

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.317 of 2023

Arising Out of PS. Case No.-40 Year-2021 Thana- MAHILA P.S. District- Samastipur

Kundan Kumar, Son of Ram Japit Rai, Resident of Village - Alampur Jimri,
P.S.- Vidyapati Nagar, Distt.- Samastipur.

... .. Appellant/s

Versus

1. The State of Bihar
2. 'X' NA

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Ms. Sushmita Mishra, Advocate
For the Respondent/s	:	Mr. Binod Bihari Singh, Addl.P.P.

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SOURENDRA PANDEY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 10-09-2025

We have heard learned counsel for the appellant and learned Additional Public Prosecutor for the State. Despite service of notice on respondent no.2 she has chosen not to enter appearance to contest the appeal. In course of hearing, we have also perused the trial court records.

2. This appeal has been preferred for setting aside the judgment of conviction dated 04.02.2023 (hereinafter referred to as the 'impugned judgment') and the order of sentence dated 23.02.2023 (hereinafter referred to as the 'impugned order') passed by learned Additional District & Sessions Judge-VI-cum-



Spl. Judge, POCSO Act, Samastipur (hereinafter referred to as the 'learned trial court') in T.R. No.155 of 2023 arising out of Mahila P.S. Case No. 40 of 2021.

3. By the impugned judgment, the appellant has been convicted for the offences under Sections 376(D), 363, 341, 504 and 506 of the Indian Penal Code (in short 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act (in short 'POCSO Act'). By the order of sentence, he has been ordered to undergo rigorous imprisonment for 20 years with a fine of Rs.20,000/- under Section 6 of the POCSO Act and in default of payment of fine, he shall further undergo rigorous imprisonment for six months.

Prosecution Case

4. The prosecution case is based on a written information submitted by the mother of the victim on 14.06.2021 in Mahila Police Station, Samastipur. She has stated in her written information that she is a resident of village-Simri, Ward No.11 under Vidyapati Nagar Police Station in the district of Samastipur. On 19.05.2021 at about 3.45 AM, she had gone to ease out outside her house in a field with her mother-in-law Most. Panwati Devi (not examined)



and her minor daughter ('X') and minor daughter ('Y'). At this stage, she has stated that the four named accused persons who were waiting there with a pre-planning pointed pistol on the informant and asked her to remain silent otherwise her head would be blown. The informant (PW-1) alleged that thereafter all the four persons took away her minor daughter ('Y') aged about 15 years forcibly in a Scorpio vehicle. She alleged that all the four persons had kidnapped her daughter with an intention to commit gang rape and for prostitution. She has stated that after putting pressure on the guardians and under societal pressure, the victim girl was left/thrown at 10 O' Clock in night on 21.05.2021. The informant alleged that from 19.05.2021 to 21.05.2021 all the four persons had committed rape on the victim. She alleged that when she thought to go to police or for treatment then all the four criminals and their dozens of guardians and associates armed with weapons were threatening her to kill all the family members. She expressed apprehension that she may be killed by all the four accused persons, their guardians and the associates. On the written information, there is a thumb impression which is said to be of the informant (PW-1) but



nobody has identified the thumb impression on the written application.

5. On the basis of this written application, Mahila P.S. Case No. 40 of 2021 dated 14.06.2021 was registered under Sections 376(DA), 363, 341, 323, 504, 506 and 34 IPC, Sections 8 and 10 the POCSO Act and Section 27 of the Arms Act.

6. After investigation, police submitted chargesheet bearing chargesheet No. 117 of 2021 dated 16.11.2021 under Sections 376(DA), 363, 341, 323, 504, 506 and 34 IPC and Sections 4 and 6 of the POCSO Act against (1) Kundan Kumar and (2) Rupesh Kumar keeping investigation pending against (3) Raushan Kumar and (4) Gaurav Kumar. Thereafter, vide order dated 02.12.2021 learned trial court took cognizance of the offence under Sections 376(D), 363, 341, 504, 506 and 34 IPC and Sections 4 and 6 of the POCSO Act. Learned trial court vide order dated 09.12.2021 sent the case record of Rupesh Kumar to the Juvenile Justice Board, Samastipur. Charges were read over and explained to the appellant in Hindi to which he pleaded not guilty and claimed to be tried, accordingly, vide order dated 27.06.2022, charges were framed under Sections 363, 376(D), 341, 504 and 506 of



the IPC and Section 6 of the POCSO Act against the appellant.

