

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1124 of 2019**

Arising Out of PS. Case No.-209 Year-2016 Thana- PIRO District- Bhojpur

1. Hare Ram Sah, aged about 30 years (Male), Son of Lakshman Sah, Resident of Village- Lahari Tiwaridih, P.S.- Piro, District- Bhojpur.
2. Manish Tiwari, aged about 27 years (Male), Son of Banshidhar Tiwari, Resident of Village- Lahari Tiwaridih, P.S.- Piro, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Pratik Mishra, Advocate Mr. Vatsal Vishal, Advocate Mr. Ramashray Roy, Advocate
For the Respondent/s	:	Mr. Abhimanyu Sharma, APP

**CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and**

**HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT**

(Per: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA)

Date: 26-09-2024

The instant appeal has been filed under Sections 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Code') challenging the judgment of conviction dated 03.08.2019 and the order of sentence dated 09.08.2019 passed by learned Ist Additional District & Sessions Judge-cum-Special Judge, POCSO Act, Bhojpur at Ara, in connection with POCSO Case No. 20 of 2016 arising out of Piro P.S. Case No. 209 of 2016 by which the appellants have been convicted for the offences punishable under Sections 376(2)/34 of the Indian Penal Code and Sections 4 and 6 of the POCSO Act and sentence of Rigorous Imprisonment for life has been awarded to the convicts with a fine of Rs. 50,000/- each



and, in default of payment of fine, additional sentence of rigorous imprisonment for one year to each appellant. Under Section 6 of the POCSO Act, Rigorous Imprisonment for life has been awarded to each appellant with a fine of Rs. 25,000/- each and, in default of payment of fine, additional sentence of rigorous imprisonment for one year to each appellant. Under Section 4 of the POCSO Act, rigorous imprisonment for seven years has been awarded to each appellant with a fine of Rs. 10,000/- each and, in default of payment of fine, additional sentence of rigorous imprisonment for three months to each appellant. All sentences have been directed to run concurrently.

2. As per the prosecution story, Sushil Kumar Tiwari, the informant, father of victim, gave a written report to the SHO of Piro Police Station on 02.07.2016 alleging therein that his co-villagers namely Hare Ram Sah and Manish Tiwari (both appellants) have committed rape with his minor daughter Victim X aged about 12 years by alluring and thereafter threatening her of dire consequence. It is further alleged that occurrence came to light when his Daughter fell ill and even after treatment her health deteriorated. Then he took his daughter to Baliya (U.P.) in his *sasural* for treatment, where she was treated in Zila Mahila Chikitsalaya, Baliya on 01.07.2016.



After test by doctor, she was found pregnant of 3 months and a few days. When the matter was inquired about from the victim girl, she told that both the appellants used to commit rape for several days. On protest, they used to give threatening and due to fear she did not disclose the matter to anyone. On the basis of written report of Informant, the instant F.I.R. was lodged as Piro P.S Case No. 209/2016 on 02.07.2016 for offence U/S 376(2)/34 of Indian Penal Code and Sections 4 and 6 of POCSO Act against the appellants.

3. During the course of trial, the prosecution has examined 7 witnesses namely, PW 1 – Arun Kumar Upadhyay, PW 2 – Victim girl (X), PW 3 – Madhu Devi, PW 4 – Noor Sultana, ACJM-5, Bhojpur, Ara, PW 5 – Sushil Kumar Tiwari, PW 6 – Punam Kumari, PW-7 Dr. Vijayata Prasad. As documentary evidence on behalf of the prosecution, Exhibit-1- Statement of victim under Section 164 of the Cr.P.C, Exhibit-2, Statement u/s 164 of Cr.P.C. was exhibited again, Exhibit-3, *fardbeyan*, Exhibit- 4 Injury Report, along with DW -1 Kamlesh Gupta, DW -2 Shiv Shankar Tiwari, DW-3 Babu Dhan Tiwari and DW4- Rajiv Ranjan was also recorded. After conclusion of the trial, the trial Court convicted the present appellants for the aforesaid offences as stated hereinabove.



4. Heard Mr. Pratik Mishra, Mr. Vatsal Vishal Mr. Ramashray Roy, learned counsel for the Appellants and Mr. Abhimanyu Sharma, learned APP for the State. Learned counsel for the appellants submits that, in the present case, the appellants have falsely been implicated in this case and further submitted that they have no relation with the victim. It has been only alleged that the accused persons raped her for several times separately.

5. Learned counsel further submitted that the accused persons have been implicated due to enmity. He further submitted that no independent witness has been examined by the prosecution and the statements of the witnesses are contradictory to each other. The age of the victim has not been determined in the medical examination. He also submitted that the informant has filed a false case against the accused. All the witnesses of the Defense have stated that at the time of the incident, the victim was living at her maternal uncle's house in district Balia and she did not live in the village of the accused. Accused Manish Tiwari has studied engineering and he lives outside the village, whereas appellant, namely, Hareram Sah is a teacher in a Government school and he also lives outside the village. Therefore, this offence has not been committed by these



two appellants. Therefore, the appellants should be acquitted of the charges levelled against them.

