IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1011 of 2022

Arising Out of PS. Case No.-121 Year-2015 Thana- RAMNAGAR District- West Champaran

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DEEPAK KUMAR S/o Raghunath Sah R/o village- Sabuni Chowk, P.S.- Ramnagar, District- West Champaran.

... ... Appellant/s

Versus

The State of Bihar Bihar

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr.Bimlesh Kumar Pandey, Advocate
For the Respondent/s : Smt Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY
CAV JUDGMENT
Date : 29-03-2023

1. The present appeal has been preferred against the judgment of conviction dated 07.02.2022 and order of sentence dated 08.02.2022 passed by learned Additional Sessions Judge, 7th cum Special Judge, Protection of Children from Sexual Offences Act (hereinafter referred to as POCSO), Bettiah, West Champaran in Ramnagar P.S. Case No. 121 of 2015, CIS No. 04/2018 whereby and whereunder the learned trial court has found the appellant guilty for the offences punishable under Sections 366A and 376 of the Indian Penal Code (hereinafter referred to as IPC) and under Section 4 of POCSO Act and sentenced him to undergo ten years imprisonment for the offence punishable under Section 366A of the IPC, to undergo seven years rigorous imprisonment for the offence punishable under Section 376 of the IPC and to undergo ten years rigorous imprisonment along with fine of Rs. 20,000/-

for the offence punishable under Section 4 of POCSO Act and in default of payment of fine he has to suffer two months additional imprisonment. All the sentences were ordered to run concurrently.

2. The name of informant and victim have been concealed in the present judgment to protect their prestige and dignity.

3. A written report submitted to S.H.O., Ramnagar Thana, Bagha, West Champaran under the thumb impression of informant is the basis for registration of First Information Report (hereinafter referred to as FIR).

4. According to written report of informant (PW-9), the occurrence is of 08.06.2015 at about 7:00 PM for which information was given on 10.06.2015 at 17 hours and immediately whereafter FIR was registered. The prosecution case in brief is that victim (daughter of informant/PW-3) aged about 14 years was kidnapped by the appellant with intention of marriage. It is further claimed that appellant was present at his house till morning of 09.06.2015. It is further claimed on the basis of communication held between informant and appellant that informant's daughter would reach at her house. It is further stated that mobile number as mentioned in the FIR was available with daughter of informant (PW-3).

5. On the basis of written report of informant, Ramnagar P.S. Case No. 121 of 2015 was initially registered under Section 366(A) of the IPC and later on Sections 376/34 of IPC and 4 of POCSO Act were added. Routine investigation followed. Statement of witnesses came to be recorded and on completion of investigation appellant along with acquitted accused namely Imran Ali came to be charge sheeted under Sections 366A, 376/34 of the IPC and 4 of POCSO Act. Rest others were not sent up for trial. Thereafter, the learned trial court took cognizance for the said offences against the accused persons and pleased to frame charges for the above stated offences. The charges were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.

6. In order to bring home guilt of the accused persons, prosecution has examined altogether nine witnesses. PW-1 Lal Babu Prasad, PW-2 Subash Gupta, PW-3 (victim), PW-4 Achchelal Sah, PW-5 Dhruv Prasad, PW-6 Afroj Alam, PW-7 Sonal Sah, PW-8 Dr. Rashmi, PW-9 (informant). Defence of the accused persons as gathered from the line of cross examination of prosecution witnesses as well as from statement under Section 313 of the Cr.P.C. is that of total denial. However, they did not enter in the defence.

7. After hearing the parties, the learned trial court was pleased to convict the appellant-accused and to sentence him as indicated in the opening paragraph of this judgment. However, co-accused Imran Ali stood acquitted by the learned trial court by the same judgment.

8. Heard Mr. Bimlesh Kumar Pandey learned counsel appearing for the appellant at sufficient length of time. Following submissions were made on behalf of learned counsel for the appellant:-

Learned counsel for the appellant submitted that the prosecution completely failed to discharge its onus of proving beyond all reasonable doubt that the victim was minor on the date of occurrence. On the said point he further submitted that victim claimed herself that her age is 20 years while adducing evidence as PW-3 on 10.11.2016. The learned trial court has also recorded the age of the victim as 20 years while taking the evidence of PW-3 (victim). The prosecution has not challenged or even suggested the victim (PW-3) on the point of her age as she has claimed herself to be 20 years old. The informant (PW-9) has not stated the date of birth of victim even on specific question being raised. He further submitted that Medical Board suggested the age of the victim between 17-18 years showing variation would not be sufficient to

