

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.118 of 2023**

Arising Out of PS. Case No.-135 Year-2016 Thana- MAHILA P.S. District- Muzaffarpur

Ajay Sharma, S/o Ramji Sharma, Resident of village- Chakmadhua, P.O.-
Basantpur Patti, P.S.- Saraiya, Muzaffarpur, Bihar.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr. Tuhin Shankar, Advocate

For the Respondent/s : Mr. Manish Kumar No. 2, APP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

and

HONOURABLE MR. JUSTICE SOURENDRA PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SOURENDRA PANDEY)

Date : 04-09-2025

Heard learned counsel for the appellant and the
learned Additional Public Prosecutor for the State.

2. Though the informant-victim has entered her
appearance by filing *Vakalatanama* and the names of two
Advocates are appearing in the daily cause list but no one
appeared to oppose the appeal on her behalf.

3. The present appeal arises out of the judgment of
conviction dated 19.12.2022 (hereinafter referred to as the
'impugned judgment') and the order of sentence dated
21.12.2022 (in short referred to as the 'impugned order') passed
by the learned Sessions Court, A.S.J. 7th -cum- Spl. Judge
POCSO Act, (W) Muzaffarpur (hereinafter called the 'learned



trial court') in Mahila P.S. Case No. 135 of 2016, G.R. Case No. 04 of 2018.

4. By the impugned judgment the appellant has been convicted for the offences under Section 376(2) of the Indian Penal Code (in short 'IPC') and Section 4 of the POCSO Act and has been sentenced to undergo 20 years of rigorous imprisonment for the offences under Section 376(2) IPC as well as Section 4 of the Protection of Children from Sexual Offences Act, 2012, with a fine of Rs. 50,000/- and in default of payment of fine to further undergo imprisonment of two years.

Prosecution Case

5. The prosecution case is based on the written application given by the informant/victim (P.W. 5). In her written report she has alleged that on 20.12.2016 at about 10.00 P.M. in the night while she was returning to her house after attending tuition classes, the appellant Ajay Sharma surrounded her and forcefully tried to commit wrong act with her. On her screaming neighbours came then everybody fled away. The informant/victim has further stated that she is a handicap girl and is studying in class 6. Appellant Ajay Sharma has committed rape with her three times in past giving threats to kill her. Her father was staying out of station to earn his livelihood



and she was residing with her mother therefore she did not tell about the incident out of fear. She disclosed this to her mother that the appellant has made forcible sexual intercourse with her. Since appellant is a rich person and due to his high status, she did not disclose about the incident to anybody. She has further alleged that in April, 2016 appellant forcibly committed sexual intercourse with her. Again on 20.12.2016, when the appellant was forcefully taking the girl into the cattle fold (Bathan) her mother came and started shouting, on which the appellant fled away. Her mother called the elder uncle, her father also came from Delhi and then she along with her family members submitted the written application to the police.

6. On the basis of this written application, Mahila P.S. Case No. 135 of 2016 dated 28.12.2016 was registered for the offences punishable under Sections 376 and 354B of the IPC and under Sections 4 and 18 of the POCSO Act.

7. After completion of investigation of the case, the S.H.O. Sunita Kumari (P.W. 10) submitted charge sheet against the sole named accused *vide* Chargesheet No. 63 of 2017 dated 31.12.2017 under Sections 376 and 354B of the Indian Penal Code and under Section 4 of the POCSO Act upon which the learned Trial Court took cognizance *vide* order dated 18.01.2018



under the aforesaid Sections.

8. Charges were read over and explained to the appellant in Hindi to which he pleaded not guilty and claimed to be tried. Accordingly, *vide* order dated 18.06.2018, charges were framed under Sections 376 and 354B of the IPC and under Section 4 of the POCSO Act.