6. Learned counsel for the appellants submits that age of the victim has not been proved by the prosecution, i.e., the date on which the victim was allegedly raped by the appellants is nowhere stated in the F.I.R. and has been suppressed by the prosecution. However, the victim, examined as PW-2 has stated that the occurrence took place after Holi festival. She has further stated that the appellants had never raped her jointly but both of them had raped her multiple times for 3 months. He further submits that the delay in lodging the F.I.R creates doubt that she was raped by the appellants distinctly for months at various places in the village and she did not bother to inform her own family members and only when her pregnancy was revealed in front of her family, they thought of implicating the Appellants for the reasons best known to them. He further submits that place of occurrence is also not proved, moreover, both the appellants were examined under Section 313 of the Criminal Procedure Code and not a single circumstance regarding any place of occurrence has been put to them. They were also denied the opportunity to give plausible explanations to the other relevant circumstances such as date of



occurrence, manner of occurrence, frequency (maiden or multiple) and even the places where allegedly rape was committed and the omission to put the incriminating materials to both the appellants has caused serious and irreparable prejudice to them. He further submits that I.O., PW-6 has also stated that she had recorded the 161 statement of Himanshu Kumar Tiwari. However, for the reasons best known to prosecution, the brother of the victim has not been examined during trial and, as such, adverse inference shall be drawn against the prosecution. It is further submitted that omission on part of prosecution not to go for D.N.A. test non-examination of appellants under Section 3-A of the Cr.P.C caused prejudice to defence.

7. Learned counsel further referred the judgment passed by Hon'ble Supreme Court in the case of **Anand Ramachandra Chougule Vs. Sidarai Laxman Chougala and others**, reported in **(2019) 8 SCC 50** as under:-

“the burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt,



unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt. The learned counsel stated the fact that a defence may not have been taken by an accused under Section 313 Cr.P.C again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In Suil Kundue v. State of Jharkhand, this Court observed: when the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabalise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.”



8. Learned counsel further referred the judgment passed by the Hon'ble Supreme Court in the case of ***Kamalanantha and others Vs. State of T. N.*** reported in 2005 SCC (Cri) 1121 in which it has been held in paragraph No. 48 as under:-

“.....Even if we were to assume that there has been a misjoinder of charges in violation of the provisions of Sections 233 to 239 of the Code, the High Court was incompetent to set aside the conviction of the respondents without coming to the definite conclusion that misjoinder had occasioned failure of justice. This decision completely meets the argument based upon Dawson case. Merely because the accused persons are charged with a large number of offences and convicted at the trial the conviction cannot be set aside by the appellate court unless it in fact came to the conclusion that the accused persons were embarrassed in their defence with the result that there was a failure of justice. For all these reasons we cannot accept the argument of learned counsel on the ground of misjoinder of charges and multiplicity of charges.

(As per Section 233 – 239 of the Code of Criminal Procedure, 1898)

9. Learned counsel referring to Section 313 of



Cr.P.C has relied upon the judgment of Hon'ble Supreme Court in the case of *Indrakunwar v. The State of Chhattisgarh* reported in **2023 Live Law (SC) 932** of paragraph 34 as follows:

“34. A perusal of various judgments rendered by this court reveals the following principles, as evolved over time when considering such statements.

34.1 The object, evident from the Section itself, is to enable the accused to themselves explain any circumstances appearing in the evidence against them.

34.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.

34.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., audi alterum partem.

34.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.

34.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate



questioning.

34.6 The right to remain silent or any answer to a question which may be false shall not be used to his detriment, being the sole reason.

34.7 This statement cannot from the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case.

34.8 This statement is to be read as a whole. One part cannot be read in isolation.

34.9 Such a statement, as not an oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.

34.10 The circumstance not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain the.

34.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully



scrutinized and considered.

34.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision.”

10. On the other hand, learned APP and learned counsel for the informant have vehemently opposed the present appeal. Learned counsels submit that both the accused took undue advantage of the situation and raped a minor girl not once but repeatedly due to which, the minor girl became pregnant and she did not tell this to her parents due to fear and hesitation. When she started falling ill and her ultrasound was done by the doctor, it was revealed that she was pregnant and upon being asked, the names of these two accused and the time of rape were known, on the basis of which the parents of the victim went to the police station and filed a case. The statement given by the victim under Section 164 of the Code has also supported the prosecution story implicating the accused. The victim is a minor girl of 14-15 years. A serious offence has been committed against her and now, perhaps, her life will not return to the way as it was before the crime. Therefore, both the appellants are not only adults, they are much older than the victim and both the appellants are educated and are engineer and teacher, hence they are not to be forgiven in any way and they do not any sympathy



by this court. It is further submitted that the victim as well as her parents have deposed before the Trial Court against the appellants beyond reasonable doubt and no error apparent is committed by the Trial Court while passing the impugned Judgment of conviction and order of sentence. The learned APP, therefore, urged that the present appeal be dismissed.

11. Having heard the learned counsel for the parties and having gone through the material placed on record, it would emerge that the prosecution had examined 7 witnesses and defence has also examined 4 witnesses with a view to prove the case against the appellants.

