

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.396 of 2023

Arising Out of PS. Case No.-18 Year-2020 Thana- EKCHARI District- Bhagalpur

- =====
1. Aman Yadav @ Aman Kumar son of Late Indradeo Yadav @ Late Indradev Yadav.
 2. Ravi Roshan Yadav @ Ravi Roshan Kumar Yadav son of Ramkhelawan Yadav, both resident of village Bari Chataiya, Police Station- Ekchari, District- Bhagalpur.

... ... Appellants

Versus

The State of Bihar

... ... Respondent

=====

with

CRIMINAL APPEAL (DB) No. 426 of 2023

Arising Out of PS. Case No.- 18 Year-2020 Thana- EKCHARI District- Bhagalpur

=====

Kundan Yadav @ Kundan Kumar son of Mantu Yadav @ Surendra Yadav, resident of village - Badi Chataiya, Police Station- Ekchari, District – Bhagalpur.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Criminal Procedure Code---section 374(2), 161, 164, 313---Indian Penal Code---section 376DA--- Protection of Children from Sexual Offences Act (POCSO Act)---section 5(g), 6, 29, 30, 42--- Indian Evidence Act, 1872---section 32, 145, 157---appeal against conviction---allegation against appellants is that they committed rape upon the victim---Findings: except the statement made by the victim girl under Section 164 Cr.P.C., no incriminating material is available on record to prove the guilt of the appellants---victim girl committed suicide about 1 year after the date of occurrence hence she could not be examined as a witness---merely because the victim is dead and consequently could not be examined, can never be a ground to acquit an accused if

there is evidence otherwise available to prove the criminal act of the accused concerned and that accused cannot be convicted for an offence of rape merely by relying upon the statement made by the victim girl under Section 164 Cr.P.C---the medical evidence in the present case specifically rules out the claim of rape to have been committed with the victim girl, muchless the factum of her being assaulted by the appellants---the statements made by the victim girl in her written report and statement made under Section 164 Cr.P.C. are full of contradictions, the prosecution has failed to establish the foundational facts, medical evidence does not show any sign of rape qua the victim girl and on the contrary shows that the victim girl was carrying pregnancy of 6 weeks 2 days in her womb, which has remained unexplained by the prosecution---statement recorded under Section 164 Cr.P.C. is not a substantive piece of evidence, however the same is a formal statement made before an authority competent to investigate a fact which may be used for contradiction or for corroboration of the witness---learned Trial Judge erred by holding that the statement of the victim girl recorded u/s 164 Cr.P.C. has been corroborated by the testimony of prosecution witnesses---impugned judgment and order set aside---appeal allowed.

(Para 36, 37, 40, 41)

1992 Supp (3) SCC 179, 2023 SCC Online Pat 5103, (2013) 14 SCC 266, (1970) 2 SCC 61

.....Referred To.

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- 2. Ravi Roshan Yadav @ Ravi Roshan Kumar Yadav son of Ramkhelawan Yadav, both resident of village Bari Chataiya, Police Station- Ekchari, District- Bhagalpur.

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with
CRIMINAL APPEAL (DB) No. 426 of 2023

Arising Out of PS. Case No.-18 Year-2020 Thana- EKCHARI District- Bhagalpur

Kundan Yadav @ Kundan Kumar son of Mantu Yadav @ Surendra Yadav, resident of village - Badi Chataiya, Police Station- Ekchari, District - Bhagalpur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :
(In CRIMINAL APPEAL (DB) No. 396 of 2023)
For the Appellants : Mr. Praveen Kumar, Advocate
For the State : Mr. Binod Bihari Singh, APP
(In CRIMINAL APPEAL (DB) No. 426 of 2023)
For the Appellant : Mr. Ranjeet Kumar, Advocate
Mr. Dilip Kumar, Advocate
For the State : Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
and
HONOURABLE MR. JUSTICE NANI TAGIA
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH)

Date : 06-02-2025

The aforesaid appeals, preferred under Section 374(2) of
the Code of Criminal Procedure, 1973 (hereinafter referred to as



the “Cr.P.C.”) arise out of the same judgment of conviction and the order of sentence dated 10.02.2023 and 04.03.2023 respectively, passed in POCSO Case No.81 of 2020 (arising out of Ekchari P.S. Case No.18 of 2020) by the learned Court of Exclusive Special Court (POCSO Act)-cum-7th Additional District and Sessions Judge, Bhagalpur (hereinafter referred to as the “learned Trial Judge”), hence, these appeals have been heard together and are being disposed of by the present common judgment and order. By the said judgment dated 10.02.2023, the learned Trial Judge has convicted the appellants for commission of offence under Section 376DA of the Indian Penal Code (hereinafter referred to as the “I.P.C.”) and under Section 5(g)/6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the “POCSO Act”) and they have been sentenced to undergo rigorous imprisonment for life i.e. for the remainder of their natural life under Section 5(g)/6 of the POCSO Act with fine of Rs.50,000/- each and in default thereof, the appellants have been sentenced to undergo simple imprisonment for a period of six months. No separate sentence has been awarded under Section 376DA of the I.P.C. considering the provisions contained under Section 42 of the POCSO Act.



2. The short facts of the case are that on 04.08.2020, the victim girl had submitted her written report before the Officer-Incharge, Ekchari Police Station. In the written report, the victim girl had stated that on 29.07.2020 at about 6 p.m. in the evening, while she was going from her house to Basa, on the way three persons, namely, Aman Yadav (appellant No.1 of the first case), Ravi Roshan Yadav (appellant No.2 of the first case) and Ankush Kumar Yadav, by showing weapons and knife had forcefully taken her in a field and had committed wrong with her as also had assaulted her when she had raised alarm and ultimately she became unconscious. The victim girl is stated to have been thrown on the banks of river Ganges at Badi Chataiya. In the morning at about 4 a.m., the victim girl had stated to have regained consciousness, whereafter her family members had taken her back to her house. It has also been stated in the written report that she is a poor girl belonging to the Scheduled Caste.