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

List of Prosecution Witnesses:

PW-1	Om Prakash Sharma
PW-2	Kauleshwar Sharma
PW-3	Kameshwar Sharma
PW-4	Manju Devi
PW-5	Seema Kumari
PW-6	Dr. Mukul Kumar
PW-7	Nageshwar Sharma
PW-8	Neelam Devi
PW-9	Dr. Meena Mishra
PW-10	Sunita Kumari
PW-11	Leelavati Devi
PW-12	Sudhir Kumar

List of Exhibits on behalf of the Prosecution:

Ext. 1	Signature of victim on written application
Ext. 1/1	Signature of victim on her statement u/s 164 Cr. P.C.
Ext. 2	Report on medical board



Ext. 3	Medical examination report of the victim
Ext. 3/1	Supplementary medical examination report
Ext. 4	Report of pathology department
Ext. 5	Endorsement of SHO on written application
Ext. 6	Signature of SHO on formal FIR
Ext. 7	Charge-sheet

10. Thereafter, the statement of the appellant was recorded under Section 313 of the CrPC. The appellant denied all the allegations and took a plea that he is innocent and has falsely been implicated due to land dispute.

11. On behalf of defence two witnesses have been examined and they are as follows:

List of Defence Witnesses :

DW-1	Ashok Sharma
DW-2	Jitendra Sharma

Findings of the Learned Trial Court:

12. Learned trial court after examining all the evidences available on the record found that the testimony of the victim is supported by her mother (P.W. 4) stating that at the time of occurrence, when her daughter was returning from coaching classes, the accused forcibly took her in the cattle fold and committed wrongful act with her. Father of the victim P.W. 2 has also supported the testimony of the victim. P.W. 1, Om



Prakash Sharma has deposed corroborating the version of the victim that on 20.12.2016 in the night at about 10 P.M., he heard the noise and when he went there he saw that accused was taking away the victim and on seeing him the accused ran away. P.W. 3, Kameshwar Sharma has also supported the version of the victim. Learned Trial Court further found that it is very tough for a sexual assault victim, who is also handicap to depose against her near relative who is accused in this case. The court saw no reason to disbelieve the version of the victim. The court found that the victim was subjected to penetrative sexual assault on prior occasions. It opined that such a victim cannot be expected to remember the date of offence of such a horrific nature. The learned Trial Court found that the accused has been charged under Section 354(B) IPC which deals with assault or use of force against a woman with intent to disrobe her but none has deposed about disrobing the victim therefore the offence under Section 354(B) IPC is not made out. It held that charge under Section 376 IPC stands proved in view of the depositions of the victim as well as other witnesses. Section 376(2) is applicable due to victim being physically handicap and subjected to sexual intercourse. The Court has found the age of the victim under 18 years, therefore the offence under Section 4



of the POCSO Act was also found proved. The Court held that in a case of sexual assault covered under POCSO Act, the burden on the prosecution is only to prove the fundamental facts of the case which has been sufficiently proved in this case by the prosecution through the deposition of victim (P.W. 5) and other witnesses P.W. 1, P.W. 2, P.W. 3 and P.W. 4.

Submissions on behalf of the appellant

13. The learned counsel for the appellant submits that the impugned judgment of conviction and order of sentence has been passed ignoring the fact that no evidence has been brought forward to support the allegations of rape committed on the victim/prosecutrix on previous occasions by the appellant except the uncorroborated statements of the prosecutrix. It has been submitted that the victim/prosecutrix has stated that she did not disclose about the incident to anyone as the appellant was a rich person and of high stature, however, it is an admitted fact that the accused/appellant was her own cousin.

14. The learned counsel for the appellant further submits that the statements of all the prosecution witnesses are contradictory and all the witnesses supporting the case of the victim/prosecutrix are her relatives and there is no independent witness examined in the present case, despite the specific



avertment of the prosecutrix/victim in her written report that on her shouting neighbours had come out, however, none have been examined.

15. The learned counsel for the appellant has further pointed out that the learned Trial Court committed a manifest error by placing reliance on Medical Board Report finding the age of the victim/prosecutrix to be 16 to 17 years ignoring the categorical statement of Dr. Mukul Kumar (P.W. 6), who was a member of the Medical Board, during his cross-examination that the age of the victim can be assessed to be 18 years. It has been pointed out that the document produced by the prosecution side in order to prove the age of the victim/prosecutrix, was a Disability Certificate, however, under the provisions of Section 94 of the *Juvenile Justice (Care and Protection of Children) Act, 2015*, it specifies certain documents to be considered as valid documents for the proof of age and the disability certificate is not one among the said document.

