

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (DB) No.566 of 2017**

Arising Out of PS. Case No.-60 Year-2013 Thana- CHACKMEHSI District- Samastipur

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Mahesh Trivedi S/o Mahendra Trivedi, Resident of Village Utrasadhi, P.S.-  
Chakmahesi, Distt.- Samastipur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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**Appearance :**

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|---------------------|---|------------------------------------|
| For the Appellant/s | : | Ms. Surya Nilambari, Amicus Curiae |
| For the State       | : | Mr. Ajay Mishra, APP               |

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**CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI  
and  
HONOURABLE MR. JUSTICE RUDRA PRAKASH MISHRA**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE RUDRA PRAKASH MISHRA)**

**Date : 25-01-2024**

The present appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as “the Code”) against the judgment of conviction dated 01.04.2017 and order of sentence dated 03.04.2017, passed by the learned Additional Sessions Judge, 1<sup>st</sup> – cum – Special Judge, POCSO Act, Samastipur in S.T. No. 516 of 2013 (Regd. No. 615 of 2014), arising out of Chakmahesi P.S. Case No. 60 of 2013, whereby and whereunder, the Trial Court concerned has convicted the sole appellant/Mahesh Trivedi for the offences punishable under Section 376 of the Indian Penal Code and



Section 4 of the POCSO Act and sentenced him to undergo life imprisonment, to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo imprisonment for six months for offence under Section 376 of the I.P.C. The appellant was further sentenced to undergo imprisonment for life, to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo imprisonment for six months for offence under Section 4 of the POCSO Act. The sentences have been ordered to run concurrently.

2. The instant case arise with the recording of *fardbeyan* of P.W.2/Rajani Devi/mother of the victim girl, by R.N. Roy, the then S.I. Chakmahesi Police Station, recorded on 06.07.2013 at about 8.30 A.M. at Sadar Hospital, Samastipur. As per prosecution case, which is based on the *fardbeyan* of the Informant/mother of the victim, she came to know at 7.00 O'clock in the evening of 05.07.2013 that her daughter/victim girl, aged about five years, who was at her parents' house at Chakmahesi, P.S. Chakmahesi, has been lifted by Mahesh Trivedi (the appellant) and taken her away. The husband of the Informant resided at Samastipur and today also, he was here. On receipt of such information, she and her husband came at native place Parana and thereafter, they started to search her daughter.



In course of such search, they heard the sound of screaming which was coming out from the maize field whereafter they went there and found the victim girl there. Mahesh Trivedi was standing behind her daughter. On seeing the Informant and others, Mahesh Trivedi started to flee from there. The villagers chased him, nabbed and handed him over to the police station. The victim girl was brought home. Thereafter, she was taken to Sadar Hospital, Samastipur in unconscious condition where she was being treated. After gaining senses, the victim girl disclosed that Mahesh Trivedi/the appellant had taken her away. The Informant examined the body of her daughter and found that there was scratch over her mouth, neck and blood was oozing out from her private part. Panty was not on her body. Nectar was found in her body and the same being thrown at another place and the victim was found at the pool of blood.

3. The *fardbeyan* of the Informant was forwarded to the Chakmehasi police station as the place of occurrence was under the jurisdiction of Chakmahesi police station. On receipt of the aforesaid *fardbeyan*, the formal F.I.R. was registered.

4. After completion of investigation, the Investigating Officer filed charge-sheet against the accused/appellant for offence punishable under Section 376 of



the I.P.C. and Section 4 of the POCSO Act before the concerned Magistrate Court. Thereafter, the learned C.J.M., Samastipur took cognizance of the offence. As the case was exclusively triable by Court of Sessions, the concerned Magistrate committed the same to the Sessions Court for trial where the same was registered as Sessions Trial No. 516 of 2013. Case proceeded for trial and after closing the evidence of prosecution, the statement of the accused was recorded under Section 313 Cr.P.C. in which the accused/appellant reiterated himself innocent.

5. During course of trial, the prosecution has examined altogether 11 witnesses in the charge-sheet but, the prosecution has brought out 10 witnesses, namely, P.W.1 Ranjit Kumar Choudhary, P.W.2 Rajani Devi (Informant), P.W.3 Kaushal Kishore Roy, P.W.4 /victim girl, P.W.5 Anita Devi, P.W.6 Narendra Thakur, P.W.7 Kapileshwar Thakur, P.W.8 Bibha Devi, P.W.9 Ram Niwas (I.O.) and P.W.10 Dr. Lalita Singh who have been examined in support of the prosecution. The prosecution has also exhibited documents in support of the allegation against the accused which are; Exhibit-1 signature of Ranjit Kumar Choudhary on *fardbeyan*, Exhibit 1/1 signature of Informant/Ranjani Devi on the *fardbeyan*, Exhibit 2 Signature



of P.W.3 Kaushal Kishore Roy on the seizure list, Exhibit 2/1 signature of witness Narendra Kumar Thakur, Exhibit 2/2 signature of Kaushal Kishore Roy on 2<sup>nd</sup> seizure list, Exhibit 2/3 signature of witness Narendra Kumar Thakur on 2<sup>nd</sup> seizure list, Exhibit 2/4 signature of Kaushal Kishore Roy on 3<sup>rd</sup> seizure list, Exhibit 2/5 signature of witness Narendra Kumar Thakur, Exhibit 2/6 signature of Narendra Kumar Thakur on 4 seizure list, Exhibit 2/7 signature of Kaushal Kishore Roy on 4 seizure list, Exhibit-3 registration and endorsement on *fardebayan*, Exhibit-4 formal F.I.R., Exhibit-5 four seizure list, Exhibit-6 medical report of the victim.

