

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.670 of 2021

Arising Out of PS. Case No.-446 Year-2019 Thana- CHAPRA TOWN District- Saran

Sonu @ Tarjan @ Saddam Hussain, Son of Niyamat Mian @ Niyamat
Hussain, R/O Mohalla- Rauja, P.S.- Chapra Town, District- Saran at Chapra
... .. Appellant

Versus

1. The State of Bihar
 2. Ms. X C/O Manoj Kumar Soni at Rauja West Ward No. 44, P.S- Town
Chapra, Distt.- Saran at Chapra.
... .. Respondents
-
-

with

CRIMINAL APPEAL (DB) No. 765 of 2021

Arising Out of PS. Case No.-446 Year-2019 Thana- CHAPRA TOWN District- Saran

Aatish Kumar @ Atish Kumar Sharma @ Atish Kumar, Son of Gorakh
Sharma, R/O Village - Rauja West, P.S.- Town, District - Saran at Chapra.
... .. Appellant

Versus

1. The State of Bihar
 2. Ms. X C/O Manoj Kumar Soni At Rauja West Ward No. 44, P.S- Town
Chapra, Distt.- Saran at Chapra.
... .. Respondents
-
-

with

CRIMINAL APPEAL (DB) No. 221 of 2022

Arising Out of PS. Case No.-446 Year-2019 Thana- CHAPRA TOWN District- Saran

Ravi Raj Sharma @ Dhyani Sharma @ Dhyani, Son of Mahesh Sharma,
Resident of village - Rauza, P.S.- Chapra Town, District - Saran.
... .. Appellant

Versus

The State of Bihar Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 670 of 2021)

For the Appellant : Mr. Chandra Mohan Jha, Advocate
For the State : Mr. Dilip Kumar Sinha, Addl.PP
For the Informant : Mr. Manish Chandra Gandhi, Advocate
Mr. Himanshu Ranjan, Advocate

(In CRIMINAL APPEAL (DB) No. 765 of 2021)

For the Appellant : Mr. Chandra Mohan Jha, Advocate
For the State : Mr. Abhimanyu Sharma, Addl.PP
For the Informant : Mr. Manish Chandra Gandhi, Advocate
Mr. Himanshu Ranjan, Advocate

(In CRIMINAL APPEAL (DB) No. 221 of 2022)

For the Appellant : Ms. Surya Nilambari, Amicus Curiae
For the State : Ms. Shashi Bala Verma, Addl.PP
For the Informant : Mr. Manish Chandra Gandhi, Advocate
Mr. Himanshu Ranjan, Advocate



**CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE ASHOK KUMAR PANDEY
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)**

Date : 05-03-2025

These appeals have been preferred for setting aside the judgment of conviction dated 11.08.2021 (hereinafter referred to as the 'impugned judgment') and the order of sentence dated 17.08.2021 (hereinafter referred to as the 'impugned order') passed by learned Exclusive Special Judge (POCSO), Saran at Chapra (hereinafter referred to as the 'learned trial court') in Sessions Trial (POCSO) No. 86 of 2019 arising out of Chapra Town P.S. Case No. 446 of 2019.

2. By the impugned judgment, the appellants have been convicted for the offences punishable under Section 376D Indian Penal Code (in short 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act' or the 'Act of 2012') and by the impugned order, the appellants have been ordered to undergo rigorous imprisonment for twenty (20) years with a fine of Rs.20,000/- and in default of payment of fine, they have to further undergo simple imprisonment for three months.

Prosecution Case

3. The prosecution story is based on the *fardebayan* of the victim (PW-4) recorded by S.I. Kumari Vibha Rani of Saran Mahila P.S.



on 10.08.2019 at 21:10 hours at Patna Medical College and Hospital, (in short 'P.M.C.H. '), Patna. In her *fardebayan*, she has stated that on 10.08.2019 at about 12:00 Noon when she was returning from her school after appearing in the examination, on the way, (1) Dhyani Sharma, (2) Sonu @ Tarzan and (3) Atish Kumar forcibly grabbed her, pressed her mouth and took her to the office of Gyani Sharma, Ward Commissioner where firstly, Dhyani Sharma raped her, thereafter Sonu @ Tarzan raped her and when she started bleeding then Atish Kumar raped her as a result of which when she started bleeding profusely, then all the accused persons left her there. Thereafter, she somehow managed to reach her house where she told about the incident to her mother then her family members took her to Sadar Hospital, Chapra where she was referred to another hospital for better treatment.

4. On the basis of this *fardebayan*, Chapra Town P.S. Case No. 446 of 2019 dated 10.08.2019 was registered under Sections 376(D)/34 IPC and Sections 4, 5, 5(g) and 6 of the POCSO Act. Thereafter, Sessions Trial (POCSO) No. 86 of 2019 was registered in the Sessions Court. After investigation, Police submitted chargesheet bearing No. 660 of 2019 dated 30.09.2019 against three accused, namely, (1) Ravi Raj Sharma @ Dhyani Sharma, (2) Sonu @ Tarzan and (3) Atish Kumar under Section 376(D) IPC and Sections 4, 5, 5(g) and 6 of the POCSO Act. On the basis of this chargesheet, learned Special Judge, POCSO Act took cognizance of the offences under Section 376(D) IPC and Section 6 of the POCSO Act vide order dated 23.10.2019. On



19.11.2019, charges were framed under Section 376(D) IPC and Section 6 of the POCSO Act against all the three accused persons. Charges were read over and explained to the appellants in Hindi to which they pleaded not guilty and claimed to be tried.

5. In course of trial, the prosecution examined as many as Seven witnesses and exhibited several documents to prove the prosecution case. The defence also exhibited some documents. The list of the prosecution witnesses and the exhibits are being shown hereunder in tabular form:-

List of Prosecution Witnesses

PW-1	Sahdev Sah
PW-2	Mother of the Victim
PW-3	Father of the Victim
PW-4	Victim
PW-5	Kumari Vibha Rani (I.O.)
PW-6	Dr. Chitra Sinha
PW-7	Dr. Anupam

List of Exhibits on behalf of Prosecution

Exhibit '1'	Signature of the mother of the victim on the Fardbeyan
Exhibit '1/1'	Signature of the mother of the victim on the Seizure List
Exhibit '2'	Signature of the father of the victim on the Seizure List
Exhibit '3'	Signature of the victim on the Fardbeyan
Exhibit '4'	Signature of S.I. Vibha Kumari on the Seizure List
Exhibit '4/1'	Signature of S.I. Rajesh Kumar on the Seizure List
Exhibit '4/2'	Signature of S.I. Rajesh Kumar on the Seizure List
Exhibit '5'	Signature of Vibha Rani on the Fardbeyan
Exhibit '5/1'	Writing and Signature of SHO on the Fardbeyan



Exhibit '6'	Formal FIR is in the writing of Police Station writer
Exhibit '7'	Signature and Writing of Dr. Chitra Sinha on the Medical Report
Exhibit '8'	F.S.L. Report

List of Defence Witnesses

DW-1	Mohd. Yusuf
DW-2	Umesh Kumar Mishra
DW-3	Jitan Sharma

List of Exhibits on behalf of Defence

Exhibit 'A'	Matric Certificate
Exhibit 'A1'	Intermediate Certificate
Exhibit 'A2'	B.Sc. Part III Marksheet
Exhibit 'A3'	B.Sc. Part II Marksheet
Exhibit 'A4'	B.Sc. Part I Marksheet

Findings of Learned Trial Court

6. Learned trial court after analysing the evidences available on the record found that prosecution has been able to prove that the victim had been raped by the accused persons on 10.08.2019. Learned trial court found that the evidence of PW-4 finds corroboration from the medical evidence as to rape. PW-1, PW-2 and PW-3 are the witnesses to the event subsequent to the incident. Learned trial court opined that the victim (PW-4) is a sterling witness. Learned trial court found that the testimony of the victim is consistently corroborated by mother of the victim (PW-2) who has stated that soon after the occurrence, the victim disclosed her about the occurrence. Learned trial court found that there is no delay in



lodging of the FIR. Learned trial court observed that the contradictions pointed out by the defence are quite natural, minor and do not go to the root of the case.

