

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.282 of 2004

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AWADHESH KUMAR BISWAS

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Dr. Ranjeet Kumar, Advocate
	:	Mr. Rajnish Prakash, Advocate
	:	Ms. Lakshmi Kumari, Advocate
	:	Mr. Shikhar Mani, Advocate
	:	Mr. Junaid Imam, Advocate
	:	Mr. Kanishk Kaustubh, Advocate
	:	Mr. Ankesh Kr. Sinha, Advocate.
For the Respondent/s	:	Ms. Anita Kumari Singh, A.P.P.

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CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT

Date : 11-09-2025

1. The appeal is filed challenging the order of conviction and judgment dated 26.04.2004 in Sessions Trial No. 36 of 1996 on the file of Additional Sessions Judge, F.T.C. No. V, Katihar wherein the appellant was found guilty for the offences punishable under Section 376 of Indian Penal Code and was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,000/- and in default of payment of fine to suffer simple imprisonment for six months. However, the



appellant was acquitted for the offences punishable under Section 313 of the Indian Penal Code.

2. This Court intends to refer the victim as "X", as her identity shall not be disclosed in view of the judgment of the Hon'ble Apex Court in ***Nipuna Saxena Vs. Union of India reported in (2019) 2 SCC 70***. It is relevant to mention that the trial court has not followed the directions of the Apex Court and the judgment reveals that the name of the victim was disclosed.

3. The brief fact of the case of the prosecution is that the victim "X" is the informant who was in a love relationship with the accused/appellant Awadhesh Kumar Biswas for about two years prior to 24.05.1995. The accused had assured to marry her, and on such assurance they established physical relationship akin to that of husband and wife. During course of such relationship the victim "X" became pregnant and she was taken to a private doctor by the appellant. Certain medicines were administered to her, resulting in an abortion. Subsequent to the abortion, the appellant



and the victim continued their physical relationship, basin on the assurance of appellant to marry her. Further, the fardbeyan of the victim disclose that these facts were within the knowledge of her parents and uncle. The appellant married one Sulochna Devi, daughter of Jagdish Chandra Biswas. After coming to know about the marriage of the appellant, victim thought to commit suicide but refrained from doing so, on the assurance of her parents, uncle and aunt that she would be eventually married to the appellant. On 23.05.1995, the victim got married with the appellant. Thereafter, the victim came to know that the father-in-law of the appellant i.e. Jagdish Chandra Biswas had lodged a complaint against her father and uncle and on that the victim was constrained to prefer a report before Kadwa Police Station against the appellant, for the offences of rape and causing abortion.

4. Basing on the fardbeyan of the victim "X" an F.I.R. was registered against the appellant at Kadwa Police Station on 24.05.1995, for the offences punishable under Section 376 and 313 of the Indian



Penal Code. After completion of the investigation, charge-sheet no. 82/1995 dated 13.11.1995 was submitted against the appellant for the said offences. Thereafter, on 15.12.1999, the Learned Chief Judicial Magistrate took cognizance for the offences punishable under Section 376 and 313 of the Indian Penal Code and committed the case to the Court of Sessions. Subsequently, the Court of Sessions transferred the case to Additional Sessions Judge, FTC No. V, Katihar for trial. The trial court framed charges against the appellant for the offences punishable under Section 376 and 313 of the Indian Penal Code, read over and explained the contents of the same to the appellant for which he pleaded not guilty and claimed to be tried.

5. During the course of trial, prosecution has examined its witnesses and marked exhibits which are as follows:-

List of Prosecution Witness

P.W. 1	Kamla Prasad Biswas	Father of the victim
P.W. 2	Amarnath Biswas	Uncle of the victim
P.W. 3	Nityanand Biswas	Known the victim
P.W. 4	Suresh Chandra Biswas	Uncle of the victim
P.W. 5	Shyam Kumar Biswas	Uncle of the victim



P.W. 6	Prabha Devi	Mother of the victim
P.W. 7	Neelam Kumar	Sister of the victim
P.W. 8	“X”	Victim
P.W. 9	Dr. Neelam Manish	Doctor

List of Exhibits on behalf of prosecution

1.	Ext. 1-1/C	4 love letter	Proved by P.W.-1
2.	Ext. 2	Prescription of Dr. Ali	Proved by P.W.-1
3.	Ext. 3	Signature of Nityanand Biswas on Ferdbeyan	Proved by Nitya Nand Biswas/P.W.3
4.	Ext. 3/a	Signature of Informant on ferdbeyan	Proved by P.W. 8
5.	Ext. 4 & 4/1	Medical Examination report	Proved by P.W. 9
6.	Ext. 5	Ferdbeyan	
7.	Ext. 6	Formal F.I.R.	
8.	Ext. 7	Charge Sheet	

List of Exhibits on behalf of Defence

Ext.-A	Charge Sheet No. 66/95 in connection with Kadwa P.S. Case No. 60/95
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6. On completion of the evidence of the prosecution witnesses, the accused was examined under Section 313 of Code of Criminal Procedure wherein he denied the incriminating evidence of the prosecution against him and claimed to be innocent. After consideration of the entire oral and documentary evidence on record, the trial court



convicted the appellant for the offence punishable under Section 376 of the Indian Penal Code and acquitted the appellant for the offence punishable under Section 313 of the Indian Penal Code.