6. However, the Defence has not adduced any evidence as a rebuttal of prosecution case as well as supporting his defence.

7. The Trial Court, after considering the documentary as well as oral evidence produced by the prosecution, passed the impugned order of conviction and sentence, as observed herein above. The sole appellant/convict has, therefore, filed the present appeal.

8. Today, when the case was called out, no one has put in appearance to press this appeal. Yesterday also, nobody had appeared on behalf of the appellant. Therefore, in view of



the order passed by this Court dated 23.01.2024, we deem it expedient in the interest of justice to appoint Ms. Surya Nilambari as *amicus curiae* to assist the Court by appearing on behalf of the appellant. Hence, we have heard learned advocate Ms. Surya Nilambari for the appellant/accused as Amicus Curiae and Mr. Ajay Mishra, learned Additional Public Prosecutor, representing the respondent-State.

9. Learned counsel appearing on behalf of the appellant has mainly contended that in the present case, there is no eye-witness to the incident, (except P.W.4/victim girl) and the case of the prosecution rests on suspicion as well as circumstantial evidence.

10. Learned counsel for the appellant further submits that the Trial Court was duty bound to at least put some formal questions to her to ascertain her level of maturity whether she is not just capable of giving her evidence in court but, also understanding the alleged activity that took place with her. Neither any such procedure was followed by the Trial Court.

11. She further submits that children can be easily tutored or taught and hence be played like puppets in the hands of elders. Hence the testimony of a child witness can only be



relied after the Judge has recorded that the child is fit enough to be testified and there is corroborative evidence for the same also but, the Trial Court has also not followed the same. She further submits that the victim girl in this case is unable to withstand the rigors of cross-examination. She makes a contradictory statement as to how the appellant accosted her. She says that she fell unconscious immediately after undergarment was removed which is just replica of the statement made by her mother. She further states that the victim girl has denied making any statement to the police rather the I.O. has stated that her statement was recorded. So, her testimony when examined as holistic prosecution story in keeping with the testimony of other witnesses, it does not stand the test of falling within the realm of beyond reasonable doubt. Thus, she submits that it seems highly improbable, incredible and she does not come across as a witness whose testimony can be relied upon safely.

12. At this stage, learned counsel for the appellant has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of ***P. Ramesh Vs. State represented by Inspector of Police***, reported in ***(2019) 20 SCC 593*** as also another decision rendered in the case of ***Pradeep Vs. State of Haryana***, reported in ***2023 SCC OnLine SC 777*** and also



placed reliance on a judgment of this Court in the case of ***Munna Sah vs. State of Bihar*** since reported in ***2023 SCC Online Pat 5099*** in which this Hon'ble Court after considering the various decision rendered by the Hon'ble Supreme Court, has held that if the Trial Court has not carried out exercise of putting question to the child witness with a view to ascertain whether the said child witness is capable of understanding the questions put to him and is able to give rational answers, the deposition of such child witness cannot be relied upon more particularly in absence of any corroboration thereof.

13. Learned counsel for the appellant next submits that the P.W.9/I.O. has deposed that a *Sanha* was lodged on 06.07.2013 at about 1.00 O'clock in the night in the Station Dairy bearing *Sanha* No. 84/13 but, the question now is that what was the nature of this information and whether the appellant was named in this information or not and if all the details had indeed been revealed in this information itself then why was the formal F.I.R. was lodged and why not the investigation initiated there and then. Thus, the information given at 1 O'clock in the night was suppressed by the prosecution. These are the questions which creates a grave doubt and lacuna in the prosecution case and falsifies the



impugned judgment passed by the learned Trial Court.

14. She further submits that non-production of the station diary entry before the Court indicates that after consultation and due deliberation subsequently on the basis of false prosecution story, the present case has been instituted. Reliance has been made by the learned counsel for the appellant on the judgment of the Patna High Court in the case of **Kamlesh Kumar Rai Vs. State of Bihar** reported in **(2005)1 PLJR 446**.

