IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.32 of 2019

Arising Out of PS. Case No.-92 Year-2016 Thana- RAJAPAKAR District- Vaishali

==

Birju @ Raja son of Vijay Sah resident of vill- Baranti, P.S. Rajapakar, Distt.-Vaishali.

... ... Appellant/s

Versus

The State Of Bihar Bihar

... ... Respondent/s

==

Appearance :

For the Appellant/s : Mr. Vijay Kumar Sinha, Advocate
M. Arvind Kumar Srivastava, Advocate
Mr. S.K. Bhatnagar, Advocate
Mr. Raushan Sinha, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

==

CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI)

Date: 10-04-2026

1. The instant Criminal Appeal challenges a judgement, dated 26th of September, 2018, whereby and whereunder, the appellant was convicted under Section 235(1) of the Cr.P.C. for committing an offence punishable under Sections 363/376(2)(i) of the Indian Penal Code and Section 4/6/10 of the POCSO Act, 2012.

2. By an order dated 5th of October, 2018, the learned Additional Sessions Judge-cum-Special Judge, Vaishali at Hajipur sentenced the appellant to undergo rigorous imprisonment for 10 years with fine of Rs. 20,000/- for the

offence under Section 363 read with Section 34 of the I.P.C. He was further sentenced to undergo rigorous imprisonment for 10 years with fine of Rs. 20,000/- for the offence punishable under Section 366A read with Section 34 of the I.P.C. The appellant was further sentenced to suffer imprisonment for 12 years and fine of Rs. 25000/- for the offence punishable under Section 376 (2)(i) read with Section 34 of the I.P.C. Further sentence of rigorous imprisonment of 12 years with fine of Rs. 25,000/- for the offence punishable under Section 4 of the POCSO Act, 2012. Further sentence of rigorous imprisonment for 10 years with fine of Rs. 20,000/-. Further sentence of rigorous imprisonment for 12 years and fine of Rs. 25000/- for the offence punishable under Section 6 of the POCSO Act, 2012 and further sentence of rigorous imprisonment for 7 years and fine of Rs. 10,000/- for the offence punishable under Section 10 of the POCSO Act, 2012. It was also directed that the appellant shall suffer simple imprisonment for 5 months each for non-payment of fine amount on each count. All the sentences of rigorous imprisonment were directed to run concurrently.

3. In the instant appeal, the appellant has challenged the impugned judgement of conviction and sentence on the following grounds: -

(a) Prosecution failed to bring home the charge against the accused;

(b) No eye-witness to support the case of kidnapping of the minor girl of the informant, and her friend could be examined by the prosecution;

(c) The Investigating Officer failed to ascertain the registration no. and identity of the Scorpio Car, with the help of which the victims were kidnapped.

(d) The prosecution failed to prove the place of illegal confinement of the victims;

(e) Prosecution also failed to prove involvement of three accused persons in the offence as alleged;

(f) The prosecution case is full of contradiction with the evidence; and

(g) The learned Trial Judge held the appellant guilty for the offence only on the basis of statement of the victim under Section 164 of the Cr.P.C. without considering the fact that such statement is only corroborative in nature.

4. Factual matrix, leading to the instant appeal is as follows: -

One Sonu Kumar of village-Ajmatpur within the Police Station-Rajapakar in the district of Vaishali lodged a

written complaint on 3rd of July, 2016, stating, inter alia, that on 3rd of July, 2016 at about 07.00 a.m., her niece Soni Kumari, daughter of Binay Kumar Sharma, aged about 14 years along with one Savita Kumari, a minor girl aged about 13 years went to Ghora Chowk, which is stated to be at a distance of about 1 k.m. away to purchase some biscuits. However, they did not return even after considerable period of time. The informant came to know from the parents of his niece that three young men of village Baranti, namely, Birju @ Raja, Chhotu Kumar and Ranjan Singh, used to eve-tease and disturb them for some period of time. The informant made a complaint against them to their respective parents and they assured that their respective sons would not further commit such wrong in future. As the victim girls did not return to their respective homes, the informant suspected that had been kidnapped for some illicit purpose and lodged the complaint so that no harm might be caused to the said minor girls.

