

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1268 of 2018

Arising Out of PS. Case No.-678 Year-2015 Thana- BIHTA District- Patna

Vinay Kumar, Son of Late Sant Rai @ Sant Kumar @ Sant Ram, Resident of
Village-Hiramanpur, P.S.-Bihta, District-Patna. Appellant

Versus

The State of Bihar Respondent

with

CRIMINAL APPEAL (DB) No. 1327 of 2018

Arising Out of PS. Case No.-678 Year-2015 Thana- BIHTA District- Patna

Sarju Chaudhary @ Saryug Chaudhary @ Suraj Chaudhary, Son of Deonath
Choudhary, Resident of Village-Maula, Police Station-Maner, Distt.-Patna. Appellant

Versus

The State of Bihar Respondent

with

CRIMINAL APPEAL (DB) No. 120 of 2021

Arising Out of PS. Case No.-678 Year-2015 Thana- BIHTA District- Patna

Kamlesh @ Jalebi, Son of Late Bhagelu Rai @ Bhagalu Rai @ Manglu
Singh, Resident of Village - Maula, P.S. Maner, District - Patna. Appellant

Versus

The State of Bihar Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 1268 of 2018)

For the Appellant : Mr. Ramakant Sharma, Sr. Advocate
Mr. Rajesh Kumar, Advocate

For the State : Ms. Shashi Bala Verma, Addl.PP

(In CRIMINAL APPEAL (DB) No. 1327 of 2018)

For the Appellant : Mr. Vijay Kumar Sinha, Advocate
Mr. Arvind Kumar Srivastava, Advocate
Mr. Satendra Kumar Bhatnagar, Advocate
Mr. Kumar Shivam Sinha, Advocate
Mr. Santosh Kumar, Advocate
Mr. Krishn Murari Prasad, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, Addl.PP

(In CRIMINAL APPEAL (DB) No. 120 of 2021)

For the Appellant/s : Mr. Pratik Mishra, Amicus Curiae

For the Respondent/s : Mr. Ajay Mishra, Addl.PP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 07-10-2024

These three appeals have been preferred for setting aside the judgment of conviction dated 24.08.2018 (hereinafter referred to as the 'impugned judgment') and the order of sentence dated 30.08.2018 (hereinafter referred to as the 'impugned order') passed by learned Additional Sessions Judge-I-cum-Special Judge, POCSO, Patna (hereinafter referred to as the 'learned trial court') in Special Case No. 127 of 2015 arising out of Bihta P.S. Case No. 678 of 2015.

2. By the impugned judgment, the appellants have been convicted for the offences punishable under Sections 376 of the Indian Penal Code (in short 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act (in short 'POCSO Act') and by the impugned order, the appellants have been ordered to undergo life imprisonment with a fine of Rs.10,000/- under Section 6 of the POCSO Act and in default of payment of fine, they have to further undergo one year simple imprisonment.

Prosecution Case

3. The prosecution story is based on the *fardbeyan* (Exhibit '1/1') of victim (PW-1) recorded by the S.I. Pratima Kumari, (PW-6) of Rupaspur Police Station on 23.08.2015 in PMCH, Patna Maternity Ward, Room No. 2 at 20:30 hours. In her

fardbeyan (Exhibit '1/1'), the informant has stated that as usual on 23.08.2015 at 10:00 am, she went to graze her she-goats towards Nahar along with neighbours children, namely, (1) Tara Pravin (PW-2), (2) Zeba Pravin, (3) Md. Arif and (4) Md. Mahboob. After some time, the informant saw that (1) Jalebi @ Kamlesh, (2) Bihari Mahto @ Pagla and (3) Saryug Chaudhary all having hasua in their hand were going to cut grass. In the meantime, at 12:10 pm the informant's she-goat while grazing reached to other side of the Nahar where Jalebi @ Kamlesh and Saryug Chaudhary were cutting grass to which the informant requested them saying that "Bhaiya, send my she-goat my side (*"Bhaiya meri bakri ko meri taraf haka do"*). After sending she-goat towards the informant, they said that "*bhaiya nahi saiyan bolo*". Whereafter she got frightened and started running, in the meantime, from behind Saryug Chaudhary caught both of her hands and pressed her mouth. Jalebi @ Kamlesh also came there. Thereafter, Saryug Chaudhary took off her *paijama* and threw the same in the paddy crop field and started committing rape on her, Jalebi @ Kamlesh had pressed her mouth. When Jalebi was committing rape on her, Saryug Chaudhary was pressing her mouth. Thereafter, they called a person who was cutting grass nearby to commit rape on the informant, on which that person also committed rape on her. Bihari

Mahto @ Pagla was keeping vigil over this incident. Thereafter, all the accused persons fled away after seeing Chandeshwar Mahto a co-villager of the informant who was passing-by from there. The informant took her *paijama* in her hand and started running in necked condition and after crossing over the canal reached the place where other children of her neighbour were grazing she-goats. The informant stated that Zeba Pravin and Tara Pravin saw the accused persons fleeing away from the place where the occurrence took place, was paddy field situated other side of the 'nahar' which comes under Bihta Police Station. With all the children, somehow she went to her house and told about the occurrence to her relatives who took her to Maner Police Station.

4. On the basis of the aforesaid *fardbeyan*, Bihta P.S. Case No. 678 of 2015 was registered for the offence punishable under Sections 376A/376D IPC and Section 6 of POCSO Act against (1) Jalebi @ Kamlesh (2) Bihari Mahto @ Pagla, (3) Saryug Chaudhary and (4) unknown person from Hiranmanpur (Vinay Kumar). After investigation, police submitted chargesheet bearing Chargesheet No. 360 of 2015 dated 20.10.2015. On the basis of this chargesheet. Learned Magistrate took cognizance on 19.11.2015. Charges were read over and explained to the accused in Hindi to which they pleaded not guilty and claimed to be tried.

On 16.02.2016, charges were framed under Section 376/34 IPC and Section 6 POCSO Act.

5. In course of trial, the prosecution examined as many as seven witnesses and exhibited several documents to prove the prosecution case. The names of the prosecution witnesses and the exhibits are being shown hereunder in tabular form:-

List of Prosecution Witnesses

PW-1	Victim
PW-2	Tara Parveen (neighbour)
PW-3	Aunt of the victim
PW-4	Mother of the victim
PW-5	Dr. Kekha Aikat
PW-6	Pratima kumari (I.O.)
PW-7	Sushila Kumari (2 nd I.O.)

