

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1355 of 2019**

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

=====

Anurag Kumar @ Anurag Choudhari S/o Premchand Chaudhary @
Premchandra Chaudhary Resident of Village- Narayanpur, P.S.- Piro, District-
Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Ravindra Kumar, Advocate
For the Respondent/s : Mr. Ajay Mishra, APP

=====

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 20-04-2023

By this appeal, appellant/convicted accused No.1

Anurag Choudhari is challenging the judgment and order dated
17.09.2019 and 20.09.2019 respectively passed by the learned
1st Additional Sessions Judge-cum-Special Judge POCSO Act,
Bhojpur, Ara, in POCSO Case No.63 of 2018, arising out of
Bhojpur Mahila Police Station Case No.129 of 2018, thereby
convicting him of the offence punishable under Section 376D of
the Indian Penal Code as well as under Section 6 of the
Protection of Children from Sexual Offences Act, 2012. For the
offence punishable under Section 376D of the Indian Penal
Code, the appellant/accused is sentenced to suffer rigorous



imprisonment for life, the term of which should not be less than 20 years apart from imposition of fine of Rs.50,000/- (Fifty thousand). In default of payment of fine he is directed to suffer rigorous imprisonment for one year. For the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the “POCSO ACT”) the appellant/accused is sentenced to suffer imprisonment for life apart from imposition of fine of Rs.50,000/- (Fifty thousand) and in default of payment of fine he is directed to suffer rigorous imprisonment for one year. Substantive sentences are directed to run concurrently by the learned trial Court. For the sake of convenience, the appellant shall be referred to in his original capacity as an accused No.1.

2. Facts leading to the prosecution of the appellant/accused No.1 projected from the Police report can be summarized thus:-

(a). The victim female child i.e., PW 1 claims to be 15 years of age on the date of lodgment of the FIR i.e., on 20.09.2018. As per prosecution case, at about 8:30 PM of 20.09.2018, she was going by a train from Hasan Bazar to Ara with two of her friends, namely, Amarjeet Yadav and Shubham Yadav resident of village Turki. Accused No.1 Anurag



Choudhari-her co-villager boarded the same train and upon noticing the fact that the First Informant-PW 1 who happens to be the victim of the crime in question was in company of two boys in the said train, had confronted her by saying that she is eloping with those two boys. The First Informant-PW 1 denied this fact and informed accused No.1 Anurag Choudhari that she was going to Ara. Accused No.1 Anurag Choudhari threatened her of beating once she reaches Ara. Then the two companions who were travelling with the First Informant-PW 1 de-boarded the train midway at Nonar Railway Station. Accused No.1 Anurag Choudhari then made the First Informant-PW 1 i.e., the victim female child to talk with accused No.2 Chhote @ Santosh Choudhari on a telephone. Said Chhote ordered the victim female child to return. Therefore, instead of going to Ara, the First Informant-PW 1 the victim female child alighted from the train at Garhani Railway Station. From that railway station, appellant/accused No.1 Anurag Choudhari took her on a motorcycle to a place in front of Santosh Hotel at Hasan Bazar. At that place accused No.2 Chhote @ Santosh Choudhary, Shekhar Choudhary (the accused who was not put up for the trial) and one unknown accused who was subsequently identified as accused No.3 Dablu Kumar @ Dablu



Mahto were present. Accused No.3 Dablu Kumar @ Dablu Mahto is stated to be the resident of village Katar. From that place, the accused persons made to First Informant-PW 1 to sit in a four-wheeler vehicle and she was then taken to a cremation ground at Digha- a place nearby her village. In the garden near that cremation ground, as per prosecution case, all four accused committed penetrative sexual assault on PW 1 the victim female child. She was threatened of killing her should she disclose the occurrence to anybody else. Thereafter, she was taken near a Girls School. The accused persons then left her at that place so as to enable her to reach her house. On reaching her house she found that her mother is absent and had gone to her parental house. On the next day, her mother, i.e., PW 2, returned to her village Narayanpur. The victim female child then narrated the entire incident to her mother. Thereafter, her aunt (Mausi) suggested PW 1- the victim female child to lodge the FIR with police. That is how the FIR came to be registered against the accused persons at Mahila Police Station at about 4:15 PM of 22.09.2018 resulting in registration of Police Case No.129 of 2018 for the offences punishable under Section 376D of the Indian Penal Code as well as under Section 6 of the POCSO Act.



