

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.31 of 2023

Arising Out of PS. Case No.-75 Year-2018 Thana- SARMERA District- Nalanda

Bablu Kumar, Son of Upendra Prasad, Resident of village - Ahiyapur, P.S.- Sarmera, District - Nalanda.

... .. Appellant

Versus

- 1. The State of Bihar
- 2. ‘X’, Daughter of ‘Y’, Resident of village and P.S.- Sarmera, District - Nalanda.

... .. Respondents

with

CRIMINAL APPEAL (DB) No. 939 of 2022

Arising Out of PS. Case No.-75 Year-2018 Thana- SARMERA District- Nalanda

Dahan Yadav, Son of Ramji Yadav, R/V- Sarmera Vasetar, P.S- Sarmera, Dist- Nalanda.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 40 of 2023

Arising Out of PS. Case No.-75 Year-2018 Thana- SARMERA District- Nalanda

Arvind Kumar @ Bittu Kumar, Son of Muneshwar Chaudhary, Resident of Village- Sarmera, P.S.- Sarmera, District- Nalanda.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 31 of 2023)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Ms. Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate
Mr. Mudit Meet, Advocate
Ms. Kiran Kumari, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, Addl.PP
(In CRIMINAL APPEAL (DB) No. 939 of 2022)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Ms. Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate
Mr. Mudit Meet, Advocate
Ms. Kiran Kumari, Advocate

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



(In CRIMINAL APPEAL (DB) No. 40 of 2023)

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate
Ms. Vaishnavi Singh, Advocate
Mr. Ritwik Thakur, Advocate
Mr. Mudit Meet, Advocate
Ms. Kiran Kumari, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, Addl.PP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 30-07-2025

Heard Mr. Ajay Kumar Thakur, learned counsel for the appellants in all the three appeals and Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State.

2. The informant has been noticed, she has entered appearance through a learned Advocate of this Court but no one has appeared today to oppose the appeals.

3. These appeals have been preferred for setting aside the judgment of conviction dated 17.11.2022 (hereinafter referred to as the 'impugned judgment') and the order of sentence dated 21.11.2022 (hereinafter referred to as the 'impugned order') passed by learned Additional District and Sessions Judge-VII-cum-Special Judge, POCSO Act, Nalanda at Biharsharif (hereinafter referred to as the 'learned trial court') in G.R. No. 2345 of 2018, POCSO Case No. 2345 of 2018 arising out of Sarmera P.S. Case No. 75 of 2018. By the impugned judgment, the



appellants have been convicted for the offences under Sections 376(D) of the Indian Penal Code (in short 'IPC') and 4/6 read with Section 5(g) of the Protection of Children from Sexual Offences Act (in short 'POCSO Act') and appellants, namely, Bablu Kumar and Dahan Yadav have also been convicted for the offences under Section 3(1)(w)(i) read with 3(1)(w)(ii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (in short 'SC/ST Act'). By the impugned order, they have been ordered to undergo rigorous imprisonment for life with a fine of Rs.20,000/- each under Section 376(D) IPC and in default of payment of fine, they have to further undergo six months simple imprisonment. Further, Dahan Yadav and Bablu Kumar have been ordered to undergo three years rigorous imprisonment with a fine of Rs.10,000/- each under Section 3(1)(w)(i) read with 3(1)(w)(ii) of the SC/ST Act and in default of payment of fine, they have to further undergo three months simple imprisonment.

Prosecution Case

4. The prosecution case is based on the written application of the informant (PW-3). In her written application (Exhibit '1'), she has stated that on 16.06.2018, at 08:00 PM she was going to the house of her *chachera Mause* situated at Sarmera Balwabhitha. When she reached in front of the Bus Stand at



Sarmera Road, then Vikash Kumar stopped her, got her seated on his motorcycle and took her in a hut situated at Ahiyapur Musahari in which there was a *chachari* of bamboo. She was asked to sit there, meanwhile Vikash Kumar called his friends, namely, Arvind Kumar @ Bittu Kumar, Dahan Yadav and Bablu Kumar. Thereafter, all four accused committed rape on her one by one and took photographs from mobile. All the four accused fled away leaving her there. Anyhow she came to her house and gave information to her mother and family members, thereafter, she came to the police station.