7. Heard the Learned counsel, Mr. Rajnish Prakash, on behalf of the appellant and the Learned Additional Public Prosecutor, Mrs. Anita Kumari Singh, for the State.

8. It is urged by the Learned counsel for the appellant that the trial court has solely relied upon the evidence of the victim and convicted the appellant for the offence punishable under Section 376 of the Indian Penal Code without proper corroborative evidence and that the fardbeyan does not inspire the confidence of the Court to sustain conviction. It is further urged that there was enormous delay in preferring the report which was not properly explained by the prosecution. Further it is contended that there exist material contradictions in the evidence of the prosecution witnesses and the age was not properly determined by the trial Court, so as to convict the appellant for



the offences punishable under Section 376 of the Indian Penal Code. It is also argued that some of the documents were suo-moto marked as exhibits by the trial Court and while others were marked through P.W. 1, who had no personal knowledge of the facts and the trial Court ought not to have marked the documents and therefore, prayed to set aside the conviction and order of sentence passed against the appellant.

9. On the other hand, the Learned Additional Public Prosecutor contended that there is no error or irregularity in the judgment or order of sentence passed by the trial Court as all the witnesses supported the case of the prosecution and the evidence of the victim corroborates with the evidence of her parents and family members. She further contended that the victim was below the age of 16 years, as on the date of the occurrence and therefore, the question of consent is immaterial, therefore, prayed to confirm the sentence of the trial Court.



10. In the light of rival submissions, the point for determination in this appeal is that

(I) whether the trial Court erred in convicting the appellant for the offence punishable under Section 376 of the Indian Penal Code?

(II) whether the prosecution was able to prove the guilt of the appellant beyond reasonable doubt for the offence punishable under Section 376 of the Indian Penal Code ?

11. In order to determine the above points, it is necessary to re-appreciate the evidence of the prosecution witnesses.

12. P.W. 1 Kamla Prasad Biswas and P.W. 6/Pratibha Devi are the parents of the victim "X". P.W. 7 is the sister of the victim. P.W. 8 "X" is the victim. P.Ws. 2 to P.W. 5 are the uncles of the victim.

13. The evidence of P.W. 1, the father of the victim, disclose that victim has preferred a report against the appellant, on the allegation that the appellant had physical relation with her under the promise of marriage. The appellant used to regularly write letters to the victim which are marked as



Exhibits 1 to 1/C through P.W. 1. His evidence disclose that the appellant took the victim to Salmari where her pregnancy was terminated. The Medical prescription of one Dr. Ali was marked as Exhibit-2.

14. In the cross-examination, it is admitted by the P.W. 1 that the father-in-law of the appellant has earlier lodged a report against him and others for which an F.I.R. was registered on the file of Kadwa Police Station vide Case No. 60/1995. Further the marriage of the appellant was arranged two to three days, prior to lodging of the report by the victim. It is the specific evidence of P.W. 1, that both the victim and the appellant used to write love letters but P.W. 1 do not have the letters of the victim. The letters of the appellant clearly reveal their relationship. He testified that at the time of abortion, the age of the victim was 18 years. It is also admitted by P.W.-1 that the victim preferred the report against the appellant, after the father-in-law of the appellant preferred the case against them. He also stated that he came to know about the pregnancy of the victim through his wife and he thought abortion was the right thing to



do, consulted Dr. Ali, who terminated the pregnancy of the victim. Pursuant to the marriage of the victim with the appellant, the victim did not go to her maternal home. P.W. 1 denied the suggestion that he did not give any statement to the police and that the victim fell ill, at her maternal home.

15. The evidence of P.W. 6, who is the mother of the victim, also disclose that the incident took place about 6 years ago. It is specifically testified by her that the appellant is her sister's son and he used to visit her house to teach the victim and her younger daughter i.e. Neelam/P.W. 7. The appellant taught both her daughter's for about two years and during that period victim developed an affair with the appellant. It is also testified by P.W. 6 that the appellant fall in love with her daughter and she had seen and read the love letters written by the appellant. She further stated that the victim became pregnant, due to her physical relationship with the appellant.

16. Her evidence contradicts with the evidence of P.W. 1 on the aspect of abortion. It is the



evidence of P.W. 1 that he had taken his daughter to Dr. Ali for termination of pregnancy. However, the evidence of P.W. 6 disclose that the abortion was caused by administering medicines to X. Further she stated that she did not know where the abortion was carried out and that the appellant did not marry her daughter but instead he married the daughter of one Jagdish.