12. PW-1, namely, Arun Kumar Upadhyay in his examination-in-chief has stated that his sister had come to his village to see (his *Baba*) and the victim was also sick. She was brought along, so he took the victim to Dr. B.K. Gupta in Baliya, where he got her X-ray and ultrasound done and after looking the ultrasound report, the doctor told that the victim was 3 months and a few days' pregnant. Then he brought the victim home and asked her. She was scared and told that the accused Hareram Sah and Manish Tiwari of her village seduced her and forcefully did wrongful act with her and threatened her that if she tells anything to anyone, they would kill her. Due to this



fear, she did not tell anyone at home. Thereafter, he stated that on the next day he and his sister (mother of the victim) alongwith the father of the victim went to Piro Police Station and lodged a complaint and the Inspector of Piro police station arrested the accused.

12.1. In his cross-examination, he has stated that upon looking at the ultrasound report, the doctor told that the victim was pregnant for 3 months and few days and because of this, her health was deteriorated. Later, the victim was made to undergo abortion in the government hospital, Ara after taking orders from Patna.

13. PW-2, who is the victim girl herself, has stated in her examination-in-chief that she used to study in a Government school, now she is studying in an English school. The incident took place after Holi in 2016. Her mother and father were not at home and she was alone at home sleeping in her house. Manish Tiwari entered the house and raped her. After raping her, he threatened her that if she told anyone of the family members, he would kill her. After two-three days of that, she went to Shivala to look for her brother Himanshu Kumar Tiwari in the evening. Harerem Sah's *dalaan* (sitting place) is on the way. When she asked him if he had seen her brother, he pointed



towards the *dalaan* and said that her brother is in that direction. When she went to the *dalaan*, no one was there. Then Hare Ram Sah came from behind and caught her. Hare Ram Sah then took her to the *dalaan* and raped her and threatened her that if she told anyone he would kill her. She was scared and did not tell anyone. After that for two-three months Hare Ram Sah and Manish Tiwari kept raping her. She fell sick and suddenly started having pain in her stomach and she also vomited, so she told her mother. She further stated that on the next day her mother brought her to the doctor in Ara. The doctor gave her medicines, but her health did not get better. Her mother went to Ballia and she also went with her. Her mother and her maternal uncle took her to a doctor in Ballia (U.P). The doctor tested her, did an ultrasound test. Her maternal uncle brought her home and when they asked, she told them that Manish Tiwari and Hare Ram Sah had raped her. The next day victim's maternal uncle brought her to Piro and a police report was written. She recognizes Hare Ram Sah and Manish Tiwari.

13.1 In her cross- examination she has stated that currently she is studying at her maternal uncle's village which is in Ballia (U.P). The house next to her is Manish Tiwari's house. There was no one in the house at the time of



incident. Her parents, her elder brother and grandfather lived in that house. The victim has also stated that she never talked to Manish Tiwari before the incident and Manish Tiwari did not talk to her brother. Before the incident, Manish Tiwari used to come to her house off and on. At one time, her father was injured and Manish Tiwari had come to drop him home. The incident took place during Holi in the month of March. On the day of the incident, Manish Tiwari came and he saw that she was alone and thereafter he raped her forcefully but she also stated that she had no injuries on any part of her body and she did not tell anyone in the village because she was scared. She also did not tell her parents due to fear. On the first day, she did not ask anyone for medicines for pain because she was scared. Manish Tiwari raped her several times. Manish Tiwari raped her outside of the house as well. Victim also stated that Hare Ram Sah raped her when she had gone to search for her brother. She never used to talk to Hare Ram Sah before the incident. She further stated that Hareram Sah runs a coaching center in a room at some distance from her house. Two-three days after the first incident when Manish Tiwari raped her, she went to look for her brother. When she went, she asked about her brother and Hare Ram Sah told her that her brother was there, and he came and



caught her from behind and took her to the coaching center. There was no one there at that time. He forcefully shut her mouth and raped her for ten to fifteen minutes. He was raping her and had forcefully closed her mouth with one hand. After raping her, he threatened her that if she tells anything, he would kill her. She stated that there were blood stains on her under pant. She was in pain while going home from there. When she went home, no one was there at that time. The Victim girl, thereafter, stated that, Manish Tiwari and Hareram Sah never raped her collectively and they did it separately. Hareram Sah also raped her many times. They raped her for several times for three months. They used to rape her when they found her alone. Hareram Sah also raped her in the school in the evening. She then stated that, apart from these two, no other person has raped her.

14. PW-3 is Madhu Dev. She has stated in her examination-in-chief that at the time of the incident, the age of the victim was 12 years. The incident occurred one and a half years ago. The victim was unwell and she brought the victim to Dr. Ram Rajan Sharma in Ara. She was undergoing treatment. Meanwhile, her grandfather's health deteriorated, so she went to the village to see him, but her father-in-law and husband (father



of the victim) advised her to take the victim to the doctor there as she was also ill. Then she took the victim to the doctor in Baliya, he got her ultrasound done and after seeing the ultrasound, the doctor told her that the victim was 3 months and a few days pregnant. Then when she asked her daughter about the same, she told her that the accused Manish Tiwari entered the house and raped her forcefully and threatened her that he would kill her. Due to this fear, she did not tell anyone. The victim also told P.W-4 that Hare Ram Sah had also raped her forcefully and threatened to kill her. The victim also said that both of them forcefully raped her several times. Then P.W-4 came back to her village and went with her husband to Piro Police Station and lodged a complaint.

