

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.54 of 2022**

Arising Out of PS. Case No.-180 Year-2019 Thana- SARSI District- Purnia

Abhinandan Sah @ Abhinandan Kumar Sah S/O Sadanand Sah R/o village-
Balutol Champawati, Ward No. 07, P.S.- Sarsi, District- Purnia

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Yogesh Chandra Verma, Senior Advocate Mr. Jitendra Kumar Giri, Advocate
For the Respondent/s	:	Mr. Bipin Kumar, APP

**CORAM: HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA**

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA)

Date : 20-12-2023

Heard learned senior counsel for the appellant and
learned counsel for the State.

2. This criminal appeal has been preferred against the
judgment dated 15.12.2021 and sentence dated 21.12.2021
passed by learned Additional Sessions Judge VI-cum-Special
Judge (POCSO Act), Purnea in connection with Special Case
No.93 of 2019 (CIS No.93 of 2019) arising out of Sarsi P.S.
Case No.180 of 2019 whereby and whereunder the appellant has
been convicted under Section 376 of the I.P.C. and Section 4 of
the POCSO Act and sentenced him for rigorous imprisonment



for 14 years under Section 4 of the POCSO Act with a fine of Rs.50,000/- and in default of payment of fine, the appellant has been directed to undergo additional rigorous imprisonment for three months. It has further been directed that the period of detention undergone by the appellant shall be set off against the sentence imposed and following the provision under Section 42 of the POCSO Act, the appellant is not liable to be punished or sentenced under Section 376 of the I.P.C. distinctly as he has already been sentenced for the offence under Section 4 of the POCSO Act. It is further ordered that fine amount shall be paid to the victim.

3. It has also been directed to send the copy of judgment to D.L.S.A., Purnea with recommendation for payment of compensation of Rs.5,00,000/- to the victim of this case.

4. The victim's name has been concealed in the present judgment and she has been referred to as the informant/victim (P.W.3) for maintaining privacy of her identity to protect her dignity.

5. A written report dated 08.10.2019 of victim submitted to S.H.O., P.S. Sarsi, Purnea on 10.12.2019 which is the basis for registration of First Information Report being Sarsi



P.S. Case No. 180 of 2019 under Section 376 of the Indian Penal Code and Section 4 of POCSO Act against the appellant. According to written report of the informant/victim (PW-3), the occurrence of rape is of 30.08.2019 at about 11 p.m. for which information was given on 10.12.2019 at 18:30 hours and immediately F.I.R. was registered.

6. The prosecution case, in brief, is that the informant aged 17 years was a student of Intermediate and she used to talk with the appellant on mobile since one year and the appellant who is her co-villager expressed his love and assured the informant for marriage. On the pretext of marriage, the appellant sexually exploited her three-four times out of house. On 30.08.2019, the appellant called the informant on telephone and said her to flee away to marry in Puran Devi Temple. Pursuant to his saying, they were secretly going to Puran Devi Temple at 11:00 p.m. then on a lonely place near Chikni village, the appellant sexually assaulted her but some villagers had seen them. Thereafter the villagers surrounded and tried to assault them. Then both of them introduced themselves as brother and sister. On asking by villagers, the appellant called his father, uncle and brother through mobile. They brought the appellant and the informant to Champawati. Thereafter the appellant and



his father forbade her from disclosing the occurrence to her guardian and assured her for solemnization of her marriage with the appellant. Thereafter, the informant approached the appellant for marriage for several times but the appellant refused to marry her then the informant filed the written application before the S.H.O., Sarsi Police Station.

7. The investigation of the case was carried out by the Investigating Officer and after completion of the investigation, the police submitted charge sheet against the appellant under Section 376 of the I.P.C. and Section 4 of the POCSO Act. Thereafter, cognizance was taken for the offences punishable under Section 376 of the I.P.C. and Section 4 of the POCSO Act. Then the case was committed to the Court of Sessions and charge was framed under Section 376 of the I.P.C. and Section 4 of the POCSO Act against the appellant.