16. The learned counsel for the appellant pointed out that the learned Trial Court ignored the statement of the victim/prosecutrix in her examination-in-chief with regard to rape one year prior to the FIR and another two months,



thereafter without any reference of rape or attempt thereto on 20.12.2016, as alleged in the FIR which was filed on 28.12.2016. Thus, falsifying the entire prosecution story, which could not stand on uncorroborated story of rape one year prior to the FIR. He draws the attention of this Court towards the fact that the learned Trial Court noted the unimpeachable contradictions in the statement of the prosecution but still accepted her statements stating that she is a handicap and belongs to poor strata of the society receiving no higher education and that an ideal kind of testimony cannot be expected from such a person, ignoring the fact that victim was returning from tuition i.e., was a literate young girl.

17. The learned counsel for the appellant submits that there is no averment with regard to rape on the alleged date of occurrence, *i.e.*, 20.12.2016, therefore, it cannot be said to be a minor contradiction and it amounts to material contradiction in the victim's testimony. The learned counsel for the appellant further points out that the delay of eight days in lodging of FIR was attributed to the fact that the father of the victim/prosecutrix was not in town and had gone to Delhi, however, the father (P.W. 2) in his deposition has categorically stated that he was present at the village on the date and at the time of the incident.



18. It has further been pointed out that it is an admitted position that after eight days of the incident the written report was presented and the victim/prosecutrix (P.W. 5) has categorically accepted in her cross-examination that the same was drafted by an Advocate, who was called by her mother.

19. The learned counsel has further submitted that the trial was not fair as charges were framed against the appellant only with regard to the alleged offence committed on 20.12.2016 and not of any previous offence of rape alleged to have been committed by him, however, the learned Trial Court at the stage of Section 313 of the Code of Criminal Procedure (in short 'the Cr.P.C.')

asked questions with regard to the alleged offence of rape committed on previous occasions and did not ask anything with regard to the offence allegedly committed by the appellant on 20.12.2016 over which the charges were framed. He, therefore, submits that the variance between the charge, the imputations put forth before the appellant under Section 313 of the Cr.P.C. and the ultimate conviction goes to the root of the trial and thus is completely unsustainable in the eyes of law.

20. The learned counsel for the appellant submits that there are significant and unexplained contradictions



between the victim's statement made under Section 164 of the Cr.P.C. and her deposition before the learned Trial Court both as regards to the date and time of occurrence and the number of times such occurrence had taken place and the way/manner disclosure was made by her. It has been further submitted that the medical evidence does not support the prosecution allegations of repeated aggravated sexual assault and the medical findings were inconclusive thereby failing to corroborate the prosecution case. The learned counsel for the appellant has pointed out that the possibility of false implication due to property dispute or family rivalry was suggested by both the prosecution witnesses as well as defence witnesses, but the same has not been considered by the learned Trial Court. He submits that the learned Trial Court has convicted the appellant based on conjecture and suspicion rather than conclusive proof and, therefore, in light of these deficiencies, the appeal is fit to be allowed and the conviction and sentence may be set aside and the appellant may be acquitted of the charges.

Submissions on behalf of the State

21. On the other hand, the learned Additional Public Prosecutor for the State submits that the victim, who is a minor and a handicap girl has been consistent in narrating the



incident of sexual assault right from her mother to the police and subsequently in the Court. He has submitted that the minor contradictions are natural in these traumatic circumstances and should be ignored. He has stated that the law is well settled that under the POCSO Act as well as in various judicial pronouncements, it is clear that conviction upon reliable testimony of the victim/prosecutrix even without full corroboration can be upheld. The learned APP has further argued that the medical examination, although was conducted after some delay, cannot be used for the purposes of corroboration, especially, when the victim through her statements has been able to prove the factum of rape committed by the appellant. The learned APP has pointed out that the defence of a property dispute between the prosecution side and the accused has not been supported by the material evidence and the defence has failed to prove any such motive. It has, thus, been prayed that the appeal is fit to be dismissed and the impugned judgment of conviction and order of sentence be affirmed.

