

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.4219 of 2019**

Arising Out of PS. Case No.-1 Year-2013 Thana- SANDESH District- Bhojpur

UDI MISHRA @ UMAPATI MISHRA S/o Late Ishwar Mishra R/o Village-
Pinjoroi, P.S.- Sandesh, District- Bhojpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Gopal Govind Mishra, Adv.
For the Respondent/s : Mrs. Anita Kumari Singh, APP

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

Date : 21-09-2024

1. Heard learned counsel appearing on
behalf of the parties.

2. The present appeal preferred by
appellant/convict, namely, Udi Mishra @ Umapati
Mishra against judgment of conviction dated
16.07.2019 and order of sentence dated 17.07.2019
rendered by learned 1st Additional District & Sessions
Judge-cum-Special Judge, POCSO Act, Bhojpur at Ara
in POCSO Case No. 17 of 2013 in connection with
Sandesh Police Station Case No. 01 of 2013, whereby
and where under appellant/convict has been convicted



for the offence punishable under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 (Ten) years and fine of Rs. 10,000/- (Rupees Ten Thousand) and in default of payment of fine, he shall further ordered to undergo rigorous imprisonment for a period of three months, and for offence under Sections-6 of POCSO Act, sentenced to undergo R.I. for ten years and fine Rs. 10,000/- (Rupees Ten Thousand) in default of payment he shall further undergo rigorous imprisonment for a period of three months and also been sentenced to undergo R.I. for seven years under Sections-4 of POCSO Act and fine Rs. 5,000/- (Rupees Five Thousand) and in default of payment of fine, he shall further undergo rigorous imprisonment for a period of two months, all the above said sentences is ordered to run concurrently.

3. Case of prosecution in brief, as it appears from written information of the informant,



namely, Munna Prasad Keshari (PW-4) that at 12.00 PM on 06.01.2013, his daughter/victim, aged about 10 years went to the house of the appellant for collecting "*Goitha*" (Cow Dung's cake), whereafter reaching the house of the appellant the victim called wife of the appellant but his wife was not present in the house. The appellant was alone in the house. When victim started returning, appellant called her inside the house and committed rape upon her and after committing rape he gave "*Goitha*" to her and threatened not to disclose the occurrence to her parents otherwise would kill her. Informant's daughter (victim) after arriving home narrated the entire incidence to her grandmother (not examined) and mother (PW-2).

4. On the basis of aforesaid written information, Sandesh P.S. Case No. 01 of 2013 was registered under sections 376 of I.P.C. and also under Section 5/6 of the POCSO Act, 2012.



5. To established its case before the learned trial court, the prosecution altogether examined total of eight witnesses, namely, PW-1 victim, PW-2 Sarita Devi (Mother of the victim), PW-3 Bachhan Prasad Keshari (Uncle of the victim), PW-4 Munna Prasad Keshari (Father of the victim/informant), PW-5 Dev Lagan Yadav (Independent witness and co-villager), PW-6 Manoj Mishra @ Manoj Kumar (Independent witness and co-villager) PW-7 Dr. Madhubala Sinha and PW-8 Shyam Dev Singh (I.O.).

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

Exhibit 1 - Signature of victim under Section 164 of Cr.P.C.

Exhibit 2 – Seizure List

Exhibit 3- First Information Report.

Exhibit 4 – Medical report of victim



Exhibit 5- F.S.L. Report

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

8. No witness was examined in defence, neither any document was exhibited, by appellant/convict in his defence during the trial

9. Upon the basis of evidences as surfaced during the trial and also by taking note of the argument as advanced by the learned counsel appearing on behalf of the parties, the learned trial court convicted appellant/convict and passed order of sentences, as stated hereinabove.

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



11. Hence the present appeal.

12. It is submitted by learned counsel arguing on behalf of the appellant/convict, that the finding of conviction as recorded by Id. trial court is not in accordance with law and same is therefore fit to be set aside and quashed. In support of his submission, it is submitted that there are several discrepancies between the statement of victim/PW-1 as recorded under Section 164 of Cr.P.C. and her testimony recorded as PW-1. It is pointed out that from the statement recorded under section 164 of the Cr.P.C. of the victim it appears that when the occurrence came into knowledge of his father she along with her father visited to the house of appellant where they met with appellant and upon query regarding occurrence it was denied by appellant to commit anything upon victim in terms of allegation. Whereas, victim while deposing before the court as PW-1 stated that after the occurrence when she