3. On the basis of the said written report of the victim girl, a formal F.I.R. bearing Ekchari P.S. case No.18 of 2020 was registered by the Station House Officer, Ekchari P.S. on 4.8.2020 at 15:30 hours under Sections 341, 323, 376, 506 of the I.P.C. and under Section 4 of the POCSO Act against Aman



Yadav (appellant No.1 of the first case), Ravi Roshan Yadav (appellant No.2 of the first case) and one Ankush Kumar. After investigation and finding the case to be true qua the appellants, the police had submitted charge-sheet on 30.09.2020 under Sections 376DA of the I.P.C., Section 4 of the POCSO Act and Sections 3(1)(r)(s)(w)(ii)/3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act, 1989 (hereinafter referred to as the “Act, 1989”). Thereafter, the learned Trial Judge had taken cognizance of offence under Sections 376DA of the I.P.C., Section 5(g)/6 of the POCSO Act and Sections 3(1)(r)/3(1)(s)/3(1)(w)(ii)/3(2)(v) of the Act, 1989 vide order dated 25.01.2021. On 03.12.2021, charges were framed by the learned Trial judge against the appellants under Sections 376DA of the I.P.C., Sections 3(1)(r)/3(1)(s)/3(1)(w)(ii)/ 3(2)(v) of the Act, 1989 and Sections 5(g)/6 of the POCSO Act, to which they pleaded not guilty and claimed to be tried.

4. During the course of trial, 17 witnesses have been examined on behalf of the prosecution and three witnesses have been examined on behalf of the defence. While P.W.1 Sikandar Ravidas, P.W.2 Bindeshwari Paswan, P.W.3 Pappu Yadav and P.W.4 Moti Yadav are hearsay and formal witnesses, P.W.5 Munilal Mandal is the grand-father of the victim girl, P.W.6



Sauhadri Devi is the mother of the victim girl, P.W.7 Ramakant Mandal is the father of the victim girl, P.W.8 Amarjeet Kumar Mandal is the brother of the victim girl, P.W.12 Laxmikant Mandal is the uncle of the victim girl and P.W.13 Nitish Kumar is the cousin brother of the victim girl. As far as P.W.9 Mukesh Kumar and P.W.11 Mani Bhushan Kumar are concerned, they are stated to be the Investigating Officers of the present case. P.W.10 Vikash Yadav is stated to be an independent witness. P.W.14 Dr. Anand Kumar Murari, P.W.15 Dr. Beena Pani Poddar and P.W.16 Dr. Punam Mishra are doctors, who have prepared the age verification report/medical report of the victim girl. P.W.17 Chanda Lal is the Judicial Magistrate, 1st Class, in whose presence the statement of the victim girl was recorded under Section 164 of the Cr.P.C.

5. Mr. Praveen Kumar, learned counsel appearing for the appellants of the first case, has submitted that the statement of the victim girl recorded by way of fardbeyan does not qualify to be a statement of relevant fact by virtue of Section 32 of the Indian Evidence Act, 1872. He has submitted that P.W.7 Ramakant Mandal has only identified the signature of her daughter on the written report but has not proved the written report. In fact neither the written report has been proved by the



person who has scribed the same nor the same has been exhibited. Admittedly the writing of the written report is different from the signature made by the victim girl over the same, as also has been admitted by the Investigating Officer i.e. P.W.9 Mukesh Kumar. It is also nowhere stated in the fardbeyan that the same was read over to the victim girl who had understood the same and put her signature. It is next submitted that the statement of the victim girl under Section 161 Cr.P.C., recorded by the police, has neither been exhibited nor proved. The learned counsel for the appellants of the first case has contended that the statement of the victim girl recorded under Section 164 Cr.P.C. cannot be a basis to convict the appellants. It is next contended that even the medical report dated 18.08.2020 (Exhibit-P5/PW16), submitted by Dr. Poonam Mishra (P.W.16) shows that there is no evidence of rape. It is submitted that since the victim girl has not been examined/cross examined, there is no other material on record to prove the guilt of the appellants, more so since the written report of the victim girl and the statement made by her under Section 164 Cr.P.C. are contrary to each other. In fact, the doctor has also not found any mark of violence much less any internal or external injury.

6. The learned counsel appearing for the sole appellant of



the second case Sri Ranjeet Kumar has submitted that the appellant of the second case, namely, Kundan Yadav @ Kundan Kumar Yadav was neither named in the F.I.R. nor in the statement made by the victim girl under Section 161 Cr.P.C. and his name has only surfaced in the statement made by the victim girl under Section 164 Cr.P.C. on 19.08.2020. He has submitted that the foundational facts are incorrect and the victim, while giving her statement under Section 161 Cr.P.C. or under Section 164 Cr.P.C., before the learned Magistrate, has concealed the fact that she was pregnant, hence no offence as alleged is made out qua the sole appellant of the second case. The learned counsel for the sole appellant of the second case has further contended by referring to the statement made by the victim girl under Section 164 Cr.P.C. that the Judicial Magistrate, 1st class had not put any explanatory question to the victim girl to ensure that she was in a fit state of mind to give her statement. It is contended that a statement made under Section 164 Cr.P.C. is not a substantive piece of evidence and the same can only be used for contradiction and/or corroboration but cannot form the basis for conviction of the appellant. It is also contended that presumption under Section 29 of the POCSO Act is also not made out. The learned counsel for the appellant of the second



case has also submitted that in the written report, the victim girl has stated about one incident of commission of rape, however, in her statement made under Section 164 Cr.P.C. she has added one more incident totaling to two incidents of rape. It is contended that P.W.8 Amarjeet Kumar Mandal (brother of the victim girl) and P.W.13 Nitish Kumar (cousin of the victim girl) have made contradictory statements and even the father and uncle of the victim girl i.e. P.W.7 and P.W.12 have made contradictory statements. Thus, it is submitted that since the statements made by the witnesses are full of contradictions and untruthful, the same are not liable to be relied upon. It is next submitted that the medical evidence on record rules out the factum of rape having being committed qua the victim girl moreso, since the same does not show any sign of violence or presence of external/internal injuries over the body of the victim girl and on the contrary pregnancy of six weeks and two days was found, which makes the entire incident doubtful.

7. At this juncture, the learned counsel for the appellant of the second case has relied on a judgment rendered by the learned Division Bench of this Court, in the case of ***Pawan Kumar vs The State of Bihar & Ors. (Criminal Appeal (DB) No. 724 of 2023)***, delivered on 26.02.2024, to submit that in



case of conflict between oral and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence but when medical evidence specifically rules out the claim of injury to have been inflicted, as per the version of the eye witness then the court can draw adverse inference to the effect that the prosecution's version is not trustworthy.