5. On the basis of this written application, Sarmera P.S. Case No. 75 of 2018 was registered on 17.06.2018 under Section 376(D) IPC, Section 4/8 of the POCSO Act and Section 3(2)(va) of the SC/ST Act against all four accused, namely, (1) Vikash Kumar, (2) Arvind Kumar @ Bittu Kumar, (3) Dahan Yadav and (4) Bablu Kumar. After investigation, Police submitted chargesheet bearing Chargesheet No. 85 of 2018 dated 10.09.2018 under above mentioned Sections against all four accused. On the plea of juvenility taken by accused Vikash kumar, learned trial court vide order dated 07.08.2018 sent the records of accused Vikash Kumar to Juvenile Justice Board, Biharshariff for age determination and further enquiry. Learned trial court vide order dated 06.12.2018



took cognizance of the offences under above mentioned Sections. Charges were read over and explained to the appellants in Hindi to which they pleaded not guilty and claimed to be tried, accordingly, vide order dated 22.01.2021, charges were framed under Section 376(D)/34 IPC, Section 3(1)(w)(i) read with 3(1)(w)(ii) of the SC/ST Act and Section 4 read with Section 3 and Section 6 read with 5(g) of the POCSO Act.

6. In course of trial, the prosecution has examined altogether ten witnesses and exhibited several documentary evidences. The description of prosecution witnesses and the exhibits are given hereunder in tabular form:-

List of Prosecution Witnesses

PW-1	Anil Kumar
PW-2	Father of the Victim
PW-3	Victim
PW-4	Mother of the Victim
PW-5	Priti Kumari Sinha
PW-6	Dr. Ram Kumar Prasad
PW-7	Dr. Kumkum Kumari
PW-8	Jitendra Kumar
PW-9	Ajay Kumar
PW-10	Shefali Narayan

List of Exhibits on behalf of the Prosecution

Exhibit ‘1’	Written Application
Exhibit ‘1/1’	Signature of victim on written application
Exhibit ‘1/2’	Signature of Anil Kumar on written application



Exhibit ‘1/3’	Forwarding and pagination of written application
Exhibit ‘2’	Signature of Anil Kumar on seizure list
Exhibit ‘2/1’	Seizure list of seized clothes of the victim
Exhibit ‘3’	Signature of the victim on her Statement u/s 164 CrPC
Exhibit ‘3/1’	Statement of the victim u/s 164 CrPC
Exhibit ‘4’	Signature of the victim on Medical Report
Exhibit ‘4/1’	Signature of Dr. Ram Kumar on Medical Report
Exhibit ‘4/2’	Medical Report
Exhibit ‘4/3’	Signature of Dr. Kumkum Kumari on Medical Report
Exhibit ‘5’	FIR
Exhibit ‘6’	Seizure list of seized mobile from Vikas Kumar
Exhibit ‘7’	Seizure list of seized mobile from Bablu Kumar
Exhibit ‘8’ and Exhibit ‘8/1’	Seizure list of seized clothes of Arvind Kumar and vikas
Exhibit ‘8/2’	Seizure list of seized clothes of Dahan Yadav
Exhibit ‘8/3’	Seizure list of seized clothes of Bablu Kumar
Exhibit ‘9’	Chargesheet
Exhibit ‘10’	Form-7 of FSL
Exhibit ‘10/1’	FSL Report No. 036994
Exhibit ‘10/2’	FSL Report No. 036995
Material Exhibits	
Material Exhibit I to I/8	Nine photographs of victim related to the occurrence

7. Thereafter, the statement of the appellants were recorded under Section 313 of the CrPC. The appellants denied all the allegations and took a plea that they are innocent and have falsely been implicated.



8. The defence has not adduced any oral or documentary evidence.

Findings of the Learned Trial Court

9. Learned trial court after examining all the evidences available on the record found that the victim is aged about 15 years and all the prosecution witnesses have supported the prosecution case. Learned trial court found that the prosecution has been able to prove its case beyond all shadow of doubt. Learned trial court observed that the victim is consistent in her 161 CrPC statement and 164 CrPC statement as well as in her deposition in course of trial, hence, her evidence is trustworthy and falls in the category of a sterling witness.

10. Learned trial court found that FSL Report (Exhibit '10', '10/1' and '10/2') proves the allegation of rape. Learned trial court found that the accused has not taken a defence that the blood and semen found on the *jhanghiya* and legging of the victim were not their.

11. Learned trial court after considering all the facts and circumstances of the case found that the prosecution has been able to prove charges under Section 376(D)/34 IPC, Section 3(1)(w)(i) read with 3(1)(w)(ii) of the SC/ST Act and Section 4/6 read with 5(g) of the POCSO Act beyond all reasonable doubts and



accordingly, convicted them for the charges under Section 376(D) IPC and Section 4/6 read with Section 5(g) of the POCSO Act and further convicted appellants, namely, Dahan Yadav and Bablu Kumar under Section 3(1)(w)(i) read with 3(1)(w)(ii) of the SC/ST Act.

Submissions on behalf of the appellants

12. Mr. Ajay Kumar Thakur, learned counsel for the appellants, has made the following submissions:-

(i) The victim (PW-3) is not a sterling witness in this case, therefore, it would not be safe to convict the appellants on the basis of the oral testimonies of the victim.

