

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1276 of 2019**

Arising Out of PS. Case No.-304 Year-2017 Thana- NAGAR District- Vaishali

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ASHOK MAHTO Son of Late Moti Mahto Resident of Village-Minapur, P.S.-
Hajipur Town, District-Vaishali.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Abhay Kumar, Advocate Mr. Dhananjay Kumar, Advocate Mr. Ashutosh Sahay Verma, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE DR. ANSHUMAN
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 18-10-2024

The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as ‘Code’) challenging the judgment of conviction dated 17.08.2019 and order of sentence dated 22.08.2019 passed by learned Additional Sessions Judge-1st-cum-Special Judge, POCSO Act, Vaishali, Hajipur in G.R. No. 1908 of 2017, arising out of Town P.S. Case No. 304 of 2017, whereby the concerned Trial Court has convicted the present appellant for the offences punishable under Section 376(2)(N) of the Indian Penal Code (hereinafter referred to



as I.P.C.) and Section 4 and 6 of POCSO Act. Considering the provisions of Section 42 of POCSO Act, he has been sentenced to undergo R.I. for 12 years for the offence under Section 6 of POCSO Act along with a fine of Rs. 50,000/- and, in default of payment of fine, he has been sentenced to undergo S.I. for six months. However, there is no separate order of sentence for offence under Section 4 of the POCSO Act. He has been directed to pay 95% amount of fine to the victim and 5% to Government.

2. The crux of the prosecution story is as under:-

2.1. The victim is a student of Standard-VII of Awadh Bihari School. There is a Government Middle School behind her house where a shopkeeper sells snacks. Her friend and she herself used to go there to eat during tiffin time. Sometimes, when her friend was not around, she would go there alone. Ashok Mahto (the accused) was old and her neighbor. That is why she used to go to his shop to get *kachori* and *phulori*. In the meantime, Ashok Mahto said that he wanted to talk to her about something important in private. On this, when she went to his shop where he said that he would tell her something which she should not tell anyone. After that, he made her swear and after taking her oath, he took her to a maize field and opened her pants and tried to commit wrong act with her. When she protested, he told her that she has



sworn in and if she would not allow him to do wrong things, he will get her parents into trouble. Because of that, she was very scared and she started crying. After that he made her keep quiet and raped her while molesting her. Out of fear, she could not say anything at her home. During second time, he told her from beside her house to go to the same maize field that day. When she went to the maize field, he told her to let him commit rape, otherwise he would kill her. After that, he forcibly started raping her. After that, she came home but did not tell her mother or any other family members about this. After that, the accused started calling her at the interval of every three days and started giving her 20 or 30 rupees after raping her. He kept on doing this for the next two months. Then, as soon as she saw him, she used to hide somewhere. In case he would see her again, he would ask her to go with him. She never consented to this. In this way, there was a gap of a few days in between. Then, like this, for the last one week, he started to forcibly rape her by calling her every alternate day. On 06.05.2017, he took her to ruins which was situated at some distance from her house where he started raping her. On 08.05.2017, at 12:30 hours, he said her to come with him. Then she told him to wait and said that she would go after some time because she did not want to go. Then, she went to Mali Complex to commit suicide. After going there, she was thinking of



ways to die. Then, her father saw her there and started asking her what she was doing there. When she did not tell him anything, he started scolding her and brought her home while scolding. Then, after being asked a lot and after being sworn in, she told her family about the incident that the accused Ashok Mahto always used to rape her. After that, her cousin brother Raushan Singh brought her to the Police Station on a bike along with her mother.

2.2. After registration of the F.I.R., the Investigating Officer started the investigation and during the course of the investigation, he had recorded the statement of the witnesses and thereafter filed the charge-sheet against the appellant/accused before the concerned Magistrate Court. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the same to the Sessions Court where the same was registered as G.R. No. 1908 of 2017.

3. Heard learned counsel Mr. Abhay Kumar for the appellant assisted by Mr. Dhananjay Kumar and Mr. Ashutosh Sahay Verma and Mr. Sujit Kumar Singh, learned A.P.P. for the respondent-State.

4. Learned counsel for the appellant, at the outset, submitted that the present is a case of false implication, wherein the appellant has been falsely implicated because of the land dispute as



well as the dispute with regard to the election between the concerned parties. Learned counsel has referred the deposition of the prosecution witnesses and thereafter submitted that the prosecution has examined only interested witnesses who are relatives of the victim. The prosecution has failed to examine the independent witnesses. Though the Investigating Officer has recorded the statement of the independent witnesses, it is further submitted that there are major contradictions, discrepancies and inconsistencies in the version given by the prosecution witnesses and the victim cannot be termed as sterling witness. Thus, simply relying upon the deposition given by the victim, conviction cannot be recorded. It is further submitted that even the medical evidence does not support the case of the prosecution. Learned counsel submits that though the prosecution has failed to prove the case against the appellant beyond reasonable doubt, the Trial Court has convicted him and, therefore, the impugned judgment and order be quashed and set aside. At this stage, it is further submitted that it is the case of the prosecution that the victim girl was a minor at the time of incident and, therefore, it was the duty of the prosecution to prove that the victim was a minor by leading documentary evidence. It is contended that though it is a case of the victim and her parents that the victim was studying in school, the Investigating



Agency has failed to collect the documentary evidence with regard to the age of the victim. Learned counsel, therefore, urged that even the conviction recorded by the Trial Court under the provision of the POCSO Act is not tenable in the eyes of law.