14.1. In her cross-examination, she has stated that permission was taken from Patna for the abortion of the victim and abortion was done after a few days. She has further stated that accused Hare Ram Sah is a teacher. He teaches in another village and accused Hare Ram's coaching is 4-5 houses away from her house. The victim was a minor, so she cannot tell about her menstruation cycle. She has also stated that it is not true that the incident is fabricated.

15. Prosecution witness No. 5 Sushil Kumar



Tiwari has stated in his examination-in-chief that the victim is his daughter. At the time of occurrence, she was 12 years old. The incident occurred two years ago. The incident occurred in Lahri Tiwaridih village and he had gone to his second village Baijnathpur. It was afternoon. When his daughter was sleeping in the house, the accused Manish Tiwari entered the house and raped his daughter and his daughter was threatened that if she tells anyone, she would be killed. 2-3 days after this incident, when his daughter went to the village to look for her brother Himanshu Tiwari, the accused Hare Ram Sah also deceived her and raped her. His daughter told him about these incidents. After the above two incidents, both the accused persons have raped his daughter several times. His daughter's health deteriorated. On 01.07.2016, when he took her to a doctor in Baliya, Uttar Pradesh, the doctor told him that she was 3 months and a few days' pregnant. Then his wife and his brother-in-law questioned his daughter and she told that Manish Tiwari and Hareram Sah had raped her. After this, they all went to Piro police station and filed a case. The witness also identified both the accused.

15.1 In his cross-examination, he has stated that his in-laws' house is in Baliya district. In Baliya, his wife and



wife's brother took the girl for treatment. On the same day, the doctor told that his daughter was 3 months and a few days' pregnant. After questioning his daughter, all of them went to the police station and filed a case. He did not talk to anyone in the village about the incident. At the time of the incident, his daughter was studying in class 7. Accused Hare Ram Sah's coaching is 5-6 houses away from his house. Accused Hare Ram Sah is a teacher. He has stated that he got the girl's abortion done in Sadar Hospital, Ara and he had taken permission for this from Patna High Court. He also stated that it is wrong to say that he has filed a false case.

16. Prosecution witness No. 7 Dr. Vijayeta Prasad who conducted the medical examination of the victim on 02.07.2016, after the examination found the points and facts about the victim which are as follows:-

Mark of Identification :-

1. A wound mark in left index finger.
2. A cut mark on right thumb.

Medical History:-

1. LMP- ??, menarche- ??, MH-??,

Dentician 14/14(unerupted 3rd molar).

Secondary Sexual Character well developed.



On P/V examination Hymen rupture, Vagina admit 2 fingers.

No any injury found on her private area.

Microscopical examination of Vaginal Swab report shows either Alive or Dead (Negative).

According to USG report- Single Viable intrauterine gestation corresponding to a gestational age of 16 weeks.

According to X-ray report show SHA Ara IGEMS-65.

X-Ray right Wrist – epiphysis of Ulna and Radius not fused.

X-Ray right elbow – epiphysis around elbow fused.

X-Ray Pelvis – Iliac crest appeared and not fused.

Report is written and signed by me. Marked as Ext. 4

16.1. After conducting medical examination of the victim, the doctor has found in his report that the victim's hymen was ruptured. Secondly, on the basis of the ultrasound report, the doctor has also found that the victim was approximately 16 weeks pregnant.

17. PW- 6, namely, Punam Kumari has stated in her examination-in-chief that on 02.07.2016, she was posted as S.H.O. in Mahila P.S. Ara. On that day, Piro P.S. Case No. 209 of 2016 dated 02.07.2016 was registered under Section 376 (2) / 34 IPC and Sections 4 and 6 of POCSO Act and the S.H.O., P.S. Piro informed her over phone. Then in the light of the



information, she went to Piro Police Station and took over the charge of the investigation there. She has further stated that in the course of investigation, the statement of the victim was recorded. The place of occurrence was also inspected. The place of occurrence is a porch of one room of the FIR named accused Hare Ram Sah located in village Lahari Tiwaridih under Piro police station. The said accused/appellant runs a coaching center in this room and he is said to have committed the offence with the victim. She further says that in course of investigating, the statement of Sudarshan Tiwari, informant's re-statement, Himanshu Tiwari's statement, Arun Kumar Upadhyay's statement, Madhu Devi's statement were recorded. She further got the victim medically examined and obtained the victim's medical report. The victim's statement was recorded under Section 164 of Cr.P.C. Statement of witnesses Rahul Tiwari and Gautam Tiwari were recorded and after finding the occurrence to be true, Charge Sheet number 163/2016 was submitted against accused Hare Ram Sah and Manish Tiwari under Section 376 (2) / 34 IPC and Section 4 and 6 of POCSO Act.