Paragraph no.17 being relevant is quoted herein below:-

*“17. The counsel for the appellant has also stated that non-production of the station diary entry before the court also indicates that after consultation and due deliberation subsequently on the basis of false prosecution story the present case was instituted. P.W.3 in his evidence has admitted that two Chawkidar and one Dinbandhu Tiwary had gone to police station to give information about the occurrence. They stayed there for 45 minutes and the I.O. came at the place of occurrence with them. P.W.12 though suppressed this fact that three persons had gone to inform him as he stated that he came to know about cognizable offence, but his conduct shows that he has substantive information regarding the occurrence and on that basis he made entry in the station diary and he proceeded with other police personnel for the place of occurrence and started writing the case diary at the police station itself before recording the fard beyan of P.W.8 in this circumstances the entry made by P.W.12 at the police station was a valuable piece of evidence and non-production before the court has made the prosecution story doubtful and adverse inference can be drawn against the prosecution. Considering the evidence of P.W.3 and non-explanation by the prosecution as well as by the I.O. P.W.12 about the non production of the*



*station diary entry in the court is vital in the present case. The evidence of I.O. indicating that he started writing the case diary at the police station itself meant that the Sanha was the first information of the occurrence lodged at the police station and it should have been treated as F.I.R. in this case, but the same has been withheld by the prosecution purposely for the reason best known to them. Subsequently after consultation and deliberation some other prosecution story was concocted. It has rightly been argued by the appellants counsel that an adverse inference can be drawn against the prosecution for non-production of Sanha entry specially in the present case when it has been admitted by the I.O. that he made Sanha entry and thereafter started writing the case diary as such started investigation thereafter.”*

15. She further states that the victim girl was found in unconscious state at 10-10.30 PM on 05.07.2013, the *Sanha* in this regard was given to the police station at 1 O'clock on 06.07.2013, the *fardbeyan* of the Informant/P.W.2 was recorded at 8.30 AM next morning which was sent to the police station and the formal F.I.R. was registered at 11 AM on 06.07.2013. Thus, there is a delay of approximately 12 hours in registering the F.I.R. and, there is no any plausible explanation for the delay caused in registering the F.I.R. which also creates a great doubt in the prosecution case and thus, falsifies the impugned judgment passed by the Trial Court.

16. Learned counsel for the appellant further states that the I.O. in his evidence has stated that the statement of the victim girl under Section 161 Cr.P.C. was recorded but, it was



the duty of the police officer to take immediate steps to take the victim to the competent Judicial Magistrate for the purpose of recording her statement under Section 164 Cr.P.C. but, he failed to do so which also creates a grave lacuna in the prosecution case.

17. She further submits that sub-section 5A reads as a mandatory provision for recording the statement of the prosecutrix under Section 164(5A) of Cr.P.C. by the Magistrate. She submits that as soon as the crime is brought to the knowledge of the police officer, he is duty bound to take the victim girl to the nearest Judicial Magistrate for recording her statement and it is the duty of the Magistrate to record her statement. But, in this case, the provision made under Section 164(5A) has not been complied with which creates a grave lacuna in the prosecution case.

18. Learned counsel for the appellant has again pointed out that the occurrence had taken place at 7 PM in the evening and the victim girl was found at around 10-10.30 PM and, at the same time, the appellant was also caught by the villagers and handed over to the police station but, there is no satisfactory explanation as to what happened in between 7 to 10.30 PM.



19. She further submits that the statement made of the accused/appellant under Section 313 Cr.P.C. is nothing but mere a formality as nothing concrete has been asked from him.

20. She has further pointed out that in the *fardbeyan*, there is no mention of Kalyanpur Hospital but, the P.Ws.1 & 7 in their examination-in-chief have stated that firstly the victim was taken to Kalyanpur Hospital from where she was referred to Sadar Hospital, Samastipur. The doctor has also stated that the victim was referred from the Kalyanpur PHC. Thus there is contradictory statement between the prosecution witnesses.

21. Learned counsel for the appellant lastly submits that despite the availability of the victim and the appellant also having been taken into custody on 06.07.2013, he was not put to make medical examination although there was already a medical report of the victim girl. The prosecution was required to examine the accused, collect the bio-specimen of both of them, sent it to the laboratory and strengthen the prosecution case despite the fact that the appellant also was available to them, victim was also available there but, they did not take any such steps to get the medical examination of the accused/appellant done which would have established whether he was the person



responsible for the rape committed upon the victim girl. Thus, these are the defects which creates grave lacuna in the prosecution story. In this regard, learned counsel for the appellant has placed reliance on the judgment of this Court dated **18.09.2023** passed in **Cr. App. (DB) No. 807 of 2015**.

22. Mr. Ajay Mishra, learned A.P.P. representing the State, on the other hand, has submitted that the prosecution has clearly established the guilt of the accused/appellant and no exceptions can be taken to the reasons indicated by the Trial Court under the well-reasoned judgment. He further submits that the evidences have also been analyzed in great detail by the Trial Court and, thus, no question of any interference is called for with the conviction recorded by the impugned judgment passed by the court below. He further states that whenever the victim girl has stated in her evidence has been corroborated by all the prosecution witnesses and, thus, there is no ground to disbelieve the evidence of the victim given in examination-in-chief. She has also corroborated that the accused has lifted her and brought in the maize field. The victim had also identified the accused in the Court. Thus, this is sufficient to convict the accused/appellant and the judgment passed by the Trial Court need not be interfered and has committed no error in passing the



impugned judgment. He further states that though there is no eye-witness to the incident, in question, but, the prosecution has proved the case against the appellant/accused beyond all reasonable doubt by producing the cogent and relevant evidence. He further submits that though the accused/appellant was medically examined but, nothing was found so as to send the same to the F.S.L. for examination. The learned counsel for the State has placed reliance on the judgment passed by the Hon'ble Apex Court in the case of ***B.C. Deva alias Dyava Vs. State of Karnataka*** reported in ***(2007) 12 SCC 122***, paragraph 19 being relevant is quoted herein below;

