

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.671 of 2015**

Arising Out of PS.Case No. -199 Year- 2012 Thana -BARSOI District- KATIHAR

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Bappa Pahari, son of Sri Biran Pahari, resident of village-Baghor Pahari Tola, P.S. Barsoi, Distt. Katihar.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. R. K. Sinha No.2-Advocate
Mr. Satyendra Prasad-Advocate
Mr. Nagendra Kumar-Advocate

For the Respondent/s : Mr. Parmeshwar Mehta-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 23-08-2018

Appellant Bappa Pahari has been found guilty for an offence punishable under Section 363 of the I.P.C. and sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.2,000/-, under Section 366A of the I.P.C. and sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.2,000/-, under Section 376 of the I.P.C. and sentenced to undergo R.I. for seven years as well as to pay appertaining to Rs. five thousand and in default thereof, to undergo R.I. for six months with regard to all the offences with a further direction to run the sentences concurrently, with a further direction that the period having undergone during course of trial would be set off in accordance with Section 428 of the Cr.P.C. with a further direction that the fine amount if deposited, the



half of the same be given to the victim as compensation, by the 3rd Additional Sessions Judge, Katihar in Sessions Trial No.329 of 2013 vide judgment of conviction dated 31.08.2015 and order of sentence dated 03.09.2015.

2. For an occurrence allegedly committed on 25.09.2012, written report was filed by the informant Nazmul Haque (PW-5) on 09.10.2012, alleging inter alia that on 25.09.2012 at about 7.30 P.M. his minor daughter victim (name withheld), who is a student of Class-VII, aged about 14 years has been enticed away by Biren Pahari, wife of Biren Pahari, Shankar Pahari, Khirod Pahari, Rupali Devi, Bhawani Devi, Shakuntla Devi, Bappa Pahari. Furthermore, he shown his apprehension that his minor daughter might have subjected to sexual intercourse against her will or would be murdered or would be sold to for illegal purpose. It has further been disclosed that as Biran Pahari, on query promised to return the victim, but took the time on one pretext or other, on account thereof, delay has been caused in filing of the written report.

3. After registration of Barsoi (Kachna O.P.) P.S. Case No.199 of 2012, investigation was taken up during midst thereof, victim was recovered, statement of the witnesses were recorded, victim was medically examined, her statement under Section 164 of the Cr.P.C. was also facilitated and then thereafter, completing the



investigation, chargesheet was submitted against the appellant keeping the investigation pending against the others which happens to be the basis for trial, meeting with the ultimate result, subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. Though, no ocular evidence has been adduced, but medical evidence has been by way of formal witness as Exhibit-A.

5. In order to substantiate its case, prosecution had examined altogether seven PWs, who are PW-1, Basanti Devi, PW-2, Kalwa Pahari, PW-3, Razia Khatoon, PW-4, Raja @ Ramzan Ali, PW-5, Nazmul Haque, PW-6, Vishal Kumar Singh and PW-7, victim. Side by side, had also exhibited, Exhibit-1, written report, Exhibit-1/1 endorsement over the written report, Exhibit-2, chargesheet, Exhibit-3, formal F.I.R., Exhibit-4, statement recorded under Section 164 of the Cr.P.C. Defence had also exhibited medical report as Exhibit-A.

6. It has been submitted on behalf of appellant that the finding recorded by the learned lower Court happens to be illegal, perverse, and cryptic on account thereof, is fit to be set aside. Furthermore, it has also been submitted that knowingly, intentionally, doctor has not been examined at the end of the prosecution with a



purpose, which is as per finding of the doctor, age of the victim was ascertained in between 16-17 years and so, giving two years of grace, victim was major. She was a consenting party and so, being a major, the consent having at her end is found duly recognizable in the eye of law, whereupon the learned lower Court would have acquitted the appellant.

7. Then, it has been submitted that from the evidence of I.O. (PW-6), it is evident that victim was found at the Platform No.2 of the Katihar Railway Station on 10.10.2012, having free access to her parents, who have influenced and continuing with such situation, the police got her statement recorded under Section 164 of the Cr.P.C. and on the basis thereof, got the victim released in their favour and since thereafter, the victim has been brain-washed, who lastly succumbed to the wish and will of her parents and ultimately, during course of trial, gone hostile to the appellant. It has further been submitted that witnesses may lie, not the circumstance. The circumstances visualizing from the record is indicative of the fact that victim was a consenting party, being major was legally competent for the same.