come to any conclusion about the exact age. On the point of age variation the learned counsel for the appellant relied upon judgment of ***Hasmuddin and others vs. The State of Bihar*** reported in ***PLJR 2018 (3) 62*** and specifically referred para 17 of the said judgment in which it has been mentioned that victim has been found in between 17 years to 19 years, which is subject to variance of two years and the age befitting with the defence case is to be accepted. Learned counsel submitted that in light of said observation, variation in age as opined by medical evidence should go in favour of the appellant. Learned counsel for the appellant further submitted that neither victim nor any witness has given evidence of physical relation of victim with the appellant and no evidence to the effect that appellant had induced the minor girl with intention or knowledge that she will be forced or seduced to illicit intercourse with any other person, hence, there is no question for conviction under Sections 376, 366(A) of the IPC and Section 4 of POCSO Act. Learned counsel of the appellant further submitted that PW-1, PW-2, PW-3(victim), PW-4, PW-5 and PW-7 have not supported the case of the prosecution and they have been declared hostile. PW-3 victim has not supported the charge levelled against the appellant in her deposition. Md. Saheb who was the witness on the written report has not been examined nor

any explanation for his non examination was given by the prosecution side. The Investigating Officer has not been examined which has seriously caused prejudice to the defence since defence has got no proper opportunity to contradict the evidence of witnesses. No evidence has been deposed regarding sexual intercourse. PW-6 is a hearsay witness whose evidence cannot be basis for conviction and PW-9 (informant) who has proved his thumb impression as Ext-1 and he has deposed that he is not aware as to what has been written in the initial version of the story of the prosecution. Learned counsel of the appellant further submitted that in the present case appellant is not guilty for taking away the victim as there is no averment made by the victim in her deposition that appellant is responsible for taking away the victim rather she went to Bettiah with her own volition. To buttress the said submission counsel of the appellant relied upon the case of ***S. Varadarajan vs. State of Madras*** reported in ***AIR 1965, 942***_and referred paragraphs no. 7 and 9 of the said judgment in which at para 7 it has been clarified that *"when the victim willingly accompanied the appellant, law did not caste upon him duty of taking her back to her father's house or even of telling her not to accompany him as she was on the verge of attaining majority and*

she was capable of knowing what was good and what was bad for her."

9. Learned counsel of the appellant further submitted that at para 9 of the said judgment it is clarified that *"there is a distinction between taking and allowing a minor to accompany a person. In order to prove taking away from the keeping of lawful guardian something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of intention of the minor to leave the house of the guardian."*

10. Learned counsel further submitted that the court below has not ascertained the age of the victim as per statutory provision and there is no finding with regard to age of the victim in judgment under challenge. He further submitted that statement under Section 164 of the Cr.P.C. is required to be specifically put to contradict the witnesses and the said statement is not substantive piece of evidence rather it can be used to corroborate and contradict the witnesses and on the said point learned counsel for the appellant relied upon a decision of ***State of Delhi vs Shri Ram Lohia*** reported in ***AIR 1960 SC 490***. He further submitted that presumption under Section 29 of POCSO Act is rebuttable in law and for the same he has relied upon judgment of ***Navin Dhaniram***

Baraiye vs. The State of Maharashtra reported in ***2018 2 AIR (Bom)(R)(Cri) 897*** in which it has been held that *"statutory presumption would stand activated only if prosecution proves the foundational facts and then, even if the statutory provision is activated, the burden of accused is not to rebut the presumption beyond reasonable doubt."*

11. Learned counsel for the appellant further submitted that the prosecution did not place the contents of statement of victim recorded under Section 164 of the Cr.P.C. while cross examining the victim. He further submitted that in the present case audio/video footage with regard to recording of statement of victim has not been done which would be proved fatal for the prosecution in view of Section 26(4) of the POCSO Act.

12. Smt. Abha Singh, learned Additional Public Prosecutor appearing for the State submitted that PW-6, PW-8 and PW-9 have supported the case of the prosecution and they have also supported the age of the victim. She further submitted that at the time of incident victim was minor. She further submitted that PW-9 (informant) clearly stated that victim was kidnapped by the appellant. She further submitted that in her statement recorded under Section 164 of the Cr.P.C. the victim has supported story of prosecution and victim further stated that she had been pressurized

to give contrary statement under Section 164 of the Cr.P.C. but she gave her statement voluntarily under Section 164 of the Cr.P.C. Learned Additional Public Prosecutor further submitted that finding of the trial court is just and due appreciation of the evidence and impugned judgment is based on sound principle of law and hence the impugned judgment does not require any interference.