5. On the basis of the said complaint, police registered a case, being Rajapakar P.S. Case No. 92 of 2016, dated 4th of July, 2016, under Section 363 / 366A and one Ravindra Kumar Singh, Assistant Sub-Inspector of Police was directed by SHO Rajapakar Police Station to investigate the

case.

6. Upon completion of investigation, the police submitted a charge-sheet against all three accused persons under Section 363/366A/376(2)(i) of the I.P.C. and Section 4/6/8/10 of the POCSO Act, 2012.

7. Since the charge-sheet was submitted under the POCSO Act, 2012, the case was committed to the Court of the learned Special Judge, POCSO Court, Vaishali at Hajipur for trial and disposal.

8. The learned Trial Judge framed charge against Ranjan Singh and Birju @ Raja, appellants, therein, under the above-mentioned penal provisions. When the charge was written over and explained to them on 1st of September, 2017, they pleaded not guilty. Accordingly, the trial commenced.

9. During trial, the prosecution examined as many as 10 witnesses. Amongst them, P.W. 1, Hari Nath Thakur, is the grandfather of the victim. P.W. 2, Vikash Kumar Thakur; P.W. 3, Sanjiv Kumar; P.W. 4, Om Prakash; and P.W. 6, Munnu Kumar are residents of village Azmatpur. P.W. 5 is the informant and P.W. 7 is the niece of the informant, who is one of the victims of this case. P.W. 8, Dr. Sima Kumari and P.W. 9, Priyanka are the Medical Officers, who were attached to Vaishali Sadar Hospital

WEB COPY

on 23rd of July, 2016. They medically examined the victims and submitted their report, which were marked during trial as Exhibit-3 to 6 and Exhibit-7 to 11, respectively. P.W. 10 is the Investigating Officer of this case.

10 During trial, the statement of the informant has been marked as Exhibit-1. Signature of the victim on her statement recorded under Section 164 of the Cr.P.C. on 23rd of July, 2016 was marked as Exhibit-2. Exhibit-3 to 6 are medical reports of victim no. 1 and Exhibit-7 to 11 are the medical reports of victim no. 2. Exhibit-12 is the formal F.I.R. and Exhibit-13 to 14 are statements of the victims under Section 164 of the Cr.P.C.

11. On the basis of the evidence on record, both the oral and documentary, the learned Trial Judge convicted the accused / appellant and sentenced him to suffer rigorous imprisonment on different heads of charges, described hereinabove.

12. Learned counsel for the appellant submits that nobody saw the appellant or his associates to elope the victim girls from Ghora Chowk. It is the case of the prosecution that the victim girls were taken to Kolkata by the appellant and his associates but the Investigating Agency could not identify the

space where the victims were allegedly confined. As per the prosecution case, they were allegedly kidnapped on 3rd of July, 2016. The victim no. 1 was recovered from the side of the high road near her village in the early morning of 22nd of July, 2016. After recovery, she was taken to the Police Station. Thereafter, her medical examination was done. Victim's statement under Section 164 Cr.P.C. was recorded on the date of her recovery, i.e., on 22nd of July, 2016. Victim No. 2 was also confined in the same room along with victim no. 1. According to her, she stayed with the accused persons for three days. Thereafter, she somehow fled away and informed the incident to an Auto Driver. The said Auto Driver handed her over to the police of Kolkata. She was sent to a Home run by Childline for about two months. Thereafter, in the month of September, she was recovered by the Investigating Officer.

13. It is submitted by the learned Advocate appearing on behalf of the appellant that there is absolutely no witness examined by the prosecution during trial, who corroborated the prosecution case regarding involvement of the appellant.

