Md. Suhail Vs State Of Bihar

Court: Patna High Court

Date of Decision: April 12, 2023

Acts Referred: Juvenile Justice (Care and Protection of Children) Rules, 2007 â€" Rule 12, 12(3)
Protection of Children from Sexual Offences Act, 2012 â€" Section 4, 6, 8, 27, 29
Indian Penal Code, 1860 â€" Section 354B, 376, 511
Code Of Criminal Procedure, 1973 â€" Section 53A, 164, 164A, 313
Juvenile Justice (Care and Protection of Children) Act, 2000 â€" Section 68(1)
Juvenile Justice (Care and Protection of Children) Act, 2015 â€" Section 94, 94(2)
Evidence Act, 1872 â€" Section 118

Hon'ble Judges: Alok Kumar Pandey, J

Bench: Single Bench

Advocate: Ajay Kumar Thakur, Vaishnavi Singh, Malay Kumar Choudhary, Syed Ashfaque Ahmad

Final Decision: Allowed

Judgement

1. The present appeal has been directed against the judgment of conviction dated 18.11.2022 and order of sentence dated 23.11.2022 passed by

learned Additional Sessions Judge-VII cum Special Judge, Protection of Children from Sexual Offences Act (hereinafter referred to as POCSO),

Patna in Special (POCSO) Case No. 178/2017 arising out of Bikram P.S. Case No. 336/2017 whereby the accused (appellant/convict) has been

convicted for the offence punishable under Section 6 of the POCSO Act and has been sentenced to undergo rigorous imprisonment for ten years

alongwith fine of Rs.50,000/- (fifty thousand) for the said offence and in default of payment of fine he has to suffer two months additional

imprisonment.

2. The name of victim has not been disclosed in the present judgment to protect her prestige and dignity.

3. A written report submitted to S.H.O., Bikram Police Station in the district of Patna under the signature of informant is the basis for registration of

First Information Report (hereinafter referred to as FIR).

4. According to written report of informant (PW-2), the occurrence is of 17.11.2017 at about 5.00 P.M. for which information was given on

19.11.2017 at about 9.30 hours and immediately whereafter FIR was registered. The prosecution case, in brief, is that the victim aged about 8 years

was lured by the accused (appellant/convict) with a promise to give lemon to her and on the pretext of taking lemon, the victim went away with the

accused (appellant/convict). When the victim did not return, the informant went out for searching her. It is claimed by the informant that she saw that

accused (appellant/convict) made an attempt to commit rape upon the victim in the husk room. It is further claimed by the informant that the accused

(appellant/convict) fled away from the spot after noticing the presence of the informant. After that, the informant cautioned the family members of

accused (appellant/convict) but she did not get any positive response. It is further claimed that she gave application to police station on 19.11.2017 as

there was no male member at her house.

5. On the basis of written report of informant, Bikram P.S. Case No. 336/2017 dated 19.11.2017 was initially registered under Sections 376/ 511 of the

I.P.C. and later on Sections 4, 6 and 8 of the POCSO Act were added. Routine investigation followed. Statement of witnesses came to be recorded

and on completion of investigation, charge sheet has been submitted against the accused (appellant/convict) under Section 354-B of the I.P.C. and

under Sections 4, 6 and 8 of the POCSO Act. Thereafter, the learned trial court took cognizance against the accused (appellant/convict) under the

aforesaid sections. The learned trial court was pleased to frame charges under Section 376 of the I.P.C. and Sections 4 and 6 of the POCSO Act.

The charges were read over and explained to the accused (appellant/convict) to which he pleaded not guilty and claimed to be tried.

6. In order to bring home guilt of the accused (appellant/convict), prosecution has examined altogether ten witnesses. PW-1 is victim, PW-2 is mother

of the victim and informant of this case, PW-3 is grand-father of the victim, PW.-4 is father of the victim, PW-5 is Shahjad Alam, PW-6 is Santosh

Kumar, PW-7 is Dilip Kumar, PW-8 is Ajayuddin, PW-9 is Imam Victoriya Bano and PW-10 is Ram Chandra Paswan who is Investigating Officer of

this case. Following documentary evidence came to be exhibited on behalf of the prosecution:-

Exhibit-P-1(PW-1) is statement of victim under Section 164 of Cr.P.C.