17. In the cross-examination, P.W. 6 admitted that she did not know for how long, the love affair of the victim and the appellant lasted. The victim was four months pregnant and the appellant married with another woman, 2-4 months after the abortion and that they preferred a report against the appellant only after the marriage of the appellant with another girl. She further testified that she got married 30 years ago and the victim was born 3 to 4 years, after her marriage. P.W. 6 stated that the victim did not informed her the name of doctor who performed the abortion. According to her, she purchased medicines for the victim and administered them to her.



18. P.W. 7, the younger sister of the victim, also testified that the incident took place six years ago. She stated that she used to sleep with the victim and on one occasion, the appellant came and called her sister/victim from window and fled away when she woke up. She further testified that the appellant used to come to their house to teach them and that the appellant was the son of her mother's sister. The appellant used to joke with them and also used to ask the victim whether she would marry him. She further testified that the victim got pregnant due to her illicit relationship with the appellant which was later aborted and that the appellant eventually married the daughter of one Jagdish, got aborted the pregnancy of the victim and that the appellant did not marry the victim.

19. In the cross-examination she admitted that there was a love affair between the appellant and the victim which was kept secret from their parents and that the case was filed against the appellant only after the second marriage. She also testified that she was not aware where the abortion



of the victim took place and that the victim has gone out without informing her mother. She further testified that the victim went out in vehicle and returned on a motorcycle.

20. It is relevant to mention the names of the persons who rode the vehicles were not the part of the deposition.

21. On perusal of entire evidence of P.W. 1, 6 and 7 it could be construed that the appellant is the son of P.W. 6's sister and their relationship by courtesy would be brother and sister. As stated supra, there are contradictions between the evidences of P.W. 1 and P.W. 6 as to who has taken the victim, for getting her aborted. P.W. 6 and P.W. 7 in one tone stated that the appellant used to visit their house and teach P.W. 7 as well as the victim nearly for a period of two years and that the report was preferred against the appellant for the offences under Section 376 of the Indian Penal Code only after the marriage of the appellant with the daughter of Jagdish. None of these witnesses have witnessed the appellant and the victim engaging in physical



relationship. The place of occurrence as stated by these witnesses was at the house of the victim.

22. The crucial evidence in this case is that of the victim i.e. P.W. 8. Her evidence disclose that she was in love with the appellant for about two years, prior to lodging of the case. The appellant used to treat her as his wife and repeatedly assured to marry her. She testified that they had physical relation on several occasions and she became pregnant. While she was four months pregnant her health got deteriorated and on that the appellant took her to a doctor, where she was administered medicines and injections which resulted in abortion. Thereafter, the appellant brought her to home. Subsequent to the abortion, the appellant promised to marry her and treated her as his wife. She further testified that these facts were known to her mother, father, uncle and aunt. On 18.05.1995 the appellant married one Sulochana, daughter of Jagdish, thereby ruining her life and when she was about to commit suicide but her father i.e. P.W. 1 assured her that he would get her married with the appellant and she got



married to the appellant on 23.05.1995. Her signature on fardbeyan got marked as Exhibit 3/A.

23. In the cross-examination, she admitted that the appellant used to teach her and that her parents and family members were not aware about the love affair or of her physical relationship with the appellant. Her marriage with the appellant was performed at her house. Invitation card were not printed. The marriage took place at night and she could not recall the date of her marriage or the name of Thakur or the carpenter or the washerman who were present. It is specifically stated by her that no videography or photography was taken at the time of marriage and that subsequent to marriage the appellant never took her to his house.

24. On perusal of the entire evidence of the victim it can be construed that the victim and the appellant had love affair and they shared physical intimacy and that the victim voluntarily surrendered herself to the appellant, on the promise of marriage.



25. It is pertinent to mention that the alleged offence took place two years prior to 24.05.1995.

26. Section 375 defines rape. There were two amendments for Section 375 of Indian Penal Code. Firstly by Act of 43 of 1983 with effect from 25.12.1983 and secondly by Act 13 of 2013 which came into force on 03.02.2013 introducing amendments to Section 375, 376, 376-A, 376-B, 376-C and 376-D IPC. Taking into consideration the date of F.I.R. i.e. 24.05.1995, this Court has reproduced Section 375 of Indian Penal Code rape as it stood under the prevailing law at the time and not as per the amendment of 2013.

Section 375 reads as follows:-

375. Rape.- *A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:-*

First.- *Against her will.*

Secondly.- *Without her consent.*



Thirdly.- *With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death, or of hurt.*

Fourthly.- *With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

Fifthly.- *With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*

Sixthly.- *With or without her consent, whom she is under sixteen years of age.*

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not



being under [fifteen] years of age, is not rape.

27. On perusal of the judgment, it is evident that the trial Court came to the conclusion that the victim was under the age of 16 years, at the time of offence and, as such, the offence falls within the ambit of Section 375 under the circumstances specified in clause (6).

