

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.694 of 2021**

Arising Out of PS. Case No.-41 Year-2013 Thana- TANDWA District- Aurangabad

Ravindra Musahar, Son of Madan Musahar @ Yogendra Musahar, Resident of
Village - Nabinagar Pokhara, P.S.- Nabinagar, Aurangabad.

... .. Appellant

Versus

1. The State Of Bihar
2. Ramashish Mehta, son of Adya Mahto, R/o village-Parsiya, P.S.-Tandwa,
District-Aurangabad.

... .. Respondents

Appearance :

For the Appellant/s : Mr. Bachan Jee Ojha, Advocate
For the Respondent/s : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

and

HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 16-01-2025

This appeal has been preferred for setting aside the impugned judgment of conviction dated 18.06.2021 (hereinafter referred to as the 'impugned judgment') and the order of sentence dated 25.06.2021 (hereinafter referred to as the 'impugned order') passed by learned Additional Sessions Judge-VI-cum-Special Judge, POCSO Act, Aurangabad (hereinafter referred to as the 'learned trial court') in G.R. Case No. 1821/2013/01/2014 arising out of Tandwa P.S. Case No. 41 of 2013 (CIS No. 15630 of 2014) whereby and whereunder the appellant has been held guilty and convicted under Section 395 and Section 376(D) of the Indian Penal Code (in short



‘IPC’) and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act and he has been ordered to undergo ten years rigorous imprisonment and to pay a fine of Rs. 10,000/- under Section 395 IPC, rigorous imprisonment for life and to pay a fine of Rs. 50,000/- for the offences punishable under Section 376(D) IPC. The learned trial court has not passed any separate sentence under the POCSO Act keeping in view Section 42 of the POCSO Act and taking note that instead of sentencing the accused under Section 6 of the POCSO Act, the court is sentencing him under Section 376(D) IPC.

Prosecution Story

2. The prosecution case is based on a written application dated 08.08.2013 (Exhibit ‘4’) submitted by father of the victim who has been examined as PW-2 in course of trial. In his written application addressed to the Officer-in-Charge of Tandwa Police Station, the informant (PW-2) alleged that when he along with his family members were present in his house on 07.08.2013 at about 11:00 PM (night hours), four persons crossed over the boundary wall and entered into his house, the accused persons opened the main door. According to the informant, one person was holding a small weapon in his hand and others were having *lathi-danda*. He alleged that by putting the family members under threat, they locked all the family members in a *pucca* room of the house and put a lock on the door



from outside. Thereafter, it is alleged that the accused persons took away all the ornaments, utensils and a sum of Rs. 18,000/- with clothes and they also took away one mobile phone. After they went away, somehow the informant came outside the room and raised *hulla*. There were six miscreants and they were in between the age of 25-30 years.

3. On the basis of the written application (Exhibit '4') investigation started. A perusal of the endorsements made on the margin portion of the written application would show that the case was registered under Section 395 IPC. The formal FIR, though contains a statutory requirement, as held by the Hon'ble Supreme Court, and it requires to mention the date of dispatch of the application to the court of learned jurisdictional Magistrate, in the present case no such information has been furnished but from the endorsement made at the top of the written application at the right hand side it appears that the written information which is the basis of the FIR reached the court of learned Chief Judicial Magistrate (CJM) on 12.08.2013 i.e. after four days.

4. In course of investigation of the case, the I.O. got recorded statement of the daughter of the informant under Section 164 CrPC on 29.08.2013 in the court of learned jurisdictional Magistrate 1st Class, Aurangabad. In her statement under Section 164



CrPC, the daughter of the informant came with an altogether different story. She disclosed her age as thirteen years old and a student of 9th Class at Golden Future School. She has stated that on 07.08.2013, she, her parents, two brothers, grandmother and grandfather all had gone asleep in their house. In the night in between 10:00-11:00 pm, six persons stealthily entered into the house and called her grandfather to awake, on hearing the voice, all the family members got awoken. All the six persons were armed with *rama*, *danda*, *raghi* and *lathi* and they were threatening to explode the family members. They got all the family members locked in a room whereafter they lifted the box and attache and thereafter they again opened the door and started pulling her away, her mother wanted to save her but they forcefully lifted her, one person gagged her mouth and took her to the nearby Devi Mandir where they torn her clothes and there remained no cloth on her body. It is further alleged in her statement under Section 164 CrPC that the accused persons tied her mouth by *gamcha* and two persons pressed her hand. One person was pressing her mouth and by his second hand he was pressing her leg and thereafter all the six persons took their turn one after another and committed penetrative sexual act in her private parts. They continued to do it for one hour. According to the victim, she was shouting but nobody could hear her voice. Her father jumped out from the window and raised