Exhibit-P-2 (PW-2) is the signature of the informant on written application.

Exhibit-P-2/1 (PW-10) is the endorsement and signature of the S.H.O. of Bikram Police Station.

Exhibit-P-3 (PW-10) is a formal FIR.

Defence of the accused (appellant/convict) as gathered from the line of cross examination of prosecution witnesses as well as from statement under

Section 313 of the Cr.P.C. is that of total denial. However, no defence witness was examined at the trial.

7. After hearing the parties, the learned trial court was pleased to convict the accused (appellant/convict) and to sentence him as indicated in the

opening paragraph of this judgment.

8. Heard Mr. Ajay Kumar Thakur, learned counsel for the appellant at sufficient length of time and following submissions were made on behalf of

learned counsel for the appellant:-

Learned counsel for the appellant submitted that the prosecution completely failed to discharge its onus of proving beyond all reasonable doubt that the

victim was minor on the date of occurrence. He further submitted that prosecution has not produced any material for the purpose of establishing the

age of the victim as per the Juvenile Justice Act nor there is any such age determination by the learned trial court and in view of judgment of

HonÃ¢â‚¬â„¢ble Supreme Court in the case of Jarnail Singh v. State of Haryana reported in (2013) 7 SCC 263, it will be deemed that prosecution has

failed to establish that victim was minor on the date of occurrence and this view has also been upheld by this Court in catena of judgments. He further

submitted that said POCSO Act is an stringent law and initial burden of the proof of criminal charges always rest with the prosecution in the light of

settled criminal jurisprudence and prosecution is bound to prove the charges beyond all reasonable doubts and the prosecution cannot take benefit of

the lapses on the part of the defence and prosecution has to stand on its own leg even in cases where there is provision of adverse burden of proof

that would attract only on the discharge of initial burden by the prosecution. He further submitted that the prosecution is bound to prove the exact age

of the victim in the light of statutory provision of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter referred to as J.J. Act) as the

present occurrence took place on 17.11.2017.

9. Learned counsel further submitted that there is no medical examination of the victim. On the said point, learned counsel submitted that PW-2

(mother of victim) has clearly stated that there was no injury upon the body of victim due to which medical examination of victim was not conducted.

He further submitted that victim herself stated that her medical examination was not conducted and on the said point PW-10 (I.O.) has stated that

victim was not medically examined nor any cloth was seized. PW-10 (I.O.) has further stated that during course of investigation he did not find any

case under Section 376 of the IPC and charge sheet has been submitted under the order of supervising authority. On the said score, learned counsel

submitted that the finding of trial court regarding the offence of penetrative sexual assault cannot be proved beyond reasonable doubt. He further

submitted that in the present case, no medical examination of the victim as well as appellant has been done as per Section 164-A and Section 53-A of

the Cr.P.C. respectively and there is no medical examination of a child under Section 27 of the POCSO Act. On the said score, he submitted that in

the case of Chotkau vs. State of U.P. reported in AIR 2022 SC 4688 it has been held that same is fatal to the prosecution and it has become settled

principle of law in the light of ruling observed by HonÃ¢â‚¬â„¢ble Supreme Court in catena of judgments.

10. Learned counsel further submitted that prosecution witnesses have not supported the prosecution case fully, in that situation the appellant will get

the benefit of doubt as it was held in Veerendra vs. State of M.P. reported in AIR 2022 SC 3379. He further submitted that in the present case, full

fledged prosecution witnesses, namely, 6, 8 and 10 have stated that no occurrence as alleged by the prosecution has taken place and due to the

existing land dispute, present case has been lodged. Similarly, PW-10 (I.O.) in para 8, 9 and 10 of his deposition stated that witnesses stated that the

present case is a false case lodged on account of land dispute. In para 11, PW-10 (I.O.) has stated that victim has not stated that appellant has

committed any wrong with her and thus in view of the judgment of HonÃ¢â‚¬â„¢ble Supreme Court in case of Raja Ram vs. The State of Rajasthan

reported in (2005) 5 SCC 272, the statement made by the witnesses on behalf of prosecution will be binding on the prosecution and the accused will

get its benefit. On the said score, learned counsel submitted that full fledged prosecution witnesses have not supported the prosecution case which will

be binding on the prosecution and the appellant will get its benefit.