8. It has also been submitted that circumstance visualizing from the record is that the mother of the victim was a Hindu Lady, who had fallen in love with father of the victim/



informant Nazmul Haque. They both fled away and then, embarrassing Islam sect, married with the informant that means to say, there was free atmosphere prevailing in the family. There was no barrier of caste, religion and that being so, being major a step having taken at the end of the victim was not at all under misguise.

9. Apart from this, it has also been submitted that from the record, more particularly from the evidence of PW-3, mother of the victim, victim was inside the house and was reading and during course thereof, when she called her, she found her absent. She had not disclosed that anybody had come during the intermediary period to call the victim. When the evidence of victim is gone through, it is apparent that she had disclosed that her friend Rupali Devi has come, who called her, whereupon she came out from her house, accompanied her to some distance where Bappa Pahari along with his father was present, who after putting handkerchief over her mouth, took her away on a jeep. That means to say, presence of Rupali Devi inside her house has been at the end of the victim, but the same has not been corroborated by PW-3, her mother. That means to say, victim on her own left the place, which is indicative of the fact that victim was a consenting party and being a major, she was legally competent enough.

10. It has also been submitted that presence of Rupali



Devi has come up even during course of statement under Section 164 of the Cr.P.C. So at least, prosecution would have examined the aforesaid Rupali, as a witness in order to disclose whether victim was a consenting party or not. Consequent thereupon, in the background of the aforesaid prevailing situation, the conviction and sentence recorded by the learned lower Court did not find favour, whereupon is fit to be set aside.

11. On the other hand, learned Additional Public Prosecutor while opposing the submission has submitted that in spite of inconsistencies prevailing in the evidence of the witnesses, the evidence of victim (PW-7) has to be accepted and there from, it is evident that she was not at all a consenting party on account thereof, conviction and sentence recorded by the learned lower Court is fit for concurrence.

12. From the record, it is evident that doctor has not been examined. It is also evident from the order dated 21.07.2015 that medical report (Exhibit-A) at the instance of appellant has been admitted in accordance with Section 294 of the Cr.P.C. at the prayer of the learned Additional Public Prosecutor. That means to say, the genuineness of the medical report goes out of controversy. Though, it did not speak with regard to recent intercourse, but discloses hymen old ruptured in consonance with the age of the victim in between 16 to



17 years. Giving grace of two years, the victim appears to be 18-19 years that means to say, major.

13. At the present moment, it looks pertinent to mention that initially prosecution had disclosed the age of victim to be 14 years and a student of Class-VII. During course of investigation, the I.O. (PW-6) had not cared to trace out the date of birth from the school nor during course of trial the same has been produced. Though, orally they have stated so, however, controverted at the end of accused. The Hon'ble Apex Court in ***Jarnail Singh vs. State of Haryana reported in 2013 CRI.L.J. 3976***, deprecated ascertainment of age by medical evidence. For better appreciation paragraph- 20 is quoted herein below:-

“20. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

*12. Procedure to be followed in determination of Age.?
(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee*



referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining .

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be



done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this



rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent)



certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

14. In the case of ***Mahadeo v. State of Maharashtra*** as reported in **(2013) 14 SCC 637** wherein it has been held as follows:-

“11. Though the learned counsel for the appellant attempted to find fault with the said conclusion by making reference to the evidence of PW 8, the doctor, who examined the prosecutrix and who in her evidence stated that on her examination she could state that the age of the prosecutrix could have been between 17 to 25 years, it will have to be held that the rejection of the said submission even by the trial court was perfectly in order and



justified. The trial court has found that to rely upon the said version of PW 8, the doctor, scientific examination of the prosecutrix such as ossification test to ascertain the exact age should have been conducted which was not done in the present case, therefore, merely based on the opinion of PW 8, the age of the prosecutrix could not be acted upon.

12. We can also in this connection make reference to a statutory provision contained in the Juvenile Justice (Care and Protection of Children) Rules, 2007, where under Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said provision in this context, inasmuch as under Rule 12(3) of the said Rules, it is stated that:

“12. (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the committee by seeking evidence by obtaining—

(a) (i) the matriculation or equivalent certificates, if available;

and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;”

Under Rule 12 (3) (b), it is specifically provided that only in the absence of alternative methods described under Rules 12 (3) (a) (i) to (iii), the medical opinion can be sought for. In the light of



such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.