17.1. In her cross-examination, she has stated that the ultrasound report is in the annexure with the FIR, the age of the victim is mentioned as 15 years as on 01.07.2016. She



had requested for determination of age of the victim in Sadar Hospital, Ara but she does not know whether the doctor did it or not. She says that she came to Ara from Piro with the victim and her mother but it is not mentioned in the case diary. The statement of the victim was recorded under Section 164 of Cr.P.C. and medical examination was done and during that time victim was with her. On 02.07.2016, the medical examination of the victim was done and on 04.07.2016, the statement of the victim was recorded under Section 164 of Cr.P.C. She further stated that the victim had told her in her statement that 3-4 months ago, when she was alone at home, the accused Manish Tiwari came to her house and raped her. This fact is not mentioned in the case diary. PW-6 further stated that the victim had also told her that both the accused raped her several times. PW-6 did not record the statements of the doctors and also she did not record the statements of the people living in the vicinity of the place of occurrence. She also did not obtain the birth certificate of the victim from the school. The accused persons were arrested by the S.H.O.

18. DW-1 is Kamlesh Gupta. He has stated in his examination-in-chief that Manish Tiwari and Hare Ram Sah both belong to his village. Manish Tiwari has studied



engineering. Manish used to work after completing engineering course. Hare Ram Sah is a teacher in a Government School. Both of them have good character. D.W-1 has stated that he also knows the victim. She used to live at her maternal uncle's house in Baliya. She stayed in his village 2-4 months before the incident in 2016.

18.1. In his cross-examination, he has stated that he too had gone to jail in a liquor case earlier. He does not know when the victim's family members come and go to the house.

19. Defense witness No. 2 Shiv Shankar Tiwari has stated that both the accused belong to his village. Both have good conduct. Hare Ram is a teacher and Manish Tiwari is an engineer. He has stated that in 2016, the victim lived in Baliya and studied there. The victim's grandfather Sudarshan Tiwari had filed a case against 10-12 persons of the village. But he does not know against whom the case was filed.

19.1. In his cross-examination, he has stated that the accused Hare Ram Sah and Manish behaved well with him and, hence, he has stated that both the accused have good character. He further stated that he did not give statement before the police.



20. Defense witness No. 3 Babudhan Tiwari stated in the examination-in-chief that he was the Mukhiya of Lahri Tiwaridih, Gram Panchayat, Bhadsar since 2006-2011. He knew both the accused. Both are co-villagers. Manish Tiwari studied engineering and worked in Indore. Hare Ram Sah is a teacher in Jasidih. He further stated that both have good conduct and the victim was living at her maternal uncle's house in Baliya district in 2016.

20.1. In his cross-examination he has stated that he did not know that a molestation case had been registered against Hare Ram Sah earlier. The Police had not recorded his statement and it is not true that he is hiding the truth to save the accused.

21. Defense witness No. 4 is Rajiv Ranjan. He has stated in his examination-in-chief that he knew Hare Ram Sah. He is a teacher in Jasidih and the deponent is a BLO in Jasidih. The conduct of the accused Hare Ram Sah is good.

21.1. In his cross-examination he has stated that he knew Hare Ram Sah since 2007. He did not know that even before this, a case of molestation was registered against Hareram which case number is Piro Police Station Case No. 172/2002.



22. We have considered the submissions canvassed by the learned Advocates appearing on behalf of the parties. We have also perused the material placed on record, including depositions. From the evidences led by the prosecution, it would emerge that the prosecution had examined seven witnesses.

23. Further, in the light of the above evidence, the victim herself has taken the names of the accused Manish Kumar Tiwari and Hareram Sah, both of whom are her villagers, have raped her several times on different occasions, as a result of which the victim became pregnant. The doctor also confirmed that she has conceived. All the four witnesses of the Defense also only give certificates to the accused that they are of good character but why the victim has made false allegations, even the Defense witnesses are not unanimous on this.

24. From the above contentions raised by the Learned counsel for the appellants and judgments referred by the Learned counsel, it is clear that for instance, the age of the victim who is a minor is not proved during the trial. The place of occurrence as well as the accused persons who had raped the victim, the time of the incident has also not been proved in the trial.



25. The Code lays down various provisions with regard to the framing of charges against an accused. On perusal of charge sheet dated 06.12.2017, it is mentioned that the date of occurrence of the incident was on 02.07.2016, but the *ferdbeyan* dated 02.07.2016, states that the daughter of the informant was pregnant for three months and few days as according to the treatment of the victim which was done on 01.07.2016. Further, on perusal of the F.I.R and case diary, the statement of the victim which is in para-3 of the case diary dated 02.07.2016, she has stated that the first incident, where Manish Tiwary (appellant no. 2) raped her three to four months back during the time of Holi and after a few days, the victim stated that Hare Ram Sah (appellant no. 1) raped her while she was searching for her brother. It is factually impossible that the incident was reported on 01.07.2016 and the charge was framed for the occurrence of incident dated 02.07.2016, but the *ferdbeyan* and the statement of the victim itself states that the incident had occurred three to four months before the F.I.R was filed.

