

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.37 of 2023

Arising Out of PS. Case No.-59 Year-2020 Thana- MAHILA P.S. District- Nalanda

Kalendra Paswan Son of Ravindra Paswan R/o Village- Madhara, P.S.- Noor Sarai, District- Nalanda

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Sudish Kumar, Advocate
		Mr. Shailesh Kumar, Advocate
For the State	:	Mr. Abhimanyu Sharma, APP
For the Informant	:	Mr. Deovind Kumar Singh, Advocate

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

Date : 19-08-2025

Heard Mr. Sudish Kumar, learned counsel for the appellant, Mr. Deovind Kumar Singh, learned counsel for the informant and Mr. Abhimanyu Sharma, learned APP for the State.

2. This appeal has been preferred for setting aside the judgment of conviction dated 02.11.2022 (hereinafter referred to as the 'impugned judgment') and the order of sentence dated 10.11.2022 (hereinafter referred to as the 'impugned order') passed by learned Additional Sessions Judge-Vith-cum-Special Judge POCSO Act, Nalanda at Bihar Sharif (hereinafter referred to as the 'learned trial court') in Mahila P.S. Case No. 59 of 2020/POCSO GR Case No. 44 of 2020. By the impugned judgment, the appellant has



been convicted for the offences punishable under Sections 376(3) of the Indian Penal Code (in short 'IPC') and under Sections 3(a) punishable under Section 4(2) of the Protection of Children from Sexual Offences Act (in short 'POCSO Act'). By the impugned order, he has been sentenced to undergo rigorous imprisonment for 20 years with a fine of Rs.2000/- under Section 4(2) of the POCSO Act and in default of payment of fine, he has to further undergo three months simple imprisonment.

Prosecution Case

3. The prosecution case is based on the written application given by the informant-cum-victim (PW-1). In her written application, she has stated that on 26.05.2020 in the night when she was sleeping, the above-named appellant entered in her house and on the gun point, committed rape on her. It is further alleged that when the prosecutrix tried to raise an alarm, she was threatened to be shot at. The informant further alleged that the appellant further threatened her not to disclose about the incident to her family members. Thereafter, the accused left her house and then the informant narrated the incident to her parents on the same night. On the next morning, the family members of the informant went to the house of the appellant where they were ill-treated by the family of the appellant.



4. On the basis of this written application, Mahila P.S. Case No. 59 of 2020 dated 08.06.2020 was registered under Sections 376, 504 and 506/34 IPC and Sections 4/6 of the POCSO Act, 2012. After investigation, police submitted chargesheet being Chargesheet No. 144 of 2021 dated 31.07.2021 under Sections 376, 457 and 506 IPC and Section 4/6 of the POCSO Act. Learned trial court vide order dated 27.08.2021 took cognizance of the offences under above mentioned Sections. Charges were read over and explained to the appellant in Hindi to which he pleaded not guilty and claimed to be tried, accordingly, *vide* order dated 04.10.2021, charges were framed under Sections 376, 457 and 506 IPC and Sections 4/6 of the POCSO Act.

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

List of Prosecution Witnesses

PW-1	Victim
PW-2	Bhabhi of the victim
PW-3	Brother of the victim
PW-4	Mother of the victim
PW-5	Dr. Kumkum Kumari
PW-6	Seema Kumari
PW-7	Anju Tiwari
PW-8	Arvind Kumar



List of Exhibits on behalf of the Prosecution

Exhibit-P1	Written Statement
Exhibit-P1/1	Signature of victim on medical report
Exhibit-P1/2	Signature of victim on statement recorded U/S 164 Cr.P.C.
Exhibit-P2	Medico Legal Report
Exhibit-P3	Endorsement on written statement
Exhibit-P4	FIR
Exhibit-P5	Statement of victim recorded U/S 164 Cr.P.C.
Exhibit-P6	Admission Register of the victim

6. Thereafter, the statement of the appellant was recorded under Section 313 of the CrPC. The appellant denied all the allegations and took a plea that he is innocent.

