



2024:CGHC:35571-DB

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 359 of 2021

Wasim Bhatthi S/o. Najiruddin Aged About 31 Years R/o. Banglapara
Tumgaon, Police Station Tumgaon, District Mahasamund Chhattisgarh

---- Appellant

versus

State Of Chhattisgarh Through Police Station Tumgaon, District
Mahasamund, Chhattisgarh

---- Respondent

CRA No. 590 of 2021

1 - Devnath @ Furrus Sahu S/o Sukhram Sahu Aged About 35 Years

2 - Sonal Pal @ Utkarsh S/o Jitendra Pal Aged About 25 Years

Both are resident Of Bunglapara, Tumgaon, Police Station Tumgaon,
District Mahasamund Chhattisgarh.

----Appellants

Versus

State Of Chhattisgarh Through Station House Officer, Police Station
Tumgaon, District Mahasamund Chhattisgarh

---- Respondent

CRA No. 697 of 2021

Jeevanlal Tandon Son Of Rajkumar Aged About 22 Years Resident Of
Ward No. 1, Tumgaon, Police Station- Tumgaon, District -
Mahasamund (Chhattisgarh)

----Appellant

Versus

State Of Chhattisgarh Through Station House Officer, Police Station

Tumgaon, District - Mahasamund (Chhattisgarh)

---- Respondent

CRA No. 818 of 2021

Parvati Poyam W/o Jilal Poyam Aged About 35 Years R/o Village-Kilepal, Police Station-Kodemar, District-Bastar, Chhattisgarh, At Present R/o Patelpara, Sukma, Chhattisgarh

----Appellant

Versus

State Of Chhattisgarh Through Station House Officer, Police Station, Tumgaon, District-Mahasamund, Chhattisgarh, District : Mahasamund, Chhattisgarh

---- Respondent

For Appellant	:	Mr.Pragalbh Sharma, Advocate in CRA No.359/2021
For Appellants	:	Mr.J.K.Saxena, Advocate in CRA Nos.590/2021 and 818/2021
For Appellant	:	Mr.Bharat Rajput, Advocate in CRA No.697/2021
For Respondent/State	:	Mr.R.S.Marhas, Additional Advocate General

Hon'ble Shri Justice Ramesh Sinha, Chief Justice

Hon'ble Shri Justice Bibhu Datta Guru, Judge.

Judgment on Board

Per Ramesh Sinha, CJ

11/09/2024

1. Since the aforesaid four criminal appeals have been filed against the impugned judgment dated 19.02.2021 passed by the Special Judge (POCSO Act, 2012), Mahasamund in Special Criminal Case No.H-09-2019, they were clubbed & heard together and being disposed of by this common judgment.

2. Appellants-Wasim Bhathi (A1), Devnath @ Furrus Sahu (A2), Sonal Pal (A3), Jeevanlal Tandon (A4) and Parvati Poyam (A5) have preferred these four criminal appeals under Section 374(2) of the CrPC questioning the impugned judgment dated 19.02.2021 passed by the Special Judge (POCSO Act), 2012, Mahasamund in Special Criminal Case No.H-09-2019, by which the Special Judge has convicted appellants-Wasim Bhathi, Devnath @ Furrus Sahu, Sonal Pal and Jeevanlal Tandon for offence under Sections 363/34, 366/34 of the IPC, Section 6 of the POCSO Act and Section 506 PartII/34 of the IPC and sentenced to undergo RI for three years and fine of Rs.1000/-, in default of payment of fine to further undergo RI for one month, RI for five years and fine of Rs.1000/-, in default of payment of fine to further undergo RI for one month, RI for twenty years and fine of Rs.25000/-, in default of payment of fine to further undergo RI for three months and RI for two years and fine of Rs.3000/-, in default of payment of fine to further undergo RI for one month. The Special Judge has also convicted appellant-Parvati Poyam for offence under Sections 363/34 and 366/34 of the IPC and sentenced to undergo RI for three years and fine of Rs.1000/-, in default of payment of fine to further undergo RI for one month and RI for five years and fine of Rs.3000/-, in default of payment of fine to further undergo RI for two months.
3. The prosecution story, in brief, is that the prosecutrix's father made a report at Tumgaon Police Station stating that on