26. Thus, it is clear to us that the charges framed are not in accordance with law and, thus, causing prejudice to the accused persons / appellants as mentioned in the trial court record. The framing of charge is the most basic step of the



process of initiation of a trial in a criminal proceeding. Utmost care must be taken while the charges are being framed as wrong framing may lead to denial of justice. Therefore, one should abstain from wrongful framing and joinder of charges as such an inefficiency would vitiate the very basic essence of a fair trial.

27. As per the depositions and the evidences it can be contended that the victim was pregnant and she was examined in Balia (U.P.) and as per the opinion of the doctor she was pregnant for three months and few days but during the course of trial the doctor who gave the opinion of pregnancy was also not examined. Any document relating to abortion has also not been submitted by the prosecution in the present case. P.W.7., the doctor who had examined the victim has stated in his report that to conceive pregnancy menstruation is must. But the mother of the victim has stated that the victim was not menstruating.

28. Further, in a trial of POCSO Case, the determination of age of the victim is a mandatory provision. As per Section 34(2) of the POCSO Act, the age of victim must be determined by the trial Court and this mandatory provision was not adhered to by the learned trial Court. Section 34, POCSO Act merely prescribes procedure in case of commission of



offence by child and determination of age by Special Court. It reads as under: -

Section 34 (Procedure in case of commission of offence by child and determination of age by Special Court)-

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of [the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”

29. Apparently, as per bare reading of heading of Section 34, it envisages a situation where a wrongdoer is found to be a child. Section 34(1) stipulates that where any offence under POCSO Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice Act



(hereinafter referred as JJ Act). Thus, in any such situation, the Special Court ceases to have any further jurisdiction and such juvenile in conflict with law is required to be dealt with as per mandate of J.J. Act. Further, As per Section 94 of J.J. Act, whenever any person is brought before the Child Welfare Committee or Juvenile Justice Board and there are reasonable grounds for doubt regarding the age of such person, the Committee or the Board shall undertake the process of age determination, by seeking evidence.

30. The Learned co-ordinate Bench of this Court in the matter of ***Sakindar Yadav Vs The State of Bihar in Criminal Appeal (DB) No.945 Of 2017*** has held in Paragraph-12 that-

*“.....In view of the authoritative pronouncement of the Hon’ble Supreme Court in the case of **Jarnail Singh versus State of Haryana reported in (2013) 7 SCC 263**, it is clear that the word ‘person’ in Section 34(2) of the POCSO Act includes not only a child who is accused of committing an offense but also a child who is a victim of the offense. The legislative intent behind using the word ‘person’ cautiously has to be paid proper homage by interpreting the word ‘child’ in a broader manner to include even a ‘child victim’. Thus, Section 34(2) of the*



POCSO Act casts a positive duty on the Special Court to satisfy itself with recorded reasons as to whether the 'person' is a child or not. Establishing the minority of the victim child is a condition precedent to proceeding with a case under the POCSO Act. However, in the present case, there is no such finding by the learned trial court regarding whether the victim was a child at the time of the alleged occurrence. Non-compliance with such procedural requirements amounts to a failure of justice, and the benefit should certainly go in favor of the accused" (emphasis supplied)

31. While the learned counsel for the appellants were arguing the matter before this Court, we raised a query that whether Section 223 of the Code has been taken into account as the first appellant and second appellant have committed the same offense as stated in the FIR, but they both were never in collusion or with meeting of minds to collectively rape the victim. Learned counsel for the appellants stated that joint trial was done but the application of Section 223 of the Code in this case was not done.

32. Before proceeding further, we have to consider the provisions of Section 223 of the Code which is as follows:-

"The following persons may be charged and



tried together, namely;

(a) Persons accused of the same offence committed in the course of the same transaction;

(b) Persons accused of an offence and persons accused of abatement of, or attempt to commit, such offence;

(c) Persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) Persons accused of different offences committed in the course of same transaction;

(e) Persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abatement of or attempting to commit any such last-named offence;

(f) Persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those Sections in respect of stolen property and the possession of which has been transferred by one offence;

(g) Persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abatement of or attempting to commit any such offence; and the provisions



contained in the former part of this Chapter shall, so far as may be, apply to all such charges;

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this Section, the Magistrate or court of Sessions may, if such persons by an application in writing, so desire, and if he or it is satisfied that such persons would not be prejudicially affected thereby, and it is expedient to do so, try all such persons together.”

33. Considering the above provision of the Code, the present case of the appellants is nowhere applicable for joint trial and learned trial Court has convicted both the accused persons through a joint trial. For a joint trial to be conducted for two persons committing an offence at different place and at different time, the trial Court shall mention this on record or an application should be moved for conducting a joint trial, and the learned Trial Court shall apply a judicial mind while considering the matter, and the Judicial Officer while performing the duties shall make sure that the procedure prescribed in the Code is followed and no prejudice be caused to any person. But, in the present case, on perusal of the entire record, no such application or mention of conducting joint trial has been brought on record. This causes a great prejudice on the



accused persons as the victim herself states in para-30 of her deposition that both the appellants raped her at different time at different places and they never raped her together. If it would have been the case where the accused persons had raped her together, the provision of 376D would have been attracted and it would be a case of gang rape. This is not such case and both the appellants must have been tried in separate trials and should be considered by laying down separate evidences for the accused persons, considering the provision of Section 223 of the Code.

