

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.268 of 2019

Arising Out of PS. Case No.-104 Year-2017 Thana- RAMGARH District- Kaimur (Bhabua)

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Sonu Kumar Gupta, Male, aged about 30 years (Male), Son Of Rameshwar Sah,
Resident Of Mohalla - Parasthua, P.S.- Ramgarh, Distt - Kaimur At Bhabhua

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent

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Appeal - filed against judgment of conviction whereby the concerned Trial Court has convicted the present appellant for the offences punishable under Section 366A and 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012

Held - when there is no documentary evidence available to substitute the age of a person as to whether she is a minor or a major, the medical examinations boards report is valid evidence. (Para 39)

The prosecution has clearly established the case against the accused person and, thus, the onus shifts on the appellant as to whether he has committed such crime or not. Basing our opinion on the above facts and circumstances, we are of the view that the appellant has not been able to prove that he is not guilty of committing the crime. (Para 47)

In the present appeal, there is clear absence of consent discussed above as the victim girl is a minor and consent of a minor is immaterial. (Para 51)

Appeal is dismissed. (Para 54)

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Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mrs. Vaishnavi Singh, Advocate Mr. R.K. Sinha No. 2, Advocate
For the Informant/s	:	Mr. Gajendra Nath Ojha, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA)

Date : 01-05-2024

The instant appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as ‘Code’) challenging the judgment of conviction dated 07.12.2018 and order of sentence dated 18.12.2018 passed by learned Special Judge, POCSO Act, Kaimur at Bhabhua in connection with Sessions Trial (POCSO) No. 27 of 2017 arising out of Ramgarh P.S. Case No. 104 of 2017, whereby the concerned Trial Court has convicted the present appellant for the offences punishable under Section 366A and 376 of the Indian



Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012, whereby and whereunder the appellant has been found guilty for committing offence under Section 376 (2) (N) of the I.P.C. and sentence of 12 years has been awarded to convict with a fine of Rs. 50,000/- and in default of payment of fine, additional punishment of rigorous imprisonment for 6 months has been awarded. Sunita Kumari, who is also a co-accused in this present matter, has already been acquitted.

2. As per the prosecution case, the victim went to Ramgarh Bazaar with Rashmi Devi, Rashmi Devi got a call from Sunita Kumari wherein a male started talking and said that he is the son of victim's maternal uncle and is coming to pick up her at Durga Chowk. Thereafter, victim went to Durga Chowk with Rashmi Devi and Rashmi Devi left for the Hospital. Sunita Kumari was there at Durga Chowk and the victim met some person with towel wrapped over his head who was sitting on bike wherein Sunita Kumari had given some water to drink to the victim, which was alleged to be intoxicated and then she was taken away by the accused person on his bike. The same information was given later on 07.05.2017 to the police station at Ramgarh.



3. On the basis of written complaint, Ramgarh P.S. Case No. 104 of 2017 dated 07.05.2017 was registered and thereafter investigating officer commenced investigation. After investigation, the investigating officer submitted the chargesheet against the present Appellant.

4. During the course of trial, the prosecution has examined 17 witnesses namely, PW 1 – Ramraj Singh, PW 2 – Victim, PW 3 – Dr. Badrudin Ansari, PW 4 – Dr. Krishna Mohan Singh, PW 5 – Dr. Mrs. Amber, PW 6 – Dr. Manish Kumar, PW-7 Baby Devi, PW-8 Santosh Kumar Gupta, PW-9 Reshmi Devi, PW-10 Vidya Kumari, PW-11 Rajesh Kumar, PW-12 Ranjeet Kumar Yadav, PW-13 Buddhiram. Singh, PW-14 Surendra Yadav, PW-15 Vishwamitra alias Khannu Yadav, PW-16 Vinod Kumar Singh and PW-17 Istiaq Khan. As documentary evidence on behalf of the prosecution, as documentary evidence, Exhibit-1- Signature of the informant on the written application, Exhibit-2, Signature of the victim on the statement under section 164 of CrPC, 16 Exhibit-3, Medical report of the victim, Exhibit- 4 letter sent for X-ray of the victim , Exhibit-5 letter sent to Forensic Science Laboratory (with protest), Exhibit-6 Microscopic examination report, Exhibit-7 Dental examination report of the victim, Exhibit-2/1 Witness on presentation cum



seizure list Signature of Rajesh Kumar, Exhibit-2/2 Signature of witness Ranjit Kumar Yadav on the seizure list, Exhibit-8 Mobile presentation cum seizure list, Exhibit-9 CDR of mobile dated 25.04.2017 to 11.05.2017. (including protest), Exhibit-10 Statement of the victim under section 164 of CrPC dated 25.04.20, Exhibit-11 Formal FIR, Exhibit-12 Endorsement on written application and further statement of the accused under section 313 of the code along with DW -1 Lalji Bind and DW -2 Bechu Bind was also recorded. After conclusion of the trial, the trial Court convicted the present appellant for the aforesaid offences as stated hereinabove.

5. Heard, Mr. Ajay Kumar Thakur, learned counsel assisted by Mrs. Vaishnavi Singh and Mr. R.K Sinha 2 for the appellant and Mr. Sujit Kumar Singh, learned APP for the State along with Mr. Gajendra Nath Ojha, learned counsel for the informant. Learned counsel for the appellant submits that, in the present case, the appellant has falsely been implicated in this case and further submitted that he has no relation with the victim and the co-accused Sunita Kumari. It has been only alleged that the accused Sonu Kumar Gupta took her to his house where his wife was also living with him and raped her for seven days. He further submitted that there is no case of alleged



rape of the victim and the victim had gone with someone else and not with the accused Sonu Kumar Gupta.

