

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.257 of 2021

Arising Out of PS. Case No.-482 Year-2019 Thana- KHAGARIA District- Khagaria

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Luko Thakur @ Awadh Kishore Thakur @ Luko Babaji, Son of Late Jaiku Thakur, Resident of Village- Vidyarthi Tola, P.S.- Muffasil, District-Khagaria.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

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with

CRIMINAL APPEAL (DB) No. 396 of 2021

Arising Out of PS. Case No.-482 Year-2019 Thana- KHAGARIA District- Khagaria

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Wakil Mandal, S/o Vindeshwari Mandal @ Vinda Mandal, R/O Village-Vidyarthi Tola, Police Station-Muffasil, District Khagaria.

... .. Appellant/S

Versus

The State of Bihar.

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 257 of 2021)

For the Appellant/s : Mr. Sumeet Kumar Singh, Advocate
Mr. Amrendra Kumar Singh, Advocate
Mr. Binod Kumar Singh, Advocate
Mrs. Alka Singh, Advocate
Mr. Kumar Avinash, Advocate

For the Respondent/s : Mr. Sujeet Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 396 of 2021)

For the Appellant/s : Mr. Anil Kumar Choudhary, Advocate

For the Respondent/s : Mr. Sujeet Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA)

Date : 09.10.2023

At the outset, it is important to mention that both above named appeals are disposed herewith through this common judgment, as same arises out of Special POCSO Case No. 23/2019, Net No. 23/2019, G.R. Case No. 1882/2019 (Arising out of Sadar Khagaria, P.S. Case No. 482/2019, disposed by learned Exclusive Special Judge, POCSO, Khagaria.

2. Heard Mr. Sumeet Kumar Singh, assisted by Mr. Amrendra Kumar Singh, Mr. Binod Kumar Singh, Mrs. Alka Singh, Mr. Kumar Avinash for the applicants/appellants as well as learned APP Mr. Sujit Kumar Singh appearing for the State in Cr. APP (DB) No. 257 of 2021 and Mr. Anil Kumar Choudhary appearing for the appellants and learned APP Mr. Sujit Kumar Singh appearing for the State in Cr. APP (DB) No. 396 of 2021.

3. Both above mentioned appeals preferred under Section 374 (2) of the Criminal Procedure Code (in short Cr.P.C.) challenging the judgment of conviction dated 11.02.2021 and order of sentence dated 18.02.2021 rendered by Exclusive Special Judge, POCSO, Khagaria, in Special POCSO



Case No. 23/2019, Net No. 23/2019, G.R. Case No. 1882/2019, arising out of Sadar Khagaria P.S. Case No. 482/2019 for the offence punishable under Section 376-D of the Indian Penal Code and Section 6 of the POCSO Act, and, is ordered to undergo rigorous imprisonment for 20 (twenty) year/s and a fine of Rs. 10,000/- (ten thousand) only, and in default of payment of fine, they shall have to undergo rigorous imprisonment for a period of three months.

4. Keeping in view the mandate of law, the name and identities of victim girl is not being disclosed and she is being described in present judgment and order as VG who examined before the learned trial court as **PW-2**.

5. The crux of prosecution case as springs through written information of informant namely, Ram Bilash Mandal (PW-3-B) that he happens to be the father of victim used to reside outside of the district for his livelihood. Prior to the occurrence, the informant arrived his home and continued residing with his son and daughter, wife of the informant was died prior to seven years ago. On 29.06.2019 at about 12 o' clock at day time, in the north direction of Bahiyar of one Ajit Thakur, containing grass and "*Manejra*" crops, brother of informant, namely Mahavir Kumar saw his daughter aged about



12 yrs, alongwith co-villager Luko Thakur (appellant/accused) in an objectionable condition. Thereafter, accused Luko Thakur succeeded in fleeing away from there and daughter of informant was brought to the home. On queries, she stated to her family members in presence of informant/PW-3 that Luko Thakur and Wakil Mandal (both appellants/accused) have been doing bad work (sexual exploitation) with her for last six months and whenever she objected, she was threatened to face dire consequences, as to kill her. When his daughter was examined, she was found pregnant.

6. On the basis of aforesaid written application, Special POCSO Case No. 23/2019, Net No. 23/2019, G.R. Case No. 1882/2019, arising out of Sadar Khagaria P.S. Case No. 482/2019 was lodged against appellants/accused. After completing investigation, the Investigating Officer submitted first charge-sheet bearing no. 25/19 dated 29.08.2019 against FIR named accused persons under Sections 376 (g) and 506 of the Indian Penal Code and also under Section 4/6 of POCSO Act, showing appellant/accused Luko Thakur as absconder. Subsequently, supplementary charge sheet no. 98/19 dated 25.10.19 against appellant/accused Luko Thakur was also submitted under Section 376(g) and 506 of the Indian Penal



Code and 4/6 of POCSO Act.

7. Learned A.S.J. 1st Cum Special Judge, POCSO Act, Khagaria, took cognizance of aforesaid case on the basis of materials available on records collected during investigation on 04.09.2019 against both appellants/accused persons under Sections 363, 376, 376D and 506 of the Indian Penal Code and also under Section 4 of the POCSO Act, whereas charges were framed against both appellants/accused on 14.10.2019 under Sections 363, 376, 376D and 506 of the Indian Penal Code and under Section 4 of the POCSO Act, which they pleaded “not guilty” and claimed trial.