11. Learned counsel for the appellant further submitted that the victim does not come within the category of sterling witness. He further submitted that

statement of victim is quite contradictory with the statement of initial version of prosecution story. In initial version, it has been claimed by the

informant that attempt of rape was made against the victim but during the course of trial victim herself has stated that her private parts have been

penetrated by the appellant and she is feeling pain which is quite inconsistent with the initial version of prosecution story and attention was also drawn

by the defence in para 14 and 15 towards her previous statement as to whether she has stated before the police that wrong was done to her by the

appellant. In para 15 she admitted that before police she has stated that when Suhail was opening her pant, her mother arrived. PW-10 (I.O.) has

stated in para 11 that victim has not stated before him that appellant committed wrong against her. On the said point statement of victim is quite

contradictory during the course of adducing evidence before the court and statement given before the I.O. In that way, learned counsel for the

appellant submitted that statement of victim is not trustworthy and reliable and the same does not inspire confidence. He further submitted that she is

not a witness of high calibre and she cannot be put under the category of sterling witness.

12. Mr. Syed Ashfaque Ahmad, learned Additional Public Prosecutor appearing for the State submitted that PW-1, PW-2 and PW-3, PW-7 and PW-

9 have supported the age of the victim and stated that at the time of incident victim was minor and same is admitted by the defence as no objection

was raised on the point of age of the victim during cross examination. He further submitted that statement of victim was recorded under Section 164

of the Cr.P.C. and she has supported the story of prosecution. He further submitted that PW-1, PW-2 and PW-3 have supported the story of

prosecution. Victim herself has supported the case of the prosecution. Learned APP for the State further submitted that solitary evidence of

prosecutrix is sufficient to prove the case of the prosecution. To buttress the said submission he referred judgment of HonÃ¢â‚¬â„¢ble Supreme Court

rendered in the case of Krishan Kumar Malik vs. State of Haryana reported in (2011) 7 SCC 130. He further submitted that finding of trial court is

just and due appreciation of the evidence and impugned judgment is based on sound principle of law and hence, the impugned judgment does not

require any interference.

13. I have perused the impugned judgment, order of trial court and lower court records. I have given my thoughtful consideration to the rival

contention made on behalf of the parties as noted above.

14. Based on the scrutiny of evidence adduced at the trial, I find substance in submission made on behalf of the appellant that the prosecution failed to

prove, beyond all reasonable doubts, the fact that the victim was minor as on the date of occurrence. The HonÃ¢â‚¬â„¢ble Supreme Court has held in case

of Jarnail Singh v. State of Haryana reported in (2013) 7 SCC 263 that Ã¢â‚¬Å“though Rule 12 of the Juvenile Justice (Care and Protection of Children)

Rules, 2007 have been framed under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as Act

2000) is applicable to determine the age of child in conflict with law, the aforesaid provision should be the basis for determination of age even of a

child who is a victim of crime. The Court remarked that there was hardly any difference insofar as the issue of minority was concerned, between a

child in conflict with law, and a child who is a victim of crime. Paragraph 22 and 23 of the said decision in case of Jarnail Singh (supra) can be usefully

referred to for clarity:-

Ã¢â‚¬Å“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection

of Children) Rules, 2007 (hereinafter referred to as Ã¢â‚¬Å“the 2007 RulesÃ¢â‚¬). The aforestated 2007 Rules have been framed under Section 68(1) of the

Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

Ã¢â‚¬Å“12. Procedure to be followed in determination of age- (1) in every case concerning a child or a juvenile in conflict with law, the court or the Board

or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict

with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may

be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home

or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as

the case may be, the Committee by seeking evidence by obtainingÃ¢â‚¬

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board,

which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be,

the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on

lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may

be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b)

shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the

conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age

and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or

the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no

further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in

sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in

accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate

order in the interest of the juvenile in conflict with law.Ã¢â‚¬â€‹

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory

provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as

the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it

would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age

conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by

adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is

expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would

conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest

rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3)

envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date

of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry,

Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is

available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate

would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age

of the child concerned, on the basis of medical opinion.Ã¢â‚¬â€‹

15. The date of occurrence in the present case is 17.11.2017. It is pertinent to note that Act of 2007 has been repealed by the Juvenile Justice (Care