7. The defence has also examined three witnesses in course of trial. The defence has not adduced any documentary evidence. The description of defence witnesses are being mentioned hereunder in tabular form:-

List of Defence Witnesses

DW-1	Sunita Devi
DW-2	Rajendra Paswan
DW-3	Gunwati Devi

Findings of the Learned Trial Court

8. Learned Trial Court after analyzing the evidence available on the record found that though P.W. 1-minor victim has deposed on the line of forcible sex but there was consensual sexual relationship established by the accused on the date of



occurrence and accordingly, learned Trial Court opined that the prosecution has succeeded in establishing its case that on the relevant date and time, the victim was sleeping alone in the '*Aangan*' of her house then accused made friendly entry into the house of the victim and had established physical relationship with the informant-cum-victim and while they were indulging in sexual act then 'Bhabhi' of the victim woke up and saw them in compromising position whereupon the accused ran away.

9. Learned Trial Court from the evidences of prosecutrix (PW-1), her mother (PW-4) and family members including I.O. (P.W. 7) found that these evidences conclusively proved beyond all reasonable doubts that an offence of rape within the meaning of Section 375 IPC has been committed by the accused upon the victim which is punishable under Section 376(3) of IPC.

10. Learned Trial Court also found that the prosecutrix at the time of incident was below the age of 16 years and would fall in the definition of a 'child' under the provisions of the POCSO Act. Learned Trial Court found sufficient materials available on the record to establish penetrative sexual assault within the meaning of Section 3(a) of the POCSO Act committed by the accused.



11. Accordingly, learned Trial Court held the appellant guilty of the offences under Section 376(3) IPC and under Section 3(a) punishable under Section 4(2) of the POCSO Act.

Submissions on behalf of the Appellant

12. Learned counsel for the appellant has assailed the impugned judgment and order on various grounds. It is submitted that in this case, the FIR has been lodged after 13 days of the occurrence. It has come in the evidence of the prosecutrix and her mother that the family members had come to know about the occurrence in the night itself, on the next day her mother wanted to go to the Police Station to lodge the FIR but her father stopped her. The prosecutrix has stated in paragraph '16' of her deposition that after a lot of thoughts, discussions and consultation, the case was lodged. It is submitted that the huge delay of 13 days in lodging of the FIR, in the facts of the present case would create a lot of doubts over the prosecution story.

13. Learned counsel further submits that to prove the age of the prosecutrix, P.W. 8, who is the In-charge headmaster of Utkramit Madhya Vidyalaya, Ganpura, Noor Sarai, has deposed. He, for the first time, in course of trial brought a page of the admission register of Class-VI. P.W. 8 has stated that the prosecutrix had taken admission in Class-VI on 11.04.2018.



According to the entry in the said register, the date of birth of the prosecutrix is 05.04.2007 but in course of his cross-examination, P.W. 8 has stated that he is in-charge headmaster in this school from 18.08.2018. He was not aware that on what basis the date of birth of the victim has been entered in the admission register.

14. The defence suggested that the prosecutrix is major and a married lady which this witness denied. It is submitted that the entry in the admission register (Ext. P6) is not based on any certificate of the date of birth. The date of birth entered in the first school admission register has not been brought on record.

15. Learned counsel further submits that the prosecutrix was also examined by a Medical Board constituted under the Chairmanship of the Civil Surgeon-cum-CMO, Nalanda. Dr. Kumkum Kumari (P.W. 5) being a member of the said Board has proved the report of the Medical Board as Ext. P2/PW-4. On dental examination, the doctor found $\frac{7/7}{7/7}$ teeth and in final opinion, it is recorded that the age of the victim is in between 15-16 years. There was no evidence of recent sexual act.

16. Learned counsel submits that in view of the judgments in the case of **Rajak Mohammad v. State of H.P.** reported in **(2018) 9 SCC 248** and in the case of **Court on its own Motion vs. State of NCT of Delhi vs. State of NCT of**



Delhi (Crl. Ref. 2/2024 judgment dated 02.04.2024) reported in **2024 SC OnLine Delhi 4484**, a margin of plus/ minus two years is required to be given to the age assessed by the Medical Board. In such circumstance, the upper extremity of the age of the victim/prosecutrix would come to 18 years. The learned Trial Court has, in the impugned judgment, recorded a finding that the appellant had made a friendly entry into the house of the victim and he had established physical relationship with the informant-cum-victim and while they were indulging in sexual act, then Bhabhi of the victim woke up and saw them in compromising position whereupon the accused ran away. It is submitted that the finding of the learned Trial Court has no basis to stand. The learned Trial Court seems to have recorded its finding on the basis of surmises and conjectures.