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

PW-1	The Informant
PW-2	The Victim
PW-3	Pradeep Kumar
PW-4	Pushplata Kumari (I.O.)
PW-5	Dr. Pratibha Kumari

List of Exhibits

Exhibit-P1/PW1	Signature of the victim on her statement under Section 164 Cr.P.C.
Exhibit-P2/PW2	Signature of the victim on the medical requisition.
Exhibit-P3/PW4	Charge-sheet
Exhibit-P4/PW5	Signature of the doctor on the medical report.

8. Thereafter, the statement of the appellant was recorded under Section 313 CrPC. The appellant denied all the allegations and took a plea that he has been falsely implicated in this case.

9. The defence also examined altogether five witnesses. The description of defence witnesses are as under:-



DW-1	Krishna Kumar Rai
DW-2	Shiv Kumar Rai
DW-3	Ravindra Kumar Rai
DW-4	Shankra Rai
DW-5	Ram Dev Rai

Findings of the Learned Trial Court

10. Learned trial court after examining all the evidences available on the record found that the prosecution has been able to prove that the appellant along with other co-accused has committed the gang rape upon the victim.

11. Learned trial court, as regards the delay in lodging of the FIR observed that it is not fatal to the prosecution case because in such type of cases, delay is not material and bound to occur as people do not want to go in the court for the sake of name and status of the family. Learned trial court found from the cross-examination of PW-2 that on the point of delay she has stated Mahila Police Station had not registered her case then she has to take the assistance of E.T.V.

12. Learned trial court, as regards the age of the victim found that her age certificate has been filed. During the judgment, it was marked Exhibit 'P5' without any objection and according to this document, her date of birth is 15.10.2006, hence, on the date of occurrence, she was below



15 years. Therefore, learned trial court observed that her consent is immaterial.

13. Learned trial court after properly appreciating the evidences on the record held that the ingredients of the offences under Sections 376D, 363, 341, 504 and 506 IPC and Section 6 of the POCSO Act and the charges are proved beyond all reasonable doubts. Accordingly, the appellant has been convicted for the offences punishable under Sections 376D, 363, 341, 504 and 506 IPC and Section 6 of the POCSO Act.

Submissions on behalf of the appellant

14. Learned counsel for the appellant assailed the impugned judgment and order and submitted that the learned trial court has committed grave error in appreciating the evidences available on the record.

15. Learned counsel for the appellant submits that in this case, there is an inordinate delay of 26 days in lodging of the FIR for which there is no explanation at all. This would raise doubt over the prosecution story.

16. Learned counsel submits that in course of trial, PW-2 has stated that she was raped eight times by the accused persons in between 19.05.2021 and 21.05.2021 and when her



condition had worsened then they had also got administered saline water. Learned counsel submits that in this regard nothing could be found and no doctor or compounder who had administered the saline water could be found by the I.O.

17. Learned counsel submits that the place where the victim (PW-2) was raped between 19.05.2021 and 21.05.2021 has not been proved by the prosecution.

18. Learned counsel submits that medical examination report completely rules out the case of sexual assault which would prove fatal to the prosecution case.

19. Learned counsel for the appellant submits that the learned trial court has relied upon the age certificate (Exhibit-P5) which was not produced during evidence. The trial court itself admits that it was marked exhibit during judgment. It is obvious that the attention of the accused was not drawn towards Exhibit-P5 during his statement under Section 313 Cr.P.C. Thus, relying upon the judgment of Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in (1984) 4 SCC 116 (paragraphs '142' to '144'), it is submitted that Exhibit-P5 cannot be looked into. It is submitted that in paragraph '7' of the impugned judgment where description of prosecution



exhibits are given there is no mention of Exhibit-P5. There is no application of prosecution to mark it exhibit so the very authenticity of Exhibit-P5 becomes doubtful.

Submissions on behalf of the State

20. On the other hand, learned Additional Public Prosecutor for the State has contested the appeal and submitted that the learned trial court has rightly convicted the appellant.

21. Learned Additional Public Prosecutor submits that the appellant along with other co-accused persons committed rape upon the victim who is a minor. Learned Additional Public Prosecutor submits that the victim (PW-2) and the informant (PW-1) supported the occurrence which had taken place on 19.05.2021 and the matter was reported on 14.06.2021 and the reason for delay was that the accused persons were threatening the informant and her family members.

22. Learned Addl. PP. submits that the occurrence had taken place on 19.05.2021 and the victim was examined on 15.06.2021 and as such it is not necessary that in case of sexual assault, there might be injury on the person of the victim.