6. Learned counsel Mr. Thakur submitted that there was previous enmity between the family of the accused person and brother in-law of victim for borrowing articles from his spectacles shop which was near to the shop of the accused person. He further submitted that the victim had gone out at her own free will and she was not taken by anyone to anywhere or even she was raped or kidnapped by the accused persons. He further contended that the victim is said to be minor of 12 years of age as per the written application of her father but no such documentary evidence has been produced with regard to the same. The medical board has determined the age of the victim, which is only an opinion and not a strong ground to determine the age of the victim.

7. Learned counsel for the appellant further contended that the victim stated in her deposition that she was raped and was also beaten up by the accused persons, but there is no sign of injury on the body of the victim, and there is also no sign of struggle on victim. The victim further stated that she was shouting all the time but her shouting was not heard by anyone and no one came to rescue her for 7 days when she was



kidnapped by the accused persons.

8. Learned counsel for the appellant further contended that deposition of victim has various discrepancy as her statement before the police and under section 164 of the code did not reveal the name of the parents of accused persons but in the trial, she has disclosed the accused person's parent name. The CDR was also not produced for investigation as to whether the mobile number of accused was used to contact Sunita Kumari's mobile phone to bring the victim to Durga Chowk where she was alleged to have been kidnapped. He further submits that the informant is not an eye-witness to the occurrence.

9. Learned counsel at this stage also contended and submitted that the prosecution has failed to prove the case against the appellant /accused beyond the shadow of all reasonable doubt, but the trial court has passed the impugned judgment of conviction and order of sentence against the appellant and therefore, the same be quashed and set aside.

10. On the other hand, the learned APP and learned counsel for the informant have vehemently opposed the present appeal. The learned counsel for the informant submits that the accused Sonu Kumar Gupta falsely used the name of the



victim's maternal uncle's son to lure the victim by covering his face and took her to his house and raped her for seven days and on protest by his person's parents and his wife he later on brought her to Ramgarh and left her there. The medical examination was conducted at Sadar Hospital, Bhabhua wherein injuries were found on her body and genitals and evidence of penetrative sexual assault was also found. The statement given by the victim under Section 164 of the Code has also supported the prosecution story implicating the accused who took her to Parasathua on his motorcycle with the help of Sunita Kumari who gave her medicated water to drink which was intoxicated by her and after that victim was not able to do anything and was taken away. It is further submitted that the victim as well as her parents have deposed before the Trial Court against the appellant beyond reasonable doubt and no error apparent is committed by the Trial Court while passing the impugned Judgment of conviction and order of sentence. The learned APP and learned counsel for the informant, therefore, urged that the present appeal be dismissed.

11. Having heard the learned counsel for the parties and having gone through the material placed on record, it would emerge that the prosecution had examined 17 witnesses



with a view to prove the case against the appellant.

12. PW-1 is the father (informant) of the victim girl. At the time of the incident he was in Durg and his son informed him that the daughter of the informant (victim) has been kidnapped. He came to know that Sunita Kumari took the victim to Durga Chowk stating that the victim's maternal uncle's son came to take her and she was later kidnapped by the boy. He further stated that Sunita Kumari broke the mobile phone of the victim. He has named the accused Sonu Gupta and also recognized the accused. He further stated that Sunita Kumari's father Dayanand is his neighbor and cousin and they are not in a good family relation and there is fight between both the families. The informant has three daughters. He further stated that the wife of the informant was not at home on the date of the occurrence. The father-in-law of the informant died and the wife of the informant was there at the funeral of his father and the informant's wife did not take the victim with her. The informant further stated in his deposition that he has been living in Durg for four years. The informant and his family members searched for victim but could not find her and they did not know that the victim was in Parasathua. The informant does not know where Sunita is studying. The victim stated before the police that she



was in Parasathua from 01.05.2017 to 08.05.2017. The informant has been in Parasathua many times but he has not seen the house of Sonu Gupta, he saw Sonu Gupta at the police station and he was told that Sonu Gupta and his wife brought the victim to Durga Chowk and left. While going to the police station, the informant saw his daughter on the way to the police station and he picked up the victim and took her to police station. The victim stayed in the police station for two days. The Sub-Inspector, watchman and the informant went to Sonu Gupta's cloth's shop which was in Parasathua market for further investigation.

12.1. In his cross-examination, he has stated that, he was in Chhattisgarh, Durg. He has registered the FIR on the basis of what he heard from his daughter who told him about Sonu Gupta. He met his daughter at police station at a distance of 40 bighas. He stated that there is shop 40 to 50 bighas east of the police station and there are settlements in the east of the police station. He further stated that he met his daughter at the place where in the east, there is a High School, in the West, there is a shop and in the North, also there is a shop and in the South, there is a road which goes to Nuav Buxar. He met his daughter/victim and she was alone. A boy of the village of the



informant has seen the victim who studies in Inter college. He brought the informant to the victim where she was sitting and from there, the informant took her to the police station where she gave her statement that Sonu Gupta kidnapped her and raped her and later on brought her to Ramgarh and left.

13. P.W. 2 is the victim of the present case. She has stated that Sunita Kumari is her cousin and Sunita Kumari came to her house on 30.04.2017 and asked her to go to Ramgarh on 01.05.2017 for her sister's admission in the morning. When the victim refused to go, Sunita Kumari wrote two mobile numbers (i) 7979786053 and the other she does not remember and said that it belonged to her brother Mukesh and asked her to talk to him on the number. Later on 01.05.2017, Sunita Kumari called on Reshmi Devi's mobile and asked her to go to Ramgarh. After this, when the victim went to Ramgarh market with Reshmi Bhabhi, she got a call again on Reshmi Devi's mobile, which came from Sunita's mobile and some unknown boy asked "where are you?", then the victim said that it was a wrong number, to which he said "I am your cousin brother Ramlakhan and your grandmother has died and your mother has gone there and called you to come to the place", then she went to Ramgarh Durga Chowk. Sunita Kumari was