17. Learned counsel submits that from the evidence on record, it would appear that the place of occurrence is said to be the house of the prosecutrix which is surrounded by a 10 fts. high wall. In this regard, paragraph-3 of the deposition of the Bhabhi of the victim (PW-2) has been placed before us. Learned counsel submits that in such circumstance, when the door of the house was closed and there was a 10 fts. high wall around the house, the appellant could not have entered into the courtyard of the house



and committed rape on the victim who, according to the medical examination also was about 15-16 years and could have well resisted any attempt to commit rape.

18. Learned counsel further submits that the brother and the mother of the victim who have deposed as P.Ws. 3 and 4 respectively have stated that the appellant is a handicapped person. In paragraph-5 of his deposition, P.W. 3 has stated that he knew the appellant for last 25-30 years, he had suffered right leg polio in the childhood itself.

19. Learned counsel further submits that a complete reading of the deposition of the prosecution witnesses would show that they have made self-contradictory statements. The prosecutrix (P.W. 1) has stated in her written application dated 08.06.2020 submitted before the Officer-in-Charge of the Police Station (Ext. P1) that the appellant had committed rape on her at the point of pistol, she has stated that she did not raise any *halla* because of threat to her life but in course of Trial, she has not stated so. She has developed her statement saying that the appellant had tied her mouth, he was having a gun and threatened that he would kill everyone whereafter he committed rape and went away. It is submitted that according to the prosecutrix, she had raised *halla* whereafter her brother, Bhabhi, mother and father all came to



whom she disclosed the occurrence. They went to the house of the appellant in the morning, but the family members of the appellant told them to do whatever they want. Her maternal uncle's son (*Mamera Bhai*) Shankar had written the application as per her direction on which she had put her signature. It is submitted that Shankar has not been examined in this case. She was suggested by the defence that the appellant was a handicap but she denied the suggestion. She has stated in her cross-examination, in paragraph-7 that there is a main door in her house which was closed from inside on the date of occurrence. She has stated that her house is boundary walled from all the four sides. She has stated in paragraph '11' that she was sleeping on an iron cot on which one *Gendra* was laid down but her Bhabhi (P.W. 2) has deposed that her Nanad (victim) was sleeping at a distance from one hand from the room in which P.W. 2 was sleeping with her husband. She has stated that the victim was sleeping on the floor.

20. Pointing out to these contradictory statements, learned counsel submits that in this case, the victim is not a sterling witness, her statements are not inspiring confidence and the medical evidence completely rules out the prosecution case.



Submissions on behalf of the Informant

21. On the other hand, learned counsel for the informant has opposed the appeal, though he has submitted that the learned Trial Court had no evidence before it to record that the victim and the accused were indulging in consensual sexual act when Bhabhi of the victim woke up and saw them in compromising position whereupon the accused ran away. It is submitted that the defence has not shown that there were any personal animosity between both the sides, therefore, there was no reason for the prosecutrix to falsely implicate the appellant in this case. As regards the plea of the defence that the father of the victim had taken Rs. 40,000/- from the father of the accused one year ago prior to lodging of this case which the father of the accused was demanding but the father of the victim was applying a dilly dallying tactics for which there was a Panchayati convened from both the sides and that is the reason for false implication, learned counsel submits that the defence has not disclosed the month of payment of money to the father of the victim. There was no paper prepared showing the transaction of the money. Hence, the learned Trial Court has rightly rejected the defence of the appellant.



Submission on behalf of the State

22. Mr. Abhimanyu Sharma, learned APP for the State has though opposed the appeal but at the same time, learned APP submits that upon application of the judicial pronouncements with regard to the determination of age of the victim, the victim would be a major aged 18 years. Learned APP does not dispute that there is no explanation for the delay in lodging of the FIR and that the medical evidence in this case completely rules out the prosecution case.

Consideration

23. Having heard learned counsel for the appellant, informant and learned APP for the State as also on perusal of the Trial Court records, this Court has noticed that in this case, the occurrence took place in the night of 26.05.2020 in the courtyard of the house of the victim/prosecutrix. It is stated in the fardbeyan that the appellant entered into the courtyard while the victim was sleeping, he put a pistol on the victim and asked her to remain silent otherwise she would be killed whereafter he committed rape on her. The written information (Ext. P1) further states that when the appellant had left the house, in the night itself she disclosed this occurrence to her mother and father.