28. The rest of the witnesses in this case are P.Ws. 2 to 5 who are the uncles of the victim. however their evidences is a heresay evidences. None of them had personal knowledge either of about the love affair of the victim with that of the appellant or about the abortion which alleged to have taken place either, at the instance of the appellant or at the instance of P.W. 1. Therefore, much weightage cannot be given to their evidence and therefore they need not be discussed at length.

29. One more crucial evidence in this case is that of the doctor i.e. Dr. Neelam Manish/PW 9 who examined the victim, basing on the requisition issued by the Kadwa Police Station. The requisition was



marked as Exhibit-4. She examined the victim "X" on 27.05.1995. The medical report of P.W. 9 was endorsed on the back side of the requisition, and it was marked as Exhibit 4/1. The report disclose that she had perused the dental report of one Dr. Ghanshyam Prasad which disclose that the third molar 15/14 were in process of eruption. Further she also perused the x-ray report prepared by Dr. Sudhir with X-ray Plate No. 264 and 265 and recorded the following findings:-

- i. epiphysis of lower part of radius and ulna have appeared and fused completely.
- ii. Epiphysis of both side iliac (ILIAC) crest have appeared and are in process of fusion.

She specifically testified that there was no clinical marks of physical violence, on the body or on the private parts of the victim. However she noted old torn hymen and on vaginal examination the vaginal orifice admits two fingers easily, the uterus was retroverted, normal size and there was no bleeding. Further she testified that the vaginal swab report was prepared by Dr. Awadh Kishore which



disclose that no spermatozoa were detected. She opined that the victim was habituated for sexual intercourse, and there was no signs or symptom of recent abortion and that as per the above findings the victim's age would be between 17 to 18 years.

30. As per the evidence of P.W. 8, the age of the victim would be between 17-18 years, as on the date of examination but not below 16 years.

31. The evidence of P.W. 6, 7 and 8 clearly disclose that the appellant used to visit the house of the victim for teaching the victim and her sister. The prosecution, however, failed to produce any documentary evidence, such as the Date of birth certificate or School Certificate of the victim to enable the court to conclusively determine the age of victim.

32. The evidence of P.W. 9 clearly disclose that the victim was examined by Dr. Ghanshyam Prasad for dental examination, by Dr. Sudhir for X-ray report for the purpose of ossification test and by Dr. Awadh Kishore for the test of vaginal swab. Inspite of



the records the prosecution made no effort to examine these doctors.

33. On perusal of the record, it is evident that the charge-sheet was marked as exhibit-7. In the present case, the investigating officer was not examined for the reason best reason known to the prosecution. The list of witnesses appended to the charge-sheet also do not mention the names of Dr. Ghanshyam Prasad, Dr. Sudhir or Dr. Awadh Kumar as witnesses, except that of P.W. 9.

34. It is also relevant to mention that Exhibit-5 to 7 were suo moto marked by the court under Section 294 of the Code of Criminal Procedure. Section 294 of the Code of Criminal Procedure reads as follows:-

No formal proof of certain documents.- (1) *Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall*



be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

35. On perusal of the record, it is evident that no petition was filed by the prosecution before the court to mark these documents as exhibits. However, the Court *suo moto*, marked these documents as exhibits without there being a petition by either of the parties. Such a procedure is unknown to law. Any document before the court has to be marked as exhibits through the parties. In the absence of the parties it can be only marked under Section 294 Code of Criminal Procedure if the genuineness of the document is admitted, then only



it can be read as evidence. The chargesheet is nothing but the report of the Investigating Officer with all the allegations against the accused/appellant. The same cannot be marked as Exhibit by the trial Court. The trial Court has erred in marking the charge-sheet as an exhibit.

36. In this regard, it is relevant to discuss the citations of the Hon'ble Apex Court which are as follows:-

In *Pankaj Singh Vs. State of HR reported in 2024 SCC OnLine SC 474*, wherein the lordships have held:

“20. The submission made by the learned counsel appearing for the Prosecutrix based on Section 294 of the Cr. P.C. remains to be dealt with. Section 294 of the Cr. P.C. reads thus:

“294. NO FORMAL PROOF OF CERTAIN DOCUMENTS.—(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such



document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.”

21. Firstly, the learned counsel appearing for the Prosecutrix admitted that the prosecution did not produce the WhatsApp messages before the recording of evidence commenced. According to his



version, the same was produced when the Prosecutrix was under cross-examination. The essential ingredient of sub-Section (1) of Section 294 of the Cr. P.C. is that when any document is produced by the prosecution or the accused, the parties shall be called upon to admit or deny the genuineness of each such document. In this case, it is nobody's case that the appellant-accused was called upon to admit or deny the genuineness of the WhatsApp chats. Moreover, sub-Section (3) of Section 294 of the Cr. P.C. indicates that even if a particular document is not disputed, the Court has the discretion to read or not to read the same in evidence without formal proof of the signature of the person to whom it purports to be signed. The Court always has the power to require the signature to be proved. Therefore, the contention of the learned counsel appearing for the Prosecutrix based on Section 294 of the Cr. P.C. has absolutely no merit. In any case, a certificate under Section 65B of the Evidence Act has not been produced.”