List of Exhibits

Ext.1	फर्दब्यान पर साक्षी PW-1 का हस्ताक्षर	अभियोजन	10.02.17	
Ext. 2	धारा 164 द0प्र0स0 के ब्यान पर साक्षी PW-1 का हस्ताक्षर	''	''	
Ext. 3	धारा 164 द0प्र0स0 के ब्यान पर साक्षी तारा परबीन का हस्ताक्षर	''	18.03.17	A.D.S.J-I <u>10-02-17</u> 16-08-18
Ext. 4	डाक्टरी जाँच रिपोर्ट	''	24.11.17	A.D.S.J-I <u>18-03-17</u> 16-08-18
Ext. 1/1	फर्दब्यान	''	07.04.18	A.D.S.J-I <u>24-11-17</u> 16-08-18
Ext. 1/2	फर्दब्यान पर पृष्ठांकन	''	''	
Ext. 1/3	फर्दब्यान के नीचे एस0एच0ओ0 सुरेशचन्द्र का लिखावट एवं हस्ताक्षर	''	''	
Ext. 5 to 5/1	जप्ती सूचि	''	''	

Ext. 6	अभियुक्त बिहारी महतो उर्फ पगला का स्वीशरोक्ति ब्यान	“	“	
Ext. 7	एफ0एस0एल रिपोर्ट	“	19.05.18	A.D.S.J-I 07.04.18
Ext. 8	पीड़िता का माध्यमिक परीक्षा 2015 का मूल प्रवेश पत्र	“	“	A.D.S.J-I 19.05.18
Ext. 9	अभियुक्त विनय कुमार का पहचान परेड प्रतिवेदन	“	16.08.18	A.D.S.J-I 16.08.18

Findings of the learned Trial Court

6. Learned trial court after hearing learned counsel for the parties and on perusal of the records found that the victim (PW-1) has taken name of the accused Saryug Chaudhary, Bihari and Kamlesh and regarding fourth accused, she (PW-1) disclosed his age about 50 years and resident of Hiranmanpur who had committed rape on her but did not disclose his name but claimed to identify him. The Investigating Officer got conducted test identification parade for which T.I. Chart (Exhibit ‘9’) was prepared in which the victim identified Vinay Kumar (Appellant in Cr. Appeal (DB) No. 1268 of 2018) who had committed rape on her. Vinay Kumar is the resident of Hiranmanpur. Learned trial court found that identification of Vinay Kumar has not been challenged and as such, involvement of appellant Vinay Kumar as fourth accused has been established without any doubt.

7. Learned trial court opined that in the cases of rape, availability of eye witnesses is a very difficult task since such offences are committed in lonely places. Learned trial court

analyzed the evidence of the victim and the circumstances prior to the occurrence and after the occurrence of rape available on the record. Learned trial court found from the evidence of the victim that she was grazing she-goats and in that course, she crossed the canal where the appellants, namely, Saryug and Kamlesh were cutting grass, she asked them to send her she-goats to her side saying *bhaiya*, send her she-goats towards her and when she was returning then Saryug caught hold of her hands and pressed her mouth thereafter, both committed rape with her, both called one Vinay Kumar who was identified later on also committed rape on her. All this was seen by accused Bihari and on crossing of one person through that place, the accused persons fled away, the victim took her trouser and came running to the place where the other children were grazing their she-goats and she wore the trouser there.

8. Learned trial court analyzed the evidence of PW-2 who was in the company of victim and was grazing her she-goats. PW-2 supported the statement of victim that she crossed the canal for bringing her she-goats and came after ten minutes having trouser in hand and asked her to flee and then they all fled away from there. From these materials, learned trial court found that on the date of occurrence the victim had gone to graze her she-goats,

PW-2 was also in her company, she-goats of the victim crossed the canal where the appellants Saryug and Kamlesh were engaged in cutting of grass and victim had crossed the canal for bringing her she-goats. Learned trial court found that the victim came back to her house where she disclosed the occurrence to her aunt (PW-3) who brought her to police station where she became unconscious. The Doctor (PW-5) also mentioned in her medical report (Ext-3) that the victim was semiconscious and she was unable to speak. There was abrasion mark on her cheek and stomach and was unable to urinate. The doctor opined that this symptom is of gang rape. In that context, learned trial court took the evidence of I. O. (PW-4) who in para 4 of his evidence has stated that at the place of occurrence, she found the grass at the land size 8 x 10 metre trampled. Learned trial court came to the conclusion that crossing of canal by the victim has been supported by PW-2. Abrasion mark on the cheek and stomach of the victim, she was unable to discharge urine and unable to speak are the circumstances which establish that rape was committed on the victim.

9. Learned trial court relied upon the Medical jurisprudence of Parekh on the point that non-finding of sperm in the private part of the victim would not establish that sexual intercourse was not done and non-finding of that may be for so

many other reasons. It is well established principle that the medical evidence may be used as corroborative evidence but it cannot be used as substantial evidence. The categorical statement of the victim would prevail over the medical evidence.

10. Learned trial court reached to the conclusion after considering together the circumstances prior to the occurrence of rape and after the occurrence of rape as also the statement of victim that rape was committed by three accused namely, Saryug, Kamlesh and Vinay Kumar who are the appellants in these appeals.

11. Learned trial court took note of the explanation of Section 5 of POCSO Act wherein it has been provided that “When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone.”

12. Learned trial court found that Exhibit -8 is the Admit Card of the victim showing her date of birth as 15.12.1999 which shows that she was aged about 15 years 8 months and 8 days on the date of occurrence and against that no evidence was found and as such, she would be protected under the POCSO Act. Thus, learned

trial court found them guilty of the offence under Section 5 of POCSO Act which is punishable under Section 6 of POCSO Act and also found them guilty under Section 376 IPC and awarded sentence of life imprisonment under Section 6 of POCSO Act.

Submission on behalf of Appellants

13. Mr. Pratik Mishra, learned Amicus Curiae has submitted that in this case the whole prosecution story is concocted one and the evidences of the prosecution witnesses including that of the prosecutrix are highly contradictory and conflicting to each other. The prosecutrix cannot be said to be a sterling witness and there being no eye-witness to the occurrence or circumstantial evidence on the record to corroborate her, it would not be safe to convict the appellants in the present case.

14. Learned counsel submits that the manner in which the *fardbeyan* of the prosecutrix was recorded by S.I., Pratima Singh of Rupaspur Police Station in Patna Medical College and Hospital, Patna (P.M.C.H.) in maternity ward on 23.05.2015 at 08:30 P.M., it would not inspire confidence. The prosecution has suppressed the first version of the prosecutrix which she made in Maner Police Station within whose jurisdiction she resides. It has come in the evidence of the I.O. Pratima Singh (PW-6) (refer para-34 of her deposition) that the primary treatment of the victim, was

got done by Maner Police, meaning thereby that Maner Police had taken the victim to the hospital for primary treatment but why no First Information Report was lodged by Maner Police remains a mystery.

15. Learned counsel further submits that in this case, the place of occurrence is an area where paddy crops were present. Description of the place of occurrence given by the prosecutrix, her friend(PW-2) who is a child witness and then the I.O. (PW-6) do not match with each other and it appears that the I.O. has done only a paper work without visiting the place of occurrence. The I.O. has stated in her cross-examination that she came to know the place of occurrence from Jugeshwar Ram, Shankar Ram and Chandeshwar Mahto. She had inspected the place of occurrence on 24.08.2015 at 6:00 P.M. None of the persons named by the I.O. from whom she claimed to have come to know the place of occurrence has been examined in this case. Contrary to the claim of the I.O. as regards her knowledge about the place of occurrence, the prosecutrix has stated in her cross-examination that she had shown the place of occurrence to police. It is also her statement that she was admitted in the hospital on 23.08.2015 and remained there under treatment for one week. Thus, it is evident that the prosecutrix has made a

false statement that she had shown the place of occurrence to the I.O. (PW-6).

16. Learned counsel further submits that it is the case of the prosecutrix that she was raped by three persons. Her 'pajama' was thrown in the paddy crop field and thereafter she was raped. She has also stated that when the accused persons saw one co-villager namely Chandeshwar Mahto passing through from the front, all the accused persons started fleeing away and she also started running taking her 'pajama' in her hand, in a naked condition and crossed over the canal. Chandeshwar Mahto has not been examined in this case. If the rape was committed by three persons at a place where nearby paddy crop plots were there and the 'pajama' was thrown in the paddy crop field, the date of the occurrence being the month of August when the paddy crop fields are regularly irrigated by the farmers and the need of irrigation is either fulfilled through natural resources such as rain or through tubewells etc., it seems difficult to believe that the victim would not have any soil/mud on her body and her 'pajama' would remain dry.