Consideration

22. We have considered the rival submissions canvassed by the learned counsel for the parties and have also



gone through the evidence produced by the parties before the learned Trial Court.

23. From perusal of the records, it would appear that the present case was initiated on the basis of a written application made by the informant/prosecutrix/victim (P.W. 5) wherein she has alleged that on 20.12.2016 at about 10:00 P.M. while she was returning to her house after attending tuition classes the appellant, Ajay Kumar Sharma, took her to a nearby cattle fold (Bathan) and tried to commit wrong act with her. On her shouting the neighbours came there upon which the accused/appellant fled away. The victim has further stated that she is a handicapped girl and student of class six and the accused/appellant has committed rape with her three times in the past and had threatened to kill her. She has further stated that as her father lives out of station to earn his livelihood it was only she and her mother who had been living together and, therefore, she did not tell about the incident out of fear. She, lastly, disclosed this to her mother that the appellant has made physical relationship with her forcibly, however, since the appellant is a rich person and due to his high status, she did not disclose about the incident to anybody. She has further alleged that in April, 2016 appellant forcibly committed sexual



intercourse with her and lastly on 20.12.2016, when the accused/appellant was taking her to the cattle fold (Bathan) she started crying and her mother came and thereafter, the appellant fled away. It has been stated that her mother called the elder uncle and her father also came from Delhi and thereafter, the written application was given before the police. It has been noted that the application before the police was given on 28.12.2016 upon which a formal FIR was drawn at 16:00 hours.

24. The victim/prosecutrix was subsequently produced before the Court and her statement under Section 164 of the Cr.P.C. was recorded by a learned Magistrate, wherein, the victim/prosecutrix has stated that while she was going, after taking tuition in the month of April, the accused/appellant had committed wrong with her. She further stated that on 20.12.2016, he caught hold of her hand and was dragging her, upon which she shouted and on listening to her voice her mother came and, thereafter, the appellant fled away. She stated that the accused/appellant was the son of her uncle, who used to threaten her that he would kill her mother, father and brother and as such she did not disclose about the said incident.

25. The victim/prosecutrix was examined as P.W. 5, who has in her deposition stated that the incident was of an year



ago and it was the appellant who had committed rape upon her and had also threatened to kill her parents. She further deposed that the appellant committed rape again after one to two months.

26. P.W. 5/victim/prosecutrix in her cross-examination has referred to the Disability Certificate and has stated that according to the same, she was an adult. She has further stated that her father's name is Kauleshwar Sharma and her uncle's name is Ramji Sharma. She admits that Ajay Kumar Sharma is the son of her uncle Ramji Sharma meaning thereby that the accused/appellant was her cousin. She has categorically stated that a land has not been partitioned between Ramji Sharma and her father, Kauleshwar Sharma and has stated that there is no dispute regarding the partition. P.W. 5 has stated that she goes for coaching at 06:00 P.M. and returns at around 09:00 P.M. and has also accepted that almost fifty students study in the said coaching. She has further deposed that 2-4 boys used to study along with her at the tuition and they all leave at the same time. She has also accepted that her brother's daughter, namely, Ragini also went along with her to study. She also stated that even Ragini's class was over by 09:00 P.M. and nobody from her house used to go with her. P.W. 5 has stated that the accused/appellant was doing wrong for the last one year and the



case was lodged after one year. She has, in her evidence in paragraph '14', stated that she did not raise hulla when the accused committed rape. She has also accepted that no injury was received on any part of her body and nobody had seen him doing wrong with her. P.W. 5 has also stated that she opposed the making of physical relationship, however, the accused never assaulted her. P.W. 5 has also stated that she had gone to the police station along with her mother and the written report was drafted by a lawyer, who had gone to the police station as she had asked him to come along, however, she did not know the name of the Advocate, who accompanied her.

27. Thus, from the aforesaid version given by the victim/prosecutrix (P.W. 5) before the police, the learned Magistrate and before the Special Court, it could be said that she had changed her version in all her statements. In her written report as well as her re-statement before the police, she has stated that the accused/appellant had previously committed rape thrice, however, she did not tell about it to anybody out of fear as the accused used to threaten her of dire consequences. She has stated that when she shouted the nearby villagers as well as her mother came there and the accused fled away. She has also stated therein that her father was at Delhi and when he was



called, thereafter, they had gone to the police station and got the case lodged.