13. In the light of our above reasoning , in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20.05.1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same.”

15. In *State of Madhya Pradesh vs. Anoop Singh reported in 2015(7) SCC 773*, also the Hon’ble Apex Court as deprecated ascertainment of age of victim by medical evidence at the first instance without following the Rule-12, so prescribed under Juvenile Justice Act, but considering the conduct of the prosecution, by admitting the medical report in accordance with Section 294 of the Cr.P.C., it looks inappropriate to reopen the issue. So, the victim is



found major.

16. Now, coming to ocular evidence, it is apparent after perusal of the same that none is an eye witness to occurrence that means to say, none had seen the victim (PW-7) having been carried by the appellant while she was in company of Rupali. Therefore, the evidence of the victim is taken on priority basis considering her status. It is needless to say, so far reliability of evidence of victim is concerned, unless and until, there happens to be cogent ground to discard her testimony, it should be accepted. It is also to be taken note of, that minor infirmity are bound to occur as the evidences are recorded after years together from the alleged date of occurrence and so, those infirmities unless and until, adversely affect upon the reliability of the prosecution version, should be discarded. So far this case is concerned, presence of PW-7, victim is, after examination of the I.O. (PW-6). She had deposed that on 25.09.2012 at about 7.30 p.m. while she was studying in her room, her neighbour Rupali came at her house and instructed her to accompany as she has got some urgency. Then, they both gone towards village where Bappa Pahari and Biren Pahari were present. Bappa Pahari pressed her mouth with handkerchief and Biren Pahari shown firearm and on that pretext, forced her to sit in a Bolero Jeep and then thereafter, they both took her to Kolkata. In Kolkata, Bappa Pahari committed rape upon her.



Then thereafter, she returned back to Katihar on train. After coming to Katihar, she was apprehended by the police. Her statement was recorded before the Magistrate, whereupon she had put her signature (Exhibited). At that very time, she was aged about 13 years. She had made similar statement before the Magistrate. Her medical examination was effected. Identified the accused. During cross-examination at Para-5, she had stated that her mother happens to be Hindu-Bengali and was residing at Katihar since before her marriage. In Para-6, she had stated that she is not knowing whether her parents have love marriage. At Para-7, she had stated that after apprehension by police, first of all, her statement was recorded by the police and then thereafter, her statement was recorded before the Magistrate. Then at Para-8, there happens to be contradiction relating to her evidence whatever she had deposed during examination-in-chief in the background of the fact that her statement was not recorded by the police. In Para-9, she had denied the suggestion that at the time of occurrence, she was major aged about more than 18 years. In Para-10, she had admitted that whatever finding have been recorded by the doctor after examining her, happens to be correct. In Para-12, she had stated that Rupali called her from outside of her house. She had not disclosed to her mother that Rupali has come and is calling her and so, she is going. In Para-13, she had stated that none had seen her along



with Rupali. In Para-15, she had stated that the place where Bappa Pahari and Biren Pahari caught hold her, they have not allowed her to shout. There was not house in surrounding. There was bamboo cluster. Her friend was not apprehended. When she was caught hold of, her friend ran there from. In Para-16, she had stated that her friend had not disclosed the occurrence to her parents. In Para-19, she had stated that she is unable to say the locality where she was kept at Kolkata. In Para-20, she had stated that she is unable to disclose at which time, she arrived at Kolkata. She met with only one person namely Prakash Das. In Para-21, she had stated that she had remained at Kolkata for 2-3 days only. During midst thereof, she had not met with anybody. In Para-22, she had stated that she came back alone from Kolkata. She is unable to disclose where she had boarded train. In likewise manner, she had stated in Para-23 that she is unable to disclose the fare. In Para-24, she had stated that she reached at Katihar in the day time. At Para-25, she had stated that at Katihar, she had disclosed regarding occurrence. At Para-26, she had stated that police had apprehended on Platform No.2. Then had denied the suggestion that at the instance of her parents, she had deposed like so. She had also denied the suggestion that she was major. No rape was committed with her rather she was a consensuous one.

17. PW-1 and PW-2 have simply stated that they heard



about the occurrence.