13. I have perused the impugned judgment, order of trial court and lower court records. I have given my thoughtful consideration to the rival contention made on behalf of the parties as noted above.

14. Based on the scrutiny of evidence adduced at the trial, I find substance in submission made on behalf of the appellant that the prosecution failed to prove, beyond all reasonable doubts, the fact that the victim was minor as on the date of occurrence. The Hon'ble Supreme Court has held in case of ***Jarnail Singh v. State of Haryana*** reported in ***(2013) 7 SCC 263*** that "though Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 have been framed under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as Act 2000) is applicable to determine the age of child in conflict with law, the aforesaid provision should be

the basis for determination of age even of a child who is a victim of crime. The Court remarked that there was hardly any difference insofar as the issue of minority was concerned, between a child in conflict with law, and a child who is a victim of crime. Paragraph 22 and 23 of the said decision in case of ***Jarnail Singh (supra)*** can be usefully referred to for clarity:-

> *"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 aforestated 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:*
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> ***"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 of a child who is a victim of crime. For, in our view, there is hardly any difference insofar 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, PW 6. 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 child concerned 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 child concerned, on the basis of medical opinion."

15. Identical provision is thereunder 94 of Juvenile Justice Care and Protection of Children Act, 2015 which came into effect from 15.01.2016. In the present case, date of occurrence is 08.06.2015. However, in the present case Rule 12 of Rules 2007 was applicable.

16. Apparently, no exercise was carried out by the prosecution to establish that the victim was minor as on the date of occurrence by following the procedure prescribed under the Act in

the light of reasoning put forth by the Supreme Court in case of ***Jarnail Singh (Supra)***. Further, in case of ***Rajak Mohammad vs. State of H.P.*** reported in ***(2018) 9 SCC 248*** the Hon'ble Supreme Court has noted 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. The Supreme Court, taking into account the facts and circumstances of that case opined in the said case that the report of radiological examination left room for ample doubt with regard to the correct age of prosecutrix. In such case, the benefit of aforesaid doubt, naturally, must go in favour of the accused. ***In the case of Sunil v. the State of Haryana*** reported in ***AIR 2010 SC 392,*** the Hon'ble Supreme Court observed that conviction cannot be based on an approximate age of the victim. ***In State of Madhya Pradesh vs. Munna @ Shambhoo Nath*** reported in ***(2016) 1 SCC 696***, the Hon'ble Supreme Court held that the evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.

17. In the present case, the prosecutrix was a literate girl as she has signed everywhere. Therefore, she must have been getting education somewhere. It is not the prosecution case or evidence that prosecutrix did not attend any school. The finding

recorded by the doctor in the medical report which has determined the victim's age to be 17-18 years based on radiological examination and opinion of the dentist is not available in the medical report and said finding in court opinion cannot be treated to be accurate for the purpose of applying the provision of POCSO Act. As a matter of fact, no effort was made by the prosecution to establish the age of the victim in accordance with statutory provision. It is necessary to evaluate, analyze and screen out the evidences of witnesses adduced before the trial court in the light of the offence punishable under Section 366A, 376/34 of the IPC and 4 of POCSO Act.

18. PW-1 Lal Babu Prasad during examination in chief has stated that he did not know about the occurrence and his statement was not recorded by the police and he has been declared hostile. In this way he has not supported the story of prosecution.

19. Evidence of PW-2 Subash Gupta is quite similar with the evidence adduced by the PW-1. In this way he has not supported the case of the prosecution and he has been declared hostile.

20. PW-3 is victim of the present case. She has stated in examination in chief that the occurrence took place one year ago and she went to Bettiah with her own volition and she has stated

that appellant took away her. She has also stated that her statement was recorded in the court and she has identified her signature on the said statement. She has further stated that she did not give her statement in court voluntarily. It is stated by her that she was threatened by daroga and her family member that if she did not give her statement else she would be sent to jail. She has been declared hostile and she has denied the suggestion that she has given her statement in order to save the accused. In the statement under Section 164 of the Cr.P.C. she has stated that appellant took away by act of inducement for the purpose of marriage. She has further stated that Imran took away her alongwith Deepak (appellant) on motorcycle to station and she has stated that Deepak (appellant) took away to hotel and committed wrong against her.

21. From perusal of statement under Section 164 of the Cr.P.C., it is crystal clear that her testimony during adducing evidence before the trial court is totally inconsistent with the statement recorded under Section 164 of the Cr.P.C. The statement of victim before the trial court has not supported story of prosecution and she has been declared hostile.