hulla whereafter on hearing *hulla* of the villagers, the accused persons left her. Her mother and grandmother came to her and took her to her house. After ten minutes, she was becoming unconscious then they took her to a Doctor who gave her some medicines and she took medicines for 5-6 days then she got strength to stand on her own. She claimed that the accused persons had also beaten her by *danda* and she had identified all the six accused because there was solar light and she had seen the accused persons in the solar light. She has stated that the accused persons had also lighted the torch while committing wrong act with her and she could identify them. She has further stated that all the accused persons were in underwear when they entered into the house and were having *motri* (bundle) and when villagers raised *hulla*, they left her and fled away with their *motri*.

5. It is evident from the statement of the daughter of the informant recorded under Section 164 CrPC that she was taken to the learned Magistrate to record her statement after twenty two days of the occurrence and in her statement she has completely changed the prosecution story.

6. After investigation, police while continuing with the investigation submitted a charge-sheet against five accused persons namely Rabinder Musahar, Kamta Musahar, Sanjay Musahar, Vinod Musahar and Dilip Musahar of village Kormat *vide* Charge-sheet No.



37 of 2013 dated 11.10.2013. Cognizance of the offences under Sections 395 and 376 IPC as also under Sections 4/8 of the POCSO Act was taken on 12.08.2014. Out of five accused persons, the records of three accused, namely, Dilip Musahar, Bhushan Musahar and Surendra Musahar were separated. Later on, due to absence of accused Dilip Musahar and Kamta Musahar, the records were separated. The bail bond of Sanjay Musahar and Vinod Musahar were cancelled. In this manner, the only accused who remained to face trial is this appellant, namely, Rabinder Musahar. He was explained the charges under the above-mentioned sections of the IPC and POCSO Act respectively which he denied and claimed to be tried. Accordingly on 23.04.2015, the charges were framed under the above-mentioned Sections in which cognizance was taken.

7. The defence completely denied the occurrence and claimed that he was innocent.

8. In course of investigation, the prosecution examined as many as nine witnesses and exhibited documentary evidences. The complete description of the prosecution witnesses and the documentary evidences exhibited on its behalf are provided hereunder in a tabular form for ready reference:-

List of prosecution witnesses

PW-1	Victim (X)
PW-2	Father of the victim (Informant)



PW-3	Dr. Vikash Kumar Sinha
PW-4	Lalita Devi
PW-5	Mukesh Kumar
PW-6	Suresh Mehta
PW-7	Adar Mahto
PW-8	Lakshminiya Devi
PW-9	Bhola Prasad

List of Exhibits

Exhibit-1	The signature of the victim on her statement under Section 164 Cr.P.C.
Exhibit-2	The signature of the informant on the written application
Exhibit-3 & 3/1	Two medical reports of the victim
Exhibit-4	The endorsement on the written application.
Exhibit-5	The Formal FIR of Tandwa P.S. Case No.41 of 2013
Exhibit-6	The Charge-sheet of Tandwa P.S. Case No.41 of 2013
Exhibit-7	The death report of I.O.
Exhibit-8 to 8/14	TIP chart

Findings of the learned Trial Court

9. The learned trial court went through the evidences available on the record and took note of the submissions made on behalf of the parties. The court first proceeded to examine as to whether the victim in this case would come within the meaning of the word ‘child’ as contained in Section 2(d) of the POCSO Act. The court readily came to a conclusion that in this case, the charge has been framed under Section 6 of the POCSO Act and if the defence has not contested it then it will be presumed that this case would come under the POCSO Act but in course of trial, if any evidence comes



with regard to the age of the victim then the decision would be taken with regard to her age in the light of such evidence. The trial court has noticed that the victim appeared before the learned Magistrate to record her statement under Section 164 CrPC in which she declared her age as thirteen years and in course of trial, she declared her age as fifteen years but the defence could not contradict the victim on this point. Thus, the court assumed that the victim is a minor and proceeded to consider the case under POCSO Act.

10. The learned trial court has taken a view that the victim (PW-1) has fully supported her case and on the point of rape her evidences corroborate her statement under Section 164 CrPC. The defence was not able to take any contradiction in her statement. There is no contradiction with regard to the time, place and manner of occurrence as stated in the evidence of PW-1. The learned trial court has concluded that to prove the guilt, the evidence of the victim alone was sufficient and for this reason, the onus to rebut the presumption contained under Section 29 of the POCSO Act would shift upon the defence.