In ***Shamsher Singh Verma v. State of Haryana reported in (2016) 15 SCC 485***, the Lordships have held at para 14, as follows:-

“14. In view of the definition of “document” in the Evidence Act, and the law laid down by this Court, as discussed above, we hold that the compact disc is also a document. It is not necessary for the court to obtain admission or denial on a document under sub-section (1) of Section 294 CrPC personally from the accused or complainant or the witness. The endorsement of admission or denial made by the counsel for defence, on the document filed by the prosecution or on the application/report with which same is filed, is sufficient compliance of Section 294 CrPC. Similarly, on a document filed by the defence, endorsement of admission or denial by the Public Prosecutor is sufficient and defence will have to prove the document if not admitted by the prosecution. In case it is admitted, it need not be formally proved, and can be read in evidence. In a complaint case such an endorsement can be made by the



counsel for the complainant in respect of document filed by the defence.”

In ***Sonu v. State of Haryana reported in (2017) 8 SCC 570***, the Lordships have held at para 35 as under:-

“35. Section 294 CrPC, 1973 provides a procedure for filing documents in a court by the prosecution or the accused. The documents have to be included in a list and the other side shall be given an opportunity to admit or deny the genuineness of each document. In case the genuineness is not disputed, such document shall be read in evidence without formal proof in accordance with the Evidence Act. The judgment in Sk. Farid case [Sk. Farid Hussinsab v. State of Maharashtra, 1981 SCC OnLine Bom 26 : 1983 Cri LJ 487] is not applicable to the facts of this case and so, is not relevant.”

In ***State of Bihar Vs. Durgavati and others reported in 2021 SCC OnLine Pat 2009***, the Lordships at Para 88 to 97 have held as under:-

“88. Section 293 CrPC corresponds to Section 510 of the old Code of Criminal



Procedure, 1898 and Section 510 of the old code was bifurcated into two sections-292 and 293. Section 292 deals with the evidence of officers of Mint, Controller of Stamps whereas Section 293 deals with evidence of certain scientific experts.

89. The legislative intention behind the framing of Section 510 vis-a-vis section 292 and 293 CrPC can be well-judged from the observation recorded by The Law Commission's 41st Report. It was observed therein:

“41.1 The framers of the Code were aware that the evidence of certain experts in the service of Government would be frequently required in Criminal Courts, and if these experts were to be treated as ordinary witnesses whose sworn statement in court alone could be legal evidence, they would be spending most of their time giving evidence. Also the number of such experts was so small that they could not be always conveniently spared for attending the court. Special



rules of evidence were therefore framed for them. They are placed in Chapter XLI of the Code.”

90. Thus, the report of any of expert specified under said Section, on any matter duly submitted to him for examination or analysis was recommended by the Law Commission to be considered as good evidence.

91. It was further observed that section 510(2) makes it obligatory for the court to summon the Chemical Examiner or other officer mentioned in sub-section (1) if either party so desires. The provision was considered unsatisfactory and the Law Commission recommended an amendment to the section to the extent that summoning any such expert should be left to the discretion of the Court. The recommendations of the Law Commission were eventually accepted and the provision was amended accordingly. The provision as laid down under section 293 CrPC, was further amended through Criminal Law (Amendment) Act, (45 of 1978) and Criminal Law (Amendment) Act 2005 (2 of 2006) and reports of some more



Government Scientific Experts were included under sub-section (4) of section 293 CrPC.

92. Section 293 CrPC makes a report of the certain Government Scientific Experts mentioned under subsection (4) of this Section admissible in evidence without calling him as a witness.

93. Although it is not required to examine the expert as a witness to prove his report under Section 293 CrPC, the report cannot be read in evidence unless it is tendered in evidence.

94. In Wali Muhammad v. Emperor reported in AIR 1924 All 193, the Allahabad High Court held: "Under Section 510 of the Code of Criminal Procedure any document purporting to be a report under the hand of a Chemical Examiner upon any matter duly submitted to him for examination and report may be used as evidence in any enquiry, trial or other proceeding. This, however, does not imply that without tendering it in evidence it can be made use of for the first time in appeal. It is a piece of evidence that does not require any formal proof, but at the same time



it must be tendered as evidence and used as such, so that the accused may have a chance of questioning the identity of the packets”.

95. Similar view was expressed by the Delhi High Court in Chhotu Kumar (supra), wherein it has been held that: “Although the said report may be admissible under Section 293 of the Cr.P.C. without the author testifying to the contents thereof, however, the said report was required to be tendered and could not be taken note of without the same being tendered and exhibited”.