14. It is also stated by him that victim no. 1 was examined during trial as P.W. 7. In her examination in chief, she stated on oath that on the date of occurrence at about 6 to 6.30

a.m., when she and victim no. 2 were going to Ghora Chowk to purchase some biscuits, a Scorpio Car stopped by their side. In the said car, there were Birju @ Raja, Chhotu Kumar and a driver. Chhotu and Birju @ Raja got down from the car and forced victim no. 1 to smell a handkerchief. Chhotu also forced victim no. 2 to smell a handkerchief. Immediately both of them lost their consciousness. When they regained their consciousness, they found that they were in Kolkata. She stated that Birju committed rape upon her in Kolkata repeatedly and Chhotu committed rape upon victim no. 2. They stayed in one room in Kolkata for about 19 to 20 days. They were subjected to sexual intercourse during these long days by Birju and Chhotu. Subsequently, the accused persons decided to leave the victims. Then she was left by the side of road near her village. There was a crossing of four lanes nearby. Police personnel were posted on the crossing. Police recovered her and got her statement under Section 164 of the Cr.P.C. Thereafter, she was medically examined. In cross-examination, it was stated by P.W. 7 that the incident of kidnapping took place before they reached the shop to purchase biscuits situated after crossing few steps at Ghora Chowk. It was admitted by P.W. 7 that there were three shops and a temple near the place of occurrence. In cross-examination

itself, she stated that there was no person in the temple. One of the said three shops was open and an aged lady was sitting in the said shop. It is affirmatively taken during cross-examination that the Scorpio Car came from the side of Bidupur market. However, she could not state the registration no. of the vehicle. P.W. 7 was further cross-examined, when she stated that in Kolkata, the victims were kept in the hotel. They were kept in a room in a house. As the accused did not allow them to go outside, P.W. 7 did not know the name of the owner of the said house. The appellant used to prepare food for both of them. However, the quality of the food was poor. Rice mixed with water was served to them. P.W. 7 further stated that the appellant set her free on 21st day of a month, though she could not recollect which month it was. She was freed at about 5 to 6 p.m. in the evening from the place where she had been left.

15. The learned Advocate appearing on behalf of the appellant submits that the statement of P.W. 7 suffers from material contradiction when compared with her statement recorded under Section 164 of the Cr.P.C. by the learned Magistrate on 22nd of July, 2016. In her statement under Section 164 of the Cr.P.C., victim no. 1 stated that she was kept in Kolkata for two or three days. Thereafter, she was taken to a

village area. She used to talk with the local villagers. In the said village also, the appellant committed rape upon her on a number of occasions.

16. It is further submitted by the learned Advocate appearing on behalf of the appellant that P.W. 7 completely suppressed the fact that the appellant had allegedly taken her from Kolkata to a village. Thus, the victim is not a sterling witness on the basis of whose evidence alone, conviction of the appellant can be sustained.

17. In support of his contention, he refers to the decision of the Hon'ble Supreme Court in ***Rai Sandeep @ Deepu vs. State of NCT of Delhi,*** reported in ***AIR 2012 SC 3157***. It is submitted by the learned Advocate, appearing on behalf of the appellant that “Sterling Witness” should be of a very high quality and caliber, whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it on its face value without any hesitation. To test the quality of such witness, the status of the witness should be immaterial and what would be relevant is 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 witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution.

18. It is submitted by the learned Advocate appearing on behalf of the appellant that the evidence of the victim no. 1, who deposed that she was physically abused by the appellant suffers from inherent contradictions. In her evidence on oath, the victim no. 1 stated that she was confined in Kolkata for about 18 to 19 days, during which period the appellant committed rape upon her. On the contrary, in her statement under Section 164 of the Cr.P.C., the victim stated that she was kept confined in Kolkata for about 3-4 days and, thereafter, the appellant took her to a village, where she was further confined and raped by him. Thus, it is submitted by the learned Advocate for the appellant that the prosecution failed to prove the place of occurrence, and the evidence of victim girl (P.W. 7) cannot be treated as of sterling nature because her evidence has not remained consistent throughout the proceedings.