34. In the matter of **Hirday Singh and others vs Emperor**, reported in **AIR (33) 1946 Patna 40**, The **Court of Justice Meradith and Imam** has held that:

“As to what is the same transactions must depend upon the fact and circumstance of each particular case. It is not the distance nor the proximity of time which is so essential in order to consider what is “the same transaction” as the continuity of action and purpose. The carrying out of a successful dacoity, that is to say, successful not only in securing the loot but carrying it off, inevitably involves previous concert and planning” and continuity of action in carrying out the joint purpose can be said to continue until the stolen property has been successfully got away to the place of concealment. Where the dacoits are intercepted



which still returning home with their booty and some of them being arrested with the booty, they are rescued, not by friends or sympathisers from their village, but by others of their number, who are returning behind them and who also have not reached home, in such as case from the time the dacoits set out on their expedition until they get safely home with their booty, everything done by the dacoits, which is directed towards the successful completion of the crime, the getting away of the culprits, and the concealment of the bounty, can fairly be described as part of the same transaction.”

35. Similarly, Calcutta High Court, in the Case of **Mozam Dafadar And Ors. vs Emperor, AIR 1933 Calcutta 563**, held that-

“The question of joint trial of the accused: Trial of appellant 5 charged for abduction as mentioned in 8 365, I.P.G. and not for kidnapping and abduction, for the commission of which offence appellants 1 to 4 were charged and the trial of appellant 6 under Section 368 with the other appellants under Section 366 was a procedure which could not be supported. We are decidedly of opinion that the joint trial of this kind could not be supported. We are decidedly of opinion that the joint trial of this kind could not but have, and had in fact prejudiced the appellants in



their defence. In the above view of the case before us the conviction of the appellants after a trial which was irregular and not in accordance with law, could not be maintained. It was necessary therefore to consider whether the appellants should be retried after proper charges have been framed against them according to law, a joint trial of all the appellants for separate and distinct offences being avoided in the interests of justice. The evidence in the case placed before the Court which was fairly summed up by the Judge in his charge to the jury, was not such as could lead to a unanimous verdict of the jury; the jurors were divided in the proportion of three to two. The Judge's order, recorded at the time of his passing sentence, indicates some disinclination on his part to accept of the jury, as returned. Taking everything into consideration, and confining ourselves to the evidence placed before the jury, we are not satisfied that the case before us is one in which a re-trial should be directed. In the result therefore the appeal is allowed. The conviction of the accused appellants in this case, and the sentences passed on them are set aside. The appellants are acquitted, and to be set at liberty, and discharged from their bail bonds."

36. In '**Raghu Dusadh v. Emperor**', AIR



1930 Pat 159 (B), a Division Bench case of this Court, the facts were that a thief was captured, and, while he was being led by the complainants, several persons armed with deadly weapons assaulted the latter and rescued the thief. The thief and the rescuers were jointly tried. The former for theft and the latter for rioting and hurt. There was no evidence, as in the present case, to show that the rescuers had acted in collusion with the thief in the act of theft, and had stood by to rescue him. In these circumstances, their Lordships held that the joint trial was bad as there was no evidence to show that the offence of rioting and the use of deadly weapons upon the complainants were part of the same transaction as the offence of theft. There are decisions to this effect of the other High Courts also, but it is not necessary to multiply the authorities on the point when a Division Bench of this Court is clear on this point. On consideration of the authorities and of the facts and circumstances of this case, the Co-ordinate Bench in the matter referred above was of the opinion that petitioners could not be tried together for the two sets of offences alleged to have been committed by them, and, therefore, it follows that the joint trial was bad in law.

37. Placing our reliance on **Harjinder Singh Vs State of Punjab and others, 1985 SCC(Cri) 93** it



was held that:

“In the facts and circumstances of this particular case we feel that the proper course to adopt is to direct that the two cases should be tried together by the learned Additional Sessions Judge but not consolidated I.e the evidence should be recorded separately in both the cases one after the other except to the extent that the witnesses for the prosecution who are common to both the cases be examined in one case and their evidence be read as evidence in the other. The learned Additional Sessions Judge should after recording the evidence of the prosecution witnesses in one case, withhold his judgment and then proceed to record the evidence of the prosecution in the other case. Thereafter he shall proceed to simultaneously dispose of the cases by two separate judgments taking care that the judgment in one case is not based on the evidence recorded in the other case. In Kewal Krishan case, this Court had occasion to deal with a situation as the present, where two cases exclusively triable by the Court of Session, one instituted on a police report under Section 173 of the Code and the other initiated on a criminal complaint, arose out of the same transaction. The Court observed



that to obviate the risk of two courts coming to conflicting findings, it was desirable that the two cases should be tried separately but by the same court. The High Court was largely influenced in upholding the order of the learned Additional Sessions Judge by the fundamental right of the accused guaranteed by Article 20(2) of the Constitution and Section 300 of the Code which provides that no person shall be prosecuted and punished for the same offence more than one. If there is no punishment for the offence as a result of the prosecution, sub-clause (2) of Article 20 has no application. The constitutional right guaranteed by Article 20(2) against double jeopardy can still be reserved if the two cases are tried together but not consolidated I.e the evidence be recorded separately in both cases and they be disposed of simultaneously. Further, the second prosecution must be for the 'same offence'. If the offences are distinct, there is no question of the rule as to double jeopardy being applicable."