24.04.2019, around 6:00 P.M., his daughter/prosecutrix left home to go to the shop, but did not return. Despite searching, her whereabouts could not be found. The complainant's minor daughter was allegedly lured and taken away by an unknown person. On the basis of report lodged by father of the prosecutrix the police of Police Station Tumgaon registered the FIR in Crime No.86/2019 for offence under Section 363 of the IPC vide Ex.P-6. Spot map was prepared by the investigating officer vide Ex.P-7. Investigating officer also prepared spot map vide Exs.P-8 and P-9. Progress card of the prosecutrix in which date of birth was mentioned as 12.01.2004 was seized vide Ex.P-10. Patwari also prepared spot map vide Exs.P-12 and P-12A. During the investigation, on 27.04.2019, the prosecutrix was recovered from the possession of appellant Parvati Poyam in Bacheli vide Ex.P-19. Consent for medical examination was obtained from the prosecutrix vide Ex.P-20. MLC of the prosecutrix was conducted by Dr.Anubha Jyotsna (PW-6) vide Ex.P-17 and found following injuries

- i. Labia majora slightly swelled, pain present while pelvic examination.
- ii. Hymen torn.
- iii. No bleeding pelvic; white discharge present.
- iv. No any injury present.

Two vaginal smear slide and public hair sample and a pink color salwar stained marked with blue pen is sent for chemical

analysis. Opinion and confirmation can be done after the deep analysis report. Sexual intercourse has been taken place.

4. Statement of the prosecutrix was recorded under Section 164 CrPC before the Judicial Magistrate First Class, Mahasamund vide Ex.P-21 and thereafter Section 376/34 and Sections 4 & 6 of the POCSO Act was added. Test identification parade was conducted by the Executive Magistrate / Naib Tahsildar, in which the prosecutrix has identified appellants Devnath Sahu, Sonal Pal and Wasim Bhatthi vide Ex.P-22. Dakhil kharij register of the prosecutrix in which her date of birth was mentioned as 12.01.04 was seized vide Ex.P-24. Investigating officer also prepared the spot map vide Ex.P-29. Appellant Parvati Poyam was arrested on 29.04.2019 vide arrest memo Ex.P-30. Appellant Devnath Sahu was arrested on 29.04.19 vide arrest memo Ex.P-31. Appellant Sonal Pal was arrested on 01.05.2019 vide arrest memo Ex.P-34. Appellant Wasim Bhatthi was arrested on 01.05.19 vide arrest memo Ex.P-35. Appellant Jeevanlal Tandon was arrested on 01.05.19 vide arrest memo Ex.P-36. Copy of dakhil kharij register in which date of birth of the prosecutrix was mentioned as 12.01.2004 was seized vide Articles A-1 to A-3. Vaginal slides, public hair, salwar and underwear of appellant Devnath Sahu were sent FSL for chemical examination and as per FSL report (Ex.P-56), semen stains and human sperm were found in Article 'D' i.e. underwear seized from appellant Devnath Sahu.

5. After completion of investigation, the charge-sheet was filed before the competent jurisdictional Criminal Court for trial in accordance with law.
6. The trial court has framed charges against the appellants. The appellants abjured their guilt and pleaded innocence.
7. In order to establish the charge against the appellants, the prosecution examined as many as 15 witnesses. The statements of the appellants under Section 313 of CrPC were also recorded in which they denied the material appearing against them and stated that they are innocent and they have been falsely implicated in the case. After appreciation of evidence available on record, the learned trial Court has convicted the accused/appellants and sentenced them as mentioned in para 2 of the judgment. Hence, these appeals.
8. Mr.Pragalbha Sharma, learned counsel for the appellant in CRA No.359/2021 would submit that the learned trial Court while passing the impugned judgment has failed to appreciate that the the prosecution has not proved its case beyond all reasonable doubts. From bare perusal of the statement of the prosecutrix under Sections 161 and 164 CrPC and the Court statement, it appears that she was a consenting party. He would also submit that substantial and material irregularities have been committed by the police while conducting the test identification parade conducted by the police authorities is suspicious and conviction