8. To establish its case before the learned trial court, the prosecution altogether examined total of seven witnesses, namely, **PW-A** Grand mother of VG, **PW-2** is VG herself, **PW-3** Father of VG and informant of this case, **PW-4** Ranjeet Kumar (I.O.), **PW-5** Dr. Kumar Deovrat, **PW-6** Dr. Jyotsna Kumari Sinha, **PW-7** Simmi Kujur, J.M.-1st Class Cum Munsiff, Khagaria, who recorded statement of victim under Section 164 of Cr.P.C.

9. The prosecution also exhibited following documents during the trial to substantiate its case which are as:-

Exhibit 1 – Signature of victim on the



statement under Section 164 Cr.P.C.

Exhibit 1/1- Signature of victim on the first page of Medical Report.

Exhibit 1/2 - Signature of victim on the second page of Medical Report.

Exhibit 2 – Formal F.I.R.

Exhibit 3- Endorsement over the written application.

Exhibit 4 - Age determination report of victim by the Medical Board.

Exhibit 5 - Medical report of victim.

Exhibit 6 - Statement of victim U/s 164 Cr.P.C.

10. No witness was examined in defence during trial as well as no document was exhibited in defence. Statement of convicts/appellants were recorded under Section 313 of the Criminal Procedure Code (Cr.P.C.), where they shows their complete innocence by denying the incriminating evidence appears against them during the trial.

11. Learned Trial Court, after completion of trial, convicted both appellants/accused under Section 376 D of Indian Penal Code and also under Section 6 of POCSO Act.



Appellants/accused also convicted under Section 506 of the Indian Penal Code and acquitted from charge of 363 of the Indian Penal Code. Upon such conviction, both appellants/accused were sentenced for 20 years of rigorous imprisonment alongwith fine. Aggrieved thereof present appeal preferred by appellants/accused under Section 372(2) of Cr.P.C.

12. Hence, the present appeal;

**ARGUMENT ON BEHALF OF THE LEARNED COUNSEL
APPEARING FOR THE APPELLANTS/ACCUSED**

13. Learned counsel appearing on behalf of appellants/accused, while opening his argument submitted that by taking note of statement/deposition of prosecutrix/victim (PW-2) during trial it cannot be said that she is a “sterling witness” on the basis of her exclusive testimony, conviction can be upheld or can be said that prosecution established its case beyond reasonable doubt. In support of his submission, it is pointed out that there is lot of contradictions while narrating the story of occurrence by victim, as it was stated in her statement recorded under Section 164 of the Cr.P.C. and while she deposed before the learned Trial Court as PW-2. It is pointed out that the present FIR was lodged when victim was found in compromising position with appellant/accused Loku Thakur,



whereas, in her statement, victim stated that it was appellants/accused Wakil Mandal and Loku Thakur, who were taken her to his house and committed rape upon her, where on her shouting, her uncle rescued her and, thereafter, she narrated the occurrence to her aunty. Learned counsel further submitted that there are material contradictions regarding the place of occurrence, whether it took place in the house of appellant/accused Wakil Mandal or in the house of appellant/accused Loku Thakur or in the agricultural field of Shatrughan Mandal or Ajay Baba. It is pointed out that the place of occurrence were not verified during the course of investigation by Investigating Officer of this case as to established accusation raised against both abovenamed appellants/accused. While travelling over the argument, learned counsel submitted that date, time and month of occurrence are also missing and as such material contradictions surfaced during the trial regarding date and time of occurrence. It is pointed out that as per FIR, the date of occurrence is 29.06.2019, which was lodged with an unexplained delay of three days, wherein it has been stated that VG was raped during last six months by appellants/accused on several occasions and if this version be accepted, then certainly, the first occurrence of rape was



committed somewhere in the month of December, 2018, which falsified the statement of victim on face as when she was raped first time in the field of Shatrughan Mandal, there was “*Manejra*” Crops and said “*Manejra*” Crop generally grown up in Kharif season which grown up generally from the month of June to October. It is also pointed out that the commission of crime were seen by Mahavir Mandal, who is none but the uncle of victim and Babita Kumari, who is the none but own sister but both of them were not examined which appears fatal to the case of prosecution. It is further submitted that medical report as appears from **Exhibit-5**, does not shows any mark of injuries upon the body of victim, which further falsify the allegation. It is submitted that as per case of prosecution, VG was pregnant out of alleged rape, when the last such occurrence came into knowledge of informant which is the basis of FIR, but investigating agency, knowing the fact as VG is pregnant about 15-20 weeks, no DNA test was conducted. It is also pointed out that appellants/accused were not examined in terms of Section 53-A of the Criminal Procedure Code. It is also pointed out by learned counsel that age of victim is doubtful as **PW-2** herself said that she is 13 years of old, whereas, the father of victim as **PW-3** disclosed the age of victim as 12 years, whereas as per



medical report, victim found between the age of 14-16 years. By taking a margin of two years, the victim appears major where fact of the case suggest consensual physical relation, which alleged to be established by appellants/accused on several occasions at different places. Learned counsel also submitted that victim herself deposed in her cross-examination that she studied up to “class Vth” and in such circumstance, it was the duty of Investigating Agency to collect her birth certificate from her first attending school as to established her age in terms of Section 94 (2) of Juvenile Justice Act. Learned counsel submitted that prosecution failed to establish the victim as ‘Child’ under Section 2(1)(d) of POCSO Act, and thus, conviction under the POCSO Act is also not sustainable under the eyes of law. Learned counsel further pointed out that charges were framed under Section 4 of the POCSO Act, but conviction was made under Section 6 of the POCSO Act, which prejudice and sentence the accused as minimum sentence under Section 4 of POCSO Act is 10 years but minimum sentence under Section 6 of POCSO Act is 20 years.