11. It appears on perusal of paragraph '22' of the impugned judgment that the learned trial court has recorded that PW-1 had supported the prosecution case as per the written application which is the basis of FIR and also supported her statement recorded after 8/9



days under Section 164 CrPC. This Court would record at this stage that in fact the statement under section 164 CrPC was recorded after twenty two days of the occurrence and the learned trial court has committed an error of record in recording that the victim had recorded her statement after 8/9 days of the occurrence.

12. The learned trial court has recorded that nobody had seen the occurrence of rape, the victim (X) is the solitary eyewitness and PW-2 (the informant) and PW-4, who is grandmother of the victim, both had gone towards the temple but by that time on hearing *hulla*, the accused persons had fled away. All the witnesses had seen the victim (X) in naked condition.

13. It was one of the submissions of the defence that the medical evidence does not support the prosecution case of commission of penetrative sexual act upon the victim. It was submitted that in case of a gang rape, there would be injury on the body of the victim particularly on fourchette and vagina. The court noticed that the occurrence took place on 07.08.2013 whereas the medical examination of the victim took place on 22.08.2013 in the Sadar Hospital, Aurangabad. The trial court records that because of the prestige issue, father of the victim had not mentioned about the occurrence of rape in the FIR. When the I.O. arrested the accused persons and recorded their confessional statement then the I.O. came



to know that the dacoits had also committed rape and the victim was suppressing this because of prestige issue. He mentioned it in the case diary. The learned trial court recorded that he was aware of the fact that the case diary cannot be read as evidence in accordance with law but in view of the provisions contained under Section 32(2) of the Indian Evidence Act, 1872, if the Investigating Officer ('I.O.') dies or his deposition is impossible then the work done by him in ordinary course of discharge of his duties may be taken into consideration by way of evidence by the court. The learned trial court has, therefore, taken a view that the part of the paragraph '94' of the case diary in which the factum of rape upon the victim (X) has been admitted by her family members on 22.08.2013 would form part of evidence.

14. The learned trial court thereafter examined the evidence of the Doctor (PW-3) who has recorded that there was no external injury on the body of the victim. The trial court thereafter proceeded to record that in this connection PW-1 and PW-5 both have given evidence. PW-5, who is brother of PW-1, had taken her for treatment elsewhere, therefore the trial court concludes that for this reason, the victim was not taken to lodge the FIR and due to her treatment for fifteen days, the injuries caused on her external part of the body/private parts had healed up naturally. The trial court, therefore, rejected the plea of the defence that in the medical examination



because no injury was found on the body of the victim, the prosecution would fail to establish its case. The trial court noticed that PW-3 has recorded in paragraph '3' of his deposition that hymen was ruptured. In paragraph '9', he has stated that she had recent sexual act and the victim was habituated to sex. The trial court took a view that if six persons would commit forceful rape on the victim, the medical report would show that she was habituated to sex. The trial court, therefore, came to a conclusion that the defence had failed to impeach the credibility of the victim (PW-1). The evidence of PW-2 may not be wholly reliable but his evidence would be partially reliable in which he has stated about the dacoity and rape. His deposition to the extent he says that even before the TIP he had identified the accused persons in the police station would not be admissible in evidence. On this point, the plea of the defence has been accepted by the learned trial court. It has been recorded that there are some contradictions in paragraph '4' of the deposition of PW-2 but that would not be significant.

15. The trial court agreed with the plea of the defence that the learned Magistrate who had conducted the TIP in jail was required to be examined in course of trial but only because he has not been examined, it cannot be taken as a reason for not deciding the present case. PW-1 and PW-5 had not gone to the police station with the



informant, both of them for the first time went to jail where the present appellant was identified and the defence has not put any question to the victim on this point. The learned court relied upon the carbon copy of the TIP chart (Exhibit '8' to '8/14') even as the same has not been proved by the author of the document. In this regard, the plea of the defence that Exhibit '8' to '8/14' would not be admissible in evidence has been rejected by the learned trial court. These exhibits were marked on 31.03.2021 by the learned trial court on the basis of an application filed by the Public Prosecutor to mark the TIP documents exhibits.