38. The proviso of Section 223 states that where a number of persons are charged with offences and such persons do not fall within any of the categories specified in this Section, the Magistrate or Court of Sessions may, if such



persons by application in writing, so desire, and if he or it is satisfied that persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together. As per the provision, if therefore, persons more than one are to be charged and tried together, their case must be brought within any of the clauses of Section 223 of the Code or any other provision of the Code and the burden is always on the prosecution to justify a joint trial. The Court, however, when several persons are tried together, must clearly and explicitly distinguish between them and point out as to how the evidence affects them individually. When facts of two incidents occurring at different place and at different times, there is no similarity between the incident, we cannot take such position that both incidents took place as a result of same transaction and joint trial conducted against the accused persons/appellants could be ordered to be conducted jointly.

39. The words “same transaction”, as per the Section 223 comprise of all acts of a person concerned which are done in one series in the course of carrying the affair in question or which are in direct or immediate casual or circumstantial relation thereto. The test of this provision is to indicate as to whether there is connection between the act and there is certain



degree of continuity of action and the circumstances of the case. The same transaction must comprise of all acts of all the persons concerned, which is done in course of carrying through the matter in question. Continuity of action is not intended in the sense that one act must immediately follow the other without connection. If one act is contemplated by itself and has no connection with the other act which is done either simultaneously or immediately after the earlier one, it cannot be said that there is continuity of action. The unity of time and place are the best tests. The mere fact that same offences were committed in different times and also at different places by different accused persons against one victim girl is not enough to make them a part of same transaction or to have committed in the course of same transaction. In this view, we do not think that the authorities and the evidences available on record convinces us that two offences committed by the above appellants were committed in the course of same transaction. Therefore, the trial is bad an account of mis-joinder of persons accused/appellants.

40. Thus, from the aforesaid deposition of the prosecution-witnesses, we are of the view that there are major and substantive inconsistencies in the deposition of the prosecution witnesses examined and taking into account the



entire evidence available on record, we come to the conclusion that the trial conducted is bad in law and has caused prejudice to the appellants and we hold that the trial is vitiated.

41. The Three Judge Bench of Hon'ble Supreme Court in the case of **Nasib Singh vs The State Of Punjab**, AIR ONLINE 2021 SC 871, in Para- 38 has held that-

“From the decisions of this Court on joint trial and separate trials, the following principles can be formulated:

(i) Section 218 provides that separate trials shall be conducted for distinct offences alleged to be committed by a person. Sections 219 - 221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with may be conducted. Similarly, under Section 223, a joint trial may be held for persons charged with different offences if any of the clauses in the provision are separately or on a combination satisfied;

(ii) While applying the principles enunciated in Sections 218-223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely, (i) whether conducting a joint/separate trial will prejudice the defence of the accused; and/or (ii) whether conducting a



joint/separate trial would cause judicial delay.

(iii) The possibility of conducting a joint trial will have to be determined at the beginning of the trial and not after the trial based on the result of the trial. The Appellate Court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of accused or the prosecutrix;

(iv) Since the provisions which engraft an exception use the phrase 'may' with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice; and

(v) A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be."

42. As per the principles laid down by the Hon'ble Supreme Court, and the two pronged test satisfies this case that the joint trial conducted has prejudiced the defence of the accused and has successfully proven to cause a miscarriage of justice. In view of the aforesaid facts and circumstances of



the present case, we are of the view that the prosecution has failed to prove the case on various grounds. The conviction of the present appellants is not being set aside on the mere ground that the procedure of Section 223 of the Code has not been adhered to but there are numerous laches on the part of the prosecution in proving the case beyond reasonable doubt. The learned Trial Court has also failed to consider the fact that Section 223 was applicable in this matter, but the same has not been considered in this case and the appellants have been tried jointly, causing prejudice to the appellants, despite which, the learned Trial Court has recorded the impugned judgment of conviction and the order of sentence. As such, the same are required to be quashed and set aside.

43. Accordingly, the impugned judgment of conviction dated 03.08.2019 and order of sentence dated 09.08.2019 passed by learned Special Judge, POCSO Act, Kaimur at Bhabhua in connection with POCSO Case No. 20 of 2016 arising out of Piro P.S. Case No. 209 of 2016 are quashed and set aside. The appellants, namely, Hare Ram Sah and Manish Tiwari are acquitted of the charges levelled against them by the learned Trial Court.

44. Since, the appellants are in custody,



they are directed to be released from custody forthwith, if their custody is not required in any other case.

45. The appeal stands allowed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

Brajesh Kumar/-
Anand Kumar/-

AFR/NAFR	AFR
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