

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 1268 of 2019**

Arising Out of PS. Case No.-129 Year-2018 Thana- MAHILA P.S. District- Bhojpur

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DABLU KUMAR @ DABLU MAHTO @ VINOD KUMAR, Son of Late
Sanjay Singh @ Sanjay Mahto, Resident of Village-Katar, P.S-Piro (Mansan
Bazar), District-Bhojpur (Arrah).

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

with

CRIMINAL APPEAL (DB) No. 1336 of 2019

Arising Out of PS. Case No.-129 Year-2018 Thana- MAHILA P.S. District- Bhojpur

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CHHOTE @ SANTOSH CHOUDHARY, Son of Barak Chaudhary @
Ramashray Chaudhary Resident of Village - Narayanpur, P.S.- Piro, O.p-
Hasan Bazar, Distt.- Bhojpur. (Arah).

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

Appearance :

(In CRIMINAL APPEAL (DB) No. 1268 of 2019)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Mr. Md.Imteyaz Ahmad, Advocate
Mr. Udbhav, Advocate
Mrs. Vaishnavi Singh, Advocate

For the State : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 1336 of 2019)

For the Appellant/s : Mr. Bindhyachal Singh, Sr. Advocate
Mr. Kaushal Kumar, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

CAV JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date : 02-02-2023

Heard Mr. Ajay Kumar Thakur, learned counsel
appearing on behalf of the appellant in Criminal Appeal (DB)



No. 1268 of 2019, Mr. Bindhyachal Singh, learned senior counsel appearing on behalf of the appellant of Criminal Appeal (DB) No. 1336 of 2019, Mr. Ajay Mishra, learned Additional Public Prosecutor for the State in Criminal Appeal (DB) No. 1268 of 2019 and Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor for the State in Criminal Appeal (DB) No. 1336 of 2019.

2. By the impugned judgment and order dated 17.09.2019/20.09.2019 passed by the learned Additional District and Sessions Judge-I cum Special Judge, POCSO Act, Bhojpur, Ara in POCSO Case No. 63 of 2018, arising out of Mahila P.S. Case No. 129 of 2018, the appellants have been convicted and sentenced as under:-

CRIMINAL APPEAL (DB) No. 1268 of 2019				
Appellant's Name	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Dablu Kumar @ Dablu Mahto @ Vinod Kumar	376(D) of the IPC	For Life (20 years)	50,000/-	RI for 1 year
	6 of the POCSO Act	For Life	50,000/-	RI for 1 year
CRIMINAL APPEAL (DB) No. 1336 of 2019				
Appellant's Name	Conviction under Section	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Chhote @ Santosh Choudhary	376(D) of the IPC	For Life	1,00,000/-	RI for 2 year
	6 of the POCSO Act	For Life	50,000/-	RI for 1 year

3. The prosecution's case, as disclosed in the



fardbeyan of the informant (whose name has been concealed in the present judgment), recorded by the Station House Officer, Mahila Police Station, Bhojpur on 22.09.2018 at 04:15 PM is to the effect that she was aged 15 years as on 20.09.2018 when she was going in a train at 08:30 in the night from Hasan Bazar to Ara with two of her friends Amarjeet Yadav and Shubham Yadav, both residents of village Turki. The appellant Anurag Chaudhary, a co-villager, boarded the same train and upon seeing the informant with two boys in the train with her, confronted her by saying that she was eloping with the said two persons. The informant denied and told him (Anurag Chaudhary) that she was going to Ara. Anurag Chaudhary threatened her of bashing her once she reached Ara railway station. The two companions who were travelling with the informant deboarded the train midway at Nonar railway station. Thereafter, said Anurag Chaudhary made the informant talk to Chhote @ Santosh Chaudhary (the appellant of Criminal Appeal (DB) No. 1336 of 2018) who commanded her to return. She thereafter got down at Garhani railway station, instead of going to Ara. From Garhani, Anurag Chaudhary took her back in a motorcycle to a place in front of Santosh Hotel at Hasan Bazar where the (i) appellant Chhotu @ Santosh Choudhary, (ii) Shekhar



Choudhary, a co-accused and (iii) another person, a resident of village Katar, whose name was not known to the informant, were there. They made her sit in a four-wheeler and took her to a cremation ground near her village and all of them committed rape upon her one by one. They, thereafter, threatened of killing her should she disclosed the occurrence to anyone, and thereafter brought her near a girls' school and left her for her to reach her house. When she reached her house, her mother was not there in the house and had gone to her brother's place (*maika*). The next day when her mother returned, she explained to her the entire occurrence. As suggested by her aunt (*mausi*), she went to the police station for lodging the FIR. It transpires from the records that the name of the fourth person (described in the FIR as a resident of Katar village) emerged as Dablu Kumar @ Dablu Mahto @ Vinod Kumar, (the appellant in Criminal Appeal (DB) No. 1268 of 2019).