Submissions on behalf of the appellant

16. Learned counsel for the appellant submits that initially the FIR being Tandwa P.S. Case No. 41 of 2013 was registered by the informant for the offence under Section 395 IPC on 08.08.2013 for the occurrence of dacoity said to be committed on 07.08.2013 at about 11:00 PM in his house by four unknown persons. There was no allegation of commission of rape with daughter of the informant under Sections 376(D) IPC as well as Section 6 of the POCSO Act in the FIR rather the allegation constituting the offences under Section 376(D) IPC and Section 6 of the POCSO Act were brought after the statement of informant's minor daughter was recorded under Section 164 CrPC on 29.08.2013 i.e. after lapse of 21 days from the date on



which the written report of the informant was submitted and the FIR was instituted.

17. It is further submitted that in this case, the I.O. has not been examined as according to the prosecution, the I.O. died and no other official witness came to depose as to what transpired in course of investigation. It is submitted that there are two places of occurrence in this case, first is the house of the informant and the second is near the Devi Asthan but neither any map of the place of occurrence nor any oral evidence has been laid to show that in course of investigation, the I.O. had verified the place of occurrence and had found the prosecution case true with regard to the place of occurrence.

18. Learned counsel submits that the evidence of the victim (X) who has been examined as PW-1 is not wholly reliable as she is not speaking the truth and has been planted by the I.O. after fifteen days of the occurrence. Submission is that the learned trial court has itself recorded in the impugned judgment that when the I.O., namely, Ajay Kumar arrested the accused persons and recorded their confessional statement then he came to know that dacoits had also committed rape but the victim and her family members were suppressing it in order to save their prestige.



19. Learned counsel submits that the confessional statement of the accused is not an admissible piece of evidence and there is no evidence on the record for the trial court to take a view that the victim and her family members had been suppressing this occurrence of rape.

Submissions on behalf of the State

20. On the other hand, learned Additional Public Prosecutor for the State has defended the impugned judgment and order of the learned trial court. It is submitted that the victim (X) has fully supported the case of the prosecution and stated that due to social fear, her father concealed the matter of rape but in her statement under Section 164 CrPC the victim narrated about the incident. The victim had identified the accused in jail at the time of TIP.

Consideration

21. Having heard learned counsel for the appellant and learned Additional Public Prosecution for the State as also on perusal of the trial court's records, this Court finds that in this case, initially the informant (PW-2) who is father of the victim girl submitted a written application on 08.08.2013 in which he described the occurrence which took place in his house at about 11:00 PM on 07.08.2013. The FIR was registered on the basis of the application of PW-2, under Section 395 IPC. It is the case of the informant in his



written application that all the family members were locked inside a *pakka* room of the house and the miscreants locked the door from outside. According to the informant, PW-4 there were four persons who had cross over the boundary wall and entered into the house, however, towards the end of his application, he has stated that there were total six numbers of miscreants who were in between the age of 25-30 years. Thus, in his application itself at one place the informant has stated that four persons had entered into his house but later on he has stated that there were six persons. The informant (PW-2) does not claim to have identified the miscreants/criminals. No source of identification has been disclosed in the written application. There is no whisper of allegation that the accused persons had forcibly taken away the victim girl and they had committed rape on her near Devi Sthan for about one hour. The FIR was registered on the next day of the occurrence at 09:00 AM whereas the distance of the village from the police station is only three kilometers.

22. It has come in the trial court's judgment that in course of investigation it was the I.O. (not examined because of his death) who sensed from the confessional statement of the accused that the accused had also committed rape on the daughter of the informant. This was noticed by the I.O. on 22.08.2013 which was after about 15 days of the occurrence. It is, therefore, evident that for 15 days,



neither the victim nor any member of the family of the informant made any statement before police that there was any occurrence of rape in the night of the occurrence.

23. Adar Mahto (PW-7) is the father of the informant who has stated in his cross-examination that on the date of occurrence, he was sleeping in his house and had bolted his door. He has further stated that dacoits had locked all of them in the house. He had not gone to the police station but this witness has stated that in paragraph '5' of his deposition that his son, daughter-in-law and the grand daughter had gone to the police station. It is, therefore, evident that the daughter of the informant had also gone to the police station but she had not disclosed that the accused persons had committed rape on her. In paragraph '6' of his deposition PW-7 has further stated that when *darogaji* caught hold of the dacoit then his son, daughter-in-law and his grand daughter were called on to the police station after three-four days of the occurrence for identification.

24. The evidence of PW-7 would create suspicion over the evidence of the victim (PW-1) who has been cross-examined by the defence and in course of her cross-examination when she was suggested by the defence that she had seen the accused persons in the police station, she denied the same. In paragraph '4' of her deposition, PW-1 has made a misleading statement that her statement was



recorded after 8-9 days of the occurrence. She has stated that her statement was recorded by police after fifteen days of recording of her statement before the Magistrate. She had gone with her father to record statement in the court. At her instance, her statement under Section 164 CrPC has been marked Exhibit '1'. The learned Magistrate who recorded her statement has not been examined in course of trial.