8. The learned counsel for the appellant of the second case has further submitted that it is very surprising that in a village which is densely populated, nobody had seen either the victim girl being taken away or brought back to her house in the morning in an unconscious state. The learned counsel for the appellant of the second case has relied on a judgment rendered by the Hon'ble Apex Court in the case of *Raju and others Versus State of Madhya Pradesh*, reported in *(2008) 15 SCC 133*, to contend that though it cannot be lost sight that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well, hence the accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved, though the broad principle is that an injured witness,



who is present at the time when the incident happened would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

9. The learned counsel for the appellant of the second case has next relied on a judgment rendered by the Hon'ble Apex Court in the case of *Santosh Prasad @ Santosh Kumar Versus State of Bihar*, reported in *(2020) 3 SCC 443*, to submit that in case the solitary version of the prosecutrix does not inspire confidence and does not appear to be absolutely trustworthy, unblemished and of sterling quality, the same should not be taken as a gospel truth on its face value and in absence of any other supporting evidence, conviction ought not to be sustained and on the contrary the accused should be given the benefit of doubt.

10. The learned counsel for the appellant of the second case has next relied on a judgment rendered by the Hon'ble Apex Court, in the case of *Manak Chand @ Mani Versus The State of Haryana*, reported in *2023 SCC Online SC 1397*, to contend that in cases where age of the prosecutrix is a crucial factor, bone ossification Test ought to be conducted for determination



of the age of the prosecutrix, however, in the present case, neither Bone Ossification Test has been carried out nor Radiological Report is on record, hence the factum of the prosecutrix being a minor at the time of commission of the occurrence in question is itself doubtful, as such, benefit of doubt ought to be given to the appellant.

11. Per contra, the learned A.P.P. for the State Sri Dilip Kumar Sinha has submitted that the fardbeyan of the victim girl, her re-statement and her statement recorded under Section 164 Cr.P.C. are consistent and enough to prove the guilt of the appellants. It is further submitted that all the witnesses except P.W.1 to P.W.4 have supported the case, their testimonies are consistent and no contradictions are present. It is also submitted that the appellants have committed a heinous crime and the records would bear it out that ample materials are available on record to connect the appellants with the alleged crime, hence, their conviction and sentence should be upheld. The learned A.P.P. for the State has further submitted that the learned Trial Judge has passed the impugned judgment and the order of conviction and sentence by considering the materials on record and the same is a reasoned order. Thus, both the appeals are fit to be dismissed.



12. Besides hearing the learned counsel for the parties, we have minutely perused both the evidence i.e. oral and documentary. Before proceeding further, it is necessary to cursorily discuss the evidence.

13. P.W.1 Sikandar Ravidas, P.W.2 Bindeshwari Paswan, P.W.3 Pappu Yadav and P.W.4 Moti Yadav have all stated in their testimony that they had heard that some quarrel had taken place due to some trouble having brewed in relation to the daughter of Ramakant Mandal, however, they have denied to be knowing anything about the occurrence in question. Nonetheless, they have stated that they recognize the accused persons.

14. P.W.5 Munilal Mandal is the grand-father of the victim girl, who has stated in his deposition that the victim girl is his grand-daughter. The occurrence dates back to about one year. On the date of occurrence, his grand-daughter was 13-14 years old, on which day the family members had gone to harvest corn crops and when his grand-daughter had not returned back to the house, they had searched for her but could not know about her whereabouts. In the morning his grandson and nephew had gone to search for her grand-daughter near the banks of river Ganges where they found her lying in an unconscious state and then



they had brought her back to the house. Thereafter, the granddaughter of the said witness had disclosed to P.W.5 that she had gone to pluck chilies, where Ravi Roshan Yadav (appellant No.2 of the first case), Ankush Yadav, Kundan Yadav (sole appellant of the second case) and Aman Yadav (appellant No.1 of the first case) had come, pressed her mouth and had taken her inside the corn field where they had raped her and then they had thrown her near the banks of river Ganges. P.W.5 has also stated that the statement of the victim girl was recorded and she was also examined by the doctors and after one year she had hanged herself in the bathroom and died. P.W.5 had recognized all the accused persons, who were standing in the dock, namely, Kundan Yadav (sole appellant of the second case), Ravi Roshan Yadav (appellant No.2 of the first case) and Aman Yadav (appellant No.1 of the first case).

15. P.W.6 Sauhadri Devi is the mother of the victim girl, who has stated in her evidence that the occurrence dates back to two years and the victim is her daughter who on the fateful day had gone with her in the corn field to cut crops and after sometime she had sent her back to home for preparing food, however since chilies were not available she had gone to Basa to pluck chilies and when she was returning after plucking chilies, four boys,



namely Ravi Roshan Yadav (appellant No.2 of the first case), Kundan Yadav (sole appellant of the second case), Ankush Yadav and Aman Yadav (appellant No.1 of the first case) had caught her and forcibly taken her inside the corn field where they had committed rape with her leading to her daughter becoming unconscious and then the said four accused persons had thrown her daughter near the banks of the river. P.W.6 has further stated that in the evening, she had gone to her house after cutting corn crops and had asked her younger daughter about the whereabouts of the victim girl, whereupon she told her that she had gone to pluck chilies in the field but had not returned. Thereafter, search was made but the victim girl was not found. On the next day the son of P.W.6, namely Navin Kumar was sent to search for the daughter of P.W.6, who found her sitting near the banks of the river, whereafter he brought her back to the house and on being asked the victim girl narrated the entire incident to P.W.6. The family members of the victim girl had then gone to the mother and father of the boys, but they told them to do whatever they want to do. At the time of the incident, the age of the victim girl was 14 years and she was studying in Class VIII. The doctor had conducted medical examination of the victim girl. The victim girl was also treated at a private



Hospital at Kahalgaon. P.W.6 had recognized all the accused persons standing in the dock. In cross examination, P.W.6 has stated that a case was filed in the Police Station after four days of the incident and she had accompanied her daughter to the Police Station where written report was filed by the victim girl. P.W.6 has denied that the name of Kundan Yadav was not present in the report. P.W.6 has also stated that no family members of the victim girl had seen the accused persons taking away the victim girl.