*“19. Though, the FSL Report marked as Ex.C-1 pertaining to the undergarments of the accused and the victim did not contain any seminal stains, yet the said report cannot be given any importance because the underwear of the accused was taken into possession by the police on the next day of the incident when he was arrested. There is no evidence brought on record to show that the accused handed over the same under wear to the police, which he was wearing on the day of incident or he had handed over some other underwear which was seized under mahazer (Ex.P-5) by the police. The possibility of absence of seminal stains on petticoat of the prosecutrix which she was wearing at the time of the incident, could not be ruled out due to the fact that the petticoat got drenched in the water and the seminal stains might have been washed away.”*

23. In order to appreciate the arguments advanced by the learned counsel for the rival parties and to determine the



correctness of the conclusions recorded in the judgment passed by the Trial Court, it will be necessary to discuss the evidence adduced by the witnesses examined by the prosecution.

24. P.W.1- Ranjit Kumar Choudhary is the husband of the Informant/father of the victim girl. Though, this witness has claimed to identify the accused/appellant but, has not been cross-examined by the defence and he was discharged. Thus, the evidence of the P.W.1 lost all credibility.

25. P.W.2- Rajni Devi is the Informant/mother of the victim girl and she has deposed on 22.11.2013 that she received information at about 7.00 PM that her daughter is missing from her parental house and on getting such information, she and her husband arrived at her Naihar and started to search out her daughter. Her daughter was found in the maize field. She was naked, unconscious and the blood was oozing out from her vagina. Thereafter, she was brought to Sadar Hospital, Samastipur. When she regained her conscious, she disclosed that Mahesh Trivedi/appellant took her away and committed rape upon her. Daroga has recorded her *ferdbeyan* on the same place. Further, on 18.01.2014, she has stated that on 05.07.2013 in the evening at 8 O'clock, she got information by her mother on mobile bearing mobile no. 9801394077 that her



daughter was missing. On receipt of such information, she reached at her maternal house by motorcycle at 10 O'clock in the night and she along with her mother, father, brother and sister-in-law started to search her daughter. In para-4 of her statement, she has stated that the corn field is about one and half to two *lagghi* distance from her house. She arrived at the field at around 10.30 PM in the night. Further in para-5, she has stated that she was the first who saw the girl who was in unconscious condition and her panty was missing. She saw the panty in the field which was of black colour. She brought the child to her house and from there took her to hospital. She was unconscious when the doctor was attending her. She took the child to the hospital at 2 PM. The daughter was examined by the doctor at 2.30 PM. After one hour, she regained her conscious. Her statement was recorded in the Hospital. Thereafter, the police had recorded her statement again. The S.I. of Police had seized the sleepers, hair-clip of her child and half filled packet of Dream Carder Biscuit. In para-6, she has stated that her daughter had told her that her panty was thrown off after removing it and she got unconscious after that. She has further stated that the house of the accused is after one or two houses adjacent to her father's house. She has further stated that there is



no land dispute between her father and the accused. It is also not that there was a land dispute between the accused and her father and due to that, they have implicated him.

26. P.W.3 Kaushal Kishore Rai is the hearsay and seizure list witness. In his examination-in-chief, he has stated that when he came to know that the victim girl was missing, he along with others started searching her. They found the girl in *Ole* farm of Ganesh Tiwari. Manesh Trivedi was also there who was running away. The villagers caught him and handed over to the police. The girl was naked and in a distressed state and blood was oozing out from her private part. They brought her home and sent to Samastipur Sadar Hospital by car. In para-2, he has stated that he and Narendra Kumar Thakur signed in the seizure list as witnesses. He also signed in the arrest memo of Mahesh Trivedi.

27. During cross-examination, he has stated that he was asked to sign on the paper and he signed. In para-6, he has stated that the wife of Mahesh Trivedi's wife is his sister-in-law (Mauseri). At the time of occurrence, there were corn crops in the farm. In para-7, he has stated that the victim girl was missing from home since 7 O'clock in the evening. He got to know about her missing at 8 O'clock in the night. He was also



among the family members of the victim who were searching her. He has further stated that the police had recorded his statement.

28. P.W.4 is the victim girl in the instant case. She has stated in the examination-in-chief that when she had gone to purchase a matchbox then Mahesh Trivedi slapped her twice and he removed her panty, brought at the field and opened her panty when she became fainted and then he left the place and blood was coming out from her urinal passage. He had bitten her cheek. She was treated in the hospital and she identified the accused/Mahesh Trivedi.