(b) The routine investigation followed. The female victim child was sent for medical examination and PW 4 Dr. Vijayta Prasad of Sadar Hospital Ara had examined her medically on 22.09.2018. Statement of witnesses came to be recorded and on completion of investigation, the accused were charge sheeted.

(c). The learned Special Judge under POCSO Act has framed charges against the accused persons. The accused pleaded not guilty and claimed trial.

(d). In order to bring home the guilt, the prosecution has examined in all five witnesses. The victim female child came to be examined as PW 1 on 06.05.2019. Her mother PW 2 came to be examined on the same day. Her maternal uncle came to be examined on 24.05.2019 as PW 3. Medical Officer Dr. Vijayeta Prasad of Sadar Hospital Ara came to be examined as PW 4. Investigator Punam Kumari, the Station House Officer of Mahila Police Station came to be examined as PW 5.

(e). The accused persons were examined under Section 313 of the Cr.P.C. Their defence was that of total denial. However, they did not enter in the defence.

(f). After hearing the parties, the learned trial



Court by the impugned judgment and order was pleased to convict and sentenced the appellant/accused No.1 as indicated in the opening para of this judgment. Other two accused persons, namely, Chhote @ Santosh Choudhary and Dablu Kumar and Dablu Mahto were also suitably convicted for the offences punishable under Section 376D of the Indian Penal Code and under Section 6 of the POCSO Act. They were also sentenced accordingly.

(g). We have noted from the record that the First charge-sheet came to be filed by the police against the accused persons mentioning therein that complicity of one of the named accused, namely, Shekhar Choudhary in the crime in question was not found. That is how, it appears that a closure report was filed against one of the named accused Shekhar Choudhary. However, appellant/accused No.1 Anurag Choudhary, Accused No.2 Chhote @ Santosh Choudhary and accused No.3 Dablu Kumar @ Dablu Mahto along with one Urmila Devi came to be prosecuted and accused Urmila Devi came to be acquitted by the learned Special Judge by the impugned judgment and order.

3. We have also noted that co-convict / accused No.2 Chhote @ Santosh Choudhary has challenged his conviction under Section 376D of the IPC and under Section 6



of the POCSO Act by filing Cr. Appeal (DB) No.1336 of 2019 whereas co-convict / accused No.3 Dablu Kumar @ Dablu Mahto has challenged his conviction and sentence by filing Cr. Appeal (DB) No.1268 of 2019. Both these appeals were heard by the Coordinate Bench of this Court on 02.02.2023 and those were allowed by the Coordinate Bench of this Court (Coram: Chakradhari Sharan Singh and Rajesh Kumar Verma, JJ.). The impugned judgment and order of conviction qua those appellants came to be quashed and set aside and both of them came to be acquitted of the offences alleged against them. However, it appears that for some reason, the instant appeal of the co-convict was not placed before the said Bench and that is how we are hearing this appeal of appellant/accused No.1 Anurag Choudhari arising out of the same judgment and order of conviction and resultant sentence which was subject matter of these two criminal appeals decided by the coordinate Bench of this Court.

4. We have heard the learned counsel appearing for the appellant at sufficient length of time. He argued that the impugned judgment and order of conviction and resultant sentence is perverse and illegal as evidence of the victim of the crime in question is not consistent and cogent. It is argued that



the prosecution has failed to prove the fact that the victim, at the time of the alleged offence was a child within the meaning of the said term as defined by Section 2(d) of the POCSO Act. There is no legal evidence to that effect on the record of the learned Trial Court. It is further argued that so far as commission of gang rape as alleged is concerned, the police itself has rejected the theory set up by the victim female child by exonerating one of the person named by her as the rapist, namely, Shekhar Choudhary. Other two accused persons are acquitted by the Coordinate Bench of this Court and therefore, the appellant/accused No.1 is also entitled for acquittal. Our attention is drawn to evidence of PW1 the victim female child as well as on evidence of her mother PW2 and that of the Medical Officer PW4 Vijayeta Prasad.