(ii) The medical evidence brought on the record and proved as Exhibit '04/03' through Dr. Kumkum Kumari (PW-7), completely rules out a case of sexual violence. PW-7 has categorically stated in course of her cross-examination that she had minutely observed the body of the victim, including her buttock and private part. She did not find any bruises, abrasion or any kind of injury on the private part of the victim or any other part of the victim's body. PW-7 has stated that in case of rape by more than one person, there is possibility of injury. As per the medical examination report, the victim was menstruating on the date of her examination.



(iii) The Forensic Science Laboratory (in short 'FSL') report (Exhibit '10' and Exhibit '10/1') have no probative value in the facts of the present case. PW-8 and PW-9, who are the Assistant Director of FSL, Patna and Assistant Director (Serology) at FSL, Patna respectively have deposed. According to Exhibit '10', blood has been detected in the Exhibit Mark - 'B/i/a' over small areas and Exhibit Mark 'B/ii' - over large areas. These two exhibits are the *salwar* and *janghiya* of the victim. Blood has been detected in Exhibit Mark 'D/i' and 'E/iv' but was too small for serological examination. Exhibit 'D/i' is the *janghiya* of the accused Vikash Kumar whereas Exhibit 'E/iv' is the orange color *gamcha* said to be of accused Arvind Kumar. There is no matching of bloods found on exhibits Mark 'B/i/a', 'B/ii', 'D/i' and 'E/iv' either with the blood samples of the victim or with that of the accused persons. Semen has been detected in Exhibit 'B/ii' and 'D/i'.

13. PW-8 has stated in his cross-examination that the report of the FSL does not show that who were the members of the team constituted by Director, FSL for the forensic examination. He has also stated that on perusal of the report that it does not mention that the detection of semen was done on the basis of spermatozoa and protein or that the semen was detected on the basis of presence



of spermatozoa or protein both. According to PW-8, the office received the sample on 25.06.2018 but the report does not reveal that when the forensic investigation got started and when it was concluded. In paragraph '9' he has stated that the samples belong to same persons or of different persons cannot be said. PW-9 has proved Exhibit '10/2' which is the report prepared by Shri Ajay Kumar, Assistant Director, FSL, Patna and countersigned by the Director I/c Das Ashok Kumar. This witness has stated that after two scientific investigations such as serological examination and after matching with the origin and grouping, the results were obtained but it may be found from paragraph '2' of his deposition that the grouping could not be determined and the result of test for blood grouping in all the aforementioned exhibits remained inconclusive. In paragraph '4' of his deposition he has stated that out of four samples only sample 'D/i' contained the semen which was the only sample which matched with the blood grouping 'B' but it cannot be ascertained that the grouping 'B' was of which individual, however, it belonged to a human being which is mentioned in the report. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Krishna Kumar Malik versus State of Haryana** reported in (2011) 7 SCC 130, learned counsel has



submitted that in such circumstance, the FSL reports proved by PW-8 and PW-9 would not carry any corroborative value.

14. Learned counsel further submits that from the evidence of the I.O. (PW-5) it would appear that she claims to have seized the clothes of the victim girl and prepared the seizure list (Exhibit '2/1') in Sarmera Police Station, however, from the victim girl (PW-3) it would appear that in paragraph '18' of her cross-examination she has stated that her clothes were kept by police personnel in Bihar Police Station. The Doctor (PW-7) has stated that the clothes of the victim were not given to him for pathological tests. As regards the place of occurrence, even as the I.O. (PW-5) claimed in paragraph '3' of her deposition that she had inspected the place of occurrence with the victim and the armed forces but the victim (PW-3) has stated that police had not taken her for the second time to the place of occurrence.

15. It is submitted that according to the I.O. (PW-5), the place of occurrence is a brick *khaprail* room at the south-east corner of a hut and there was a boundary wall from all the four sides which were in damaged condition. According to him, in the brick *khaprail* room there is an iron door. The occurrence is said to have been committed in this room but the victim (PW-3) has clearly stated that there was no door/gate in the hut where rape was



committed with her and according to PW-3, the hut was made of mud and cement.

16. It is further submitted that the I.O. (PW-5) has proved some photographs which she claimed to have taken out from the mobile phone of one of the appellant Babloo Kumar. She has proved the seizure list of the mobile phone of Babloo Kumar as Exhibit '7' but the said mobile phone was not sent to the FSL for forensic examination. PW-5 has stated in paragraph '23' of her deposition that she has mentioned about the nine half naked photos in paragraph '53' of the case diary but she did not remember from where she had taken out the print of the half naked photos. She has stated that she had not sealed the mobile phone and the mobile was kept in the Malkhana of Sarmera Police Station but she had not written all these facts in the case diary and she had not proved any serial number of the Malkhana register giving proof of deposit of mobile phone in the Malkhana. She has admitted in paragraph '25' of her cross-examination that in the half naked photographs, the face of the victim is not clearly seen and she had not sent those photographs for any scientific investigation to an expert.