4. The police, upon completion of investigation, filed its first chargesheet on 17.12.2018 against the appellant Chhote @ Santosh Choudhary, Anurag Choudhary and Urmila Devi for commission of the offence punishable under Section 376(D) and Section 6 of the Protection of Children from Sexual Offences Act (POCSO Act for short) while keeping the investigation



pending against another accused person. The second chargesheet was submitted on 31.12.2018 against the appellant Dablu Kumar @ Dablu Mahto for the offences punishable under Section 376(D) of the IPC and Section 6 of the POCSO Act. Learned Special Court under the POCSO Act, Ara after taking cognizance of the offences framed charges against the appellant Chhote @ Santosh Choudhary, Anurag Choudhary, appellant Dablu Kumar and Urmila Devi for commission of the offences punishable under Sections 376(D), 120 (B) of the Indian Penal Code and Section 6 of the POCSO Act.

5. At the trial, the prosecution examined five witnesses, viz., the informant (PW-1), the mother of the informant (PW-2), the maternal uncle of the informant (PW-3), the doctor who had conducted the medical examination of the informant (PW-4) and the Investigating Officer (PW-5).

6. After closure of the evidence of the prosecution's witnesses, the trial court elicited responses from the persons put to trial based on the circumstances emerging against them in the light of the evidence of the prosecution's witnesses, in compliance with the requirements under Section 313 of the CrPC. The appellants denied the circumstances as put to them by way of questions by the trial court. No defence witness was



examined at the trial.

7. The trial court, upon analysis of the evidence adduced at the trial, recorded acquittal of co-accused Urmila Devi. The trial court, however, came to a conclusion that the charges against these appellants and Anurag Chaudhary stood proved beyond all reasonable doubts.

8. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant Dablu Kumar has submitted that conviction of the appellant for the offence punishable under Section 6 of the POCSO Act is manifestly erroneous in the absence of any conclusive evidence adduced at the trial to establish that the informant was a child within the meaning of Section 2(d) of the Act. He has submitted that the finding recorded by the medical expert based on X-ray report to the effect that the age of the victim was less than 18 years is the only material based on which the trial court has reached a conclusion that the informant was below 18 years of age and, therefore, a child. He has submitted that the trial court failed to appreciate that age determination done during the medical examination could not be treated to be accurate. He has submitted that the trial court ought to have followed the procedure prescribed for determination of age as laid down by the Supreme Court in case



of *Jarnail Singh vs. State of Haryana* reported in (2013) 7 SCC 263.

9. He has further submitted that the appellant Dablu was arrested on 24.12.2018. He was, however, not subjected to any medical examination contemplated under Section 53A of the CrPC. He has relied on the Supreme Court's decision in case of *Chotkau vs. State of Uttar Pradesh* reported in 2022 SCC OnLine 1313. He has further submitted that the appellant Dablu Kumar was not named in the FIR and it would appear from the evidence of the informant that for the first time the informant identified the appellant Dablu at the trial without any Test Identification Parade was held. He has placed reliance on the Supreme Court's decisions in case of *Sukhbir Singh and another vs. State of Punjab* reported in (2011) 11 SCC 436, *Prakash vs. State of Karnataka* reported in (2014) 12 SCC 133 and *Jaspal Singh vs. State of Punjab* reported in (1997) 1 SCC 560 to bolster his contention that the evidence for the first time at the trial should be considered with great caution and circumspection.