29. During cross-examination, she has stated that she was residing at her Nana's place for five years. She had gone to get the matchstick at 4 O'clock in the evening. Mahesh Trivedi was near the Gachhi (garden) next to the shop and was urinating there. She has further stated that when she went a little distance with the matchstick, she saw Mahesh while putting his hand on her mouth, forcibly took her to the garden and bitten her cheek. She shouted, called her grand-mother (Nani) but, no one else came. He forcibly took her in the farm on foot and suppressing her mouth which is at a short distance away from the garden. The house of Mahesh is at a little distance from her



Nana's house. She has further stated that she did not understand as to why Mahesh was putting off her panty. She got unconscious as Mahesh put off her panty and she does not know the further facts. She could not say regarding the farm where Mahesh took her away. When her Chhotu Mama came to her, she could know that her Mama has come who carried her in his lap. In para-3 of the cross-examination, she has stated that on the day of incident, she wore a frock and panty and she did not know whether the police had handed over her panty to the Darogaji or not. She does not know the meaning of rape. She has again stated that Mahesh brought her at 3 O'clock in the day in the field. Mahesh uncle had taken her after giving her Chocolate and, that is why, she was not fearing at that time. In para-4, she has stated that whatever she has to say today was not taught by her mother, father and grand-mother.

30. P.W.5 Anita Devi is the shop-keeper and is also a hear-say witness. She has corroborated that the victim girl had come at her shop for buying a matchbox with Rs. 10/- to which she returned Rs. 5 to her and she went to her home with the matchstick. In para-2, she has stated that after an hour, the maternal grand-mother of the victim girl came there searching her. She told her that she had gone with matchstick. After one



hour, it came to light that Mahesh Trivei had taken the victim girl to the garden and raped her.

31. During cross-examination, she has stated in para-3 that the house of the accused is four-five houses away from her house. In para-4, she has stated that there was an uproar that Mahesh Trivedi took the victim girl away and raped her. The victim girl had went away from her shop at about 7 O'clock.

32. P.W.6 Narendra Thakur is a resident of the same village and is a seizure list witness in the present case. He has deposed that the maternal grand-mother of the victim girl had come to his house searching her. He has further stated that the girl was found moaning and screaming in Ganesh Tiwari's corn field at 10-10.30 PM. When they ran towards the sound, Mahesh Trivedi was running away wearing *Lungi* after raping her. People caught Mahesh Trivedi, police came and the accused was arrested. The girl was naked. He has *interalia* stated that the victim girl was sent for treatment in Sadar hospital where she was treated.

33. During cross examination, he has stated that Darogaji prepared the seizure list and after reading the same, he put his signature. In para-9, he has stated that he had not seen



the accused rapping the girl. In para-10, he has stated that the police had registered his statement at the incident site itself. In para-11, he has stated that he saw the accused running wearing a *lungi* after rape.

34. P.W.7 Kapileshwar Thakur is the maternal grand-father of the victim girl. In the examination-in-chief, he has stated that the incident dates back to 9 months ago at around 7 O'clock in the evening. His grand-daughter/the victim girl is five years old. He has further stated that his wife had sent her with ten rupees to buy matchstick from the shop. When she did not return back from the shop, then he informed his daughter and son-in-law. They came together and started searching out the girl. Later on, at around 10 PM, in the *Oal* field of Ganesh Tiwari, she was found. She was crying in pain in the *Oal* field. Mahesh Trivedi was seen running from the same field. He saw that his grand-daughter was in naked state, blood was oozing out from her private part. He asked the victim girl then she told that Mahesh Mama has raped her. Mahesh Trivedi was chased away by the people and caught and was handed over to the police. He has further stated that his grand-daughter was taken to Kalyanpur Hospital for treatment from where she was referred to Sadar Hospital. He has further stated that the police



came to the village and one slipper of Mahesh Trivedi and the victim girl each and her hair-clip and underpants were seized from the spot.

35. During cross-examination, in para-3, he has stated that he has not seen Mahesh Trivedi raping. He has seen the accused running away. In para-4, he has stated that the accused has his own land and the land on which he saw the victim girl is the land of Ganesh Tiwari. In para-5, he has stated that he saw the accused Mahesh Trivedi at a distance of seven laggas. At that time, 25-30 people were with him. At that time, it was 10-11 O'clock in the night. In para-7, he has stated that he had sent the girl to bring matchstick at 7 O'clock in the evening from the shop. The shop is at 5-60 *laggas* distance from his house. When the girl did not come back till half hour then they started searching. The field of incident is at a distance of 400-500 *laggas*.

36. P.W.8 Vibha Devi is the maternal grand-mother of victim girl. This witness has stated in her examination-in-chief that at the time of occurrence, the victim girl was living at her house. She has further deposed that the occurrence took place ten months ago at about 7 PM. At that time, she had sent the victim girl to purchase matchbox from the shop of Daya



Baitha but, when she did not return till the half an hour then they all started tracing her out but, she could not be traced out. Then her parents was informed through mobile, both had come and contacted and thereafter all started tracing her out. During course of search, her grand-daughter was found in the *Oal* field of Ganesh Tiwari in naked condition and she was groaning. Mahesh Trivedi was seen running away from such field then the people chased him and nabbed. Thereafter, the victim was brought her home, she regained her sense and disclosed that Mahesh Mamu has committed rape with her in the *Oal* field. Slipper of Mahesh Trivedi and the victim girl, hair clutcher and underwear were recovered from such *Oal* field. She was treated at the Samastipur Hospital.