19. It is further submitted by the petitioner Advocate appearing on behalf of the appellant that the medical report of the victim clearly suggests that she had previous sexual experience because the Gynecologist stated in her report that the

victim had an old healed rupture of the hymen. Secondly, it is the case of the prosecution that the victim was subjected to sexual intercourse against her will. However, the Medical Officer did not find any mark of injury on her body or in and around her private parts. If a girl of 14-15 years is ravished against her will, she must try to resist, which would result in having localized injuries on her body. But the Medical Officer did not find any injury on the person of the victim.

20. Lastly, it is submitted by the learned Advocate appearing on behalf of the appellant that the learned Trial Judge held the appellant guilty for committing the offence under Section 376 of the I.P.C. read with Section 4 and 6 of the POCSO Act, 2012, on the basis of the medical report where the Medical Officer found motile and non-motile spermatozoa in the vaginal swab of the victim no. 1. It is contended on behalf of the appellant that the prosecution did not take any step to ascertain the source of spermatozoa in the vaginal swab of the victim no. 1. It has not been proved whether the said spermatozoa belonged to the appellants. This could have been proved by subjecting the appellant to medical examination. However, the Investigating |Agency did not take any step to adduce such evidence during trial of the case.

21. The learned Advocate appearing on behalf of the appellant, in support of his argument, refers to an unreported judgement passed by a Co-ordinate Bench of this Court in Criminal Appeal (DB) No. 1268 of 2018 (Vinay Kumar v. The State of Bihar) decided on 7th of October, 2024, wherein, the Division Bench of this Court disbelieved the evidence of the prosecutrix on the ground that her evidence cannot be accepted for its face value without hesitation and she was not a sterling witness. On the same issue, the Division Bench relied on the subsequent decision of the Hon'ble Supreme Court in the case of ***Nirmal Premkumar v. State,*** reported in ***2024 SCC OnLine SC 260***. Paragraph 22 of the aforesaid judgement is relevant and quoted below: -

> *"22. Conviction undoubtedly can be recorded on the sole evidence of a victim of crime; however, it must undergo a strict scrutiny through the well-settled legal principles as established by this Court in a catena of decisions. While the actions attributed to A-1, as sought to be demonstrated by the prosecution, may fall within the purview of 'sexual harassment' under section 11 of the POSCO Act, the evidence in this case has been marred by inadequacies from the outset, evident in*

> *contradictions within statements and testimonies. The evidence led leaves reasonable suspicion as to whether A-1 was actually involved in any criminal act."*

22. Conviction, no doubt, can be based on the sole evidence of the victim of a crime, however, such testimony must undergo a strict scrutiny in light of the well-settled principles laid down by this Court in a catena of decisions. While the actions attributed to A-1, as sought to be demonstrated by the prosecution, may fall within the purview of "Sexual Harassment" under Section 11 of the POCSO Act, the evidence in this case is marred by inadequacies from the outset, as is evident from the contradictions in the statements and testimonies. The evidence adduced gives rise to a reasonable doubt as to whether A-1 was, in fact, involved in the commission of any criminal act.

23. The learned Advocate on behalf of the appellant also refers to a decision passed by Hon'ble Supreme Court in the case of ***P. Yuvaprakash v. State represented by Inspector of Police,*** reported in ***AIR 2023 SCC 3525***.