and Protection of Children) Act, 2015, (Ã¢â‚¬ËœThe Act of 2015Ã¢â‚¬â„¢ for short). Section 94 of the Act of 2015 lays down the procedure for determining

juvenility. Relevant part of sub-section (2) of Section 94, which provides substantially similar procedure as was prescribed under 2007 Rules, reads as

under:-

Ã¢â‚¬Å“(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.Ã¢â‚¬â€‹

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

procedure prescribed under the Act in the light of reasoning put forth by the Supreme Court in case of Jarnail Singh (Supra). In the case of Sunil vs.

the State of Haryana reported in AIR 2010 SC 392, the HonÃ¢â‚¬â„¢ble Supreme Court observed that conviction cannot be based on an approximate age

of the victim. In State of Madhya Pradesh vs. Munna @ Shambhoo Nath reported in (2016) 1 SCC 696, the HonÃ¢â‚¬â„¢ble Supreme Court held that the

evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.

17. In the present case, the prosecutrix was a literate girl as she has signed everywhere. Therefore, she must have been getting education

somewhere. It is not the prosecution case or evidence that prosecutrix did not attend any school. As a matter of fact, no effort was made by the

prosecution to establish the age of the victim in accordance with statutory provision. In this way, the contention of learned counsel for the appellant as

submitted in foregoing paragraphs is quite tenable and sustainable.

18. It is necessary to evaluate, analyze and screen out the evidences of witnesses adduced before the trial court in the light of offence punishable

under Section 6 of POCSO Act.

19. PW-1 is the victim herself and in her deposition her age is mentioned as 8/9 years. Before taking the deposition of minor victim who is of 8/9

years, the court has made observation that the victim is competent to adduce evidence. Subsequently, the court also satisfied with answers given by

the victim but the court is totally silent on specific questions that were put to her, consequently it defeats the very foundation of Section 118 of the

Indian Evidence Act which reads as under:-

118. who may testify- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions

put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause

of the same kind.

In this way, the court has departed from said procedure of recording evidence and has erroneously committed error on record.

In the light of aforesaid discussion, it can well be concluded that trial judge who has a child witness before him should preserve on record question and

answer which could help the higher courts or courts of appeal; to come to conclusion whether the trial court judge decision of competency was right

or wrong.

The victim has stated that the appellant lured her with a promise to give lemon and she went away towards Kharhi with appellant where there was

tree of lemon and she sat over there and the appellant did not come with lemon and the appellant sat upon the victim by disrobing her and the appellant

closed her mouth. When on alarm the victimÃ¢â‚¬â„¢s mother came the appellant went away. The victim has deposed that she has stated all the matters

to her mother that had been happened against her but in her version during course of adducing evidence she has stated that the appellant penetrated

her private part after sitting on her body. Her statement in paragraph 3 during deposition is quite inconsistent with the initial version of story of

prosecution which is narrated by none else than the victim mother and victim herself in paragraph 5 has stated that whatever occurrence happened

against her, she has told to her mother. In the light of said version of victim her deposition as PW-1 is quite contradictory in nature. She has stated in

paragraph 11 that her statement was recorded in the court prior to this and she was taken away by the police for the said purpose. She has further

stated that whatever she stated before the court was tutored to her by the police.

20. Statement of victim recorded under Section 164 Cr.P.C. is merely a tutor version in the light of paragraph 11 of deposition of PW-1 (victim) where

it is clearly stated that the statement was recorded at the behest of police. She has also stated in paragraph 8 that the house of appellant is in front of

her house and there was dispute with regard to drainage between houses of the appellant and victim. She has stated in paragraph 12 that no medical

examination was conducted and it has been stated before the police in paragraph 14 that the appellant committed wrong against her and in paragraph

15, she has stated before the police that when her pant was being opened by the appellant, her mother came but her statement in paragraph 14 is

totally negated by PW-10 (I.O. of the case) in paragraph 11 that the victim has never stated that the appellant committed wrong against her.