7. Learned trial court also took note of the defence evidence. Learned trial court found that DW-1 who deposed in favour of the accused, namely, Saddam Hussain happens to be his relative. Learned trial court further found that no substantial material has come out in the defence evidence which has potential to falsify the prosecution case.

8. Therefore, learned trial court after close scrutiny of the evidences available on the record came to a conclusion that the prosecution has been able to prove its case against the appellants, namely, Dhyani Sharma, Aatish Kumar and Sonu @ Tarjan @ Saddam Hussain beyond all reasonable doubts and held the appellants guilty for the offences punishable under Section 376D IPC and Section 6 of the POCSO Act.

Submissions on behalf of the appellants

9. Learned counsel(s) for the appellants have assailed the impugned judgment and order on several grounds. It is submitted that in the present case the officer incharge of Mahila police station, Saran (PW-5) claims to have gone to the PMCH on 10.08.2019 itself where she recorded the fardbeyan of the victim (PW-4) at 21.10 hours. She has stated in paragraph '5' of her



deposition that PMCH comes within the jurisdiction of Pirbahore police station, however, no police officer from the said police station was present, statement has been recorded by Pirbahore police and she had not recorded any reason in the case diary as to why she had recorded the fardbeyan of the victim. It is submitted that in her examination-in-chief she has stated that at the time of recording of the fardbeyan in the PMCH she had prepared the production-cum-seizure list (exhibit-4). Learned counsel points out that from Exhibit-4, it would appear that the mother of the victim had produced the clothes and PW-5 had prepared a seizure list. In paragraph '6' of the seizure list it is shown that the clothes of the victim (i) a Kathai colour janghia with pad showing some bloodstains and (ii) a red colour salwar on which there was some stains like blood were seized. It is, thus, evident that with Janghia of the victim a pad was also handed over to PW-5 but 'pad' was not sent to the Forensic Science Laboratory (in short 'FSL').

10. Learned counsel submits that Dr. Anupam (PW-6) who has proved her letter addressed to the Superintendent, PMCH, Patna vide memo no.1103 dated 12.09.2019 has stated in paragraph '14' of her deposition that no cloth of the victim having bloodstains was seized in PMCH. She has stated in her examination-in-chief that the victim was referred from Sadar



Hospital, Chapra with intra cath in right hand with Haemaccel running and pack in situ in vagina. She was an alleged case of sexual assault with complaint of bleeding P/V after assault. She was unmarried and her LMP was 04.08.2019. Patient was conscious, pallor was present and on P/A examination abdomen was soft, on inspection, there was pack-in-situ with no active bleeding.

11. Learned counsel submits that the evidence of the doctor (PW-6) clearly shows that the victim (PW-5) was treated earlier. The prosecution claims that she was first taken to Chapra Sadar Hospital where she had received treatment and from there she was referred to PMCH but the medical report of the victim, if any, of the Sadar Hospital, Chapra has not been adduced in evidence. PW-6 had found the victim having pack-in-situ in vagina with no active bleeding, therefore, it is evident that prior to reaching the PMCH, the victim had already changed her clothes and what were handed over to the I.O. (PW-5) were the *Janghia* with pad and red colour *salwar*. The mother of the victim who has deposed as PW-2 in this case has stated in paragraph '15' of her deposition that she had handed over the clothes of the victim to police at PMCH. She has stated that it was a red colour *salwar*, *kathai* colour of *Janghia* and pad and papers were also prepared by



police but in course of her cross-examination, PW-2 has stated that her daughter was not wearing pad on the date of the occurrence. Thus, it is submitted that PW-2 had produced the Janghiya with pad which were perhaps used during the menstruation period. In fact, PW-2 has stated in paragraph '31' that she was aware of the fact that when the women undergoes the monthly period then blood comes out and the girls and women use pad. Fact is that in FSL report no server has been detected on the 'Janghiya' of the prosecutrix.

12. It is submitted that on the point of seizure of the cloth and recording of fardbeyan of the victim on the same day of the occurrence, prosecution evidence is full of material inconsistency. The mother of the victim (PW-2) has stated in her examination-in-chief that her 14 years old daughter came weeping in the house, she was in frightened condition and on asking she told that when she was returning from her school then on way the accused persons-appellants took her to the office of Savita Devi and committed rape on her. Thereafter, she brought her daughter to Sadar Hospital, Chapra where she did not get any treatment. She was referred to PMCH. She came Patna where she was treated. She has stated that police came in Patna hospital and recorded the statement of her daughter on which she had also put her signature.



In paragraph '7' of her deposition, in course of cross-examination, PW-2 has stated that she had no meeting with police on the date of occurrence and she had not made any statement before police on the date of occurrence. She has categorically stated in paragraph '9' of her deposition that police had recorded her statement at Patna on the next day of the occurrence. It is, thus, submitted that the evidence of PW-2 would clearly show that the fardbeyan of the victim (PW-4) was recorded only on the next day of the occurrence but the I.O. (PW-5) has anti-dated and anti-timed the fardbeyan. Learned counsel submits that the fact that PW-2 has put her signature on the fardbeyan still she says that on the date of the occurrence she had no meeting with the police and police had not recorded the statement of anyone on the date of the occurrence would clearly show that the prosecution story remained a mystery and it was not reported to police on the date of occurrence. Neither Chapra hospital nor PMCH reported it to the jurisdictional police station. The seizure list has also been prepared only on the next day of the occurrence.

13. Learned counsel further submits that the fact that the fardbeyan of the victim was not recorded on the date of the occurrence would be further clear from the statement of PW-2 in paragraph '14' of her deposition where she has stated that the



victim regained her consciousness on the next day after her admission in Patna. PW-2, however, could not say the time when the victim regained her consciousness. In paragraph '11' of her deposition, PW-2 has stated that no *policewala* had gone from Chapra to Patna and no one from her neighbourhood had either gone to Sadar Hospital, Chapra or to Patna hospital. Her daughter was getting conscious during her travel from Chapra to Patna but then some times she was becoming unconscious. She has further stated that no paper was given from Chapra Sadar Hospital to take her daughter to Patna hospital. Thus, submission is that the story that the victim had gone to Sadar Hospital Chapra has not been proved by producing any cogent evidence. Learned counsel, therefore, submits that the recording of fardbeyan as shown on 10.08.2019 is highly doubtful.

14. Learned counsel further points out that in paragraph '16' of her deposition, PW-2 has stated that the school dress of the victim is white *Salwar* and blue colour *Sameej*. In paragraph '17' she has stated that in Chapra Sadar Hospital the clothes of the victim were given of which papers were also made. It is submitted that the prosecution case is that the victim was returning from her school after appearing in her examination and on way she was taken away to the place of occurrence where rape was committed



on her, therefore, the submission is that the victim was in school dress and the white colour *salwar* with blue colour of *sameej* which she was wearing while returning from school were required to be seized and sent to the FSL. To whom the clothes were given in Chapra Sadar hospital and what kind of papers were prepared there remained a mystery.