22. It is well settled law that evidence given in court on oath coupled with opportunity of cross examination to the accused has great sanctity and that is why same is called substantive

evidence. It is well settled by catena of judicial pronouncement that statement under Section 154 Cr.P.C. or under 161 Cr.P.C. or under 164 Cr.P.C. can be used for corroboration and contradiction only. In ***R. Shaji vs. State of Kerala*** reported in ***(2013) 14 SCC 266,*** the Hon'ble Supreme Court said that a proposition to the effect that if statement of a witness is recorded under Section 164 of the Cr.P.C., his evidence in court should be discarded, is not at all warranted. As the defence had no opportunity to cross examine the witness whose statement was recorded under Section 164 Cr.P.C. or under Section 161 Cr.P.C., such statements cannot be treated as substantive evidence.

23. Statement of victim cannot be trustworthy in the light of the fact adduced during evidence before the court is quite inconsistent with the story of prosecution. Her evidence does not inspire confidence and such evidence cannot be trustworthy.

24. Statement of PW-4 Achchelal Sah is quite similar to the statement made by PW-1 and PW-2 and he has also been declared hostile as he has not supported the case of the prosecution.

25. Statement of PW-5 Dhruv Prasad is quite similar to the statement made by PW-1 and PW-2 and he has also not

supported the case of the prosecution and has been declared hostile.

26. PW-6 Afroj Alam has stated that the occurrence took place one year ago at about 7 PM and victim fled away with Deepak (appellant) and she at the relevant time was 14 years of age. He further stated that the appellant told that victim would reach next day but she did not return till today. During cross examination he stated that he could not tell as to who has pointed out regarding the said occurrence as he has not seen the occurrence. From perusal of evidence adduced by PW-6 it is crystal clear that he is not eye witness to the actual occurrence rather he is hearsay witness of the said occurrence.

27. Evidence adduced by PW-7 Sonal Sah is quite similar to the evidence adduced by PW-1 and PW-2. He has also been declared hostile as he did not know the occurrence and his statement has not been recorded by the police.

28. PW-8 Dr. Rashmi has examined the victim. She has opined that no injury was found on her body and her private parts and in her opinion on the basis of pathological and radiological findings, there is no sign of sexual assault and the age of the victim is about 17-18 years. Medical report is marked as Exhibit-X.

29. PW-9 is none else than informant of the present case. He has stated that he is informant of the case and victim is her daughter and at the time of occurrence, the age of the victim was 14 years and occurrence took place four years ago at 7 PM. He has stated that victim went for natural call and from there she was found missing. He has further stated that he came to know that her daughter went away with Deepak appellant. This witness (PW-9) went to the father of Deepak and requested for getting back her daughter. The father of Deepak Kumar (appellant) told that he did not know. Deepak was also present there. It was assured by Deepak (appellant) to bring back the victim at 4 O'clock but appellant was not found at there after 4 O'Clock. He further stated that he went to thana and got the application written which was read over and explained over to him and he has put thumb impression which is marked as Exhibit-1. He has also identified the signature of the victim made under section 164 of the Cr.P.C. which has been marked as Exhibit-2. He has also stated that Imran was also associated with Deepak in the said occurrence and victim was taken away from the motorcycle of Imran. During cross examination he has stated that he did not know as to who has written the application. He has further stated that he did not know as to what is written in the said application. When specific

question was asked regarding the date of birth of his daughter, he has stated that he did not know the date of birth of his daughter but he has stated that her age was 14 years on the date of occurrence. He has also stated that he has not seen the taking away of victim. From perusal of statement of informant (PW-9) upon whose statement the initial version of prosecution story has been set into motion, his version during examination in chief is quite inconsistent with the initial version of story of prosecution on the point that there is no whispering regarding the point of time upon which victim would be returned back to her house by the appellant but during examination in chief he has clearly stated that it was stated by the appellant that the victim would return back till 4 O'Clock. It is also stated by PW-9 (informant) that Deepak Kumar (appellant) went away after 4 O'Clock but during initial version of prosecution story it is stated that the said appellant was available till early morning of 09.06.2015 which is next date after the occurrence which took place on 08.06.2015. In this way the statement of PW-9 which has been adduced during the course of trial is quite inconsistent with the initial version of prosecution story. During cross examination he has clearly stated that he did not know the contents of application and though he has specifically mentioned that the said application was read over and

explained to him and he has put signature after being fully aware of the facts and contents of the said application. In this way the story of prosecution creates doubt surrounded with suspicion regarding the occurrence which has been stated in the initial version of the prosecution story. Even the FIR is treated as correct information for the purpose of prosecution, it is held in the catena of judgment passed by the Hon'ble Supreme Court that FIR is never treated as substantive piece of evidence it can only be used for corroborating and contradicting its maker when he appears in the court as witness as it was held in ***Dharma Rama Bhagare v. State of Maharashtra*** reported in ***(1973) 1 SCC 537***.