cannot be based upon the faulty test identification parade. Para 62 of the evidence of the prosecutrix itself shows that she had seen accused Wasim and Sonal in the Police Station itself and no test identification parade was conducted before arrest of the appellant. He would also submit that learned trial Court has failed to appreciate that in the statement of the prosecutrix (Ex.D-1) and supplementary statement (Ex.D-2) she neither named the appellant nor disclosed the description of the appellant and medical report of the prosecutrix does not support the allegations of forcible sexual intercourse and merely swelling on the private part will not lead to a presumption of rape. As such, the appeal deserves to be allowed and the impugned judgment so far as it relates to the present appellant deserves to be set aside.

9. Mr.J.K.Saxena, learned counsel for the appellants in CRA Nos.590/2021 and 818/2021 would submit that the learned trial Court has failed to appreciate that the actual age of the prosecutrix has not been proved by the prosecution. The person who has entered the date of birth in dakhil kharij register of the prosecutrix has not been examined before the trial Court. He would further submit that the trial Court has failed to appreciate that according to Court's statement of the prosecutrix, there was darkness in the place of incident and after some time she became unconscious, therefore, it cannot be said that the present appellants have committed rape with the prosecutrix. He would also submit that the findings given by the learned trial Court

against the appellants are perverse and contrary to evidence on records and the same is liable to be set aside.

10. Mr. Bharat Rajput, learned counsel for the appellant in CRA No.697/2021 would submit that the trial Court has failed to appreciate that there was no semen found in the clothes of the prosecutrix. The learned trial Court has failed to appreciate that there are material contradiction and omission in the Court statement and case diary statement of the prosecutrix, which cannot be relied upon. He would also submit that the learned trial Court has failed to observe that the prosecution has completely failed to prove its case beyond all reasonable doubt, hence, the impugned conviction and sentence is liable to be set aside. As such, the appeal deserves to be allowed and the impugned judgment so far as it relates to the present appellants deserves to be set aside.

11. On the other hand, learned counsel for the State opposes the submissions made by the learned counsel for the appellant and submits that the prosecutrix was minor and below 18 years of age at the time of incident, which is proved by the School dakhil-kharij register (Article A-1) which contains the date of birth of the prosecutrix as 12.01.2004. The dakhil-kharij register is admissible piece of evidence to determine the age of the prosecutrix. He further submits that the trial Court has rightly convicted and

sentenced the appellants, in which no interference is called for by this Court.

12. We have heard the learned counsel for the parties and perused the record with utmost circumspection.

13. In order to consider the age of the prosecutrix, we have examined the evidence produced by the prosecution. The prosecution relied upon the School dakhil-kharij register (Article A-1) which is sought to be proved by PW-10 Karuna Thakur, Headmistress of Government Primary School, Bhatapara, Tumgaon, Mahasamund. Karuna Thakur (PW-10) has stated in para 1 of her statement that he has been posted as In-Charge Head Teacher at Government Primary School, Bhatapara, Tumgaon since 2005. On 06.05.2019, she was served a notice by Tumgaon Police Station to produce dakhil kharij register related to date of birth of the prosecutrix in connection with Crime No. 86/2019. The notice is Ex.P-23, which bears her signature. She has stated in para 2 of her statement that in compliance with the notice, she produced dakhil kharij register (Article A-1) and date of birth affidavit register (Article A-2) before the police. They were seized and she received a certified copy of the relevant page and a receipt (Exs. P-24 and P-25), both of which bear her signature. In para 3 of her cross-examination, she has admitted that the entries in Article A-1 and Article A-2 are not in her handwriting, as she was not posted in that school in 2004. The entries in Article A-1 and Article A-2

are in the handwriting of the then posted teacher, Lakshmi Sahu, and teacher Basant Sharma. In para 4 of her evidence, she has admitted that in Articles A-1 and A-2 it is not mentioned as to who came for admission and in Articles A-1 and A-2 it is not mentioned as to who told the date of birth and on the basis of which document it was recorded.