5. The learned Additional Public Prosecutor opposed the appeal and supported the impugned judgment by stating that evidence of the victim female child is clear and cogent.

6. We have considered the submission so advanced. We have also perused records and proceedings including oral as well as documentary evidence adduced by the prosecution. The appellant along with the co-accused were charged for the



offence punishable under Section 6 of the POCSO Act which is prescribing punishment for the aggravated penetrative sexual assault on a child. It is averred by the prosecution that the appellant and the co-accused had committed penetrative sexual assault on her repeatedly. The learned Trial Court it seems has invoked provisions of Section 5(k) of the POCSO Act incorrectly as the same Section deals with committing penetrative sexual assault on a child taking advantage of her mental or physical disability.

7. Be that as it may, for making out the offence punishable under Section 6 of the POCSO Act, it is incumbent on the part of the prosecution to establish that the victim of the crime in question, at the relevant time, was a child as defined by Section 2(d) of the POCSO. If it is shown that the victim was below 18 years of age at the time of commission of offence of penetrative sexual assault on her repeatedly then only the accused persons can be made liable for the consequence thereof provided by Section 6 of the POCSO Act. Let us therefore examine whether the prosecution has proved that on the date of alleged offence i.e., on 20.09.2018, the PW1 was below 18 years of age.

8. It is well settled that for proving age of a person,



oral evidence is hardly of any assistance. In the case in hand, the prosecution has relied on oral evidence regarding age of the victim so also evidence of Medical Officer- PW 4 Dr. Vijayeta Prasad. Now firstly, let us look at oral evidence regarding age of the victim female child. In her FIR lodged on 22.09.2018, the PW 1 has stated her age as 15 years as of that day. She had entered in the witness box on 06.05.2019. On that day also, she has restated on oath her age as 15 years on the date of recording evidence. Her mother, on 06.05.2019 has stated age of the victim female child as 15 years. One fails to understand as to how age of the victim at various stage remains static as 15 years. Thus obviously, there is no sanctity to such statement as to age of PW 1 made by her as well as her mother. Both of them have not disclosed date of birth of the victim female child. Hence, we find that oral evidence regarding age of the victim female child cannot be accepted.

9. Now let us examine evidence regarding age of the victim female child coming from mouth of PW 4 Dr. Vijayeta Prasad. She happens to be a gynecologist. This witness had examined the victim female child/ PW 1 on 22.09.2019. Under the heading medical history, the medical history of the victim female child stated before the learned Trial Court by this



witness reads as “X-ray report done at Sadar Hospital”. This witness had not even ventured to state that she had perused X-rays of the victim female child which were taken at the Sadar Hospital. This witness has stated in her evidence that “according to above findings and X-ray report, age of the above mentioned person is below 18 years”. This so called expert witness has not given data as to how she concluded that age of the victim female child was below 18 years of age on the date of her medical examination. In cross-examination, PW 4 Dr. Vijayeta Prasad has candidly admitted that age of the victim as given in her report is not her own opinion. Thus, fatal blow is given to the prosecution case regarding age of the victim by this Medical Officer by giving this admission in her cross-examination. With this material elicited on record from cross-examination of PW 4 Dr. Vijayeta Prasad, there remains no evidence regarding age of the victim female child.

10. Even if we consider radiological age of the victim as below 18 years as stated by PW 4 Dr. Vijayeta Prasad then also this evidence is laconic and unacceptable. In the matter of **Rajak Mohammad vs. State of Himachal Pradesh** reported in **(2018) 9 SCC 248**, the Hon’ble Apex Court has held that age determination on the basis of radiological examination



may not be accurate determination of age. It is held that sufficient margin on either side has to be allowed in such age determination. In the matter of **Jaya Mala vs. Home Secretary, Government of J. & K. and others** reported in **AIR 1982 Supreme Court 1297**, lacuna in determination of bony age of a person is described in following sentence “however, it is notorious that one can take judicial notice that margin of error in age ascertain by radiological examination is two years on either side”.