standing there who gave the victim some water from the bottle and after drinking the water, she got intoxicated and whatever Sunita was saying seemed right. Sunita asked her to go on her cousin brother's bike who was wearing a shawl on his mouth, so Sunita made her sit on the bike. The boy, then took her to Parasathua (his home) and locked her in his house, where she was screaming. The name of that boy is Sonu Gupta (accused) and he forcibly raped her at night and on the second night when his wife came, she started shouting and asked Sonu Gupta from where he brought the girl to the house, then he said from wherever he brought her, he will leave her there in the morning. After this, Sonu Gupta gave a tablet to the victim. After eating the tablet, she started feeling dizzy and later on fainted. This victim has further stated that from 01.05.2017 to 08.05.2017, he kept her in his room and sexually abused her. This victim further stated that when Sonu Gupta's parents threatened him, he left her to Ramgarh and when she was going to the police station, her brother and father met her and took her to the police station. The victim has further stated that her statement was recorded on 09.05.2017 at 12 o'clock in the day and her statement was recorded in the court on 11.05.2017. This victim has identified her signature on the statement under section 164 of the Code and



the statement given in the Court which is marked as Exhibit-2. This witness has said that her medical examination was done at Mohaniya Government Hospital on 11.05.2017 and she has also identified the accused.

13.1. In her cross-examination, this witness has said that even before 01.05.2017, she had gone to Ramgarh with her mother, but has never been to Parasathua before the incident. She has further stated that Sonu's (appellant) parents do not live in Parasthua's house. She does not know whether his two brothers are studying there or not. The victim came to know the names of her brothers which she heard from the closed room. This victim has further stated that she was not conscious when she went inside the Parasathua house and she regained consciousness when she went inside the house. This victim has also stated that the wife of the accused was in that house from 02.05.2017 to 08.05.2017. The accused used to live with his wife and also used to threaten her. She further stated that the accused would come to her at night. The victim also stated that she had come to Parasathua to Ramgarh on a bike where the victim was sitting on the bike and wife of the accused was sitting behind her.

14. PW- 3, 4, 5 and 6 are the doctors, consisting



of the medical board namely, Dr. Badruddin Ansari along with Dr. K.M. Singh, Dr. Manish Kumar and Dr. Mrs. Ambar examined the victim on 11.05.2017 at 1:41 PM and they found:-

1) Two bruises along the medial border of the Palmer surface of the right hand.

i) Dimension 2.5 cm x 5 cm yellow in color.

ii) 1.25 cm x .75 cm yellow in color

2) Punctured wound on the hipothinner region of the Palmer surface of the right hand about .75 cm diameter. Soft reddish scap formation with inflammation and tenderness in the adjoining area.

3) Punctured wound on the Palmer surface of the terminal (illegible) on the right middle finger .75 cm diameter with soft reddish scap, inflammation and tenderness.

4) A bruise behind the left ear 2.5 cm x 2.5 cm.

Age of the injury:- one to two weeks

Cause :- Injury No. 1 & 4 hard blunt object and 2&3 by pointed substance. All are Simple in nature.

Internal examination: done by Dr. Miss. Amber with Urmila Kumari ANM, Assistant.

Injury on mid-line tear on the posterior forchet covered with granulation tissue, collagen tissue and beed of pus- age one to two week. An epithelial tag hangs from upper left lateral in troitus about 1cm. in size irregular margin of epithalamium showing heling raw bed. The hymen was not present.

Age- On to two weeks

Auxiliary & pubic hair mainly along labia enlargement & elevation of breast and iliac with no separation their contour, papilla very small.

Microscopic examination shows two-three epithelial cells. Erythrocytes & pus cell - Nil, Spermatozoa - live or dead not found. The report given by KM Pathologist SDH,



Mohania. X-ray of dead not found. The report right & the left shoulder joint & both knee joint & pelvis wrist, both low their corresponding epiphysis the centre for lateral. epicondyle iliac crest & adial tuberosity has appeared. On the basis of physical feature, menstrual history development of sexual character dentition and radiological examination her age is 12- 14 years. **There is evidence of forceful vaginal penetration, penile penetration can not be ruled out. F.S.L report is awaited. Sign of struggle is present.**

Rrine- Preg. Test is negative.

14.1. They further stated that the girl's statement was verified through her report. They gave a report and stated that if one commits forceful sex with a virgin girl, injuries stated in the report would definitely occur. There is also sign of struggle. Bruises and abrasions are very superficial injuries and superficial injuries cannot be manufactured. In case of abrasion, the outer layer of skin partly gets damaged. If any part of the body is rubbed, the abrasion may be punctured and wound may be caused on pointed surface such as bricks or tiles. The suggestive of age victim is 12-14 years. A 14-year-old girl has a second molar. Two molars area on top and two are at the bottom. The third molar grows after the age of 17 years. Apart from the molars, at the age of 14 there are five teeth on top and five teeth on the bottom. There are 7 teeth above and 7 below in the report. According to the report, including both sides, there are 14 teeth



on top and 14 teeth on bottom.

14.2. In his cross examination, PW-3 has stated that he had received a demand letter for examination from police and he along with the board of doctors have prepared the report after getting the X-ray report. The witness has also stated that he did not write the statement recorded by the police. He has also stated that the wounds are not doctored wounds and they cannot be created. He also mentioned that no case history has been told by the victim.

15. PW-4 Dr. Krishna Mohan Singh, was a member of the Medical Board, through whom age verification and medical examination of the victim was done. This witness has stated in his evidence that on 11.05.2017, he was posted as Medical Officer in the Sub-Divisional Hospital, Mohaniya, and he examined the vaginal swab of the victim, on the basis of the demand letter of Dr. Badruddin Ansari. The sperm was not found alive or dead. This witness has identified his investigation report which is in his own handwriting (Exhibit-6). He has stated in his cross-examination that he was not acquainted with the victim before the examination and only the vaginal swab was produced before him.