17. It is lastly submitted that the age determination of the victim has been done and the doctor (PW-6) who was posted at Sadar Hospital, Bihar Sharif and had conducted examination on



17.06.2018 for age determination of the victim has proved the medical report given by the Medical Board as Exhibit '04/01'. They have not found any injury on the pelvic part, spermatozoa was not found, however, RBC was present in plenty due to menstruation.

18. The radiological findings have been recorded in the report and on the basis of the same, the doctor was of the opinion that the age of the victim is between 15 to 16 years. In his cross-examination, PW-6 has stated that in sexual offence cases, the life of a spermatozoa may be found up to forty eight hours and dead spermatozoa may be found for seventeen days. The cloth of the victim was not brought before him for pathological examination. On the strength of this report proved by PW-6, learned counsel has submitted that in view of the judicial pronouncements on the subject in the matter of age determination of the victim in the cases of the present kind, the margin of +/- two years may be given. In that case, the upper age of the victim could be eighteen years. Reliance has been placed on the judgment of the Hon'ble Delhi High Court in the case of **Court on its own Motion vs. State of NCT of Delhi (Crl. Ref. 2/2024 judgment dated 02.04.2024)** which has been followed by this Court in Cr. Appeal (DB) No. 461



of 2022. On all these grounds, prayer has been made to set aside the impugned judgment and order of the learned trial court.

Submissions on behalf of the State

19. The appeal has been contested by learned Public Prosecutor. Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State submits that in this case the learned trial court has analysed the evidences of the prosecution witnesses and rejected the contentions of the defence by providing cogent reasons in the impugned judgment.

20. The learned trial court has rightly rejected the contention of the defence with regard to the conduct of the victim and her family members in not reporting the occurrence to the police station in the night of 16.06.2018 itself. The trial court has taken a view that the victim has given sufficient explanation for the delay. Citing the judgment of the Hon'ble Supreme Court, the learned trial court has taken a view that the delay in lodging FIR in rape cases is not of much significance as the victim and family have to muster courage to come out as there is always a fear of social stigma and lack of inner strength to go for legal battle in such cases.

21. It is submitted that the learned trial court has also rejected the submission of the defence that the prosecution



witnesses are the closely related family members of the victim. The trial court has also rejected the contention of the defence that there are material contradictions in the evidence of the prosecution witnesses. It has been held on the strength of the judgment of the Hon'ble Supreme Court that the law does not require corroboration and therefore if the evidence of the prosecutrix is believed, there would be no bar to convict the accused on her testimony alone.

22. It is submitted that the learned trial court has not found any material contradiction in the evidence of the victim and the kind of contradictions even if it is there, the same cannot create a doubt over the prosecution case.

23. It is pointed out that the learned trial court has also rejected the contention of the defence as regards the photographs (Exhibits I', 'I/1', 'I/2', 'I/3', 'I/4', 'I/5', 'I/6', 'I/7' and 'I/8') even as no certificate under Section 65B of the Indian Evidence Act was produced in support of admissibility of these exhibits. The learned trial court has held that the victim in this case is a sterling witness. The learned Additional Public Prosecutor has therefore supported the impugned judgment.

24. As recorded hereinabove, no one appeared on behalf of the informant to oppose the appeals.



Consideration

25. We have heard learned counsel for the appellants and learned Additional Public Prosecutor for the State and have perused the trial court's records.

26. From the written information dated 17.06.2018 (Exhibit '1') of the victim girl (hereinafter called 'victim' or 'X'), it appears that the alleged occurrence took place on 16.06.2018 at about 8:00 PM when she was going to her mausa's house at Balwa Bhitha situated in Sarmera. The first place of occurrence in this case is Sarmera Bus Stand where according to Exhibit '1', the child in conflict with law ('CICL') namely Vikash Kumar stopped 'X' and she was seated on the motorcycle. He took 'X' to a hut in Ahiyapur Musahari where she was made to sit on bamboo *chachri*. Vikash Kumar called his friends Arvind Kumar @ Bittu, Babloo Kumar and Dahan Yadav whereafter all the four committed rape on her one after another and they took photographs from the mobile. They left her there and fled away. The victim came to her house on her own and informed her mother and relatives whereafter she came to the police station and lodged the FIR.

