

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1253 of 2023**

**In
CRIMINAL APPEAL (DB) No.812 of 2022**

Arising Out of PS. Case No.-15 Year-2013 Thana- MAHILA P.S. District- Munger

Chandan Kumar Bhushan, Son of Purushottam Kumar Singh @
Pursotam Kumar Singh R/O Village- Sangat Mandir (Rajguru),
P.S.- Tarapur, District- Munger.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s : Ms. Surya Nilambari, Advocate
Mr. Sandeep Patil, Advocate
For the Respondent/s : Mrs. Anita Kumari Singh, APP

**CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT**

Date : 30-07-2024

1. The present appeal preferred by
appellant/convict Chandan Kumar Bhushan against
judgment of conviction dated 05.09.2022 and order of
sentence dated 12.09.2022 rendered by learned
Exclusive Special Judge (POCSO Act) cum Additional
Sessions Judge-VI, Munger, in Sessions Trial (S.T.) No.



377/2014 Mahila P.S. Case No. 15/2013, whereby and whereunder appellant/convict Chandan Kumar Bhushan has been convicted for the offence punishable under Section 376 of the Indian Penal Code and Section 3/4 of the POCSO Act and sentenced to undergo rigorous imprisonment for 10 (Ten) years and fine of Rs. 20,000/- (Rupees Twenty Thousand) and in default of payment of fine, he shall further undergo simple imprisonment for a period of four months for the offence under Section 4 of the POCSO Act.

2. Case of prosecution, as per written information dated 25.08.2013 of informant/victim/PW-2, aged about 16 years and 6 months, precisely appears that on 09.07.2013 at about 3:00 PM, when her grand maternal uncle Shri Lotan Singh/PW-4 went to visit Teldiha Bajrangbali Mandir and her maternal aunt went to nearby field for work and as such when she was alone at her home, appellant/convict, namely Chandan Kumar Bhushan, who is also her distant relative, entered in her



house suddenly, while she was working with computer and knowing her alone at home, committed rape upon her. It further appears out of narration that as to avoid social stigma, she remains silent and taking benefit of that, appellant/convict committed rape upon her on several occasions till 20.07.2013. Whenever, she objected, it was assured by appellant/convict that he would solemnize marriage with her. On 21.07.2013 appellant/convict went to join his duty, who was working with B.S.F. as a Constable. He returned on 20.08.2013 and on same very day, her mother/PW-3 also came to her parental village and when on same day at about 4:00 PM when her mother and maternal aunt were outside home, as they went to market for purchasing "Rakhi", appellant/convict again came to her house and made an attempt to commit rape upon her, which was protested by her and asked appellant, first to discuss their marriage with her mother, but he refused flatly, consequent upon the information of entire occurrences



was given by informant/victim to her parents. A panchayati was commenced in this connection, wherein the mother of appellant/convict, namely Geeta Devi assaulted the victim/informant with sliper and appellant/convict also threatened to kill her parents, if she will lodge any case.

3. The aforesaid written information was given to SHO of Mahila police Station, District- Munger, whereafter, aforesaid FIR as Mahila Police Case No. 15/13 was lodged for the offence under Sections 341, 323, 376, 504 and 506/34 of the Indian Penal Code. Police after completing investigation and on the basis of materials collected thereof, submitted charge sheet accordingly under aforementioned sections. No charge sheet for any offences submitted under POCSO Act, 2015.

4. The learned trial court/Special Court, after perusal of record took cognizance against appellant/convict under Section 4 of the POCSO Act,



besides aforesaid offences of Indian Penal Code.

5. To established its case before the learned trial court, the prosecution altogether examined total of seven witnesses, namely, **PW-1** Ravindra Kumar (Father of victim), **PW-2** is victim X, **PW-3** Kaushlya Devi (mother of victim X), **PW-4** Lotan Singh (Maternal Grandfather of victim X), **PW-5** Dr. Madhumita Mandal, (Medical Officer, Sadar Hospital, Munger), who examined victim, **PW-6** Ranjit Kumar (S.H.O., Tarapur) and I.O. of this Case and **PW-7** Dr. Ravindra Kumar Gupta (Medical Officer, Munger).

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

Exhibit 1 -Written Application of the informant.

Exhibit 1/1- Endorsement on written application.

Exhibit -2 – Medical Report regarding



the physical examination of victim.

Exhibit -2/1 Report of Medical Board
regarding assessment of the age of
victim.

7. On the basis of evidences, as surfaced during the trial, the appellant/convict was examined under Section 313 of the Cr.P.C., where he denied all the evidences as surfaced against him and claimed his complete innocence and false implication.