10. Mr. Bindhyachal Singh, learned senior counsel appearing on behalf of the appellant Chhote @ Santosh Choudhary while adopting the submission advanced by Mr. Ajay



Kumar Thakur on the point of legality of conviction for the offence punishable under Section 6 of the POCSO Act, has submitted that as the prosecution failed to prove the most essential ingredient to bring home charge of commission of offence punishable under Section 6 of the POCSO Act and in such situation, the legal presumption under Section 29 of the Act becomes irrelevant. He has submitted that in such circumstance, the onus is on the prosecution to prove beyond all reasonable doubts, commission of an offence punishable under Section 376 (D) of the IPC, by these appellants. He has argued that in order to establish the charge of commission of an offence punishable under Section 376 of the IPC, it is incumbent upon the prosecution to establish beyond all reasonable doubts that there was penetrative sexual assault on the victim of the crime. He contends that there is no such clear evidence adduced at the trial. He has argued that on the one hand, in the First Information Report the informant alleged that the person, whose name was not known to the informant, was present in front of Santosh Hotel, Hasan Bazar when she had reached there in the motorcycle with Anurag Choudhary, in her deposition (paragraph-3) she developed an entirely different story to the effect that a person not known to her was waiting for her at



Garhani railway station with a motorcycle whose name she later learnt as Dablu Mahto. Both of them (Anurag and Dablu) had taken the informant from Garhani to Hasan Bazar where Chhote Choudhary and Shekhar were present. Her deposition in examination-in-chief in paragraph 3 itself shows that she is not a trustworthy witness and whose sole testimony of sexual assault should not have been the basis for conviction in the absence of any corroboration by other evidence, including medical evidence. He has argued that the informant in her testimony (paragraph 20) deposed that she had received injuries on her body during the course of sexual assault caused by stones and pebbles which were lying on ground. The medical evidence, however, contradicts deposition as no injury has been sustained by PW-1 (the informant). He has also argued that failure on the part of the prosecution to examine the appellant medically as required under Section 53 -A of the CrPC is a major lacunae in the prosecution's case and on that account also the appellant deserves to be given benefit of doubt.

11. Mr. Ajay Mishra, learned Additional Public Prosecutor appearing in Criminal Appeal (DB) No. 1268 of 2019 and Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor in Criminal Appeal (DB) No. 1336 of 2019 have



argued that the evidence of the informant is specific on the point of commission of rape upon her by these appellants. They have submitted that there is no reason why her deposition should be disbelieved by this Court. As the doctor has found the age of the informant to be below 18 years, the trial court has rightly convicted the appellants for commission of the offence punishable under Section 6 of the POCSO Act.

12. We will discuss the submissions on behalf of the appellants as regards sustainability of the conviction of these appellants for commission of the offence punishable under Section 376 (D) of the IPC after considering the issue as to whether the conviction under Section 6 of the POCSO Act recorded by the trial court can be upheld or not.

13. To address the said issue, we at the outset, take note of the observation made by the Supreme Court in case of ***Rajak Mohammad vs. State of Himachal Pradesh*** reported in ***(2018) 9 SCC 248*** wherein the Supreme Court has held that age determined on the basis of radiological examination cannot be an accurate determination and sufficient margin either way will have to be allowed. In the present case, based on radiological examination, there is a vague determination of age by the doctor to the effect that the age of the informant on the date of



examination was below 18 years. It appears from the evidence of the informant that she was studying in a school. No attempt was made by the prosecution to find out the date of birth of the informant as recorded in the school register. In case of **Rajak Mohammad** (supra) the Supreme Court has held in paragraphs 9 and 10 as under:-

"9. While it is correct 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, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

10. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out."

14. Further, in case of **Sunil vs. State of Haryana** (**AIR 2010 SC 392**) the Supreme Court has enunciated that conviction of an accused cannot be based on an approximate age of victim of sexual assault, which is not supported by any record. Paragraph 29 of the said decision is relevant, which is being reproduced hereinbelow:-



"29. The short question in the facts and circumstances of this case that remains to be determined is whether the prosecutrix was a minor? Dr. Sadhna Verma, PW 1 who examined the prosecutrix referred her for verification to the dental surgeon and the radiologist. The failure of getting the prosecutrix examined from the dental surgeon or the radiologist despite the fact that she was referred to them by Dr. Sadhna Verma, PW 1 is a serious flaw in the prosecution version. We are not laying down as a rule that all these tests must be performed in all cases, but in the instant case, in the absence of primary evidence, reports of the dental surgeon and the radiologist would have helped us in arriving at the conclusion regarding the age of the prosecutrix."

15. The Supreme Court in case of **Jarnail Singh**

(supra) has laid down in paragraphs 22 and 23 as under :-

"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 7-A, 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 of 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 of a child who is a victim of crime. For, in our view, there is hardly any difference insofar 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, PW 6. 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 child concerned 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 child concerned, on the basis of medical opinion."