28. However, contrary to the aforesaid statement, the P.W. 5/victim/prosecutrix in her 164 Cr.P.C. statement has stated that the accused appellant had committed wrong in April and thereafter on 20.12.2016, when he tried to drag her, she shouted upon which her mother came (does not say about villagers) and the accused fled away. In complete contrast to the aforesaid statements, she in her deposition as P.W. 5 has stated that the incident occurred one year ago when appellant/Ajay Kumar Sharma dragged her to the cattle fold (Bathan) and committed rape upon her. She has stated that the accused threatened her to kill her mother, father as well as her brother and therefore, she did not say anything out of fear and went back to her house. She further stated that after 1-2 months, the accused/appellant committed rape at the same cattle fold (Bathan) upon which she came back to her mother and disclosed about the incident and thereafter, the case was lodged.

29. From the aforesaid material contradictions in the version of the victim/prosecutrix, wherein she has changed her story from time to time, this Court is reminded of the decision rendered by the Hon'ble Supreme Court in the case of



Rai Sandeep vs. State (NCT of Delhi), reported in **(2012) 8 SCC 21**, wherein the Hon'ble Supreme Court in Paragraph '22' has observed 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 co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence



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

30. In view of the aforesaid judicial pronouncement and considering the facts in the present case, the victim/prosecutrix cannot be termed as a sterling witness.

31. This Court shall discuss the statements of the witnesses examined on behalf of the prosecution, in order to



ascertain as to whether the prosecution story finds any corroboration from the other materials on record.

32. P.W. 4, who happens to be the mother of the prosecutrix/victim, stated in her deposition that the incident was of 2014 (admittedly case is of 2016). She has stated that while her daughter was coming back from coaching classes, she was forcibly being taken away by Ajay Kumar, who had already committed wrong twice with her but she did not report about the same out of fear. She stated that again on the date of occurrence when the accused/appellant was trying to take her daughter to the cattle fold, she saw her daughter and on hulla the villagers also came. She has stated that on the request of the villagers, she did not state anything in the night and again in the next morning when she tried to raise voice, people suggested for amicable settlement, however, nothing happened and therefore, when her husband came back as also her brother-in-law (Bhaisur) was called, then the present case was lodged.

33. P.W. 4 in her cross-examination admits that the accused was her neighbour and is her nephew in relationship. She has stated that partition had already taken place during their forefathers period and there was no dispute with regard to partition with the accused. P.W. 4 has also accepted that the FIR



was lodged after eight days which was drafted by 'Sir' (Advocate). She has also stated that accused/appellant made physical relationship in April 2016, however, no case was lodged and thereafter, physical relationship continued for six months to one year. She admitted that no shanha (information) was given for the threats given by the accused.

34. P.W. 2 is the father of the victim/prosecutrix. He has stated in his deposition that the incident is of 12 to 13 months ago, when appellant/Ajay had caught hold of his daughter while she was on her way back home from tuitions and when she shouted he had closed her mouth and threatened her for dire consequences.

35. In his cross-examination P.W. 2 has stated that he stayed in Delhi and had left Delhi around three years back. He specifically stated that he was present at the time of incident in his house. He, in paragraph '9' of his cross-examination, has stated that his daughter/victim/prosecutrix had told about the incident when he came back on that day. P.W. 2, contrary to what his wife had stated denied that there was any partition of the land.

36. P.W. 3 is the uncle of the victim/prosecutrix and elder brother of P.W. 2. In paragraph '1' of his deposition, he has



stated that the incident occurred at around 10:00 P.M. and on her shouting people had come and appellant/Ajay fled away. He has deposed that Ajay had committed rape with his niece (victim/prosecutrix) thrice earlier and he was threatening of dire consequences. He has stated that his niece had told him about the incident. He has also stated that his niece stays along with her mother. During his cross-examination, he has stated that he cannot tell the date of incident nor the Hindi calendar month. He has stated that both the younger brothers (father of the prosecutrix/victim as well as father of the accused) stay at home. He stated that when he received the information and came to his home, his younger brother, namely, Nageshwar Sharma was there and on the same day his another brother Kauleshwar Sharma (father of the victim/prosecutrix) reached from Delhi after his arrival. He has also categorically stated that partition has already been done among the brothers. P.W. 3 has stated that the mother of the prosecutrix/victim informed him about the incident on phone which he shared with co-villagers, who suggested him to lodge a case.