17. The prosecutrix herself has stated in her fardbeyan that the place of occurrence is situated on the other side of the canal and fall under Bihta Police Station and there are paddy crop fields.

It is submitted that it seems highly improbable that the victim will go with her she-goats to the canal area where the paddy crops were being cultivated and there was no chance of grazing of grass by she-goats in that area. It is submitted that as per prosecution story only the she-goats of the prosecutrix cross-over the canal, the she-goats of other children of the neighbours remained this side. This can not be believed that the she-goats of the prosecutrix would leave the group of other she-goats and cross-over the canal during rainy season.

18. Learned counsel further submits that the victim has stated in her deposition that after the occurrence, she came running to the place where the other children were present, she wore her 'pajama' and came back to her home where she disclosed the occurrence to her Aunt (PW-3). She has also stated that she was taken to the Maner Police Station where she had become unconscious. In her fardbeyan she did not say that she had become unconscious at Maner Police Station. The story of the victim getting unconscious at Maner Police Station has been developed later on to suppress her first version at Maner Police Station. Her Aunt (PW-3) has stated in her deposition that she had taken the victim girl after the victim told her to take her to Maner Police Station to lodge a case. PW-3 had taken the victim to Maner Police

Station, along with them, sister of the prosecutrix and the husband of her sister were also present. PW-3 has categorically stated in her examination-in-chief that in Maner Police Station, the victim had lodged the case, but then PW-3 states that at the time of lodging the case when the victim went inside a room of the police station, she became unconscious.

19. It is submitted that if rape was committed at 10-11 am, thereafter, the victim was in a position to run away, reach her village and she did not become unconscious till 4:00 pm when she reached Maner Police Station, it cannot be believed that all of a sudden she became unconscious at Maner Police Station.

20. It is submitted that as per prosecution case the victim's original treatment papers of Danapur have not been brought on record only to suppress the initial observation of the doctor. She was taken to Danapur Hospital and from Danapur she was referred to Patna Medical College and Hospital (PMCH) for treatment where she regained her consciousness on 08:00 pm. It is submitted that from the evidence of PW-3, it is clear that the case was lodged at Maner Police Station. This case has been suppressed by the prosecution. No Police Officer from Maner Police Station was examined by the I.O. (PW-4) and the prosecution has

maintained a complete silence as regards her first version at Maner Police Station.

21. Learned counsel further points out from the records that in this case on behalf of the prosecution, the discharge ticket of the prosecutrix issued under joint signature of Senior Resident/Assistant Professor/Junior Resident of PMCH vide Registration No. 0/3359 was filed on behalf of the prosecution which has been seen by the Incharge ADJ-1st on 26.10.2015 but the prosecution did not get it exhibited. Attempt has been made by the prosecution to suppress it. It is submitted that the prosecution has not proved medical findings, if any, by the Doctor of PMCH and no Doctor from PMCH has been examined. No tenderness on private parts or redness on labia majora and labia minora has been noted by the doctor (PW-5) in her so-called injury report dated 13.09.2015.

22. It is submitted that the injury report dated 13.09.2015 is said to have been prepared by Medical Officer of Sub-Divisional Hospital, Danapur, Patna after 18 days and the same has been exhibited as Exhibit '4'. It has been marked exhibit at the instance of the Dr. Kekha Aikat (PW-5). The prosecution, instead of exhibiting the initial registration and treatment papers of Danapur Hospital got prepared a report (Exhibit '4') after 15 days

of the discharge of the victim from PMCH. PW-5 has stated in her examination-in-chief that the victim was medically examined by her on 23.08.2015 when she was in Emergency Duty in the Hospital. She was incapable of verbal communication. She had bruises on both cheeks and neck and lower abdomen but from where she has noted these observations on 13.09.2015 is not known. She had taken vaginal swab on slide and the same was sent to PMCH for spermatozoa test. Report from PMCH obtained on 25.08.2015 and spermatozoa was not found. The patient was sent to PMCH and for its report to Department of Radiology. The report of X-Ray plate received from PMCH vide report No.1068. As per report from Radiology Department, PMCH, age of the victim was between 17-19 years. It is submitted that neither the X-Ray nor the report of PMCH have been brought in evidence in the present case. The treatment particulars of the victim in Danapur Sub-divisional Hospital has not been brought in evidence and it appears that PW-4 prepared a report on 13.09.2015 partly on the basis of the report of the Micro-biology Department and Radiology Department, PMCH but the original reports of PMCH have been suppressed. In her deposition she referred about her previous report but the said previous report has not been brought on record in course of the trial. It is, thus, evident that the prosecution has not only

suppressed the first version of the prosecutrix in Maner Police Station, it has also suppressed the previous report of PW-4. The prosecution has suppressed that in the discharge ticket of the PMCH, which is available on the record, it is recorded that the patient was conscious and in the investigation the doctor noted “no tear and no bleeding”.

23. Learned counsel submits that PW-4 has recorded in her supplementary report (Exhibit-4), that “according to above report it is difficult to say that rape has occurred or not”. It is, thus, submitted that the report of the PMCH on the basis of which PW-4 is said to have prepared partly the supplementary report (Exhibit-4) did not contain any finding of rape, therefore the report of PMCH has been suppressed.

24. Learned counsel submits that the prosecutrix has stated in her evidence, she came to the hospital in the same dress in which the rape was committed and her treatment was done in the same dress. Her aunt(PW-3) has stated that police had seized clothes of the prosecutrix in the night (Para-5 of her deposition). Contrary to that the I.O.(PW-6) has stated that she had seized the clothes of the prosecutrix on 25.08.2015. She had not seized the clothes prior to 25.08.2015 because the prosecutrix had no other clothes to wear. On 25.08.2015 when her mother came to meet her

then she had brought clothes of her, thereafter the clothes of the victim were seized. The seizure list was prepared by Deepak Kumar, Sub-Inspector of Bihta Police Station. It is submitted that Deepak Kumar, who prepared the seizure list has not been examined by the prosecution. It is further difficult to understand when PW-6 was the I.O. from Rupaspur Police Station but there was no female Police officer in Bihta Police Station, as stated by her in deposition, how Deepak Kumar, who is a male Police officer could come to seize the clothes of the victim. It is further submitted that on perusal of the seizure list, all the clothes of the victim (Exhibit-5) it would appear that it has been prepared on 25.08.2015 at 10 A.M. and the name of the Police officer seizing the clothes has been mentioned as that of Pratima Kumari (PW-6). It nowhere contains signature of Deepak Kumar.

25. It is submitted that police had made seizure list of clothes of the victim on 25.08.2015 but the seizure list was filed in the court only on 07.09.2015 without bringing the seized clothes in the court, who placed the seizure list on record is not known because there is no order on record showing filing of seizure list. Much after that on 06.10.2015 an application was filed by another I.O. Sushila Singh (PW-7) to pass an order for sending the material Exhibit- A, A/1, A/2, B and C to Forensic Science Laboratory. It is

submitted that in the entire order-sheet of the court of learned 1st Additional Sessions Judge, Patna, it would not appear that the seizure list was filed in the court on 07.09.2015, though at the top of the seizure list(Exhibit-5) there is an endorsement of 'seen' without there being any signature of the learned ACJM. It is, thus, not known where these seized clothes of the victim were kept by police from 25.08.2015 to 06.10.2015 and in whose presence the cutting of the clothes of the victim and the clothes of the accused persons were marked material exhibits for sending to FSL.