16. PW No. 5 Dr. Mrs. Amber, who was a



member of the Medical Board, has stated in her evidence that she was posted as Lady Medical Officer in Subdivision Hospital, Mohaniyan on 11.05.2017 and was a member of the Medical Board, which was constituted to examine the victim (daughter of Ram Raj Singh, resident of village- Isri, police station- Ramgarh, district- Kaimur) and she examined the victim at 01:44 pm with the help of Urmila Kumari ANM and found- injury on middle line tear on the posterior forchet covered with granulation tissues, collagen tissues and bead of pus- Age one to two week and epithelial tag hangs from upper left lateral introites about 1cm. in size. The injury has irregular margin epithelium showing healing raw bed. The hymen is not present. Her auxiliary and pubic hair very sparse and light brown color. Her pubic hair mainly along labia. Enlargement and elevation of breast areola with no separation of their Contour, papilla very small. She has given her report which has been marked as Exhibit 5.

16.1. This witness has stated in cross-examination that the wound found on the body of the victim was healed. This witness has further said that once the hymen is ruptured, it does not come back and she has not recorded the time of rupture of the hymen. This witness has also stated that the wound has



healed and turned light pink color and there was swelling around the wound from where the pus was coming which was visible from outside.

17. PW-6, Dr. Manish Kumar, a dentist and a member of the Medical Board, has stated that he had examined the condition of the teeth of the victim and had found that she had seven upper and seven lower teeth and her age could be 12-14 years. This witness has identified his report as Exhibit-7. This witness has also said that children get second molar at the age of 14 years.

18. PW-7, who is wife of the appellant stated that she didn't know about the victim and if any incident took place, she didn't know anything with regard to it. This witness was declared hostile on the request of the prosecution.

18.1. In her cross examination, she states that she had been married for 15-16 years and have 2 boys aged about 4-5 years and 2 girls aged about 12-13 years. She further stated that appellant is in textile business and there is no case registered against him except this case and she has a good relationship with her husband (appellant). She also stated that she didn't knew anything about a girl named Sunita Kumari.

19. P.W.-8, who is brother of the appellant, stated



that he does not know the victim of this crime and have not even heard her name and he do not even know if any such incident occurrence. On request of the prosecution, this witness was also declared hostile. He further stated that accused person has a house in Parasthua and he do not recognize Sunita Kumari.

19.1. In his cross examination he stated that he is running his shop for almost 6 years and the appellant began his shop after 2 years of his shop and there are no criminal case against the appellant and his conduct is fine.

20. PW No.- 9, Reshmi Devi is the co-villager of the victim, with whom the victim has been said to have gone to Ramgarh. This witness has stated in her evidence that in the morning of 01.05.2017, the victim came to her house and said that she wanted to talk to Sunita Kumari and asked for her mobile, then she gave her mobile to the victim and the victim talked to Sunita Kumari and returned the mobile. After an hour, she went to Ramgarh market with the victim, where she got a call on her mobile from Sunita Kumari who asked her to make her talk to the victim , then she gave her mobile to the victim to talk to Sunita. The victim talked and said that Sunita was calling her and she was going to Durga temple. Saying this, she left from there and this witness went to get medicine from doctor.



This witness has further stated that she has given a statement to the police and she recognizes Sunita. This witness has further stated that she later came to know that a boy named Sonu Gupta, a resident of Parasathua, had run away with the victim. This witness has further stated that his statement was recorded by the police and she had told that the victim had talked to Sunita Kumari by taking her mobile. This witness has denied that she has testified falsely.

21. P.W.-10, Vidya Kumari d/o Subhash Yadav, has stated in her evidence that the incident occurred on 04.05.2017. On that day she her sister-in-law Reshmi Devi and her mother were going to Ramgarh market to buy medicines and when they reached Ramgarh Chowk, victim and Sunita Kumari of her village were talking amongst themselves and were also talking on mobile. A boy was standing with a motorcycle with a towel tied on his face, standing 10 feet from Durga Chowk and victim said "we are going, you all go to the hospital", then these people went to the hospital. This witness has further stated that later she heard that Sonu Gupta had kidnapped her, in which Sunita Kumari was also involved. This witness has identified Sunita, but has not identified Sonu Gupta.

21.1. She has stated in her cross-examination that



she studies in class 8 and victim studies in class 7 in her school, who is her elder uncle's daughter. This witness has also stated that she met victim on 01.05.2017 at 1:30 pm. While she was leaving for the market with her sister-in-law and mother, the victim was going alone to Ramgarh and told that her maternal uncle's son had come to pick her up, she was going to visit Ramgarh to her maternal uncle's village. This witness has also said that at Durga Chowk, victim had not talked by taking her sister-in-law's mobile. The boy she had talked to was sitting on the motorcycle with his face tied with towel. This witness has also stated that she had not taken the name of Sonu Gupta before the police.

22. PW-11, Rajesh Kumar, is a witness to the seizure list, who has stated that Sub-inspector of Police had prepared a seizure list in front of him at Ramgarh police station of blue coloured mobile model - factor company's Hero 2 SIM mobile, in which the SIM and the battery were missing and the lid was broken on 09.05.2017 at 10:30 am. Similarly, PW No. 12, Ranjit Kumar Yadav is also a witness to the seizure list and he has identified his signature on the seizure list, which was prepared by Inspector Vinod Kumar at Ramgarh police station, which is marked Exhibit-2/2.