15. In paragraph '22', PW-2 has further made it clear that the seizure list of the clothes of the victim was made on the next day of the occurrence at approximately 10-11:00 AM. It is, thus, submitted that there is no iota of doubt that the I.O. (PW-5) has indulged in anti-dating and anti-timing the 'fardebyan' and the 'seizure list' by putting a date of 10.08.2019 instead of 11.08.2019.

16. Learned counsel for the appellants would submit that in this case, the age of the victim has not been duly determined in accordance with law. As regards the place of occurrence, the I.O. (PW-5) has stated that it is situated at a distance of 200 meters East-North which is the house of Ward Parishad Sarita Devi, wife of Atul Sharma and accused Ravi Raj Sharma @ Dhyani Sharma's brick and karkat made house. In the eastern side of the house is a room in which straw were stored and in the west side room, office is being run in which there is a door from road side. The I.O. has stated that towards East-North side of the office room, there is a



brick made one feet high platform which is seven feet in length and about three feet in width. The rape was allegedly committed on the platform. The I.O. claimed that there were blood mark at the southern side of the platform and some papers were found spread in the north side. In the boundary of the place of occurrence, the I.O. has given the boundary as in North, there is a three feet PCC *gali*, in South brick *karkat* house of Shankar Sah, in East *Parti* land and well of Shankar Sah and in west, PCC road. Learned counsel submits that it is evident from the boundary of the place of occurrence that it is not surrounded by any wall and from two sides of the place of occurrence, PCC roads/street are passing on. The area is populated but the I.O. has stated in paragraph '7' of her deposition that she had not recorded statement of the people residing in the boundary of the place of occurrence. PW-5 had not even recorded the statement of Sarita Devi, her husband and the father-in-law because according to her, they happen to be the parents and brother's wife of the accused. The I.O. has stated that she had not seized the blood from the platform which is the place of occurrence. She had also not conducted any investigation in the school of the victim. In her *fardbeyan*, the victim had given her age as 17 years.



17. It is submitted that PW-5 claimed that she had made a *Nazri Naksha* of the place of occurrence but that has not been proved in course of trial. She has stated that the Officer-in-Charge of the Town Police Station had called FSL Team on the same day and with the team, Rajesh Kumar of Town Police Station had gone to the place of occurrence and collected the evidence and prepared seizure list. The I.O. (PW-5) has proved the signature of Rajesh Kumar as Exhibit '4/1' on the seizure list. It is submitted that the said Rajesh Kumar who had prepared the seizure list was not made even a chargesheet witness and has not been examined to prove the fact that he had visited the place of occurrence and had prepared the seizure list. The I.O. has further proved the signature on the seizure list prepared by Rajesh Chaudhary showing seizure of the underwear having bloodstained mark of the accused Ravi Raj Sharma @ Dhyani Sharma. This signature has been marked Exhibit '4/2'. It is submitted that Exhibit '4/1' and Exhibit '4/2' are the only signatures of Rajesh Kumar and Rajesh Chaudhary which have been identified by the I.O but the witnesses to the seizure list (Exhibit '4/1' and '4/2') have not been made chargesheet witnesses and they have not been produced in course of trial.



18. As regards Exhibit '4' which is another seizure list said to have been prepared by Rajesh Chaudhary, learned counsel for the appellants would submit that there is an overwriting on the date on which the seizure list was prepared. The date and time was earlier written as 10.08.19 and the time has been mentioned as 16:00 Hours but there is an overwriting in the date and '10' has been made '11' at two places in Exhibit '4'. Initially, it was shown prepared on the same day of the occurrence at 4.00 PM but later on realizing that police had not registered this case by 4.00 PM on 10.08.2019 and the fardbeyan has been shown recorded on 10.08.2019 at 21.10 hours, an interpolation has been done and the seizure list (Exhibit '4') has been shown prepared on 11.08.2019. It is submitted that in her deposition, PW-5 has categorically stated that on the same day, the Officer-in-Charge of the Town Police Station had called the FSL Team and Rajesh Kumar had gone with the Team to the place of occurrence and collected the evidences. Thus, Rajesh Kumar, who has not been examined in this case, had gone on the same day of the occurrence. The seizure list had been prepared in presence of two witnesses, namely, (1) Vishal Kumar Sharma, and (2) S. Kamuddin but both the witnesses have not been made chargesheet witnesses and they have not been examined. It is submitted that from the evidence of PW-5 and further from Exhibit



‘4’, it is evident that no effort was made by officer-in-charge while sending the FSL team to the place of occurrence to send the I.O. to the house of the prosecutrix on the same day. Recording of the fardebyan of the victim, her parents or grandfather was possible if the officer-in-charge of the police station had any information that very day. On way to Sadar Hospital, police station came but the occurrence was not reported to police by PW-2 or her husband (PW-3) or by the grandfather of the victim. the seizure list (Exhibit ‘4’) had already been prepared. Till preparation of the seizure list (Exhibit ‘4’), the prosecution story had not surfaced.

19. Learned counsel for the appellants has further pointed out that the seizure list (Exhibit ‘4’), if prepared on 10.08.2019, would have definitely been submitted in the court of learned CJM on 11.08.2019 with the copy of the fardebyan, formal FIR and the seizure list which was prepared by PW-5 on 10.08.2019 at 21:30 Hours. It is pointed out that at the top of the fardebyan, the formal FIR and the seizure list dated 10.08.2019 showing prepared at 21:30 Hours at PMCH, Patna by PW-5, the In-charge, ADJ, POCSO has endorsed “seen” and put his signature but contrary to the same, in the seizure list shown prepared initially on 10.08.2019 at 16:00 Hours by Rajesh Chaudhary (not examined) in which the date has been over written as ‘11’, there is



neither any endorsement of 'seen' or signature of the learned ADJ, POCSO Act. Even the order dated 11.08.2019 shows submission of only one fardbeyan and one production-cum-seizure list in the court. There is no recording of filing/submission of the seizure list prepared by Rajesh Chaudhary after reaching the place of occurrence on the same day. Even the order dated 12.08.2019 would not show filing of this seizure list.

20. Learned counsel submits that the I.O. (PW-5) has stated in paragraph '1' of her examination-in-chief that on the same day, the Officer-in-Charge of the Town Police Station arrested two accused, namely, Sonu Kumar @ Saddam Hussain and Atish Kumar who were medically examined in Sadar Hospital, Chhapra and the sample of their sperm were taken and packed in a 'dibba'. No blood sample was taken. Who collected the sample of sperm of these accused in Sadar Hospital, Chhapra and where the packed sample of the sperms of the accused were kept remained a mystery. If the sample of sperm of the two accused were collected in Sadar Hospital, Chhapra and the same were packed then why these information were not furnished to the learned court. Both the accused were produced in court on 11.08.2019, they were taken into judicial custody. The another accused Dhyani Sharma @ Ravi Ranjan Sharma was produced in court on 12.08.2009. There is no



whisper in the court's order that they have been medically examined and sample of their sperms were taken in the Sadar Hospital, Chhapra. Neither any medical examination report of the accused-appellants have been proved in course of trial nor the 'dibbas' in which the sample of sperms were kept could be produced. It is submitted that after more than a month on 17.09.2019, the I.O. submitted an application in the court in which a prayer was made to allow her to send the seized exhibits to the Regional Forensic Science Laboratory, Muzaffarpur for examination but in whose presence these samples were marked exhibits remained a mystery.