5. Learned counsel has placed reliance upon the following judgments rendered by this Court in support of his contention:-

(i) **Sakindar Yadav & Anr. Vs. The State of Bihar, in Criminal Appeal (DB) No. 945 of 2017.**

(ii) **Deepak Kumar & Anr. Vs. The State of Bihar, in Criminal Appeal (DB) No.586 of 2023.**

(iii) **Chandan Singh & Ors. Vs. The State of Bihar, in Criminal Appeal (DB) No. 1142 of 2019.**

6. On the other hand, learned A.P.P. has opposed the appeal. Learned A.P.P. would mainly contend that, in the present case, the victim is a minor girl studying in Standard-VII. From the deposition given by the Doctor (PW-11), it is revealed that the age of the victim was between 9-11 years. It is submitted that merely because the prosecution has failed to produce documentary evidence with regard to the age of the victim, it cannot be said that the prosecution has failed to prove that the victim was minor. Learned A.P.P. would further submit that the victim, her parents and



other prosecution witnesses have supported the version of the prosecution. Even the medical evidence supports the case of the victim and, therefore, the Trial Court has not committed any error while passing the impugned judgment and order. Learned A.P.P., therefore, urged that the present appeal be dismissed.

7. We have considered the submissions canvassed by the learned counsels for the parties. We have also perused the evidence of prosecution witnesses and also perused the documentary evidence exhibited.

8. At this stage, we would like to appreciate the entire relevant evidence led by the prosecution before the Trial Court.

9. Before the Trial Court, prosecution examined 13 witnesses.

10. PW-1 is the victim herself. She has deposed, in her examination-in-chief, that the accused Ashok Mahto, who is like her grandfather, used to live next to her house. She used to go to his shop to buy *kachori-pakoda*. When she went there one day, he made her swear on her parents that she will not tell anyone. When she swore, he asked her to go to the field. She understood and told him that she would tell her father. He said that if she tells anyone, he would implicate her in front of everyone and kill her



parents. He started threatening her like this and she got scared. After that, he took her forcefully to the field. He took her to the maize field and raped her. After that, when he tried to give her money, she did not take it and started crying. There was blood in her urinary tract. After a day or two, he started calling her and then raping her. She has stated that he has raped her a lot of times. He has raped her for 4-5 months. She used to hide from him and when he would see her, he used to do the same thing. Last time, on Saturday, he asked her to do the same thing. She told him that she would come and then she went to the bypass road to commit suicide. When her father saw her, he asked her why she had gone there. She did not tell her father because she was afraid that the accused might kill him. After that, he persuaded her a lot, so she told him everything. After that, her father called the accused Ashok Mahto and brought him to her house. A fight broke out due to that between her father and the accused over the same issue. After that, the accused was caught and sent to jail. In Para-3 of her deposition, she has stated that a month ago, Ashok's son, namely Rajesh Mahto, fought with her father over the same issue and tried to strangulate him. Further, in Para-6, she has stated that *darogaji* took her clothes for examination and made a Seizure List and sent it for



investigation. *Darogaji* recorded her statement during the course of investigation.

10.1. In her cross-examination, she has deposed that she can not tell how far the school is from her house. The school where she studied was aided. All her brothers and sisters study in school and college. In Para-9 of her cross-examination, she has stated that the accused's house is across the street from her house facing each other. On the day of incident, she came upstairs at 05:30 in the evening. It is stated that the accused and his wife were getting beaten but his wife did not get injured in that beating. It is not that her family members and her father's friends beat up the accused Ashok Mahto and his wife for not voting for his candidate in the election. In Para-10, she has stated that the bypass is at a distance of 2-3 kilometers from her house. She reached bypass at 05:30 in the evening. She left her house 10 minutes earlier. The clothes which she was wearing were seized. She came from the bypass on foot with her father. She has further stated that she went to the Police Station at night and was at the Police Station for the whole night. The Doctor examined her body. It took the Doctor half an hour to examine her body. She was examined on the same day at night during which she has denied the suggestion that Ashok Mahto had not committed such heinous act of rape with her and that



because of the past feud between the accused and her family members, and to save themselves from the charge of assault to Ashok Mahto, her family members tried to falsely implicate the accused in the heinous crime of rape under a conspiracy. In her statement recorded under Section 164 of the Code, she has stated that she narrated the incident to her father on which her father quarrelled with the accused Ashok Mahto. She has come to depose with her parents.