25. On perusal of the evidence of PW-4 who is the mother of the victim, it would appear that this witness has not stated in her examination-in-chief that her daughter was taken away near the Devi Asthan and the accused persons committed rape on her there. What is surprising from the evidence of PW-4 is that she claims to have identified the dacoits in solar light. She has stated that she did not know but other mushars had told her their names. From the statement of PW-4 two things are appearing, firstly that she did not know the dacoits and their names were told to her by other mushars. Who were those other mushars is not known and how they could tell PW-4 the names of dacoits is also not known, the another thing which is evident is that if PW-4 had identified the dacoits by their names and she had seen them in solar light then her natural conduct would have been to disclose those names to her husband and to the I.O. and the names could have been mentioned in the written application submitted by



her husband but the written application did not mention any name, therefore, this Court is of the opinion that the claim of PW-4 that she identified the dacoits is completely unfounded.

26. In this case, the I.O. has not been examined as according to the prosecution the I.O. died and no other official witness came to depose as to what transpired in course of investigation. There is nothing on the record to show that the I.O. had visited the place of occurrence. In this case, there are two places of occurrence first is the house of the informant and the second is near the Devi Asthan but neither any map of the place of occurrence nor any oral evidence has been led to show that in course of investigation, the I.O. had verified the place of occurrence and had found the prosecution case true with regard to the place of occurrence.

27. The learned trial court proceeded to accept the prosecution case taking the evidence of the victim (X) who has been examined as PW-1 sacrosanct and a wholly reliable piece of evidence but this Court is of the considered opinion that that evidence of PW-1 is wholly unreliable. She is not speaking the truth and has been planted by the I.O. after 15 days of the occurrence. The learned trial court has itself recorded in the impugned judgment that when the I.O. namely Ajay Kumar arrested the accused persons and recorded their confessional statement then he came to know that dacoits had also



committed rape but the victim and her family members were suppressing it in order to save their prestige. This, in the opinion of this Court, is a gross error in appreciation of the evidence available on the record. The confessional statement of the accused is not an admissible piece of evidence and there is no evidence on the record for the trial court to take a view that the victim and her family members had been suppressing this occurrence of rape.

28. Further, this Court finds that the learned trial court has proceeded to admit paragraph '94' of the case diary as an admissible piece of evidence under Section 32(2) of the Indian Evidence Act because the I.O. in this case had died and his evidence could not have been recorded. In this paragraph '94' of the case diary, the I.O. had recorded that the fact that the wrong act was committed upon the victim (X) has been admitted by her and her family members on 22.08.2013. When the victim and her family members came to depose, they did not claim to have made this statement to the I.O. on 22.08.2013. The learned trial court, in the opinion of this Court, has failed to appreciate that the writings in the case diary cannot be taken as a piece of evidence. There is no statement of PW-1 in her deposition that she had not disclosed the occurrence of rape because she was afraid of her prestige. Similarly, her father who has been examined as PW-2 has nowhere stated that he did not disclose this



occurrence to police because of any prestige issue. Thus, the observation of the learned trial court seems to be completely unfounded and has no basis to stand.

29. In the case of **State of Punjab vs Jagir Singh & Ors.** reported in **(1974) 3 SCC 277**, the Hon'ble Supreme Court has been pleased to observed inter alia that "a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses."

30. To this Court, it is evident that the victim of this case has been tutored after about fifteen days of the occurrence, a story was developed by the I.O. of the case that he came to know about commission of rape through the confessional statements of the accused and then the victim and her family members admitted the said occurrence. Seven days thereafter, the victim was taken to the court of a learned magistrate where her statement under Section 164 CrPC was recorded and for the first time, she has come out with a



wholly different prosecution story, incorporated the occurrence of rape near Devi Sthan for one hour and then the fact that the accused persons fled away after the villagers raised *hulla*. According to her the accused person fled away with the '*motri*' which which they had entered into the house, what happened to the boxes and other articles which they had looted in the dacoity from the house of the informant remained unanswered. There was no seizure of the boxes and other articles of the house of the informant near the place where the accused persons had gone with the boxes, articles and the victim girl and had committed rape on her. No independent witness from the village has come to depose that he had gone near Devi Sthan and had either seen the accused persons fleeing away or the victim PW-1 in naked condition. In her 164 CrPC statement, the victim has stated that on hearing *hulla* of the villagers, the accused persons fled away and thereafter her mother and grandmother came and took her to her house. Thus, it is evident that her father and brother had not come near Devi Sthan. No other person from the village had come there.