**ARGUMENT ON BEHALF OF THE LEARNED APP
APPEARING FOR THE STATE**

14. Learned APP appearing on behalf of the



State submitted that the victim girl (VG) is a minor girl as per her medical/radiological examination because her age was found between 14-16 years. It is submitted that victim is a girl of rural background and appears illiterate, whose mother died much prior to this occurrence and father remains outside village in connection of his professional engagement. She appears vulnerable to the society, where appellants/accused appears her cousin and co-villager. It is submitted that from the deposition of victim, it is clear that at first instance, she was raped and thereafter, under influence of threat, she was raped by appellants/accused on several occasions and out of said rape, she became pregnant, give birth of a male child during the trial. It is submitted that as occurrence took place on several occasions at different places, in last six months prior to the occurrence, which is the basis of FIR, as such, contradictions regarding place of occurrence, time and manner of rape are very natural and cannot be said as a material contradictions to disbelieve the version of prosecutrix/victim girl. It is further submitted by learned APP that submission of learned defence counsel *qua* consent of victim is not appearing convincing in present fact as “sexual intercourse” is proved which is a condition precedent to attract presumption as available under



Section 114-A of Indian Evidence Act, which appears un rebutted during trial. In support of submission, learned APP relied upon the report of Hon'ble Supreme Court in the matter of *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra* reported as (1973) 2 SCC 793 and submitted that Hon'ble Supreme Court observed in said case that evidence of rural witness should not be just by same standard as of urban witness. Learned APP also relied upon the report of Hon'ble Supreme Court in the matter of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* reported as AIR (1983) SC 753 regarding non-consideration of minor discrepancies of evidences.

15. Learned APP also submitted that the delay in FIR is very natural, as it appears explained from available set of facts, as father of victim remains outside village and when he returned to his village only after that the occurrence was reported to police. The learned APP also submitted that the rape was committed on VG on several occasions, where pregnancy is the result and, as such, non-finding of any visible injury is very natural. Unwanted pregnancy, out of rape in itself a big injury, physical as well as mental, which appears duly corroborated from medical evidence. There is no motive for false implication.



It is also submitted that taking in totality of the present occurrence, it can be said that the victim's deposition appears trustworthy and inspire confidence as to gathered safely that she qualified the test of "**sterling witness**".

16. We have perused the record and proceedings of the learned Trial Court and also paid our thoughtful consideration to submissions as advanced by learned counsel appearing on behalf of the parties.

17. No doubt this case rest upon the sole witness of prosecutrix/rape victim i.e., **PW – 2**. The core issues which are required to be established, while deciding present appeal are as:-

- (i) Whether, the prosecution established Victim/VG/PW-2 as a "child" within meaning of Section 2(1) (d) of the POCSO Act.
- (ii) Whether, Victim/VG/PW-2, can be accepted as "**sterling witness**", inspire such level of confidence, that on sole basis of her evidence, conviction can be recorded.

DISCUSSION OF EVIDENCE

18. PW-1 is Leela Devi, who is the grandmother



of VG, she stated before the court that she came to know about the occurrence from the both of her grand daughters as appellants/accused Loku Babaji and Wakil Mandal ruined her chastity and was also informed that occurrence took place in agricultural field near to railway line. Occurrence also takes place in the field of one Ajit Baba.

18.1 In her cross-examination, PW-1, stated that the appellant/accused Wakil Mandal is her cousin, whereas, the house of appellant/accused Loku Thakur is at a distance of half kosh (equivalent to $\frac{1}{2}$ Km). She has ten goats. The agricultural field of appellant/accused Loku Thakur is near to Ajit. She denied the suggestion that the present case is falsely lodged against appellant/accused Loku Thakur, as he not permitted her she-goat in his field for grazing. She also stated that appellant/accused Loku Thakur is a T.V. patient and having childrens. It is further stated that the house of appellant/accused of Wakil Mandal is just near to her house and denied suggestion that there is partition dispute between the father of accused/appellant Wakil Mandal and her husband. She denied any pending land dispute with appellant/accused Wakil Mandal. It was also deposed by her that she is mother of six sons but not remembering the name of all his six son for the present and



stated that what she stated before the Court was on the instruction of his learned advocate. She denied suggestion that what she stated in examination-in-chief is not correct and also denied that her grand daughter is a girl of easy virtue.

19. PW-2 is VG (victim girl, name is hidden as per mandate of law, as to protect the identity of victim), who stated in her examination-in-chief that occurrence took place prior to one year, where appellants/accused Wakil Mandal and Loku Thakur committed rape upon her. The occurrence took place in agricultural field, which was of his cousin having “*Manejra*” crops. It is further stated by her that appellant/accused Wakil Mandal also committed rape upon her in his house, in night. She stated that she has no mother and her father is staying in Delhi. It was also deposed by her that appellant/accused Wakil Mandal is her uncle. She deposed that she is living together with her grandmother and whenever she tried to explain the occurrence to her grandmother, she was threatened by appellant/accused Wakil Mandal by showing her pistol, whereas appellant/accused Loku Thakur usually threatens her that if she will disclose the occurrence will hang her. It is deposed by her that both appellants/accused committed rape upon her together and also separately. It is also deposed by her



that occurrence was continued for a year and when she disclosed the occurrence to her grandmother then occurrence came to the knowledge of others. It was deposed that her grandmother saw the occurrence at the house of appellant/accused Wakil, as on her alarm, they were followed by her grandmother. Occurrence of field was seen by her uncle when appellants/accused Wakil Mandal and Loku Thakur were committed rape upon her. She deposed that out of said rape occurrences, she became pregnant and delivered, a male baby, just before one month. It was further deposed by her that medical examination was conducted upon her and her statement was also recorded under Section 164 of Criminal Procedure Code, where she identified her signature which has been exhibited as **Exhibit-1**. She also identified her signature on her medical reports, which were exhibited as **Exhibit-1/1 and Exhibit-1/2**. She identified both appellants/accused before the learned Trial Court.