14. The prosecutrix in her 164 CrPC statement (Ex.P-21) has stated that the incident happened 6 days ago. She had gone out to buy eggs from a shop around 9 P.M. On the way, two boys from her village, Banglapara, one of whom was a Sahu boy, caught hold of her hand and took her away forcibly. They called another person on the phone and asked him to come. Then, both of them raped her. After some time, two more boys came on a motorcycle with samosas. They threatened her to eat samosas and when she ate samosas, she started feeling dizzy. Then, two boys who came later took turns raping her. In para 2 of her statement, she has stated that three boys who raped her left her at the scene and went away. One of the boys, who walked with a slight limp, took her to her friend Manisha's house in Tumgaon on his motorcycle around 1 A.M. I told Manisha and her parents about the rape, but Manisha's parents scolded her and Manisha also denied knowing her.

15. In para 3 of her evidence, she has stated that the boy who dropped her at Manisha's house threatened her saying they

would kill her and her family if she went home. He took her to his house, where his mother told her to lie and say she was their relative, but she don't remember what she said. The boy raped her again at his house. She wanted to go to her sister's house in Bastar, so she told the boy she would leave. He dropped her at Mahasamund bus stand around 5 A.M. and put her on a bus. She went to Raipur, where she met a woman at the bus stand who was also from Bastar. She told her she was going to her sister's house and she bought her a ticket and took her to Dantewada. The next morning, after breakfast, the woman who had helped her started drinking and fell asleep. She left her house but forgot the way, so she started crying. Then, another woman found her and took her to Dantewada Police Station. In para 5 she has stated that currently, four boys from Banglapara who raped her keep threatening her saying they will harm her and her family if she say anything against them.

16. The prosecutrix has been examined as PW-8 before the trial Court. She has stated in para 2 of her evidence that the incident happened about three months ago. Around 6:30 P.M., she was going to a shop to buy eggs from home. Then, these two boys came (witness pointed to Devnath and Sonal Pal present in the court) and overtook her on a motorcycle. They turned back and caught her. Both of them took her to a bush near Buta and asked her to remove her clothes. They removed her clothes and asked her wear the clothes they had with them. They took her behind

Dr. Shankar's house. They called two other persons who are present in the court. They were brought samosas. In para 4 of her evidence, she has stated that the fat person (witness pointed towards accused Wasim) took out a knife and asked her to eat samosas, which made her dizzy. Then, all four accused raped her one by one. Her clothes got wet, so she wore the clothes that her nephew had with her. The four accused discussed among themselves and asked her if I knew anyone in the village. She said she knew Manisha, the daughter of her father's friend. Then, Devnath took her to Manisha's house on a motorcycle, but Manisha and her family denied knowing her. He took her to his house and told her to say that she was an orphan from the Sahu community and wanted to marry him. Accused Devnath's parents asked her if she wanted to marry him and when he gave her a threatening look, she agreed. The next morning, he took her to Mahasamund bus stand and put her on a bus to Raipur.