8. To substantiate the charges levelled against the accused/appellant, the prosecution has examined altogether eight witnesses, who are as follows:-

- P.W.1 is the father of the informant
- P.W.2 is the mother of the informant
- P.W.3 is the victim (informant)
- P.W.4 is Dadan Kumar (Investigating Officer)
- P.W.5 is Syed Nusrat Abbas Rizvi (another I.O.)
- P.W.6 is Dr. Shivpriya Singh (Medical Officer)
- P.W.7 is Umesh Sah (Hostile)
- P.W.8 is Ganesh Kumar Sah (Hostile)



9. The prosecution has also exhibited following documentary evidences:-

Ext.1 is the written application
Ext.2 is the signature of the victim on statement under Section 164 of the Cr.P.C.
Ext.2/1 is the signature of the victim on statement under Section 161 of the Cr.P.C.
Ext.2/2 is the signature of the victim on protest-cum-complaint petition
Ext.2/3 is the signature of S.H.O. on formal F.I.R.
Ext.3 is the formal F.I.R.
Ext.4 is the statement of the victim under Section 161 of the Cr.P.C.
Ext.5 is the charge sheet
Ext.6 is the Medical Report of the victim
Ext.7 is the statement of the victim recorded under Section 164 of the Cr.P.C.

10. The defence has also adduced five witnesses in support of his defence, who are as follows:-

D.W.1 is Mohan Kumar Yadav
D.W.2 is Yashoda Devi
D.W.3 is Prithivi Sharma
D.W.4 is Sanjeet Thakur
D.W.5 is Mrityunjay Kumar Malakar

11. In addition to oral evidence, the defence has exhibited certified copy of Miscellaneous Petition No.691P of 2019 filed by the appellant before S.D.M., Dhamdaha, Purnea against the informant and her parents under Section 39 Cr.P.C. on 08.11.2019.

12. After completion of oral and documentary evidences, the statement of the accused/appellant was recorded



under Section 313 of the Cr.P.C. to which he denied the occurrence and claimed to be innocent.

13. At the conclusion of trial, the Trial Court has convicted the accused/appellant and sentenced him as aforesaid. Being aggrieved by the judgment of conviction and order of sentence, the present appeal.

14. Mr. Yogesh Chandra Verma, learned senior counsel appearing on behalf of the appellant assailing the impugned judgment and order of the Trial Court has submitted that the appellant has falsely been implicated in this case. He contends that the circumstances indicate that an after thought version has been brought by the victim against the accused/appellant. In this regard, he has pointed out that the mother of the victim (P.W.2) in her deposition has deposed that her daughter was involved in love affairs with the appellant and she wanted her daughter to be married with the appellant but when there was a refusal, the instant case was lodged against the appellant. He has next submitted that the Investigating Officer has admitted that they had not visited the place of occurrence where the alleged occurrence of rape said to have taken place and the said place of occurrence has not been established/proved by the prosecution. It is also submitted that the prosecution has



failed to duly establish the age of the victim to show that she was minor at the time of occurrence and thus the conviction of appellant under the POCSO Act is not sustainable. The prosecution has failed to produce the mobile to show that there was any talk between the victim and the appellant. He has argued that prosecution failed to examine any witness from the village Chikni where the alleged occurrence of rape was taken place and where some villagers had caught them. They were the material witnesses on the fact to prove rape and their non-examination also casts serious doubt and accordingly, the appellant is entitled to get benefit of doubt. He has further argued that the victim had wanted to marry with the appellant and for that reason the parents of the victim along with victim concocted the false story and lodged the false case against the appellant to take revenge for refusing marriage proposal.

15. Learned senior counsel for the appellant has further submitted that P.W.1 and P.W.2, who are parents of the informant/victim, are not the eye witnesses to the occurrence and they are hearsay witnesses to whom the victim disclosed the occurrence after about two months of alleged occurrence of 30.08.2019. He has further submitted that as per the medical report of P.W.6, no sign of rape has been detected by the doctor.



As per the version of the victim as set out in the F.I.R., the said occurrence is said to have taken place on 30.08.2019 whereas the F.I.R. was lodged on 10.12.2019 after lapse of more than three months without giving plausible explanation.