visited the house of appellant along with her father, mother and 2-3 neighbors by that time the appellant has already left his house. It is submitted that these two different statements disputed the presence of appellant at his house and, therefore, also creating a doubt *qua* occurrence. It is further submitted by learned counsel that upon medical examination the age of victim was found below 14 years and, therefore, sentence of appellant for aggravated sexual assault under Section 6 of POCSO Act appears bad in eyes of law because for any such sentence the age of victim must be less than 12 years, in terms of proviso available under Section 5(m) of the POCSO Act. It is further submitted in this context that admittedly the victim was not a school going child and she was not proved "child" in view of Section 2(1)(d) of the POCSO Act as per mandate available under Section 94(2) of Juvenile Justice (Care and Protection of Children) Act, 2015 as approved also by Hon'ble



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

13. Learned counsel further submitted that victim deposed during the trial that the occurrence took place on 01.06.2013, making the entire occurrence false, as she is the only witness of the occurrence. Learned counsel while traveling over the argument, submitted that judgment of conviction as recorded by Id. trial court is based upon the depositions of family members of the victim who are appearing the interested and heresay witnesses. It is pointed out that the independent witnesses of this case turned hostile, even the seizure list witnesses regarding recovery of "lungi", and "*jhangia*" (innerwear) of the appellant, namely, Ravi Kumar Mishra and Ramchandra Yadav were not examined during the trial. It was stated that out of two seizure list witnesses of innerwear (*jhangia*) of PW-1/victim, only, Bachhan Prasad Keshari (PW-3) was examined,



who supported the seizure but he appears to be uncle of the victim. It is also submitted by learned counsel that the report of medical board subsequent to the examination of victim was not placed on record during the trial. It is also pointed out by learned counsel that appellant was not examined in view of Section 53(A) of the Cr.P.C.. It is also submitted that the aforesaid seized undergarments as recovered by the Investigating Officer of this case/PW-8 was not put on T.I. Prade for identification. The FSL report of blood and semen is unable to connect appellant with crime in question beyond reasonable doubt mere on the basis as it shows presence of same human blood group "O".

14. Making submissions regarding injury report of the victim, it is submitted that save and except tenderness, no injury was found in or around the private part of the victim and for that matter on any part of the body of victim as per deposition of PW-7, who is a Doctor and examined victim within 12



hours of the occurrence. It is pointed out that from medical report of victim it appears that hymen of victim was found ruptured which suggest that she was habitual of sex prior to the occurrence. The finding of Doctor was silent whether rupture of hymen was recent or old. It is submitted that in view of aforesaid submission the presumption as available under POCSO Act as available under Sections 29 and 30 is not applicable to present case as prosecution failed to established foundational aspect of its allegation *qua* appellant with regard to crime in question, hence, the judgment of conviction as recorded by Id. trial court is fit to be set aside and quashed.

15. In support of aforesaid submissions learned counsel relied upon the legal reports of Hon'ble Supreme Court as available through ***Prahlad Singh vs. State of Madhya Pradesh*** reported in ***(1997) 8 SCC 515, Santosh Prasad @ Santosh Kumar vs. The State of Bihar*** reported in ***(2020)***



3 SCC 443 and Sheikh Hasib @ Tabarak vs. The State of Bihar reported in **(1972) 4 SCC 773.**

16. It would be apposite to reproduce para no. 5.4.2 of the **Santosh Prasad @ Santosh Kumar case (supra)** which reads as under:-

"5.4.2. *In Rai Sandeep [Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21 : (2012) 3 SCC (Cri) 750] , this Court had an occasion to consider who can be said to be a "sterling witness". In para 22, it is observed and held as under: (SCC p. 29)*

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There



should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to



sieve the other supporting materials for holding the offender guilty of the charge alleged."

17. It would be apposite to reproduce para no. 6 and of the ***Sheikh Hasib @ Tabarak case (supra)*** which reads as under:-

"Now, identification parades are ordinarily held at the instance of the investigating officer for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the persons who are alleged to have been concerned in the offence. Such tests or parades belong to the investigation stage and they serve to provide the investigating authority with material to assure themselves if the investigation is proceeding on right lines. It is accordingly desirable that such test parades are held at the earliest possible opportunity.