8. No defence witnesses/documents were examined on behalf of accused/appellant during the trial.

9. Upon the basis of evidences surfaced during the trial and by taking note of the argument as advanced by the learned counsel appearing on behalf of the parties, the learned trial court convicted appellant/convict for the offence under Section 4 of the POCSO Act, 2015 and also under Section 376 of the Indian Penal Code, where appellant/convict sentenced for ten years for the offence under Section 4 of the



POCSO Act, alongwith fine of Rs. 20,000/-

10. Being aggrieved with aforesaid judgment of conviction and order of sentence, the appellant/convict preferred the present appeal.

11. Hence the present appeal.

12. It is submitted by learned counsel Ms. Surya Nilambari while arguing on behalf of the appellant/convict, that in present case conviction of appellant/convict was secured on the sole testimony of victim/PW-2. It is pointed out that there are major contradictions surfaced during the trial out of her deposition *qua* occurrence which was overlooked by the learned trial court. It is submitted that no doubt, conviction in rape case can be secured on the sole testimony of victim of crime in question but it must inspired confidence regarding its truthfulness, where victim must qualify the test of "**Sterling Witness**". It is also submitted by Ms. Nilambari that admittedly victim was the student of B.A. 1st year at the time of



occurrence but no documents regarding her date of birth was collected during investigation which may be the best documents to establish her as a "child" within the meaning of Section 2(1)(d) of the POCSO Act by following the legal provisions as available under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and also by following legal ratio, as settled through ***Jarnail Singh v. State of Haryana, (2013) 7 SCC 263.*** It is submitted that if the fundamental aspects as to establish "Child" was not proved during the trial, presumption as available under Section 29 of the POCSO Act, 2015 cannot be imported.

13. Ms. Nilambari, further submitted that out of fardbeyan and deposition of PW-2/informant, it can be gathered easily that the occurrence was reported to the police only when appellant/convict refused to solemnize his marriage with victim, who was a working Constable with BSF. It is also submitted that FIR was lodged with delay of more than one month, for which,



the explanation not appearing justified. It is also submitted that the reasons for delay as cited through FIR was a Panchayati, which was held to settled the differences regarding marriage proposal but no documents in support of said panchayati was brought on record and moreover, all the members of said panchayati were the family members of the victim. Concluding argument, Ms. Nilambari submitted that precisely, the nature and quality of evidences as surfaced during the trial does not inspired such confidence, on the basis of which, the conviction as recorded by the learned trial court against appellant/convict may sustain under the law and as such, the judgment of conviction and order of sentence is liable to be set aside/quashed.

14. Learned APP Ms. Anita Kumari Singh, while opposing the appeal submitted that PW-2/victim, who is also the informant of this case, categorically deposed against appellant/convict during the trial that he committed rape upon her on several occasions. It is



submitted that minor contradictions, if any surfaced during trial, cannot be a ground to set aside the finding of conviction. It is pointed out by learned APP that even as per the medical report, the age of victim was assessed between seventeen years and half to eighteen years on the date of occurrence and as such, victim was minor, therefore, the conviction under Section 4 of POCSO Act is also justified and same not required to be interfered. Learned APP relied upon the report of ***Krishna Kumar Malik v. State of Haryana***, reported through ***(2011) 7 SCC 130***, wherein 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."

15. I perused the record, and considered the argument, as canvassed by the learned counsel



appearing on behalf of the parties.

16. Record of this case suggest, that the most important witness of this occurrence is PW-2/informant/victim herself. It appears from her deposition that the appellant/victim, who is working as a Constable with BSF was her distant relative, who committed rape upon her on different occasions, starting from 9th of July 2013 to 20th of July 2013. It also appears from her deposition that on last occasion i.e. on 20.08.2013 when appellant/convict returned from his duty after one month, he again made an attempt to commit rape upon her, which she objected and asked him to solemnize marriage, which he refused and thereafter the present case was lodged. It also appears from her examination-in-chief itself that a panchayati was conveyed regarding the occurrence between the parents of victim and appellant/convict, where, the mother of appellant/convict, namely Geeta Devi assaulted victim and she was also threatened to kill



alongwith her parents, if she lodged the false case. It transpires from her deposition that she was student of B.A. Part I at the time of occurrence. She was grown enough and educated female. There is no doubt regarding availability of her matriculation certificate but same was not brought on record, even I.O. of this case, who examined as PW-6 did not made any efforts to collect her date of birth from her first attending school. It nowhere appears from the record that any effort was made to established victim as a "child" within the meaning of Section 2(1)(d) of the POCSO Act, 2015, by following the legal provisions under Section 94 of the Juvenile Justice Act, 2015.

17. It further appears from the deposition of PW-7 that the radiological age of the victim at the time of occurrence was within the age group of seventeen and half to eighteen years, if the benefit of +2 years be given, as per settled principle of law, then victim appears major on the date of occurrence and thus her conviction



as recorded under Section 4 of the POCSO Act is appearing non-convincing.

