

IN THE HIGH COURT OF JUDICATURE AT PATNA

Anil Kumar & Anr.

vs.

The State of Bihar

CRIMINAL APPEAL (DB) No. 417 of 2020

[With CRIMINAL APPEAL (DB) No. 76 of 2021 &

CRIMINAL APPEAL (DB) No. 477 of 2021]

28 June 2023

(Hon’ble Mr. Justice Chakradhari Sharan Singh &

Hon’ble Mr. Justice Chandra Prakash Singh)

Issue for Consideration

Whether judgment of conviction and order of sentence passed by learned 1st Additional Sessions Judge-cum-Special Judge (POCSO Act and SC/ST Act), Sitamarhi, in G.R. No. 2454/19, Trial No. 90/19 arising out of Sitamarhi Mahila P.S. Case No. 27/19 requires interference?arc

Headnotes

Indian Penal Code, 1860—Section 376-DA, 354-A, 354-B and 506—Protection of Children from Sexual Offences Act, 2012—Section 6—Information Technology Act, 2000—Section 67-B—gang rape—two minor girls were gang raped by appellants—prosecution failed to exercise to establish that victims were under the age of 18 years of age as on date of occurrence—Medical Board assessed the age of both victims as between 16-18 years based on radiological examination—video was made by appellants while committing gang rape, it was sent through whatsapp—neither the mobile was seized nor the contents of electronic records were proved.

Held: school register was produced but headmaster of the school was not examined nor the contents of admission register were proved—Medical Board did not find any external or internal injuries on the body of victims—FIR was written by grandfather, who was not examined—charge of commission of gang rape is not supported by the medical evidence nor by the result of forensic examination—non-examination of the mother of the victims, who was present in the house and to whom the victims had disclosed about the occurrence first, is fatal to the prosecution’s case—prosecution has not been able to prove beyond all reasonable doubts commission of offence of rape or gang rape—impugned judgment of conviction and impugned order of sentence set aside—appeal allowed. (Paras 21 to 30, 42, 43, 45)

Case Law Cited

Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1; Jarnail Singh vs. State of Haryana, (2013) 7 SCC 263; Rajak Mohammad vs. State of H.P., (2018) 9 SCC 248; Anvar P.V. vs. P.K. Basheer, (2014) 10 SCC 473—Relied Upon.

List of Acts

Indian Penal Code, 1860; Protection of Children from Sexual Offences Act, 2012; Juvenile Justice (Care and Protection of Children) Act, 2015; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; Information Technology Act, 2020.

List of Keywords

Victim, rape, gang rape, medical evidence not supported, FIR, School register, external or internal injuries on the body of victims.

Case Arising From

From judgment of conviction dated 06.03.2020 and order of sentence dated 17.03.2020 passed by learned 1st Additional Sessions Judge-cum-Special Judge (POCSO Act and SC/ST Act), Sitamarhi, in G.R. No. 2454/19, Trial No. 90/19 arising out of Sitamarhi Mahila P.S. Case No. 27/19.

Appearances for Parties

(In all appeals)

For the Appellant: Mr. Ajay Kumar Thakur, Advocate; Mr. Ritwaj Raman, Advocate; Mr. Md. Imteyaz Ahmad, Advocate; Mr. Ritwik Thakur, Advocate; Mrs. Vaishanavi Singh, Advocate.

For the Respondent-State: Ms. Shashi Bala Verma, APP.

For the Informant: Mrs. Alka Verma, Advocate; Mrs. Mira Kumari, Advocate.

Headnotes Prepared by Reporter: Abhas Chandra, Advocate

Judgment/Order of the Hon’ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.417 of 2020

Arising Out of PS. Case No.-27 Year-2019 Thana- MAHILA P.S. District- Sitamarhi

- 1. ANIL KUMAR Son of Sri Lal Babu Mahto @ Lalu Mahto Resident of Village- Indarwa, P.S.- Kanhauli, District- Sitamarhi.
- 2. Parsuram Kumar @ Pashuram Kumar Son of Sri Jai Narayan Mahto @ Jai Narayan Bhagat Resident of Village- Indarwa, P.S.- Kanhauli, District- Sitamarhi.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 76 of 2021

Arising Out of PS. Case No.-27 Year-2019 Thana- MAHILA P.S. District- Sitamarhi

- 1. NAGENDRA KUMAR S/O Sub Narayan Mahto @ Shubh Narayan Mahto R/O Village- Indarwa, P.S. - Kanhauli, Dist. - Sitamarhi.
- 2. RAJU KUMAR @ DAKMA @ DAKMA KUMAR @ SHATRUGHANA S/O- Late Chandeshwar Mahto R/O Village- Indarwa, P.S. - Kanhauli, Dist. - Sitamarhi.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 477 of 2021

Arising Out of PS. Case No.-27 Year-2019 Thana- MAHILA P.S. District- Sitamarhi

- 1. KAMLESH KUMAR Son of Ram Ekbal Mahto R/o Village- Ward No. 2 Indarwa, P.S.- Kanhauli, District- Sitamarhi.
- 2. Govinda Kumar Son of Gudar Mahto R/o Village- Ward No. 2 Indarwa, P.S.- Kanhauli, District- Sitamarhi.
- 3. Sujit Kumar Son of Late Lal Babu Mahto R/o Village- Ward No. 2 Indarwa, P.S.- Kanhauli, District- Sitamarhi.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

(In all appeals)

For the Appellants :

Mr. Ajay Kumar Thakur, Advocate
Mr. Ritwaj Raman, Advocate
Mr. Md.Imteyaz Ahmad
Mr. Ritwik Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate
Ms. Shashi Bala Verma, APP

For the Respondent State:



For the Informant : Mrs. Alka Verma, Advocate
Mrs. Mira Kumari, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : -06-2023

These appeals, preferred under Section 374(2) of the Code of Criminal Procedure, arise out of the same judgment of conviction dated 06.03.2020 and order of sentence dated 17.03.2020 passed by learned 1st Additional Sessions Judge-cum-Special Judge (POCSO Act and SC/ST Act), Sitamarhi, in G.R. No. 2454/19, Trial No. 90/19 arising out of Sitamarhi Mahila P.S. Case No. 27/19, and, therefore, these appeals have been heard together and are being disposed of by the present common impugned judgment and order.