11. PW-2 Nirmala Devi is the mother of the victim girl. She has deposed, in her examination-in-chief, that the incident happened at around 05:00 p.m. Her daughter was 11 years old at that time. Ashok Mahto raped her daughter. Her daughter informed her that the accused Ashok Mahto raped her. After that, she told about this incident to her husband. Her husband brought her daughter from Malik Complex, where she had gone to commit suicide. On enquiring, she told him about the said incident. After that, her husband called Ashok Mahto and an altercation took place. Her daughter's urinary tract was bleeding. After that, she got her daughter treated at Sadar Hospital, Hajipur. *Darogaji* recorded the statement of the victim there.

11.1. In her cross-examination, she has stated that Ashok Mahto's house is in front of her house and there is a



road in between. She has further stated that the victim girl studies in school and is still studying. Further, in Para-9, she has stated that she took the victim to the Sadar Hospital for treatment. Blood was coming out of her urinary tract and the Doctor had seen blood coming out. She did not give the blood-stained clothes to anyone but kept it to herself. She has further stated that it is not a fact that she and her husband along with her husband's friends together assaulted Ashok Mahto badly for 15 days and injured him and when his family members took him to Sadar Hospital, Hajipur for treatment, then they also lodged a false F.I.R. fabricating a false story and that they had assaulted Ashok Mahto for this.

12. PW-3 Dharmendra Kumar Singh is the father of the victim girl. He has stated, in his examination-in-chief, that the incident took place on 08.05.2017 at around 12:00 in the afternoon. At that time, he was near highway road Manik Complex. He was standing there and saw that the victim girl was coming. Then, he followed her. When he caught hold of her and asked her where she was going, she could not tell anything at that time. At that time, it was her coaching time. So, he said that he will talk to her once she returns from coaching. When she came back from coaching in the evening, he made a lot of requests and made her swear then she replied crying that the accused did wrong with her. When he went



to the accused, he was frying fritters at the shop. He then caught him and brought him in front of his daughter where his daughter spoke that he did wrong things with her. The accused Ashok Mahto was threatening her to death so she could not tell. After that, he caught hold of him and brought him in front of the villagers and asked the villagers as to what should be done to him. The villagers said beat him. Then, some people assaulted him. After that, some people informed the administration. Then, the administration came and took Ashok Mahto to the Police Station. After that, he got his daughter treated at Sadar Hospital, Hajipur and her statement was also recorded before the Magistrate in the Court. His statement was recorded by *darogaji* and he told him everything.

12.1. In his cross-examination, he has stated that he and the accused are neighbours and the houses are opposite to each other and there is a street in between and there are about 9-10 houses there. He has no enmity with anyone. He has seen Ashok Mahto since childhood. Even before this case, there were cases against Ashok Mahto. He has further stated that it is not the fact that he is lying and no such incident has happened. He has also stated that, even before this case, there was a case against the accused Ashok Mahto in which the Police beat him up and took him away. In Para-13 of his cross-examination, he has stated that when



darogaji took away Ashok Mahto from his hands, at that time, paper-work was not done nor the documents were prepared nor did he get it written by him, his wife or his daughter that he was taking away the accused Ashok Mahto from his hands. In Para-18, he has stated that it is not the fact that he along with the others, committed assault on 08.05.2017 because they have formed a gang to manipulate voting in favour of a particular candidate and Ashok Mahto and his family members did not vote for the said candidate in the Municipal Corporation Elections. Hence, by creating a false story as part of a conspiracy, they severely assaulted Ashok Mahto and his wife and falsely implicated him in the rape case of his daughter and that the case filed by him is absolutely false and baseless.

13. PW-4 Ruby Devi has stated, in her examination-in-chief, that the incident happened on 08.05.2017 at around 03:00-04:00 p.m. When she heard an uproar at her door, she came out and saw that the victim girl, aged about 12 years, was there. Then, she asked her as to what had happened. The victim girl then told her that the accused Ashok Mahto took her to maize field and did wrong with her. After that, there was an uproar and fight and assault. The victim girl told her that the accused Ashok Mahto was doing wrong with her since last two months. It is stated that the



case was filed on the date of incident itself. After that, the victim girl was treated at Hajipur Government Hospital. Her statement was recorded before *darogaji*.

13.1. In her cross-examination, she has stated that there was an uproar when she was doing her household work. She came outside hearing the uproar. All the villagers had gathered at the place where there was an uproar. She did not recognize the people of the village. In Para-7, she has stated that Ashok Mahto's house is in front of her house. She saw that Ashok Mahto was being assaulted by her family members. He was being assaulted because he had done wrong deed and she did not try to save him. She has also stated that she did not ask the victim girl or her parents about the details of the maize field.