27. The victim has been examined as PW-3. In her examination-in-chief she has stated that when she reached Sarmera Bus Stop then Vikash (a juvenile) came on a motorcycle and asked



her that where was she going? On this, she disclosed that she was going to her mausi's house then he said that he would drop her there and on this pretext he got her seated on his motorcycle but thereafter she was not aware that where was she taken as she did not know the name of the village. From this part of her statement, it appears that PW-3 did not know the name of the village and where was she taken on the motorcycle, if it is so then how she mentioned the name of village Ahiyapur Musahari in her written information is not known. Her statement that she was not aware of the place where she was taken would throw a serious doubt as to how she could take the name of the village Ahiyapur Musahari. In such circumstance, the statement of I.O. (PW-5) that she had visited the place of occurrence with PW-3 and armed forces would not inspire confidence. She had seen that there was a hut made of mud and cement and there were some bamboo articles. Vikash made her to lie on the same and thereafter he made a telephone call to Arvind, Babloo and Dahan then all the four assembled and committed wrong act with her. She has stated that photos were also taken and the video was made. Babloo was taking photos. Contrary to her statements in the written information (Exhibit '1') that the accused persons left her at the place of occurrence and fled away whereafter she reached her house on her own, this witness



has stated in her examination-in-chief that after the occurrence clothes were put on her mouth, Vikash and Arvind brought her on motorcycle and left her at the bus stop whereafter she went to her house and told the occurrence to her mother. On the next day, they came to the police station and lodged the FIR. She has stated that the application giving rise to the FIR was written by his brother (PW-1). Her statement under Section 164 CrPC was recorded and medical examination was also conducted. She also identified the hut in the photographs and has stated that those were her photos in which the hands taking out her clothes may be seen. On her identification Material Exhibits 'I', 'I/1', 'I/2', 'I/3', 'I/4', 'I/5', 'I/6', 'I/7' and 'I/8' were marked.

28. In her cross-examination, PW-3 has stated that in all these photographs her face cannot be seen and no date may be found in the photographs. She has stated that she had concealed her face due to shame. She had left her house after her mother scolded. She has stated that her mausi's house is at a distance of 6-7 minutes from the bus stand but she was taken by a different road. She had tried to raise *hulla* but her mouth was tied with clothes. She has stated that her mouth was not tied at the bus stop where she was seated on the motorcycle but after taking her to some distance, her mouth was tied by a white coloured *gamchi*. She has



stated that when Arvind sat, darkness had already prevailed and she could not know that where she was being taken. She has stated that in the running condition of the motorcycle Arvind had tied her mouth by cloth and had tightly caught her. At this stage, this Court finds that while in her examination-in-chief she has not stated that her mouth was tied with any cloth when she was being taken on the motorcycle by Vikash and she has stated that Vikash had called Arvind, Babloo and Dahan at the place of occurrence after reaching there, in her cross-examination this witness has stated that Arvind sat when the darkness had prevailed and in the running condition Arvind had tied her mouth by cloth. This is a material deviation from her statement in the examination-in-chief.

29. As regards the place of occurrence, this witness has stated that in paragraph '11' that there was darkness in the hut and no one was there from before, there was no door in the said hut. She has not stated about any source of light in the said hut. She has stated in paragraph '11' that when she was protesting against the act of the accused persons then she was being assaulted, her legs were tied and for two and half hours - three hours wrong act was committed with her, during the said occurrence she was becoming unconscious then Arvind and Babloo were sprinkling water on her face. She has stated that after all the accused had committed wrong



act with her and she had become unconscious then after five minutes she was taken on the motorcycle and was left at the bus stand from where she reached her house within ten minutes. At this stage, this Court finds that once again the victim has made material deviation from her statement in the examination-in-chief, according to her she had become unconscious when she was being taken on the motorcycle and was left at the bus stand. She has not stated at this stage that clothes were forced in her mouth or her mouth was tied by clothes when she was being taken to the bus stand to drop. She has stated that she was in unconscious condition.

30. As regards the place of occurrence, the victim has stated that it was a mud and cement hut but the I.O. (PW-5) has given a completely different picture of the place of occurrence. She has stated in paragraph '4' that the second place of occurrence is an old brick-straw-bamboo made *dalan* of one Mahesh Prasad in village Ahiyapur Musahari under Sarmera Police Station. There was a boundary wall from all the four sides and in front of the hut towards the south - east corner, there was a brick-*khaprail* room in which there was an iron gate, the door was towards the north side on which "Milan DJ" was written. The place was lonely. I.O. has not stated in her deposition about any source of light at the place of



occurrence. She has stated that she had visited the place of occurrence with the victim and the armed force but the victim (PW-3) has stated that police had not taken her again to the place of occurrence and police had not visited her house. To this Court, it appears that the place of occurrence in this case has not been duly established by the prosecution. The description of the place of occurrence given by the victim materially differs with that of the description provided by the I.O. (PW-5).