37. During cross-examination, she has stated in para-6 that the *Oal* field belongs to Ganesh Tiwari. In para-9, she has stated that there was a *Oal* field at the time of incident. She did not see the rape taking place and the witness herself says that she saw the accused running away from there. In para-10, she has identified the slipper of the accused. The police took her statement at her home. The police took her statement the day after the incident. In para-12, she had denied any conflict between her husband and the accused before the incident.



38. P.W.9 Ram Niwas is the Investigating Officer of this case. He has stated in examination-in-chief that on 06.07.2013, he was posted as S.H.O. of the police station Chakmaihasi and on the same day at around 11 AM, he received the *fardbeyan* of the Informant/Rajni Devi which was in the writing and signature of R.N. Roy, S.I. Samastipur, Town. He has also deposed that a *Sanha* was also lodged on 06.07.2013 at about 1 AM in night in the station diary, bearing *Sanha* No. 84/13. He has further stated that he himself took over the investigation and visited at the place of occurrence. He further described the place of occurrence by stating that the place of occurrence is situated in the village Uttrasadhi under Chakmahesi police station which comes under the Lakwapatti Sivan, which is situated in western side of orchard of Haridev Trivedi, which is surrounded by Banana, Sisam and Jangali grass. He has further deposed that the place of occurrence has been found to be pressed by the steps. Right leg sky coloured slipper of accused, hair clutcher of the victim, half empty packet of biscuit of the Dream lite, 5 pouch Pan Mashala and black coloured underwear of the victim were recovered. He has further described the second place of occurrence stating that the same is located in the maize and Oal field of Ganesh Tiwari



which is situated in village Uttrasadhi coming under the Lakwasivan. He has further disclosed that the victim girl was found in groaning condition inside of the field at the distance of 10 feet away from southern-western corner and the accused was nabbed running away from the vicinity of such place. The I.O. has prepared the seizure list of the recovered article. He has also stated that he has recorded the re-statement of the Informant and the statement of the witnesses as well as statement of the victim girl. The defence statement of the accused was also recorded.

39. During cross-examination, he has stated that he has made the Nazri map of the incident site but, has not made the Nazri map of second incident. In para-11, he has stated that none of the materials seized has any mark on the basis of which he can say whether it belongs to the accused or the complainant.

40. P.W. 10 Dr. Lalita Singh is the doctor who was one of the member of the Medical Board constituted for examining the victim girl. She has deposed she was posted as Dy. Superintendent of S.D. Hospital, Dalsing Sarai. On the same day, a Medical Board was constituted under the Chairmanship of Dr. S.N. Das and the members were Dr. Anu Ranjan Kr. and herself. She has further deposed that on 06.07.2013 at about 4.00 AM, the medical board examined the victim girl who was



referred from Kalyanpur PHC and found following injuries on her body:- (i) Multiple abrasion on the face (including mandibular region), (ii) Lacerated wound over angle of mouth and lip, both lips swollen and inflamed, Multiple abrasion over the front of neck size varying from 2-5 mm plus bruise, Two abrasions 4-5 mm + bruise on inguinal region, Multiple abrasion over back, P/A - above mentioned, P/B - lacerated wound over the inner part of the Libia Majora and Labia Minora. There is a tear of perineum and vaginal wall. Hymen ruptured. There is thick discharge over the vagina and libia majore but, there was no active bleeding. The Doctor has assessed the age of injury within 24 hours and deposed that vaginal swab taken for microscopic examination, there is no foreign hair. It has also been interalia found that the vaginal swab examination for presence of spermatozoa shows spermatozoa not found and the USG normal. The Doctor has assessed the age of the girl to be 5 to 6 years. The Medical Board has also opined that the evidences found on her body and private parts are suggestive of rape.

41. On re-appreciation of evidence of the prosecution witnesses, it is noted that the prosecution case is based on the *fardbeyan* given by the P.W. 2/Informant/mother of



the victim girl recorded on 06.07.2013 at about 8.30 A.M. at Sadar Hospital, Samastipur stating therein that she came to know at 7.00 O'clock in the evening of 05.07.2013 that her daughter/ the victim girl, aged about five years, was at her parents' house at Chakmahesi, P.S. Chakmahesi, she was lifted by Mahesh Trivedi (the appellant) and taken away her. The husband of the Informant resided at Samastipur on receipt of such information came at native place Parana and thereafter, the Informant and her husband started to search her daughter. In course of such search, they heard the sound of screaming which was coming out from the maize field whereafter they went there and found the victim girl there and Mahesh Trivedi was standing behind her daughter. On seeing the Informant and others, Mahesh Trivedi started to flee away from there. The villagers chased him, nabbed and handed him over to the police station. The victim girl was brought home. Thereafter, she was taken to Sadar Hospital, Samastipur in unconscious condition where she was being treated. After gaining senses, the victim girl disclosed that Mahesh Trivedi/the appellant had taken her away. The Informant examined the body of her daughter and found that there was scratch over her mouth and neck and blood was oozing out from her private part. Nectar was found in her body,



she was undressed by the accused and thrown at another place and the victim was found at the pool of blood.