23. PW-13, Buddhiram Singh has stated in his evidence that he has no information about the incident, nor his statement was recorded by the police. Thus, this witness has been declared hostile by the prosecution and in the cross-examination on behalf of the prosecution, this witness has denied that he had told the police that the victim was his cousin and that she had asked for Sunita Kumari's mobile and was talking to someone. On 01.05.2017, the victim went to Ramgarh market with her sister-in-law and talked from Reshmi's mobile, whose number was 7979785053 on 8757079816 and when Ramraj Singh scolded Sunita for making her talk from her mobile, she got angry and removed the SIM and battery, broke it and threw it away. This witness has identified Sunita Kumari, but has not identified Sonu Kumar.

24. PW-14 has also not supported the incident and has been declared hostile. In his cross-examination, he has denied that he had told the police that both Mamta Kumari and victim are sisters and Puja Kumari had a mobile phone and victim went to Ramgarh market with Reshmi Bhabhi of the village on 01.05.2017 and talked on two mobile numbers from Reshmi's mobile. She went with the boy, who was standing near the gate with his face tied with a towel, on the motorcycle. She



told Reshmi's sister in law that he was her maternal uncle's son and would take her to her grandmother's place, but when victim did not reach her maternal uncle's place, search for her began and Ramraj Singh inquired Sunita Kumari and scolded her for making the victim talk on mobile due to which Sunita got angry and broke her mobile and threw it and Sunita Kumari has been accused of helping in kidnapping because of making the victim talk on mobile.

25. PW-15, Vishwamitra alias Kanu Yadav has stated in his evidence that he has neither any information nor heard anything about the incident and his statement was not recorded by the police.

25.1. In the cross-examination on behalf of the prosecution, it has been denied that the victim used to from the mobile of her cousin sister Sunita Kumari and victim went to Ramgarh market with Reshmi Bhabhi of the village and from there talked on two mobile numbers from Reshmi's mobile and the person to whom she talked was standing near the gate of the block with a motorcycle covering his face with a towel and victim told Reshmi that she was going with her maternal uncle's son and went with him.

26. PW-16 Vinod Kumar Singh is the



Investigating Officer of this case, who has stated in his evidence that on 01.05.2017, he was posted at Ramgarh police station and on that day, he undertook the charge of investigation of case no. 104/2017 on the orders of SHO. Thereafter, after recording the presentation cum seizure in the case diary, recorded the statement of the informant and proceeded to the spot of incident. The place of incident of this incident is 200 meters north of Durga Chowk Park under Ramgarh police station, situated on the south-north corner, adjacent to the main gate of the East Office, where the accused was standing with a motorcycle, covering his face with a towel. The boundary of the incident site, there is the block office and consolidation office in the east, to the west is the gate of the block office and Ajay Chaurasia's paan kiosk, Durga temple and Dharamshala in the north and paved road in the south. Later, he went from the incident site to village Isri, and recorded the statements of witnesses Reshmi, Vishwamitra Yadav, and Sanjay Yadav who supported the incident. This witness has further stated that on 09.05.2017, the victim came to the police station with her parents and on that day he recorded the statement of the victim, but due to the court being closed, her statement under Section 164 Cr.P.C could not be recorded. Later, on 11.05.2017, the statement of the victim



u/s 164 Cr.P.C was recorded in the court and her medical examination was done at Mohaniya Hospital and the victim's statement was recorded by the Dy SP. In the light of the victim's statement, he reached village Parasthua, arrested Sonu from there and statements of residents of the village namely, Santosh Kumar Gupta, Shyam Bihari Sah, Manta Sah, Guput Sharma, and Ashok Sah were recorded. He inspected the place where the victim was kept, which is a three-room terraced house, which has an iron gate and the exit is towards the west. There is a hand pump and a staircase in the middle of the house and it is the house of the appellant Sonu Gupta. Thereafter, he obtained the statement of the victim under Section 164 and the medical examination report and after receiving the slide given by doctor, he sent it to the Forensic Science Laboratory for examination on 25.07.2017. This witness has also said that he obtained the call details of the appellant and Sunita Kumari from the mobile company, which revealed that the mobile numbers of the appellant were 7979785053 and 8757079816 and the IMEI No. of Sunita Kumari's mobile was 911487600160474 and 9114876003854779 and call was placed between Sunita Kumari's mobile no. 7319775465 and 9065027741 and Sonu Kumar Gupta's (appellant) mobile no. 8757079816 on



26.04.2017, 09.05.2017 and 01.05.2017. The call details of Reshmi Kumari's mobile number revealed that conversation took place on Sonu Kumar Gupta's (appellant) number from her mobile number 8573305749 on 02.05.2017, 03.05.2017 and 08.05.2017. Subsequently, in the light of the facts found during the investigation, this witness submitted the first charge sheet against the appellant under Section 366A, 376 of the Indian Penal Code and Section 4 of the POCSO Act on charge sheet No. 125/2017 dated 11.07.2017 and Second charge sheet No. 149/2017 dated 31.07.2017 was submitted against accused Sunita Kumari under Section 366A and 376 of the IPC and Section 4 of POCSO Act. This witness has identified the presentation-cum-seizure list, which is marked Exhibit-8 and has identified the CDR of the mobile dated 25.04.2017 to 11.05.2017, which is enclosed at page no. 23 to 45 of the diary, which was marked as Exhibit-9 along with the objection.