14. PW-5 Ravindra Kumar Singh has stated, in his examination-in-chief, that the incident took place on 08.05.2017 at 03:00 p.m. At that time, he was on duty in Hajipur. He came from duty at 10:00 p.m. When he came back from duty, his family members and his elder brother Dharmendra Kumar Singh told him that Ashok Mahto had lured the victim girl, who was 12 years old, to the maize field and committed rape on her. He has further stated that his elder brother told him that there was a fight between Roshan Singh and Jitendra Singh.



14.1. In his cross-examination, he has stated that the accused Ashok Mahto had a scuffle with both Jitendra Singh and Roshan Singh. His brother told him that the maize field belonged to Maini Singh.

15. PW-6 Santosh Kumar Singh has deposed, in his examination-in-chief, that the incident occurred on 08.05.2017 at around 03:00-04:00 p.m. He was at his home at that time. When he heard the uproar, he went to Dharmendra's house and saw that there was an altercation between the accused Ashok Mahto and Dharmendra. After that, he asked Dharmendra as to what had happened. Then, Dharmendra told him that his daughter, who was aged about 10 years, had been raped. Ashok Mahto used to rape the victim girl continuously for two months before the incident. On the day of incident the victim girl was crying and saying that she will die and that she will not survive. Upon hearing this, Dharmendra asked the victim girl as to what had happened, then she told him that she was being raped continuously for two months. The victim girl had narrated the entire incident in front of her father Dharmendra.

15.1. In his cross-examination, in Para-9, he has stated that at the time when he saw *darogaji*, he had a conversation with *darogaji* and the *darogaji* also got him to sign a



page on which something was written, which he did not go through. He has further stated that Dharmendra, who is the informant of this case, belongs to his caste.

16. PW-7 Gunja Devi has stated, in her examination-in-chief, that the incident had occurred on 08.05.2017. At that time, it was around 03:00 – 04:00 p.m. She was at her house at that time. The victim girl, aged about 11 years, who is his niece, came crying and was going to commit suicide. When her father brought her, he asked her as to why she was going to do so. The victim girl told him that the accused Ashok Mahto had been raping her for 2 months and would kill her if she told anyone. Because of this, the villagers caught Ashok Mahto and beat him.

16.1. In her cross-examination, she has stated that she got information about the incident from the victim girl at 03:00 –04:00 p.m. On the same day, when the victim girl informed her, there was a conversation with *darogaji* about the incident. She has further stated that it is not true that no such incident has happened as she has stated before the Court in her examination-in-chief and, as part of a conspiracy, her family members have implicated the accused Ashok Mahto in a heinous crime like rape, with the intention of ruining him due to village and political hatred



and she had given a false testimony in the Court due to pressure from her family members.

17. PW-8 Subhash Kumar has stated, in his examination-in-chief, that the incident occurred on 08.05.2017. It was 04:00–06:00 in the evening. At that time, he was asking for votes because elections were going on. On hearing the commotion, he reached the Middle School and there he heard that the victim girl, aged about 10-11 years, was raped by the accused Ashok Mahto. After that, the people took the victim girl to the Government Hospital where medical treatment was given to her.

17.1. In his cross-examination, he has stated that he was asking for votes for the election of ward councilor. He was asking for the votes in favour of the candidate Indrajeet Kumar @ Indra Singh, who was his cousin brother. In Para-5, he has stated that he heard the uproar at around 04:00 o'clock. He cannot bring the person to the Court from whom he got the information about the incident. Further, in Para-7, he has stated that it is not true that what he had stated before the Court in his examination-in-chief was due to electoral rivalry with the accused and, since the accused in this case and their family members were opposing the candidate supported by him, he had come and given false testimony and he never went to the hospital because of the elections.



18. PW-9 Raushan Kumar has stated, in his examination-in-chief, that the incident occurred at around 04:00 – 04:30 o'clock. The accused Ashok Mahto used to call the victim girl, aged about 11 years, and rape her. He used to rape the victim girl 3-4 months prior to the incident. On the day of incident, the accused Ashok Mahto had called the victim again but the victim did not go there and was going to commit suicide. Then, her father had seen her and asked her where she was going. Then, the victim girl told her that she was going to commit suicide. When her father asked her as to why she was going to commit suicide, the victim girl told him about the entire incident. When the accused Ashok Mahto was asked regarding this, he started beating the victim's father. After that, the Police came and the case was registered. His statement was recorded before *darogaji*.

18.1. In his cross-examination, he has stated that apart from this case, there was no rape case or any other case filed against the accused Ashok Mahto. He has further stated that the election process was going on when the incident had occurred.