24. Referring to another judgement of the Hon'ble Supreme Court in ***Krishan Kumar Malik v. State of Haryana,*** reported in ***AIR 2011 SC 2877***, it is submitted by the learned

Advocate for the appellant that the conduct of the victim in the instant case is absolutely unnatural. According to the victims, they were confined in a house for quite few days. They did not use any alarm to attract other inmates of the house, who might help them in their recovery. The Investigating Officer failed to identify the house where the victims were allegedly confined and subjected to rape. Therefore, the Hon'ble Supreme Court held that the evidence of prosecutrix was shaky, untrustworthy and cannot be believed. Under such circumstances, the appellant was acquitted of the charges.

25. In ***Nirmal Premkumar v. State Rep. By Inspector of Police,*** reported in ***AIR 2024 SC (Supp) 1318***, a teacher of a minor prosecutrix was charged with having allegedly committed sexual harassment. On the factual aspect, the Hon'ble Supreme Court found that the parents of the minor girl had never made any complaint to the Principal of the school prior to lodging of report at the Police Station. There were discrepancies between victim's version recorded under Section 164 of the Cr.P.C. and her deposition. She gave varying accounts at different points of time. The Investigating Officer also failed to examine the classmates of the victim in order to ascertain the incident. In such circumstances, and in view of the fact that there was

previous animosity between the parents of the victim and the concerned teacher, the Hon'ble Supreme Court declined to reply upon the evidence of the prosecutrix and recorded an order of acquittal, thereby reversing the judgement delivered by the Madras High Court.

26. The learned Advocate for the appellant referred various other decisions, which, in our opinion, are not relevant for adjudication of this case. Therefore, we refrain from discussing such reported decision.

27. The learned Advocate appearing on behalf of the State Respondent, on the other hand, supports the impugned judgement and submits that there is no reason to turn down the findings of the Trial Court on re-appreciation of evidence.

28. Having heard the learned counsels for the appellant and the defence, and upon perusal of the materials on record, we would like to observe at the outset that every accused is presumed to be innocent unless proved guilty. The presumption of innocence is a human right. However, subject to statutory exceptions, the said principle forms the bedrock of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and its gravity must be taken into consideration. The Courts must remain vigilant to ensure that

the application of such presumption does not result in injustice or mistaken conviction. Under the Prevention of Children from Sexual Offences Act, the concept of reverse burden has been introduced, as in certain other serious offences under enactments such as the NDPS Act, Negotiable Instrument Act, Prevention of Corruption Act and Terrorist and Disruptive Activities (Prevention) Act, etc. The provisions contained in the aforesaid enactments and particularly in Sections 29 and 30 of the POCSO Act, 2012, are in the nature of an exception to the general principle that the burden of proof always lies upon the prosecution. In the instant case, since we are concerned with the principle of reverse burden contained in Section 29 and 30 of the POCSO Act, we propose to deal with the law relating to reverse burden POCSO Act.

29. In ***Sachin Baliram Kakde v. State of Maharashtra,*** reported in ***2015 SCC OnLine Bom 8972,*** the Hon'ble Supreme Court in the context of presumption under Section 29 of the POCSO Act, 2012, held as follows: -

> *"18. Thus, when a person is prosecuted for commission of the offence specified in the said section, the Court is required to presume that he said person has committed the said offence unless the contrary is proved.*

> *19. The presumption, however, cannot be said to be irrebuttable. Infact, no presumption is irrebuttable in law, as this cannot be equated with conclusive proof. The provisions of section 29 of the POCSO Act mandates the Court to draw the presumption unless contrary is proved.*
>
> *20. One has to keep in mind, as expressed by an eminent jurist that presumptions are bats in law, they fly in a twilight but vanish in the light of facts."*

30. It is no longer *res integra* that the presumption under Section 29 of the POCSO Act is not absolute. It is the duty of the prosecution to prove the foundational fact of the case, and only thereafter can the presumption under Section 29 and 39 be invoked. The statutory presumption stands activated only upon proof of the foundational facts by the prosecution. Even once such presumption is activated, the burden upon the accused is not to rebut the same beyond reasonable doubt. It is sufficient if the accused is able to create a serious doubt regarding the veracity of the prosecution case or brings on record material, rendering the prosecution version highly improbable.