24. This Court finds that a written information was submitted to the Police Station on 08.06.2020 at 08:30 A.M. On receipt of the written application (Ext. P1), a formal FIR (Ext. P4) was lodged. According to Ext. P1, the date of occurrence is 26.05.2020. The victim was taken to a learned Magistrate for recording her statement under Section 164 Cr.P.C. (Ext. P5). In her statement under Section 164 Cr.P.C. recorded on 10.06.2020, the prosecutrix has stated that the occurrence took place on 25.05.2020. This time, she has not stated that the appellant had committed rape on her by putting pistol upon her and under threat to kill. She has stated that the appellant had tied her hand and legs and had also tied her mouth by a towel, for this reason she could not raise any halla. When she started weeping then her brother and Bhabhi came whereafter he fled away.

25. On a reading of the written application (Ext. P1) and the statement under Section 164 Cr.P.C. (Ext. P5), it is evident that within two days only the victim/prosecutrix had made material deviations in her statement. While in the written application (Ext. P1), she has stated that the appellant had pointed pistol upon her and asked her to remain silent whereafter he committed rape, she has not stated that her hands and legs were tied or her mouth was tied by a towel. In her 164 statement (Ext.



P5), she did not say about committing rape on the point of pistol. She says that her hands and legs were tied and mouth was also tied. In Ext. P1, she has stated that after commission of rape, the appellant had gone from the house then in the night, the prosecutrix had told the story to her parents but in Ext. P5, she says that when she started weeping then her brother and Bhabhi came whereafter the appellant fled away.

26. The I.O. (P.W. 7) has stated that after recording of the FIR and taking the charge of the investigation, she had recorded the re-statement of the victim (PW-1), mother of the victim (PW-4) and Shankar Paswan, all of them supported the occurrence. She has stated that the place of occurrence is an under-constructed house of the prosecutrix and according to the prosecution, the appellant had crossed over the wall, went to the courtyard of the prosecutrix and had committed wrong act with her. She has given the boundary of the house of the prosecutrix. The house of the appellant is in the eastern side of the house of the prosecutrix. P.W. 7 has stated in paragraph-4 of her deposition that there is evident door fitted in the wall of the house. The house has only one gate, it is surrounded from all the four sides. She had not found any gate or cloth at the place of occurrence and had not seized the same. She had not recorded the statement of the people



residing in the boundary of the house. P.W. 7 has further stated that in the written application, there is no explanation for the delayed lodging of the FIR. She had not recorded the reason for the delay in lodging of the case in the re-statement. P.W. 7 has stated that in the medical report of the victim, the doctor (PW-5) has written that there is no evidence of recent sexual intercourse. She has stated that she was not aware that there was some money transactions between the parties and because of a dispute over that, this case was fabricated.

27. The prosecutrix in this case has been examined as P.W. 1 who has proved the Ext. P1 and Ext. P2. She has identified her signature on her statement under Section 164 Cr.P.C. In her cross-examination, she has stated that her house is surrounded from all the four sides, there is a main door in the house. She had not seen the appellant entering into the house and could not see that for how long he remained inside the house. In paragraph '12', she has stated that she has raised 'halla' after the accused had fled away. She has specifically stated that during his stay in the house, she had not raised any 'halla'. In the adjacent room to the courtyard, her brother and Bhabhi were sleeping. She had met police after 7-8 days. Her family members had not gone to the Police Station on the next day of the occurrence. In paragraph-



‘16’ she has stated that after discussions and deliberations, the case was lodged.

28. P.W. 1 has stated that she had met police after 12 days in Noor Sarai Police Station, where her statement was recorded. She had not received any injury on her body on the date of occurrence. She had not informed the police on the date of occurrence. She, however, denied the suggestion of the defence that the accused/appellant was a handicapped person and his right leg was atrophied. We find from the evidence of P.W. 1 that the place of occurrence in this case is a house surrounded from all the four sides. It is totally unnatural that while all the family members were sleeping in the room and on the roof of the house, the victim was alone sleeping in the courtyard. Though she claims that she was sleeping on an iron cot where there was a bed, her Bhabhi (P.W. 2) has stated that the victim was sleeping at a distance of one hand from her room on the floor. P.W. 2 has stated that P.W. 1 had started weeping all of a sudden whereafter she came outside after opening her door then she saw that the appellant was fleeing away after opening the door of the house. Therefore, P.W. 1 has not seen the appellant committing any sexual act with the victim. P.W. 1 does not say that she found victim in a compromising position with the appellant. She asked P.W. 1 as to what had



happened then she informed her that the appellant had committed rape on her and fled away. Thereafter the mother, father of the victim came down in the house and asked P.W. 1 about the occurrence. In the morning, her father-in-law went to the house of the appellant where the mother of the appellant told him to go and do whatever he wanted. The father-in-law of P.W. 2/ father of the victim has not been examined. In her cross-examination, she has stated that when she woke up, at that time this appellant was in the house, she and her husband tried to catch hold of him but he fled away after opening the door. To this Court, this seems highly improbable that the appellant who was a handicapped person could have fled away after opening the door despite chase by P.W. 2 and her husband (P.W. 3).