30. Now, in the light of evidence adduced by the prosecution it is crystal clear that PW-1, PW-2, PW-3, PW-4, PW-5 and PW-7 have not supported the case of the prosecution and they have been declared hostile. PW-6 and PW-9 (informant) have not been declared hostile but they themselves have stated that they have not seen the actual occurrence. PW-6 has not even pointed out that as to who has told him about the said occurrence and statement of PW-9 is very contradictory that he did not know the contents of the application upon which he has put thumb impression. On the said score the whole prosecution story is full of doubt. The statement of victim which was adduced before the trial

court is quite inconsistent with the statement under Section 164 Cr.P.C. which does not inspire confidence.

31. From perusal of the FIR it is crystal clear that initial version of the prosecution story has been narrated by none else than informant who is father of the victim himself but so far as deposition of PW-9 (informant) is concerned, during cross examination informant has stated that neither he is aware of the author of the FIR nor does he know about the contents of the same then the question arises who has prepared the initial version of FIR which puts question mark on the said version of prosecution. From perusal of record it is crystal clear that out of eight factual witnesses, PW-1, PW-2, PW-3, PW-4, PW-5 and PW-7 (six in numbers) have been declared hostile and so far as PW-9 (informant) and PW-6 are concerned, they have not been declared hostile but they are not eye witness of the actual occurrence. PW-9 who is informant of the case during cross examination he has stated that he did not know who is the author of the written report and he cannot point out what is mentioned in the said written report which makes the whole prosecution story doubtful. One of the witnesses namely Md. Saheb who puts signature on written report has not been examined. Apart from the said discussions made above, story of prosecution creates doubt in light of the fact

that occurrence took place on 08.06.2015 and information regarding the said occurrence was given to concerned police station on 10.06.2015 when place of occurrence is merely 2 km away from the concerned police station. He further submitted that in one column of formal FIR, there is interpolation regarding entries and no plausible explanation has been given regarding the said delay in lodging the FIR and said interpolation.

32. It is worth to note that I.O. has not been examined and contention of learned counsel of the appellant is quite sustainable in the light of the fact that on account of non examination of the investigating officer, the place of occurrence has not been identified and the veracity of the prosecution witnesses has not been tested as defence has not got opportunity to test the veracity of prosecution witnesses in the light of oral statement given before the investigating officer.

33. Learned counsel of the appellant submitted that in light of Section 53 A of the Cr.P.C., the appellant has not been examined and non examination of appellant was certainly fatal to prosecution case.

34. I consider at this juncture useful to refer to Section 53 A of the Cr.P.C., which ordains that 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, as mentioned in the said provision. Section 53 A of the Cr.PC., read as under:-

> **53-A. 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 to 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.]

35. It is true that said provision is not mandatory in character, in court's opinion the said provision enables the prosecution to conduct the examination of victim in a manner as to substantially establish a charge of committing an offence of rape.

36. In this respect, it is necessary to discuss oft quoted judgment of Hon'ble Supreme Court in case of ***Chotkau v. State of Uttar Pradesh*** reported in ***AIR 2022 SC 4688*** whereby it has been observed that failure of the prosecution to subject the appellant to medical examination was certainly fatal to the prosecution's case especially when the ocular evidence was found to be not trustworthy.

37. The contention of appellant in the light of Section 29 of POCSO Act is quite tenable in the light of fact that there was failure on the part of prosecution to establish the essential fundamental facts to attract the provision of POCSO Act.

38. From all counts from the analysis of evidence adduced during trial, contention of learned counsel of the appellant it is crystal clear that offence under Section 366A, 376 of the IPC and 4 of POCSO Act have not been proved beyond reasonable doubt and benefit of doubt goes in favour of the appellant.

39. In the result, in my view, prosecution case suffers from several infirmities, as noticed above, and it was not a fit case where conviction could have been recorded. The learned trial court fell in error of law as well as appreciation of facts of the case in view of settled criminal jurisprudence. Hence, impugned judgment and order of sentence are hereby set aside and this appeal stands allowed. The appellant is in custody. Let him be released forthwith, if he is not warranted in any other case.

(Alok Kumar Pandey, J)

shahzad/-

AFR/NAFR	AFR
CAV DATE	21.03.2023
Uploading Date	29.03.2023
Transmission Date	29.03.2023