37. P.W. 7, Nageshwar Sharma is another uncle of the prosecutrix/victim. He in his deposition has stated that he had heard about the incident and that mother of his niece



(prosecutrix/victim) was saying about rape. In paragraph '3', during his cross-examination he has stated that the accused and the prosecution side are agnates. In paragraph '6' of his cross-examination he has stated that there is a dispute with regard to a land situated at the doors of the accused which the prosecution side wants to forcibly take possession of. He has stated that no person in the village had told him about rape being committed.

38. P.W. 8 is the aunt of the victim/prosecutrix, wife of Nageshwar Sharma (P.W. 7). She has stated that she heard *hulla* and went there and found that Kauleshwar Sharma and Ajay were in an altercation. She has stated that no partition had taken place among the brothers. She has categorically stated that Kauleshwar Sharma and Ramji are cousins and both are in dispute with respect to a land. In paragraph '6' of her cross-examination she had stated that parents of the victim/prosecutrix told her that there was an altercation.

39. We shall now go on and consider the evidences of official witnesses, examined on behalf of the prosecution.

40. P.W. 6, Dr. Mukul Kumar was a Member of the Medical Board constituted for determination of the age of the victim. He has stated that the age of the victim/prosecutrix was assessed between 16 to 17 years. However, during cross-



examination he has said that the age can be assessed as 18 years.

41. P.W. 9, Dr. Meena Mishra is the doctor who had examined the victim and posted at sadar hospital at the relevant time stated that no mark of any injury was found. She has stated that no spermatozoa was found and the girl was conscious and no case of sexual assault was observed.

42. P.W. 10, Sunita Kumari was the S.H.O. of Mahila police station and the I.O. of the present case. She has stated that she received the written report and had recorded the re-statement of the victim, statement of her mother and uncle. She has further stated that she had inspected the place of occurrence, got the victim medically examined and her statement under Section 164 of the Cr.P.C. was also recorded. She has further stated that she had handed over the charge on 25.01.2017. During her cross-examination she has stated that the place of occurrence was cattle fold (Bathan). She has also stated that no mark of violence was found on the body of the victim. She further stated that Manju Devi (mother of the victim) had not stated that any wrong was committed with her daughter at 10:00 P.M. She stated that Manju Devi has not stated of any act of force being used against her daughter.

43. P.W. 10 has also stated that the victim is the



only eye witness and she had stated that the first incident took place in April. She has also accepted that she did not verify the school certificate and had not seized the clothes of the victim nor the victim had given any clothes to her.

44. P.W. 11, Leelavati Devi is the second I.O. of the case, who took charge on 08.02.2017 and has stated that she had not done any work in the case apart from submitting the charge-sheet. She has accepted that she does not know about the ingredients of Section 4 and Section 6 of the POCSO Act.

45. P.W. 12, Sudhir Kumar, who is the son of Nageshwar Sharma, i.e., cousin of the prosecutrix/victim had only stated that he had heard that an altercation had taken place on account of land dispute. However, he was declared hostile.

46. The defence has also examined two witnesses being D.W. 1 Ashok Sharma, who has stated that Ramji Sharma (father of the accused) and Kauleshwar Sharma (father of victim) are cousins and he has also stated himself to be an agnate from the same descendants. He has categorically stated that there was land dispute between Ramji and Kauleshwar. In paragraph '8' of his examination-in-chief, he has stated that the case of rape is false and was lodged only to pressurize and capture the land. He has stated that every person in the village



knows that the case is false.

47. D.W. 2 Jitendra Sharma, has stated that both the parties share one common courtyard. He has further stated that partition has not taken place and because of the said fact there is a dispute between the parties and hence Kauleshwar Sharma has got the present case registered through his daughter. Even, he has stated that the villagers know that it is a false case and even he knows that a false case has been lodged in order to pressurise the accused persons.