26. Learned counsel submits that in this case at much belated stage, one admit card of Bihar School Examination Board, Annual Examination-2015 was brought on record by the prosecution and the same got exhibited as Exhibit-8. It contains altogether a different name of the student, though the mother and father's name remains that of the mother and father's name of the present prosecutrix but the name of the candidate nowhere tallies with that of the present prosecutrix. In her *fardebayan* the prosecutrix disclosed her name as 'X' @ 'X1' aged about 18 years. In her statement under Section 164 Cr.P.C. recorded before the learned Magistrate she again disclosed her name as 'X' @ 'X1' but when she came to depose on 10th February, 2017, her name was recorded as 'Y' @ 'X1'. It is important to note that the prosecutrix

had made her statement under Section 164 Cr.P.C., there also she disclosed her name as 'X1' only. It has come in evidence that the prosecutrix had three elder sisters. In her deposition she has stated that at the time of occurrence, she was studying in class X in the year 2015 and she used to go to her school. On the date of occurrence also she had gone to attend her class but thereafter, she has stated that on the said date due to her engagement in the household work, she had not gone to school and she was not going to school from before the date of occurrence. She has disclosed in her deposition that she had failed in matriculation examination. She was four sisters and the three other elder sisters were married, they were 31 years, 26 years and 25 years old. She disclosed for the first time that her Date of Birth is 15.12.1999 and she had wrongly informed her date of birth in her *fardbeyan*. It is submitted that when the prosecutrix had appeared in the matriculation examination in 2015 which according to Exhibit-8 was going to commence on 17.03.2015 itself, her statement that she was going to school and on the date of occurrence also she had gone to attend the class and then the subsequent statement that she had not gone to school on the date of occurrence because of engagement in household work would only show that this admit card of the school examination board is not of the prosecutrix and has been

introduced without bringing the matriculation certificate showing the date of birth and the mark sheet which also contains date of birth and this suppression has been made only to keep it vague whether the candidate 'Y' as per admit card had appeared in the examination and passed the examination or failed in that. The victim has even in her statement under Section 164 Cr.P.C. disclosed her age as 18 years and as per PW-4, the report of the PMCH had assessed her age in between 17-19 years. In such circumstance, this case being under the POCSO Act, the trial court was obliged to ascertain the age of the victim in accordance with law as per the provisions of Juvenile Justice (Care and Protection) Act, 2015 but the same has not been done and the admit card of the candidate 'Y' has been taken as proof of age of the present victim who all the times disclosed her name 'X' @ 'X1'. At the same time, it is also pointed out that PW-2 who is the friend of victim has stated that the date of occurrence was Sunday. It is, thus, submitted that the reliance placed by the learned trial court on Exhibit-8 is not in accordance with law and has resulted in miscarriage of justice.

27. Mr. Vijay Kumar Sinha, learned Advocate for the appellant in Cr.Appeal (DB) No.1327 of 2018 has submitted that in the fardbeyan as well as in her statement under Section 164 Cr.P.C., the age of the prosecutrix was recorded as 18 years. It is submitted

that in this case, the learned trial court had not determined the age of the prosecutrix in accordance with law. He has relied upon a judgment of the Hon'ble Supreme Court in the case of **P. Yuvaprakash Vs. State Rep. by Inspector of Police** reported in **AIR 2023 SC 3525**.

28. It is pointed out that according to the so-called supplementary medical report (Exhibit-4) the victim was brought in the hospital at Danapur in semi-conscious condition but she was incapable to communicate. Exhibit-4 does not mention any complaint of sexual assault. The doctor noted her general condition (G/condition-weak, BP 80/60). She was referred PMCH on the same day where the doctor noted that the patient was in conscious condition. It is submitted that the prosecution developed a case at a later stage saying that the victim while recording the FIR in Maner police station became unconscious, this has been done only to suppress the first version of the prosecutrix. The occurrence had allegedly taken place in between 10.00-11.00 AM whereafter the victim came running to the place where the other children were present then she went to her village where she claims to have explained the occurrence to PW-3. It has come in evidence that from the village she started for Maner police station with PW-3, her sister and her sister's husband. They reached Maner police station

and there she is said to have become unconscious while recording the FIR. The doctor in PMCH has noted her last menstruation period (LMP) on 20.05.2015. It is evident that during her menstruation period, she had developed weakness and for that she had been brought to the Sadar Hospital, Danapur. Even if the prosecutrix had become unconscious, Maner police was obliged to record a FIR on the basis of the information furnished by PW-3, sister and sister's husband of the prosecutrix but that has not been done. The sister and sister's husband who had accompanied the victim to the police station have not been examined.

29. Learned counsel submits that in this case the place of occurrence is said to be the other side of the canal where there were paddy crops in the area. Even otherwise it is easy to understand that in a canal area, the land would not be left Parti and the month of August being rainy season period when the farmers cultivate paddy crops, the prosecution story that that the prosecutrix had gone with other children to the canal area for grazing the she goats seems highly doubtful. The prosecution story that the victim came running from the other side of the canal to the side where children were present and there she wore the Payjama is again doubtful.

30. Learned counsel further submits that in this case PW-2 is a child witness whose statement under Section 164 Cr.P.C. was

also recorded. The 164 Cr.P.C. statement of PW-2 has been recorded by the learned Magistrate-1st Class at Danapur. On perusal of the same, it would appear that the learned Magistrate did not test the capability of the child witness to depose in the facts and circumstances of the case. Even, in course of trial, the learned Magistrate has not tested the child witness before recording her statement. The recording of evidence of PW-2 is in the teeth of the judgment of Hon'ble Supreme Court in the case of **Pradeep Vs. State of Haryana** reported in **AIR 2023 SC 3245**. It is submitted that neither in her statement under Section 164 Cr.P.C. nor at the stage of the trial, PW-2 has stated to have seen the appellants near the place of occurrence. PW-2 has stated that she had gone for grazing her she goats at about 9.00-9.30 AM and she had not seen the occurrence. She has stated that she can identify the accused persons because they are from her village. It is, thus, submitted that the evidence of PW-2 does not prove even the presence of the accused persons near the place of occurrence. It is pointed out that the learned Magistrate who recorded the 164 Cr.P.C. statement has not been examined.

31. Learned counsel had relied upon an article that it is the nature of she-goats that they would not go in the water. They are always afraid of water so how can they cross over the canal.

32. Learned counsel submits that it is not known how the I.O. (PW-6) who is a police officer in Rupaspur police station could reach PMCH for recording the fardbeyan. The PMCH has a dedicated police out-post to attend the medico-legal cases. The I.O. did not examine the victim as to who had taken her to Danapur sadar Hospital and while she has stated that she had visited the place of occurrence on 24.08.2015 at 6.00 PM, she had come to know about the place of occurrence from the co-villagers namely, Jugeshwar Rai, Shankar Rai and Chandeshwar Mahto who have not been examined in this case, contrary to her statement the prosecutrix has stated that she had shown the place of occurrence to the I.O. If the prosecutrix was admitted in the hospital in PMCH from 23.08.2015 and was discharged on 28.08.2015, her statement that she had shown the place of occurrence to the I.O. is a false statement.

33. Learned counsel submits that in this case even the original admission register of the hospital at Danapur and the investigation as also the treatment given to her at Danapur hospital on 23.08.2015 has not been brought on record. Exhibit-4 is not the original injury report prepared in course of treatment of the prosecutrix rather it has been prepared by the doctor (PW-5) on 13.09.2015 partly on the basis of the report of the PMCH but those

reports of the PMCH have not been brought in evidence and no doctor from the PMCH has been examined.