16. Upon conjoint reading of the decisions of Supreme Court in case of **Jarnail Singh** (supra), **Rajak Mohammad** (supra) and **Sunil** (supra), we are of the definite opinion that it would be unsafe for this Court to affirm the



finding recorded by the trial court that the victim was a child within the meaning of Section 2(d) of the POCSO Act in order to attract Section 6 thereof. The conviction of these appellants for commission of the offence punishable under Section 6 of the POCSO Act, is manifestly erroneous and unsustainable. The appellants thus stand acquitted of the charge of the offence punishable under Section 6 of the POCSO Act.

17. The next question, which requires consideration by this Court is as to whether finding of conviction recorded by the trial court for commission of the offence punishable under Section 376(D) of the IPC is sustainable or not. There are five witnesses, who were examined at the trial to support the prosecution's case. PW-1 in her examination-in-chief deposed that on 20.09.2018 when she was going to Ara from Hasan Bazar in a train, co-accused Anurag Choudhary had met her and had enquired about her destination. He had made her talk to the appellant Chhote @ Santosh Choudhary, on whose directions she got down at Garhani Railway Station with Anurag Choudhary. At the Railway Station, the appellant Dablu Kumar @ Dablu Mahto came, whose name she was not knowing and both of them took the informant (PW- 1) to Hasan Bazar near Santosh Hotel, where Chhote @ Santosh Choudhary (the



appellant) and Shekhar Choudhary were also there. There is apparent deviation in her evidence in examination-in-chief from what she had mentioned in her *fardbeyan*. In her *fardbeyan*, she had not disclosed the name of the appellant Dablu Kumar @ Dablu Mahto as the one who had taken the informant in motorcycle from Garhani to Hasan Bazar. According to her, Dablu Kumar @ Dablu Mahto (the appellant) a resident of Katar was present near Santosh Hotel at Hasan Bazar when she had reached there with Anurag Choudhary. We consider it to be a major deviation in the story as narrated by the informant in her *fardbeyan* and her evidence at the trial. As regards the appellant Chhote @ Santosh Choudhary, she deposed that he was introduced to her by her aunt as her bodyguard. In her cross-examination, she deposed that the two boys with whom she was going from Hasan Bazar to Ara, namely, Amarjit and Subhash, were her friends for last six months. She admitted in her cross-examination that there were four police stations between Garhani and Hasan Bazar, but she could not go to any police station while moving from Garhani to Hasan Bazar with Anurag Choudhary and the appellant Chhote @ Santosh Choudhary. The appellant Chhote @ Santosh Choudhary, though a co-villager of the informant, was introduced by the informant's aunt to the



informant in 2018. In her cross-examination on behalf of Dablu Kumar @ Dablu Mahto, she deposed that she did not know the appellant Dablu Kumar @ Dablu Mahto by his name and she could see her face when he had come in a motorcycle to take her from Garhani to Hasan Bazar.

18. The evidence of PW-2, the mother of the informant, is of much significance. In her examination-in-chief, she deposed that on the date of occurrence, she had gone to her *maike* in village Pachma whereas the informant was there in her village at Narayanpur. At 6 PM in the evening, the informant had called PW-2 on phone and enquired from her as to when would she return. When she returned from Pachma to Narayanpur, the entire occurrence was narrated to PW-2 by PW- 1. When PW-2 enquired from the appellant Chhote @ Santosh Choudhary as to who had committed wrong with the informant, he expressed his ignorance. The informant had disclosed PW-2 thereafter that it was the appellant Chhote @ Santosh Choudhary, who had committed the offence. In her cross examination, she accepted in paragraph 7 that she had disclosed to the police that on the day of occurrence, the informant was there at village Pachma and had told her that she was going back to Narayanpur to feed cattle and thereafter she had left Pachma. She also admitted that she



had not disclosed this fact to the police that the informant (PW-1) had called her to enquire about her plans to return to village Narayanpur. Apparently thus, PW-1 and PW-2 are not consistent in their depositions. Whereas PW-2, in her examination-in-chief, deposed at the trial that PW-1 had called her on phone to enquire about her plans to return back to Narayanpur from Pachma, in her cross-examination, she accepted that she had told the police that on the date of occurrence, the informant was, in fact, with her at village Pachma and she had not called her on phone, rather told her at 6 PM that she was going back to Narayanpur. It does not appear from the evidence of PW-2 that PW-1 had ever told PW-2 about the fact that she was going to Ara in a train with two of her friends, late in the evening. PW-3, a maternal uncle of the informant, in his deposition, testified, *inter alia*, that Hasan Bazar Police Station was at a distance of two kilometers from his village Pachma. He learnt about the occurrence one day after registration of the FIR. Evidence of PW-3 is of not much significance to the extent the same relates to trustworthiness of the prosecution's witnesses. He is said to have simply learnt about the occurrence from the informant, according to his deposition. It is noted, at this juncture, that the occurrence is of 20.09.2018 in the night according to the prosecution's case. She



was subjected to medical examination on 22.09.2018. The Doctor (PW-4), in her evidence has recorded that no injury was found on the private parts of the informant. She deposed that the age of the informant was not given in her report, which was not her opinion.