16. Learned senior counsel for the appellant has lastly submitted that the prosecution has failed to prove the basic ingredients of rape of victim by the appellant. He has submitted that the medical evidence does not support the case of the prosecution and the evidence of victim is not of sterling quality and inspires no confidence. The Trial Court failed to appreciate that defence witnesses were independent witnesses and their evidence had not been shaken in cross-examination. The appreciation of evidence by the Trial Court is not proper and correct. The appellant ought to have been acquitted of the charges but the court below committed an error in convicting and sentencing the appellant.

17. On the other hand, learned counsel for the State has submitted that the prosecution has been able to prove its case. The victim is a minor, who has stated about the incident and the evidence of victim alone is sufficient to prove the prosecution case as per settled position of law. He has further submitted that under Section 29 of the POCSO Act presumption



operated against the appellant and it was necessary for the appellant to prove the contrary, which he failed to do so in the instant case. The impugned judgment is in accordance with law and this appeal is liable to be dismissed.

18. We have perused the impugned judgment and Trial Court records and given thoughtful consideration to the rival contention made on behalf of the parties.

19. From perusal of the impugned judgment, it is clear that the learned Trial Court convicted the appellant holding that victim is a minor, who has supported the factum of rape/penetrative sexual assault committed by the appellant with her in Chikni village and her consent is immaterial being minor and the defence witnesses do not falsify/disprove the prosecution case.

20. The appellate Court is empowered to reappraise the entire evidence on record for the purpose of ascertaining as to whether the appellant had committed the charged offence or not and if the impugned judgment and order is ultimately found to be clearly unreasonable and perverse then such judgment and order can be set aside by the appellate Court.

21. To examine the correctness of the findings, we will first assess the testimony of witnesses adduced by both



sides. P.W.3 is the victim, who is the informant of this case. She had deposed that she was a student of Intermediate 2nd Year at the time of occurrence. The appellant called her and told that he will marry her in Puran Devi Temple. She was not ready to go with him but he insisted her for marriage then she secretly came out of her house and seated on the motorcycle of the appellant. She further deposed that near Chikni village at a lonely place the appellant forcibly established physical relation with her by pressing her mouth and when she cried, some villagers saw them, who tried to assault them but the appellant told them that they are brother and sister. The villagers asked their names and address. The appellant called his father, uncle and brother through mobile and they came there and got them freed from the villagers. She further deposed that they dropped the victim on the road in front of her house and forbade her from disclosing the occurrence in her home and they asked that they will organize her marriage with the appellant. She came to her house and slept. She further deposed that whenever she talked about her marriage, the appellant had prevaricated. She further deposed that after *Chhath Puja* when she was talking with the appellant, her mother caught her then she narrated about the occurrence to her mother, who said everything to her father. Her



father went to the house of the appellant and met with his father and at that time, the appellant had said that he is ready to marry with her but when her father returned home, the appellant called the victim and refused to marry with her. Then, the father of the victim convened *panchayati* 2-3 times but no one appeared from the appellant's family. Thereafter, she filed this case. In her cross-examination, she has admitted that she used to talk with the appellant since one year before the occurrence to which the family members did not know and no any villagers had seen her talking with appellant. She used to talk with the appellant on his mobile no.7991188651 from her mobile no.9162865488. She further stated that she was not scared of going with the appellant at 11:00-11:30 p.m. as he had said that he will marry her. She further admitted that at a distance of 10-15 steps, there was a house and there were 25-50 houses there. She deposed that when the appellant said to the villagers that they are brother and sister then she did not say that the appellant had committed rape with her. She further deposed that at 12:30 a.m. to 1:00 a.m. she came back to her home by appellant's motorcycle and at that time she had not said to her parents about the occurrence but after 3 months she said about the occurrence. She further said that if the appellant had married, she would not have filed the



case.

22. P.W.1 is the father of the victim and P.W.2 is the mother of the victim, who have supported the prosecution case that the victim had narrated the said incident to them and the proposal for marriage of victim with the appellant was refused then they tried to resolve the same through Panchayati but appellant refused and solemnized marriage with someone other then the victim lodged the F.I.R.

