On this, PW-1 told that the accused had committed sexual intercourse with his own daughter. On 10.2.2015, when the child was taken to doctor for her treatment, they were advised to report the matter to the police. It is thereafter, the matter was reported to Deputy Commissioner, Chamba by the complainant.

24. Interestingly enough, PW-2 Chino Devi tells us that though she had three sons and two daughters, however, since her relations were not cordial with her daughter-in-law, therefore, it is for this reason, she is residing separately at Karian in a room taken on rent. Though, she denied that her daughter (PW-1) was married

in village Mehla, however, volunteered that she had only been engaged in the said village. Her testimony is contrary to that of the complainant who has flatly denied that she was married/engaged at village Mehla. The statement of PW-2 Chino Devi that PW-1 was engaged in the said village is nearer to the version as has come on record by way of testimony of DW-3 Pritam Singh, who belongs to village Mehla and as per his version, the complainant was married to his late brother Narain. The photographs Ext. D-1 and D-2 also substantiate this part of the case of the defence. PW-2 Chino Devi though tells us that her daughter after marriage resided with the accused, however, at the same time admitted that PW-1 had filed a complainant against brother and father of accused with the allegations of committing sexual intercourse by them with her. It is proved satisfactorily that the complainant not only implicated her brother-in-law Rajesh DW-2 but also her father-in-law with the allegation that they both subjected her to sexual intercourse falsely because had there been any truth in the allegations so levelled, at least a case would have been made out and filed against them as well as tried by a competent Court. No such evidence, however, was produced by the prosecution to remove doubts qua the genuineness and authenticity of the allegations so leveled against the accused. The accused, according to her, was residing in her room when the victim child was taken to hospital. At the first instance, it is the accused who himself had taken the child to the hospital whereas on the second occasion, the child was taken by her to the doctor at

Karian. It is on such visit, the doctor told that the child had infection in her utrine. The condition of the child according to PW-2 Chino Devi became critical and she used to cry during night meaning thereby that the cries of the child, if any, were not on account of the accused having committed sexual intercourse with her but due to infection in her utrine.

25. The close scrutiny of the testimony of PW-2 Chino Devi, therefore, leads to the only conclusion that she has demolished the entire prosecution case. Learned Trial Judge believing her statement and that of the complainant PW-1 as dependable, has proceeded to record the findings of conviction against the accused which in our opinion are erroneous.

26. The next material witness is PW-7 Dr. Minakshi, M.O. RH Chamba. On internal examination, this witness had noticed redness and swelling in the uterine of the victim child and hymen was found absent. Vaginal laceration was also noticed. Therefore, in her opinion, the child was subjected to sexual intercourse within two months from the date of her examination. Her opinion, however, cannot be termed as very specific and authentic particularly when past medical history i.e. the treatment of the victim child in the hospital(s) was neither in her knowledge nor disclosed to her by the complainant. Above all, as per her own version, she did not consult/refer any book on medical jurisprudence while forming the opinion. The opinion was based upon the medical examination of the victim child she conducted.

She admitted that the nature of the injuries she noticed in the vagina of the victim child could have been caused had someone inserted/applied medicine through finger or thumb in vagina by way of domestic treatment. Since as per the own admission of the complainant and her mother PW-2 Chino Devi to the effect that doctor when examined the child found infection in her utrine, the possibility of the injury noticed by PW-7 Dr. Minakshi while applying some medicine in the infected vaginal part cannot be ruled out. Though the suggestion that the child rubbed her vagina with her own finger due to infection were denied by PW-7 Dr. Minakshi being wrong, however, there being infection in vagina, the possibility of the child having rubbed the infected part of her vagina cannot be ruled out. Therefore, the medical evidence is also not dependable so as to believe that the victim child was subjected to sexual intercourse.

27. As per the prosecution case, the victim child was examined in the hospital by a male doctor who advised the complainant to get the child medically examined from Gynecologist. Who was that male doctor and when the victim was got medically examined from him; nothing has come on record. As a matter of fact, the said doctor was a material witness in this case and to our mind, he has been withheld initially during the course of investigation of this case and later on during the course of trial intentionally and deliberately and as such an adverse inference has to be drawn against the prosecution.

28. Now, if coming to the testimony of the I.O. Insp. Tilak Raj (PW-10), though in his examination-in-chief he has corroborated the prosecution case qua the manner in which he conducted the investigation, however, when cross-examined, it is surprising to note that he expressed ignorance to the suggestions put to him which were relevant to find out truth because according to him, he did not enquire from the complainant as to why she was not residing in her own house. He even did not enquire from PW-2 Chino Devi as to why she was not residing in her house. He also did not try to find out the duration of stay of complainant with her mother at Karian nor anything qua the previous medical history/treatment given to the victim child. Not only this, but as per his version, the accused was arrested from his own house, meaning thereby that he was not residing in Karian. It is again surprising to note that the I.O. did not enquire about the relations of the accused and his wife, the complainant nor about the complaint she lodged against the brother and father of the accused regarding the sexual assault they committed on her. He even expressed his ignorance that the said complaint ultimately had turned false. He has also expressed his ignorance that the relations of the accused with his mother-in-law and complainant (wife) were not cordial. He also did not investigate the matter as to where the accused was residing at the time of the incident. We fail to understand that when I.O. did nothing during the course of investigation, how the allegation against the accused that he had been residing in the room taken on rent by PW-2 Chino

Devi at the time when the incident allegedly took place is proved. As a matter of fact, he believed the version of the complainant and her mother PW-2 Chino Devi before him in view of the discussion hereinabove turned false as a gospel truth and not made any effort to enquire into the allegations leveled against the accused by investigating the matter further and to find out the truth by associating independent witnesses and collect evidence through independent source. Learned trial Judge has failed to take note of such factual position having emerged on record and to the contrary recorded the findings of conviction against the accused in a case which was of no evidence.