18. PW-3 is the mother of the victim. She had deposed that on 25.09.2012 at about 7.30 p.m., she was in kitchen engaged in cooking, her daughter was studying. She called her, but having no response at her end, she gone inside the room and found her absent. Then, she made hectic search, but failed to locate. Then thereafter, she called her husband and disclosed the event, whereupon her husband came and gone in search of her and during course thereof, they came to know that Shakuntla, Bhawani, Rupali, Dhiren Pahar, Shankar, son of Biren Pahari namely Bappa Pahari have kidnapped her daughter. At the time of occurrence, she was aged about 12 years and was student of Class-VII while they were going to launch a case, accused persons said that they will produce her daughter, whereupon no case was filed. Even thereafter, she was not produced. Then son of Batuja namely Prakash telephonically informed them that son of Biren accompanied her to Kolkata. Then thereafter, she accompanied her husband and brought back her daughter. Her daughter has disclosed that Rupali has enticed her away from her house to outside wherefrom, after gagging her mouth, on the pretext of revolver, she was taken away on a vehicle, which was parked outside to Kolkata where she was raped. She had made statement before the police divulging the fact, identified the accused. At Para-7, she had stated that she is unable to



disclose which side of her building, her daughter was studying on the alleged date of occurrence. Within five minutes, she finished cooking and then, called her daughter. Having no response, whereupon she inferred that she was not present. In Para-4, she had stated that her daughter had gone in night itself. In Para-11, she had stated that she along with her husband had inquired from Rupali, Bhawani, Firoz, Shankar, Dhiren, Shakuntla, who were present at their respective house. Then at Paras-13, 14, 15, there happens to be contradiction. In Para-15, she has admitted that she had stated before the police that Prakash son of Batuja has telephonically informed that son of Biren Pahari namely Bappa Pahari took her (victim) to Kolkata. Then she along with her husband had gone there and took away her daughter. Then at Para-20, she had stated that she is unable to disclose the phone number of Prakash. In Para-22, she had stated that her daughter came in the month of April, but she is unable to disclose the year and date. Again corrected that she came after 15 days. Then she stated that she had not gone to bring her rather her husband and her Dewar had gone, but she is unable to say by which train. In Para-26, she had stated that about 25 years ago, she was married. Eldest issue happens to be son and then, victim after 3-4 years. Then had denied the suggestion that victim happens to be aged about 20 years. In Para-28, she had stated that statement of her daughter was recorded before the



Magistrate and not before the police. Then there happens to be cross-examination with regard to her status under Para-29. Then, she stated that at Para-30, she had love marriage with her husband. Then she denied the suggestion that her daughter being major seeing the family status, taken the step, but same was not liked by them on account thereof, this false case has been instituted.

19. PW-4 is the brother of the victim. He is also not an eye witness to occurrence. He had deposed that on the night of 25.09.2012, his sister disappeared from her house. At that very time, she was aged about 14 years. She was taken away by the son of Biren Pahari namely Bappa Pahari, Shakuntla Devi, Rupali Devi and others to Kolkata where Bappa Pahari had committed rape upon her. His sister was recovered by the police and then, she came to house. Thereafter, she talked with her during course thereof, disclosed regarding the occurrence. During cross-examination at Para-4, he had stated that he had not seen anything.

20. PW-5 is the informant/ father of the victim. He had stated that occurrence is of dated 25.09.2012 at about 7.30 P.M. by which time, his daughter became missing, whereupon he was telephonically informed by his wife. He came and then, gone in search of her and during course thereof, came to know that Bappa Pahari,



Biren Pahari, Shankar Pahari, wife of Biren Pahari namely Rupali Devi, Firoz Pahari, Shakuntla Devi, Bhawani Devi all hatching a conspiracy took her away from the house. He also came to know that Bappa Pahari took her away to Kolkata. He had filed petition on 09.10.2012 before the police (Exhibited). His daughter was recovered by the police, she was produced before the Court where her statement was recorded. She was medically examined and then, she was handed over to them. His daughter had further informed that Bappa Pahari had committed rape on her. At that very time, his daughter was aged about 14 years and was a student of Class-VII. Identified the accused. During cross-examination at Paras-6, 7, there happens to be cross-examination relating to his marriage. His wife, who was earlier Hindu having named Jharna has married with him after converting to Islam and for that, her parents were instituted case against him. He had further stated that they have got eight children having their name according to Islamic Culture. In Para-14, he had admitted that during course of statement before the police, he had disclosed that when he reached Barsoi Station, at that very place his co-villager Khirod Pahari had disclosed that Bappa Pahari took his daughter to some unknown destination. Then, there happens to be contradiction under Paras-16, 17, 18. At Para-29, he had admitted presence of house of accused at his western boundary. Then had denied the suggestion.