26.1. In his cross-examination, this witness has stated that Chaurasia paan shop is next to the place of incident, but his statement was not recorded and that place remains busy till 10 pm. This witness has further stated that in the presentation-cum-seizure list, it is not written that who produced the broken mobile and that it has been left out by mistake. This



witness has also stated that the call details were obtained after the seizure list was prepared. He has also stated that he had received the CDR from the clerk of the SP office, but it has not been written in the diary. This witness has also stated that witness Vidya Kumari had stated in her statement that on 01.05.2017, she was going to Ramgarh market with her mother and sister-in-law at 2 o'clock in the day. While leaving the village, victim told that her maternal uncle's son had come to pick her up in Ramgarh and she went to Durga Chowk and called the number on Reshmi Bhabhi's mobile and talked and saw the boy who was riding a motorcycle with his face tied with a towel who was standing at the Block office gate and victim went away saying that "you go with Reshmi Bhabhi, I am going to my grandmother's place along with my cousin brother". This witness has also stated that the informant, Ramraj Singh had said that before the incident, so he had gone to his in-laws house with his wife for his mother-in-law's last rites where he got information that his daughter was not at home, then he came home and searched. But this witness, in his statement, did not say that the girl was raped, but rather said that she was kidnapped. This witness has stated that the victim had stated in her statement that on 01.05.2017, Sunita told Reshmi Devi on



her mobile to hurriedly go to Ramgarh, to which she said that she would reach Durga Chowk in five minutes and was on the way to Ramgarh. Then, there was a call again on Reshmi Devi's mobile, which came from Sunita's mobile, in which the boy's voice was coming, he asked "where are you"?, then she said that it is a wrong number, then he said "This is your brother Ram Lakhan, your grandmother has died and your mother has gone there and has called you there". Sunita was also standing there, where she gave her water from the bottle, after drinking it, she could not understand anything. Sunita Devi said "you should go on your cousin brother's bike" and she was in a state of intoxication and Sunita had helped in the kidnapping and rape incident. Sunita also made her sit on the bike and herself sat on it. This witness has further said that this witness did not say that Sonu Gupta (appellant) had physical relations with her from 01.05.2017 to 08.05.2017 and used to beat her and when Sonu's parents threatened Sonu then brought and dropped her at Ramgarh market. This witness has also stated that he had talked about his wife's protest, but he had not said that Sonu Gupta had given her the tablet to eat due to which she got intoxicated and he had also not said that Sonu Gupta had locked her inside the house and she kept screaming out of fear. This witness has



denied that his investigation is erroneous.

27. PW No. 17 is a formal witness, who has identified the endorsement on the formal FIR of Ramgarh Police Station Case No. 104/2017 dated 07.05.2017 and on the written application, which have been marked as Exhibit-11 and 12.

28. Two witnesses have been produced on behalf of the defence side.

29. D.W. 1 is Lalji Hind, a resident of Mauza-Binpurwa police station- Ramgarh district- Kaimur, who has stated in his evidence that he knows the appellant . Along with this, he also knows the informant Ramraj Singh. He has further stated that Shiv Kumar Singh, son-in-law of Ramraj Singh, has a spectacles shop in Parasathua and appellant has a cloth shop near Dak Bungalow in Parasathua. Appellant lives with his family in Parasathua and he had heard that Shiv Kumar's family used to visit his house in Parasathua. This witness has further stated that Shiv Kumar Singh had taken clothes from appellant's shop two years ago and there was dispute between appellant and Shivkumar Singh over money. Appellant's ancestral house is in Badhupar and he also has his own house in Parasathua.

29.1. In the cross-examination, this witness has stated that he does business in Parasathua and has further stated



that he does not remember the date and month of him visiting appellant's shop. He has further deposed that he has not bought spectacles from Shiv Kumar's shop, nor does he has any document. The appellant had not shown any document for the outstanding money. His house is in Bindpurwa, Police station-Ramgarh.

30. D.W. 2 Baiju Bind is also a resident of village Bindpurwa, police station Ramgarh district Kaimur. He has stated that he knows informant Ramraj Singh and appellant. He also knows Shiv Kumar, who is Ram Raj's son-in-law. This witness has further stated that Shiv Kumar has spectacles shop in Parasathua and appellant has a clothes shop in Parasathua. Shiv Kumar lives with his family in a rented house in Parasathua, where his in-laws and the victim visit. appellant Kumar also has a house in Parasathua and both shops are nearby. This witness has further stated that there was a fight between appellant and Shiv Kumar about some issue one and a half years ago regarding borrowing of clothes.

30.1. In his cross-examination, this witness has stated that his village is two and a half kms away from Parasathua and Isri, the village of the victim, is at a distance of 10 Kms from Parasathua. This witness has further stated that he



does not remember the date of the dispute nor did he see any receipt for the outstanding amount. His house is also in Bindpurwa, Police station- Ramgarh.

31. We have considered the submissions canvassed by the learned advocates appearing on behalf of the parties. We have also perused the material placed on record, including depositions. From the evidences led by the prosecution, it would emerge that the prosecution had examined seventeen witnesses and it is not in dispute that the victim was not found anywhere between 01.05.2017 to 08.05.2017 and was later found out while the informant was going to file a missing complaint and he thereafter took her to the police station where the victim gave her statement before the police officers that the accused kidnapped her and sexually assaulted and raped her for seven days and thereafter brought her back to Ramgarh and left her.

32. At this stage, we would like to refer to the deposition given by PW-03 namely, Dr. Badruddin Ansari along with the board of doctors including, Dr. K.M. Singh, Dr. Manish Kumar, Dr. Mrs. Ambar, who examined the victim girl and stated in his deposition in examination-in-chief as under: -

- 1) Two bruises along the medical border of the Palmer surface of the right hand.



- i) Dimensions 2.5cm x 5 cm yellow in color.
- ii) 1.25 cm x .75 cm yellow in color.
- 2) Punctured wound on hipothinner region of the Palmer surface of the right hand about .75 cm diameter.
- 3) Soft reddish scap formation with inflammation and tenderness in the adjoining area. Punctured wound on the Palmer surface of the terminal on the right middle finger .75 cm diameter with soft reddish scap, inflammation and tenderness.
- 4) A bruise behind left ear 2.5 cm x 2.5 cm.

33. The age of injury is stated to have been one or two weeks old. The medical examination is done on 03.01.2018.

34. According to the internal examination conducted by Dr. Mrs. Ambar with Urmila Kumari A.N.M. as assistant, there is injury on mid-line tear on the posterior surface covered with granulation tissue collasion tissue and beed pus. The hymen is also not present. As per microscopic examination, spermatozoa was not found.