42. From perusal of the prosecution case, after hearing both the sides as also perusing the evidences of the witnesses, it is found that the date of occurrence is 05.07.2013, *fardbeyan* of the Informant was recorded 06.07.2013 at 8.30 AM in the morning but, the F.I.R. was instituted at 11.00 AM and there is no plausible explanation for delay in instituting the F.I.R. which creates a grave doubt in the prosecution case. It is well known that when an FIR is delayed, in absence of proper explanation, the courts must be on guard and test the evidence meticulously to rule out possibility of embellishments in the prosecution story, inasmuch as, delay gives opportunity for deliberation and guess work.

43. From perusal of the records, it also appears that the the P.W.9/I.O. has deposed that a *Sanha* was lodged on 06.07.2013 at about 1.00 O'clock in the night in the Station Dairy bearing Sanha No. 84/13 but, the same was suppressed by the prosecution and was not made base of the F.I.R. and is also not on record. Whether the name of the appellant was there is also not known. What the allegation made therein is also not known to anyone. Thus, under this circumstances, the Sanha



was the valuable piece of evidence and non-production of the same before the court has made the prosecution story doubtful and adverse inference can be drawn against the prosecution.

44. The Criminal Law (Amendment Act) 2013, among its various sweeping changes, inserted a new provision 5A (a) into the Section 164 of the CrPC, making it mandatory that when an offence of rape is committed and the same is brought to the knowledge of the police officer he is bound to take the victim to the nearest Judicial Magistrate for recording of her statement. Thus, the I.O. has not followed the mandatory provision contained under Section 164 (5A) of the Cr.P.C. which creates a grave lacuna in the prosecution case. For the convenience, Section 164(5A)(a) of the Cr.P.C. is quoted herein below:-

*“164(5A) (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, <sup>3</sup>[section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB,] section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:*

*Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:*

*Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with*



*the assistance of an interpreter or a special educator, shall be video graphed.”*

45. This Court also finds that although the statement of victim girl under Section 161 was recorded by the I.O. but, she was not produced before the competent Magistrate to get her statement recorded under Section 164 of the Cr.P.C. and she was directly examined as witness before the Trial Court which also creates a great doubt in the prosecution case. This Court also finds that the victim girl, who is a five years old girl at the time of occurrence, has not gone through the *Voir dire* test (a preliminary examination to determine the competency of witness or juror) before taking evidence. Under this, the court may ask questions to the child witness which are not connected to the case to test the competency, such as questions about name, name of parents, residence, education etc. It is very desirable that a trial judge, who has a child witness before him, should preserve on record, apart from the child witnesses evidence in the case, some other questions and answers which could help the higher courts or courts of appeal to come to conclusion whether the trial judge's decision of competency was right or wrong. If the testimony of the child witness is credible and truthful and supported by other evidence conviction can be based on it. Corroboration of evidence with testimony of a child



is also desirable in order to make conviction. Children are often the most dangerous witnesses, as they can be easily tutored or taught and hence be played like puppets in the hands of elders. Hence the testimony should always be relied upon only after the judge has recorded that the child is fit enough to testify and there is corroborative evidence for the same also, but not in all cases is the corroborative evidence necessary.

46. At this stage, we would like to refer the decision passed by this Court in the case of Munna Sah (supra) wherein this Court has observed in paragraph nos. 24, 25, 26 and 27 which reads as follows:-

*“24. 18.1. In the case of **Pradeep (supra)**, the Hon’ble Supreme Court has observed in Para-7 to 10 as under:-*

*“7. We have carefully considered the submissions. The fate of the case depends on the testimony of the minor witness Ajay (PW-1). Under Section 118 of the Evidence Act, 1872 (for short, “the Evidence Act”), a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short “Oaths Act”) is relevant. Section 4 reads thus:*

*“4. **Oaths or affirmations to be made by witnesses, interpreters and jurors.**—(1) Oaths or affirmations shall be made by the following persons, namely:—  
(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be*



(c) *jurors:*

(2) .....