19.1 On cross-examination, VG/PW-2/victim stated before the court that she has six brothers and sisters, out of which one Shobha Kumari is eldest, aged about 19 years, thereafter, Sunti Kumari, aged about 17 years, thereafter, **VG/PW-2**, herself aged about 13 years, thereafter, brother Jitendra Kumar, aged about 10 years, thereafter, sister Babita



Kumari, aged about 6 years and thereafter, brother Dharmendra Kumar, aged about 5 years. It is also stated by her that her father is a labourer and working outside since last three years. It is further stated that present case was lodged by her father, who came to village prior to lodging this case. She deposed that she also narrated the occurrence to her father, who remains in village for 15 days. It was also deposed by her that she did not explain about occurrence to her father immediately after arriving village as she was threatened by appellant/accused Wakil Mandal, when she went outside for grazing her she-goat. It was also deposed that threat was given two days before, when the occurrence was narrated to her father in presence of her grandmother. She did not disclose the occurrence to her sisters and brothers. She also narrated the occurrence to her aunty after disclosing the same to her father. She also stated that the house of appellant/accused Wakil Mandal is about 25 steps north to her house, whereas the house of appellant/accused Loku Thakur is at distance of three “*Lagga*” from her house. It is stated that as her grandfather using “*Lagga*” for measurement, therefore, she knows about “*Lagga*”, where one “*Lagga*” is equivalent to twelve human hands. It was also stated by her that appellant/accused Wakil Mandal carried her in Lap to his house,



but she never visited the house of appellant/accused Loku Babaji (Loku Thakur). It was stated that when she was carried from her home, at that time her grandmother, all brothers and sisters were present in house but they were sleeping. It was deposed that she also raised alarm when appellant/accused Wakil Mandal hold her and was carrying her forcibly. It was deposed that on her cry, her uncle wake up but did not made any attempt to save her. It was also deposed by her that she informed her father on telephone through phone of her uncle Mahavir Mandal. She failed to disclose the mobile number of her father and uncle. It is also deposed by her that she not narrated the occurrence to anyone in village including Sarpanch and Mukhiya. It is categorically deposed by her in para -7 of cross-examination that she dropped her study after Class-V. She deposed that her menstruation started before one and half years ago but she is not remembering exact month, when it was started. She failed to depose first date of occurrence but stated that same was committed in agricultural field, subsequently, she deposed that the first time occurrence took place in the field of uncle Shatrughan Mandal having “*Manejra*” Crops, grown up to height of a human waist. It was deposed that when first time rape was committed upon her, she went there to bring grass



along with her younger sister, namely, Babita Kumari, where it was deposed that appellant/accused Loku Thakur brought her to said "*Manejra*" field from field of her grandfather Vishundeo Mandal. She went for grass at 1:00 P.M. but failed to disclose the time when she came back to home, but, subsequently, deposed that she returned in day time itself before sunset with her sister. It was deposed by her that occurrence was not noticed by her sister as her eyes were closed by clothes, whereas her eye was opened. It was also deposed by her that when first time occurrence took place with her, the blood was oozes which spread over her clothes. She not shown this blood to her sister. It was deposed by her that she is not remembering that as how many times appellants/accused were established physical relations with her. It was deposed by her that she could not even say the exact number of occurrence, even on the basis of rough counting, as whether it was 10 times, 20 times or 50 times. She denied suggestion of learned defence counsel that as she was in love affairs with some unknown and out of said relation, she became mother and to conceal the said fact, falsely implicated appellants/accused. She also denied land dispute with her father with appellant/accused Wakil Mandal. She also denied that she deposed falsely before the court in her examination-in-chief.



She denied the suggestion of any tutoring. She failed to disclose the age of appellant/accused Loku Thakur. It was deposed by her that appellant/accused Loku Thakur (Loku Babaji) is aged person and appellant/accused Wakil Mandal living with wife and childrems. She denied to lodge false case against appellants/accused.

20. PW-3, is Ram Bilash Mandal, who is the informant of this case and deposed before the learned Trial Court in his examination-in-chief that victim i.e. **VG/PW-2** is his daughter, aged about 12 years. It was also deposed that the present case was lodged by him, where occurrence took place before ten (10) months. It was deposed by him that appellants/accused Wakil Mandal and Loku Thakur committed rape upon her daughter in agricultural field having “*Manejra*” crops. It was further stated that rape was also committed in bamboo clumps. It was deposed that out of said rape, his daughter became pregnant and delivered a male baby which is now one month old. He identified appellants/accused before the learned Trial Court and stated that what he deposed before the learned trial court as above was also stated before the police.

20.1 On cross-examination, PW-3, deposed that that the application which was given in police station was



written by police inspector (Bada Babu), where he given his thumb impression. It was deposed that the contents of said written application was neither read by him nor it was read over to him by anyone. It was deposed by him that he lives outside village and when he was told by her Bhabhi (sister-in-law) to lodge case, he went police station and lodged present case. He failed to remember the name of wife of brother's wife. It was deposed by him that he has six brothers, all are alive but living separately. He deposed that the name of husband of his Bhabhi is Shatrughan Mandal. He came to know about the occurrence after 15 days when he came to his house. It was stated that his wife already died and he has two sons, namely, Jitendra Kumar, aged about 7 years and second one is Dharmendra Kumar, aged about 5 years, having four daughters also and they are living together. It was stated by him that the name of his elder daughter is Shobha Kumari, who is married and living with her in-laws. Rest are living together. It was stated that at present his only daughter, namely, Babita, aged about six years is going to school. One daughter is married and rest two daughters are not going to school (including victim). He also stated that after lodging this case, he never met with police. He denied the suggestion that no such occurrence took place as he deposed in



his examination-in-chief. He denied the suggestion that his deposition is tutored.