35. As per the dental report given by Dr. K.M. Singh, the suggested dental age is of 12-14 years. On the basis of physical feature, menstrual history, development of secondary sexual characters, dentism and radio-logical examination, the age of the victim is 12-14 years. There is evidence of forceful vaginal penetration. Penile penetration cannot be ruled out. Sign of struggle is present.



35.1. In his cross examination he has specifically stated the injury to be around one to two weeks old and there was sign of struggle on the basis of injury suffered by survivor. He further stated that these injuries could not be manufactured and the injury is caused by hard and blunt substance.

36. The report given by the medical board and the depositions given in their examination-in-chief, it is prima facie clear and evident that the victim is a minor aged about 12-14 years, according to the dental report and radio-logical examination. The victim, in her statement under section 164 of the Code, has stated that her age is 12 years, which is recorded by the Magistrate. Under Rule 12 of the J.J. Rules, 2007, in the absence of relevant documents, a medical opinion had to be sought from a duly constituted Medical Board which would declare the age of the juvenile or child.

37. Taking into consideration of the fact that the prosecution has failed to provide any documentary evidence with regard to the age of the victim. It has been categorically decided in a catena of judgments that if there is no documentary evidence available to decide the age of the victim, the report of the medical board is to be taken into consideration, medical opinion thus assumed importance. In the case of **Om Prakash**



vs State of Rajasthan reported in, (2012) 5 SCC 201, the Hon'ble Supreme Court has held as under-

“While considering the relevance and value of the medical evidence, the doctor's estimation of age although is not a sturdy substance of proof as it is only an opinion, such opinion based on scientific medical tests like ossification and radio-logical examination will have to be treated as strong evidence having corroborative value while determining the age of the alleged juvenile accused.”

38. In another judgment in the case of **Ramdeo Chauhan Vs State of Assam (2001) 5 SCC 714**, the Hon'ble Supreme Court has held as under-

“Of course, the doctors estimation of age is not a sturdy substitute for proof as it is only his opinion. But such opinion of



an expert cannot be sidelined in the realm where the court gropes in the dark to find out what would possibly have been the age of a citizen for the purpose of affording him a constitutional protection. In the absence of all other acceptable materials, if such opinion points to a reasonable possibility regarding the range of his age it has certainly to be considered.”

39. Considering the above judgments, it is clear that when there is no documentary evidence available to substitute the age of a person as to whether he/she is a minor or a major, the medical examinations boards report is valid evidence.

40. The victim has further stated that she does not know if the shop of the brother-in-law of the victim is neighboring appellant's shop. Further, she also does not have any knowledge about the enmity and borrowings between her family and the appellant. Though, P.W. 8 has been declared



hostile at request of the prosecution, but in his cross-examination P.W. 8 has also not stated that the shop of brother-in-law of the victim is nearby or close to the appellant's shop.

41. In this present case the age of the victim is stated to be 12 -14 years. Taking the margin of error into account of two years, the age of the victim is still 16 years which is two years below the age of majority. The age of consent is 18 years. The victim is aged about 14 to 16 years, which is below the age of consent.

42. Learned counsel for the appellant has submitted that the victim has consented to the sexual intercourse/relation with the appellant. Regarding this submission of the learned counsel for the appellant, it is clear that the victim being a minor and minor has no consent to sexual relation/intercourse and it will be considered as sexual assault in every situation. Considering this fact and statement of the prosecution witnesses and defence witnesses, there is no such evidence or fact amongst all of it, that the victim had earlier relation with the accused and they have not suggested anything regarding the same.

43. There cannot be any rational conclusion that the victim has consented to the sexual intercourse and thus it is



clear that the victim was raped by the appellant. The injuries sustained by the victim on her body parts was caused by hard blunt object was examined by the board of doctors, which showed sign of struggle suffered by the survivor victim. The victim was also examined internally and the hymen was not present and there was evidence of forceful vaginal penetration. The Medical Board also concluded that the injuries sustained by the victim cannot be manufactured or self-implicated.

44. Coming to the point that the accused is guilty of the offense or not, it comes down to the point that the accused has to prove whether he has committed the offence or not. The accused is not innocent until proven guilty but he has to prove that he is not guilty. Section 29 of the POCSO Act lays down that when a person is prosecuted for committing or abetting or attempting to commit any offence under the POCSO Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved, an accused has to prove the contrary, i.e., he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved in order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is,



therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary. The presumption does not take away the essential duty of the Court to analyze the evidence on record in the light of the special features of a particular case, e.g., patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. Section 114B of the Indian Evidence Act, 1872, deals with the presumptions as to the offense and reads as under-

“114B. Presumption as to offences committed under section 354, section 354A, section 354B, section 354C, section 354D, section 509, section 509A or section 509B of the Indian Penal Code, 1860.- When the question is whether a person has committed an offence under Section 354, section 354A, section 354B, section 354C, section 354D, section 509, section 509A, or section 509B of the Indian Penal Code and



if the victim deposes before the court that she has been subjected to sexual harassment or her modesty was outraged or she was disrobed or she was stalked or her privacy was intruded or she was sexually harassed by any means, as the case may be, the court may, unless contrary is proved, presume that such offence has been committed by that person.

45. In *Ragul v. State* (Crl.Appeal. No.391 of 2016) learned Single Judge of the Madras High Court had occasion to consider the scope of the presumptions under the POCSO Act, at the instance of the accused who challenged the conviction. It was held that section 29 of the POCSO Act has to be strictly construed inasmuch as penal consequences are involved. It was held that, the said section does not say that it was ir-rebuttable presumption and in this context, it can be safely concluded that the presumption to be drawn under the provision is a rebuttable presumption. The Court proceeded to consider whether the prosecution has put forth and established the foundational facts to draw presumption under section 29 of the POCSO Act.