23. P.W.2 has deposed that she had no knowledge about their love affairs prior to the occurrence and when she came to know about it, she has opposed it. She has further stated that she had not seen the victim in love with the appellant but the villagers had seen. She further said that she could not say the name of the villagers, who have seen the same.

24. P.W.4 is the Investigating Officer of this case. He has deposed that he recorded the statement of the victim and proceeded for the place of occurrence which is the house of the victim. He recorded the statement of witnesses and taken the victim to Sadar Hospital, Purnea for medical examination and he brought the victim to the Court and got her statement recorded under Section 164 of the Cr.P.C. He obtained the birth certificate of the victim from her father and as per the birth



certificate, her date of birth is 04.04.2002. He proved the formal F.I.R. In cross-examination, he has stated that on 10.12.2019 at 6:30 p.m. he was given the application dated 08.12.2019 and he did not ask as to why the application signed on 08.12.2019 was given on 10.12.2019. He further deposed that he had not asked for mobile number of the victim and not investigated on this point. He further deposed that the victim had not shown the place where the offence of sexual exploitation took place. He admitted that he did not investigate scientifically on the point of phone calls. He further deposed that the victim has not mentioned the place of occurrence of Chikni village in her written application. He also deposed that the victim, her parents and witnesses have not mentioned the place of occurrence in their statements. He further deposed that he had not mentioned the name of persons of Chikni village, who had caught them. He admitted that he had neither investigated about her date of birth certificate from her school from where she studied nor seized the clothes of the victim. He further deposed that the victim was medically examined but the medical report does not confirm rape.

25. P.W.5 is another Investigating Officer, who had submitted charge sheet against the appellant. In his cross-



examination, he deposed that no any witness in the case-diary has said that the accused had forcibly committed rape with the victim.

26. P.W.6 is the Medical Officer, who had examined the victim on 11.12.2019. On examination, she found that there was no injury on private part of body and she found old perforated hymen. The age of the victim was found 16-17 years. The finding was given that there is no evidence of physical assault at the time of examination although the possibilities could not be ruled out. In her cross-examination, she deposed that U.P.T. was suggested by her but the victim did not get U.P.T. done.

27. P.W.7 and P.W.8 were declared hostile on the request of prosecution.

28. It appears from the suggestion put to prosecution witnesses in their cross-examination on behalf of defence that no such occurrence took place and the case was filed for pressuring the accused/appellant for marriage with the informant.

29. The defence adduced five witnesses out of which four are from the village Chikni which is the alleged place of occurrence. D.W.1 Mohan Kumar Yadav in his deposition has



deposed that the father of the informant had proposed the marriage of informant with appellant and had threatened to ruin him on refusal to marry with her. D.W.2 Arjun Muni, D.W.3 Prithvi Sharma, D.W.4 Sanjeet Thakur and D.W.5 Mrityunjay Kumar Malakar in their deposition have deposed that they had never heard about the said occurrence in Chikni village and police had never come to their village in this regard. The wife of D.W.3 and D.W.4 were Sarpanch and Ward Member of Chikni Panchayat.

30. In cases concerning offences under POCSO Act, the main arguments made on behalf of the State is presumption that operates against the accused under Section 29 of the POCSO Act. It is contended by the learned A.P.P. for the State that the Court has to presume that the accused had committed the offence for which he is charged under the POCSO Act, unless contrary is proved. On this basis, it is submitted that in the present case, it was for the appellant to have proved to the contrary and burden was entirely upon him, which he has failed to discharge and, therefore, the conviction and sentence imposed by the Trial Court not be disturbed.

31. It is necessary to examine the effect of presumption under Section 29 of the POCSO Act and the



manner in which accused could rebut such presumption. Under Section 29 of the POCSO Act, it cannot be said that presumption is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. There may be difficulty in proving a negative fact. It is trite law that negative cannot be proved. In order to prove a contrary fact, the fact whose opposite is sought to be established, must be proposed first.

32. It is pertinent to mention that foundational facts in a POCSO case includes the proof that the victim is a child, that the alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, to establish it with medical evidence. If the basic and foundational facts of prosecution case is laid by adducing legally admissible evidence then burden gets shifted to the accused to rebut it by establishing from the evidence on record that he has not committed the offence or that no such incident was occurred or that victim is not a child.