11. Keeping in mind such fact situation commonly arising in cases relating to sexual offences relating to minors, the Hon’ble Supreme Court in the matter of **Mahadeo S/o. Kerba Maske vs. State of Maharashtra and Another** reported in **(2013) 14 SCC 637** has held that the procedure which is adopted for determining age of the juvenile in conflict with law should be adopted while determining age of the victim of sexual assault. This proposition is also there in the matter of **Jarnail Singh vs. State of Haryana** reported in **(2013) 7 Supreme Court Cases 263**. As per the ratio of these rulings, procedure as envisaged by rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is required to be adopted for determining age of the victim child in sexual offences. Para



22 of the judgment in the matter of **Jarnail Singh** clinches the issue and reads thus:-

“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 aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12. Procedure to be followed in determination of age.—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the



case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

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

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

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

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

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



may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

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

(5) Save and except where,



further inquiry or otherwise is required, inter alia, in terms of Section 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.”

12. It is thus clear that options given in sub-Rule 3(a) are having overriding effect over the option given in clause (b) of sub-Rule (3) of Rule 12 of these Rules. For availing option given in clause (b) of Rule 12(3), the prosecution has to adduce clear, cogent and trustworthy evidence regarding non-availability of matriculation or other equivalent certificate of the child concerned. The prosecution is required to come up with the evidence that record of the school first attended by the



victim female child does not contain entry regarding her date of birth and there is no entry of date of birth of the PW1, i.e., victim female child, in the record of corporation or municipal authority or a panchayat. Unfortunately, no such evidence is forth coming in the case in hand. On the contrary, evidence of the victim female child/ PW 1 makes it clear that she was taking education in 8th standard in Government Middle School at Narayanpur at the relevant time. She has also spoken of her first attended school as the Primary Middle School, Bhupatpur. It is in her evidence that at that school, her date of birth was informed by her uncle and aunt to the school authorities. This implies that there is record of date of birth of the victim female child in the first attended school. However, for the reasons best known to it, this evidence is suppressed from the Court by the prosecution.

13. The Registration of Births and Deaths Act, 1969 provides the procedure for registration of birth as well as death. This procedure is mandatory. Section 7 of this Act deals with appointment of Registrars for each local area comprising of area within the jurisdiction of Municipality, Panchayat or Local Authorities. It is duty of the Registrar to register every birth and every death occurring in his jurisdiction. Section 8 of the said



Act cast duty on head of each family to report the births to the Registrar. That is how the Registrar is duty bound to issue certificate of birth as per provisions of Sections 12 and 17 of the said Act. Such certificates are record of act of a public servant and as such are relevant as per provisions of Section 35 of the Evidence Act. Such certificates are directly admitted in evidence as per provisions of Section 77 of the Evidence Act, those being a public document. Evidence of the Investigator is conspicuously silent about her efforts in searching out the record regarding date of birth of the victim female child from the concerned panchayat.

14. In this view of the matter and for the reasons recorded in foregoing paras, one will have to conclude that the prosecution has failed to adduced any evidence to point out that the victim female child, on the date of commission of alleged offence was a child below 18 years of age. Hence, the provisions of POCSO Act are not applicable to the case in hand and as such, conviction of appellant / accused No.1 Anurag Choudhari for the offence punishable under Section 6 of the said Act cannot be sustained.

15. Now, let us examine whether the appellant / accused No.1 can be held guilty of the offence of commission of



gang rape on the victim/ PW 1 which is punishable under Section 376D of the Indian Penal Code. It is well settled that in an Indian settings, refusal to act upon testimony of a victim of sexual offence in absence of corroboration, as a rule, is adding insult to the injury. However, in **Radhu Vs. State of M.P.** reported in **2007 Criminal Law Journal 4704**, a note of caution is given. It is noted therein that there have been few cases or rare instances where parents have compelled an obedient child to make a complaint of penetrative sexual assault. False charges of rape are not uncommon. Similarly, it is also clear that if a victim of rape states that she has been ravished by committing forcible sexual intercourse on her, her statement has to be accepted even if it is uncorroborated by other evidence on record, provided such testimony inspires confidence and is truthful. However, when the material found on record gives an inference that the act was with consent or that the entire incident was false, then conviction cannot be validly sustained. If the evidence of the victim of the sexual offence is pregnant with imagination, surmises and improbabilities then also it cannot be acted upon to record conviction unless it is corroborated by other material on record coming from independent sources. Keeping in mind these principles for appreciation of evidence,



we will have to appreciate evidence of the PW 1, victim of the crime in question.