21. The statement of victim recorded under Section 164 of the Cr.P.C. is merely a tutored version of the police as words were put to victimÃ¢â‚¬â„¢s

mouth by the police itself and in this context, the statement of victim under Section 164 of the Cr.P.C. in which it was recorded that she was lured by

the police on the pretext of giving lemon and she was undressed and wrong was committed against her by the appellant. The aforesaid statement of

victim lost its credibility and the same hits at the very root of the story of prosecution.

22. From perusal of statement of PW-10 (I.O.), it is crystal clear that victimÃ¢â‚¬â„¢s statement is totally inconsistent with the statement of PW-10 as

stated in paragraph 11 of the deposition. From perusal of evidence adduced by PW-1, her statement is full of contradictions as initial version of story

of prosecution is not consistent with the evidence adduced by the victim as mentioned in paragraph 3 that she was raped by the appellant. On the said

point PW-2, who is the informant of the present case has stated in paragraph 13 of her cross-examination that body of victim does not have any injury,

hence, medical examination was not conducted. In this way, the statement of victim is quite contradictory in nature with the statement of informant

(PW-2).

23. PW-2 is mother of victim and informant of the case and she has stated before police in paragraph 11 that the appellant sat on the body of the

victim after disrobing her (on said point attention of victimÃ¢â‚¬â„¢s mother has been drawn by defence) but on the said point PW-10 (I.O.) has totally

negated the version of PW-2 (informant) that victimÃ¢â‚¬â„¢s mother has not stated before PW-10 that the appellant sat on the victim after disrobing her.

In this way, her statement is also quite contradictory.

24. PW-3 is grand-father of the victim. This witness is not eye witness of the occurrence and he has heard from victim and her daughter-in-law that

the victim was being thrashed and she was being forced for indecent conduct and appellant went away after noticing presence of informantÃ¢â‚¬â„¢s

mother. In this way, the present witness is a hearsay witness.

25. PW-4 is father of the victim. This witness is not eye witness of the occurrence. This witness stated that he was informed through phone by his

wife that occurrence took place against her daughter. He has stated that his daughter stated that she was raped by the appellant by disrobing her but

his version in paragraph 1 has been negated by PW-10 (I.O.) in paragraph 12 that the father of the victim has never stated before him that there was

an attempt to commit rape after undressing the victim. In this way, he is hearsay witness and his statement is quite inconsistent with the statement of

PW-10 as stated in paragraph 12 of his deposition.

26. PW-5 is Shahjad Alam. This witness stated that he does not know about the occurrence and his statement was recorded by the police and he has

stated that the appellant has been falsely implicated on account of land dispute and he has been declared hostile.

27. PW-6 is Santosh Kumar. This witness stated that he knows the occurrence and he has heard that false charge of rape was made against the

appellant. He has further stated that his statement was recorded by police. He further stated that there was land dispute between both sides and Md.

Sonu @ Rafique threatened the appellant for dire consequences. This witness has not been declared hostile though he has not supported the case of

the prosecution and his evidence is quite consistent with the evidence adduced by PW-10 (I.O.) in para-9 that said witness PW-6 (Santosh Kumar)

has stated before the PW-10 (I.O.) that Sonu @ Rafi induced the informant to file false case in thana by the victim and PW-2 has stated in para-9

that the written application was in the writing of Rafi. In this way the role of Rafi is quite visible in the present case but he has not been examined.

28. PW-7 is Dilip Kumar. This witness stated that he does not know the occurrence and he has been declared hostile.

29. PW-8 is Ajayuddin. This witness stated that his statement was recorded by the police and land dispute was going on between informant and family

member of appellant and he has stated in para-3 of cross examination that appellant did not commit any occurrence against the victim. The said

witness has not been declared hostile by the prosecution though he has not supported the case of the prosecution and his evidence is fully consistent

with the evidence of PW-10 (I.O.) as mentioned in para-10 that he has stated before the police that there was land dispute between the informant and

appellant and no occurrence took place against the victim. In this way, the statement of this witness before the police is quite consistent with the

statement adduced before the court and full fledged prosecution witness has supported the case of the defence.

30. PW-9 is Imam Victoriya Bano. This witness has stated that no occurrence took place against the victim. She stated that the police has recorded

her statement. This witness has been declared hostile.