17. In para 7 she has stated that when she got off at Raipur bus stand, she met accused Parvati, who asked her where she was going. She told her what the accused had told her to say that she was going to her sister's house in Asana, Bastar. Accused Parvati took her to Dantewada and at 2 A.M., she took her to the market, which was closed. She left her there and the next morning, she took her to her sister's house. She left her with her mother at the hospital and went to drink alcohol. In para 9 of her evidence, she has stated that when she went out to look for

Parvati, she couldn't find her and she started crying. A vegetable vendor saw her and asked why she was crying. She told her that Parvati had sold her for two lakhs and was sleeping after drinking alcohol. The vendor took her to her house and let her sleep. Later, she took her to Bacheli Police Station. She had a mobile phone with her brother's number, which she gave to the police. They called her brother and then Tumgaon Police took her back. The police made a recovery memo (Ex.P-19) and took her into custody from Parvati Poyam. In para 44 of her cross-examination, it has been stated that out of two accused, one whose legs were fine had held her mouth. Those people had tied her hands with a dupatta. She has admitted that she had not told anyone before this Court about gagging and tying her hands. She voluntarily said that she had told the police but they had taken money so they did not write it. She did not tell this in the statement in the Magistrate Court because she was not well and was feeling dizzy. She had told this to the Judge then he had said that tell as much as you want to tell now and tell more later. In para 45 she has stated that she had told the Magistrate Court about the accused threatening her with a knife, if it is not written, she cannot tell the reason. She has denied that she is not telling the truth today.

18. Father of the prosecutrix (PW-4) has stated that he recognized only accused Wasim Bhatthi among the accused because he is from his village. The said witness has stated in para 23 that the prosecutrix did not know the said accused Wasim before and had

never seen him. The mother of the prosecutrix (PW-7) has stated that she recognized all the four accused because they were from Tumgaon and that she recognized accused Parvati after the incident.

19. Investigating Officer Ransay Miri (PW-13) has stated in para 44 of his cross-examination that accused Devnath was called to Tumgaon Police Station on the basis of being suspect, where the prosecutrix identified Devnath after he was brought. In para 45, it is accepted that identification proceedings were not conducted at the time of the report. The prosecutrix has not mentioned accused Devnath @ Furr or any lame person in the police statement. The said witness has stated that accused Devnath is called Furr in the colloquial language, this was confirmed during the investigation. In para 49 he has denied that identification proceedings were conducted belatedly to fulfil the deficiency by sending accused Devnath to jail on the basis of mere suspicion. The said witness has stated in para 62 that when the prosecutrix was brought to the police station, she saw accused Wasim and Sonal in the police station and pointed towards them. In para 72, it has been stated that the accused were arrested on the basis of description given by the prosecutrix. In para 73, it has been stated that accused Wasim and Sonal were arrested on the basis of the prosecutrix's indication that they were a fat and a thin boy. In para 76, it has been admitted that before the said arrest, the identification proceedings were not done. In para 77, it has been

admitted that when the prosecutrix saw and pointed towards the accused, at that time all the four accused Devnath, Sonal, Wasim and Jeevan were present in the police station.

20. In the Indian society refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in **Rameshwar v. The State of Rajasthan (AIR 1952 SC 54)** were:

“The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...”.

21. Crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial

Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. This position was highlighted in **State of Punjab v. Gurmeet Singh (1996 (2) SCC 384)**.

22. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short 'Evidence Act') similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must

necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence.

23. The Supreme Court in the matter of **Rai Sandeep @ Deenu v. State of NCT of Delhi, 2012 (8) SCC 21** held as under:-

“In our considered opinion, the ‘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 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 everyone 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 similar such tests to be applied, it can 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."

24. The Supreme Court in the matter of **Nawabuddin v. State of Uttarakhand** (CRIMINAL APPEAL NO.144 OF 2022), decided on 8.2.2022 has held as under:-

"10. Keeping in mind the aforesaid objects and to achieve what has been provided under Article 15 and

39 of the Constitution to protect children from the offences of sexual assault, sexual harassment, the POCSO Act, 2012 has been enacted. Any act of sexual assault or sexual harassment to the children should be viewed very seriously and all such offences of sexual assault, sexual harassment on the children have to be dealt with in a stringent manner and no leniency should be shown to a person who has committed the offence under the POCSO Act. By awarding a suitable punishment commensurate with the act of sexual assault, sexual harassment, a message must be conveyed to the society at large that, if anybody commits any offence under the POCSO Act of sexual assault, sexual harassment or use of children for pornographic purposes they shall be punished suitably and no leniency shall be shown to them. Cases of sexual assault or sexual harassment on the children are instances of perverse lust for sex where even innocent children are not spared in pursuit of such debased sexual pleasure.