34. Learned counsel further submits that in the FSL report (Exhibit '7') blood has been found on the Salwar cuttings and Ganjee cutting which were marked as Exhibit-A and A/1 respectively and the doctor has also found semen on Exhibit 'A' but the fact remains that the accused persons despite having been arrested immediately after the occurrence were not subjected to medical examination. The clothes of the accused were seized by police and those were also sent to the FSL which were marked as Exhibit-B and C but the FSL report (Exhibit- 7) would show that neither blood nor semen could be detected in Exhibit-B and C. The result of Serological analysis as per report of the FSL is available on the record as Exhibit-7 from which it would appear that in Exhibit-A, blood of human was found and ABO grouping result was of Group 'B'. Semen was present on Exhibit-A and ABO grouping result of blood on Exhibit-A/1 could not be determined. According to this report, the result of test for blood grouping is inconclusive. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Krishan Kumar Malik Vs. State of Haryana** reported in **(2011) 7 SCC 130** to submit that there being no medical examination of the accused persons and no

matching of the blood and semen and the fact that the victim was menstruating for last three days, the seizure of clothes were made at a much belated stage, the seizure list was just filed in court without any order being drawn in that respect after about 13 days of the alleged seizure and then the same was sent to FSL after about a month, during this period where the clothes were lying is not known, the kind of evidence on the record would not prove the guilt of the appellants on the basis of the FSL report. Chances of presenting a 'pajama/salwar' of any married lady from the family contains blood and semen cannot be ruled out.

35. Learned counsel has also pointed out that as regards the appellant Vinay Kumar in Cr. Appeal (DB) No.1268 of 2018 the I.O. has stated in paragraph '25' of her deposition that on 23.08.2015 she had recorded the statement of the witnesses such as PW-2 and PW-3. On 23.08.2015 after recording the re-statement of the prosecutrix, the statement of other witnesses were recorded on the same day. This witness has further stated that on 23.08.2015 no witness had taken name of the appellant Vinay Kumar but he was arrested on the basis of his confessional statements made by him on 23.08.2015. She has stated that she had not recorded the confessional statement of Bihari Mahto. His statement was recorded by Sub-Inspector Deepak Kumar who has not been

examined by her. It is submitted that in complete disregard to the law on the subject, the confessional statement of the accused Bihari Mahto said to have been recorded by Sub-Inspector of Police Deepak Kumar (not examined) has been marked Exhibit-6. In this manner, a travesty of justice has taken place and the learned trial court has remained not only a mute spectator but has admitted evidence on the record in violation of the law that a confessional statement made before the police shall not be admissible in evidence.

36. The S.H.O. of Bihta Police Station who lodged the formal FIR and handed over investigation to PW-6 has not been examined which has caused serious prejudice to the defence. I.O. did not examine the doctor of the Sub-Divisional Hospital, Danapur and that of PMCH.

37. On these grounds, it is submitted that the appellants Saryug Chaudhary, Vinay Kumar and Kamlesh @ Jalebi have been wrongly convicted by the learned trial court.

Submissions on behalf of the State.

38. Ms. Shashi Bala Verma, Mr. Abhimanyu Sharma and Mr. Ajay Mishra, learned Addl.P.Ps for the State have opposed the appeals. It is submitted that the victim in this case has been found aged about 16 years only at the time of occurrence. In this regard,

the prosecution has brought on record the admit card of the prosecutrix which has been marked Exhibit-8. It is submitted that no doubt the admit card issued by the Bihar School Examination Board (in short 'Board') is showing a different name of the candidate but the parentage mentioned therein is that of the parents of the prosecutrix. It is also submitted that neither the prosecutrix nor her mother has been questioned on this issue in course of their cross-examination. It is, thus, submitted that Exhibit-8 belonged to the victim and it has duly proved the age of the victim. The victim has stated that at the time of recording her *fardbeyan*, she had wrongly given her date of birth.

39. Learned counsel further submits that in this case the appellants namely, Kamlesh @ Jalebi and Sarju Chaudhary are the co-villagers of the prosecutrix who were residing nearby her house. The appellant Vinay Kumar is from village Hiranpur, she did not know her name but she has identified him in the Test Identification Parade (TIP).

40. Learned counsel submits that the prosecutrix as well as PW-3 both have stated that they had gone to Maner police station to lodge the FIR but at the same time they have explained circumstances under which the statement of the prosecutrix could not be recorded at Maner police station. She has stated that she had

become unconscious while recording her statement in Maner police station.

41. It is submitted that although the prosecution has not examined the independent witnesses of this case as they were won over by the defence, the prosecution witnesses are able to prove the guilt of the appellants beyond all reasonable doubts. It is submitted that in this case the charges were also framed under Section 6 of the POCSO Act, therefore, by virtue of Section 29 of the POCSO Act, the burden would be upon the appellants to prove that they have not committed the offence. It is submitted that the learned trial court has recorded that the defence of the appellants was that no such occurrence had taken place and only at the instigation of the villagers the prosecutrix had lodged this false case but the defence has not been able to demonstrate and create any doubt of false implication on the basis of cogent evidence.

Consideration

42. Having heard learned counsel for the appellants, learned Amicus Curiae and the learned Addl.PPs for the State as well as on perusal of the trial court's records, we find that the first and foremost issue which is required to be considered in this case is as to whether the prosecution has been able to prove that Exhibit '8' may be relied upon to prove that the prosecutrix was aged

below 18 years on the date of occurrence ? This Court finds that the occurrence as alleged has taken place on 23.08.2015 at about 10.00 AM. In her farbdeyan, the prosecutrix (PW-1) has stated to the I.O. (PW-6) that her age is about 18 years. She disclosed her name as 'X' @ 'X1' at the time of her statement under Section 164 Cr.P.C. recorded by a learned Magistrate at Danapur. In her statement under Section 164 Cr.P.C., she has stated that her age is 18 years. This statement (Exhibit-2) was recorded by Mr. Ranjeet Prasad, learned Judicial Magistrate-1st Class, Danapur on 25.08.2015. The learned Magistrate has, however, not been examined in this case. Exhibit-2 has been signed by the prosecutrix as 'X1'. After about one and half year when the prosecutrix came to depose as PW-1 she declared her name as 'Y'+ 'X1'. In the format of the deposition only the new name 'Y' has been mentioned. In her examination-in-chief, PW-1 has stated in paragraph '7' that her date of birth is 15.12.1999. She has not stated that prior to the occurrence she had appeared in the matriculation examination of the year 2015 conducted by the Board. In her examination-in-chief she did not declare the name of her school in which she was studying. She also did not mention that her name in the school is 'Y'.

