

IN THE HIGH COURT OF JUDICATURE AT PATNA

Pradeep Srivastava

versus

The State of Bihar

CRIMINAL APPEAL (SJ) No.1133 of 2024

11 September, 2024

(Hon'ble Mr. Justice Chandra Shekhar Jha)

| Headnotes |
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The present appeal has been filed for setting-aside the judgment of conviction dated 28.01.2023 and order of sentence dated 09.02.2023 passed by learned 6th Additional Sessions Judge-cum-Special Judge, POCSO Act, East Champaran, Motihari in connection with P.Tr. No. 14/2020 arising out of Turkauliya (Banjariya) P.S. Case No. 850 of 2019, whereby and whereunder the learned trial court has awarded with rigorous imprisonment of ten (10) years with a fine of Rs. 20,000/- under Section 4(1) of the POCSO Act, in default of payment of fine, S.I. of one month. Further, convict is ordered to undergo S.I. of five (5) years with a fine of Rs. 10,000/- under Section 10 of the POCSO Act, in default of payment of fine, S.I. of fifteen (15) days. Further, the learned trial court convicted the appellant to undergo imprisonment of seven (7) years with a fine of Rs.10,000/- for the offence under Section 363 of the Indian Penal Code and in default of payment of fine, convict is ordered to undergo S.I. of one month and further ordered that all the sentences shall run

concurrently.

The case arose from Turkauliya (Banjariya) P.S. Case No. 850 of 2019, initiated by the father of the minor victim, who alleged that the appellant had kidnapped and repeatedly raped his daughter during a period of captivity lasting approximately ten days. The victim was reportedly abandoned at 'Chati Mai' after this. The victim testified that she was abducted by two individuals, including the appellant, and taken to a forest area where the alleged assaults occurred. She categorically denied any involvement with the appellant in a romantic context. During her examination on May 13, 2022, she identified the appellant as her kidnapper and abuser. The Appellant contended that the victim's testimony was not of "sterling quality" and that there were inconsistencies and contradictions that undermined her credibility. The defense also highlighted the delay in filing the FIR, which was lodged 15 days after the victim's recovery and 25 days post incident, raising doubts about the veracity of the claims.

Further it is contended that deposition of victim qua occurrence is not of sterling quality and, therefore, conviction, as recorded to be set-aside in want of any further corroboration.

It is submitted that no doubt the conviction can be recorded on the sole testimony of victim, but it must be trustworthy, unblemished and should be of sterling quality. In support of his submission, learned counsel relied upon Judgment of Hon'ble Supreme Court **Krishna Kumar Malik v. State of Haryana**,

(2011) 7 SCC 130 and also relied upon **Rai Sandeep @ Deepu, v. State (NCT of Delhi)**, reported in **(2012) 8 SCC 21**. And also in **Rajak Mohammad Vs. State of Himachal Pradesh**, reported in **(2018) 9 SCC 248**; where it has been held that determination of age on the basis of radiological examination be not accepted accurate determination and sufficient margin either way has to be allowed.

The Assistant Public Prosecutor asserted that minor contradictions are typical in such cases and should not discredit the victim's account. The prosecution maintained that the victim's testimony was corroborated by other evidence, including the medical examination.

HELD, Having discussed all such backgrounds, it can be safely said that prosecution could not prove the victim as 'child' within the meaning of section 2(1)(d) of the POCSO Act and, therefore, the conviction as recorded by the learned trial court under POCSO Act is appearing not convincing and, therefore, available presumption under the Act, as available under Section 29 and 30, is of no bearing in the present case. It is --also found that the victim's testimony, while critical, did not meet the stringent standards required for a "sterling witness." The inconsistencies in her account, coupled with the significant delay in reporting the crime, cast doubt on the prosecution's narrative.

Hence, the present appeal stands allowed, Accordingly, the impugned judgment of conviction dated 28.01.2023 and order of sentence dated 09.02.2023 passed by learned 6th Additional

Sessions Judgecum-Special Judge, POCSO Act, East Champaran, Motihari in connection with P.Tr. No. 14/2020 arising out of Turkauliya (Banjariya) P.S. Case No. 850 of 2019, is quashed and set aside. Resultantly, the appellant, namely, Pradeep Srivastava is acquitted from the charges leveled against him by the Trial Court.

Since appellant is in custody in connection with aforesaid case, he is directed to be released forthwith, if not required in any other case. Fine, if any, deposited be returned to the appellant forthwith.