31. It is further found that the attention of the victim (PW-3) was drawn towards her statements made before police and the Judge as also towards her written information, PW-3 has admitted that in all the three statements made by her she had never said that Arvind sat on the motorcycle on way and had tied her mouth. Her attention was also drawn towards her statements recorded under Section 164 CrPC by the learned Magistrate in which she had stated that Vikash and Arvind were standing from before at Sarmera Bus Stop. The 164 CrPC statement has been marked Exhibit '03/01'. On going through this exhibit, we find that the statement of PW-3 was recorded on 18.06.2018 in which she has stated that when she was going to her *mausi's* house at about 8:00 PM on 16.06.2018, Vikash and Arvind met her at Sarmera Bus Stop and both of them told her that they would drop



her at her *mausi's* house. She has stated in her statement (Exhibit '03/01') that she was taken to another village where they called other two friends namely Babloo Kumar and Dahan and thereafter they took her in a room where they committed rape on her and then they took her to Sarmera where she was dropped. It is important to note that in her 164 CrPC statement, the victim has not stated that either at the time of taking away from the Sarmera Bus Stop or while dropping to her at Sarmera Bus Stop after commission of rape, her mouth was tied with clothes. In this manner she has conveniently changed her statement within one day of lodging of the FIR.

32. On further analysis of the evidence of the prosecutrix (PW-3) it appears that in paragraph '13' of her deposition, she has stated that when she reached her house, all the family members were found sleeping outside the house because it was a summer season. Her mother was sleeping on a cot outside the house and the victim disclosed the entire occurrence to her mother whereafter her mother started weeping. PW-3 has further stated that her brother and father were sleeping on the roof of the house who were told about the occurrence by her mother on the next day and on the next day, all of them went to the police station. She has stated that her father had also gone to the police station but contrary to her



statement, the father of the victim, who has been examined as PW-2, has clearly stated in paragraph '3' of his deposition that he had not gone to the police station. He has stated that his wife and child (*bacha*) had gone there. PW-2 has not stated that his daughter had gone to the police station with his wife and son. PW-2 has gone to the extent of saying in paragraph '6' of his deposition that in connection with this case, his statement was not recorded by the police and it further appears from deposition of PW-2 that he had come to depose from a murder case being Sarmera P.S. Case No. 72 of 2020. He was in jail and had come to depose from the said case. In this connection, from the deposition of the brother of the victim, who has been examined as PW-1, it would appear that he is also an accused in the said case which is in connection with murder of the brother of one of the appellants Arvind Kumar. In the said case Vikash was injured.

33. PW-3 has stated that she did not know Babloo and she had seen him for the first time that day. She had gone to the police station at 9:30 AM where she found that police had brought Babloo at the police station and all the four persons were caught and brought to the police station. This Court finds that according to the deposition of PW-3 she had gone to the police station at 9:30 AM but on reaching there she saw the accused persons who were



brought by police in the police station. It means even before the reaching of PW-3 to the police station, the accused persons had been arrested and brought to the police station. At this stage, we notice that in this case, the formal FIR has been registered on 17.06.2018 at 7:30 AM. The I.O. (PW-5) has stated that on the basis of the written application of the victim, this case was registered and she was given charge of the investigation. In paragraph '38' of her deposition, PW-5 has stated that she reached Sarmera Police Station at 9:35 AM where she found that the victim was already sitting there and she was sitting in the same clothes in which the occurrence had taken place with her. The I.O. was suggested by the defence that even before her reaching to the Sarmera Police Station, all the accused persons were already brought to the police station after arresting them but she had made false entries in the case diary that the accused were arrested one after another and they were brought to the police station. PW-5 denied this suggestion but this Court finds that from her deposition it is evident that even before the prosecutrix (PW-3) and the I.O. (PW-5) reached the Sarmera Police Station at about 9:30 AM/9:35 AM respectively, all the accused persons were already brought to the police station. This creates a lot of doubt as to how without disclosure of the occurrence to police by the prosecutrix/victim,



the FIR had already been registered at 7:30 AM and police had arrested the four accused persons. This material discrepancy in the prosecution case is to be considered keeping in view the statement of PW-2 that it were only his wife and son who had gone to the police station. It has come in evidence that the brother of the victim, who has been examined as PW-1, had written the application but according to PW-1, when her sister went to the police station, she disclosed the entire occurrence which PW-1 had recorded and read over to his sister (PW-3) whereafter she had put her signature on the written application (Exhibit '01'). The statement of PW-1 would not inspire confidence of this Court that the written application was prepared by PW-1 in the police station and he had recorded the statement made by PW-3 after reaching the police station. If it would have been so, then there was no question of registration of FIR at 7:30 AM because it is the statement of PW-3 that she reached the police station at 9:30 AM.