19. PW-10 Jitendra Kumar has stated, in his examination-in-chief, that the incident took place on 08.05.2017 at around 4 o'clock in the evening. When he asked the victim girl about the reason for her crying, she told him that the accused Ashok



Mahto had been continuously raping her by luring and threatening her for 2 months. On the day of incident, there was a scuffle between Ashok Mahto and his brother Dharmendra. On the day of incident, Ashok Mahto had called the victim girl to rape her again, but the victim girl went to the bypass to commit suicide where she met her father Dharmendra. At that time, the victim girl was crying. Her father Dharmendra Singh brought her home after coaxing her and asked her as to why she was going to do that. Then, she told everything to her father that the accuse Ashok Mahto used to rape her. There was a fight between the two regarding this matter.

19.1. In his cross-examination, he has stated that he came to know about the incident on the very day of the incident from the victim girl. He has further stated in Para-8 that, at the time of incident, Municipal Council Elections were going on and during those elections, he and his family members were trying to pressurize Ashok Mahto and his family members to vote in favour of the candidate supported by them. He has further stated that the present incident was concocted, by fabricating a false story under a conspiracy and no such incident was committed by the accused Ashok Mahto.

20. PW-11 Dr. Aasma Parvin has deposed that she was posted as Lady M.O. on 08.05.2017 in Sadar Hospital, Hajipur.



On that day, she had medically examined the victim and noted following:-

“M/I:- i. Mole over right side leg.

ii. Mole over face and right side and mole over right ear lobes.

External Examination: Secondary sexual character well developed. Slight hair over pubic.

Internal examination:- i. No swelling over vulva and vagina.

ii. Hymen torn.

iii. Vaginal wall reddish.

Dental Checkup:- Id. 49 dated 08.05.17 reg. no. 3785 Dr. Gopal Pd. Singh according to dentist she is 11 years.

Radiological examination:- 54/49 by Dr. B.K. Singh according to radiologist her age is approx 8.5 to 10 years.

Pathological Lab Serial No.:- 11686 dated 08.05.17 according to reports non mortile spermatozoa, non mortile and mortile spermatozoa not seen. RBC is seen by Dr. S.K. Verma.

Enclosure:- i. X-ray place 4 pcs. with report.

ii. Pathological report.

iii. Dental Report.

In my opinion her age is approx. 9 to 11 years.”

She has further stated that the medical examination of the victim girl was conducted by the Medical Board consisting of two ladies including a lady Dr. Pushp Lata Mishra and she herself. She has further stated that there is no evidence of sexual assault. This entire Medical Examination Report is in her pen and signature which bears the signature of Dr. Pushp Lata Mishra, which she identifies and is marked as Exhibit No. 3. She sent a requisition for the dental checkup of the victim to the dentist. These dental reports



bears the pen and signature of Dr. Gopal Prasad Singh, Dental Surgeon, whom she identifies and is marked as Exhibit No. 4. Requisition for pathological examination of the victim was sent to Pathologist Dr. S.K. Verma which is in her pen and signature and which she identifies and is marked as Exhibit No. 5. On the back of the Pathological requisition which was sent by her, there is a report of Pathologist Dr. S.K. Verma which is in his pen and signature which she identifies and is marked as Exhibit No. 6. The radiological report of the victim is in the pen and signature of Dr. B.K. Singh, Radiologist which is marked as Exhibit No. 7.

20.1. In her cross-examination, she has stated that she and Dr. Pushp Lata Mishra jointly conducted the physical examination of the victim girl. The date is not mentioned in the report sent by the Radiologist, Dentist and Pathologist in the physical examination of the victim. The physical examination report of the victim girl was prepared by her which also bears the signature of Dr. Pushp Lata Mishra.

21. PW-12 Upendra Rai has not supported the case of the prosecution and he has been declared hostile.

22. PW-13 Md. Aariz Ehkam is the Investigating Officer of this case. He has deposed, in his examination-in-chief, that he was entrusted with the responsibility of investigating this



incident by the Town Police Station Incharge. After taking charge of the investigation, he prepared the Seizure List of white coloured *payjama* and red coloured suit of the victim girl. In Para-4, he has stated that he recorded the statement of the witnesses Dharmendra Kumar, Nirmala Devi, Jitendra Kumar, Ravindra Kumar, Raushan Kumar, Santosh Singh, Subhash Kumar, Rubi Devi and Gunja Devi. He inspected the place of incident. The scene of incident was a maize field in village Minapur and a two-storeyed empty house of Durga Babu which was adjacent to the maize field. In Para-6, he has stated that, on 09.05.2017, after treatment in Sadar Hospital, the accused Ashok Mahto was presented in the Court under proper Police custody. After that, he was sent to judicial custody. On 09.05.2017 itself, after the medical examination of the victim girl, from the point of view of security, the victim girl was kept in Women's Short Stay Home, Hajipur under the supervision of S.I. Gayanti Kumari. In Para-9, he has stated that Seizure List of the clothes of the victim girl was obtained by him and signatures of two independent witnesses were obtained which are in his handwriting and signature and is marked as Exhibit No. 12. On 20.07.2017, an application was given in the Court to get the seized clothes of the victim girl and the accused Ashok Mahto examined by the Regional Forensic Science Laboratory, Muzaffarpur which is in his



handwriting and bears his signature and is marked as Exhibit No. 14.