43. In her cross-examination, she has stated that she has studied from Savitri Kanya Uchh Vidyalaya which is at a far distant place from the village. She has stated that she was studying in class-X. In her further cross-examination, she has stated that on the date of occurrence she had gone to attend the class but having said so she has stated that because of her household engagements, she had not gone to school on the date of occurrence. Exhibit '8' mentions the school name as 'Pavitri Kanya H/S, Simri, Danapur'. The fact that PW-1 has not disclosed the correct name of her school and she could not disclose the name of the place where the school is situated creates a doubt that Exhibit '8' belongs to her. At this stage, it would appear from the deposition of PW-2 that she has stated in her cross-examination on behalf of the accused Bihari Mahto that the date of occurrence was a Sunday. PW-1 has stated that she has four sisters, the eldest one is aged 31 years, younger to her is aged 26 years and the third sister is aged 21 years, she is five years younger to her third sister. Her Aunt (PW-3), in her examination-in-chief, has stated the name of the prosecutrix as 'X'. She has stated in her cross-examination that the victim had gone for grazing the she goats at 11.00 AM and returned home at 1.00 PM. She had reached Maner police station at 4.00 PM where writings and studied (लिखा पढ़ी) had taken place. The mother of the victim

(PW-4) has taken the name of the victim as 'X' and 'X1' in her examination-in-chief. From the deposition of these witnesses, it would appear that they have not stated in their examination-in-chief that the victim was studying in Pavitri High school situated at Simri, Danapur. In the light of this evidence, when the admit card issued by the Board (Exhibit -8) is looked into, at the first instance, it is found that it has not been marked Exhibit either at the instance of I.O. (PW- 6) or any other competent witness. I.O. does not claim to have verified the school of the prosecutrix. The prosecution brought it on record at a much belated stage on 19.05.2018 with a petition dated 14.05.2018 to admit it as a public document. From the order-sheet of 19.05.2018, it would appear that it records that no objection has been raised on the petition by the advocate for the defence. In these circumstances, even if the said document was marked Exhibit, when the name of the candidate mentioned on Exhibit-8 is 'Y' alone, a question would arise as to whether it may be taken as a proof of fact that the candidate as mentioned on Exhibit -8 and the prosecutrix who always disclosed her name as 'X' @ 'X1' is the same and one person and whether the admit card issued by the Board is a public document which may be admitted on the basis of an application filed on behalf of the prosecution and non-production of the school admission register of

the school and non-examination of the principal or in-charge of the said school who could have made a statement as to whether the admit card pertains to the prosecutrix and she was a regular student of the school or not. It is also worth mentioning that the Exhibit-8 mentions the name of the School as Pavitri High School but the prosecutrix in her cross-examination had disclosed the name of the school as Savitri Kanya Uchh Vidyalaya without disclosing the name of the place where the school is situated. She has only stated that the school is at a far distant place from her village.

44. To this Court, it appears that Exhibit '8' is a photocopy of an admit card said to have been issued by the Bihar School Examination Board. The learned trial court has admitted it in evidence saying that the original of it was produced but on record a photocopy of the certified copy is available. From the ordersheet of the learned trial court it nowhere appears as to where the original Admit Card has gone. To this Court, even if this document is admitted in evidence, this alone would not be a proof of the fact that Exhibit '8' is the admit card of the prosecutrix in this case. In the opinion of this Court, in this matter, the learned trial court was required to exercise its power under Section 165 of the Indian Evidence Act (hereinafter referred to as the 'Evidence Act') to find out the truth from the prosecution witnesses with

regard to the relevance of Exhibit '8' and it was required to be established that name which the admit card (Exhibit '8') contains is the name of the prosecutrix and she was a regular student of Pavitri High School, Simri, Danapur. Section 165 of the Evidence Act reads as under:-

“165. Judge's power to put questions or order production.

The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant ; and may order the production of any document or thing ; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any question:

Provided that the judgment must be based upon facts declared by this Act to be relevant and duly proved :

Provided also that this section shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document , except in the cases hereinbefore excepted.”

45. This Court finds that the trial court accepted Exhibit '8' as a proof of age of the prosecutrix and proceeded with the trial on the assumption that the victim is a child within the meaning of the POCSO Act. Since we have found that at no point of time, the victim disclosed her name as mentioned on Exhibit '8', prior to her

deposition in course of trial and even in course of deposition, she did not say it in course of her examination-in-chief, her new name has been mentioned in the format of deposition only, Exhibit '8' cannot be taken as a proof of age of the prosecutrix.

46. The learned trial court was obliged to determine the age of the prosecutrix keeping in view the principles of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 but the same has not been done in this case. We have also noticed that the victim has stated in her fardbeyan that like every day she had gone for grazing her she-goats towards 'Nahar' with her neighbours children. In her Section 164 Cr.P.C. statement, the victim has stated that she had gone with her nine she-goats for grazing and along with her, there were two girls and two boys. According to her, her she-goats had crossed over the canal ('Nahar') in the forest where she had gone to bring back her she-goats and in course of that, the occurrence had taken place. In course of her evidence, the prosecutrix has not stated about any forest area. She has stated about the place of occurrence in her deposition. The place of occurrence is said to be a field where paddy crops were being cultivated. She has stated that there was no person from the village near the place of occurrence at the time of occurrence whereas the child witness (PW-2) has stated that paddy

crops were present besides the place of occurrence and a large number of farmers had gone to see their crops. PW-2 has also stated in her cross-examination on behalf of Bihari Mahto that at the time of occurrence, she was studying. She has stated that the victim had told her the name of the accused persons.

47. This Court finds it difficult to believe that only the she-goats of the victim crossed-over the 'Nahar'. The she-goats are always afraid of water and when the she-goats of all the neighbouring children were grazing in one side of the 'Nahar', the story that the she-goats of the prosecutrix crossed-over the 'Nahar' would not inspire confidence of this Court.

48. The I.O. (PW-6) claims that she had gone to the place of occurrence on 24.08.2015, initially she said that she did not remember who had shown her the place of occurrence but later on, she named Yogeshwar Rai, Shankar Rai and Chandeshwar Mahto who had told about the place of occurrence. So it is clear that these persons had not shown the I.O. the place of occurrence. The I.O. had not made sketch map of the place of occurrence. She has stated that the place of occurrence is of about eight meters and besides the place of occurrence, there are long standing bushes of grass where the occurrence is said to have taken place. She had not even recorded the length and breadth of the 'Nahar'. From the

deposition of the prosecutrix, her friend (PW-2) and the I.O. (PW-6), it is found that the witnesses have stated about different place of occurrence at different stages. While initially, the prosecutrix said that her she-goats had gone to the canal in the forest where the occurrence had taken place, she has at the same time said that her '*paijama*' was thrown in the paddy crops field. In her deposition, she has stated that her she-goats had crossed over the canal from this side to other side and she had gone in the field for grazing of her she-goats. PW-2 has, however, stated that paddy crops were being cultivated and large number of farmers had gone for seeing their crops. It appears that the I.O. never visited the place of occurrence. Her claim that she came to know about the place of occurrence from Yogeshwar Rai, Shankar Rai and Chandeshwar Mahto has not been corroborated and the statement of the victim that she had shown the place of occurrence to the I.O. is apparently a false statement because she was in Hospital on that day. Coming to know and showing are two different things. The I.O. had not even prepared any map of the place of occurrence and her statement that there were long bushes standing at the place of occurrence and at the same time, saying that north to the place of occurrence, there is a chat of canal and thereafter, *parti* land and in some land, there were paddy crops only shows a tentative kind of

description given by the I.O. with regard to the place of occurrence.

In the opinion of this Court, the prosecution has failed to prove the place of occurrence beyond all reasonable doubts in this case.

49. It is evident from the evidence of the prosecutrix (PW-1) and her Aunt (PW-3) that they had gone to Maner police station initially. In her *fardbeyan* as well as in paragraph '5' of her deposition, she has stated that she was taken to the Maner police station but there, she had become unconscious and when she regained consciousness, she was in PMCH. This statement of the prosecutrix that she had become unconscious at the police station would not inspire confidence of this Court. No police officer from Maner Police Station has been examined by the prosecution on this point. From the evidence of PW-3, it would appear that according to her, the victim had lodged a case in Maner Police Station. She along with the sister and sister's husband of the victim had gone to Maner Police Station. She has stated that at the time of lodging the case, the victim had become unconscious whereafter she was taken to the Hospital. In her *fardbeyan*, the PW-1 has not stated that she had become unconscious but in her statement under Section 164 CrPC, she has stated to have got consciousness on 24.08.2015. In her deposition, in course of trial, she stated that she regained her sense on the same day at about 8:00 PM in PMCH. In the opinion

of this Court, her subsequent versions about her unconsciousness is not believable.