Office is directed to send back the Trial Court Records (TCRs) along with a copy of this judgment to the learned trial court, without delay.

APPEAL ALLOWED

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| Appearances for Parties |
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For the Appellant: Mr.Sudhir Kumar Singh, Advocate; Mr.Priyesh Kumar, Advocate

For the Respondent: Mrs.Anita Kumari Singh, Addl.PP

Headnotes Prepared by Reporter: Sarangdhar Upadhyay

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| Judgment/Order of the Hon'ble Patna High Court |
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IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1133 of 2024

Arising Out of PS. Case No.-850 Year-2019 Thana- TURKAULIYA District- East
Champaran

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Pradeep Srivastava S/O Lalan Srivastava R/O Village- Chilwaniya, P.S-
Turkaulia (Banjariya), Distt.- East Champaran.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

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Appearance :

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| For the Appellant/s | : | Mr.Sudhir Kumar Singh, Advocate Mr.Priyesh Kumar, Advocate |
| For the Respondent/s | : | Mrs.Anita Kumari Singh, Addl.PP |

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CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 11-09-2024

Heard Mr. Sudhir Kumar Singh, learned counsel
appearing on behalf of the appellant and Mrs. Anita Kumari
Singh, Additional Public Prosecutor for the State.

2. The present memo of appeal has been filed for
setting-aside the judgment of conviction dated 28.01.2023
and order of sentence dated 09.02.2023 passed by learned
6th Additional Sessions Judge-cum-Special Judge, POCSO
Act, East Champaran, Motihari in connection with P.Tr. No.
14/2020 arising out of Turkauliya (Banjariya) P.S. Case No.
850 of 2019, whereby and whereunder the learned trial
court has awarded with rigorous imprisonment of ten (10)



years with a fine of Rs. 20,000/- under Section 4(1) of the POCSO Act, in default of payment of fine, S.I. of one month. Further, convict is ordered to undergo S.I. of five (5) years with a fine of Rs. 10,000/- under Section 10 of the POCSO Act, in default of payment of fine, S.I. of fifteen (15) days. Further, the learned trial court convicted the appellant to undergo imprisonment of seven (7) years with a fine of Rs. 10,000/- for the offence under Section 363 of the Indian Penal Code and in default of payment of fine, convict is ordered to undergo S.I. of one month and further ordered that all the sentences shall run concurrently.

3. The brief facts of this case as it appears from the written information of the father of victim (PW-2), that while his minor daughter aged about 12 years, was going to 'Chhath Ghat' on 03.11.2019 at around 4:00 a.m., two accused persons namely, Pradeep Srivastava (appellant) alongwith co-accused Suman Srivastava forcibly dragged and seated her in the middle of their motorcycle and taken away towards Ambika Nagar. The informant alleged that some villagers had seen that accused persons were taken away his



minor daughter on the motorcycle. The villagers informed the informant regarding the occurrence, thereafter the informant alongwith family members followed the accused persons but they were not caught. The informant stated that when he reached at the house of the accused persons and met with their father, he assured him to return his minor daughter. The informant further stated that he never made any application to the concerned police station regarding the occurrence. He stated that the accused persons left his minor daughter at 'Chati Mai' after 8 to 10 days of the occurrence. He alleged that the accused namely, Pradeep Srivastava (appellant) repeatedly raped his minor daughter ten days of her captivity and also abused him by taking caste name and threatened him that he will upload the photos and video, which he has created with his daughter during the aforesaid period. He further stated that when his son opened the social media account on facebook, he found those photos and videos were uploaded. Thereafter, the informant lodged the present F.I.R.

4. On the basis of aforesaid written report, police



drawn formal F.I.R. being Turkauliya (Banjariya) P.S. Case No. 850 of 2019 registered for the offence punishable under Section 363, 366(A), 376 and 34 of the Indian Penal Code read with Section 4/8 of the Protection of Children from Sexual Offence Act and Section 3(i)(r)(w) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act. After conclusion of investigation, police submitted charge-sheet being No. 21/2020 dated 27.02.2020 and, on the basis of which, cognizance was taken against the accused persons under section 363 and 365 of the I.P.C. read with section 8 of the POCSO Act on 18.03.2020 but upon perusal of materials collected during investigation, charges were framed against the accused persons under Section 363, 365, 370, 376(3) of the I.P.C. alongwith Section 4, 10 & 14 of the POCSO Act, Sections 3(i)(w) of the SC/ST (POA) Act & Section 67(B) of the I.T. Act on 09.09.2021.