96. In Chhotu Kumar (supra), the Court referred a Division Bench judgment of Delhi High Court in Dharampal v. State reported in (2011) 525 DRL 417 wherein it was held: “It is true that in view of Section 293 of the Criminal Procedure Code, the report in question need not have been proved by summoning the author thereof, but that does not mean, that during trial nobody had to tender the same in evidence and have the same exhibited by deposing that either he himself went to the FSL Laboratory and collected the report in question or deposing



that during investigation he obtained the report in question and that the same pertains to the investigation conducted in the case which was being tried. It must be deposed that the report in question pertains to the case at hand”.

97. In the light of the statutory provisions as laid down under Section 293 of the CrPC, we are in complete agreement with the views expressed by the Allahabad High Court in Wali Muhammad (supra), and the Delhi High Court in Chhotu Kumar (supra) and Dharampal (supra). We are also of the view that the FSL report and its contents would be admissible in evidence even without examining the author and calling for its formal proof. However, the report falling under the ambit of Section 293 of the CrPC need to be tendered in evidence by some witness so that the same is exhibited and connected with the case in hand. If it is not tendered in evidence by any witness, the same cannot be used in evidence.”

37. Further it is the contention of the Learned counsel for the appellant that the



investigating officer was not examined before the Court which also becomes very fatal to the case of the prosecution. The investigation done by the Investigating Officer, for procuring the birth certificates of the victim or the mode of investigation adopted to establish the place of occurrence could not be brought on record. It is also contended by the Learned counsel that non-examination of the Investigating Officer have highly caused serious prejudice to the appellant.

38. In this context, the Learned counsel for the appellant relied on the judgment of *Bahadur Naik Vs. State of Bihar reported in 2000(9) SCC 153*, wherein the Lordships have held that non-examination of Investigating Officer is of no consequence, if no prejudice is caused. However, it is contended by the Learned counsel for the appellant that the non-examination of Investigating Officer caused prejudice to the appellant and, therefore, it is fatal to the case of the prosecution. Paragraph 2 of the judgment reads as follows:-



“2. The appellant has not been able to shake the credibility of the eyewitnesses. No material contradiction in the case of the prosecution has been shown to us. Under these facts and circumstances, the non-examination of the investigating officer as a witness is of no consequence. It has not been shown what prejudice has been caused to the appellant by such non-examination.”

*In **Takhaji Hiraji Vs. Thakore Kubersing Chamansing and others** reported in (2001)6 SCC 145, wherein the Lordships have held at Paragraph 19 as under:-*

“19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a



witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself—whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon



it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of the Thakores was hurt leading to a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not premeditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near



the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non-explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tightrope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tightrope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eyewitnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have



gone through the evidence adduced and on our independent appreciation we find the eyewitnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case.”

39. Furthermore, Exhibit 1/C are the love letters allegedly written between the victim and the appellant. The prosecution ought to have marked those love letters through the victim because she had specific knowledge about it, instead the letters were marked through P.W. 1/the father of the victim. The Learned counsel for the appellant relied in the case of *Ashok Koeri & Ors. Vs. The State of Bihar [Criminal Appeal (SJ) No. 61 of 2004]*, wherein the Lordships have held at para 31, 32, 33 as under:-

“31. Further, the trial Court out to have taken caution in marking of the documents. A document can only be marked by a person who has personal knowledge about the incident. The Injury Report was alleged to have been marked through P.W.-6, who had no personal knowledge about it.



32. It is evident that in order to have the documents marked by the Court as Exhibits, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that:

(a) The “contents” of the document are proved (i.e. the document exists).

(b) The signature or handwriting on the document, if any, are proved (i.e. the document is genuine).

(c) In some cases, the witness who seeks to tender the document in evidence has personal knowledge of the document (i.e. that the witness is in a position to prove the accuracy or truth of the contents of the document);

(d) The document is not inherently or ab initio inadmissible on some other legal ground (e.g. irrelevance, privilege, non-registration) and

(e) The document has been appropriately stamped, if so required by law.

33. In order to prove contents of a document, the witness through whom the document is sought to be tendered must produce the document in Court. The Evidence



Act provides, in essence, that the “contents” of documents must ordinarily be proved by “primary” evidence. As the second step in getting a document marked, the witnesses who introduces the document must identify the signature or handwriting on the document, if there is any. The mere production of a document is not sufficient for the document to be marked as an exhibit. Thirdly, in order to lay a foundation for marking a document, if the document contains any statement(s) of fact, and the party propounding the document relies on the truth or accuracy of those statements, then the witness. who tenders the document must demonstrate personal knowledge and the familiarity of the document. Fourthly, in some cases, irrespective of a party’s ability to satisfy the criteria set out above, a law might prohibit some documents from being considered admissible in evidence. Such documents cannot be marked in evidence. Once a document is marked, it becomes the part of the record but has to be considered by the Court about its admissibility and relevancy of such



document. Marking of document alone will not give any right to read the contents of the documents or about the admissibility of the documents.”