29. This Court finds that while the prosecutrix has stated that after committing rape on her the appellant had fled away and only thereafter she had raised halla, P.W. 2 has stated that when she woke up, the appellant was in the house. She and her husband had tried to catch hold of him. The defence suggested P.W. 2 that the appellant is suffering from Polio, therefore, he cannot run away after opening the door, therefore, P.W. 2 was speaking a lie but P.W. 2 denied this suggestion. The unnatural conduct of P.W. 2 may be found in her statement in paragraphs '6' and '7' where she



has stated that in the night, she had not raised any halla. In the morning, the neighbouring families came to know about the occurrence. She could not say the name of the boundary people. It is important to note that in paragraph – 8 of her deposition, P.W. 2 has stated that on the next day of the occurrence, in the morning Noor Sarai Police Station had come and had enquired from her, she had told everything to police but police had not taken her signature or thumb impression. Police had taken thumb impression from her mother-in-law. It is evident from this statement of P.W. 2 that police had arrived in the house of P.W. 2 on the very next day and according to her, police had taken her statement. Her mother-in-law had also put her thumb impression. This, in the opinion of this Court, is the first version of the prosecution case which has been suppressed by the prosecution. In paragraph-9 of her deposition, she denied the suggestion of the defence that she was only making a fabricated story that on the next day of the occurrence, police had come. P.W. 2 has, in fact, confirmed in paragraph -9 that police had enquired from her and she had told the entire story to police. She has stated that on the next day of the occurrence, her statement had taken place before the police whereafter her statement was not recorded. She has denied the suggestion of the defence that P.W. 1 was adult more



than 18 years old, there are some disputes as they are neighbours and for that reason, the false case has been instituted.

30. This Court further finds that P.W. 3 is the brother of the prosecutrix who has also stated in his examination-in-chief that when he heard the halla of his sister, he came outside of his room and found that the appellant was fleeing away from his house. His sister told him that he has committed rape on her. In paragraph-5, he has stated that the appellant was known to him for last 25-30 years. From the childhood, he had suffered Polio in his right leg. He has stated that the appellant used to visit his house. In paragraph-17 of his deposition, P.W. 3 has stated that on the next day of the occurrence, Daroga Jee had gone to the house of Kalendra Paswan (appellant). Noor Sarai Police had come, many villagers had assembled, police had enquired from them and had returned. He denied the suggestion of the defence that on the next day of the occurrence, when police came and enquired from the people, it was found that the information was not correct whereafter no case was registered and police had returned because no occurrence of rape had taken place. He has stated in paragraph -21 that on the next day of the occurrence Noor Sarai police has registered a case. This Court finds from the evidence of P.W. 3 that he has deposed on the line of his wife (P.W. 2). From his



statement also, it appears that the information was given to police on the next day of the alleged occurrence and police had come to the village. In fact, it would appear from the evidence of the mother of the victim (P.W. 4) in paragraph -25 of her deposition that on the next day of the occurrence, she was going to the Police Station with her daughter to lodge the case but from the midway her husband returned her and they left their thinking to lodge a case. From the evidence of P.Ws. 2 and 3, it is evident that the prosecution witnesses have stated about the arrival of police on the very next day of the occurrence, inquired and recorded the statement of P.W. 4, took her thumb impression also but P.W. 4 has stated that on the next day, she was going to the police station to lodge a case but her husband returned her from midway. The husband of P.W. 4 has been withheld by the prosecution.

31. In this case, the defence has also examined three witnesses and all of them had stated that the rape case lodged against the appellant is false. D.W. 1 Sunita Devi seems to be an independent witness who is married in the village about 12 years ago. She has deposed that the victim is aged about 20 years and the case has been lodged because the father of the prosecutrix was not returning the money which was being demanded by the father of the appellant for which a Panchayati had also taken place.