5. Learned trial court explained the aforesaid charges to appellants/accused, which he pleaded "not guilty" and claimed trial.

6. To establish its case before the learned trial



court, the prosecution altogether examined total **Seven (7)** witnesses including the minor victim, which are as under: -

- PW-1 namely, x (victim)**
- PW-2 namely, Umesh Paswan (informant and father of the victim)**
- PW-3 namely, Manorama Devi (mother of the victim).**
- PW-4 namely, Ramesh Ram**
- PW-5 namely, Dr. Manoj Kumar**
- PW-6 namely, Santosh Kumar Singh (I.O.)**
- PW-7 namely, Pramod Kumar Paswan (Braj In-charge Police Line)**

7. The prosecution has produced and relied upon following documentary evidences also as to substantiate its case during trial, which are as under:

| Exhibit No(s). | List of documents |
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| Exhibit-1 | Statement of the victim u/s 164 Cr.P.C. |
| Exhibit-1/1 | Signature of victim on her statement u/s 164 Cr.P.C. |
| Exhibit-2 | Age determination report of the victim |
| Exhibit-2/2 | Signature of victim on her age determination report. |
| Exhibit-3 | Written complaint. |
| Exhibit-3/1 | Thumb impression of informant on his written complaint. |
| Exhibit-4 | Arrest Memo |



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| Exhibit-5 | Formal F.I.R. |
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8. After examination of prosecution witnesses and by taking note of evidence and incriminating circumstances as surfaced during trial, statement of accused/appellant was recorded under Section 313 of the Cr.P.C. on 23.03.2022 which was denied by the appellant in totality by claiming his complete innocence and false implication.

9. On the basis of evidences as surfaced during the trial, the learned trial court convicted and sentenced the appellant/convict, in aforesaid terms. Being aggrieved of which present appeal was preferred.

10. Hence, the present appeal.

Submission on behalf of the appellant/convict

11. While arguing the argument, Mr. Sudhir Kumar Singh, learned counsel appearing on behalf of the appellant submitted that mainly on two main scores the present judgment of conviction as recorded by the learned trial court is fit to be set-aside/quashed. In support of his submission, it is submitted firstly, that the victim during the trial could



not proved by the prosecution as 'child' within the meaning of Section 2(i)(d) of the POCSO Act as only document in support of her date of birth was medical examination report i.e. **Exhibit '2'** showing the date of birth of victim between 15 to 16 years. It is submitted that victim was not declared 'child' on the basis of document as referred under Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter referred to as the "J.J. Act"), which also approved by Hon'ble Supreme Court through its legal report as available through **Jarnail Singh Vs. State of Haryana** reported in **(2013) 7 SCC 263**.

12. The second issue, which was raised by learned counsel for the appellant/convict, is that deposition of victim *qua* occurrence is not of sterling quality and, therefore, conviction, as recorded to be set-aside in want of any further corroboration.

13. It is submitted that no doubt the conviction can be recorded on the sole testimony of victim, but it must be trustworthy, unblemished and should be of sterling quality. In support of his submission, learned counsel relied upon of



Hon'ble Supreme Court as available through **Krishna Kumar Malik v. State of Haryana, (2011) 7 SCC 130** and also relied upon **Rai Sandeep @ Deepu, v. State (NCT of Delhi)**, reported in **(2012) 8 SCC 21**.

14. Learned counsel for appellant/convict also relied upon the legal report of Hon'ble Apex Court as available through **Rajak Mohammad Vs. State of Himachal Pradesh**, reported in **(2018) 9 SCC 248**; where it has been held that determination of age on the basis of radiological examination be not accepted accurate determination and sufficient margin either way has to be allowed.

15. While concluding argument, it is submitted by learned counsel that even the Investigating Officer/PW-7 of this case failed to established the place of occurrence as he categorically deposed during the trial that he did not visited the place of occurrence during investigation of this case and, therefore, considering aforesaid, the impugned judgment of conviction *qua* appellant is fit to be quashed/set-aside.

16. Learned A.P.P. for the State, Mrs. Anita Kumari



Singh, while opposing the appeal of the appellant/convict, submitted that the victim specifically deposed against the appellant to commit rape upon her, while she was sleeping in her room. It is submitted by learned A.P.P. that minor contradictions are bound to be surfaced during the trial and, on this score alone, conviction, as recorded by learned trial court, cannot be viewed with doubt. It is also submitted that as per radiological examination victim appears minor i.e. less than 18 years on the date of occurrence and, therefore, conviction as recorded under POCSO Act is also justified and, as such, the judgment of conviction as recorded by learned trial court, is not required to be interfered.

17. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

18. As to re-appreciate the evidences, while dealing with present appeal, it would be apposite to discuss the evidences as available on record, which are as under:-

19. PW-1 namely, X/victim, who is the most



important witness of the occurrence, deposed during the trial explaining the occurrence that on the day of "Chhath Puja" while she was sleeping in her room, in early morning, appellant entered her room and committed rape upon her. She also deposed that she was taken far away from her house, where rape was also committed upon her. It was further deposed categorically that she was traced by police and thereafter she was brought back to her home. She deposed that nobody had witnessed her while she was taken away by the accused persons. She deposed that she was kidnapped by two persons including the appellant, who kept her in forest area (jungle). It was further deposed that appellant captured her objectionable photos and made videos and uploaded said photos and videos on social media platform like Facebook. It was deposed that appellant committed rape on several time during the period of her captivity. It was stated that her statement was recorded under Section 164 of the Cr.P.C. before the court which she identified and same was exhibited upon her identification as **Exhibit '1'**. She also identified her signature there which was



exhibited as **Exhibit '1/1'**. She also identified her signature upon medical report regarding her age determination which upon her identification, exhibited as **Exhibit '2'**, where her signature was exhibited as **Exhibit 2/1**.

19.1. Upon cross-examination, she stated that she was not acquainted with the appellant prior to the occurrence. She also denied any love affairs with the appellant. She categorically stated that at the time of occurrence she was in her house and was working, when appellant entered her house. Door of the house was said to be opened. It was stated that at the time of the occurrence, her parents were at "Chhath Ghat". The occurrence took place at 3:00 A.M. in the night. It was stated that she was senseless at the time of kidnapping. It was stated that the kidnapper was none but Pradeep Srivastava (appellant). She denied the suggestion that she went alongwith appellant out of her love affairs. She was again recalled for her examination on 13th May, 2022 where she identified the appellant as the same person who kidnapped her and committed rape upon her. It was stated in her cross-



examination that she came to know Pradeep Srivastava only after the occurrence.

20. PW-2 is Umesh Paswan, who is the father of the victim/X/PW-1 and also the informant of the present occurrence. It was deposed by him that at the time of occurrence, victim was working at home and by that time appellant entered his house and outraged the modesty of his daughter, whereafter alarm was raised, resultantly appellant after assaulting the victim and tiding her with motorcycle, kidnapped her. Subsequently, he also deposed that victim was threatened on the point of knife. He came to know all such facts from the mouth of victim. It was further deposed by him that appellant dropped the victim at Motihari Station and fled away. He also deposed that the case was lodged with delay as to save his time and also the police atrocities. It was deposed that initially objectionable photographs were sent by the appellant to his neighbour and subsequently, it was sent to him, only after that, he went to police station as to lodge the present case. He identified his thumb impression on his written complaint, which upon his identification was



exhibited as **Exhibit '3'** and his thumb impression was also exhibited as **Exhibit 3/1**. It was deposed that the victim was examined medically at Sadar Hospital, Motihari and her statement was also recorded in court. He claimed to identify the appellant.

20.1. Upon cross-examination, it was stated by him that he is not the eye witness of the occurrence of kidnapping. He came to know about the occurrence at 6:00 A.M. that his daughter was kidnapped. He claimed to make self-search for next 2 to 3 days and thereafter, he came to know that on the date of occurrence appellant was found roaming around his house/place of occurrence, and, thereafter, he went to the house of appellant, where, he found the appellant traceless. It was further deposed by him that he reported this occurrence to the police only after receiving objectionable photographs of his daughter. He could not know when it was sent for the first time. He came to know regarding viral photographs of his daughter by his sister-in-law. He did not lodged any *Sanha* (informatory petition under Section 39 of the Cr.P.C.) regarding the



occurrence before police. He denied the suggestion of false implication.

21. PW-3 is Manorama Devi. She is the mother of the victim and PW-4 is Ramesh Ram, who is neighbour of informant/PW-2. Both these witnesses are hearsay witnesses and stated the entire version on the basis of their hearsay inputs and, therefore, their testimony is not appearing so relevant as to discuss *qua* crime in question. However, PW-3 deposed that she saw naked photographs of her daughter on mobile and her daughter was recovered by police. She deposed that she met with her daughter first time after the occurrence in police station and, thereafter, she remained with her. She stated to be present in court premises on the date of recording of statement of her daughter under Section 164 of the Cr.P.C.