48. It is relevant to note here that neither P.W. 7 nor P.W. 8, who also have stated about land dispute, were declared hostile by the prosecution.

49. Upon careful examination of evidences of the prosecution as well as defence side, it could safely be deduced that the age of the victim has not been assessed properly in terms of the scheme of the statute governing it.

50. We would like to refer to the deposition of the prosecutrix (P.W. 5) who has stated that her Disability Certificate contains the date of birth as 23.01.2001, however, the learned Trial Court has failed to acknowledge that the said document does not fall within the list of documents referred under Section 94 (2) of the Juvenile Justice (Care and Protection



of Children) Act, 2015 to ascertain the age of the victim.

51. The Doctor, P.W. 6 has stated that the age may be assessed as 18 years and the I.O. of the case (P.W. 10) has stated that she did not verify the school certificate of the victim/prosecutrix. From the deposition of the aforesaid witnesses, it is clear that the prosecution has failed to produce any documentary evidence to prove the age of the victim. Learned counsel for the appellant has rightly submitted that from the evidence on record the victim/prosecutrix could not be stated to be a minor.

52. We have seen that from the radio-logical report the age of the victim appeared between 16 to 17 years.

53. In the case of *P. Yuvaprakash vs. State Rep. By Inspector of Police*, reported in *2023 SCC OnLine SC 846*, the Hon'ble Supreme Court in Paragraph 14 to 17 has observed as under :-

“14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to



be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2) (i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in Rishipal Singh Solanki v. State of Uttar Pradesh,³ this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia)



with Section 94 of the JJ Act, and held as follows:

“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (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. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this court held in Sanjeev Kumar Gupta v. The State of Uttar Pradesh⁴ that:

4. (2019) 9 SCR 735



“Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a) (i) indicates a significant change over the provisions which were contained in Rule 12(3) (a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In *Abuzar Hossain @ Gulam Hossain v. State of West Bengal*⁵, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.”

5. (2012) 9 SCR 224



54. On the point of assessment of age of a victim under the POCSO Act, in the case ***Rajak Mohammad Vs. State of Himachal Pradesh*** reported in (2018) 9 SCC 248, the Hon'ble Supreme Court observed in paragraphs '8', '9' and '10' as under:-

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

9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

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

The judgment in the case of ***Rajak Mohammad (supra)*** has been relied upon by the Hon'ble Division Bench of Delhi High Court in the case of ***Court on its own Motion Vs. State of NCT of Delhi (Crl. Ref.2/2024 judgment dated 02.07.2024)***



reported in **2024 SC OnLine Delhi 4484** and held in paragraph '46' as under:-

“46. As an upshot of our foregoing discussion, the Reference is answered as under:-

(i) Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test?

Ans: In such cases of sexual assault, wherever, the court is called upon to determine the age of victim based on 'bone age ossification report', the upper age given in 'reference range' be considered as age of the victim.

(ii) Whether the principle of 'margin of error' is to be applicable or not in cases under the POCSO Act where the age of a victim is to be proved through bone age ossification test.

Ans: Yes. The margin of error of two years is further required to be applied.”

55. From the judicial pronouncements considered hereinabove, it can be said that a judicial notice can be taken that the margin of error in ascertaining of age by radiological examination is two years on either side.

56. In the present case, we have seen that except the radio-logical report there is no material produced by the prosecution with a view to prove the age of the victim. We have already observed that age given on a Disability Certificate



cannot be a basis for documentary proof of age. Even as per the radiological report the age of the victim is said to be between 16 to 17 years, therefore, it could be safely said that the age of the victim can be treated between 18 to 19 years.

57. We have observed that there are material contradictions in the evidences of the prosecution witnesses and we have seen that own uncle of the victim/prosecutrix, i.e., P.W. 7 and her aunt P.W. 8 have not supported the prosecution case and have stated that there is a land dispute between the parties.