21. PW-4, is Ranjeet Kumar, who is Investigating Officer of this case, who was posted in Muffasil P.S. of Khagaria as A.S.I. on 01.07.2019 and received the charge of investigation from Station In-charge, recorded re-statement of **informant/PW-3**. He also recorded the statement of Mahavir Kumar and visited place of occurrence which is a agricultural field having "*Manejra*" crops located north to Vidyarthi Tola at a distance of one kilometer, where it was stated that appellant/accused Loku Thakur committed rape upon minor daughter of informant. During investigation of place of occurrence, he found 6-7 broken plants of "*Manejra*". He described the place of occurrence showing the field of Ajit Thakur in north, field of Sanjay Rai in South, Kamshil Rai in east having "*Manejra*" crops. It was deposed by him that statement of VG/victim was recorded under Section 161 of the Cr.P.C. by lady inspector, Mani Kumari and sent victim to Sadar Hospital for her medical examination, and thereafter, her statement under Section 164 of Cr.P.C. was also recorded. He also deposed that another statement of victim was recorded under Section 161 of Cr.P.C., where she stated that the



occurrence took place at both place, in field and in house. He deposed to record statement of Champa Devi, wife of Kailash Mandal, Leela Devi, wife of Vishundeo Mandal and Seema Devi, wife of Mahavir Mandal and after investigation submitted the charge sheet no. 25/2019 dated 29.08.2019 under Section 376 D of Indian Penal Code and Section 4/6 of POCSO Act. Supplementary charge sheet was submitted through charge sheet no. 98/2019 dated 25.10.2019 under Section 376 G/506 of the Indian Penal Code and 4/6 of POCSO Act against appellant/accused Loku Thakur, son of Late Jaiku Thakur. He proved formal FIR and written application which were exhibited as **Exhibit-2 and Exhibit-3** before the learned Trial Court.

21.1 On Cross-examination, it was stated by PW-4 that he cannot said as who is author of this original written application, as same is neither bearing any signature nor any date. It was deposed by him that thumb impression of informant/PW-3, Ram Bilash Mandal was not obtained before him. It was stated by him that he found broken plant of “*Manejra*” at place of occurrence which was 6-7 in numbers but did not find there any foot marks or any marks of human activities as of sleeping and sitting postures. It was stated by him that the field was with grass and “*Manejra*” and it was



month of June. He also deposed to record the statement of Mahavir Kumar. It was stated by him that he did not examine, whether victim is literate or not, but deposed that she knows to do her signature. He also deposed that whether appellant/accused Loku Thakur is aged persons or young person, healthy or ill was not investigated by him as he was not available during investigation. It was deposed by him that clothes which was wearing by victim during the occurrence was not collected by him. It was deposed by him that appellant/accused Wakil Mandal is a man of clean antecedent, and while he was crossed by appellant/accused Loku Thakur it was deposed by him that informant is not the eye-witness of the occurrence and also deposed that none of the prosecution witnesses are the eye-witness of this occurrence. It was deposed that appellant/accused Loku Thakur is also a man of clean antecedent. It was deposed by him that no investigation was carried on point, whether victim having illicit relation with male of her age group or with her brother-in-law or with any relatives. It was deposed by him that to ascertain paternity of child, no "DNA test" was conducted during investigation. He denied the suggestion that to save the real lover of victim, appellants/accused were falsely implicated.



22. PW-5, is Dr. Kumar Deovrat, who is a doctor, deposed that he had examined the Victim girl on 02.07.2019 at 02.30 P.M. in Sadar Hospital, Khagaria and found the following findings:

Height- 5 feet

Weight- 38 Kg

M.I. - Till mark on neck below right ear.

Total number of teeth- 28

Radiological Examination-

X-ray of wrist AP lateral view-lower end of radius and ulna not fused.

X-ray of Pelvis AP view- iliac crest not fused.

X-ray elbow AP and lateral view- upper end of radius and ulna fused.

PAN OPG- coronal and root apex of all second molar formed. Coronal portion of all third molar just appear.

All X-ray done at Sadar Hospital, Khagaria on 02.07.2019 plate number 9736 except PAN OPG.

PAN OPG done at Khagaria Digital X-ray, Khagaria on dated 02.07.2019 plate number 12400.

Inference- On the basis of above radiological finding, the age of victim is between fourteen to sixteen years.

The report of Medical Board is prepared by Dr. Gulshanobar and the same is marked as **Exhibit-4**.

22.1 Cross-examination on behalf of Wakil

Mandal:-

Ossification test is required to ascertain the age of



victim. Signature of victim is available on medical report. All the members of medical board are available at Khagaria at that time. I cannot say that no external injury was found on the person of victim. It is not a fact that my report is not scientifically correct.

22.2 Cross-examination on behalf of Loku Thakur:-

On cross-examination, it is deposed by him that he is not a radiologist. He is not even a MBBS. He is a B.D.S. doctor. It is not a fact that my age determination report is incorrect or not based on technical and scientific evidence.

23. PW-6, is Dr. Jyotsna Kumari Sinha, who is also a doctor, deposed that she had examined the Victim girl on 02.07.2019 at 01.35 P.M. in Sadar Hospital, Khagaria and found the following findings:

Height- 5 feet

Weight- 38 Kg

M.I. - Till mark on neck below right ear.