16. Before advertng to evidence of the victim of the crime in question, it would be apposite to put on record paragraphs 20 and 23 of the common judgment passed by the Coordinate Bench of this Court in Cr. Appeal (DB) No.1268 of 2019 and 1336 of 2019, thereby acquitting accused No.3 Dablu Kumar @ Dablu Mahto and accused No.2 Chhote @ Santosh Choudhary, against whom the very same evidence is available. Those reads thus:

“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.”

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.”

17. Perusal of the judgment rendered by the Coordinate Bench of this Court makes it clear that the testimony of the prosecutrix was not believed by the Coordinate Bench of this Court in the same case for basing conviction. By disbelieving the prosecutrix and drawing adverse inference because of non-examination of the accused by non-compliance of Section 53A of the Cr.P.C., those co-convicts came to be acquitted by the coordinate Bench of this Court.

18. The victim of the crime in question/ PW.1 in her statement before the Court has stated that on 20.09.2018, she was going by train from Hasan Bazar to Arra and during the course of that journey, she met appellant / accused No.1 Anurag Choudhari. She deposed that accused No.1 Anurag questioned her as to where she is going. She told him that she is going to Arra. Then as per her version, accused No.1 Anurag Choudhari threatened her that he will beat her and she should not go to Arra. He then made her to talk with accused No.2 Chhote @ Santosh Choudhary. Said Chhote told her to alight from the train and informed her that he is coming to take her. The victim female child stated that thereafter she de-boarded the train with accused No.1 Anurag Choudhary at Garhani Railway Station.



Next portion of her evidence is material. She claimed that at Garhani Railway Station, one boy came with a motorcycle but she was not knowing name of that boy at that time. Later on she came to know that the said boy is accused No.3 Dablu Mahto. The victim female child then claimed that from Garhani Railway Station, accused No.1 Anurag and accused No.3 Dablu Mahto took her on a motorcycle to a place known as Santosh Hotel, Hasan Bazar. She testified that at Santosh Hotel of Hasan Bazar, accused No.2 Chhote Choudhary and other rapist Shekher Choudhary were present. She started weeping by apprehending that she will be beaten by them. Then all four accused persons took her by a four wheeler vehicle to a funeral ground at Digha. As per her version, at the nearby garden all four accused persons then committed penetrative sexual assault on her one by one. Then they threaten her that she as well as her brother would be killed if the incident is disclosed to anybody. She was then left at a school at Narayanpur from where she went to her house and on return of her mother to her house, on the next day she lodged the report of the incident.

19. The prosecutrix has further stated that accused No.2 Chhote @ Santosh is known to her through accused No.4 Urmila Devi. The prosecutrix stated that she became acquainted



with accused No.2 Chhote at the instance of accused No.4 Urmila Devi who told her that upon getting acquainted with accused No.2 Chhote, nobody will dare to cast an evil eye on her. The prosecutrix claimed that accused No.2 Chhote is her bodyguard but he himself has spoiled her life.

20. Cross-examination of the prosecutrix is also interesting. She has reiterated in her cross-examination that she was inform that accused No.2 Chhote Choudhary shall act as her bodyguard and upon being acquainted with Chhote Choudhary, she was assured that he will protect her. However, she denied that said accused was always accompanying her.