31. PW-10 (Ram Chandra Paswan) is Investigating officer of this case. This witness recorded the statement of PW-1 (victim), PW-2 (informant) and

some other witnesses. This witness (I.O.) stated that nothing significant was found on spot during his investigation. This witness has stated that during

the course of investigation medical examination of victim was not conducted nor clothes of victim were seized. He has stated in para-14 of his

deposition that there was land dispute between appellant and family of informant but he did not conduct any investigation on the said point and he did

not find any case under Section 376 of IPC during course of the investigation and he submitted charge sheet on the order of supervising officer. In this

way, the statement of PW-10 (I.O.) is crystal clear that neither medical examination of victim was conducted nor her clothes were seized.

32. From perusal of the FIR, it is crystal clear that occurrence took place on 17.11.2017 at about 5:00 PM and information regarding the said

occurrence was given to concerned police station on 19.11.2017 at 9:30 hours when place of occurrence is merely 6 km. away from the concerned

police station as she has made bald statement which is not categorical on the point of availability of male member. On the said point the PW-10 (I.O.)

has stated in para-6 of his deposition that information was given to thana on 19.11.2017 though the occurrence took place on 17.11.2017 and it has

been deposed by the PW-10 (I.O.) that there was column no. 8 in formal FIR for giving the reasoning for delay regarding belated information but the

said column does not indicate any reason for belated information. The statements given by the informant as well as by the I.O. lack coherence and are

not in synced with each other. In the light of aforesaid fact, the prosecution story is surrounded with the suspicion which clearly reflected not only in

the initial version of the prosecution story but same is admitted by the PW-10 (I.O.) that there is column for recording the reason of delay while

sending belated information but the said column does not indicate any reason for belated information.

33. In the present case, it is necessary to cite a decision rendered by HonÃ¢â‚¬â„¢ble Supreme Court in the case of Rai Sandeep @ Deepu reported in

2012 (8) SCC 21 in which the HonÃ¢â‚¬â„¢ble Supreme Court said that before relying on the sole testimony of the prosecutrix, the court must be satisfied

that the prosecutrix is a Ã¢â‚¬Å“sterling witnessÃ¢â‚¬â€‹

Para 22 of the judgment is being reproduced below:

Ã¢â‚¬Å“22. In our considered opinion, the Ã¢â‚¬Ëœsterling 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 Ã¢â‚¬Ëœsterling witnessÃ¢â‚¬â„¢ 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 allegedÃ¢â‚¬â€‹.

34. Now the question is whether the prosecutrix of this case is a sterling witness. In the present case, the statement of victim has already been

discussed in foregoing paragraphs. Her statement is quite contradictory in nature on vital points. She herself stated in para 14 that she has stated

before the police that appellant committed wrong against her. During the course of cross examination attention of this witness has been drawn by the

defence on the aforesaid point and on the said point PW-10 who is I.O. of the case has stated in para 11 of his cross examination that victim has not

made statement that wrong was committed against her by the appellant. The aforesaid contradictions on the said point are hitting the foundation of

prosecution case and in that context, the version of PW-1 who is victim of the case gave fatal blow to the story of prosecution. In para 5 of her

deposition victim has stated that whatever occurrence happened against her, she has told to her mother. The initial version of prosecution story is

narrated by none else than the PW-2 (victimÃ¢â‚¬â„¢s mother) who stated that appellant made an attempt to commit rape which is totally inconsistent

with the evidence of PW-1 (victim) as mentioned in para 3 of her deposition in which she has stated that her private parts have been penetrated by the

appellant. The victim has stated in para 11 of her cross examination that her statement was recorded in the court prior to this and she was taken away

by the police for the said purpose. She has further stated that whatever she stated before the court was tutored to her by the police. In the light of

victimÃ¢â‚¬â„¢s statement recorded at para 11 of her deposition indicates that her statement recorded under Section 164 of the Cr.P.C. is nothing but

purely a tutor version of police and words were put to her mouth by the police which does not inspire confidence and statement under Section 164 of

Cr.P.C. has lost its credibility for the purpose of corroboration and therefore, she cannot put into category of sterling witness. PW-2, the mother of

victim has stated that there was no injury on the body of victim hence medical examination of victim was not conducted. PW-10 (I.O.) stated that

neither medical examination of victim was conducted nor her clothes were seized.

35. Learned counsel of the appellant submitted that in light of Section 53A of the Cr.P.C., the appellant has not been examined and non examination of

appellant was certainly fatal to the prosecution case.