22. PW-5 is Dr. Manoj Kumar. He was posted at Sadar Hospital, Motihari as Deputy Superintendent. He examined the victim/X on 8th March, 2022. It would be apposite to reproduce the relevant part of medical examination of the victim, which are as under:



"Upon examination of victim, the medical board found the age of the victim to be 15- 16 years. The age determination test was opined on the basis of X-ray report of the victim/girl. In cannot recall as to whether the victim had signed the instant report in my presence or not."

22.1. Upon cross-examination, he stated that "It is correct that the X-ray plate which was taken for the purpose of determination of age of victim was not handed over to the police/I.O."

23. PW-6 is Santosh Kumar Singh. He was second Investigating Officer of this case. He only submitted the charge-sheet bearing No. 21/20 dated 27.02.202 under Section 363, 365 of the I.P.C. and section 8 of the POCSO Act and section 3(i)(w) of the SC/ST (POA) Act against the appellant. In cross-examination, he stated that he did not investigated this case.

24. PW-7 is Pramod Kumar Paswan. He is the Investigating Officer of this case and deposed that he had visited the place of occurrence i.e. house of PW-2/victim during investigation. He also produced victim before court



for recording her statement under Section 164 of the Cr.P.C. It was deposed that upon medical examination, the age of the victim was found between the age group of 15-16 years as per medical examination. Thereafter, she handed over the victim to her parents. He also identified the signature of arrest memo of appellant which upon his identification exhibited as Exhibit '4'.

24.1. Upon cross-examination, it was stated by him that he arrested the appellant on 22.12.2019 and when he arrested appellant, at that point of time, victim was not there. Victim was recovered prior to the arrest of the appellant. He affirmed that during investigation, he did not ask any caste certificate from informant. He visited the place of occurrence on the same day, immediately after receiving charge of this case to investigate the matter.

25. In the backdrop of aforesaid discussed evidence, now the first and foremost issue which is required to be decided in this case whether the prosecution established the victim as a 'child' within the meaning of Section 2(1)(d) of the POCSO Act or not during the trial.



26. In this aspect, it would be apposite to reproduce Section **94 of the J.J. Act**, which reads as under for ready reference:

"94. Presumption and determination of age – (1)

Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person".

27. It would further be apposite to reproduce **para 22 & 23** of the judgment of Hon'ble Supreme Court as



available through **Jarnail Singh's case (supra)** which is as under:

"22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "the 2007 Rules"). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

"12.Procedure to be followed in determination of age.—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case



may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-



PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

28. Coming to the facts of this case, it appears that the age of victim was mentioned in F.I.R. by the informant/PW-2 who is none but her father as 12 years. The victim was recovered after about 10 days of the occurrence and thereafter her statement was recorded under section 164 of the Cr.P.C., whether her age was disclosed as 16



years. There is no matriculation certificate or certificate from the first attending school in view of section 94(2) of the J.J. Act of the victim. There is no certificate from local municipality also suggesting the date of birth of the victim. The only option left was to determine the age of the victim on the basis of radiological examination. It appears from deposition of PW-5 and also the **Exhibit '2'**, which is the medical report ascertaining the age of the victim, suggesting her age between the age group of 15 to 16 years.

29. It is settled law that the age which was assessed on the basis of radiological examination cannot be said absolute in view of legal report as available through **Rajak Mohammad's case (supra)**, therefore, if the age of victim be assessed by giving a margin of plus minus (\pm) two years at both end, in that case, the victim appears major on the date of occurrence. It also appears from perusal of record that the basis of ascertaining age out of radiological examination i.e. X-ray report and other allied materials were not properly exhibited during the trial.

30. Having all such backgrounds, it can be safely



said that prosecution could not proved the victim as 'child' within the meaning of section 2(1)(d) of the POCSO Act and, therefore, the conviction as recorded by the learned trial court under POCSO Act is appearing not convincing and, therefore, available presumption under the Act, as available under Section 29 and 30, is of no bearing in the present case.

31. As far the second issue, which was raised by Mr. Sudhir Kumar Singh, learned counsel appearing on behalf of the appellant, that whether the victim appears to qualified the test of sterling witnesses during the trial so as the conviction under Section 376 of the I.P.C. or for penetrative sexual assault can be believed on her sole testimony.