21. PW-6 is the Investigating Officer. During examination-in-chief, he had stated that after registration of Barsoi P. S. Case No.199 of 2012, he took up investigation, visited the place of occurrence, which happens to be the Pakka house of the informant having two rooms. He had also shown presence of the accused at the western boundary of the informant. Then had stated that he took up statement of the witness. He got the statement of victim recorded under Section 164 Cr.P.C. She was medically examined and then thereafter, had submitted chargesheet. During cross-examination at Para-6, he had stated that victim never came to him on her own rather he along with lady constable recovered her, which has been incorporated under Para-18 of the case diary. She was at Railway Station. They have gone there and then recovered. They have recovered on 11.10.2012. Statement of victim was recorded on 12.10.2012. He along with lady constable and Chaukidar had taken away the victim. Then handed over the victim to her parents on an order of the Court. He had further stated that on 11.10.2012, victim was handed over to Rano Devi, lady constable with whom, she spent night at Lady Barrack. In Para-12, he had stated that parents of the girl visited on the same day. Then had denied the suggestion that victim was tutored by him as well as he allowed her parents to tutor her. Then at Para-15, there happens to be contradiction relating to the



informant.

22. After giving anxious consideration to the evidence as disclosed hereinabove, it is apparent that irrespective of the fact that there happens to be specific disclosure at the end of the prosecution party that victim was aged about 14 years and was a student of Class-VII, nothing has been adduced to substantiate instead thereof, the finding of the doctor (Exhibit-A) suggests her status to be a major. In the aforesaid background, other circumstances are to be seen. From the topography of the P.O. as is evident from PW-6, he had not found kitchen. He had not found stove. So, at the time of occurrence whether PW-3, mother was engaged in cooking, is a circumstance to be taken note of in the background of the fact that PW-6, I.O. had found only two rooms, but he had not gone inside the room to see whether kitchen was inside the room or not. None of the PWs have stated that kitchen was a way from the main building, though the I.O. had found courtyard, hand-pipe etc. That means to say, when the victim left the place in the night itself, the mother (PW-3) was not in a position to see her leaving the place. Furthermore, neither any PW nor the I.O. had stated that window was found. So, it is difficult to accept presence of Rupali with whom, victim left the place. Whether victim became absent at 7.30 P.M. is another circumstance as call detail has not been placed to substantiate that



informant was informed in the same night by PW-3, his wife. Furthermore, from the evidence of PW-3, mother of the victim, it is evident that she had information from Prakash that victim was at Kolkata along with Bappa Pahari, whereupon she with her husband and then, corrected her husband and Dewar had gone there and took her back. Then what was occasion for the other family member that means to say, PW-4, brother and PW-5, the informant to conceal the same. So, concealment of aforesaid activity is suggestive of the fact that prosecution has tried to conceal the crucial evidence exploring that the victim was kept, tutored and then, parents taking the police in collusion, got her statement under Section 164 of the Cr.P.C. in the background of the fact that informant is a government employee engaged at S.D.O. Office, Katihar having due access in the police administration. This part is found duly supported with the evidence of the victim herself, who had disclosed that just after 2-3 days staying at Kolkata, she returned back there from. She had gone on 25.09.2012 and after three days means on 28.09.2012. In worst case on 29.09.2012, she was at Katihar, but her presence has been shown on 10.10.2012, so during midst thereof, it is apparent that she was not under custody of police and that happens to be reason behind that I.O. had not stated that statement of victim was recorded under Section 164 Cr.P.C.



23. As per evidence of the victim, Bappa Pahari and Biren Pahari both taken her away to Kolkata while from the evidence of PW-3 and PW-5, they have made query even from Biren Pahari, father of the appellant, who was present at his house.

24. Considering the overall situation so prevailing as discussed hereinabove, it is difficult to accept the narration of the prosecution in a way as flashed, casting doubt over its authenticity, reliability, genuineness and that being so, appellant is found entitled for benefit of doubt. Consequent thereupon, judgment impugned is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	25.08.2018
Transmission Date	25.08.2018