16. P.W. 7 Ramakant Mandal is the father of the victim girl, who has stated in his evidence that the occurrence dates back to two years. The victim girl is his daughter and at the time of incident, his daughter was 14 years old. He has stated that the occurrence had taken place at about 6 p.m. in the evening on 29.07.2020 and on that day four boys, namely Kundan Yadav (sole appellant of the second case), Aman Yadav (appellant No.1 of the first case), Ravi Roshan Yadav (appellant No.2 of the first case) and Ankush Yadav had committed rape with his daughter and had then thrown her near the banks of river Ganges and at that time he was at Sahebganj, however after he returned back, his daughter had disclosed the names of all the aforesaid four accused persons, who had taken the victim girl from her Basa



into the corn field and raped her, whereafter she was thrown near the banks of river Ganges. P.W. 7 has further stated that he had then taken his daughter to the Police Station and filed a case. P.W. 7 had recognized the signature of his daughter made on the written complaint, which has been exhibited as Exhibit-P1/P.W.7. On 15.07.2021 when the daughter of P.W. 7 was sleeping in the house, P.W.7 had gone to Sahebganj for earning his livelihood and in the meantime unknown persons had killed his daughter and hanged her in the bathroom. P.W.7 had recognized all the accused persons standing in the dock. In cross examination, P.W.7 has stated that he had returned from Sahebganj on 30th whereupon, his daughter had disclosed about the incident and then case was filed in the police station on 04.08.2020. P.W.7 has stated that at the initial point of time he did not want to file any case, however sanha was given at the Police Station four days back and the Officer-Incharge was trying to settle the matter. P.W.7 has also stated that he had gone with his daughter to file the case and the case was filed on the basis of written report of his daughter. P.W.7 has also stated that he had given a written complaint to the Superintendent of Police that the Police Station is not accepting the written report since past four days. P.W.7 has next stated that the case which was



filed in the Police Station did not contain the name of Kundan Yadav (sole appellant of the second case) since he was under pressure and crooks had surrounded his brother-in-law at Bakhiya but no complaint was made with regard to the same nor any case was filed in the Court. P.W.7 has also stated that his statement was recorded by the police, however, he had not disclosed the name of Kundan Yadav since he was under pressure. At the time of the occurrence, his son, his nephew and his wife were at home. P.W.7 has next stated that if his daughter has committed suicide, it is because of the present case and his brother, namely Laxmikant Mandal had filed a case in connection with the suicide committed by the victim girl. P.W.7 has denied the suggestion that they used to leave cattle for grazing in the field of Kundan Yadav leading to dispute having taken place amongst them and on account of such dispute, Kundan Yadav (sole appellant of the second case) has been falsely implicated in the case.

17. P.W. 8 Amarjeet Kumar Mandal is the brother of the victim girl, who has stated in his evidence that the occurrence dates back to two years. On 29.07.2020 at about 6 p.m., his sister had gone to the Basa to pluck chilies and from there she disappeared. On search she was not found. On the next day in



the morning, when he was going towards the bridge for easing himself, he found his sister lying in an unconscious state on the banks of river Ganges, whereafter he had brought her back to their house where she had disclosed about the incident to her mother. P.W.8 has stated that his sister had disclosed that Ankush Kumar, Ravi Roshan Yadav (appellant No.2 of the first case), Aman Yadav (appellant No.1 of the first case) and Kundan Yadav (sole appellant of the second case) had together committed rape with her. A mediation was held by the panchayat, after the incident, however the accused persons did not come and even their family members did not come, whereafter the Police Station was informed and the case was filed. P.W.8 had recognized Aman Yadav (appellant No.1 of the first case), Ravi Roshan Yadav (appellant No.2 of the first case) and Kundan Yadav (sole appellant of the second case), who were present in the dock. P.W.8 has further stated that after about one year, i.e. on 15.07.2021 his sister was killed and hanged in the toilet when he was not at home.

18. In cross examination, P.W.8 has stated that on the date of occurrence his sister had not come back to the house and they had been searching for her all throughout the night but they had not given any information to the Police Station. In the night of



the occurrence, no information was given to the Mukhiya/ Sarpanch, but in the morning, information was given by his father. P.W.8 has also stated that his father was working at Sahebganj and had returned in the morning at about 8 a.m. He has stated that a case was filed on 04.08.2020, after six days of the incident. P.W. 8 has stated in his cross examination that he has not seen the accused persons taking away his sister and when he had gone to ease himself in the morning, Nitish was also along with him, who is his maternal brother. He has stated that when his sister was found at the banks of river Ganges, she had not disclosed anything to him or his maternal brother but had disclosed the names of the accused persons to his mother. He has stated that the police had recorded his statement and it is not a fact that he had not taken the name of Kundan Yadav (sole appellant of the second case) before the police. P.W.8 has also stated in his cross examination that he does not know as to who had killed his sister and hanged her. He has stated that Kundan Kumar (sole appellant of the second case) resides 15-20 houses away from his house. He has denied the suggestion that Kundan has been falsely implicated in the present case on account of his father, namely Surendra Yadav having filed a complaint against father of P.W.8 before the Gram Kachahari to the effect that



father of P.W.8 leaves the cattle in the field for grazing. In his cross examination, P.W.8 has further stated that he has not read the complaint filed by his uncle with regard to the suicide of his sister as also he does not know that the case number is 01/2021. He has denied the suggestion that the father of the co-convict, namely Aman used to quarrel with them, which has led to filing of a false case.

19. P.W.9 Mukesh Kumar has stated in his evidence that the occurrence dates back to 04.08.2020, when he was posted as Officer-In charge of N.T.P.C. Police Station at Kahalgaon. On 14.09.2020 P.W. 9 had assumed charge as Officer-In charge of Ekchari Police Station and on 16.09.2020 he had taken over the charge of investigation of Ekchari P.S. Case No.18 of 2020 from Sub-Inspector of Police, Manibhushan Kumar. P.W.9 had arrested Kundan Yadav, whom he had recognized in the Court. P.W.9 has further stated that after completing the investigation on all aspects, he had submitted the charge sheet bearing CS. No.25 of 2020 dated 29.09.2020 under Section 376 of I.P.C., Section 4 of the POCSO Act and Sections 3(1)(r)(s)(w)(ii)/3(2)(v) of the Act, 1989 against Aman Yadav (appellant No.1 of the first case), Ravi Roshan Yadav (appellant No.2 of the first case) and Kundan Yadav (sole appellant of the second case). P.W.9



has identified his writing and signature made over the charge sheet, which has been marked as Exhibit-P/2/P.W.9. In cross examination, P.W.9 has stated that he had submitted the charge sheet after going through the case diary. He has stated that on the written report, signature of only the victim girl is present and upon perusal of the said written complaint, it appears that the same has been written by someone else and thereafter, the victim girl had made her signature over the same. The name of the person, who has scribed the written complaint, is not mentioned on the same.

20. P.W.10 Vikas Yadav has stated in his deposition that the occurrence dates back to 2-3 years. The daughter of Ramakant Mandal was having love affair with Nitish Kumar and he had heard rumors about the same. In fact, Nitish Kumar had eloped with the daughter of Ramakant Mandal, however the victim girl did not return back and she died there. P.W.10 has stated that he knows Nitish Kumar. In cross examination, P.W.10 has stated that he is not aware as to who had taken away the victim girl, however, he knows that the victim girl had hanged herself and died. P.W.10 has also stated that Nitish Kumar is maternal brother of the victim girl and there was rumor in the village that the victim girl had become pregnant but Nitish Kumar had



refused to marry her.