22.1. In his cross-examination, he has stated that he did not go to the school where the victim girl studied, for the purpose of investigation. He did not go because it was not related to investigation. The victim has stated in her statement that she studied in a government school. It is stated that the victim girl was in a Women's Short Stay Home, Hajipur for three days for which he had not obtained an order from the Court. Further, in Para-14, he has stated that the seized clothes are not before him. In Para-15, he has stated that the second Seizure List was also prepared on 08.05.2017 at 21:50. Further, in Para-16, he has stated that after the case was registered, he took the statement of the witnesses. The place of incident was inspected on 09.05.2017 and, on 08.05.2017, the statement was taken under Section 161 of the Code. In Para-17, he has stated that, during the course of investigation, Hari Rai's statement was recorded and he had told in his statement that the residence of the victim's father Dharmendra Kumar and that of accused Ashok Mahto are side by side. There is a land dispute going on between the two for many years. In the meanwhile, the election of ward councilor took place. Ashok Mahto supported Sanjay Singh while Dharmendra Singh supported Shambhu. There



was a dispute between Ashok Mahto and Dharmendra regarding this matter. It was for these reasons that Ashok Mahto was implicated in the scandal. This statement was given by Hari Rai during the course of investigation. During investigation, statement of the witness Upendra Rai was taken under Section 161 of the Code. The said witness had stated that there is a land dispute going on between these two for years and the ward councilor election was held a few days prior to the incident in which Ashok Mahto supported Sanjay and Dharmendra supported Shambhu. Further, the witness Surendra Rai also stated that the land dispute between the parties has been going on for years.

23. We have gone through the entire evidence led by the prosecution and re-appreciated the same. It is the case of the prosecution that PW-1 (victim), who was a minor on the date of the incident and was aged about 11 years. Therefore, it is the duty of the prosecution to prove that the victim was minor by leading cogent evidence. The victim as well as her parents have specifically deposed before the Court that victim is studying in the school and, therefore, it was the duty of PW-13 (Investigating Officer) to collect documentary evidence with regard to the age of the victim. Even it was the duty of the prosecution to examine the concerned person of the school where the victim was studying with a view to prove that



the victim was minor and was studying in the school. However, the prosecution has failed to examine the concerned person of the school where the victim was studying. It would further reveal from the deposition of PW-13 (Investigating Officer) that, in Para-12 of his cross-examination, the said witness has stated that he did not visit the school in which the victim was studying. The said witness has further admitted that the victim has stated, in the *fardbeyan*, that she was studying in the Government School.

23.1. It is true that PW-11 (Doctor), who had examined the victim, has given an opinion on the basis of opinion given by the Dentist as well as Radiologist that the age of the victim is approximately 9-11 years.

23.2. At this stage, we would like to refer the decision rendered by this Court on 28.02.2024 in **Criminal Appeal (DB) No. 586 of 2023 (Deepak Kumar & Anr. Vs. The State of Bihar)**, wherein the Division Bench of this Court has observed in Para-16, 16.1, 17, 18, 18.1 as under:-

“16. From the deposition of the aforesaid two witnesses, it is revealed that the prosecution has failed to produce any documentary evidence with a view to prove the age of the victim. Learned counsels appearing for the appellants have rightly contended that the victim was studying in the school and she was attending the coaching classes of accused Deepak Kumar. However, the Investigating Officer has failed to produce the school register or birth certificate of the victim with a view to prove her age.



16.1. From the medical evidence given by Dr. Alpana Mitra, it would reveal that as per the radiological report, age of the victim appears between 14-16 years.

*17. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Jarnail Singh (supra)** wherein the Hon'ble Supreme Court has discussed in detail with regard to the provisions contained in Juvenile Justice (Care and Protection of Children) Rules, 2007 and the Rules framed thereunder. However, the Hon'ble Supreme Court has observed in paragraph-22 and 23 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 7-A, 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 of 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 of a child who is a victim of crime. For, in our view, there is hardly any difference insofar 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, PW 6. 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 child concerned 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 child concerned, on the basis of medical opinion.”



18. In the case of *P. Yuvaprakash vs. State Rep. By Inspector of Police*, reported in **2023 SCC OnLine SC 846, the Hon'ble Supreme Court has observed in paragraph 14 to 17 as under:**

“14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.



15. In a recent decision, in Rishipal Singh Solanki v. State of Uttar Pradesh,³ this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:

“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (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. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”



16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this court held in Sanjeev Kumar Gupta v. The State of Uttar Pradesh⁴ that:

“Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In Abuzar Hossain @ Gulam Hossain v. State of West Bengal⁵, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.