8. Under the proviso to sub-Section (1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW-1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth



*and state why he is of the opinion that the child understands the duty of speaking the truth.*

*9. It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.*

*10. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court.”*

**25.** 18.2. In the case of **P. Ramesh (supra)**, the Hon’ble Supreme Court has observed in Paragraphs-13 to 16 as under:-

*“13. Section 118 [ “118. Who may testify.— All persons shall be competent to testify unless the Court considers that they are*



*prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.”]* of the Evidence Act, 1872 deals with the competence of a person to testify before the court. Section 4 [ **“4. Oaths or affirmations to be made by witnesses, interpreter and jurors.—**(1) Oaths or affirmations shall be made by the following persons, namely:(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;(b) interpreters of questions put to, and evidence given by, witnesses; and(c) jurors:Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.”] of the Oaths Act, 1969



*requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The rule was stated in Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , where this Court, in relation to child witnesses, held thus : (SCC p. 343, para 5)*

*“5. ... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”*

*14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in Wheeler v. United States [Wheeler v. United States, 1895 SCC OnLine US SC 220 : 40 L Ed 244 : 159 US 523 (1895)] , wherein it was held thus : (SCC OnLine US SC para 5)*

*“5. ... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth*



*and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous.”*

*15. In Ratansinh Dalsukhbhai Nayak v. State of Gujarat [Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 : 2004 SCC (Cri) 7. Subsequently, relied upon in Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565 : (2009) 1 SCC (Cri) 454] , this Court held thus : (SCC pp. 67-68, para 7)*

*“7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of Patna High Court CR. APP (DB) No.1039 of 2015 dt.01-11-2023 20/24 an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of makebelieve. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an*



*impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”*

*16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. [Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 : 2004 SCC (Cri) 7] A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. [Sarkar, Law of Evidence, 19th Edn., Vol. 2, Lexis Nexis, p. 2678 citing Director of Public Prosecutions v. M, 1998 QB 913 :(1998) 2 WLR 604 : (1997) 2 All ER 749 (QBD)] If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.”*

**26.** *From the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that before recording evidence of a minor, it is the duty of Judicial Officer to ask preliminary question to him/her with a view to ascertain whether the minor can understand the questions put to him/her and is in a position to give rational answers. The Judge must be satisfied that the minor is able to*



*understand the questions and respond to them and understands the importance of speaking the truth. The Judge has to make a proper preliminary examination of a minor by putting appropriate questions to ascertain whether the minor is capable of understanding the question put to him. It can be further said that in order to determine the competency of the child witness, the Judge has to form his/her opinion. The Judge is at liberty to test the capacity of a child witness. The competency of a child witness can be ascertained by questioning him to find out the capability to understand the occurrence witnessed and to speak the truth before the Court. In criminal proceedings, the person of any age, is competent to give evidence if he is able to understand questions put as a witness and give such answers to the questions that can be understood. A child of tender age can be allowed to testify if he has the intellectual capacity to understand the questions and give rational answers thereto. However, a child becomes incompetent in a case the Court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner.*

*27. Keeping in view the aforesaid decisions, if the facts of the present case are examined, it transpires that the concerned Trial Judge has not carried out the aforesaid exercise by putting question to the child witness with a view to ascertain whether the PW-8 (child witness) is capable to understand the question put to her. Thus, we are of the view that the reliance placed by the learned Trial Court only on the deposition given by PW-8 who is the child witness, aged about 10 yrs. and was aged about 7.5 yrs. at the time of occurrence, is misplaced. Therefore, the Trial Court has wrongly placed the reliance upon the said deposition of the child witness.”*

47. This Court also finds that the statement made of the accused under Section 313 Cr.P.C. is just a formality. In a criminal trial, the purpose of examining the accused person



under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice i.e. *audi alterum partem*. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The answers by an accused under Section 313 of the Cr.PC are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of Section 313 of the Cr.PC is wide and is not a mere formality. While examining the accused, Trial Court has to take into consideration that the questions should be based on the evidence adduced by the prosecution witnesses. The questions should be formulated in clear, logical and understandable leaving no ambiguity in questioning the accused.

48. It is a fundamental principle of criminal jurisprudence that the prosecution must prove the case against the appellant/accused beyond all reasonable doubt and if the



prosecution fails to prove its case beyond reasonable doubt, the benefit goes to the accused person.

49. Looking to the over all facts and circumstances of the present case, we are of the view that the Trial Court has committed grave error in convicting the appellant. Thus, we are inclined to allow this appeal and, accordingly, the appeal stands allowed.

50. Thus, the impugned judgment of conviction dated 01.04.2017 and order of sentence dated 03.04.2017, passed by the learned Additional Sessions Judge, 1<sup>st</sup> – cum – Special Judge, POCSO Act, Samastipur in S.T. No. 516 of 2013 (Regd. No. 615 of 2014), arising out of Chakmahesi P.S. Case No. 60 of 2013 is quashed and set aside. The appellant, namely, Mahesh Trivedi is acquitted of the charges levelled against him by the learned Trial Court.

51. Since the appellant, above named, is in jail, he is directed to be released forthwith, if his presence is not required in any other case.

52. It goes without saying that if the appellant/accused has deposited the fine, the same shall be returned to him.

53. Before parting with the appeal, we record our



appreciation for the able assistance rendered by Ms. Surya Nilambari, learned *Amicus Curiae*.

54. The Patna High Court, Legal Services Committee is, hereby, directed to pay 5,000 (Rupees Five Thousand) to Ms. Surya Nilambari, learned Amicus Curiae in Criminal Appeal (DB) No. 566 of 217 as consolidated fee for the services rendered by her.

**(Vipul M. Pancholi, J)**

**(Rudra Prakash Mishra, J)**

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