19. The Investigating Officer (PW-5), in her evidence, deposed that she had visited the place of occurrence, but she did not find any mark to suggest that the said occurrence had taken place on the place of occurrence as alleged by the informant. She further deposed that though the informant had disclosed that she was going in a train with Amarjit Yadav and Subhash Yadav, but during the course of investigation, she could not interrogate them though she had attempted to search them out. She further deposed that PW-2 had stated in her statement recorded during the course of investigation that the informant had also gone to village Pachma on the date of occurrence. Further, she had not disclosed to the I.O. that it was Chhote @ Santosh Choudhary, the appellant, who had made the informant deboard the train. In paragraph 18 of her evidence, the I.O. deposed that name of Dablu Kumar @ Dablu Mahto emerged in the statement of witness Sanjeev Kumar and confessional statement of accused Anurag Choudhary.



20. Upon close scrutiny of the evidence of PW-1 and PW-2, we find that there are certain salient features of the lopsided story of the informant/prosecutrix (PW-1) as would emerge from conjoint reading of her evidence and evidence of her mother (PW-2). PW-1 was at village Pachma with her mother (PW-2), according to the statement given by PW-2 to the police during the course of investigation. PW-2 apparently made a false statement in her examination-in-chief when she deposed that PW-1 had enquired from her on phone as to when would she return from Pachma to Narayanpur. This fact, PW-2, subsequently accepted in her cross-examination. The informant was travelling in a train late in the evening at 8.30 PM with two of her friends from Hasan Bazar to Ara. It is not the case of the prosecution that the mother of the informant was knowing about the informant's movement in the train at 8.30 PM. The informant, with two of her friends were spotted by the accused Anurag Choudhary in the train and he is said to have confronted her by saying that she was eloping with her friends, who were accompanying her. He (the accused Anurag Choudhary) had made her talk to the appellant Chhote @ Santosh Choudhary. The informant (PW-1), on being asked by the appellant Chhote @ Santosh Choudhary, got down from the train at Garhani. In



her *fardbeyan*, she had disclosed that she had come to Hasan Bazar with Anurag Choudhary on a motorcycle without raising any alarm though there were four police stations in between Garhani and Hasan Bazar. She had also disclosed that at Hasan Bazar near Santosh Hotel, the appellants, Dablu Kumar @ Dablu Mahto and Chhote @ Santosh Choudhary, were already waiting for her in a four-wheeler. Her deposition at the trial, as has already been noted hereinabove, is materially different, inasmuch as, she deposed that the appellant Dablu Kumar @ Dablu Mahto had come to Garhani Railway Station on a motorcycle and she had returned from Garhani to Hasan Bazar with Anurag Choudhary and Dablu Kumar @ Dablu Mahto. According to her, she was sexually assaulted by all the four persons one by one and thereafter she was left near a school to go back to her home. On account of the manifest contradictions in the statement of the informant (PW-1) and her mother (PW-2), their evidence do not inspire confidence and do not appear to be of sterling quality. It is true that solitary evidence of the prosecutrix to hold an accused guilty for commission of an offence of rape is adequate, provided the same inspires confidence and appears to be unblemished, truthful and of sterling quality. In the present case, we notice that not only that



the evidence of the prosecutrix is inconsistent, the said evidence does not find any corroboration from the medical evidence. Further, contrary to the evidence of PW-1 that she had sustained injuries in her back during the course of commission of rape, the medical evidence does not support the said part of the prosecution's case. The IO did not notice any mark at the place of occurrence from which it could be inferred that the offence was committed at the place of occurrence. The two persons, who were travelling in the train with the informant, could not be interrogated by the police during the course of investigation. There is no evidence on record to support the prosecution's case of sexual assault on the informant in any form, accept her own deposition, which we have noticed above that the same is not fully trustworthy and free from embellishment. It is also noted that there has been no compliance of Section 53A of the CrPC. We consider it apt to notice in this regard, a Supreme Court's decision in the case of *Krishan Kumar Malik v. State of Haryana*, reported in (2011) 7 SCC 130, wherein the Supreme Court has emphasized the necessity of adhering to the requirement under Section 53A of the CrPC for medical examination of rape accused. Paragraph 44 of the said decision is of relevance and is being reproduced hereinbelow: -

“44. Now, after the incorporation of Section



53-A in the Criminal Procedure Code w.e.f. 23-6-2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences.”