General Examination- Thin body built. No mark of violence anywhere over the body. Axillary hair absent. Breast developed. Per abdomen examination reveals uterus eighteen to twenty weeks. External Genitalia developed. Public hair present. Hymen old ruptured. Suggestive of habitual intercourse. Vaginal swab taken and sent for microscopical examination. Investigation- USG abdomen + pelvis shows single live



foetus of twenty weeks and one day and the report has been marked as **Exhibit-5**.

No specific question has been asked regarding rebuttal of the evidence adduced on behalf of this witness. Although some question has been asked about the age of menstruation and also about the age of attraction for the opposite sex. One another question have been asked on behalf of Luko Thakur that it is difficult for attraction of girl for the age group of father and grandfather. Although it is admitted that on the basis of above report it is difficult to say that who is the father of the foetus developing inside womb of victim.

24. PW-7, is Simmi Kujur, learned Judicial Magistrate, who recorded statement of victim under Section 164 of Cr.P.C. It was deposed by learned Magistrate in her examination-in-chief that she was posted on 03.07.2019 as Judicial Magistrate at Khagaria and recorded the statement of **VG/PW-2** under Section 164 of Cr.P.C. She identified her signature over statement before the learned trial court and on her identification, same was exhibited as **Exhibit-6**. It was deposed in cross-examination that while she was recording statement of victim, she was healthy. She failed to depose to state whether victim was under depression. She also failed to depose as to



notice any mark of injury upon VG/victim. It was deposed by her that at the time of recording statement, the victim was looking apparently minor, and therefore, she recorded her age as 13 years. While she was crossed on behalf of appellant/accused Loku Thakur, deposed before the learned trial court that the victim girl did not disclosed any specific date and time regarding occurrence. Victim also not specified any place of occurrence. She denied suggestion that victim concealed truth while recording her statement. She denied any tutoring of victim/VG/PW-2 while recording her statement under Section 164 of Cr.P.C.

CONCLUSION

25. To answer the first issue, as discussed above, whether victim girl i.e. VG is a “child” within meaning of Section 2(1)(d) of POCSO Act, 2012, it appears to us to take a guiding note from the legal report of Hon’ble Supreme Court as reported in the matter of *Jarnail Singh Vs. State of Haryana*, reported in *(2013) 7 SCC 263*, where the Hon’ble Supreme Court had occasion to deal with the procedure for determination of age of rape victim for the purpose of application of the provisions of the POCSO Act. The Hon’ble Supreme Court held, while dealing with the Rule 12 of the Juvenile Justice



(Care and Protection of Children) Rules, 2007 ('Rules of 2007' for short), framed under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2007 ('Act of 2007' for short) that the aforesaid provision should be the basis for determination of age even of a child, who is victim of crime. The Supreme Court has remarked that there was hardly any difference so far as the issue of minority was concerned between a child in conflict with law and a child who is a victim of crime Paragraphs 22 and 23 of the said decision, being relevant, is therefore, reproduced herein below:-

“22. 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 aforesaid 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.”

“23. 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.”

26. It is also important to note that the Act of 2007 has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 ('Act of 2015' for short), where Sub-Section (2) of Section 94 of the Act of 2015 provides a mandate for determining the age of a person in conflict with law. Procedure regarding determination of age, is now available under Section 94 of the Act of 2015, which is substantially the same as it was prescribed under 2007 Rules, which read as under:-

“94. Presumption and determination of age – (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person



brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person”.



27. Importing guiding note of *Jarnail Singh (supra)*, in the present case, it can be gathered safely from the deposition of PW-4, namely, Ranjeet Kumar, who is the Investigating Officer of this case that no steps were taken during investigation to establish the age of victim i.e. V.G/PW-2, that at the time of occurrence, she was under the age of 18 years by following the procedure prescribed under the Act of 2015 as discussed above and further in the light of reasoning put forth by the Hon'ble Supreme Court in the matter of Jarnail Singh (*Supra*). It appears that medical board opined the age of the victim girl i.e. VG/PW-2 between 14-16 years, based on radiological examination. The Supreme Court in the case of *Rajak Mohammad Vs. State of Himachal Pradesh*, reported in *(2018) 9 SCC 248* has held that the determination of age on the basis of radiological examination be not accepted accurate determination and sufficient margin either way has to be allowed.

28. In the present case, no effort was made by prosecution to establish the age of victim girl i.e. VG/PW-2 in terms of Section 94 Sub-Clause (1) of the Act of the POCSO Act, 2015. It appears during cross-examination of victim girl i.e. "V.G." /PW-2 that she studied up to class Vth and, thereafter, she



dropped her study. This fact also corroborate by PW-3, who is the father of the victim girl that at present only one daughter (not victim) is going to school. No efforts appears to be taken by Investigating Officer as to collect any documents from first attending school of victim girl i.e. VG/PW-2, in support of her age in terms of Section 94(2)(i) of the Act of 2015. This is not a case, where victim girl i.e. VG/PW-2 was never attended any school. Investigating Officer also failed to collect any birth certificate in support of the age of victim girl i.e. VG/PW-2 issued by local bodies in terms of Section 94(2)(ii) of the Act of 2015. The provision of Section 94(iii) of the Juvenile Justice (Care and Protection of Children), Act 2015 applies only in the absence of provisions as made under Sections 94 (2)(i) and 94(1)(ii) of the Act of 2015. Knowing the fact that victim girl i.e. VG/PW-2 was minor and studied up to class Vth, non-collecting of birth certificate from her first attending school on the part of investigating agency cannot be said to be a permissible ground to attract the precondition “**only in the absence of**” as to attract the provisions available under Section 94(2)(iii) of the Act of 2015, where age shall be determined by an ossification test or any other latest medical age determination test.