Consideration

23. We have heard learned counsel for the appellant and learned Additional Public Prosecutor for the State and also perused the trial court records.

24. The prosecution case is based on a written information submitted by the mother of the victim on 14.06.2021 in Mahila Police Station, Samastipur. She has stated in her written information that she is a resident of village-Simri, Ward No.11 under Vidyapati Nagar Police Station in the district of Samastipur. On 19.05.2021 at about 3.45 AM, she had gone to ease out outside her house in a field with her mother-in-law Most. Panwati Devi (not examined) and her minor daughter ('X') and minor daughter ('Y'). At this stage, she has stated that the four named accused persons who were waiting there with a pre-plan pointed pistol on the informant and asked her to remain silent otherwise her head would be blown. The informant (PW-1) alleged that thereafter all the four persons took away her minor daughter ('Y') aged about 15 years forcibly in a Scorpio vehicle. She alleged that all the four persons had kidnapped her daughter with an intention to commit gang rape and for prostitution.



25. She has stated that after putting pressure on the guardians and under societal pressure, the victim girl was left/thrown at 10 O' Clock in night on 21.05.2021. The informant alleged that from 19.05.2021 to 21.05.2021 all the four persons had committed rape on the victim. She alleged that when she thought/tried to go to police or for treatment then all the four criminals and their dozens of guardians and associates armed with weapons were threatening her to kill all the family members. She expressed apprehension that she may be killed by all the four accused persons, their guardians and the associates. On the written information, there is a thumb impression which is said to be of the informant (PW-1) but nobody has identified the thumb impression on the written application.

26. It is evident that the victim (PW-2) had already come back to her home on 21.05.2021 at 10 O' Clock in night but the written application giving rise to the present FIR was submitted after one month three weeks approximately. In course of trial, the attention of the informant (PW-1) was drawn towards the date of occurrence and PW-1 has stated that the occurrence is of 19.05.2021. She has also stated that her daughter returned after three days but she has stated that



she lodged the case after return of her daughter. The defence suggested this witness that her daughter had not been kidnapped rather she had gone away on her own will and had returned but she had falsely implicated the innocent people.

27. On the point of delay in lodging of the FIR, the I.O. (PW-4) has stated in paragraph '13' of her deposition that she had asked the informant the reason for the delay in lodging of the FIR but she had not given any explanation. This Court, therefore, finds that there is a delay of 26 days in lodging of the FIR. There is no explanation at all as to why this delay has occurred. This would raise doubt over the prosecution story. On the question of delay and its effect, the Hon'ble Supreme Court has observed in the case of **Meharaj Singh (L/Nk.) vs. State of U.P.** reported in **(1994) 5 SCC 188** in paragraph '12' as under:-

“**12.** FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or



exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW-8.”

The same view has been reiterated by the Hon’ble Supreme Court in the case of **Chotkau vs. State of U.P.** reported in **(2023) 6 SCC 742**. Paragraph ‘69’ of the judgment in the case of **Chotkau** (supra) reads as under:-

“69. On the question of compliance of Section 157(1) along with logical reasoning for doing so, the following



passage from the decision in *Jafarudheen v. State of Kerala*⁸ may be usefully quoted as under : (SCC p. 462, paras 28-29)”

“28. The jurisdictional Magistrate plays a pivotal role during the investigation process. It is meant to make the investigation just and fair. The investigating officer is to keep the Magistrate in the loop of his ongoing investigation. The object is to avoid a possible foul play. The Magistrate has a role to play under Section 159CrPC.

29. The first information report in a criminal case starts the process of investigation by letting the criminal law into motion. It is certainly a vital and valuable aspect of evidence to corroborate the oral evidence. Therefore, it is imperative that such an information is expected to reach the jurisdictional Magistrate at the earliest point of time to avoid any possible ante-dating or ante-timing leading to the insertion of materials meant to convict the accused contrary to the truth and on account of such a delay may also not only get bereft of the advantage of spontaneity, there is also a danger creeping in by the introduction of a coloured version, exaggerated account or concocted story as a result of deliberation and consultation. However, a mere delay by itself cannot be a sole factor in rejecting the prosecution's case arrived at after due investigation. Ultimately, it is for the court concerned to take a call. Such a view is expected to be taken after considering the relevant materials.”