31. Bearing this principle in mind, this Court shall now appreciate the evidence on record in order to come to a

definite finding and the final conclusion in the instant appeal.

32. It is not in dispute that the two victim girls were found missing in the early hours of 3rd July, 2016. The F.I.R. was lodged by the uncle of victim no. 1 on 4th of July, 2016 at 05.00 pm. In the F.I.R., he clearly stated that he was suspecting the appellant and two others that they had kidnapped the said two victim girls, as they had been disturbing them for quite some time.

33. The informant was examined as P.W.5. In his evidence, he stated that when the victims were not found despite repeated search, he and his family members came to know that the appellant and two others had kidnapped them in a four-wheeler. Victim No. 1 was recovered about 18-20 days after her kidnapping. Victim no. 2 was recovered about two months after she was found missing. P.W. 5 also stated on oath that he heard from victim no. 1 that the appellant had repeatedly committed rape upon her. P.W. 5 was cross-examined on the question as to whether anybody saw the appellant to kidnap the victims, he replied it in the negative. Upon perusal of the other witnesses, namely, P.W. 1, Hari Nath Thakur, P.W. 2, Vikash Kumar Thakur; P.W. 3, Sanjiv Kumar; P.W. 4, Om Prakash; and P.W. 6, Munnu Kumar, it appears that they also stated on oath that they

suspected the appellant and other two accused persons of having kidnapped the victims. On careful perusal of the cross-examination, we do not find that even a single question was put by the defence to the above-named witnesses regarding the allegation of commission of rape or penetrative sexual assault allegedly committed by the appellant upon victim no. 1, although the said witnesses had stated that, after her recovery, the victim disclosed to them that she had been forcibly subjected to sexual assault. Now comes the evidence of P.W.7, who was the victim in the instant case. It is stated by P.W. 7 that on 3rd of July, 2016 (it was wrongly typed in the paper book as on 23rd of July, 2016) at about 6 to 6.30 a.m., she and victim no. 2 were going to purchase biscuits at Ghora Chowk. While they were proceeding, a Scorpio Car stopped by their side. The appellant and Chhotu got down from the car and held a handkerchief over the nose of the victims. They lost their consciousness. When they regained their consciousness, they found themselves in Kolkata. The appellant committed rape upon her repeatedly during the period when she was kept confined. It is true that in the examination in chief, she stated that she and victim no. 2 were kept in one room for about 19-20 days. She did not state anything that she was thereafter shifted to a village by the

appellant. This appears to be the only contradiction in the victim's statement regarding the place and manner of her confinement. The question that arises at this stage for consideration is as to whether the above-mentioned solitary contradiction should be considered as material contradiction effecting the decision of the case.

34. Our view on the aforesaid issue is in the negative.

35. Let us assign the reason.

36. In paragraph 8 of the cross-examination, it was specifically taken by the defence as hereunder: -

8- dydRrk esa dejk okys ?kj gksVy ugha Fkk] edku dk dejk FkkA pwafd ogka ls ckgj fudyus ugha fn;k Fkk] blfy, ugha crk ldrh fd og fdldk edku FkkA [kkuk jktk cukdj f[kykrk FkkA lgh ls [kkuk ugha f[kykrk Fkk] ikuh pkoy f[kykrk FkkA 18 fnu ckn pksj esa ykdj NksM+ fn;kA fnukad 21 dks NksM+k Fkk] mldk ekg ;kn ugha gSA djhc 5&6 cts "kke dks NksM+k FkkA ogkWa ls iqfyl Fkkuk gedks ysdj गयी FkhA pkSd ij हमेशा xkM+h iqfyl dh [kM+h jgrh gSA

37. From this evidence, it is affirmatively taken on

behalf of the appellant that the appellant was staying with the victims. He used to prepare food for her and she was confined for about 18 days. She was brought by the appellant on 21st of a month at about 5 to 6 p.m. and left her on the side of the road near her village. Seeing her standing by the side of the road, on duty police officer recovered her and took her to the Police Station. It was suggested to P.W. 7 that she had love relation with the appellant since 2015 and as a result of such love relationship, P.W. 7 voluntarily went with the appellant away to Kolkata and subsequently filed a false case.