34. According to PW-3, her clothes were taken by the police personnel and were kept in Bihar Police Station. The clothes were sealed by ladies police but she was not aware of any signature. In this connection, when the evidence of the I.O. (PW-5) is looked into, this Court finds that PW-5 claims to have seized the clothes of the victim girl in Sarmera Police Station. In paragraph



‘33’ of her deposition, she has stated that she had not mentioned in the case diary as to whether there was any stain (*daag*) on the cloth of the victim. She had also seized the clothes of the accused persons, she had not found any stain on their clothes and she had not sent the accused persons for medical examination even though she was aware of the provision of Section 53A CrPC which requires medical examination of the accused of a rape case. This Court finds that in paragraph ‘33’ of her deposition, PW-5 has stated that all the clothes of the accused and the victim were dried and packed/sealed and kept the same in the police station.

35. A perusal of the FSL report (Exhibit ‘10/1’) would show that the report has been prepared on 18.12.2019 i.e. after about one year, six months of the occurrence. It was received in the FSL Patna on 25.06.2018 i.e. after about eight days of the seizure. As regards the mode in which the parcel was found to be packed and received and description of seal, the FSL report (Exhibit ‘10/1’) records as under:-

“The parcel consisted of one plastic dibba enclosed within cloth cover which was duly sealed with impressions of seal corresponding with the seal impression forwarded.

It contained, seventeen (17) sealed paper packets marked A, B/i, B/ii, B/iii, C/i, C/ii, C/iii, D/i, D/ii, D/iii, E/i, E/ii, E/iii, E/iv, F/i, F/ii and F/iii respectively.”



36. The FSL report (Exhibit '10/1') refers Memo Number 160 dated 23.06.2018 advising dispatch of one parcel per special messenger Chowkidar 4/3 Awadhesh Singh which was received in the office on 25.06.2018. This Chowkidar Awadhesh Singh has not been examined. What is surprising is that it is not known as to when the exhibits, which were sent to the FSL, were produced before the learned Special Judge.

37. We find from the records that the FIR of this case was received in court on 18.06.2018. On the same day, an application was filed by the I.O. to record the statement of the victim under Section 164 CrPC which was allowed and the statement was recorded by a learned Magistrate. The accused were also produced in court and thereafter they were forwarded to the Divisional Jail, Biharsharif with a custody warrant till 29.06.2018. The order nowhere mentions about seizure of clothes either of the accused or the victim. It is not known where the seized clothes were kept and when did the exhibits which were sent to the FSL, Patna, prepared and in whose presence the parcel which consisted of one plastic *dibba* enclosed with cloth and seventeen sealed paper packets were prepared.

38. On a close scrutiny of the evidences available on the record, it appears that there are production-cum-seizure lists of the



clothes of the accused persons which are Exhibit '08/01', Exhibit '08/02' and Exhibit '08/03'. All these production-cum-seizure lists have been prepared in Bihar Police Station but I.O. (PW-5) claimed that all the clothes of the victim and accused were dried and sealed were kept in the police station but Exhibits '08/01', '08/02' and '08/03' falsify the statements of the I.O. The seizure list witnesses are Mukesh Yadav, Samrendra Yadav @ Tantan Yadav, Bhuneshwar Yadav and Ramatar Yadav, all of them are illiterate persons, their thumb impressions have been shown on the production-cum-seizure lists, they are residents of different places such as village and post Sarmera and village Misla, none of the seizure list witnesses have been produced by the prosecution. It is rather surprising that these seizure list witnesses have not been made charge-sheet witnesses in this case. This gives an impression to this Court that the I.O. (PW-5) was perhaps well aware that the seizure list witnesses, whose thumb impressions have been shown on the production-cum-seizure list, would not support the prosecution case. This Court cannot ignore the case of the defence as suggested to the I.O. (PW-5) that she had made false entries in the case diary.