18. It would be apposite to reproduce para nos. 22, 23 and 26 of the ***Jarnail Singh's case (supra)***, which reads 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 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."

19. 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 reads 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”.

20. In this context, it is also important to refer the judgment of ***Rajak Mohammad Vs. State of Himachal Pradesh***, reported in ***(2018) 9 SCC 248***, wherein it has been held categorically by Hon'ble Supreme Court that determination of age on the basis of radiological examination be not accepted accurate determination and sufficient margin either way has to be allowed.

21. In view of aforesaid, it can be said without any doubt that prosecution failed to established victim/PW-2/informant as a “child” within the meaning of 2(1)(d) of the POCSO Act, 2015. It is important to mention in this case that establishing victim as a “child” is a foundational aspect under the POCSO Act and in absence thereof, presumption as available under Section 29 of the Act cannot be imported.



22. Now the foremost issue, which is required to be discuss, that whether victim/PW-2 can be said as "**Sterling Witness**".

23. No doubt, the occurrence took place inside the close room, where the victim of crime was the only witness. It appears from her deposition that when attempt for rape was made upon her on 20.08.2013, she narrated the entire occurrence of rape as committed upon her by the appellant/convict, first time to her maternal parents/parents but PW-1, who is her father, PW-4 Lotan Singh who is her maternal grandfather, PW-3 Kaushlya Devi, who is her mother are completely silent regarding the occurrence dated 20.08.2013, which is the cause of lodging present FIR. It also appears from her deposition that FIR in issue was lodged when appellant/convict refused to marry her. As per her deposition, her maternal aunt may be the best witness of the occurrence but she was not examined during the trial by prosecution. It also appears from her deposition that



as she was of 16 years only at the time of occurrence, having less understanding, therefore, she did not reported the occurrence to the police, which appears contradictory to her statement as available through FIR (**Exhibit-1**) that she did not reported the occurrence what happened with her between 09.07.2013 to 20.07.2013 due to fear of social stigma.

24. It also appears from her deposition that a panchayati was conveyed regarding the occurrence but no such documents was placed on record, where in panchayati, maximum members appears from her family.

25. In this context, it would be apposite to refer legal report of ***Ansaar Mohammad Vs. State of Rajasthan and others***, reported as ***2022 SSC Online SC 886***, wherein it is categorically held by Hon'ble Apex Court that entering into any kind of corporeal relationship with a person on the pretext of getting marriage cannot be termed as rape.



26. From the deposition of PW-5, Dr. Madhumita Mandal, who examined victim medically, nothing appears that she was raped on several occasions. Though rape is a legal finding not a medical one but certainly it has some corroborative value which appears absent in this case, doubting the version of informant/victim. The delay of about one month and twenty days from the first day of occurrence, is also not appearing properly explained to lodge present FIR, as explanation supplied for delay on the ground of panchayati and to remain on duty for one month by the appellant/convict, is not inspiring confidence in want of any documents. All these versions put a question mark to the testimony of victim/PW-2 as to qualify the test of a "Sterling Witness"

27. In this context, it would be apposite to take a guiding note *qua* "**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."

28. Therefore, precisely, the deposition of witnesses during the trial suggest that victim/PW-2 not established as a "child" within the meaning of Section 2(1)(d) of the Act. Secondly, victim lodged this case only when appellant/convict refused to marry her, where it appears that on different occasions she established physical relations, with her consent with appellant/convict, on the pretext of solemnizing marriage thus by creating a barrier as to import presumption as available under Section 114-A of the Evidence Act. Thirdly, the doctor also suggest her age on the basis of



radiological examination between the age group of seventeen and half to eighteen years, where admittedly the victim is student of BA 1st year and also her statement appears full of contradictions to doubt her veracity as to accept her a "Sterling Witness".

29. In view of aforesaid discussed, legal ratio and factual aspects, it can be said safely that prosecution failed to established its case during the trial, beyond all reasonable doubts as to convict the appellant/convict for the charges leveled against him.

30. Accordingly, appeal stands allowed.

31. The impugned judgment of conviction dated 05.09.2022 and order of sentence dated 12.09.2022 passed by learned Exclusive Special Judge (POCSO Act) cum Additional Sessions Judge-VI, Munger in Sessions Trial (S.T.) No. 377/2014, Mahila P.S. Case No. 15/2013 is hereby set aside/quashed.

32. Appellant namely, Chandan Kumar Bhushan is in custody in connection with this case, he is



directed to be released forthwith, if not required in any other case.

33. Office is directed to send back the trial court records along with a copy of this judgment to the trial court, forthwith.

(Chandra Shekhar Jha, J)

veena/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	01.08.2024
Transmission Date	01.08.2024