50. It is evident that the prosecutrix and her Aunt (PW-3) both have deposed that they had gone to the police station at Maner and the case was lodged but in this case, the prosecution has suppressed the first version of the prosecutrix which she made at Maner police station. It is also evident that even if the prosecutrix had become unconscious at Maner police station, there was no reason for Maner police station not to lodge the FIR after recording the fardebyan of her Aunt (PW-3) or the sister or sister's husband of the prosecutrix. PW-3 has gone to the extent of saying that in the police station, some writings and studying ('लिखा-पढ़ी') had taken place. What was that writing in the police station at Maner has been suppressed by the prosecution. The sister and her husband have not been examined by the prosecution.

51. This Court further finds that the Doctor (PW-5) of Sub-Divisional Hospital, Danapur has not proved the treatment particulars of the victim in the hospital. She prepared a so-called supplementary injury report (Exhibit '4') on a plain paper on 13.09.2015 in which she has not recorded about any complaint of sexual assault. Why the first report of the doctor has been suppressed by the prosecution would be a question while

appreciating the supplementary report. PW-5 has recorded some findings based on the X-ray done in PMCH. According to her, the age of the victim was found in between 17-19 years, no spermatozoa was found and she has recorded that according to the reports, it is difficult to say whether rape had occurred or not. This is a case in which allegation is that the victim was raped by three named accused persons and the definite case of the prosecution is that of a penetrative sexual assault upon the victim. When the Doctor was examining the victim girl, she had not found any injury on the private part of the victim and she has stated that the injury found on the body of the victim may be caused due to fall on peg ('*khuta*'). It may be found from the fardbeyan and deposition of the prosecutrix that she never alleged that the accused persons had caused any injury on her cheeks and neck. In paragraph '14' of her deposition, she has stated that the occurrence took place for about 15-20 minutes and after the occurrence, all the accused persons remained there, they had not assaulted her by '*hasua*'. In her fardebyan, the victim girl had stated that at the time of occurrence, when the accused persons saw the villager Chandeshwar Mahto (not examined) passing through the area, all of them started fleeing away. In her statement under Section 164 CrPC, she does not mention Chandeshwar Mahto. In her examination-in-chief she does

not name Chandeshwar Mahto rather she makes a vague statement that one person was passing through and on seeing him the accused persons started fleeing but in her cross-examination, she has stated that after committing rape, all the accused persons remained there.

52. On the point of identification of the accused persons, in her *fardbeyan*, she has named Saryug and Kamlesh. About the third person she has stated that he was a person from village-Hiramanpur. In her cross-examination she has stated that it takes 5-10 minutes in reaching the house of Saryug Chaudhary from her house and the house of Kamlesh is near her house but in her cross-examination she has stated that prior to the occurrence she did not know the accused persons.

53. This Court also finds that the Doctor (PW-5) has in her supplementary report not recorded any finding on the basis of any report of the PMCH that there was any sign of sexual assault upon the victim. The opinion of the Doctor saying that it is difficult to say whether rape has occurred or not, has to be considered keeping in view the material differences in the statement of the victim and other prosecution witnesses with regard to the conduct of the prosecution witnesses. In a case of gangrape, if the Doctor did not find any sign of injury on the private part of the victim girl,

the ocular evidences of the prosecution witnesses would be required to be examined with all circumspection and care.

54. We have noticed that on the backside of the supplementary injury report (Exhibit '4'), is the requisition of Police in the name of one Sanjeev Kumar, Sub-Inspector of Police, Maner addressed to the Sub-Divisional Medical Officer, Danapur. This requisition mentions the case number as Bihta P.S. Case No. 678/15 dated 22.08.2015. In the bottom, the date has been cut and then 23.08.15 has been put. It is relevant and it gains importance as the I. O. (PW-6) has stated that the primary treatment was got done by Maner Police. A question would arise that when the victim was taken to the Danapur Hospital at about 4:00 pm on 23.08.2015 how could the police officer from Maner mentioned the case number with a date (22.08.2015) which is a date prior to the allege date of occurrence. Even if it is taken as a mistake for 23.08.2015, still it was not possible for the police of Maner Police Station to mention the case number of Bihta Police Station when the victim was brought to Danapur Police Station. These are the questions which could have been answered by Sanjeev Kumar, S.I., but he has not been examined so defence has got no opportunity to extract the truth on these points.

55. In this case, *fardbeyan* of the victim has been recorded by PW-6 who is from Rupaspur Police Station. She has not stated as to who authorized her to go to PMCH. As per formal FIR Bihta Police Station got information of the occurrence on 23.08.2015 at 18:15 hours. Who informed Bihta Police Station and why no one from Bihta Police Station was deputed to visit the place of occurrence which was within their jurisdiction. The date mentioned by the prosecutrix in her *fardbeyan* just below her signature has been cut down and interpolation on the date may be clearly noticed by this Court. On all these issues the S.H.O. of Bihta Police Station would have been a competent witness to throw light but he has not been examined.

56. In these circumstances, this Court is of the considered opinion that serious prejudice has been caused to the defence due to non-examination of these police officers.

57. We have also noticed that in this case, the victim has claimed that the rape was committed in the field and she had resisted the same, her *pyjama* was thrown in the paddy crop field, still the deposition is that when the accused persons started fleeing away on seeing one person who was passing through that area, she took her *pyjama* in her hand and started running to the place where the children were present. She was wearing the same cloth right

from that time till 25.08.2015 when the clothes were seized by the I.O. No soil/mud has been found on the clothes and it again seems difficult to appreciate that she would remain wearing the same clothes which had got blood stains and semen. She had gone to her house after the occurrence and only after about 2-3 hours she had gone to Maner Police Station. She had opportunity to change her clothes and hand over the same to Maner Police. The family members of the victim such as her sister and sister's husband were available to bring her clothes from her house but the clothes were allegedly changed only after the mother of the victim came from Delhi, two days after the occurrence. It has come on record that the victim was menstruating and the last menstruation date is mentioned in the admission slip of the PMCH as 20.08.2015, therefore, the presence of blood cannot be taken as an indication of the commission of rape. There is no matching of blood group of the victim with the blood found on Exhibit 'A' & 'A/1'. The appellants were arrested by police but they were not subjected to any medical examination. Their clothes were also seized but no blood mark has been found on their clothes. Their blood groups have not been matched with the blood on Exhibit 'A' & 'A/1'. So far as the presence of semen on the *paijama* of the victim girl is concerned, no matching of the semen has been done to connect the same with

the appellants and above all, what creates doubt as to the seizure of the clothes is the fact that even though the I.O. claims that those clothes were seized on 25.08.2015 in PMCH, it was not brought before the court and it is not known as to where those clothes were kept. It is also not known where the clothes were cut to prepare exhibits. An application for sending these exhibits to F.S.L. was filed in the learned trial court only on 06.10.2015.

58. To this Court, it appears that where the offence punishable attracts severe punishment, the safeguards provided by law to an accused must be duly complied with by the prosecution. In the kind of evidence on these points again, this Court finds that the presence of blood and semen on the cloth of the victim not having been matched with the appellants will prove fatal to the prosecution. Reference in this regard may be made to the judgment of the Hon'ble Supreme Court in the case of **Krishan Kumar Malik** (Supra). Paragraph No. '40', '43' and '44' of the said judgment are being reproduced hereunder for a ready reference:-

“**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.”