21. Learned counsel further submits that the injury report (Exhibit '6') has been prepared by Dr. Anupam in form of a letter addressed to the Superintendent, PMCH, Patna dated 07.09.2019, except that there is no documentary evidence to show that the victim was admitted in PMCH on 10.08.2019 and had remained admitted there for 15 days as claimed by the victim (PW-4) in her evidence. Dr. Anupam (PW-7) has stated in her evidence that when she examined the victim, she was 17 years old and she had not treated the victim on the day she reached PMCH. She has stated that when a lady undergoes the periods, it continues for 3-4 days. She has further stated in her cross-examination that she had



not prepared the medical report and the victim was not examined in her presence. She has stated that the stitching of the victim was done in her presence and she had not received any report of the FSL. Dr. Anupam (PW-7) has stated in her examination-in-chief that she has examined the patient and had repaired vaginal wall tear under TIVA (total Intra Venous Anesthesia). She has stated that medical examination report is under pen and her signature. She has stated that from the medical report of the victim, she cannot say that in between 10.08.2019 and 19.08.2019 what treatment has been given to the victim and which medicine has been administered to her. It is, with reference to this statement of PW-7, it is submitted that the prosecution has purposely withheld the discharge summary of the PMCH which could have shown the kind of treatment given to the victim and the medicines administered to her. There was no reason for the prosecution to withhold the discharge summary of the PMCH and would have only relied upon Exhibit '6' which is nothing but in form of a letter of Dr. Anupam (PW-7) and counter signed by Dr. Chitra Sinha (PW-6). The report has been prepared after one month as submitted.

22. It is lastly submitted that in this case, the FSL report has been marked exhibit on the request of the prosecution under



Section 294 of the Code of Criminal Procedure vide order dated 15.02.2021. Learned counsel submits that the FSL report has not been duly proved in accordance with law. Reliance has been placed on the judgment of this Court in the case of **State of Bihar versus Durgawati** reported in **2021 (4) PLJR 516 (HC)** in which a Division Bench of this Court having found that the FSL report was not supplied to the appellants and the signatories of the FSL report did not turn up and the appellants were not confronted with the contents of the FSL report in their examination under Section 313 CrPC, the Hon'ble Division Bench took a view that no reliance can be placed on the FSL report which was taken into evidence by the trial court without being tendered by any witness and that too at a belated stage. It is submitted that the FSL report (Exhibit '7') leads nowhere. According to the FSL report, Exhibit 'A', 'B', 'C', 'D', 'E', 'F' and 'G' had blood all over the areas but no semen could be detected in the exhibits marked 'A', 'B', 'C', 'D', 'E' and 'F'. Exhibit 'A', 'B' and 'C' are the cotton swab which bore reddish brown stains and these are the seizures made by Rajesh Chaudhary (not examined) on 10.08.2019/11.08.2018 (interpolation in the date by overwriting). If these are the blood collected from the platform on which rape was committed, they did not contain any semen suggesting rape on the platform. It is



further submitted that Exhibit 'D' contained one old dirty pink white cloth bag which bore reddish brown stains over large areas, Exhibit 'E' contained one old dirty maroon colour said to be *Kathai* colour lady *janghiya* which bore reddish brown stains. This is said to be the *janghiya* of the victim which was seized by the I.O. (PW-5) in PMCH but as per the FSL report, semen could not be detected on it. Similarly, Exhibit 'F' contained one dirty pink colour said to be red *salwar* which bore reddish brown stains, this is also the cloth which was seized by PW-5 in PMCH but on this also no semen could be detected. It is submitted that Exhibit 'G' contained one old dirty blue said to be Grey colour *janghiya* of accused Ravi Raj Sharma @ Dhyani Sharma and on this, at some places blood has been found and semen has been detected but neither the blood nor the semen have been matched with the samples of the accused. In fact, no blood sample of the accused has been collected in this case and the semen present on Exhibit 'G' has not been matched with the sample of the semen contained in the vial marked "H/X" of Ravi Raj Sharma @ Dhyani Sharma. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Krishna Kumar Malik versus State of Haryana** reported in **(2011) 7 SCC 130**, learned counsel submits that in a case of rape in which medical evidence is vital, in absence of serological



report and matching of the blood of the accused with the blood present on the *janghiya* of the victim, it would not be prudent and safe to convict the accused.

23. Learned counsel further submits that in this case, the learned trial court has not even determined the age of the victim. I.O. (PW-5) has stated that the victim had disclosed her age as 17 years in her *fardbeyan*. She had not visited the school of the victim/prosecutrix and no proof of date of birth was brought on record. In such circumstance, it was incumbent upon the trial court to determine the age of the victim by resorting to the scheme of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. It is submitted that in the case of **Md. Mahmood Alam versus the State of Bihar** reported in **2024 (4) PLJR 795**, a learned Co-ordinate Bench of this Court has reviewed the case laws on the subject and held that in a case under the POCSO Act, the settled position of law is that the foundational facts of the alleged offence are required to be proved by the prosecution before the court raises the presumption under Section 29 and 30 of the POCSO Act. The learned Co-ordinate Bench, it is submitted, held that when there is no school certificate of Panchayat or Municipal authority certificate regarding the age of the victim, the oral testimony of the father of the victim and the



medical opinion with regard to the age of the victim on the alleged date of occurrence would be important to take a view as to whether the victim was a child under the provisions of the POCSO Act. In this case, it is submitted that neither any date of birth of the school has been brought in evidence nor any medical examination was conducted on the victim to determine her age through age related examination such as ossification test.

24. It is lastly submitted that the learned trial court has miserably failed to appreciate the evidences available on the record and has wrongly concluded that the victim (PW-4) in this case would fall in the category of a sterling witness.

Submissions on behalf of the informant and the State

25. On the other hand, learned counsel for the informant and learned Additional Public Prosecutor for the State has opposed the appeal. Relying upon paragraph '20' of the impugned judgment, learned counsel submits that the learned trial court has rejected the argument of the defence with regard to the age of the victim by relying upon the oral testimony of the victim (PW-4) and PW-7. PW-4 has stated that her age was 14 years and PW-7 has assessed her age about 17 years, therefore, the prosecution has clearly proved the age of the victim below 18 years.



26. Learned counsel submits that the foundational facts of the case have been duly proved in this case and the Court should not be swayed away by minor discrepancies. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **State of Punjab versus Gurmit Singh** reported in **(1996) 2 SCC 384**.

27. It is submitted that from the pattern of cross-examination of the defence, it would appear that different suggestions have been given to the prosecution witnesses. In this regard reliance has been placed on **Santhosh Moolya & Anr. State of Karnataka** reported in **(2010) 5 SCC 445**.

28. Learned counsel has further submitted that in this case FSL report has been rightly proved. He has relied upon the judgment of the Hon'ble Supreme Court in the case of **State of H.P. versus Mast Ram** reported in **AIR 2004 SC 5056**. It is submitted that in the said case, a ballistic report submitted under signature of the Junior Scientific Officer of Central Forensic Laboratory was admitted in evidence. Learned counsel relies upon sub-Section (4) of Section 293 of the CrPC which envisages that the court should accept the documents issued by any of six officers enumerated therein as valid evidence without examining the author of the documents.



29. It is submitted that in this case a school going girl has been gang-raped and she has identified the accused, therefore, conviction may be upheld on the basis of sole testimony of the victim.

Consideration

30. We have heard learned counsel for the parties and learned Additional Public Prosecutor for the State and also perused the trial court records. On scrutiny of the materials available on the records, we find that in this case, the alleged occurrence has taken place on 10.08.2019 at about 12 Noon when the victim was returning from her school after appearing in her examination. The victim was taken to the Office of the Ward Commissioner where she was subjected to rape. She has claimed that after she had started bleeding, the accused persons left her there and fled away whereafter she came her house slowly and told the entire story to her mother. In her examination-in-chief, she has reiterated that she was returning from her school but she claims that as soon as she reached her house, the accused persons came and forcibly caught hold of her and pressed her mouth. In her *fardebayan*, while she has stated that she was forcibly taken away while she was on way from her school to her house but in her examination-in-chief, she has changed her statement and has stated that as soon as she reached



her house, the accused persons came there and forcibly caught hold of her, pressed her mouth and took to the office of the Ward Commissioner. Thus, the prosecution story with regard to the place from where the victim was forcibly taken away has changed in course of trial.