18. Mrs. Anita Kumari Singh, learned APP while arguing on behalf of State submitted that the victim as a "child" is not a disputed fact in this case as same was not disputed by the appellant during the trial. It is pointed out that upon medical examination the age of victim was found below 14 years, in FIR



her age was mentioned as 10 years and same is also in her statement recorded under Section 164 of the Cr.P.C.. It is pointed out that victim was examined on 10.07.2015, where her age was taken as 11-12 years and, therefore, the conviction as recorded under Section 6 of the POCSO Act by Id. trial court is justified. It is further submitted that the version *qua* occurrence as stated by victim appears throughout consistent, which is fully corroborated with her medical examination report and the report of FSL. It is submitted that upon forensic examination the inner-wear of victim found with semen of blood group "O" which matched with blood group of "*jhangia*" which was recovered from the house of the appellant as same found blood stained with human blood group "O".

19. Learned APP further submitted that the deposition of PW-1 *qua* occurrence as 01.06.2013 is apparently a typographical error which can be taken



note by any prudent imagination and same be read as 06.01.2013. It is nothing but a slip of pen. This fact can be gathered from the testimony of rest of witnesses who stated that occurrence took place on 06.01.2013, more particularly from the deposition of PW-7 who is doctor and examined victim on 06.01.2013 on same day at about 11:15 P.M. Statement of victim under section 164 of Cr.P.C. was also recorded on 06.01.2013.

20. Learned APP further submitted that non-examination of independent witnesses in such a case does not make any difference, particularly when the testimony of victim appearing of "sterling" quality, which further appears corroborated from her medical examination report and the report of FSL. It is also submitted that the non-examination of seizure list witnesses *qua* "lungi" and "inner-wear" of appellant from his house does not make any doubt of such quality which may falsify case of prosecution, in view



of deposition of victim/PW-1 which is of sterling quality.

21. Summing up the argument, learned APP submitted that consistent deposition *qua* occurrence by PW-1 which appears duly corroborated with her medical report and also with FSL report of her inner-wear and also from the inner-wear of the appellant are sufficient to established the foundational aspects of the charges as raised against the appellant to import the presumption available under Sections 29 and 30 of the POCSO Act and, therefore, the conviction as recorded by Id. trial court is not required to be interfered.

22. In support of her submissions learned APP relied upon the legal report of Hon'ble Supreme Court available through ***Aman Kumar v. State of Haryana*** reported in ***(2004) 4 SCC 379***.

23. It would be apposite to reproduce para no. 7 and of the ***Aman Kumar case (supra)*** which



reads as under:-

"7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, IC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana [(1979) 1 SCC 212 : 1979 SCC (Cri) 252] .] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute



merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending



on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

24. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

25. As to re-appreciate the evidences, while dealing with present appeal, it would be apposite to discuss the evidences as available on record, which are as under :-

26. From the perusal of records, it appears



that most important witness of this case is **P.W.-1** who is the victim of this case, she stated that occurrence took place on 01.06.2013, before two years at about 12 P.M., when she went to the house of the appellant to collect the cow-dung cake (*goitha*) upon instruction of her mother. It was deposed that after arriving the house of appellant she asked for his wife but it was said by appellant that she is sitting on the roof top, believing the version of appellant she went to the roof top, but his wife was not there and thereafter while she was in process to return her home the door of home was locked from inside by the appellant. No other family member was present at the time and it was said by appellant that "*goitha*" is at terrace and, therefore, she went up to terrace but no "*goitha*" was there. Appellant after taking her in his lap brought her down from the terrace and laid down her on *palang*, thereafter he took out his cloth and also the cloth of the victim and committed wrong work "*galat*



kaam" upon her. When she started to cry, he opened the door and threatened her as not to disclose about the incident to anyone, failing which he will kill her. She returned crying to her home and narrated the entire occurrence to her grand mother, who asked her to report this incidence to her mother and thereafter she narrated the entire occurrence to her mother and thereafter her mother reported the entire occurrence to her father, thereafter her father, uncle and 2-3 neighbors went to the house of the appellant but by that time he was fled away. She also accompanied her father. Thereafter she was brought to the police station by her parents and reported the occurrence to the police. Victim was brought immediately thereafter to Sadar hospital for medical examination and on next day she was produced before the court for recording her statement u/s 164 of the Cr.P.C.. She identified her signature upon her statement recorded under Section 164 of the Cr.P.C., which upon her



identification, exhibited as exhibit-1. She also said to made her statement before the police, and she also identified the appellant before the court during the trial.