29. Therefore, in our considered opinion in the aforesaid circumstances, as prosecution failed to collect any evidence from first attending school of the victim girl i.e. VG/PW-2, regarding her age, from where she studied up to class Vth, it cannot be held conclusively that victim was below 18 years of age as on the date of occurrence and, therefore, cannot be said that prosecution proved victim as a “child” under Section 2(1)(d) of the POCSO Act, and such, we are, therefore of considered view that finding of learned trial court regarding conviction of the appellants/accused for the offence punishable under Section 6 of the POCSO Act is not a correct finding and same is liable to be set aside. There is no need of further discussion regarding correctness of sentence under Section 6 of POCSO Act, in view of framing charge under Section 4 of POCSO Act, causing prejudice to appellants/accused, as submitted, because core foundational issue to established victim as a “child” under Section 2(1)(d) of POCSO Act, failed itself.

30. Let us now consider the charge and conviction of appellants/accused under Section 376-D and 506 of the Indian Penal Code.

31. At this stage and in the context, it would be apposite to take a guiding note regarding “sterling witness” as



per ratio laid down by Hon'ble Supreme Court in the case of ***Rai Sandeep @ Deepu, v. State (NCT of Delhi), (2012) 8 SCC 21***, where the Hon'ble Apex Court held in paragraph 22 that who can be said to be a “**sterling witness**”. It is observed and held as under:

“22 In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there



should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

32. The main argument as raised by learned counsel appearing on behalf of appellants/accused that there are major contradictions appearing regarding date, place and time of occurrence and, therefore, victim girl i.e. VG/PW-2 cannot be accepted as “**sterling witness**”. It appears from the deposition of victim girl i.e. VG/PW-2 that she was raped on several occasions by both appellants/accused may be upto 50 (fifty) times, in last six months, under threat, where last such occurrence took place on 29.06.2019, which is the basis of FIR. It appears from her deposition that on certain occasions, she was raped by both appellants/accused and sometimes she was raped individually at different places, either in home or fields, causing



her pregnant. In such circumstances, contradictions regarding place of occurrence, time of occurrence, day/date of occurrence, whether she was raped by both appellants/accused or by single appellant/accused are very natural and on this score, it cannot be said that victim girl i.e. VG/PW-2, cannot be accepted as **“Sterling witness”**. Moreover, fact of this case in totality of the circumstances, as available on record of the case discloses that victim/prosecutrix does not have a strong motive to falsely implicate appellants/accused. In defence, sometimes suggestion regarding false implication was given out of property dispute and sometimes love affairs with unknown person. Even appellants/accused while explaining incriminating circumstances/evidence under Section 313 of Cr.P.C., replied in very casual manner, simply showing their innocence, no defence witness was examined or even efforts were made during trial by appellants/accused to rebut presumption as available under Section 114 A of the Indian Evidence Act to ‘rape victim’ regarding consent. Statement of victim under Section 164 of Cr.P.C. appears throughout consistent with her oral evidence while deposing before the learned trial court as VG/PW-2. Her statement is fully corroborated with medical evidence, **Exhibit-5**, and such taking all these aspects in totality, we have no



hesitation to accept victim/VG/PW-2 as “sterling witness”.

33. Hon’ble Supreme Court in the matter of **State of Maharashtra v. Chandraprakash Kewalchand Jain** reported in [(1990) 1 SCC 550 : 1990 SCC (Cri) 210], held as under:-

“that a woman who is a victim of a sexual assault is not an accomplice to the crime but is a victim of another person's lust and therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice. She is not in the category of a child witness or an accomplice and therefore the rule of prudence that her evidence must be corroborated in material particulars has no application, at the most the court may look for some evidence which lends assurance.

8. This is what this Court said in paragraph 16 of the judgment in the aforementioned case: (SCC p. 559)

“A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that



it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.”

34. Further, in the matter of **Krishna Kumar Malik v. State of Haryana, (2011) 7 SCC 130**, Hon’ble Supreme Court held as under:-

“ It is observed and held by this Court that no doubt it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.”

35. It is also submitted by learned counsel appearing on behalf of appellants/accused that the fact of case suggests that it may be a case of consensual physical



relationship. In this context, it is important to reproduce Section 114 A of the Indian Evidence Act, which reads as under:-

“114-A. Presumption as to absence of consent in certain prosecution for rape.- In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f) clause (g), clause (h), clause (I), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-Section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

Explanation.- In this Section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).”

36. Importing above legal position to factual aspect of this case, it appears from the deposition of victim girl i.e. VG/PW-2, who deposed in her examination-in-chief before the learned trial court that out of rape committed by appellants/accused, Wakil Mandal and Loku Thakur, she became pregnant and just before a month, she gave a birth of a male child. She was examined before the learned trial court on 6th December, 2019. Statement of victim was also recorded under Section 164 of the Cr.P.C. before the learned Judicial Magistrate, who examined as PW-7. In her deposition, PW-7



also stated that victim named both appellants/accused and stated to commit rape upon her by both appellants/accused. She also stated about the threat advanced to her and also stated that by that time she was pregnant of five months.