21. P.W.11 Manibhushan Kumar is the Investigating Officer of the present case and he has stated in his evidence that on 04.08.2020 he was posted as Officer-In charge, Ekchari Police Station and on 04.08.2020 he had assumed the investigation of Ekchari P.S. Case No.18 of 2020, whereafter he had conducted inspection of the place of occurrence which is situated at the chili field of Ajit Jha at Badi Chataiya, Bhagalpur. P.W.11 has stated that the first place of occurrence is surrounded on the north by the corn field of Keshri Kant Jha, on the south by chili field of Rishidhar Jha, on the east by the corn field of Umesh Chandra and on the west by the chili field of Fuday Yadav @ Fudo. P.W.11 has also stated that the second place of occurrence of the present case is corn field of Keshri Kant Jha, which is surrounded on the north by the chili field of Ajit Jha and on the south by the field of Nilmani Jha, on the east by the house of Keshri Kant Jha and on the west by the chili field of Ram Khelawan Yadav. The third place of occurrence is situated at Badi Chataiya near the banks of river Ganges where on the north river Ganges is situated, on the south river is flowing, on the east village concrete road is situated, on the west field of Rishidhar Jha is present and on the northern and southern side,



river is flowing. P.W.11 is stated to have examined Sahodi Devi, Ramakant Mandal, Nitish Kumar, Amarjeet Mandal, Sikandar Ravidas, Bindeshwari Paswan, Kampu Yadav, Moti Yadav, Vikash Kumar, Laxmikant Mandal and Munilal Mandal and recorded their statement. The medical examination of the victim girl was also conducted and her statement under Section 161 Cr.P.C. was recorded by the Sub-Inspector, whereafter the statement of the victim girl was recorded under Section 164 Cr.P.C., before the learned Court.

22. P.W.11 is also one of the Investigating Officer, who is stated to have arrested accused Aman Yadav and Ravi Roshan Yadav whom he had recognized in the Court. P.W.11 has further stated that the learned Court had handed over the victim girl to her mother in his presence. In his cross examination, P.W.11 has stated that after taking over the investigation and going through the written complaint of the victim girl, he had registered a case and there the name of Kundan Kumar (sole appellant of the second case) was not present and in fact the victim girl had also not taken the name of Kundan Kumar in her re-statement. P.W.11 has also stated that neither the mother of victim girl nor the witnesses Ramakant Mandal, Nitish Kumar and Amarjeet Mandal had taken the name of Kundan in their statements made



before him. P.W.11 had also recorded the statement of the persons belonging to the area surrounding the place of occurrence, however, they had also not taken the name of Kundan. As far as the victim girl is concerned, she had also not taken the name of Kundan Kumar in her statement made U/s. 161 Cr.P.C. P.W.11 has next stated that no information was given to him regarding members of the prosecution being threatened by the accused persons. P.W.11 has stated that although it was orally informed that the accused persons were threatening the family members of the victim girl but no written complaint was made.

23. P.W.11 has denied recording the statement of Mukhiya/Sarpanch. P.W.11 has also denied having knowledge regarding the accused Kundan having made an application before the Sarpanch, Gram Kachahari, Khawaspur on 05.06.2020 with regard to the cattle belonging to the family members of the victim girl having grazed the crops situated over the field of Kundan and the same having led to quarrel in between them. P.W.11 has admitted that in the medical report, it has been mentioned that the victim girl is carrying a pregnancy of six weeks and two days and that the medical examination was made within a week of the incident. P.W.11 has stated that he



had not investigated as to who is the father of the child in the womb of the victim girl as also with regard to the relation, the victim girl was having with her cousin brother, namely Nitish Kumar. P.W.11 has also stated that he has no knowledge as to whether the victim girl had committed suicide or not. P.W.11 has also denied to have conducted investigation with regard to the dispute in between the father of the victim girl and the family members of the accused persons.

24. P.W.12 Laxmikant Mandal is the uncle of the victim girl, who has stated in his evidence that the occurrence dates back to 29.09.2020 when he was at Sahebganj and when he came from Sahebganj to his house situated at Badi Chataiya then his niece told him that when she was coming from Basa to her house four boys, namely, Aman Yadav (appellant No.1 of the first case), Ravi Roshan Yadav (appellant No.2 of the first case), Ankush Yadav and Kundan Kumar Yadav (sole appellant of the second case) had caught hold of her and committed rape with her. Thereafter, panchayati was held, however, the accused persons did not heed to the decision taken at the panchayati. Then the brother of P.W.12 had gone to the Police Station but the Officer-In charge had kept the written report but did not proceed with the case, whereafter complaint was made before the Deputy



Superintendent of Police and after he had created pressure, the case was registered. P.W.12 has stated that when the victim girl had committed suicide on 15.06.2021, then the police people had forcibly made them write that the victim girl has committed suicide. P.W.12 had recognized the four accused standing in the dock. In cross examination, P.W.12 has stated that he had also gone along with his brother to the Police Station to file the case and the case was filed by his brother, namely Ramakant Mandal (P.W.7). P.W.12 has denied to be having knowledge as to against whom his niece had filed the case. He has also stated that the name of Kundan was not taken in the complaint since they had put gun on the forehead of the maternal uncle of the victim girl. P.W.12 has further stated that his statement was not recorded by the police and whatever has been stated by him has been stated in the Court by way of the present testimony. He has also stated that in the case which was filed regarding the suicide committed by his niece, it has not been stated that Kundan and other accused persons had together killed his niece and then hanged her and shown the same to be a case of suicide. He has denied to have stated wrong facts during the course of his deposition. P.W.12 has also stated in his cross examination that the case was filed by his brother in the Police Station over which the victim



girl had made her signature. He has next stated that the report filed by his brother was changed by the Officer-In charge who had got a report written on his own and then the victim girl had made her signature over the same. P.W.12 has further stated in his cross examination that when his niece had hanged herself, he had brought her down by cutting the rope with a *hasua*. He has also stated that it is not a fact that he and his sister-in-law had killed the victim girl, hence postmortem was not done. He has also denied that his niece was having love affair with Nitish Kumar and that is why she had become pregnant, leading to her hanging herself.