21. Instinct of self-preservation of the prosecutrix can be gathered from her chief examination. She has omitted to state names of two young boys who were accompanying her in the train. She has not spoken about presence of her friends Amarjeet Yadav and Shubham Yadav with her in her train journey to Ara when she met accused No.1 Anurag Choudhari. This omission appears to be with some intention. The tone and tenure of evidence of the prosecutrix goes to show that accused No.2 Chhote @ Santosh was remaining with her throughout after she came to be acquainted with him through accused No.4 Urmila Devi. Unexpectedly, she was caught while in company



of her friends Amarjeet and Shubham by accused No.1 Anurag Choudhari. Accused No.1 Anurag then made her to talk to accused No.2 Chhote Choudhary during the course of her train journey itself and both her friends then alighted from the train by aborting further rail journey. This is case of the prosecution reflected in the FIR. However, the chief examination of the prosecutrix is conspicuously silent on these aspects. This aspect cast a shadow of doubt regarding truthfulness of further version of the prosecutrix which we shall deal in subsequent para of the judgment.

22. Now, let us understand what the prosecutrix / PW1 has deposed regarding subsequent incidents. Though, in the FIR she had claimed that she alighted at Garhani Police Station from where she was taken to Santosh Hotel at Hasan Bazar by accused No.1 Anurag Choudhari, while in witness box she stated that upon alighting at Garhani Railway Station, accused No.3 Dablu Mahto came there on the motorcycle and thereupon accused No.1 Anurag and accused No.3 Dablu Mahto took her to Santosh Hotel at Hasan Bazar. She stated that at that place, accused No.2 Chhote @ Santosh Choudhary to whom she has described as her bodyguard was present with one Shekhar Choudhary. Chief examination of the prosecutrix shows her



reaction upon seeing Chhote Choudhary at that place. She stated that she started weeping upon seeing Chhote Choudhary with an apprehension that he would beat her. Then, she states that she was taken in a four wheeler vehicle to a cremation ground where she was subjected to gang rape by all four accused persons. She stated that in that four-wheeler vehicle, she was weeping and accused No.2 Chhote Choudhary was asking her to keep quiet. Evidence of the prosecutrix shows that because she was subjected to gang rape on the ground having stones and pebbles, she had suffered injuries on her back so also she had suffered abrasions.

23. This version of the prosecutrix makes it clear that she was frightened upon seeing accused No.2 Chhote @ Santosh Choudhary who was probably accompanying her throughout during the journey in life after getting acquainted with her through accused No.4 Urmila Devi. The prosecutrix is referring Urmila as her aunt. The prosecutrix was found to be in company of two boys and this fact was not known to accused No.2 Chhote @ Santosh Choudhary at any point earlier to the information given by accused No.1 Anurag Choudhary.

24. The prosecutrix was then subjected to medical examination on 22.09.2018. In that medical examination



conducted by PW4 Dr. Vijayeta Prasad, no external or internal injury was found on person of the prosecutrix/PW1. The Medical Officer in her cross-examination has stated that the prosecutrix was habitual to coitus. Ultimately, this fact is not of much relevance because what the prosecutrix was doing in past has no concern with the incident in question. However, non-finding of injuries on the person of the prosecutrix despite allegation of repeated forcible sexual intercourse on her on rough surface of the garden containing pebbles and stones by four adult males creates a lurking doubt in judicial mind as to whether the incident was reported as a counter blast and because of instinct of self preservation upon being noticed in company of two boys by accused No.2 Chhote @ Santosh Choudhary.

25. The Coordinate Bench of this Court has found the very same testimony of the victim female child as unworthy of reliance. With the aid of the said reasonings adopted by us in foregoing paras so also in view of additional reasons given by us, we are also of the considered opinion that uncorroborated testimony of the prosecutrix cannot be acted upon to record conviction and resultant sentence for such grave offence. In this view of the matter, the following orders:-

I. The appeal is allowed.



II. The impugned judgment and order of conviction and resultant sentence recorded by the learned Trial Court is quashed and set aside.

III. The appellant / accused No.1 Anurag Choudhari is also acquitted of the offences held to be proved against him by the learned Trial Court. He be set at liberty if not required in any other case.

IV. Fine, if any, paid by him be refunded to him.

(A. M. Badar, J)

(Chandra Shekhar Jha, J)

Mkr./
Saurabhkrsinha/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	10.05.2023
Transmission Date	10.05.2023