40. This Court also observed that the fardbeyan was also marked suo moto by the trial Court. When the victim was examined before the Court, the fardbeyan ought to have been proved and got marked through her. The trial Court has erroneously adopted a procedure which is unknown to law.

41. As far as Ossification test is concerned, the Learned counsel for the appellant relied on the judgment of ***Chhotu Kumar Yadav vs. State of Bihar passed in Cr. Appeal (DB) No. 458 of 2003 dated 11.03.2024***, wherein their Lordships have held at para 11, 12, 13 and 14, as follows:-

11. At this stage, the medical evidence given by the Doctor (PW-5), namely Dr. Shakuntala Nag, who had examined the victim, is also required to be discussed. The said Doctor has specifically stated, on general



examination, that the age of the girl was 16-18 years and in paragraph 15 of conclusions, the Doctor has stated that, based on physical and radiological findings, the age of the victim is between 15-17 years. It is pertinent to note that the prosecution has not produced any documentary evidence with a view to prove the age of the victim. Though, the victim has produced photocopy of her Aadhar card, the said document has not been duly exhibited. Thus, with a view to determine the age of the victim, the evidence given by the doctor on the basis of the radiological finding is required to be kept in view.

12. At this stage, we would like to refer to the case of Jaya Mala (supra), wherein the Hon'ble Supreme Court has observed in Paragraph-9 as under:-

"9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention. Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously



occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert, in October 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school-going boy. It equally appears that there was some upheaval in the educational institutions. This young school-going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in



the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed."

13. In the case of *Rajak Mohammad (supra)*, the Hon'ble Supreme Court observed in Paragraph-9 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."

14. Thus, from the aforesaid decisions, it can be said that sufficient margin either way has to be allowed while determining the age on the basis of the radiological examination. In the present case, the age of the victim can be said to be in between 17-18 years and the benefit of the same is required to be given to the accused.



42. The ossification test is a test which determines the following:-

[1] Age based on the “degree of fusion of bone” by taking the x-ray of a few bones.

[2] In simple words, ossification test or osteogenesis is the process of bone formation

[3] Based on the fusion of joints between birth and the age of twenty five years in an individual.

[4] Bone age is an indicator of the skeleton and biological maturity of an individual which assists in determination of age.

[5] The most common method used for calculation of the bone age is radiography of hand and wrist until the age of 18 years beyond which the medical age of clavicle is used for bone age calculation till the age of 22 years as the hand and wrist bones radiographs cannot be computed beyond 18 years of age as the elongation of the bone is complete after adolescence.



[6] However, it must be noted that the ossification test varies slightly based on individual characteristics,

[7] Therefore, the ossification test though is relevant however it cannot be called solely conclusive.

43. On perusal of the above of Chhotu Kumar (supra) said judgment it could be construed that while determining the age on the basis of radiological examination the age can be ascertained two years on either side. It may be below or above the age specified therein, therefore, the benefit of doubt has to be extended to the appellant herein.

44. The trial Court while convicting the appellant have come to a conclusion that the victim was aged below 16 years considering the evidence of P.W. 9, wherein she opined that the age of the victim was between 17 to 18 years as on the date of the examination. The trial Court has presumed that the offence took place two years, prior to the date of registration of the F.I.R., further concluded that, the victim would be below 16 years of age and thereby



convicted the appellant for the offence punishable under Section 376 of the Indian Penal Code. At this juncture, it is very much relevant to rely on the evidence of the mother of the victim i.e. P.W. 6.

45. P.W. 6 being the natural witness in her cross-examination deposed that she got married 30 years, prior to the date of her examination and the victim was born 3 to 4 years after her marriage. On that basis, the age of the victim would be around 26 years as on the date of examination of P.W. 6. The offence took place in the year 1995 while P.W.'s deposition was recorded in the year 2001, if 6 years is deducted from the age of 26 years, the victim would be 20 years as on the date of the alleged offence and even if two years is also deducted from the date of the offence she would be around 18 years. Thus, the victim would not fall under Section 375 clause (6) of the description of the offence. The trial Court have however given undue weightage to clause (6) of Section 375 of the Indian Penal Code and came to a conclusion the victim is below the age of 16 years. As per the testimony of the mother of



the victim, the victim was aged about 18 years as on the date of offence. Further, the evidence of P.W. 8/the victim, disclose that the relationship was consensual between her and the appellant, therefore, the offence under Section 375 would not attract to the present case.

46. Furthermore, neither the victim nor her parents have testified before the Court as on which date the first alleged incident of rape took place, therefore, the trial Court could not have presumed or assumed the date of offence in order to convict the appellant.