31. In her *fardbeyan*, her age has been assessed as about 17 years whereas in her deposition which took place after about one and half year, she claimed her age as 15 years only. In her cross-examination, she has stated that in her *fardbeyan*, she had got recorded her age as 14 years and *fardbeyan* was read over to her by Daroga Vibha Rani. She has stated that in the year 2016, she was admitted in school in Class 7 but she cannot say the age which was recorded at that time. Vibha Rani who is the I.O. of the case and has been examined as PW-5 has stated in her deposition in paragraph '7' that in course of investigation, she had never visited the school of the victim and she had not gathered any information till date that on the date of occurrence whether the victim had her examination in the school or not. PW-5 has stated that she had recorded in the *fardbeyan* what she was told by the victim and the victim had informed her age as 17 years. She denied the suggestion that at the time of recording of the *fardbeyan*, the victim had informed her age as 14 years.



32. On the point of determination of age of the victim, no date of birth certificate of the school of the victim has been produced by the prosecution. No age related test has been conducted by the Doctors, namely, Dr. Chitra Sinha (PW-6) and Doctor Anupam (PW-7). PW-6 has stated that when she examined the victim, she was 17 years old. In her cross-examination, she has stated that she had not estimated the age of the victim. PW-7 has stated that she had examined the patient (victim) aged about 17 years in O.T.

33. It is evident on the reading of the impugned judgment that the defence had raised a plea that the victim was not a minor but the learned trial court has rejected the said contention of the defence by taking notice of the statement of the victim in her fardbeyan, the statement of PW-7 and the statement of her parents who have deposed as PW-2 and PW-3 respectively. In this regard, we are of the opinion that the learned trial court has completely missed out on an important aspect of the matter that is the determination of age of the victim. It is well-settled in law that the prosecution has to prove the foundational facts of the alleged offence to raise presumption under Section 29 and 30 of the POCSO Act, 2012. Section 2(d) of the Act of 2012 defines the word 'child' which means a person below the age of 18 years. It is,



therefore, mandatory to prove that the alleged victim of crime was a child i.e. below 18 years of age, on the date of the occurrence. It is for the prosecution to prove the minority of the victim for application of the POCSO Act.

34. As regards the presumptions under Section 29 of the Act of 2012, this Court has in the case of **Heera Das vs. State of Bihar and Anr. (Cr. Appeal (DB) No. 103 of 2019 disposed of on 19.06.2024)** expressed its views in agreement with the views expressed by the Hon'ble Delhi, Calcutta, Kerala and Bombay High Courts. Learned Co-ordinate Bench in the case of **Md. Mahmood Alam** (supra) has taken a similar view as expressed in the following judgments:-

(1) Dharmender Singh Vs. State (Govt. of NCT of Delhi) reported in **2020 SCC Online Del 1267**

(2) Sahid Hossain Biswas Vs. State of West Bengal, reported in **2017 SCC Online Cal 5023**

(3) Joy V. S. Vs. State of Kerala reported in **(2019) SCC Online Ker 783**

(4) Navin Dhaniram Baraiye Vs. State of Maharashtra reported in **2018 SCC Online Bom 1281.**

35. In all these judgments, it has been held that the presumption under Section 29 of the Act of 2012 operates only



when the foundational facts are duly proved by the prosecution beyond all reasonable doubt. The accused has right to rebut the presumption either by creating a dent in the evidence of the prosecution witness through cross-examination or by leading evidences to prove his defence. It is also settled that rebuttal of the presumption would be on the touch stone of preponderance of probability.

36. Section 34 of the Act of 2012 provides the procedure in case of commission of offence by child and determination of age by Special Court. It reads as under:-

“34. Procedure in case of commission of offence by child and determination of age by Special Court.—
(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of ¹[the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].
(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.
(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”

1. Subs. By Amdt. Act 25 of 2019, *vide* S.9, (*w.e.f.* 16.8.2019).



37. At this stage, it would be equally important to take note of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) (hereinafter referred to as the 'J.J. Act' or 'Act of 2015') as under:-

“Section 94. Presumption and determination of age.

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

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

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

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

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



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

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

38. In the present case, we find that the prosecution has not led any evidence which would fall in line with the scheme of Section 94 of the J.J. Act. The learned trial court has, therefore, erred in rejecting the plea of the defence that the prosecution had failed to prove that the victim was a minor at the time of occurrence.

39. We have noticed from the evidences placed before us that the school dress of the victim was a white colour *salwar* and blue colour *samij* (Para ‘16’ of PW-2) and according to PW-2, the clothes of the victim were given in Chapra Sadar Hospital for which a paper was also prepared. We do not find any clue as to whom the clothes were handed over and which paper was prepared at Chapra Sadar Hospital. The prosecution has not brought on record any evidence to prove that the victim’s school dress were handed over to the I.O. and any seizure of the same was made. On the contrary, PW-2 who is the mother of the victim has stated that the clothes which the victim was wearing were given to police in



Patna Hospital and the colour of the dress is stated to be red color *salwar* and '*kathai*' color '*janghiya*' and pad. PW-2 has stated that the victim had been wearing black color *samij* and police had prepared paper of the articles given to them. Contrary to this statement of PW-2, the Doctor (PW-6) has stated in paragraph '14' of her deposition that no blood soaked cloth of the victim was seized in PMCH, Patna. If the statement of PW-2 saying that the clothes of the victim were given in Chapra Sadar Hospital and paper was prepared of the same, is correct, the prosecution has suppressed it. It would also lead to take a view that the clothes and the pad which were produced before the I.O. (PW-5) in PMCH, Patna by mother of the victim were some other clothes and those were not blood soaked cloths. Further, we find that the seizure list showing seizure of clothes, prepared by the I.O. (PW-5) in PMCH bears a date of 10.08.2019 at 21:30 Hours. It has not been witnessed by a Doctor or nursing staff of the PMCH. PW-2 has categorically stated in her deposition that on the date of occurrence, she had not met police and no statement of any kind was recorded by police on the date of occurrence. She has gone on to say in paragraph '22' of her deposition that the papers of the clothes of the victim were prepared on the next day in between 10-11 AM but she did not remember the time at which she had put her



signature on the same. The evidence of PW-2 who had produced the clothes under the seizure list creates a huge doubt over the authenticity of the seizure list. It clearly shows that the fardbeyan of the victim and the seizure list have been antedated and ante-timed. If PW-2 had no meeting with police and no kind of statement was recorded by police on the date of occurrence, the fardbeyan on which PW-2 has put her signature as an attesting witness is also an antedated and ante-timed document. It is also evident that the seizure list shows one of the seizures 'pad' but the 'pad' which was seized by the I.O. (PW-5) was not sent to the FSL and there is nothing on the record as to what happened to the said pad which has been shown seized in the seizure list prepared by PW-5.