8. (2022) 8 SCC 440 : (2022) 3 SCC (Cri) 436]



28. Apart from the inordinate delay in lodging of the FIR, we find from the evidence on the record that while PW-1 has stated that she, her mother-in-law and two minor daughters had gone to ease out in the field at 3.45 AM, the victim girl (PW-2) has made statement under Section 164 Cr.P.C. on 16.06.2021 before a learned Magistrate where she has stated that she had gone to ease out in the field after she was awoken by her sister ('X'). She has not stated that she had gone in the field with her mother, grand-mother and her sister. In course of trial, PW-2 has though stated that she had gone to ease out with her mother, grand-mother and sister, this Court finds that the statement of the victim (PW-2) is materially inconsistent with her own statement under Section 164 Cr.P.C. and this would create a dent on her evidentiary value. In course of trial, PW-2 has stated that she was raped eight times by the accused persons in between 19.05.2021 and 21.05.2021 and when her condition had worsened then they had also got administered saline water. In course of investigation, however, nothing could be found in this regard and no doctor or compounder who had administered the saline water could be found by the I.O.



29. This Court further finds that PW-2 has stated that her eyes were closed so she could not see where she was taken away by the accused persons, however, the I.O. (PW-4) has given the description of the place of occurrence in paragraph '2' of her deposition. PW-4 has stated that she had inspected the place of occurrence as disclosed by the victim and the witnesses. This is a completely vague statement inasmuch as the victim says that she could not know where she was taken away and there is no other witness on the record who has given the description of the place of occurrence where rape was committed with the victim (PW-2). From paragraph '2' of her deposition, it appears that the place of occurrence is a *Sahan* land of one Padarath Rajak but Padarath Rajak has not been examined by the I.O. and the I.O. has not stated about the presence of any sign/mark of commission of occurrence at the said place. In paragraph '10' she has stated that the place of occurrence is a field where she did not find any objectionable article and the field was not found in tampering condition. This Court, therefore, finds that the place where the victim (PW-2) was allegedly raped between 19.05.2021 and 21.05.2021 has not been proved by the prosecution.



30. The witness (PW-2) is also liable to be discredited for the reason that while she has stated that the accused persons had committed rape at least on eight occasions with her but her mother (PW-1) has stated in her deposition that on asking her daughter ('Y') had informed her that the accused persons were administering injection on to her hands and had committed wrong act with her but in the medical examination report (Exhibit-P4/PW5) Dr. Pratibha Kumari (PW-5) has not mentioned about presence of any external injury over whole body of the victim.

31. In fact, PW-5 has deposed that there was no external and internal injury over perineum, vagina valva appeared healthy and the hymen was old healed and ruptured. She has clearly opined that on the basis of physical and radiological findings the age of the victim was between 17-18 years and on the basis of the physical findings investigation report there is no sign of sexual assault at the time of examination. In fact, in Exhibit-P4/PW5, the doctor (PW-5) has not recorded that the victim told her about any sexual assault on her. The extract of the medical report (Exhibit-P4/PW5) are as under:-

“Mark of identification – Cut mark on forehead
Height – 5’2” feet
weight – 40 kg



Teeth – 7x7/7x7

LMP- Not sure of date

On General examination

Bilateral Breast – well developed

Auxiliary and pubic hair- present

No external Injury over whole body and breast

P/A- NAD

Pelvic examination – Hymen, old, healed and ruptured.

Vagina valva appears healthy.

No External and internal injury over perineum

No foreign body found.

Two Vaginal Swab taken for microscopical examination –
Reports not present

Investigation, suggestions and findings

X- ray pelvis A.P. View shows epiphysis of both illiac crest
appeared but not fused.

X-ray wrist joint- A.P. view shows epiphysis of lower end of
radius and ulna not completely fused.

X-ray elbow joint- A.P. view shows epiphysis of upper end of
radius and ulna fused completely. USG whole abdomen-
normal study.

Urine Pregnancy Test- Negative

On the basis of above Physical and radiological findings the
age of victim is in between 17-18 -Years (Seventeen to
eighteen years). There is no sign of sexual assault at the time
of examination.”

32. At this stage, we also find force in the submission of learned counsel for the appellant as regards Exhibit-P5. This document has been taken on record during judgment as recorded by the trial court itself. Who produced this document and whether original or photocopy was produced is not recorded. The order-sheet of trial court does not show filing of any application by prosecution to take any document on the record. It is evident that the manner in which Exhibit-P5 has been taken on record and exhibited lacks



credence. The accused was not made aware of it during his 313 Cr.P.C. statement. This Court is, therefore of the opinion that Exhibit-P5 must be discarded. In the list of prosecution Exhibits as provided in the impugned judgment (page 2-3), the trial court has enclosed Exhibits upto Exhibit P4/PW5 only. This Court has, thus, relied upon the medical evidence (Exhibit-P4/PW5) in which the age of the prosecutrix has been assessed in between 17-18 years.