29. Surprisingly enough, learned trial Judge has criticized the defence evidence in sundry and without any justification thereto because overall act and conduct of the complainant PW-1 and her mother PW-2 Chino Devi leads to the only conclusion that PW-2 Chino Devi was residing away from other members of family in a rented accommodation to the reasons best known to her. In her cross-examination, she has denied that the accused used to reside with PW-1 and PW-2 Chino Devi at Karian at the time of birth of the second child.

30. DW-1 Usha Devi is none else but real sister of PW-1 and daughter of PW-2 Chino Devi. She has denied the prosecution case that the accused was not residing with the said witnesses at the time of birth of male child. DW-2 Rajesh Kumar is none else but real brother of the accused. He has categorically stated that not

only he but his father were falsely implicated by PW-1 complainant in a case of molestation and they were arrested. The report after enquiry was, however, found false. The complainant, according to this witness had threatened the accused to implicate him in a false case which she managed and when he was in jail, she had taken her ornaments and other articles from his house. He has also denied that the accused used to reside in the company of the complainant and her mother PW-2 Chino Devi at Karian and that he subjected his own daughter to sexual intercourse. The complainant and her mother PW-2 Chino Devi, both have admitted that the report was lodged against DW-2 and his father by the complainant with the police. The said report, however, as per the evidence available on record had turned false. Therefore, the possibility of the complainant having lodged a false complaint against the accused cannot be ruled out.

31. The testimony of DW-3 Pritam has already been discussed in para supra, hence suffice would it to say that he has proved the previous marriage of the complainant (PW-1) with Narain, his real brother. DW-4 Brijinder Singh is former President of Gram Panchayat Baror. His testimony that no dispute was ever reported to the Panchayat by them has erroneously been taken to believe that their relations were cordial in complete departure to the evidence having come on record because as per the own testimony of the complainant and her mother PW-2 Chino Devi itself their relations were not cordial. Therefore, in our considered opinion, learned trial

Judge has brushed aside the evidence produced by the accused in his defence without any justifiable reasons. The same rather was criticized on flimsy grounds.

32. The close scrutiny of the evidence as has come on record by way of the testimony of the so called star prosecution witnesses and also the defence version amply demonstrate that the complainant party in order to wreck vengeance against the accused did not even spared her own daughter i.e. the victim child, a minor below two years of age and thereby not only tarnished the reputation of the accused who happens to be the father of the victim but also put a big question mark on the pious relations between a father and daughter. Not only this, but the false prosecution story has culminated in a discussion that a father can also assault his own daughter in this manner. In the given facts and circumstances, it is the complainant who in connivance with the local police has implicated the accused in a false case.

33. The evidence as has come on record by way of the testimony of Yogesh Sharma PW-4 who has issued the birth certificate Ext. PW-4/B of the victim child, PW-5 Satish Kumar, Peon in the office of Deputy Commissioner, Chamba who has delivered the application Ext. PW-1/B made by the complainant to Deputy Commissioner, Chamba in Police Station Sadar Chamba, PW-6 Const. Vinod Kumar who had videographed the proceedings when the statement of the complainant was being recorded in the Police Station vide CD Ext. PW-6/A, PW-8 Dr. Kamaljeet who has

examined the accused vide MLC Ext. PW-8/B and PW-9 ASI Ashok Kumar who had investigated the case partly could have been used as link evidence had the prosecution otherwise been able to prove its case against the accused beyond all reasonable doubt.

33. The reappraisal of the evidence, therefore, leads to the only conclusion that the complainant and her mother in connivance with the local police has falsely implicated the accused in the present case. The charge framed against the accused for the foregoing reasons, therefore, fails. He, as a matter of fact is entitled to the benefit of doubt and consequently acquittal. Being so, the findings of conviction recorded against the accused are neither legally nor factually sustainable. The impugned judgment, as such, does not stand for the test of judicial scrutiny, hence, deserves to be quashed and set aside.

34. In view of what has been said hereinabove, this appeal succeeds and the same is allowed. Consequently, the impugned judgment is quashed and set aside and the accused is acquitted of the charge framed under Section 376 IPC and Section 4 of the POCSO Act. He presently is undergoing sentence, therefore, if not required in any other case, be set free forthwith. The release warrant be prepared accordingly. The fine amount as imposed upon the accused, if deposited, shall be refunded to him against proper receipt.

35. Before parting, we would be failing in our duty if not point out the overall conduct of the Investigating Agency which has implicated the accused in a false case on the basis of highly interested evidence i.e. the only statement of complainant who was not only inimical to the accused but also to other members of his family. Her mother PW-2 Chino Devi, though helped her daughter, the complainant in getting the accused booked falsely, however, unsuccessfully. Any how, we leave it open to high ups in police department to take steps as warranted to sensitize the officers/I.Os so that any such instance does not reoccur.

36. Learned trial Judge has also failed to appreciate the evidence in its right perspective and swayed only by the severity of the allegations and the alleged incident of rape with a minor below two years of age by none else but allegedly her father. Since the allegations leveled against the accused were highly sensitive having repercussions in the society as a whole, an onerous duty was cast upon learned trial Judge to have examined the given facts and circumstances of the case and also evidence available on record with all circumspection and more care and caution. Due to such an approach in the matter, pious relations between a father and daughter got tarnished. We hope and trust that in a case of this nature, the Investigators, Prosecutors and Adjudicators shall discharge their respective duties in the light of the principles we

settled in this judgment and also in accordance with law. With the above observations, the appeal is finally disposed of.

(Dharam Chand Chaudhary),
Judge.

September 22, 2017,
(ysc/karan)

(Vivek Singh Thakur),
Judge.