18.1. From the aforesaid decision rendered by Hon'ble Supreme Court, it can be said that the burden of proof that someone is juvenile (or below the prescribed age) is upon the person claiming it. In the present case, the prosecution has claimed that the victim is minor girl, therefore, it was the duty of the prosecution to prove that the victim was minor on the date of occurrence."

24. In another decision rendered by the Division Bench of this Court on 05.09.2023 in **Criminal Appeal (DB) No. 1142 of 2019 (Chandan Singh & Ors. Vs. The State of Bihar)**, the Division Bench has observed in Para-19, 20, 21, 22 & 23 as under:-

"19. If the aforesaid provisions are read together, it is revealed that age of the child in conflict with law can be determined by producing the evidence in the form of date of birth certificate from the school or matriculation or equivalent certificate from the concerned examination board and in absence thereof birth certificate given by corporation and municipal authority or panchayat and in absence of both the aforesaid, the age shall be determined by ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

*20. At this stage, this Court would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Jarnail Singh** (supra) wherein the Hon'ble Supreme Court after considering the aforesaid provisions of law has observed in para-20 that even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, the aforesaid statutory provisions should be the basis for determining age even for a child who is a victim of crime. It is further observed that 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.*



21. At this stage, it is pertinent to note that in the said case the Hon'ble Supreme Court has considered Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007, which is pari materia to Rule 19 of Bihar Juvenile Justice (Care and Protection of Children) Rules.

22. Thus, from the aforesaid, it is clear that the prosecution has failed to prove the age of the victim and, therefore, the conviction of the accused-appellants under the provisions of POCSO Act cannot be sustained.

*23. At this stage, we would also like to refer the decision rendered by Hon'ble Supreme Court in the case of **Rajak Mohammad** (supra) wherein the Hon'ble Supreme Court observed in para-9 and 10 as under:-*

“9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

10. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.”

25. From the aforesaid decisions rendered by the Division Bench of this Court, it can be said that it is the duty of the prosecution to prove that the victim was minor on the date of



incident by leading cogent evidence. In the present case, as discussed hereinabove, it is the case of the prosecution that the victim was studying in the school, no efforts are made to produce any documentary evidence before the Court and thereby, the prosecution has failed to prove that the victim was minor. We are, therefore, of the view that the Trial Court has committed an error while convicting the appellant for commission of the offences punishable under the provisions of the POCSO Act.

26. From the evidence led by the prosecution, it transpires that the prosecution had examined the victim, her parents and her relatives with a view to prove the case against the appellant. It is relevant to observe, at this stage, that, during the course of the investigation, the Investigating Officer (PW-13) had recorded statement of the independent witnesses including Hari Rai, Upendra Rai and Surendra Rai. Upendra Rai was examined as PW-12. However, he did not support the case of the prosecution and, therefore, he was declared hostile. So far as the other two persons are concerned, the prosecution has failed to examine the said person. The Investigating Officer, during cross-examination, has admitted, in Para-17 & 18, that Hari Rai and Surendra Rai have given the statement under Section 161 of the Code that there was a land dispute between the father of the victim and the appellant and



thereafter, there was a dispute with regard to the election of the Municipal Corporation. In the said election, the appellant was supporting one candidate whereas the father of the victim was supporting another candidate and, because of the said dispute, the appellant has been falsely implicated. Thus, the aforesaid two persons, who are independent witnesses, have specifically stated in their statement recorded under Section 161 of the Code about the false implication of the appellant. Thus, it appears that the prosecution did not examine the aforesaid persons as prosecution witnesses. It is a specific case of the appellant that he has been falsely implicated in the incident in question because of the dispute with regard to the election of Municipal Corporation. Specific suggestions are also put to the prosecution witnesses with regard to the same.

27. Keeping in view the aforesaid aspects, now we would like to consider the deposition of the prosecution witnesses. From the *fardbeyan* as well as the deposition given by PW-1 (victim), it transpires that the case of the victim is that, since two months, the appellant was repeatedly committing rape on her, as a result of which she decided to commit suicide and, therefore, she had gone to Manik Complex where her father saw her and inquired. She was brought to the house. When repeatedly asked, she



disclosed about the incident of rape. However, it is relevant to note that, in Para-2 of the deposition, PW-1 (victim) has stated that she had gone for committing suicide near bypass road. She had gone to the bypass road at about 05:00 - 05:30 p.m. Bypass road is 2-3 kilometers away from her house.