32. In the case of **Rajak Mohammad** (supra), the Hon'ble Supreme Court has held in paragraphs '8', '9' and '10' as under:-

“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.”

33. **Rajak Mohammad** (supra) has been relied upon by the Hon'ble Division Bench of the Delhi High Court in the case of **Court on its own Motion** (supra). Paragraph '46' of the judgment



of the Hon'ble Division Bench of Delhi High Court is being reproduced hereunder:-

“**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.”

This Court has followed the aforesaid rule in Cr. App (DB) No. 12 of 2023 (Sartaj Alam @ Md. Sartaj Alam vs. The State of Bihar and Anr.).

34. In view of the discussions made hereinabove and the judicial pronouncements on the subject, this Court would record that Ext. P6 was not collected in course of investigation, a bare perusal of Ext. P6 does not inspire confidence of the Court and it



cannot be taken as a proof of date of birth of the victim. Taking into consideration the age determined by the Medical Board vide Ext. P2/P4, on giving a plus/ minus two years margin, the upper extremity of the victim would be of 18 years. Thus, she was major on the date of occurrence.

35. We also find that in this case, there is a huge delay of 13 days in lodging of the FIR. The prosecution witnesses are not consistent whether police had arrived in the village on the very next day of the occurrence, but it is evident from the evidence of P.W. 4 that the prosecution side decided not to lodge any case. This gives rise to a thought in mind of this Court that had it been a case of commission of rape, the prosecution would have definitely lodged the case on the very next day. Apparently, the present case has been lodged after 13 days with an afterthought, therefore, the authenticity of the genuineness of the prosecution case becomes doubtful.

36. We also find from the evidence on the record that the place of occurrence is a house surrounded from all the four sides by boundary wall. The victim has herself stated about the place of occurrence. P.W. 2 has stated to the extent that the walls are 10 fts. high. In such circumstance, it could not be possible for the appellant to cross over the wall, jump into the courtyard and then



commit rape upon the victim then he would successfully flee away after opening the door of the house, despite chase. We must keep in mind that the appellant was suffering from Polio and his right leg had suffered the Polio attack, therefore, the defence has suggested that he could not have run away.

37. There is a material contradictions also in the statement of the victim (P.W. 1) on the one hand and her brother and Bhabhi on the other hand. While P.W. 1 says that she raised halla after the appellant had fled away after commission of rape, P.Ws. 2 and 3 have stated that when they woke up, they saw the appellant in the house and they had tried to catch hold of him but he had fled away by opening the main door. The I.O. did not find any sign of rape at the place of occurrence. The clothes and the bedsheets of the victim were not seized.

38. On a threadbare discussions of the entire evidence on the record, we are of the opinion that in this case, the victim cannot be said to be a sterling witness. Who will be a sterling witness has been considered by the Hon'ble Supreme Court in the case of **Rai Sandeep v. State (NCT of Delhi)** reported in **(2012) 8 SCC 21**. Paragraph '22' of the said judgment is being reproduced below for ready reference :-

"22. In our considered opinion, The "sterling witness" should be of a very high quality and



caliber 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 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."

39. The fact that the prosecutrix is not a sterling witness, her statements are vacillating and contradictory to the extent of contradicting her own statements at various stages would make it difficult for this Court to record a conviction on the basis of her sole testimony. F.I.R. has been lodged after 13 days with an afterthought. There is no other witness of the commission of rape. Father of the victim whom she first complained about the occurrence in the night has been withheld by the prosecution. The case of defence is that he had taken loan of Rs.40,000/- from the father of the appellant. His withholdment would give rise to an adverse inference. The Medical report completely rules out any sexual intercourse upon the victim.



40. In the kind of evidences available on the record, we are of the considered opinion that the charges levelled against the appellant are liable to fail.

41. The presumption of innocence remains intact and the appellant has been able to demonstrate that the prosecution has not proved its case beyond all reasonable doubts. In ultimate analysis, we set aside the impugned judgment and order of the learned Trial Court giving benefit of doubt to the appellant.

42. The appellant is in incarceration, he shall be released forthwith if not wanted in any other case.

43. This appeal is allowed.

44. Let a copy of this judgment with the Trial Court records be sent down to the Trial Court.

(Rajeev Ranjan Prasad, J)

(Sourendra Pandey, J)

krishna/-

AFR/NAFR	NAFR
CAV DATE	NA
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