31. The learned trial court has recorded that one Suresh Mehta (PW-6) is an independent witness from the village. On bare perusal of his examination-in-chief, it would appear that he is the *gotiya* of the informant. He has stated that seven years ago at 11.00 PM dacoity had taken place in the house of Ramashish Mehta and



dacoits had committed rape on his daughter. He has stated in paragraph '2' that later on he came to know the name of the dacoits. In paragraph '3', he has stated that he does not identify the accused persons. In his cross-examination, this witness has stated that his statement was recorded by the police on the next day of the occurrence but in his statement he had not stated the name of the accused persons because he did not know the names. He came to know the names of the accused after one week through newspaper. In paragraph '5' of the deposition, he has stated that the photographs were published in the newspaper and he had read the newspaper after fifteen days from which he came to know. From the evidence of PW-6, it is crystal clear that he is not an eye witness of this occurrence. He has not stated that the dacoits had forcibly lifted away the daughter of the informant and had committed rape on her near Devi Asthan. It is also clear that he does not claim to have heard *hulla* or have visited the place near Devi Asthan in the night of the occurrence.

32. The learned trial court has also failed to appreciate the evidence of PW-6 that the photographs of the accused persons were published in the newspaper and he had come to know about them from the newspaper. This evidence is to be seen together with the evidence of PW-7 who has stated that his son, daughter-in-law and the grand-daughter (victim) were called to the police station after the



dacoits were caught and they were called after 3-4 days for identification. It is evident from the evidence of this witness that the police had got identified the accused persons in the police station only after 3-4 days of the occurrence and the photographs of those persons were published in the newspaper.

33. The learned trial court while relying upon the TIP chart (Exhibit-8 to 8/14) could not appreciate that the carbon copy of the TIP chart was not proved through any witness by the prosecution. Those were marked exhibits on mere application filed by the Public Prosecutor and the order passed by the learned trial court on 31.03.2021 would show that those were marked exhibits on mere asking by the Public Prosecutor. Admittedly the Magistrate, who conducted the TIP, has not been examined in course of trial. The learned trial court could not appreciate that the TIP had lost its significance when the accused persons had already been shown to PW-1, PW-2 and PW-4 in the police station immediately after their arrest and then their photographs had already been published in the newspaper.

34. This Court finds from the materials discussed hereinabove that the victim (PW-1) whose testimony has been relied upon by the learned trial court cannot be put in the category of a sterling witness. In the case of **Rai Sandeep Alias Deepu Vs. State**



(NCT of Delhi) reported in **(2012) 8 SCC 21**, the Hon'ble Supreme Court has discussed the characteristics of a sterling witness. Paragraph '22' of the judgment in the case of **Rai Sandeep Alias Deepu** (supra) is quoted hereunder for a ready reference :-

22.. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with

* [Ed.: Para 22 corrected vide Official Corrigendum No. F.3/Ed.B.J./48/2012 dated 18-8-2012.]



the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

35. In the light of the above views of the Hon’ble Supreme Court expressed in the case of **Rai Sandeep Alias Deepu** (supra) when we examine the evidence of PW-4, we find that she has come to make statement with regard to the occurrence of her rape at a much belated stage, she seems to have been tutored. The medical examination report which has been marked Exhibit-3 and 3/1 at the instance of Dr. Vikash Kumar (PW-3) shows that she was found aged between 17-18 years on the basis of physical, mental detention and radiological report. The doctor had conducted pelvic examination, found the hymen ruptured but no local injury and tenderness on valva,



perineum, medial side of thigh and locally, no abnormal discharge seen, intriotus admits two fingers easily and vaginal swab was taken to send for histopathological examination. The supplementary report has also been proved by PW-3 on the basis of X-ray reports and regarding sexual act the doctor opined that “on the basis of findings described above, she seems to have undergone sexual act and habituated to sex.” Both the medical reports have been exhibited and marked as Exhibit-3 and 3/1 respectively. In his cross-examination, PW-3 has stated that he cannot say how many days before the occurrence sex would be taken as habituated sex. PW-3 opined that there was no sign of injury on the private part of the victim. According to the report, the victim had recent sexual act. The medical report also mentions that she had her last menstruation period on 06.08.2013 as per statement, she had washed her clothes (private parts) and changed her clothes after incidence. No injury report of any other doctor has been brought on record to prove that the victim (PW-1) had suffered an injury because of gang rape and had received treatment for the same. The learned trial court seems to have assumed upon itself some facts without any evidence to prove the same.