“43. With regard to the matching of the semen, we find it from *Taylor's Principles and Practice of Medical Jurisprudence*, 2nd Edn. (1965) as under:

“Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months.”

Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the appellant.”

“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.”

59. We have also noticed that in this case, the *fardbeyan* of the victim which is the basis of the FIR has been recorded by the police officer from Rupaspur Police Station, who had deputed her to record the *fardbeyan* of the victim is not known. In her

examination-in-chief, the I.O. (PW-6) has started with a statement that she was posted in Rupaspur Police Station on 23.08.2015. On the said date, she had received charge of investigation of Bihta P.S. Case No. 678 of 2015. She has proved the *fardbeyan* recorded by her and has also proved the endorsement made at the bottom of the *fardbeyan* by the S.H.O. of Bihta Police Station, namely, Mukesh Chandra Kunwar which has been marked Exhibit '1/3'. The S.H.O. Mukesh Chandra Kunwar of Bihta Police Station has not been examined in this case, therefore, the defence could not examine him as to how he got information of the occurrence and who had deputed the I.O. (PW-6) to record the *fardbeyan* of the victim. We are aware that the PMCH has a devoted Police Outpost to record the statement of the victims who are brought in the hospital and which are found to be a medico-legal case. In this case, even as the victim is said to have arrived in the Hospital at 05:00 PM, her *fardbeyan* has been recorded by PW-6 from Rupaspur Police Station at 08:30 PM. To explain this time gap, a statement has been made that the victim was unconscious and she regained her consciousness only at 08:30 PM, on this point, the Doctor of the PMCH would have been a competent witness but no Doctor from PMCH has been examined. The prosecution has not proved that the I.O. had examined any Doctor of the PMCH and had recorded

his/her statements about the condition of the prosecutrix when she was brought in the Hospital. This Court has noticed that the prosecution has though brought on record the discharge ticket of PMCH on the record and it has been seen by the In-charge, ADJ, 1st on 26.10.2015 but it has not been marked exhibit. It has been contended on behalf of the defence that had this document been marked exhibit and read in evidence, it would have been clear that the prosecutrix was fully conscious at the time of her admission in the Hospital. This Court finds substance in the submission of learned counsel for the defence. The discharge ticket of the PMCH is a very important piece of evidence which could have thrown light on the general condition of the victim but that has not been exhibited by the prosecution and no Doctor of the PMCH has been examined. This Court, therefore, finds that an adverse inference is to be drawn against the prosecution and it is held that the prosecution purposely suppressed the truth which could have been revealed by this piece of document.

60. In the light of the discussions made hereinabove, we are of the considered opinion that the learned trial court has erred in appreciation of the evidences available on the record. The material discrepancies in the evidence of the prosecution witnesses including the prosecutrix have escaped the attention of the learned

trial court. The prosecutrix cannot be put in the category of a sterling witness. Who may be called a sterling witness has been observed by the Hon'ble Supreme Court in the case of **Rai Sandeep v. State (NCT of Delhi)** reported in **(2012) 8 SCC 21** which was a case of gang rape, it has been held that:

“22.....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”

61. In **Krishan Kumar Malik** (supra) Hon'ble Supreme Court laid down that although the victim's solitary evidence in a matter related to sexual offence is generally deemed sufficient to hold an accused guilty, the conviction cannot be sustained if the

prosecutrix testimony is found unreliable and insufficient due to identified flaws and lacunae. It was held thus:

31. 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. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

62. Both the above judgments have been recently referred to and relied upon by Hon'ble Supreme Court in the case of **Nirmal Premkumar v. State** reported in **2024 SCC OnLine SC 260 (2024 INSC 193)**. Paragraph '22' of the said judgment reads as under:-

“22.Conviction undoubtedly can be recorded on the sole evidence of a victim of crime; however, it must undergo a strict scrutiny through the well-settled legal principles as established by this Court in a catena of decisions. While the actions attributed to A-1, as sought to be demonstrated by the prosecution, may fall within the purview of 'sexual harassment' under section 11 of the POSCO Act, the evidence in this case has been marred by inadequacies from the outset, evident in contradictions within statements and testimonies. The evidence led leaves reasonable suspicion as to whether A-1 was actually involved in any criminal act.”

63. The learned trial court went into the hand of the prosecution and did not take any effort to find out the truth by exercising its power under Section 165 of the Evidence Act.

64. In this case, the learned trial court seems to have been swayed away by the fact that it is a case registered under POCSO Act. Sections '29' & '30' of the POCSO Act read as under:-

"29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

"30. Presumption of culpable mental state.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".

"Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

65. It has been held by judicial pronouncements that to attract Section 29 of the POCSO Act, the prosecution has to

first lay down the foundational facts. Reference in this regard may be made to the **Babu Vs. State of Kerala** reported in **(2010) 9 SCC 189** wherein the Hon'ble Supreme Court held that that presumption of innocence is a human right, though the exception may be created by statutory provisions. But even such statutory presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. In **Navin Dhaniram Baraiye Vs. State of Maharashtra** reported in **2018 SCC Online Bom 1281**, Hon'ble Bombay High Court held that the presumption under Section '29' of the POCSO Act operates against the accused only when the prosecution proves the foundational facts against the accused in the context of the allegation made against him under the POCSO Act and the accused has right to rebut the presumption, either by discrediting prosecution witnesses through cross-examination or by leading evidence to prove his defence. Rebuttal of the presumption would be on the touchstone of preponderance of probability.

66. Similar view has been taken by Kerala High Court in **Joy V. S. Vs. State of Kerala** reported in **(2019) SCC Online Ker 783** and Calcutta High Court in the case of **Sahid Hossain Biswas Vs. State of West Bengal** reported in **2017 SCC**

Online Cal 5023. The Hon'ble Gauhati High Court in **Latu Das Vs. State of Assam** reported in **2019 SCC OnLine Gau 5947** has also held that the presumption under Section 29 of the POCSO Act does not absolve the prosecution of its usual burden to prove the guilt of the accused beyond all reasonable doubts. It only lessens its burden to some extent and put a corresponding burden on the accused. Initial burden in a criminal case is always on the prosecution to bring on record reasonable evidence and materials to prove that the accusation against the accused is true.

67. Guided by the aforesaid judgments of the different Hon'ble High Courts in India, when we examine the evidences on the record we find that the conviction of the appellants by way of presumption of guilt citing section '29' of POCSO Act would result in travesty of justice.

68. From the materials available on the record, it is evident that in this case the basic fact that victim was a minor on the date of occurrence and her identity as per Exhibit '8' could not be established by the prosecution.

69. On appreciation of the entire evidences on the record, we are of the considered opinion that the judgment of the learned trial court is liable to be set aside and the appellants are required to be acquitted of the charges giving them benefit of doubts.

70. Accordingly, these appeals are allowed. The impugned judgment and order of the learned trial court are set aside and the appellants are acquitted of the charges giving them benefit of doubt.

71. The appellants are said to be in custody. They shall be released forthwith if not wanted in any other case.

72. Let a copy of the judgment and the trial court records be sent back to the trial court.

73. We acknowledge the assistance rendered by Mr. Pratik Mishra, learned Advocate as Amicus Curiae in Cr. Appeal (DB) No. 120 of 2021. A consolidated sum of Rs. 15,000/- (Rs. Fifteen thousand only) shall be paid to the learned Amicus Curiae by the Patna High Court Legal Services Authority within one month from the date of receipt of a copy of this judgment.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

SUSHMA2/-

AFR/NAFR	
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