25. P.W.13 Nitish Kumar is the cousin of victim girl, who has stated in his evidence that the occurrence dates back to two years and on the date of occurrence he was at Badi Chataiya where his Nani's house is situated. He has stated that the victim girl is her maternal sister and on the date of occurrence the victim girl had gone to the field to bring chilies but she did not return back, whereafter search was made but she could not be found. In the morning, P.W.13 and Amarjeet Kumar (P.W.8) had gone to search for the victim girl and when they had reached near the banks of river, they found the victim girl lying there unconscious, whereafter they had lifted her and brought her



back to home and when she regained consciousness at home, she disclosed, upon being inquired that four boys, namely, Aman Yadav (appellant No.1 of the first case), Ravi Ranjan Yadav (appellant No.2 of the first case), Ankush Yadav and Kundan Yadav (sole appellant of the second case) had together committed rape with her. In cross examination, P.W.13 has stated that he had not told the police that on 30.07.2020 at about 4 a.m. in the morning when he along with Amarjeet Mandal had gone to a place beneath the Chataiya Bridge near Ganga Kachaar for easing themselves, they had seen the victim girl standing near the *jalebi* tree and on asking her, she did not say anything at that time and when they reached home along with Amarjeet Mandal, the victim girl had disclosed about the incident to her mother. He has further stated that it is not a fact that he had not told the police in his statement that the victim girl had not taken the name of Kundan Yadav before her mother. P.W.13 has also denied that he had not taken the name of Kundan before the police and that he had not told the police that Kundan is also part of the occurrence. P.W.13 has also stated that he does not know as to whose name the victim girl had given in the case. P.W.13 has further stated in his cross examination that he had not told the police that when they had



gone to search for the victim girl, they had seen her standing near the *jalebi* tree and upon asking her she had not disclosed anything, instead he had told the police that the victim girl was unconscious. P.W.13 has next stated that when he and Amarjeet had reached the place of occurrence, after having set out to search for the victim girl, they found the victim girl to be unconscious. He has also stated that immediately after easing themselves, they had found the victim girl in an unconscious state, whereafter they had lifted her and taken her home where she regained consciousness. He has denied to have made any mistake resulting in the victim girl having becoming pregnant, leading to her becoming unconscious.

26. P.W.14 Dr. Anand Kumar Murari is the Doctor, who has determined the age of the victim girl and he has stated in his evidence that on 05.08.2020, he was posted in the Radiology Department of J.L.N.M.C.H., Bhagalpur as a Radiologist, on which day the victim girl was referred by the Superintendent of J.L.N.M.C.H., Bhagalpur to his Department for radiological examination, whereafter he had examined X-ray of both wrist with elbow and pelvis of victim, done by the Subordinate X-Ray Technician on duty and had opined as follows :-

“Epiphysis of iliac crest and distal ends of radius and ulna appeared-not fused.



Conclusion- Age on above radiological grounds appears between 14-16 years.”

P.W.14 has proved the said report, which has been prepared by him as also he has identified his writing and signature, which has been marked as Exhibit P-3/PW14. In cross examination, P.W.14 has stated that for the purposes of age determination, various bones of the body of the victim girl was examined by him and he had determined the age of the victim girl on the basis of the data to be in between 14-16 years. P.W.14 has also stated that the victim girl was not on the verge of majority.

27. P.W.15 Dr. Bina Rani Poddar is the Doctor, who had examined the vaginal swab of the victim. P.W.15 has stated that on 05.08.2020, she was posted at J.L.N.M.C.H., Bhagalpur as Medical Officer and on that day vaginal swab of the victim was referred by the Superintendent, J.L.N.M.C.H., Bhagalpur to her department for examination and after examination of the same, she did not find any spermatozoa in the vaginal swab. P.W.15 has proved the said report as also identified her writing and signature, which has been marked as Exhibit P-4/PW15. In her cross examination, P.W.15 has stated that after examination of the vaginal swab, the same is destroyed and slide of the vaginal



swab is prepared and examined by the means of a microscope. She has stated that she does not know as to after how many days of taking the vaginal swab, the same was sent to her, however possibility of finding spermatozoa in the vaginal swab remains within two days of taking the vaginal swab.

28. P.W.16 Dr. Poonam Mishra is the Doctor, who has medically examined the victim girl. P.W.16 has stated that on 05.08.2020 she was posted as Medical Officer at Sub Divisional Hospital, Kahalgaon and had examined the victim girl on 05.08.2020 at about 12.45 p.m. with her consent and in presence of the staff of the Police Station and found the following:-

“(A) No. of teeth – Upper – 14

Lower – 14

(B) Breast Developed.

(C) Axillary hair – present.

(D) Pubic hair – present.

(E) No sign of violence present either external or internal part of Body.

(F) There is no foreign hair present either on external or internal part of vagina or vulva or on undergarment.

(G) There is no foreign discharge present on vagina or vulva or on undergarment.

(H) According to pathological report from J.L.N.M.C.H. Bhagalpur, no spermatozoa found in vaginal swab.



(I) According to radiological report sent from J.L.N.M.C.H., age of the person to be examined is between fourteen to sixteen years.

(J) According to U.S.G. report there is intrauterine embryo of 6 week 2 days in womb.

Clinical inference – Based upon above clinical finding there is no evidence of rape.

M/I – A till mark on upper chest.”

P.W.16 has identified the said medical report and has stated that the same has been prepared in her writing and bears her signature and the same has been marked as Exhibit P5/PW16.

29. P.W.17 Chanda Lal is the then Judicial Magistrate, 1st class, who had examined the victim girl under Section 164 Cr.P.C. P.W.17 has stated in her evidence that on 19.08.2020 she was posted as Judicial Magistrate, 1st class at Bhagalpur and had recorded the statement of the victim girl under Section 164 Cr.P.C. in connection with Kahalgaon Ekchari P.S. case No.18/2020, POCSO case No.81/2020. P.W.17 has further stated that she had recorded the statement of the victim girl in her words in presence of her mother and the same was scribed by



her, which was read over to the victim girl and her mother, whereafter the victim girl and her mother had put their signature over the same. P.W.17 has identified the statement made by the victim girl under Section 164 Cr.P.C. and has stated that the same has been written in her writing as also she has identified her signature, which has been exhibited as Exhibit P6/PW17. In cross examination, P.W.17 has stated that she had written exactly whatever was told to her by the victim girl. The victim girl had disclosed before her that on 13.07.2020 Aman Yadav (appellant No.1 of the first case) had committed wrong with her, whereafter other people had also committed wrong with her. P.W.17 has further stated in her cross examination that it is true that at the time of recording of the statement of the victim girl, she had not mentioned the expression over the face of the victim girl.

30. After closing the prosecution evidence, the learned Trial Court recorded the statements of the appellants on 14.12.2022 under Section 313 of the CrPC for enabling them to personally explain the circumstances appearing in the evidence against them, however in their respective statements, they claimed themselves to be innocent.