36. I consider at this juncture useful to refer to Section 53 A of the Cr.P.C., which ordains that when a person is arrested on a charge of committing

an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence

as to the commission of such offence, it shall be lawful for a registered medical practitioner, as mentioned in the said provision. Section 53 A of the

Cr.PC., read as under:-

53-A. Examination of person accused of rape by medical practitioner-(1) When a person is arrested on a charge of committing an offence of rape or

an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission

of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the

absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered

medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid

and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination

giving the following particulars, namely:-

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

(ii) the age of the accused,

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

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

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

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

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate

referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.]

37. It is true that said provision is not mandatory in character, in courtÃ¢â‚¬â„¢s opinion the said provision enables the prosecution to conduct the

examination of victim in a manner as to substantially establish a charge of committing an offence of rape.

38. In this respect, it is necessary to discuss oft quoted judgment of HonÃ¢â‚¬â„¢ble Supreme Court in case of Chotkau v. State of Uttar Pradesh reported

in AIR 2022 SC 4688 whereby it has been observed that failure of the prosecution to subject the appellant to medical examination was certainly fatal

to the prosecutionÃ¢â‚¬â„¢s case especially when the ocular evidence was found to be not trustworthy.

39. The contention of appellant in the light of Section 29 of POCSO Act is quite tenable in the light of fact that there was failure on the part of

prosecution to establish the essential fundamental facts to attract the provision of POCSO Act.

40. Learned counsel for the appellant further submitted that in the present case there is no compliance of Section 164-A of the Cr.P.C. as victim was

not medically examined which is evident from the deposition of PW-1 (victim) herself, PW-2 (mother of the victim) and PW-10 (I.O.). On the said

point, contention of learned counsel for the appellant is quite tenable and sustainable in the light of discussions made in foregoing paragraphs and the

same was fatal to the prosecution case.

41. From perusal of evidence adduced by PW-1 (victim), it is clear that she made contradictory statements on vital points and on this score, contention

of learned APP for the State is not tenable and sustainable that victim comes under the category of sterling witness and her solitary evidence is

sufficient to prove the case of the prosecution.

42. Now, in the light of evidence adduced by the prosecution, it is crystal clear that PW-6 Santosh Kumar and PW-8 Ajayuddin are full fledged

prosecution witnesses but they have not supported the case of the prosecution rather they have supported the defence case by deposing that there

was land dispute between both sides and Rafi threatened the appellant for dire consequences and role of Rafi is quite visible in the statement of PW-2

(victimÃ¢â‚¬â„¢s mother) that the written report is in the writing of Rafi though he has not been examined on behalf of the prosecution. Further the

deposition of PW-6 and PW-8 is quite consistent with the statement of I.O. who has deposed in the court as PW-10 and their version before the

police is quite consistent with the evidence adduced before the court. The contention of learned counsel for the appellant that in the present case, PW-

6 and PW-8 who are full fledged witnesses but they have not supported the case of the prosecution rather they have supported the case of defence is

quite tenable and sustainable in the light of judgment of HonÃ¢â‚¬â„¢ble Supreme Court rendered in Raja Ram (Supra) and Veerendra (Supra) and the

same view is reiterated in Mukhtiar Ahmad Ansari Vs. State (NCT of Delhi), reported in (2005) 5 SCC 258.

43. It is worth to note here that the trial court has not given any finding regarding the charges framed under Section 376 of the IPC and Section 4 of

the POCSO Act in concluding part of its judgment which is bad in the eye of law and the concerned court has passed the judgment of conviction

under Section 6 of POCSO Act.

44. On all counts from the analysis of evidence adduced during trial, it is crystal clear that offence under Section 6 of the POCSO Act has not been

proved beyond reasonable doubt and benefit of doubt goes in favour of the appellant.

45. In the result, in my view, prosecution case suffers from several infirmities, as noticed above, and it was not a fit case where conviction could have

been recorded. The learned trial court fell in error of law as well as appreciation of facts of the case in view of settled criminal jurisprudence. Hence,

impugned judgment of conviction and order of sentence are hereby set aside and this appeal stands allowed. The appellant is in custody. Let him be

released forthwith, if he is not warranted in any other case.