26.1. Upon cross-examination, it was stated by her that her family members are the witness of this occurrence. She stated that prior to this occurrence she also visited the house of appellant for taking "*goitha*" which on every occasion was given by the wife of appellant. It was said that the age of appellant is about 35 years. It was stated that during the occurrence her hand and legs were not tied up, she denied the suggestion of learned counsel of the appellant that appellant only made an attempt to commit for wrong work/rape, but in actual it was not committed upon. It was stated that the occurrence took place for about 5 minutes and there was no oozing of blood, she could not noticed that anything was released from the body of the appellant. She did



not even noticed any "stains" on clothes. Her clothes were not taken by police. It was stated categorically that this occurrence took place first time in her life. It was stated that case was lodged by her father, who stated about the occurrence to police. She categorically stated that she made same statement before Id. Magistrate, what she deposed today. It was also stated by her that police came to her for taking her statement. She denied suggesting that she did not made statement before the police, that the appellant committed wrong work/rape upon her after removing her cloth. It was stated that she tried her best to save herself from appellant by using her hand and legs during the occurrence. She did not talked about the occurrence with anyone, while returning to her house, as no one met with her on the way. She denied suggesting that as she was caught red handed while stealing the *goitha* of the appellant, for said reason she was assaulted and just to take revenge the



appellant was falsely implicated with present case.

27. P.W.-2 is Sarita Devi, who is mother of the victim. It was deposed that occurrence took place at about 12 P.M. on 06.01.2013. It was deposed by her that the appellant came to her grocery shop in morning, where she asked him to pay balance of Rs. 20 which was due to her, upon which appellant replied to take "*goitha*" for value of Rs. 20. Accordingly, to take said "*goitha*" she sent her daughter (PW-1) to the house of appellant where the present occurrence took place. It was deposed that when she along with family members went to the house of appellant it was found locked from outside and appellant was not found at his house. It was further deposed by her that she was said by victim that she is feeling pain in her private part whereafter she with her family members brought victim to police station and thereafter victim was brought to Sadar Hospital, Ara for treatment. Her statement was said to be recorded by police during



investigation. She identified appellant during the trial.

27.1 Upon cross-examination, she stated that she is not in inimical terms with anyone of her village except the appellant. It was stated that her family members are the witness of this case. It is stated that she was not an eye witness of the occurrence. She was told about the occurrence by her daughter at about 12:30 P.M. on same day. It was stated by her, that she also made this statement to police that she came to know about the occurrence at about 12:30 P.M. It was also stated by her that she has no proof in writing regarding due of Rs. 20, as claimed by her. She came to the house of the appellant at about 12:45 P.M. along with her family members for inquiry, where "*chawkidar*" was also with them. It was stated that her daughter was examined medically twice. It was stated by her that on the date of occurrence her daughter was wearing frock and "*jhangia*" of red color. It was stated that the village is



divided in two groups, where she failed to disclose regarding affiliation of her husband with a particular group. A suggestion was also given to her that as victim was caught while stealing "*goitha*" from the house of the appellant she was assaulted and for that reason present false case was lodged, which she denied.

28. P.W.-3 is Bachhan Prasad Keshari, who is the uncle of the victim. It was deposed by him that occurrence took place on 06.01.2013 at about 12 P.M. He narrated the occurrence in same manner as it was deposed by PW-1 and PW-2. He appears the witness of the under garment (*kachha*) of the victim, which was seized by police in hospital itself, which was hand over him by the treating doctor i.e., PW-7. He identified his signature on said seizure list and upon his identification it was exhibited as exhibit-2. He also identified the signature of Ramchandra Yadav on that seizure list who signed said seizure list in his presence.



28.1 Upon his cross-examination, it was stated that no "*goitha*" was seized from the house of appellant. He came to know about the occurrence from his family members at about 12:30 P.M. He denied to depose falsely against the appellant being the member of opposite group.

29. P.W.-4 is Munna Prasad Keshari, who is the father of the victim/PW-1 and informant of this case. It was deposed by him that the victim is his daughter, aged about 10 years and occurrence took place on 06.01.2013 at about 12 P.M. when his daughter went to the house of the appellant for collecting "*goitha*". He narrated the occurrence thereafter in the same manner as it was deposed by PW-1 and PW-2. He identified his signature on his written statement which upon his identification exhibited as exhibit-3. It was deposed by him that immediately after giving his written information the police came to the house of appellant but he was not



found there and his house was locked from outside, whereafter, they came to Sadar Hospital, Ara along with her daughter where she was treated and examined medically. On the next day her statement was recorded under Section 164 of the Cr.P.C. Her restatement was also recorded by the police during investigation. He also denied any enmity with appellant.