33. We would also take note of paragraph '6' of the cross-examination of PW-5 where she has stated that she had examined the clothes of the victim. At the time of examination, she did not find any sign of sperm on the clothes or any evidence connecting sexual assault on the clothing of the victim. To this Court, therefore, it appears that so far as the medical examination report and the deposition of the doctor (PW-5) are concerned, they are completely ruling out a case of repeated sexual assault for three days by four persons.

34. We find from the evidence of the maternal uncle of the victim, who has been examined as PW-3, that he is a hearsay witness. He has stated that when the victim girl came back to home then he had taken her to Dr. R.K. Shah for treatment in Simri village but Dr. R. K. Shah has not been



examined in course of trial. The I.O. (PW-4) has stated that she had not seen the clothes of the victim which she was wearing at the time of occurrence and in course of investigation she had not found any eye witness or witness to the circumstances. In this regard, PW-4 has specifically stated in paragraph '18' of her deposition.

35. It is important to take note of the fact that the grandmother and sister of the victim who were said to be present in the field at the time of taking away of the victim girl have been withheld by the prosecution for no plausible reason. They are said to be the eye witnesses of the occurrence of 19.05.2021 when the victim girl was being taken away, still withholding of these witnesses without any explanation would result in drawing of an adverse inference against the prosecution.

36. From the aforementioned discussions, we have come to a conclusion that in this case not only the huge delay in lodging of the FIR but even the other materials on the record such as the vacillating statement of the victim (PW-2) and the medical examination report completely ruling out a case of sexual assault would prove fatal to the prosecution case. In this case, the age of the victim has been assessed by



the medical team which has been proved by PW-5 between 17 to 18 years. For purpose of assessing the age of a victim in a case under the POCSO Act, we would rely upon a judgment of the Hon'ble Supreme Court in the case of **Rajak Mohammad v. State of H.P.** reported in **(2018) 9 SCC 248**.

Paragraph '9' of the said judgment reads 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.”

37. The another judgment is that of the Hon'ble Delhi Court in the case of **Court on its own Motion vs. State of NCT of Delhi vs. State of NCT of Delhi (Crl. Ref. 2/2024 judgment dated 02.04.2024) reported in 2024 SC OnLine Delhi 4484** where while answering the reference in this regard, the Hon'ble Delhi High Court answered the reference in paragraph '46' as under:-

“**46.** As an upshot of our foregoing discussion, the Reference is answered as under:-

(i) Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test?
Ans: In such cases of sexual assault, wherever, the court is called upon to determine the age of victim



based on 'bone age ossification report', the upper age given in 'reference range' be considered as age of the victim.

(ii) Whether the principle of 'margin of error' is to be applicable or not in cases under the POCSO Act where the age of a victim is to be proved through bone age ossification test.

Ans: Yes. The margin of error of two years is further required to be applied."

38. When we apply the aforementioned judicial pronouncements in the facts of the present case, it is found that the upper extremity of the age of the victim would go to $18+2=20$ years. However, the learned trial court seems to have missed out this aspect of the matter and has convicted the appellant for the offences punishable under Section 6 of the POCSO Act and Section 376(D) IPC but has imposed a sentence of 20 years rigorous imprisonment with a fine of Rs.20,000/- for the offence under Section 6 of the POCSO Act and this being the higher sentence, in the light of Section 42 of the POCSO Act the appellant has been ordered to undergo to said sentence. We are of the considered opinion that in this case the prosecution has failed to establish the primary facts such as the age of the victim to bring it under the POCSO Act and then the burden of the prosecution to belie the principles of presumption of innocence of the accused have not been discharged beyond all reasonable doubts, in our opinion, the judgment of the learned



trial court would not sustain and it would not be safe to approve the judgment of the learned trial court.

39. In result, we set aside the impugned judgment and order and acquit the appellant of the charges giving him benefit of doubt.

40. The appellant is said to be in custody, hence he is ordered to be released forthwith, if not wanted in any other case.

41. The appeal is allowed.

42. Let a copy of the judgment along with the trial court records be sent down to the learned trial court.

(Rajeev Ranjan Prasad, J)

(Sourendra Pandey, J)

arvind/-

AFR/NAFR	
CAV DATE	
Uploading Date	25.09.2025
Transmission Date	25.09.2025