21. The said decision in the case of **Krishan Kumar Malik** (supra) has been recently noticed by the Supreme Court in **Chotkau** (supra), paragraphs 73 to 76 are relevant and are being reproduced hereinbelow: -

“73. Section 53(1) of the Code enables a police officer not below the rank of Sub-Inspector to request a registered medical practitioner, to make such an examination of the person arrested, as is reasonably necessary to ascertain the facts which may afford such evidence, whenever a person is arrested on a charge of committing an offence of such a nature that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence. Section 53(1) reads as follows:

“53. Examination of accused by medical practitioner at the request of police officer.-

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful



for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.”

74. By Act 25 of 2005, a new Explanation was substituted under Section 53, in the place of the original Explanation. The Explanation so substituted under Section 53, by Act 25 of 2005 reads as follows:

“Explanation.-In this section and in sections 53A and 54,-

(a) “examination” shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) “registered medical practitioner” means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.”

75. Simultaneously with the substitution of a new Explanation under Section 53, Act 25 of 2005 also inserted a new provision in Section 53A. Section 53A reads as follows:

“53A. Examination of person accused of rape by medical practitioner, -



(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner; acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

“(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars



in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in Clause (a) of sub-section (5) of that section.”

*76. Even in a case where the victim of rape was alive and testified before the Court and the accused was also examined by a doctor, this Court found in *Krishan Kumar Malik v. State of Haryana*⁸ that the failure to obtain the report of the Forensic Sciences Laboratory was fatal. Paragraph 40 of the said decision reads as follows:*

“40. The appellant was also examined by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the appellant.”

22. Further, we are mindful of the fact that the Supreme Court in case of ***Rajendra Pralhadrao Wasnik v. State of Maharashtra***, reported in (2019) 12 SCC 460 has though



held Section 53A to be not mandatory, the Court has noted in paragraph 54 as under: -

“54. For the prosecution to decline to produce DNA evidence would be a little unfortunate particularly when the facility of DNA profiling is available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions of Section 53-A and Section 164-A CrPC. We are not going to the extent of suggesting that if there is no DNA profiling, the prosecution case cannot be proved but we are certainly of the view that where DNA profiling has not been done or it is held back from the trial court, an adverse consequence would follow for the prosecution.”

23. In view of the discussions noted above, particularly the inconsistencies, contradictions and improbabilities in the evidence of the prosecution's witnesses, we are of the view that the prosecution miserably failed to bring home the charge of commission of offence punishable under Section 376(D) of the IPC. This is because we have found the evidence of the informant, which is the solitary evidence to support the charge, to be not trustworthy and not free from embellishment. We, therefore, do not find it prudent nor safe to uphold the finding of conviction recorded by the trial Court against these appellants for commission of the offences punishable under Section 376(D) of the IPC.

24. Resultantly, the finding of conviction for the



offences punishable under Section 6 of the POCSO Act and Section 376(D) of the IPC recorded by the trial Court is hereby set aside. The order of sentence stands set aside accordingly. Consequently the impugned judgment of conviction dated 17.09.2019 and order of sentence dated 20.09.2019 passed by the learned Additional District and Sessions Judge-I cum Special Judge, POCSO Act, Bhojpur, Ara in POCSO Case No. 63 of 2018, arising out of Mahila P.S. Case No. 129 of 2018 are set aside.

25. These appeals are allowed accordingly.

26. The appellants, namely, Dablu Kumar @ Dablu Kumar @ Vinod Kumar, in Criminal Appeal (DB) No. 1268 of 2019 and Chhotu @ Santosh Choudhary in Criminal Appeal (DB) No. 1336 of 2019, are in custody. Let them be released forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

I agree
Rajesh Kumar Verma, J

(Rajesh Kumar Verma, J)

Rajesh/Gaurav

AFR/NAFR	NAFR
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