40. On further appreciation of the evidences available on the record, it appears that even though the victim along with her parents (PW-2 and PW-3) had gone to Chapra Sadar Hospital and then she was referred to PMCH, neither the Chapra Sadar Hospital nor the PMCH reported the matter to the police station. PW-2 has stated in paragraph '36' of her deposition that the treatment of the victim started in Patna Hospital in the night in between 12-1:00 O'Clock. This witness has stated that her daughter was not wearing/putting pad on the date of occurrence and she has stated in



paragraph '38' of her deposition that the seizure list was prepared at Patna. According to PW-2, the clothes were taken out from the body of her daughter, her daughter wore a nighty and her daughter had handed over the blood soaked cloth to police. These statements of PW-2 are not corroborated either by the evidence of the I.O. (PW-5) or from the seizure list. The seizure list clearly shows that the clothes were produced by PW-2 before the I.O. (PW-5) in PMCH. How PW-5 reached PMCH is also not evident from the materials on the record. While recording the *fardebayan* of the victim (PW-4) said to be on 10.08.2019 at 21:00 hours, neither the outpost In-charge of the PMCH nor any police officer from Pirbahore Police Station within whose jurisdiction the PMCH would fall was present. According to the I.O., the Officer-in-Charge of Town Police Station, Chapra had called the FSL Team on the same day but it is evident from the evidence on the record that the I.O. (PW-5) did not reach Chapra Sadar Hospital to record the *fardebayan* of the victim or her parents on the date of occurrence. In the kind of material inconsistency present in the evidence of PW-2 and her clear statement that on the date of occurrence, no statement of any kind was recorded before police would lead this Court to conclude, that the FIR and the seizure list shown to have been prepared in PMCH on 10.08.2019 are



antedated and antetimed documents which are required to be considered with all circumspection and care.

41. The prosecution has failed to prove the place from where the victim was forcibly taken away by the accused persons. The I.O. (PW-5) never visited the school of the victim to find out as to whether she was a student of any school. The victim (PW-4) has not disclosed the name of her school either in her *fardebayan* or in her examination-in-chief. She has stated in her cross-examination that on the date of occurrence, her examination was scheduled in the first sitting. Initially, she stated that the said sitting would start at 09:00 AM and continues till 2:00 PM but then she again said that the first sitting comes to an end at 12 O'clock and second sitting starts from 12:30 PM and comes to an end at 2:00 PM. Thus, according to her, the first sitting of examination is for three hours whereas the second sitting is only for one and half hours. Even on this point, there is no evidence. The victim (PW-4) has categorically stated in paragraph '10' that her first sitting examination was finished at 11:45 and she had already reached her house at 12 O'Clock. It is evident from her statement and her *fardebayan* saying that while returning from school to her house, on way, she was forcibly caught and taken away by the accused persons is highly doubtful. She had already reached her house at



12:00 noon. In her house, her mother and grandfather were present. In fact, the mother of the victim (PW-2) has stated in paragraph '8' of her deposition that for the first time when she met the victim, the victim was in conscious condition and apart from this witness, her husband and her father-in-law were in the house. It is, therefore, evident that the victim (PW-4) had already returned to her house from the school and the prosecution is withholding the true story that how the victim (PW-4) was taken to the place of occurrence where she was subjected to rape. There is no evidence either of the parents or the grandfather of the victim that the victim was forcibly taken away from her house. It is also a matter of common sense that it would not have been possible for the accused persons to take away the victim from her house in presence of her parents and grandfather and then occurrence of rape would have continued for 1-1½ hours whereafter the victim would return on her own to her house. PW-2 has stated that they had reached Sadar Hospital, Chapra at 01:30 PM and stayed there for half an hour but during this half an hour, no treatment was given to the victim in Sadar Hospital, Chapra. She has also stated that in Sadar Hospital, Chapra, the victim had not disclosed to any doctor about her injuries. She has stated that the victim was not in a position to speak but the statement of PW-2 raises doubt over the veracity of



her statement and further raises a doubt whether at all the victim was taken to Sadar hospital, Chapra for treatment or she was treated somewhere else. No documentary evidence of the treatment of the victim in Sadar Hospital, Chapra has been adduced by the prosecution. No Doctor from Chapra Sadar Hospital has been examined to support the prosecution case that the victim was taken to Sadar Hospital, Chapra. Victim has claimed in her examination-in-chief that she was taken to Sadar Hospital, Chapra where she had been treated and from there she was referred to PMCH. She has stated that she was treated in the hospital for one to two minutes. In paragraph '20' of her deposition, the victim (PW-4) has stated that she had left for Chapra Hospital with her mother. She cannot say the direction in which Sadar Hospital is situated and at what distance it is. Whereas the same victim has stated in paragraph '6' of her deposition that her school is situated towards west side of her house and it takes 10-15 minutes in reaching her school. We have noticed from the medical injury (Exhibit '7') that it is not a contemporaneous document. PW-6 and PW-7 have prepared it in form of a letter to the Superintendent of P.M.C.H., after about a month of the treatment. Why the Bed Head Ticket or the Discharge Summary or the treatment particulars which were prepared in



P.M.C.H. in ordinary course of treatment has not been brought on records remain a mystery. This lacuna adds to the lopsided story of the prosecution.

42. This Court is, therefore, of the opinion that while the victim (PW-4) is aware of the direction and the time taken by her in reaching her school, she has not disclosed the direction of the hospital and the distance. Here, this Court is of the opinion that the victim (PW-4) is not speaking the truth. She has stated that she was treated in hospital for one to two minutes but it would be evident from the evidence of the Doctor (PW-6) that she has recorded the condition of the victim, she recorded that the victim was admitted on 10.08.2019 around 09:00 PM in PMCH with intra cath in right hand with haemaccel running and pack in situ in Vagina. The patient was conscious and there was no active bleeding. The evidence of PW-6 makes it clear that the victim (PW-4) had received some treatment elsewhere, she claimed that she was treated for one and two minutes in Sadar Hospital, Chapra but it is not possible that within one and two minutes, such treatment could have been given to the victim in Sadar Hospital, Chapra. The prosecution has, therefore, miserably failed to prove that the victim (PW-4) was taken to Sadar Hospital, Chapra and she was referred to PMCH from Sadar Hospital. The statement of



PW-2 that the victim was not in a position to speak in Chapra Hospital and she had not disclosed about her injury to the doctor in Sadar Hospital, Chapra is only an attempt to suppress the true facts as to where the victim was taken for treatment and what was her first version before the Doctor, who treated her initially. This Court has already taken note of the fact that Sadar Hospital, Chapra had not reported the matter to the police which again strengthens the belief of this Court that the victim had not gone to Sadar Hospital, Chapra.

43. In the evidence of I.O. (PW-5), she has stated that she had visited the place of occurrence on 11.08.2019 and inspected the same. She had prepared the *nazri naksha* and had found blood mark on the southern side of the platform and some papers spread in the north side. This Court finds that the I.O. had not seized those papers and she has clearly stated that a team of FSL with which one Rajesh Kumar of Town Police Station had visited the place of occurrence and collected the evidence, they prepared the seizure list. The seizure list was prepared by Rajesh Kumar. PW-5 has proved the signature of Rajesh Kumar which has been marked Exhibit '4/1'. It is evident that Rajesh Kumar who was with the FSL Team and had collected the evidence at the place of occurrence has not been even made a charge-sheet witness and



has not been examined. The I.O. had not collected any evidence from the place of occurrence is apparent on the face of her deposition. She has stated that she received the medical examination report of the victim on 12.09.2019 and recorded it in her case diary but she has not stated that from whom she had received the medical examination report of the victim on 12.09.2019 i.e. after more than a month from the date of occurrence. I.O. (PW-5) has stated that on 17.09.2019 she had obtained order from the court and sealed/packed all the seized exhibits which she sent to the Forensic Science Laboratory, Muzaffarpur on 18.09.2019. From her deposition, it appears that the seized exhibits were sealed and packed only on 17.09.2019 i.e. after more than a month and it is not known as to where these seized exhibits were lying. She has stated in paragraph '17' of her deposition that she had not recorded the statement of the witnesses of the seizure list which was prepared by the FSL Team. She had not recorded the statement of Ward Parshad Sarita Devi. She had not recorded the statement of Sub-Inspector of Police, Rajesh Kumar. The I.O. was suggested by defence that she had not incorporated the evidences which she had collected and she had prepared the case diary in her office and thereby she had not done



proper investigation. The suggestion was denied by the I.O. (PW-5).