31. The defence had then adduced evidence. D.W.1 Anandi



Das has stated in his evidence that he was a member of the Gram Panchayat, Khawaspur in the year, 2020 and at that time the Sarpanch was Ratan Devi. He has stated that he knows father of Kundan Kumar Yadav, namely Surendra Yadav @ Mantu Yadav and also knows Ramakant Mandal as also his daughter, all of whom belong to his village panchayat. He has stated that Kundan Kumar Yadav had given an application before the Sarpanch of the Gram Panchayat on 05.06.2020, which also bears his signature as also the signature of the Sarpanch, which he has identified and the same has been marked as Exhibits D1/DW1 and D1/1/DW1. In cross examination, D.W.1 has stated that the incident dates back to two and half years. He has also stated that it is not a fact that false document has been prepared.

32. D.W.2 Rohit Kumar has stated in his evidence that he knows the victim girl, whose father's name is Ramakant Mandal and her brother's name is Amarjeet. He has stated that Aman Kumar (appellant No.1 of the first case) is a driver. In the year 2020, he used to stay at home and the incident had taken place on 25-26th July, 2020, wherein Aman Kumar had hit a calf, whereupon scuffle had taken place in between Ramakant/Amarjeet and Aman, however the villagers had



mediated and pacified them. In cross examination, D.W.2 has stated that Roshan (appellant No.2 of the first case) and Aman (appellant No.1 of the first case) are brothers.

33. D.W.3 Mohan Yadav has stated in his evidence that he knows Ramakant Mandal and brother of the victim girl, namely Amarjeet. D.W.3 has stated that two and half years back he used to stay in the village and he knows Ramakant Mandal, Amarjeet, Roshan (appellant No.2 of the first case) and Aman (appellant No.1 of the first case). He has stated that Aman (appellant No.1 of the first case) is a driver and Roshan (appellant No.2 of the first case) is studying. He has also stated that two and half years back a calf was hit by the car of Aman, which belonged to Ramakant Mandal, whereafter scuffle had taken place in between both of them and after ten days he came to know that Ramakant has implicated the accused persons in a false case by projecting her daughter as a victim. He has also stated that at the house of Ramakant his cousin nephew stays, whose name is Nitish and there is talk about the daughter of Ramakant having some internal relationship with Nitish which had led to the victim committing suicide by hanging herself. In cross examination, D.W.3 has stated that he had not seen the victim girl hanging herself. He has also stated that Roshan (appellant



No.2 of the first case) is his nephew and Aman (appellant No.1 of the first case) is a village brother.

34. The trial Court, upon appreciation, analysis and scrutiny of the evidence adduced at the trial has found the aforesaid appellants guilty of the offences and has sentenced them to imprisonment and fine, as noted above, by its impugned judgment and order.

35. We have perused the impugned judgment of the Ld. Trial Court, the entire materials on record and have given thoughtful consideration to the rival submissions made by the learned counsel for the appellants as well as the learned A.P.P. for the State. The first and foremost aspect which is required to be adjudicated is as to whether any evidence is available on record to prove the guilt of the appellants for the offences with which they have been charged. A bare perusal of the written report of the victim girl dated 04.08.2020 would show that on 29.07.2020 at about 6 p.m. in the evening, the appellants of the first case and one Ankush Kumar Yadav had taken the victim girl inside the corn field and raped her and similar type of statement has also been made by the victim girl under Section 161 Cr.P.C. before the police, however in her statement made under Section 164 Cr.P.C. before the learned Judicial Magistrate, 1st class on



19.08.2020, she has narrated a different story to the effect that firstly on 13.07.2020, Aman Yadav (appellant No.1 of first case) had committed wrong with her and thereafter, the appellants of the aforesaid two cases and one Ankush Kumar Yadav had committed wrong with her, whereafter she was also assaulted, leading to her becoming unconscious whereupon her brother and family members had brought her to their house. We also find that the victim girl had committed suicide on 15.06.2021, hence she could not be examined as a witness.

36. Thus, we find that except the statement made by the victim girl under Section 164 Cr.P.C. i.e. Exhibit P6/P.W.17, no incriminating material is available on record to prove the guilt of the appellants. As far as testimony of P.W.5 Munilal Yadav (grandfather of the victim girl), P.W.6 Sauhadri Devi (mother of the victim girl), P.W.7 Ramakant Mandal (father of the victim girl), P.W.8 Amarjeet Kumar Mandal (brother of the victim girl), P.W.12 Laxmikant Mandal (uncle of the victim girl) and P.W.13 Nitish Kumar (cousin brother of the victim girl) are concerned, they have all stated that the brother of the victim girl, namely, Amarjeet Kumar Mandal (P.W.8) and P.W.13 Nitish Kumar had gone to ease themselves on the morning of 30.07.2020 near the banks of the river Ganges and had found the victim girl in an



unconscious state, whereupon they had brought her back to their house where she had disclosed about the incident to her mother to the effect that the appellants of the aforesaid two cases and one Ankush Kumar Yadav had committed rape with her. However, P.W.10 Vikash Yadav, who is an independent witness, has stated in his testimony that the daughter of Ramakant Mandal i.e. the victim girl was having love affair with Nitish Kumar and Nitish Kumar had eloped with the victim girl, whereafter she did not return and had died thereafter. Thus perusal of the written report of the victim girl, her statement made under Section 164 Cr.P.C. before the learned Magistrate and the testimony of the aforesaid witnesses would show that there are serious contradictions which definitely lead to the inference that their testimony is not trustworthy, more so in view of the medical evidence adduced by P.W.16 Dr. Punam Mishra, who had prepared the medical report, after having medically examined the victim girl on 05.8.2020 and she had found no sign of violence present either on external or internal part of her body, had not found foreign hair present on external or internal part of vagina or vulva or on undergarment, had not found foreign discharge present on vagina or vulva or on undergarment, had not found spermatozoa in the vaginal swab,



the ultrasound report depicted that the victim girl was carrying pregnancy of 6 weeks 2 days in the womb and finally she had opined in her clinical inference that there is no evidence of rape.