36. From the report of the medical board and the evidence of doctor (PW-3), it is evident that the victim was found aged between 17-18 years and she was habituated to sex. The victim was claiming



her age as 13 years at the time of occurrence, she disclosed that she was studying in a school but the prosecution did not bring her school admission register to prove her date of birth. The learned trial court ignored the fact that as per the radiological report the victim was aged about 17-18 years, therefore, if there was no other evidence of age in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the age of the victim (PW-1) had to be ascertained keeping in view the medical examination report as to her age and the law in this regard on the subject. The learned trial court proceeded to accept that the victim is a child within the meaning of Section 2(d) of the POCSO Act because the defence had not cross-examined her with regard to her age which would not be the correct way to approach a case. The prosecution must stand on its own leg is a well settled principle of appreciation of evidences in criminal trials.

37. In the case of Ram Vijay Singh Vs. State of Uttar Pradesh reported in **(2021) 15 SCC 241**, the Hon'ble Supreme Court was considering a plea of the appellant that he was a juvenile on the date of incident. The radiologist had assessed the age of the appellant at the time of occurrence in between 15½ –17½ years. Earlier the High Court had sought a report of the medical board consisting of five doctors who had opined that the age of the appellant is between 40-55 years. The High Court submitted a report to the Hon'ble



Supreme Court that the appellant was juvenile on the date of commission of the offence. The Hon'ble Supreme Court reviewed the case-laws on the subject and observed in paragraph '14' as under:-

“14. We find that the procedure prescribed in Rule 12 is not materially different than the provisions of Section 94 of the Act to determine the age of the person. There are minor variations as Rules 12(3)(a)(i) and (ii) have been clubbed together with slight change in the language. Section 94 of the Act does not contain the provisions regarding benefit of margin of age to be given to the child or juvenile as was provided in Rule 12(3)(b) of the Rules. The importance of ossification test has not undergone change with the enactment of Section 94 of the Act. The reliability of the ossification test remains vulnerable as was under Rule 12 of the Rules.”

38. In the case of Court on its own motion Vs. State of NCT of Delhi reported in **2024 SCC Online Del 4484**, the Hon'ble Delhi High Court was hearing the reference under Section 395(2) of Cr.P.C. The following questions of law were referred for decision of the High Court:-

“(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?

(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.”.

39. While considering the above questions, the Hon’ble High Court took note of it’s coordinate Bench judgment in the case of **State Vs. Basir Ahamd** reported in **2023 SCC Online Del 5852** and further relied upon the judgment of the Hon’ble Supreme Court in the case of **Rajak Mohammad Vs. State of Himachal Pradesh** reported in **2018 SCC Online SC 1222**. In paragraph ‘38’ and ‘39’ of the judgment of the Hon’ble Delhi High Court in the case of **Court on its own motion** (*supra*) are being reproduced hereunder:-

“38. In the case of State v. Basir Ahmad⁶, a Coordinate Bench of this Court presided over by one of us, (Suresh Kumar Kait, J.) was faced with the similar issue. The accused, who was facing trial for committing sexual assault, was acquitted by learned Trial Court observing that the age of the prosecutrix was shown to be between 17 to 19 years and, therefore, there was no conclusive evidence of her being a minor at the time of alleged offence. Consequently, the benefit was extended to the accused who was acquitted. Such order was assailed before this Court and the appeal was dismissed. This Court not only upheld the factum of consideration of the age on the upper side of ossification report while assessing the age of the prosecutrix but also approved the principle of giving further margin of two years to such upper estimated age. The pertinent excerpt from the aforementioned judgment is as under:

6. 2023 SCC OnLine Del 5852



“12. The question which thus arises is whether the lower or the upper age recommended in the ossification test should be adopted to be the age of the prosecutrix. If benefit of doubt has to be given to the accused under all circumstances, then, it is the higher limit which has to be taken and benefit extended as has been held in the cases of *Triveniben v. State of Gujarat* (1989) 1 SCC 678 and *Maru Ram v. Union of India* (1981) 1 SCC 107. So being the case, we may consider the range of age of the prosecutrix as given in the ossification test to be 17 to 19 years. Applying the margin of error principle of two years on either side, the age of the prosecutrix could be anything between 15 to 21 years. Even if the margin of error is not on the higher side, the upper limit of the age has been estimated by the ossification test as 19 years. Giving the benefit, the age of the prosecutrix has to be held as 19 years. Similar conclusion was taken by the Court in the case of *Shweta Gulati v. State of NCT of Delhi* 2018 SCC OnLine Del 10448. We thus find that learned ASJ has rightly held the prosecutrix to be major at the time of incident. We find no infirmity in the findings in respect of the age of the prosecutrix.”