38. In view of such cross-examination, can it be said that the victims were not kidnapped by the appellant and his friends.

39. Now comes the question as to whether victim no. 1 was subjected to penetrative sexual assault by the accused or not. Victim No. 1 was medically examined by P.W. 8, Dr. Sima Kumar on 22nd of July, 2016. During medical examination, her vaginal swab was taken and it was examined by one Dr. S. K. Verma, Pathologist. Dr. Verma found non motile spermatozoa and RBC in vaginal swab. One Dr. Brajesh Kumar Singh, Radiologist opined through ossification test that the victim was aged about 17 to 19 years on the date of medical examination.

P.W. 8 further opined that the victim had recent sexual activity.

40. It is pointed out by the learned Advocate on behalf of the appellant very strenuously that the Medical Officer did not find any injury in or around the private part or other parts of the body of the victim.

41. We are not unmindful to note that in every case of rape, there must be physical injury around the private part and other parts of the body of the victim where there is complete subjugation out of fear and the victim found that any resistance against such act of the accused would be futile effort. Absence of injury does not support a case of consensual sex.

42. On the question as to whether the physical relationship between the appellant and the victim no. 1 was consensual or she was forced to commit sexual intercourse, the evidence of victim as well as circumstances leading to such activity are relevant. In Premkumar (supra), the Hon'ble Supreme Court held that physical relationship between the victim and the accused was consensual because of the fact that it appeared in evidence that the victim and the accused had love relationship for long. In the instant case, on the contrary, it is specifically denied by the victim no. 1 that she had love relationship with the appellant. In the F.I.R. also, the informant,

being the uncle of the victim no. 1, stated that the appellant and two other boys used to disturb the victims for quite some time. Therefore, there is absolutely no evidence that the victim had love relationship with the appellant. The medical report of victim no. 1 (Exhibit – 3 to 6), shows that P.W. 8 found non motile spermatozoa and RBC in vaginal swab of the victim. In a scholarly article published in a Canadian Medical Journal in 1963, which is available on the internet- https://pmc.ncbi.nlm.nih.gov/articles/PMC1921890/, it is observed that motile spermatozoa typically remained detectable in vaginal swabs for a short time after intercourse, usually 0.5 to 6 hours, with an average of around 3 hours. While, non-motile spermatozoa persists much longer. They are usually detectable for 7-12 hours (sometimes up to 18-24 hours), but intact form can remain on vaginal swab for up to 3 days in most cases and occasionally up to 6 days.

43. Thus, non-motile spermatozoa which was found in the vaginal swab of victim no. 1 was even 3-6 days old.

44. Learned Advocate on behalf of the appellant submits that, when spermatozoa were found, the appellant ought to have been medically examined for the purpose of identification of spermatozoa or for conducting a DNA test. It

hardly needs to be stated that identification of spermatozoa through a DNA test could only have been carried out if the accused / appellant had consented to submit himself to such DNA test.

45. In the instant case, the accused did not come forward to discharge his reverse burden under Section 29 of the POCSO Act. Therefore, such plea cannot be taken by the learned Advocate for the appellant at the stage of appeal.

46. We are not unmindful to note that Section 53A of the Code of Criminal Procedure, 1873 clearly empowers the Investigating Officer to take steps for examination of person accused of rape by medical practitioner. Section 53A runs as hereunder:-

> ***"53A. Examination of person accused of rape by medical practitioner-***
>
> *(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of*

such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and".

(v) other material particulars in reasonable detail.

(3) The report shall state

precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section."