32. In aforesaid context, it would be apposite to discuss the first statement of victim which is available on record i.e. her statement recorded under Section 164 of the Cr.P.C. It appears from her said statement that while she was cooking at about 5:00 A.M. on the occasion of 'Chhath Puja' in her home, the appellant entered into her house and



tied her mouth by 'Orhani' making her senseless, thereafter kidnapped her. When she regain to herself, she found herself in the forest (Jungle). She requested the appellant to return back her home but on the point of knife, he captured several objectionable photographs and also created videos, which made viral. She categorically stated that except that appellant did nothing with her. She also claimed to saw the photographs. She stated that she went with appellant to Sitamarhi where she was with her aunty.

33. Now coming to her deposition as she deposed during the trial as PW-1, where it appears that on the date of occurrence she was sleeping in her room when appellant entered there and committed rape upon her. She stated to be recovered by the police, whereas in her cross-examination again she stated that she was working in her house at the time of occurrence i.e. about 3:00 A.M. Taking note of her two aforesaid statements, it appears that she disputed the allegation of penetrative sexual assault/rape. She also stated different time of occurrence. She, for the first time, raised allegation of committing rape upon her before the court



during the trial. In view of all such major discrepancies and improved variations, she, at the first instance, cannot be accepted as '**sterling witness**' and, therefore, further corroboration of allegation from the rest of evidences are required. Now, it would be apposite to reproduce **para '22'** of the judgment of Hon'ble Supreme Court as available through **Rai Sandeep @ Deepu's case (supra)**, which reads as under:

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



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

34. Taking a corroborative note after doubting the victim as '**sterling witness**', the first and foremost important evidence in this context is medical evidence. It appears from perusal of record that only doctor, who examined in this case is PW-5 namely, Dr. Manoj Kumar, who only stated about the age of victim, where he found the victim between the age group of 15 to 16 years, except that, entire examination is silent over sexual assault/physical assault, doubting whether any penetrative sexual assault was committed upon victim. It is important to mention in this context that not even injury report of victim was brought on record despite of the fact that she was medically examined



at Sadar Hospital, Motihari.

35. Deposition of PW-2, who is none but the father of the victim, is also relevant to discuss *qua* crime in question as far kidnapping of victim is concerned, which is the genesis of the present occurrence. It appears from his deposition that the occurrence took place while the victim was coming to "Chhatt Ghat". If his deposition be taken into consideration, what he came to know from the mouth of victim herself, as it was deposed by him, then, certainly the occurrence of kidnapping took place on way to "Chhath Ghat" and thus, same creating a serious doubt also regarding kidnapping as stated earlier by the victim herself. It further appears from F.I.R./**Exhibit-3** which is written complaint/information, that the victim was dropped by the appellant at "Chatti Mai" (name of place), whereas during the trial, he deposed that the victim was dropped at Motihari Railway Station by the appellant.

36. Coming again to the deposition of PW-1/victim, it appears that she was neither dropped by appellant at "Chhath Mai" not at "Motihari Railway Station", rather she



was recovered by the police. The entire version of kidnapping and recovery of victim makes a serious doubt regarding the occurrence. Moreover, it is an admitted position that the F.I.R. was lodged after 15 days of the recovery of victim and in total after 25 days of the occurrence. An explanation was offered by PW-2 that to save from police atrocities and time also, F.I.R. was not lodged immediately but said explanation is not appearing convincing. The appellant, upon specific question during his examination under Section 313 of the Cr.P.C., stated that he was implicated falsely with this case for the reason that before 2 to 3 days of the alleged occurrence, a quarrel developed between his father and the father of victim and, therefore, he was implicated falsely with the present case. Unconvincing explanation of delay as to lodge the present F.I.R. after 25 days of the occurrence giving a sufficient time-gap for afterthought.

37. Hence, the present appeal stands allowed.

38. Accordingly, the impugned judgment of conviction dated 28.01.2023 and order of sentence dated



09.02.2023 passed by learned 6th Additional Sessions Judge-cum-Special Judge, POCSO Act, East Champaran, Motihari in connection with P.Tr. No. 14/2020 arising out of Turkauliya (Banjariya) P.S. Case No. 850 of 2019, is quashed and set aside. Resultantly, the appellant, namely, Pradeep Srivastava is acquitted from the charges leveled against him by the Trial Court.

39. Since appellant is in custody in connection with aforesaid case, he is directed to be released forthwith, if not required in any other case. Fine, if any, deposited be returned to the appellant forthwith.

40. Office is directed to send back the Trial Court Records (TCRs) along with a copy of this judgment to the learned trial court, without delay.

(Chandra Shekhar Jha, J.)

Rajeev/-

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| AFR/NAFR | AFR |
| CAV DATE | NA |
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