44. We find from the evidence of the I.O. that she had not collected any evidence from the place of occurrence and had not even examined Rajesh Kumar of the FSL team or any member of the FSL Team who had collected the evidences which were sent to the FSL by I.O. (PW-5) after sealing and packing the same on 17.09.2019.

45. The seizure list prepared by Rajesh Chaudhary who is said to be the member of the FSL Team is on the record but only the signature of Rajesh Chaudhary has been marked Exhibit '4' on 25.01.2021. The two witnesses namely, Vishal Kumar Sharma and Shlauddin have not been examined. There is also interpolation by way of over writing on the date of seizure list which we have already taken note of in detail in the submissions of learned counsel for the appellants, moreover, it appears that the seizure list prepared by Rajesh Chaudhary does not bear endorsement of the learned incharge court whereas the other documents including seizure list containing signature of Rajesh Chaudhary Exhibit '4/1' bears the signature at the top 'seen' on 12.08.19. There is another aspect of the matter which would appear from perusal of the seizure list prepared by I.O. (PW-5) in PMCH. It is evident on



perusal of the seizure list prepared by the I.O. in her signature that the date i.e. 10.08.19 with her signature has been marked Exhibit '4' on 05.02.21, therefore, while signature of Rajesh Chaudhary has also been marked Exhibit '4', signature of I.O. (PW-5) has again been marked Exhibit '4'. From the order dated 25.01.2021 passed by the learned trial court it would appear that on the said date, signature of the I.O. on production-cum-seizure list was marked Exhibit '4' and on the same day the I.O. proved the signature of S.I. Rajesh Kumar on the seizure list and this signature was marked Exhibit '4/1'. We have seen that the signature Exhibit '4/1' is of one Rajesh Chaudhary and not of Rajesh Kumar and Exhibit '4' which is the signature on the production-cum-seizure list has been signed by the learned Trial Judge on 05.02.21. On 05.02.21 in fact the doctor (PW-6) was produced and she was examined and cross-examined. She proved the signature of Dr. Anupama (PW-7) on the medical report and also identified her own signature which was marked Exhibit '6'. Therefore, there is some discrepancy in the marking of exhibits by the learned trial court which we have taken note of only to put the record straight.

46. From the evidence of I.O. (PW-5) we further find that two accused namely, Sonu @ Saddam Hussain and Aatish



Kumar were arrested on 11.08.2019 and they were subjected to medical examination in Sadar Hospital, Chapra. Their sperm sample were separately collected in a pack container (*dabba*) and thereafter, there defence statements were recorded and they were produced in the court. It further appears that the another accused Ravi Raj Sharma @ Dhyani Sharma was arrested by Officer Incharge of Town Police Station and it was found that he was wearing a blood stained underwear which was seized by Rajesh Chaudhary who prepared the seizure list. In her evidence, she has taken two names (1) Rajesh Kumar and (2) Rajesh Chaudhary but neither of them has been examined. This accused was also sent for medical examination and his sperm sample was collected. I.O. has claimed that the sample were kept safely for FSL examination but who kept it and where those were deposited, has not been stated. The doctor of the Sadar Hospital, Chapra who conducted the medical examination of the accused and collected the sperm sample has not been examined by the I.O. and they have not been made chargesheet witness. This Court further finds that there is no evidence that blood sample of the accused persons were collected after their arrest by the doctor of Sadar Hospital, Chapra. There is no matching of blood and there is no serological report on origin of blood group and semen which have been found on Exhibit 'A'



‘B’, ‘C’, ‘D’, ‘E’, ‘F’ and ‘G’. On perusal of the FSL report which has been marked Exhibit ‘P8’ by order of the court under Section 294 Cr.P.C. on 15.02.2021 would show that it contains description of articles kept in parcel. We find that Exhibit ‘P8’ records the mode in which parcel was found to be packed on receipt and description of seal. It records as under:-

“..... The parcel contains of one wooden box enclosed with a cloth cover which was duly sealed with impressions of seal corresponding with the seal impression forwarded.

It contains three paper sachets marked as ‘A’, ‘B’ and ‘C’, four paper envelopes marked as ‘D’, ‘E’, ‘F’ and ‘G’ and three small cartons (*dabbas*) marked as H, I and J respectively.”

47. The description of articles contained in the parcel and the result of examination as disclosed in Exhibit ‘P8’ are being quoted hereunder for a ready reference:-

1. the sachet marked ‘A’ contained one cotton swab which bore reddish brown stains practically all over. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluorescence in ultra violet light. The stains were taken in cotton swab from earth by FSL team.
2. The sachet marked ‘B’ contained one cotton swab which bore reddish brown stains over large areas. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluorescence in ultra violet light. The stains were taken in cotton swab from earth by FSL team.



3. The sachet marked 'C' contained one cotton swab which bore reddish brown stains practically all over. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluorescence in ultra violet light. The stains were taken in cotton swab from cemented rectangular "Chabutara" by FSL team.

4. The envelop marked 'D' contained one old dirty pink white cloth bag which bore reddish brown stains over large areas. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluorescence in ultra violet light.

5. The envelop marked 'E' contained one old dirty marron colour said to be Kathai colour ladies janghia which bore reddish brown stains practically all over. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluorescence in ultra violet light.

6. The envelop marked 'F' contained one old dirty pink colour said to be red salwar which bore reddish brown stains practically all over. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluorescence in ultra violet light.

7. The envelop marked 'G' contained one old dirty blue said to be grey colour janghia which bore reddish brown stains at places. It also bore greyish white stains which were stiff to feel and which produced characteristic bluish white fluorescence in ultra violet light. The janghia was said to be of accused Ravi Raj Sharma alias Dhyani Sharma.

The dabba marked 'H' contained one plastic vial which was further marked as 'x' in this laboratory.

8. The vial marked 'H/x' contained one cotton swab said to contain semen sample of Ravi Raj Sharma alias Dhyani Sharma which bore brownish stains. It also bore greyish



white stains which were stiff to feel and which produced characteristic bluish white fluorescence in ultra violet light. The dabba marked 'I' contained one plastic vial which was further marked as 'y' in this laboratory.

9. The vial marked "I/y" contained some cream colour sticky liquid substance said to be semen sample of accused Sonu alias Tarzan alias Saddam Hussain which bore brownish stains. It also bore greyish white stains which were stiff to feel and which produced characteristic bluish white fluorescence in ultra violet light.

The dabba marked 'J' contained one plastic vial which was further marked as 'z' in this laboratory.

10. The vial marked "J/z" contained some cream colour sticky liquid substance said to be semen sample of accused Atish Kumar which bore brownish stains. It also bore greyish white stains which were stiff to feel and which produced characteristic bluish white fluorescence in ultra violet light.

RESULT OF EXAMINATION

1. Blood has been detected in the exhibits as noted below:-

- (a) Exhibit marked 'A'all over.
- (b) Exhibit marked 'B'over large areas.
- (c) Exhibit marked 'C'all over.
- (d) Exhibit marked 'D' over large areas.
- (e) Exhibit marked 'E' all over.
- (f) Exhibit marked 'F'all over.
- (g) Exhibit marked 'G'at places.