29.1. Upon cross-examination, it was stated that he is not an eye witness of the occurrence. It was stated by him that the written information was written by a person of village Khandon, as per his instruction. It was stated that the "*lungi*" and "*kachha*" (under garment) was seized from the house of the appellant but same was not seized before him. He saw "*lungi*" and "*kachha*" in police station, where he remembered the color of "*lungi*" as "blue". He denied the suggestion that as on the date of occurrence the appellant caught PW-1/victim while stealing *goitha*,



upon which she was slapped and for said reason the present police case was lodged purely on imaginary grounds.

30. P.W.-5 and PW-6 are Dev Lagan Yadav and Manoj Mishra @ Manoj Kumar, who declared hostile by prosecution where nothing appears upon their cross-examination by State or by defence which may be said relevant for the purpose of contradiction or corroboration of testimony of other prosecution witnesses, who appears supported the case of prosecution.

31. P.W.-7 is Dr. Madhubala Sinha, who examined victim on 06.01.2013 at 11:15 P.M., while posted at Sadar Hospital, Ara. On that day she examined Sanju Kumari (victim) aged about 10th years, old Hindu female, Daughter of Munna Prasad Keshri, Vill- Pinjroi, Thana- Sandesh and found following findings on her bodies:-

"1. Teeth 14/14



2. M.I. - Scar mark on center of forehead.
3. Brought by constable no. 115 and Reeta Kumari and Meena Kumari no. 1409.
4. On external examination no injury found.
5. Breast not developed.
6. Pubic and axillary hair not present.
7. On examination of private parts no injury present.
8. Hymen ruptured admit one finger.
Some tenderness is there.
9. Vaginal swab is taken.
10. According to report no spermatozoa either alive or dead.
11. Advised e-ray elbow pelvis and wrist.
12. According to report she is aged below 14 years.
13. Her undergarment is sent to constable for examination at forensic lab.

Opinion:-

Regarding Rape opinion is reserved till reports of undergarment came. Report is written and signed by him. Marked as Ext.4.

2. Cross Examination :- No one turns for cross-examination of this witness on behalf of appellant.

Later on,

3. I have not found internal or external injury upon the victim.

Question:- you didn't find any sign of Rape on the private part of the victim and as such her garment was kept reserved for FSL Report?



Ans:- I found hymen ruptured and some tenderness is there. Rupture of hymen may be due to other reasons.

4. I have not mentioned the time of rupture of hymen, whether it was recent or old. FSL report is attached with the record. I don't know about the fact whether there was any reconstitution of medical board under order of court. The victim is not present in the court.

5. I can't say which garment was wore by a victim at the time of examination. It is wrong to say that my report is collusive on the instance of informant and her parent."

32. PW-8 is Shyam Dev Singh, who is the Investigating Officer of this case. It was deposed by him that on 06.01.2013, he was posted as S.H.O. of Sandesh Police station. He lodged present case on the basis of written information of PW-4/informant namely Munna Prasad Keshari, S/o Vill- Pinjroi, Thana- Sandesh, District- Bhojpur @ Ara. He after taking charge of investigation recorded the reinstatement of informant/PW-4 and thereafter visited the place of occurrence, where rape was alleged to be committed upon. One bed was available in south-west room,



where occurrence took place in next room there was a cot also on which one "*lungi*" and one "*jhangia*" was found, which was seized before the witness, namely, Ramchandra Yadav and Ravi Kumar Mishra. He also got recorded the statement of victim under Section 164 of the Cr.P.C.. He also obtained the medical report of victim where the final opinion was kept reserved on certain issues. He also recorded the statement of victim during investigation. He also said to obtained the reserved medical report of the victim and made a request for sending the seized items for FSL examination and after completion of investigation he submitted charge-sheet for the offences under Section 376 of the IPC and Sections 4/6/8 of the POCSO Act against the appellant/convict through charge sheet no. 27 of 2013 dated 05.04.2013.

32.1 Upon cross-examination, it was stated by him that during course of investigations none of the witness stated that victim was noticed



while going to the house of appellant. It was stated that he found "*goitha*" in the house of appellant but he did not mentioned it in case diary. He stated that he did not recovered seized "*lungi*" or objectionable material from the room where actual occurrence took place. He did not even mentioned in case diary regarding sealing of seized materials.