37. Further, upon medical examination, VG found pregnant having single live foetus of twenty weeks and one day. The said medical report is available through **Exhibit-5**, which was proved by Dr. Jyotsna Kumari Sinha, as PW-6, before learned trial court. No evidence was brought by appellants/accused during trial to rebutt presumption as available to victim under Section 114A of Indian Evidence Act. Statement of victim found consistent from her statement recorded under Section 164 of Cr.P.C., oral deposition, which further corroborate with medical report (**Exhibit-5**), moreover, old ruptured hymen of victim and finding of habitual of sex, only corroborate the version of rape on multiple occasions as stated by VG/victim/PW-2. Thus, from aforesaid facts, and as appellants/accused failed to rebutt presumption under Section 114A of the Indian Evidence Act, it can be held safely that victim/VG/PW-2 was not a consenting party.

38. The next argument, as raised by learned counsel appearing on behalf of appellants/accused that FIR in



present case cannot be said proved as informant/PW-3, only give his thumb impression, where he categorically deposed that contents of said FIR was not read over and explained to him. It is also submitted by him that it was lodged with a delay of three days as occurrence is of 29.06.2019. The said delay is also not appears explained by PW-3. In this context, it is also submitted that the occurrence was known to informant much prior to the last occurrence, as it was deposed by victim/PW-2 herself that the information was given to her father/informant over telephone and just to create recent cause of action, the occurrence of 29.06.2019 was falsely created, which cannot be believed in absence of examination of only *eye-witness* i.e. uncle of victim/VG/PW-2, namely Mahavir Kumar. By taking note of aforesaid submissions and facts as raised by learned counsel appearing for the appellants, it appears to us that written information of this case which was given to SHO, which is the basis of formal FIR, was made under thumb impression of PW-3, who is the informant of this case. He deposed as to narrate the occurrence before the police in same manner as he deposed through his examination-in-chief. He appears to be an illiterate person giving his thumb impression. PW-4, who is Investigating Officer, specifically deposed that the formal FIR is in hand



writing and bearing signature of SHO, namely, Avinash Kumar, which he identified before the court and same was exhibited as **Exhibit-2**. He also identified endorsement of SHO, Avinash Kumar regarding lodging of present case over written information given by informant/PW-3, which exhibited as **Exhibit-3**, and as such not reading the contents of FIR before putting thumb impression and not explaining the narration by subscriber of written information to PW-3 before putting his thumb impression does not appears fatal to prosecution. As far delay to lodge present FIR is concerned, it can be gathered safely from para-5 and 6 of cross-examination of informant/PW-3, where it appears that he resides outside village in connection of his livelihood, and, when he was asked by other persons and his Bhabhi i.e. (sister-in-law), only then he reported this occurrence to police. His deposition further reflects that his six brothers are living separately. They are illiterate, poor and man of rural background. He first discussed the occurrence at family level and, thereafter, at social level as to collect the courage to report such occurrence with police. Certainly, in case of rape, a decisive courage at family level/social level is required, which usually caused delay to lodge a case with police regarding occurrence. Hence, the factual background of this case is



sufficient to explain the delay as to lodge present FIR and thus, we did not find any force in submission of learned counsel arguing for appellants/accused, as submitted above.

39. Another important aspect, as raised by learned counsel appearing on behalf of appellants/accused that non-examination of DNA of living foetus of victim/PW-2 is also fatal to prosecution. It appears to us from cross-examination of PW-4 that a question was asked on behalf of appellant/accused Loku Thakur that whether DNA test of living foetus was conducted to ascertain the real father, on which it was replied by PW-4, i.e. Investigating Officer that no such effort was made by him regarding DNA test. In our considered opinion, DNA test in present case can only ascertain paternity or involvement of either of appellants/accused, and as such, not helping appellants/accused persons to prove their innocence in view of consistent statement of VG/PW-2. Even, if it is so, it is a case of negligence on the part of investigating officer. Certainly, a rape victim cannot be deprived from justice out of state negligence, that is negligence of investigating officer, while investigating a case, particularly when statement of victim appears trustworthy and inspire confidence, which is duly corroborated with her medical examination report (**Exhibit-5**). Hence, we are of



considered opinion, that non-examination of DNA test of living foetus is also not appears fatal to prosecution. It was also argued by learned counsel that *eye-witness* of the occurrence dated 29.06.2019 namely, Mahavir Kumar and sister of victim, namely, Babita, who witnessed the first occurrence of rape, were not examined in this case. We are of the view, that when victim/PW-2 herself accepted as a “**sterling witness**”, in view of discussions as made above, non-examination of any *eye-witness* as submitted above is not appearing fatal.

40. Further, it also, appears that prosecutrix/victim stated that accused persons kept her into fear of death and also injury of her reputation and, therefore, she could not able to tell about the occurrence to any other persons, including family members. Victim was living with her younger brothers, sisters and old aged grandmother, where her mother died much prior to this occurrence and father was residing at remote place in connection with his livelihood. Moreover, victim girl i.e. VG/PW-2 through her deposition stated about the criminal intimidation by appellants/accused and there is no contradictions to disbelieve said testimony and, as such, this Court does not find any reason to set aside the conviction of appellants/accused under Sections 376-D and 506 of the Indian



Penal Code, in view of aforesaid discussion.

41. Thus, conviction of appellants/accused under Section 6 of the POCSO Act by the learned trial court is hereby quashed, whereas conviction and sentence of both above named appellants/accused under Sections 376-D and 506 of the Indian Penal Code as recorded by learned trial court are hereby confirmed alongwith fine, in view of abovesaid discussion.

42. Hence, the appeal is partly allowed, in above mentioned terms.

43. LCR, if any, be sent back to learned Trial Court along with the copy of this judgment.

(Vipul M. Pancholi, J)

(Chandra Shekhar Jha, J)

veena/-

AFR/NAFR	AFR
CAV DATE	19.09.2023
Uploading Date	09.10.2023
Transmission Date	09.10.2023