Children are precious human resources of our country; they are the country's future. The hope of tomorrow rests on them. But unfortunately, in our country, a girl child is in a very vulnerable position. There are different modes of her exploitation, including sexual assault and/or sexual abuse. In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas. As observed and held by this Court in the case of **State of Rajasthan v. Om Prakash, (2002) 5 SCC 745**, children need

special care and protection and, in such cases, responsibility on the shoulders of the Courts is more onerous so as to provide proper legal protection to these children. In the case of **Nipun Saxena v. Union of India, (2019) 2 SCC 703**, it is observed by this Court that a minor who is subjected to sexual abuse needs to be protected even more than a major victim because a major victim being an adult may still be able to withstand the social ostracization and mental harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Therefore, the child needs extra protection. Therefore, no leniency can be shown to an accused who has committed the offences under the POCSO Act, 2012 and particularly when the same is proved by adequate evidence before a court of law.”

25. Section 34 the IPC reads as under:-

“34. Acts done by several persons in furtherance of common intention.-When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

26. From perusal of Section 34 of the IPC, it appears that when a criminal act is done by several persons with a common intention each of the person is liable for that act as it has been done by him alone. Therefore, where participation of the accused in a crime is proved and the common intention is also established,

Section 34 IPC come into play. To attract Section 34 IPC, it is not necessary that there must be a prior conspiracy or premeditated mind. The common intention can be formed even in the course of the incident i.e. during the occurrence of the crime.

27. The intendment of Section 34 IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention *qua* its existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offense.
28. The word "furtherance" indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion. Here may be cases where all acts, in general, would not come under the purview of Section 34 IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offense. Such an intention is meant to assist, encourage, promote

and facilitate the commission of a crime with the requisite knowledge as aforesaid.

29. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 IPC. A mere common intention *per se* may not attract Section 34 IPC, sans an action in furtherance. Further, the fact that all accused charged with an offence read with Section 34 IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the Court.

30. As per the statement of the prosecutrix before the trial Court (PW-8), the incident happened about three months ago. Around 6:30 P.M., she was going to a shop to buy eggs from home. Then, these two boys came (witness pointed to Devnath and Sonal Pal present in the court) and overtook her on a motorcycle. They turned back and caught her. Both of them took her to a bush near Buta and asked her to remove her clothes. They removed her clothes and asked her wear the clothes they had with them. They took her behind Dr. Shankar's house. They called two other

persons who are present in the court. They were brought samosas. In para 4 of her evidence, she has stated that the fat person (witness pointed towards accused Wasim) took out a knife and asked her to eat samosas, which made her dizzy. Then, all four accused raped her one by one. Her clothes got wet, so she wore the clothes that her nephew had with her. The four accused discussed among themselves and asked her if I knew anyone in the village. She said she knew Manisha, the daughter of her father's friend. Then, Devnath took her to Manisha's house on a motorcycle, but Manisha and her family denied knowing her. He took her to his house and told her to say that she was an orphan from the Sahu community and wanted to marry him. Accused Devnath's parents asked her if she wanted to marry him and when he gave her a threatening look, she agreed. The next morning, he took her to Mahasamund bus stand and put her on a bus to Raipur. She has further stated that when she got off at Raipur bus stand, she met accused Parvati, who asked her where she was going. She told her what the accused had told her to say that she was going to her sister's house in Asana, Bastar. Accused Parvati took her to Dantewada and at 2 A.M., she took her to the market, which was closed. She left her there and the next morning, she took her to her sister's house. She left her with her mother at the hospital and went to drink alcohol. In para 9 of her evidence, she has stated that when she went out to look for Parvati, she couldn't find her and she started crying. A vegetable

vendor saw her and asked why she was crying. She told her that Parvati had sold her for two lakhs and was sleeping after drinking alcohol. The vendor took her to her house and let her sleep. Later, she took her to Bacheli Police Station. She had a mobile phone with her brother's number, which she gave to the police. They called her brother and then Tumgaon Police took her back. The police made a recovery memo (Ex.P-19) and took her into custody from Parvati Poyam.