Conclusion

33. It appears from the perusal of records and argument as advanced by learned counsel appearing on behalf of parties that the most important witness of this occurrence is PW-1/victim herself. This unfortunate occurrence took place within the four corner of the house of appellant while he was alone at his home and his family members were not available, when victim approached him to take cow-dung cake (*goitha*), under instruction of her mother/PW-2, against due of Rs. 20. The rest of the prosecution witnesses are the relatives of the victim who



supported the case and narrated the occurrence as they came to know it from the mouth of PW-1/victim. PW-3 is the seizure list witness of the undergarment of the victim which was handed over by PW-7 to police at the time of her medical checkup.

34. The most important aspect of this occurrence is to ascertain whether the victim is a child within the meaning of 2(1)(d) of the POCSO Act.

35. In this context it would be apposite to reproduce Section 2(1)(d) of the POCSO Act :-

"d) "child" means any person below the age of eighteen years;"

36. Now coming to the fact of this case, it appears that the age of victim was mentioned in FIR, where informant ,who is none but the father of the victim mentioned her age as 10 years old. Age of victim also mentioned as 10 years in her statement as recorded under Section 164 of the Cr.P.C. and even on the date of her examination before Id. trial court,



which was recorded after about 2 years of the occurrence i.e., on 10.04.2015 she was found between the age group of 11-12 years. The doctor/PW-7 also ascertain her age upon medical examination below 14 years. Moreover, this fact was also not disputed during the trial by the appellant.

37. It would be apposite to reproduce para nos. 22 and 23 of the ***Jarnail Singh's case (supra)*** and ***Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015***, which reads as under:-

"22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

"12. Procedure to be followed in determination of age.- (1) *In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a*



period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

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

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

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

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii), (iii) or in the absence whereof,



clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

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

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

"23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules,



to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

94. Presumption and determination of age.—(1) *Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the*



Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

38. Now considering the aforesaid legal provisions and settled preposition of law the most convincing evidence which appears regarding the age of the victim is the deposition of PW-7 from where it



appears that on the date of occurrence i.e., on 06.01.2013, she was found below 14 years. Admittedly no documents in terms of Section 94(2) of the Juvenile Justice Act 2015, as issued by first attending school or matriculation certificate or certificate from local *panchayat* was brought on record and in such condition the age which was ascertained by PW-7 upon the basis of radio-logical examination of the victim is the only option which may be accepted as a relevant finding *qua* age of the victim. Moreover, status of victim as a "child" was not disputed during the trial.

39. Considering aforesaid, it can be said safely that prosecution proved victim as a "child" within the meaning of section 2(1)(d) of the POCSO Act and therefore the conviction as recorded by Id. trial court under POCSO Act cannot be made questionable, on this ground.

40. Another important aspect of this case



is to test the trustworthiness and credibility of the testimony of victim/PW-1. As per deposition of PW-1 this occurrence took place in the house of the appellant in broad day light while he was alone and before committing rape, room was locked from inside by the appellant and she was brought down by the appellant from the terrace by taking her in his lap and was laid down on bed in the house where before committing rape appellant removed her cloth. It appears from the statement of PW-1 that when appellant started to commit rape upon her she raised an alarm and thereafter the room was opened and she came out from the house. This statement of the victim appears consistent through her statement as recorded under Section 164 of the Cr.P.C. and also in her testimony as recorded as PW-1. Rape was said to be continued for about five minutes.

41. Nothing appears from the cross-examination of PW-1/victim which can create a doubt



qua her deposition in examination in-chief, narrating about the occurrence, rather, it appears from her cross-examination that the appellant admitted his presence with victim in his house as a question was advanced in suggestion that the occurrence was only *qua* attempt of rape and no rape was actually committed upon her, which was denied by victim/PW-1 saying that it was not mere an attempt rather rape was committed upon her. This specific question in defence itself sufficient to construed that victim at the time of occurrence was present in the house of appellant otherwise there was no occasion to advance such suggestion. Immediately after the occurrence victim came to her house and reported the occurrence to her grandmother (not examined), whereafter she was asked to report the occurrence to her mother/PW-2, she immediately narrated the occurrence to her mother, whereafter her mother (PW-2) immediately reported this occurrence to PW-4/victim's father. The



victim claimed pain in her private part as it appears from the deposition of PW-2. Victim was medically examined at Sadar Hospital, Ara, where she was examined by PW-7 on same very day i.e., 06.01.2013 at about 11 P.M., where doctor found tenderness in her private part. This medical finding appears corroborate with the deposition of PW-1 where she narrated to her mother/PW-2, immediately after occurrence that she is feeling pain in her private part. Taking note of the consistency of victim *qua* occurrence which appears corroborated with medical finding, there is no apparent reason to disbelieve her version or to have an occasion to look her testimony with tainted glass.