47. In relevance to inspire the confidence of the witness, the Learned counsel for the appellant has relied on the judgment in the case of ***Manak Chand alias Mani Vs. State of Haryana reported in 2023 SCC Online SC 1397***, wherein the Lordships have held at para 7, 8, 9 and para 10 as follows:-

7. The evidence of a prosecutrix in a case of rape is of the same value as that of an injured witness. It is again true that conviction can be made on the basis



of the sole testimony of the prosecutrix. All the same, when a conviction can be based on the sole testimony of the prosecutrix, the courts also have to be extremely careful while examining this sole testimony as cautioned in State of Punjab v. Gurmit Singh, (1996) 2 SCC 384:

“If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”



8. *This was reiterated by this Court in Sadashiv Ramrao Hadbe v. State of Maharashtra, (2006) 10 SCC 92:*

“It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix.”

9. *Both the prosecutrix as well as the accused have a right for a fair trial, and therefore when the statement of the prosecutrix does not inspire confidence and creates a doubt, the court must look for corroborative evidence. Relying upon the case of Gurmit Singh (supra) this court in Raju v. State of Madhya Pradesh, (2008) 15 SCC 133 held as under:*

“10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should



not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and



that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

10. *Does the testimony of the prosecutrix in the present case inspire confidence? We are afraid it does not. Let us appreciate the facts once again.*

48. At this stage, it is relevant to refer the decision rendered by the Hon’ble Supreme Court in the case of ***Kamlakar Patil v. State of Maharashtra, reported in (2013) 6 SCC 417,*** wherein the Court has observed in paragraph 18 as under:-

“18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the FIR but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the investigating officer



has not been examined by the prosecution. It is an accepted principle that nonexamination of the investigating officer is not fatal to the prosecution case. In Behari Prasad v. State of Bihar [(1996) 2 SCC 317 : 1996 SCC (Cri) 271] , this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In Bahadur Naik v. State of Bihar [(2000) 9 SCC 153 : 2000 SCC (Cri) 1186] , it has been opined that when no material contradictions have been brought out, then nonexamination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken



while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in Arvind Singh v. State of Bihar [(2001) 6 SCC 407 : 2001 SCC (Cri) 1148], Rattanlal v. State of J&K [(2007) 13 SCC 18 : (2009) 2 SCC (Cri) 349] and Ravishwar Manjhi v. State of Jharkhand [(2008) 16 SCC 561 : (2010) 4 SCC (Cri) 50], has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.”

From the aforesaid, it can be concluded that non-examination of the IO is not fatal to the prosecution's case when no prejudice is likely to be suffered by the accused. However, if the defence has suffered prejudice due to such non-examination of the IO, it becomes fatal to the prosecution



49. Furthermore, there is a delay in lodging the F.I.R. As per Exhibit 2, the medical prescription dated 13.08.1994, the victim had undergone abortion. Dr. Ali who is alleged to have performed abortion was not also examined before the Court. However, the trial court has acquitted the appellant for the offence u/s 313 of Indian Penal Code. The date of filing the report before the police was on 24.05.1995 which clearly disclose that all the prosecution witnesses except the doctor knew about the love affair between the victim and the appellant and that the pregnancy she was aborted on 13.08.1994. There is no explanation as to why no report against the appellant for the offence of rape was lodged earlier. Exhibit-A is the document marked through defence which is nothing but the charge sheet filed against P.W. 1 and others for kidnapping the appellant and for performing his second marriage with the victim. Admittedly, the present case was instituted against the appellant subsequent to the report lodged by Jagdish for kidnapping his son-in-law i.e. the appellant and for performing a forceful



marriage of appellant with that of the victim. Therefore, this Court can construe that it is nothing but a counter case which was filed against the appellant, in order to over come from the case which was filed against them. The fardbeyan, evidence of the victim as well as her parents clearly disclose that the case was preferred to counter the case which was filed by Jagdish against the parents of the victim. The delay in preferring the report subsequent to the filing of the case against the parents of the victim, if added cannot be the sole basis to convict the appellant.

50. In view of the aforesaid discussions and observations, this Court is of the considerable view that the prosecution has miserably failed to prove the guilt of the accused beyond reasonable doubt and the trial Court ought not have convicted the appellant for the offences punishable under Section 376 of the Indian Penal Code as it is not supported by any documentary evidence, so as to prove the age of victim below 16 years as on the date of offence.



51. Accordingly, the conviction of the appellant for the offence punishable under Section 376 of the Indian Penal Code is not sustainable and therefore, the judgment in Session Trial No. 36/96 dated 26.04.2004 on the file of Additional Sessions Judge, F.T.C. No. V, Katihar is liable to be set aside.

52. In result the appeal is allowed setting aside the conviction and sentence imposed against the appellant in Session Trial No. 36/96 dated 26.04.2004 on the file of Additional Sessions Judge, F.T.C. No. V, Katihar and the appellant is acquitted for the offences punishable under Section 376.

53. The record reveals that the appellant was enlarged on bail on 30.06.2004, therefore, the bail bond of the appellant shall stand cancelled.

(G. Anupama Chakravarthy, J)

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