39. In context of said all important aspect of ‘granting of benefit of doubt to accused at every stage’, we may also refer to *Rajak Mohammad v. State of Himachal Pradesh*⁷ whereby the Hon'ble Supreme Court allowed the appeal of the convict who was facing charges of kidnapping and sexual assault and acquitted him while observing as under:—

“4. In view of the above, the focal point for decision would be the age of the prosecutrix in order to determine as to whether she was a major so as to give her consent.

7. (2018) 9 SCC 248



5. In this regard, we have considered the evidence and materials on record. The age of the prosecutrix has been sought to be proved by the prosecution by bringing on record the school admission form (Ext. PW 5/A) and the certificate (Ext. PW 5/B) issued by one Jasdeep Kaur (PW 5), JBT Teacher of Government School Dungi Plate. PW 5 in her deposition has stated that the writings in the school admission form (Ext. PW 5/A) are in her handwriting and the signature affixed is that of the mother of the prosecutrix.

6. In cross-examination, PW 5 had stated that the details mentioned in Ext. PW 5/A have been obtained from the school leaving certificate issued by the Government Primary School, Tambol. The certificate issued by the Government Primary School, Tambol on the basis of which the details in the admission form (Ext. PW 5/A) was filled up by PW 5 has not been exhibited by the prosecution.

7. Nothing hinges on the document exhibited by the prosecution as Ext. PW 5/B as that is the consequential certificate issued on the basis of the entries in Ext. PW 5/A. The mother of the prosecutrix who had allegedly signed Ext. PW 5/A has not been examined by the prosecution.

8. On the other hand, we have on record the evidence of Dr Neelam Gupta (PW 8), a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

9. While it is correct that the age determined on the basis of a radiological examination may not be an



accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

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

11. We will, therefore, have to conclude that the appellant-accused deserves to be acquitted on the benefit of doubt. We, consequently, set aside the order of the High Court and the conviction recorded as well as the sentence imposed and acquit the appellant-accused of the offences alleged. We further direct that the appellant-accused be released from custody forthwith unless his custody is required in connection with any other case.

(emphasis supplied)”

40. In paragraph ‘46’ of its judgment, the Hon’ble Delhi High Court summarized the discussions and the answer to the reference in the following terms:-

“**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."

41. It is evident from the judgment of the Hon'ble Delhi High Court that in 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. In our opinion, the same principle is required to be followed in the present case and the upper age of PW-1 given in the opinion of the medical board being 18 years, the victim (PW-1) would not be covered within the meaning of the definition of the word 'child' under Section 2(d) of the POCSO Act.



42. In our opinion, the learned trial court has completely erred in recording that this case would be covered under the provisions of the POCSO Act.

43. We find that in this case the written application was submitted giving rise to the present FIR after about 10 hours of the occurrence, still there was no information with regard to the names of the accused and their identification and there was no whisper of the occurrence of rape and further this FIR was sent to the court of learned Chief Judicial Magistrate after four days. The I.O. was not available for deposition in this case, therefore, the defence was completely deprived of an opportunity to examine the I.O. on the question of delay in sending the FIR to the jurisdictional court.

44. The victim (PW-1) is not a sterling witness in this case and the identification of the accused said to have been done in a TIP conducted in jail is highly suspicious.

45. Thus, in our opinion, the judgment and order of the learned trial court is liable to be set aside. We are of the opinion that the prosecution has miserably failed to prove this case on all aspects of the matter such as place of occurrence, time of occurrence and manner of occurrence and it would not be safe to sustain the conviction of the appellant in the kind of evidences available on the record.



46. This is a case of no evidence.

47. We, accordingly, set aside the impugned judgment and order of the learned trial court. The appellant is in jail, hence he shall be released forthwith if not wanted in any other case.

48. A copy of this judgment together with the trial court records be sent back to the learned trial court.

49. This appeal is allowed.

(Rajeev Ranjan Prasad, J)

(Ramesh Chand Malviya, J)

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CAV DATE	
Uploading Date	29.01.2025
Transmission Date	29.01.2025