33. On the value of the evidence of a prosecutrix, the Hon'ble Supreme Court in case of **Manak Chand alias Mani Vs. State of Haryana** reported in **2023 SCC OnLine SC 1397**



held as follows:

7. The evidence of a prosecutrix in a case of rape is of the same value as that of an injured witness. It is again true that conviction can be made on the basis of the sole testimony of the prosecutrix. All the same, when a conviction can be based on the sole testimony of the prosecutrix, the courts also have to be extremely careful while examining this sole testimony as cautioned in **State of Punjab v. Gurmit Singh, (1996) 2 SCC 384**:

“If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

8. This was reiterated by this Court in **Sadashiv Ramrao Hadbe v. State of Maharashtra, (2006) 10 SCC 92**:

“It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix.”



9. Both the prosecutrix as well as the accused have a right for a fair trial, and therefore when the statement of the prosecutrix does not inspire confidence and creates a doubt, the court must look for corroborative evidence. Relying upon the case of Gurmit Singh (supra) this court in **Raju v. State of Madhya Pradesh, (2008) 15 SCC 133** held as under:

“10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”



34. In a case pertaining to the POCSO Act, it needs no reiteration that it is imperative to establish the age of the victim and thereby her minority. The age of the prosecutrix has an extremely crucial bearing in the case. The age of victim has to be determined on the basis of settled statutory criteria. Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 provides for determination of age of the child in conflict with law and child in need of care and protection. The law is well settled that the method to determine the age of a juvenile is also applicable to determine the age of the victim. The Hon'ble Supreme Court in **P. Yuvaprakash Vs. State** (Criminal Appeal No.1898 of 2023) vide judgment dated 18.07.2023 observed that in view of Section 34 (1) of the POCSO Act and Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, whenever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 94 (2)(iii) of the Juvenile Justice (Care and Protection of Children) Act, 2015 clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned



examination board has to be firstly preferred.

35. The Hon'ble Supreme Court in case of **Jarnail Singh Vs. State of Haryana (2013) 7 SCC 263** has held that "though Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 have been framed under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 is applicable to determine the age of child in conflict with law, the aforesaid provision should be the basis for determination of age of a child who is victim of crime. The Court remarked that there was hardly any difference between a child in conflict with law, and a child who is a victim of crime. Identical provision is thereunder Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 which came into effect from 15.01.2016.

36. In case of **Rajak Mohammad Vs. State of H.P. (2018) 9 SCC 248**, the Hon'ble Supreme Court has noted that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. In State of **Madhya Pradesh Vs. Munna @ Shambhoo Nath (2016) 1 SCC 699**, the Hon'ble Supreme Court held that the evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of victim. If there is doubt with regard to correct age of



prosecutrix, the benefit, naturally, must go in favour of the accused.

37. In case of **Rishipal Singh Solanki Vs. State of Uttar Pradesh and Others**, reported in **Manu/SC/1081/2021** the Hon'ble Supreme Court discussed the law on this point and culled out the principles with regard to the determination of age. It is observed therein that when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or Sub-section (2) of Section 94 of JJ Act, 2015, shall be sufficient for *prima facie* satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised. It is further observed therein that when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

38. The Hon'ble Supreme Court through the three-Judge bench in **Abuzar Hossain @ Gulam Hossain Vs. State**



of West Bengal (2012) 9 SCR 224 held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. It is now well settled that the burden is always upon prosecution to establish what is alleges.