42. In such circumstances, non-examination of independent witness or examination of only family members does not make any relevant bearing *qua* crime in question, when deposition of PW-1 appears trustworthy, convincing and in corroboration



with medical finding.

43. The Investigating Officer of this case, PW-8 categorically stated that he seized "*lungi*" and "*kachha*" of the appellant from the next room to the room. Where actual occurrence of rape took place, which was seized and sent for forensic examination, where report is available and same was exhibited as exhibit-5 (FSL report).

44. It also appears from the deposition of PW-7 that on the date of occurrence, when victim came to hospital for her treatment, her inner-wear (*kachha*) was given to police. It was seized properly in accordance with law, where PW-3 was made as one of the witness, who supported the seizure. The said underwear of victim (*kachha*) was sent for forensic examination also where it is apparent from the FSL report that "human semen" was noticed on her undergarment, having of human blood group "O". It also appears from aforesaid FSL report that



undergarment which was seized from the house of appellant found with human blood group "O". There is no evidence to negate or to doubt this seizure as the seizure of "*kachha*" of the victim was made on same day which was handover by doctor to police for aforesaid forensic examination. The exhibit of forensic report was not even objected by appellant during the trial. Accepting FSL report as evidence by Id. trial court cannot be said bad in view of section 294 of Cr.P.C. Non-examination of seizure list witness *qua* "*lungi*" and "*kachha*" of the appellant does not bear any significance in view of Forensic report (exhibit-5), moreover I.O./PW-8, supported aforesaid recovery and seizure beside deposition of PW-3, who supported the seizure of "*kachha*" of victim by saying that it was handed over to police by doctor in hospital itself. This fact was also supported by doctor/PW-7. Non-finding of any visible injuries upon or in and around private part or any other part of body of the victim does not



lead to conclusion *ipso facto* that penetrative sexual assault was not committed upon the victim as legal proposition in this regard is already settled by making rape as a legal finding not a medical one.

45. The date of occurrence as appears from deposition of victim is 01.06.2013 which is appearing *prima-facie* out of slip of pen as the entire record and deposition of the witnesses including the statement of victim recorded under Section 164 of the Cr.P.C. suggest that occurrence took place on 06.01.2013 at about 12 P.M. (in day). The FIR was lodged on 06.01.2013, the victim was also medically examined on 06.01.2013 at about 11:15 P.M. by PW-7.

46. Hence, the argument of learned counsel that no such occurrence took place in view of deposition of victim on alleged date and time of occurrence not appears convincing and the recording of evidence *qua* date of occurrence as 01.06.2013 in



deposition of PW-1 is nothing but a slip of pen and as such cannot be viewed with doubt *qua* occurrence as to give any benefit to the appellant on this score.

47. In view of aforesaid, the testimony of victim/PW-1 *qua* penetrative sexual assault/rape cannot be viewed with doubt. It hardly matter that what was the extent of penetration.

48. As far conviction of appellant under Section 6 of the POCSO Act is concerned it appears that said conviction was recorded in view of Section 5 (m) of the POCSO Act, by taking age of victim below 12 years. In this context, it appears that doctor/PW-7, ascertained age of victim below 14 years, which simply implies on its face that she could be less than 12 years also, in absence of any finding *qua* minimum age. As per FIR, age of victim was shown as 10 years on the date of occurrence. In statement of victim recorded under Section 164 of the Cr.P.C., before Id. Magistrate her age was also recorded as 10 years.



While deposing before court her age was assessed by Id. trial court between 11-12 years. She categorically stated her age on oath as 11 year and 6 months. Accordingly, conviction of appellant under Section 6 of the POCSO Act, also appears justified and need not to interfere on sole ground that PW-7 assessed the age of victim below 14 years.

49. Hence, appeal stands dismissed.

50. Let a copy of this judgment be sent back to Id. trial court along with trial court record, forthwith.

(Chandra Shekhar Jha, J)

Sudha/-

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