27.1. However, from the deposition given by PW-3, who is father of the victim, it is revealed that, on 08.05.2017 at about 12:00 hours, he was near Manik Complex. He saw that his daughter was going towards the complex. Therefore, he chased her. Thereafter, he caught his daughter and inquired. However, she did not tell anything to the said witness. She was going to the coaching class. Thereafter, when his daughter returned from the coaching class in the evening, he made a lot of request. At that time, she cried and told him about the incident of rape committed by the appellant. Further, PW-4 (Ruby Devi), PW-5 (Ravindra Kr. Singh), PW-6 (Santosh Kumar Singh) & PW-7 (Gunja Devi) have stated that, at about 03:00-04:00 p.m., they heard an uproar near their house and, when inquired, they came to know that the victim had disclosed about the rape being committed by the appellant herein.

27.2. Thus, from the aforesaid evidence of the prosecution, it can be said that there are major contradictions, inconsistencies and discrepancies with regard to the time when the



victim came back to the house and narrated the story of rape. At this stage, it is required to recalled that it is a specific case of the victim that when she had gone to the Manik Complex for committing suicide, her father saw her and caught her. Thereafter, she was brought to the house and, at that time, she disclosed the incident of rape whereas PW-3, who is the father of the victim, has specifically deposed before the Court that, at about 12:00 hours, he saw his daughter near Manik Complex. However, it was the time of coaching and, therefore, he did not inquire her in detail but when she returned back to the house in the evening, after repeated inquiry, the victim disclosed about the incident of rape.

28. It is also pertinent to note that from the deposition of PW-2 (Nirmala Devi), who is the mother of the victim, it transpires that it is a specific case of the said witness that the incident happened at around 05:00 p.m. Her daughter informed her that the accused Ashok Mahto raped her. After that, she told about the said incident to her husband. Her husband brought her daughter from Manik Complex where she had gone to commit suicide and, on inquiry, she told him about the incident. She has specifically deposed that her daughter's urinary tract was bleeding. During cross examination also, the said witness stated, in Para-9, that she took the victim to Sadar Hospital, Hajipur for treatment.



Blood was coming out of her urinary tract and the Doctor had seen the blood coming out.

28.1. However, it is relevant to note that it is not the case of the victim that, on 08.05.2017, the accused has committed rape on her. Even it is not the case of the victim and her father i.e. PW-3 that when victim came back to the house, blood was coming out of her urinary tract. Thus, we are of the view that the victim and her parents have narrated different stories with regard to the manner of incident and with regard to the time when the victim came back to the house, on 08.05.2017, and disclosed about the incident of rape. We are of the view that the victim cannot be termed as sterling witness and, therefore, simply relying upon her version, conviction cannot be recorded and further corroboration is required. At this stage, it is relevant to note here that PW-10 Jitendra Kumar has specifically admitted in Para-8 of his cross-examination that, at the time of incident, Municipal Council Elections were going on and during those elections, he and his family members were trying to pressurize Ashok Mahto and his family members to vote in favour of the candidate supported by them. He has further stated that the present incident was concocted, by fabricating a false story under a conspiracy and no such incident was committed by the accused Ashok Mahto.



29. At this stage, we would like to refer the deposition given by PW-11 (Doctor), who had examined the victim. The said Doctor has stated that, on internal examination, no swelling over vulva and vagina was found. However, the Doctor found hymen torn and vaginal wall reddish but thereafter, in Para-8 of the deposition, PW-11 has specifically stated that there is no evidence of sexual assault.

30. At this stage, it is also relevant to note that the Investigating Officer (PW-13) has deposed that he had seized the clothes of the victim as well as the appellant and thereafter sent the same for necessary analysis to the F.S.L. However, it is relevant to note that F.S.L. Report has not been produced before the Court. It is also relevant from the deposition of the prosecution witnesses including PW-13 (Investigating Officer) that the appellant/accused was assaulted by the father and other relatives of the victim and he was admitted in the Sadar Hospital, Hajipur. PW-13 has further stated that after giving the treatment to him in Sadar Hospital, Hajipur, on 09.05.2017, he was taken to the Court and thereafter sent to custody. The prosecution has failed to produce any injury certificate of the appellant/accused nor the Doctor, who had given the treatment to the appellant, has been examined.



31. From the aforesaid discussion, we are of the view that the prosecution has failed to prove the case against the appellant beyond reasonable doubt despite which, the Trial Court has passed the impugned judgment and order. Hence, the same is required to be quashed and set aside.

32. Accordingly, the impugned judgment of conviction dated 17.08.2019 and order of sentence dated 22.08.2019 passed by learned Additional Sessions Judge-1st-cum-Special Judge, POCSO Act, Vaishali, Hajipur in G.R. No. 1908 of 2017, arising out of Town P.S. Case No. 304 of 2017 are quashed and set aside.

33. The appellant is acquitted of the charges levelled against him by the learned Trial Court. He is directed to be released from jail custody forthwith, if his custody is not required in any other case.

34. The appeal stands allowed.

(Vipul M. Pancholi, J.)

(Dr. Anshuman, J.)

Sachin/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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