2. Semen has been detected in the exhibits marked 'G', 'H/x' 'I/y' and 'J/z'.

3. Blood could not be detected in the exhibits marked 'H/x', 'I/y' and 'J/z'.

4. Semen could not be detected in the exhibits marked A, B, C, D, E and F.

5. Serological report on origin and group of blood and semen would follow.”



48. This Court finds that sachet marked 'A', 'B' and 'C' are one cotton swab which were collected by the FSL team. About sachet marked 'A' and sachet marked 'B'. It is not recorded that from where the FSL team had collected the stains in the cotton swab. From Exhibit marked 'C', it only appears that the stains were taken in cotton swab from cemented rectangular "*Chabutara*" by FSL Team. Neither the blood report of the victim nor that of the accused persons have been brought on the record and it has not been proved by the prosecution that the blood stains contained in Exhibit marked 'A', 'B' and 'C' which were sent to the FSL team matched with whom. In absence of blood samples of the victim or of the accused persons, it would not be possible to conclude that the blood stain was of the victim. The non-examination of the member of the FSL team who had collected the blood stain in cotton would, therefore, prove fatal to the prosecution.

49. It is evident that the blood were found all over the Exhibit marked 'E' which is a *kathai* colour lady underwear but no semen has been detected on this exhibit. Here, it is important to note that the victim had her last menstruation period on 04.08.2019 only and the Doctor has opined that the period



continues for 3-4 days. The seizure list prepared by the I.O. in PMCH shows that PW-2 had presented 'janghiya' with the pad. The pad is used by a female during period. What happened to the said pad is not known. Why was that pad not presented in the court and sent to the FSL remains a mystery. In any case, the fact that on Exhibit marked 'F' and 'G' also the FSL report shows presence of blood but there is no evidence that the blood found on the exhibit 'G' which is the 'janghiya' of accused Ravi Raj Sharma @ Dhyani Sharma matched with the blood of the victim. Here again, it is important to note that semen has been detected in Exhibit marked 'G' but it has not been matched with the semen sample marked Exhibit 'H/x'. The semen sample were collected from the accused but who collected it, when it was collected and how it was preserved for more than a month before sending it to the FSL have not been proved by the prosecution. At this stage, we would take note of the judgment of the Hon'ble Supreme Court in the case of **Krishna Kumar Malik**, the Hon'ble Supreme Court has discussed the effect of not matching the semen of the appellant with that found on the undergarment of the prosecutrix. Paragraphs '43' and '44' of the said judgment are as under:-

"43. With regard to the matching of the semen, we find it from *Taylor's Principles and Practice of Medical Jurisprudence*, 2nd Edn. (1965) as under:



“Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months.”

Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the appellant.

44. Now, after the incorporation of Section 53-A in the Criminal Procedure Code w.e.f. 23-6-2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences.”

50. In the present case, no semen has been found on the undergarment of the prosecutrix. Blood found thereon had not been matched with that of the prosecutrix. No DNA test has been conducted.

51. We, therefore, find that in this case, the prosecution has not proved either the collection of Exhibits ‘A’, ‘B’ and ‘C’ from the place of occurrence by producing the witnesses who had



collected the same nor the prosecution has proved the serological report and matching of blood.

52. We further notice that in this case, FSL report has been proved under sub-section (4) of Section 294 Cr.PC. In this regard, the order of the learned trial court passed on 15.02.2021 is available on the record. It is evident that the FSL report has not been tendered in evidence and it was not supplied to the appellants. The learned trial court did not draw the attention of the appellants towards the findings recorded in the FSL report (Exhibit 'P8'), during the statement of the accused persons under Section 313 Cr.PC. In this regard, while learned counsel for the State and the informant have heavily relied upon the judgment of the Hon'ble Supreme Court in the case of **Mast Ram** (*supra*), learned counsel for the appellant has relied upon the judgment of this Court in the case of **Durgawati** (*supra*).

53. We have gone through both the judgments. It is noticed that in case of **Mast Ram** (*supra*), the only issue which was addressed before the Hon'ble Supreme Court was as to whether a ballistic report submitted under the signature of Junior Scientific Officer of the FSL would have been admitted in the evidence under sub-Section (4) of Section 294 CrPC which envisages that the court should accept the document issued by any



of six officers enumerated therein as valid evidence without examining the author of the documents. So far as this aspect of the matter is concerned, there is no iota of doubt that the FSL report (Exhibit 'P8') is admissible in evidence but the question remains as to whether the admission of document alone, its contents would bind the accused or in order to bind the accused and provide a fair trial, it was required that the FSL report be tendered by a competent witness. In the case of **Durgawati** (*supra*), a Division Bench of this Court having found that FSL report was not supplied to the appellants and the signatories of the FSL did not turn up and the appellants were not confronted with the contents of the FSL, in their examination under Section 313 CrPC, took a view that no reliance can be placed on the FSL report which was taken into evidence by the learned trial court without being tendered by any witness.

54. We are of the view that the admissibility of the document is one thing whereas reliability of the same would be quite different and distinct thing. In a criminal trial, where the accused is facing a serious charge and is likely to suffer life imprisonment, it is all the more necessary for the prosecution to act fairly and meet all the parameters of a fair trial. We find, the prosecution is lacking even on this aspect of the matter.



55. Learned trial court has held that the victim (PW-4) would be falling in the category of a sterling witness. We have already discussed her evidence hereinabove and have recorded our views holding that the victim is trying to suppress true facts. We have noticed that her evidence is materially inconsistent and while she disclosed her age as 17 years in her *fardbeyan*, in her examination-in-chief after one and half year she claimed herself only 15 years old. She did not disclose the name of her school though her mother (PW-2) has disclosed the name of the school in course of her cross-examination but the date of birth of the victim as recorded in the school has not been brought in evidence which is the another attempt to suppress the true age of the victim.

56. We agree with the submissions of learned counsel for the appellants that the prosecution had no faith in the statement of the victim that she had been forcibly kidnapped or taken away by the accused persons either from her house or while she was on way to her house from her school and it is for this reason, no charge under Section 363 or 364 IPC has been framed.

57. As regards, who may be called a sterling witness, the Hon'ble Supreme Court has in the case of **Rai Sandeep** reported in (2012) 8 SCC 2021 in paragraph '22' held as under:-



“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have correlation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

58. On the touchstone of the judgment of the Hon’ble Supreme Court, when we examine the evidence of the victim, in our opinion, she would not be put in the category of a sterling witness.

59. We have discussed the evidences available on the record, in our opinion the finding of the learned trial court as regards



proving of guilt of the appellants beyond all reasonable doubts is not sustainable. Learned trial court seems to have missed several important aspects of the matter which we have discussed hereinabove. We, therefore, set aside the impugned judgment and order and acquit the appellants of all the charges giving them benefit of doubt.

60. The appellants are reported to be in custody, they shall be released forthwith if not wanted in any other case.

61. The trial court records along with a copy of the judgment be sent down to the learned trial court.

62. We acknowledge the assistance rendered by Ms. Surya Nilambari, learned Advocate as learned Amicus Curiae in Cr. Appeal (DB) No. 221 of 2022. A consolidated sum of Rs. 15,000/- (Rupees Fifteen Thousand/-) shall be paid to the learned Amicus Curiae by the Patna High Court Legal Services Authority within one month from the date of receipt of a copy of this judgment.

(Rajeev Ranjan Prasad, J)

(Ashok Kumar Pandey, J)

Sushma2/Arvind

AFR/NAFR	
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