39. On going through the evidence of the doctor (PW-6) and (PW-7), this Court finds that while PW-6 was a member of the



Medical Board which was constituted under the Chairmanship of the Civil Surgeon-cum-Chief Medical Officer, Nalanda for the medico-legal examination and age determination of the victim, he has proved his signature on the medical report (Exhibit '04/01'). He has stated that on external examination no injury on pelvic part was found. The final opinion of the Medical Board was that the age of the victim is in between 15 to 16 years. PW-6 has stated that the cloth of the victim was not brought before him for pathological examination. A perusal of the medical report (Exhibit '04/02'), it appears that the Medical Board was constituted to examine the victim on 17.06.2018 at 2:30 PM, therefore, there cannot be any doubt that the victim was taken to the Sadar Hospital, Biharsharif for medical examination before 2:30 PM but the doctor was not given the clothes of the victim. This raises a doubt that if PW-5 had already seized the clothes of the victim in Sarmera Police Station itself, then why it was neither produced before the doctor nor in the court. It further appears from the production-cum-seizure list of the clothes of the victim (Exhibit '02/01') that the clothes were seized on 17.06.2018 at 9:15 AM. There is no independent witness to the seizure list (Exhibit '02/01'). The brother (PW-1) and mother of the victim (PW-4) are the witnesses. On the one hand, the seizure list of the clothes of the victim is



showing seizure of clothes in Sarmera Police Station, the victim (PW-3) has stated that her clothes were made to be taken out and kept in Bihar Police Station. Thus, this Court finds that not only the seizure of the clothes of the accused and the victims as shown by the prosecution create a lot of doubt, even the veracity of the sample sent to the FSL, Patna is highly doubtful.

40. Doctor (PW-7) was also a member of the Medical Board who had conducted physical examination of the victim. She has stated in paragraph '9' and '10' of her deposition as under:

“9. I minutely observed the body of the victim including her buttock and private part. I did not find any bruises, abrasion or any kind of injury on the private part of the victim or any other part of the victim's body.

10. It is true that in case of rape by more than one person there is possibility of injury.”

Thus, the medical evidence in this case completely rules out a case of rape by four persons.

41. This Court finds that the doctor (PW-7) has further stated that the assessment of the age is mainly given on the report of the radiologist and orthopedics. The main basis of the age assessment is ossification test. She has further stated in ossification test that there is always possibility of margin of +/- two years of age.



42. At this stage when we look into this aspect of the matter, we find that in this case, the age of the victim has been assessed between 15 to 16 years. Keeping in view the judicial pronouncements on the subject such as in the case of **Rajak Mohammad v. State of H.P.** reported in (2018) 9 SCC 248 and in the case of **Court on its own Motion vs. State of NCT of Delhi** (*supra*) which this Court has also followed in Cr. Appeal (DB) No. 461 of 2022, the upper stream of the age of the victim would come to eighteen years.

43. The prosecutrix was menstruating, therefore, presence of blood on her Exhibits 'B/i/a' and 'B/ii'. So far as finding of semen on Exhibit 'D/i' is concerned, the said exhibit is the cloth of Vikash Kumar who has been found juvenile. Exhibit 'E/iv' is the '*gamcha*' of Arvind on which blood is said to have been found but there is no matching of blood found on Exhibit 'E/iv' with that of Exhibit 'B/i/a' or 'B/ii'. We have taken note of these aspects of the matter even as we have found that the prosecution has failed to prove the veracity of the exhibits sent to FSL, Patna.

44. In ultimate analysis of the entire evidence available on the record, we are of the considered opinion that in this case, the victim (PW-3) cannot be put in the category of a sterling



witness. She has been changing her statements right from the beginning, her brother (PW-1) and father (PW-2) both are accused in the murder case of brother of Arvind Kumar (the appellant in Cr. Appeal (DB) No. 40 of 2023), the preparation of production-cum-seizure lists of the clothes of the victim as well as that of the accused are highly doubtful, non-production of the seized articles/materials before the Court and there being no proof of the fact as to how the exhibits which were sent to the FSL were collected and preserved before sending the same to the FSL, Patna, there is no examination of seizure list witnesses and the chowkidar and there being no medical examination of the accused in terms of Section 53A CrPC, even though they were arrested immediately after the occurrence and so far as these appellants are concerned, even the FSL report has not found any presence of blood or semen on their clothes, there is no matching of blood on Exhibit 'E/iv' and the doctor (PW-7) has not found on microscopic examination of vaginal swab any smears/spermatozoa and the RBC were present in plenty due to menstruation, in the kind of evidences on record, it would not be safe to convict the appellants for the offences punishable under Sections 376(D) IPC and 4/6 read with Section 5(g) POCSO Act and appellants, namely, Bablu Kumar



and Dahan Yadav for the offences under Section 3(1)(w)(i) read with 3(1)(w)(ii) of the SC/ST Act.

45. In our considered opinion, the prosecution has failed to prove even the primary facts which would have laid down the foundation for the case beyond all reasonable doubts.

46. In result, the impugned judgment and order is set aside. The appellants are acquitted of the charges giving them benefit of doubt.

47. The appellants are in incarceration, hence they shall be released forthwith if not wanted in any other case.

48. These appeals are allowed.

49. Let a copy of this judgment along with trial court’s record be sent down to learned trial court.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

SUSHMA2/-

AFR/NAFR	
CAV DATE	
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