46. After examining the defence witness nos.1



and 2, they have stated that the appellant and the brother-in-law of the victim had previous enmity regarding some money for taking cloths from shop of victim's brother in law and not paying for it and due to which both accused and brother-in-law of the victim had verbal fights with each other, the exact dates of which is not known to both defence witnesses. D.W.1 Lalji Bind in his statement has stated that he has heard that brother-in-law of the victim has a clothes shop in Parasthua. Considering the statements given by both the witnesses, the defence witnesses have stated that the appellant has been falsely implicating that due to previous enmity and the victim girl has named the appellant in this present case. The victim in her cross-examination, had clearly stated that she has knowledge of the spectacles shop of the brother-in-law of the victim, but she has also mentioned that she does not have any knowledge about the shop or house of the appellant adjacent to shop of the brother-in-law of the victim. She has also mentioned that she no acquaintance with the appellant. The victim has also stated that she knows that her maternal uncle has two sons, namely, Mukesh and Ramlakhan, but she does not know them and she has never been to her maternal home.

47. The prosecution has clearly established the



case against the accused person and, thus, the onus shifts on the appellant as to whether he has committed such crime or not. Basing our opinion on the above facts and circumstances, we are of the view that the appellant has not been able to prove that he is not guilty of committing the crime.

48. Learned counsel for the appellant has also taken a plea that the family of the victim did not file any complaint against the police or any authority for 8 days when the victim was missing, they only filed a case after finding the girl on the last occasion. Any prudent person, whose minor child of 12 years goes missing for even a single day, would leave no stone unturned to find the child. The only person who has stated that the offense has been committed is the victim girl only and corroboration of the same is erroneous. Coming to this contention, we are of the view that if evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. A rapist not only violates the victim's privacy and personal integrity but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault but it is often destructive of the whole personality of the victim. A rapist degrades the very soul of the helpless female, the Courts,



therefore, should have a great responsibility while trying an accused charged of rape. The Court should also examine the broader probabilities of a case and not get swayed by minor contradictions and insignificant discrepancies in the statement of the prosecutrix, which are not fatal in nature, to throughout an otherwise reliable prosecution case. victim of a rape, the Statement given by her and the testimony of the offence should be appreciated on the basis of probabilities like testimony of other witness and conviction can be based solely on such testimony.

49. In our Indian Society, the dignity of a girl child and a woman is of a paramount importance. Even a woman/girl is considered to be goddess. Considering this fact and the status of dignity of a girl, which altogether holds the dignity of a family, would not go out of the way and file a false rape case against a person to satisfy the enmity of her family. The father of the prosecutrix would also not ordinarily subscribe the false story of the rape on his daughter and thereby bring a public shame and embarrassment. In the present case, the father was living in Durg for a significant period of time and his statement is only hearsay. Still the statement given by him corroborates with the statement given by the victim under



Section 164 of the Code.

50. Rape is defined under Section 375 of IPC- Under Section 375, a man is said to commit rape if he; Penetrates his penis into a woman's vagina, mouth, urethra, or anus to any amount, or forces her to do so with him or anybody else; or Inserts any object or portion of the body, other than the penis, into the vagina, urethra, anus, or any other part of her body, or forces her to do so with him or another person. Manipulates any part of a woman's body to produce penetration into the vagina, urethra, anus, or any other part of her body, or forces her to do so with him or anybody else; or Applying his tongue to a woman's vagina, anus, or urethra, or forcing her to do so with him or another person, or Any of the seven clauses laid down under Section 375 of the Indian Penal Code, 1860. The provision embraced with seven clauses that majorly lays down circumstances that if takes place, can be quoted to be amounting to the offence of rape. **Sixth and seventh clause :** sexual intercourse with a minor and when the woman is unable to communicate consent.

51. As per the sixth clause, if the offensive act is done with or without the consent of the girl and the girl is under the age of eighteen, it is termed rape. **The seventh clause**



states that if the offensive act is performed on a woman who was not in a position to consent at the time of the intercourse, the same will also be considered to be rape. Under these circumstances, where a person whom rape is committed is under 16 years of age, her consent is immaterial and penetration is sufficient to constitute the offense. All other facts are immaterial and considering the fact that the medical examination board has also concluded that there was injury on the body of the victim and the hymen was not present, and there is sign of struggle, corroborates with the prosecutrix version of the case. Also, Considering the fact that under Indian Evidence Act, 1872, there is provision regarding presumption as to absence of consent in certain prosecution for rape-

“114A. Presumption as to absence of consent in certain prosecution for rape. —In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and



such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.”

In the present appeal, there is clear absence of consent discussed above as the victim girl is a minor and consent of a minor is immaterial. Even though it is immaterial, in this present case, the statement given by the victim under section 164 of the Code and other corroborating evidence and substantive evidence clearly suggest that there was no consent given by the victim which altogether negates the point of consent of the victim.

52. While concluding the matter, the learned counsel for the appellant further contended that the period of punishment of the appellant shall be reduced considering that the appellant has already spent approximately 7 (seven) years of sentence in prison and he shall be given a lower punishment. Coming to this submission, the injury sustained by the victim, the medical report of the board of doctors and the trial Court record, it is clear to us that the victim was sexually assaulted and thus, the sentence of 12 years and fine is appropriate and should not be changed.

53. Considering the above facts and circumstances, we are of the view that the trial Court has not committed any error while passing the impugned judgment and



order. Thus, looking to the overall facts and circumstances of the present case, we are not inclined to interfere with impugned judgment and order and the judgment passed by the trial Court is confirmed.

54. Accordingly, the present appeal is dismissed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

Brajesh Kumar/-

AFR/NAFR	AFR
Uploading Date	14.05.2024
Transmission Date	14.05.2024