47. Thus, the above provision under the Cr.P.C. which corresponds with Section 52 BNSS empowers a Police Officer to carry on a critical investigative procedure under Section 53 A of the Cr.P.C. to collect forensic evidence, such as semen, blood and DNA samples and record the marks of injury, if any, within 24 hours of arrest of the accused. This provision is laid down in Cr.P.C. with the primary aim of establishing contact between the accused and the victim, ensuring preservation of evidence and supporting scientific investigation.

48. In the instant case, the Investigating Officer failed to comply with the directions laid down in Section 53 A of the Cr.P.C. and the appellant was not medically examined within 24

hours of his arrest.

49. We also find that though the victim claimed that she was aged about 15 years at the relevant point of time, the radiologist opined after conducting ossification test that the victim was aged between 17 and 19 years. If we consider the margin of errors to two years, then the approximate age of the victim at the relevant point of time was either 17 years or 21 years. It is needless to say that the margin of error shall be taken into consideration on the higher side to the benefit of the appellant.

50. The Investigating Officer did not take any attempts to seize: -

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

(ii) Birth certificate given by a corporation or a municipality authority or a Panchayat; and

(iii) only in absence of (i) and (ii) above, age shall be determined by an ossification test or any other medical age determination test.

51. In the absence of any birth certificate from the school or birth certificate given by the corporation, we have no

other alternative but to rely on the ossification test of the victim, on perusal of which it is very uncertain to note that the victim was a minor on the date of commission of offence.

52. Even assuming that the victim was a major and she was subjected to rape by the appellant and for commission of such offence, she was abducted and forcibly confined in a room, the appellant is liable to be convicted under Section 366 for forcing the victim to illicit intercourse and Section 376 of the I.P.C.

53. In view of the above discussions, we modify the order of conviction and sentence passed against the appellant.

54. The appellant, namely, Birju @ Raja, is convicted under Section 235(1) of the Cr.P.C. for the offence punishable under Section 366 and Section 376 of the I.P.C. In respect of other offences, charged, the appellant is acquitted.

55. For the offence punishable under Section 366 of the I.P.C., the appellant is liable to be sentenced to suffer imprisonment of either description, for a term which may extend to 10 year and shall also be liable to fine.

56. For the offence punishable under Section 376 of the I.P.C., he shall also be punished with imprisonment of either description, which shall not be less than 10 years, but which

may extend to imprisonment for life and shall also be liable to fine.

57. We have considered the fact that the appellant is a young man. No previous offence was proved against him. Undoubtedly, he committed a heinous offence but considering the age of the appellant and the fact that his entire life is left, when he can live a life of a responsible citizen, we propose to pass the following order of sentence: -

(a) The appellant, Birju @ Raja, is sentenced to suffer rigorous imprisonment for a period of 10 years with fine of Rs. 20,000/-, in default to suffer further imprisonment of six months for the offence punishable under Section 366 of the I.P.C.

(b) The appellant is also sentenced to suffer rigorous imprisonment for 10 years and also to pay fine of Rs. 20,000/-, in default to suffer further imprisonment for six months for the offence punishable under Section 376 of the I.P.C.

(c) Substantive sentence of imprisonment shall run concurrently. However, sentence for non-payment of fine shall run separately.

(d) If the fine amount is realized, 80 per cent of the said fine amount be paid to the victim no. 1 as compensation.

58. The appellant is acquitted of the remaining

charges.

59. The appeal is, accordingly, disposed of, on contest.

60. A copy of the order be provided to the appellant free of costs.

61. The lower court records be sent to the concerned court forthwith.

(Bibek Chaudhuri, J)

Chandra Shekhar Jha, J: I agree.

(Chandra Shekhar Jha, J)

uttam/-SKM

AFR/NAFR	AFR
CAV DATE	06.04.2026
Uploading Date	10.04.2026
Transmission Date	10.04.2026