37. It is a well settled law that in case of non-availability of the victim for examination during the course of the trial the case of the prosecution should not be thrown over board and the death of the victim and her non-examination cannot be a ground to acquit an accused if there is cogent evidence, otherwise available to prove the criminal act of the accused concerned. Thus, mere fact of non-availability of the victim for examination cannot be fatal for the prosecution case and the Court should decide the case on the basis of available evidence. Reference in this connection, be had to a judgment rendered by the Hon'ble Apex Court in the case of *State of Karnataka Versus Mahabaleshwar Gourya Naik*, reported in *1992 Supp (3) SCC 179*. It is equally a well settled law that in absence of substantial oral evidence corroborated with medical evidence it can be construed that the appellants shall be presumed to be innocent of the charged offences and that the statement of the victim recorded under Section 164 Cr.P.C. can be used for corroboration or contradiction but cannot be the sole basis for conviction. Reference in this connection, be had to a judgment



rendered by the learned Division Bench of this Court in the case of *Satyamanu Kumar Singh Versus State of Bihar*, reported in *2023 SCC Online Pat 5103*. Therefore, the law that emerges is that merely because the victim is dead and consequently could not be examined, can never be a ground to acquit an accused if there is evidence otherwise available to prove the criminal act of the accused concerned and that accused cannot be convicted for an offence of rape merely by relying upon the statement made by the victim girl under Section 164 Cr.P.C.

38. Now coming back to the present case, we find that in absence of availability of the testimony/deposition of the victim girl on account of her death, though her non-examination would not be fatal to the case of the prosecution, but then it would have to be seen as to whether there is evidence otherwise available on record for proving the criminal act of the accused concerned. In the present case, the victim girl has given a conflicting statement with regard to the occurrence inasmuch as in her written report dated 04.08.2020 and her statement made under Section 161 Cr.P.C. before the police, she has only stated about one occurrence of rape to have been committed by the appellants of the first case and one Ankush Kumar Yadav, however subsequently in her statement made under Section 164



Cr.P.C. on 19.08.2020 before the learned Judicial Magistrate, 1st class she has stated that firstly she was raped on 13.07.2020 by Aman Yadav i.e. the appellant No.1 of the first case and thereafter by the appellants of the aforesaid two cases alongwith one Ankush Kumar Yadav. We also find from the medical examination report of the victim girl submitted by P.W.16 Dr. Punam Mishra that there is neither any sign of violence present either on external or internal part of the body of the victim girl nor on external or internal part of vagina or vulva and in fact no evidence of rape has been found. Thus we find that the medical evidence specifically rules out the claim of rape to have been committed with the victim girl, muchless the factum of her being assaulted by the appellants. Thus, considering the law laid down by the Ld. Division Bench of this Court in the case of **Pawan Kumar** (*supra*), adverse inference has to be drawn to the effect that the prosecution's version is not trustworthy.

39. We would like to refer to a judgment rendered by the Hon'ble Apex Court in the case of **R. Shaji v. State of Kerala**, reported in **(2013) 14 SCC 266**, paragraph Nos.26 and 29 whereof are being reproduced herein below :-

“26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence.



Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

29. During the investigation, the police officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 CrPC. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced.

(Vide Mamand v. Emperor [(Bhuboni Sahu v. R. [AIR 1949 PC 257], Ram Charan v. State of U.P. [AIR 1968 SC



*1270] and Dhanabal v. State of
T.N. [(1980) 2 SCC 84 : AIR 1980 SC
628])”*

40. Thus we find from the materials on record and the evidence adduced by the prosecution, including the medical evidence that the statements made by the victim girl in her written report and statement made under Section 164 Cr.P.C. are full of contradictions, the prosecution has failed to establish the foundational facts, medical evidence does not show any sign of rape qua the victim girl and on the contrary shows that the victim girl was carrying pregnancy of 6 weeks 2 days in her womb, which has remained unexplained by the prosecution, though P.W.10 Vikash Yadav and independent witness have stated that the victim girl was having love affair with P.W.13 Nitish Kumar, had eloped with her and had become pregnant but Nitish Kumar had refused to marry her and then she did not return, which definitely casts a question mark upon the testimony of the prosecution witnesses, apart from the fact that though the Investigating Officer of this case P.W.11 Mani Bhushan Kumar had recorded the statement of several independent witnesses but they have been withheld by the prosecution and not produced during the course of the trial,



from which adverse inference has to be drawn with regard to the motive of the prosecution. Hence in the present case, since the prosecution has failed to lead cogent, credible and trustworthy evidence to establish the commission of the offence of rape beyond all reasonable doubts, no presumption arises under Section 29 of the POCSO Act.

41. Therefore, we find that the learned Trial Judge has committed a gross error in holding that the prosecution has established the foundational fact to the effect that the accused persons have committed penetrated sexual assault/rape upon the victim and defence has not been able to prove its innocence beyond all reasonable doubt under Sections 29 and 30 of the POCSO Act. We also find that the statement recorded under Section 164 Cr.P.C. is not a substantive piece of evidence, however the same is a formal statement made before an authority competent to investigate a fact which may be used for contradiction under Section 145 of the Indian Evidence Act, 1872 or for corroboration of the witness who makes such a statement under Section 157 of the Indian Evidence Act, 1872. Reference in this connection, be had to a judgment rendered by the Hon'ble Apex Court in the case of *State of Rajasthan Versus Kartar Singh and analogous case*, reported in (1970) 2



SCC 61. Therefore, we find that the learned Trial Judge has erred by holding that the statement of the victim girl recorded under Section 164 Cr.P.C. has been corroborated by the testimony of P.W.6, P.W.7, P.W.8, P.W.12 and P.W.13.

42. We are thus of the considered view that the prosecution has failed to prove beyond all reasonable doubts the commission of offence of rape/gang rape punishable under Section 376DA of the Indian Penal Code and under Section 5(g)/6 of the POCSO Act. Thus in the facts and circumstances, as discussed hereinabove and for the foregoing reasons, we are of the view that there are compelling reasons in the present case, which necessitate that the appellants of the aforesaid two cases be given the benefit of doubt.

43. Accordingly, the finding of conviction recorded by the Trial Court, in our opinion, is not sustainable and requires interference, therefore, the judgment of conviction dated 10.02.2023 and the order of sentence dated 04.03.2023, passed by the learned Court of Exclusive Special Court (POCSO Act)-cum-7th Additional District and Sessions Judge, Bhagalpur in POCSO Case No.81 of 2020 (arising out of Ekchari P.S. Case No.18 of 2020) are set aside.

44. The appellants of both the aforesaid two appeals are in



custody, hence consequent upon their acquittal by the present judgment, let them be released forthwith, if not required in any other case.

45. The aforesaid two appeals are accordingly allowed.

(Mohit Kumar Shah, J)

I agree
Nani Tagia, J. :-

(Nani Tagia, J)

Narendra/Sonal

AFR/NAFR	AFR
CAV DATE	23.01.2025
Uploading Date	06.02.2025
Transmission Date	06.02.2025