58. In view of such evidence coming out from the prosecution side, wherein the own uncle and aunt of the victim have stated that there is a land dispute between the prosecution side and the accused and initially the Aunt of the victim was informed that there was an altercation between the accused and father of the victim, we do not see any reason but to accept those evidences and in doing so, the two defence witnesses examined, have also corroborated the statements as far as land dispute is concerned. In fact, the defence witnesses have categorically stated that the case of rape is false and only to pressurize the accused, the same has been lodged at the behest of the father of the victim.

59. We have also taken note of the evidence of P.W.



10 Sunita Kumari, who was the I.O. of the case and she had specifically stated that she had not found any mark of violence and she has also stated that the mother of the victim/prosecutrix had not stated that any wrong was committed with her daughter at 10:00 P.M.

60. P.W. 9, the Doctor, who examined the victim has stated that there is no evidence of sexual assault and no injury was found on the body of the victim including around her pelvic area. It is a settled proposition of law that minor variations or inconsistency would not tilt the balance of justice in favour of the accused, however, when contradictions and variations are of serious nature, which apparently or implacably is destructive of the substantive case sought to be proved by prosecution, they may provide an advantage to the accused. The principle of innocence until proved guilty remains intact.

61. The learned Trial Court has failed to analyze the most important factor in a case registered for offences under POCSO Act i.e. the determination of the age of the victim, which we have found to be between 17 to 19 years, taking the error into account. We have seen that the prosecution witnesses have given contradictory statements regarding the dates of incident, the time line of events and the mode of disclosure.



62. We have also taken note that the Trial Court has failed to address a vital issue as to non-examination of other witnesses, who could have thrown light, especially, with regard to the presence of the victim at the relevant time and date as stated by her.

63. The Hon'ble Supreme Court has established clear parameters for evaluating victim's testimony in sexual assault cases which is:-

(i) Sterling witness test, wherein victim's testimony must be of exceptionally high quality and credible;

(ii) Consistency requirement- the statement of prosecutrix/victim should be consistent from the beginning to the end and

(iii) Corroboration analysis- the Courts should seek corroboration where credibility of the evidence of the victim is doubtful.

64. As observed, hereinabove, the victim has failed in all the above three assessments as her testimony cannot be said to be credible as she has different stories at different stages. It has neither been consistent and her statement has not been fully corroborated by the other prosecution witnesses, especially, the fact that the FIR was lodged on account of the



father of the victim being not present on the date of occurrence and it was lodged after eight days only when her father is stated to have come back from Delhi. However, we have seen the deposition of the father as P.W. 2, who had categorically stated that he was present at his home at the time of the incident.

65. The aforesaid fact reminds us of the judgment rendered by the Hon'ble Supreme Court in the case of ***Santosh Prasad @ Santosh Kumar vs. State of Bihar*** reported in (2020) 3 SCC 443, wherein the Apex Court in paragraph '5.4.1' has observed thus:-

"5.4.1. In Raju², it is observed and held by this Court in paras 11 and 12 as under: (SCC p. 141)

11. It cannot be lost sight of 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. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness 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.

2. Raju vs. State of M.P., (2008) 15 SCC 133 : (2009) 3 SCC (Cri) 751



12. Reference has been made in *Gurmit Singh case*⁷ to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

7. *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316



66. Considering the aforesaid facts and circumstances of the present case and from the evidence led by prosecution as well as the defence, we are of the considered opinion that the prosecution has failed to prove the case against the appellant beyond reasonable doubt and therefore, the conviction of the appellant cannot be sustained.

67. We find that the Trial Court has committed grave error in passing the impugned judgment and subsequent order ignoring the vital contradictions in the testimony of the victim. The learned Trial Court has failed to adequately consider the material contradictions not only within the statement of the victim/prosecutrix but also in comparison to the other prosecution witnesses.

68. In view of the aforesaid discussions and taking into account the various judicial pronouncements, we find that the conviction of the appellant cannot be upheld with the kind of evidence which is inconclusive and accordingly the conviction and sentence of the appellant cannot be sustained and is, therefore, set aside giving him the benefit of doubt.

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



70. The appeal stands allowed.

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

(Rajeev Ranjan Prasad, J)

(Sourendra Pandey, J)

manoj/krishna-

AFR/NAFR	AFR
CAV DATE	NA
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