39. Dealing with the issue of victim's age, the evidence of P.W.1 (father of victim) is that her daughter was to appear in the matriculation and was 16 years old. P.W.2 (mother of victim) deposed that the victim was born on 13.02.2003 but in her matric and Aadhar Card it was recorded as 04.04.2002. P.W.3 (victim) deposed that at the time of occurrence, she was studying in Intermediate 2nd year. In her cross-examination, she admitted that her date of birth is 13.02.2003 but in admit card her date of birth is 04.04.2002. P.W.4 (I.O.) in paragraph 8 deposed that he had not investigated with respect to the date of birth of victim during investigation and had not taken any information in this regard from the school from where she had done her matric and intermediate. P.W.6 (doctor), who had examined the victim, on the basis of radiological report assessed the age of the victim 16-17 years although there is no suggestion given by the defence in cross-examination to contradict the evidence of prosecution witnesses that the victim was major, in our considered opinion, the onus is cast on prosecution to prove



its case beyond reasonable doubt and lack of cross-examination does not do away with the statutory requirement placed on the prosecution by Sections 101 and 102 of the Indian Evidence Act, 1872.

40. In the present case, the prosecution failed to bring the original or certified true copy of Matriculation Certificate of the victim in trial to prove the same and its contents. In the scheme of the said Rule 12 (3), matriculation (or equivalent) certificate of concerned child, is the highest rated option. In case, such certificate is available, no other evidence can be relied upon. The doctor in the Medical Report estimated the age of victim 16-17 years based on radiological examination which cannot be treated to be accurate for the purpose of applying the provision of POCSO Act. As a matter of fact, no effort was made by the prosecution to establish the age of victim in accordance with statutory provision.

41. Documentary evidence to establish the victim's age was imperative for the proof of her age as matriculation certificate was available with the prosecution. The prosecution has failed to conduct necessary investigation and the learned Trial Court has been remiss in failing to take into consideration the provisions of Section 94 of the Juvenile Justice (Care and



Protection of Children) Act, 2015.

42. The date of birth is question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with the proof of majority of the victim drags an accused to the rigorous of POCSO Act, 2012 which mandates a reverse burden of proof. The aim of the Court of facts is to come to a firm conclusion about the minority of the victim. Like all other facts in issue, the determination of age of victim must necessarily be proved by cogent evidence needed in a criminal trial. The POCSO Act, 2012 does not diminish or dilute the Indian Evidence Act.

43. On the point of delay in filing F.I.R., it is well settled that the normal rule that prosecution has to always explain the delay does not apply to rape cases. A Coordinate bench of this Court in the judgment dated 23.11.2022 passed in Criminal Appeal (DB) No.1306 of 2018 observed that the delay in lodging the F.I.R. casts serious doubt on the prosecution's case. It is true that in a given situation delay can raise suspicion on the genuineness of implication of an accused. This principle, however, depends on the facts and circumstances of each case and cannot be a general rule. When a plea is taken by the defence to doubt the veracity of the prosecution's case on the



ground of delay in lodging of an F.I.R. in cases involving commission of sexual offence under the provisions of Indian Penal Code or under POCSO Act, the Courts are supposed to be more cautious, careful and sensitive in scrutinizing the evidence keeping in mind the social circumstances which have great bearing in such matters. The Courts cannot ignore the social reality that if a sexual offence is committed constituting an offence punishable under the provisions of POCSO Act, there is normal and natural tendency of the victim's family to conceal that occurrence to safeguard interest of the family prestige, avoid vilification and in the interest of the future of the victim as well.

44. In the present case, as per the prosecution, the informant and the appellant, who were resident of same village, had in love affairs since last one year of incident, had been caught by the villagers of Chikni village in the midnight and guardian of appellant had gone to bring back them from there, the time of F.I.R. after filing of complaint by appellant against the informant and her parents for pressuring to marriage and after solemnization of marriage of appellant with another girl, the delay in lodging F.I.R. creates doubts in prosecution case that the same is after thought.



45. In the instant case, the mobile of the victim was most important link to show that on the date of occurrence, the appellant had called the victim on mobile to flee away with him and they were on talking terms. Even thereafter, the prosecution failed to bring this evidence without any reason which also weaken the prosecution case.

46. On the point of actual incident, victim P.W.3 was the sole witness. It is but natural. Such incidents always take place in secrecy. However, in the present case, the prosecution case is that some villagers of Chikni village had caught the appellant and the informant on spot but no witnesses from Chikni village on this fact have been examined on behalf of prosecution. Prosecution has examined the parents of informant (P.W.1 and P.W.2) on the point of post incident narration by the victim after about two months of incident. The commission of rape by appellant had not been disclosed by the informant immediately. There is clearly no medical evidence in the present case to demonstrate that the victim had suffered any such sexual assault alleged to be committed by the appellant.