31. Test identification parade was conducted by the Executive Magistrate / Naib Tahsildar, in which the prosecutrix has identified appellants Devnath Sahu, Sonal Pal and Wasim Bhatthi vide Ex.P-22.

32. The Supreme Court in the matter of **Malkhansingh and others v. State of M.P.** reported in **(2003) 5 SCC 746** held as under:-

“7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to

generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (Emphasis supplied).”

33. Considering the evidence of the prosecutrix (PW-8) who has specifically stated the role of each of the appellants, evidence of her father (PW-4) and mother (PW-7), evidence of Headmistress Karuna Thakur (PW-9), further considering the FSL report (Ex.P-56) in which semen stains and human sperm were found in Article ‘D’ i.e. underwear seized from appellant Devnath Sahu, also considering the evidence of Dr. Anubha Jyotsna (PW-6) and test identification parade conducted by the Executive Magistrate /

Naib Tahsildar, in which the prosecutrix has identified appellants Devnath Sahu, Sonal Pal and Wasim Bhati vide Ex.P-22, the material available on record and the law laid down by the Supreme Court in the above-stated judgments, we are of the considered opinion that the learned Special Judge has rightly convicted appellants- appellants-Wasim Bhati, Devnath @ Furrusahu, Sonal Pal and Jeevanlal Tandon for offence under Section 363/34, 366-A/34 of the IPC, Section 6 of the POCSO Act and Section 506 Part-II/34 of the IPC. We do not find any illegality and irregularity in the findings recorded by the Special Judge.

34.In the result, this Court comes to the conclusion that the prosecution has succeeded in proving its case beyond all reasonable doubts against appellants-Wasim Bhati, Devnath @ Furrusahu, Sonal Pal and Jeevanlal Tandon. The conviction and sentences as awarded by the Special Judge to them is hereby upheld.

35.So far as appellant-Parvati Poyam is concerned, she has been convicted only for offence under Sections 363/34 and 366/34 of the IPC. She is in jail since 29.04.2019 and was granted bail by this Court vide order dated 24.11.2022, thereby she has completed the jail sentence of 3 years 6 months and 26 days. Considering the evidence of the prosecutrix (PW-8) and material available on record against her, her conviction under Sections 363/34 and 366/34 of the IPC is hereby maintained and her

sentence under Section 363/34 of the IPC is also maintained, however, her sentence under Section 366/34 of the IPC is altered/modified to the sentence already undergone by her i.e. 3 years 6 months and 26 days.

36. Accordingly, Criminal Appeal No.359/2021 filed on behalf of appellant-Wasim Bhati, Criminal Appeal No.590/2021 filed on behalf of appellants-Devnath @ Furru Sahu and Sonal Pal @ Utkarsh, Criminal Appeal No.697/2021 filed on behalf of appellant -Jeevanlal Tandon are **dismissed**.

37. However, Criminal Appeal No.818/2021 filed on behalf of appellant-Parvati Poyam is **partly allowed** to the extent indicated herein-above. She is on bail. She is not required to surrender. Her bail bonds are cancelled and sureties stand discharged.

38. It is stated at the Bar that appellants-Wasim Bhati, Devnath @ Furru Sahu, Sonal Pal and Jeevanlal Tandon are in jail. They shall serve out the sentence as ordered by the trial Court.

39. The Registry is directed to transmit the certified copy of this judgment along with the record to the trial Court concerned for necessary information and compliance.

Sd/-

(Bibhu Datta Guru)
Judge

Sd/-

(Ramesh Sinha)
Chief Justice