47. From the evidence of the victim, it appears that she was a consenting party to what was going with her. The victim had not stated the said incident to her parents



immediately and was in talking term with the appellant even after the said occurrence of alleged rape till filing of the F.I.R. against the appellant. It also appears that she had not disclosed even to the villagers of Chikni village where it is alleged that both the appellant and the victim were caught and she had said nothing when the appellant had stated that the victim and the appellant are brother and sister. The prosecution has failed to prove that even the victim and the appellant had love affairs and they were talking on the mobile. The victim and her parents admitted that they wanted to marry the victim with the appellant and for that purpose, they had conducted *panchayati* but when the appellant refused to marry with the victim, this case was lodged. There is no evidence on record that whether *panchayati* was held in this regard or not and who had attended the alleged *panchayati*.

48. The learned Trial Court relied on the statements of informant under Section 161 and 164 Cr.P.C. The police record the statements under Section 161 Cr.P.C. which are not evidence for prosecution but the same can be used by the defence for contradicting the prosecution witnesses at the time of cross-examination. However, when prosecution witness turns hostile, with the permission of Court, the public prosecutor can cross-



examine that witness by using that statement to establish contradiction. Under Section 164 of the Cr.P.C., statement is recorded by a Magistrate. The statement recorded under Section 164 of Cr.P.C. is not substantive evidence even if formally proved and can be utilized only for the purpose of contradiction of the deponent under Section 145 or corroboration by him under Section 157 of the Evidence Act. Evidence given in a Court under oath has great sanctity, which is why the same is called substantive evidence. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statement cannot be treated as substantive evidence. There is no element of enticement with the victim by the appellant. The offence of rape is not corroborated by any evidence.

49. It also appears from the record that the Investigating Officer had not visited the place of occurrence where the alleged offence was committed by the appellant. He has not taken the statement of any independent witness available near the place of occurrence. The prosecution has miserably failed to prove the place of occurrence, the manner of occurrence and also the age of the victim.

50. A proper analysis of the prosecution witnesses and



the medical evidence brought on record by the prosecution shows that the foundational facts, necessary in the present to raise presumption under Section 29 of the POCSO Act, have not been established beyond reasonable doubt by the prosecution. The defence has been able to demonstrate that the prosecution story cannot be believed and that, therefore, the presumption would not operate. Under such backdrop, it would be unsafe to hold that the prosecution had proved its case against the appellant under the provision of POCSO Act or under Section 376 of I.P.C.

51. Thus, it is to be held that the prosecution has failed to prove the charges levelled against the accused/appellant beyond all reasonable doubts thereby entitling the accused/appellant for acquittal.

52. In the result, the instant appeal deserves to be allowed and is allowed with the following orders:

I. The appeal is allowed.

II. The impugned judgment of conviction dated 15.12.2021 and order of sentence dated 21.12.2021 passed by learned Additional Sessions Judge VI-cum-Special Judge (POCSO Act), Purnea in connection with Special Case No.93 of 2019 (CIS No.93 of 2019) arising out of Sarsi P.S. Case No.180



of 2019 thereby convicting the appellant/convicted accused and sentencing him, accordingly, is set aside.

III. The appellant is acquitted of the charges levelled against him and held to be proved against him by the learned Trial Court.

IV. The appellant, who is in jail custody, be set at liberty forthwith, if not required in any other case.

53. The aforesaid appeal, accordingly, stands disposed of.

54. Let a copy of this judgment be dispatched to the Superintendent of concerned jail forthwith for compliance and record.

55. The Trial Court records of the instant appeal be returned to the Trial Court forthwith.

56. Interlocutory application(s), if any, also stand(s) disposed off, accordingly.

(Sunil Dutta Mishra, J)

I agree
Arvind Srivastava, J

(Arvind Srivastava, J)

AFR/NAFR	AFR
CAV DATE	06.12.2023
Uploading Date	20.12.2023
Transmission Date	20.12.2023