2. By the impugned judgment and order, the appellants have been convicted and sentenced as under: -

Cr. Appeal (D.B.) No. 417 of 2020				
	Convicted under Sections	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Appellant No. 1 (Anil Kumar)	376 DA of the Indian Penal Code	Life (for remainder of his natural life)	25,000/-	-
	354-A, 354-B and 506 of the Indian Penal Code	-	-	-
	6 of the Protection of Children from Sexual Offences Act, 2012	-	-	-



	Section 67-B of the Information Technology Act, 2020	-	-	-
	Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.	Life	5,000/-	Three months R.I.
Appellant No. 2 (Parsuram Kumar @ Parshuram Kumar)	376 DA of the Indian Penal Code	Life (for remainder of his natural life)	25,000/-	-
	354-A, 354-B and 506 of the Indian Penal Code	-	-	-
	6 of the Protection of Children from Sexual Offences Act, 2012	-	-	-
	Section 67-B of the Information Technology Act, 2020	-	-	-
	Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.	Life	5,000/-	Three months R.I.
Cr. Appeal (D.B.) No. 76 of 2021				
Appellant No. 1 (Nagendra Kumar)	376 DA of the Indian Penal Code	Life (for remainder of his natural life)	25,000/-	-
	354-A, 354-B and 506 of the Indian Penal Code	-	-	-
	6 of the Protection of Children from Sexual Offences Act, 2012	-	-	-
	Section 67-B of the Information Technology Act, 2020	-	-	-
	Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.	Life	5,000/-	Three months R.I.
Appellant No. 2 (Raju Kumar @ Dakma @ Dakma Kumar @ Shatrughna)	376 DA of the Indian Penal Code	Life (for remainder of his natural life)	25,000/-	-
	354-A, 354-B and 506 of the Indian Penal Code	-	-	-
	6 of the Protection of Children from Sexual Offences Act, 2012	-	-	-
	Section 67-B of the Information Technology	-	-	-



	Act, 2020			
	Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.	Life	5,000/-	Three months R.I.
Cr. Appeal (D.B.) No. 477 of 2021				
Appellant No. 1 (Kamlesh Kumar)	376 DA of the Indian Penal Code	Life (for remainder of his natural life)	25,000/-	-
	354-A, 354-B and 506 of the Indian Penal Code	-	-	-
	6 of the Protection of Children from Sexual Offences Act, 2012	-	-	-
	Section 67-B of the Information Technology Act, 2020	-	-	-
	Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.	Life	5,000/-	Three months R.I.
Appellant No. 2 (Govinda Kumar)	376 DA of the Indian Penal Code	Life (for remainder of his natural life)	25,000/-	-
	354-A, 354-B and 506 of the Indian Penal Code	-	-	-
	6 of the Protection of Children from Sexual Offences Act, 2012	-	-	-
	Section 67-B of the Information Technology Act, 2020	-	-	-
	Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.	Life	5,000/-	Three months R.I.
Appellant No. 3 (Sujit Kumar)	376 DA of the Indian Penal Code	Life (for remainder of his natural life)	25,000/-	-
	354-A, 354-B and 506 of the Indian Penal Code	-	-	-
	6 of the Protection of Children from Sexual Offences Act, 2012	-	-	-
	Section 67-B of the Information Technology Act, 2020	-	-	-
	Section 3(2)(v) of the	Life	5,000/-	Three months



	Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.			R.I.
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All the sentences have been ordered to run concurrently.

3. We have heard Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellants in all the three cases, Ms. Shashi Bala Sharma, learned Additional Public Prosecutor for the State and Ms. Alka Sharma, learned counsel for the informant/victim.

4. Keeping in view the mandate of law, the names and identities of the two victims are not being disclosed and they are being described in the present judgment and order as ‘V-1’ and ‘V-2’.

5. V-1 and V-2 are full sisters. A written report of the informant (V-1, P.W. 2) addressed to the Officer-in-Charge of Mahila Police Station, Sitamarhi, dated 21.06.2019 is the basis for registration of the concerned Sitamarhi Mahila P.S. Case No. 27 of 2019 on 21.06.2019 in relation to the occurrence, which had taken place on 19.06.2019. The FIR was originally registered leveling the offences punishable under Section 376-D of the IPC and Sections 6 and 8 of the POCSO Act. Subsequently, Sections 376-DA, 376-DB, 354-B, 354-C, 354-D of the IPC and Section 3(2)(v)



of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act, 1989, were added under the orders of the learned court below. Subsequently, Sections 67, 67-A, 67-B of the Information and Technology Act, 2020 ('IT Act' for short) and Section 27 of the Arms Act were also added under the another order of the court below. The informant V-1, alleged in her written report that she was aged nearly 16 years and belonged to a Scheduled Caste. On 19.06.2019, in the evening at 8:30 pm, she and her younger sister (V-2, PW-8) aged nearly 14 years were taking a stroll near the door of her house. In the meanwhile, one Sunaina Devi (not examined) came and insisted both the sisters to go for a walk. The said three persons, thereafter proceeded for a walk in the northern direction. After they travelled nearly half a kilometer, they saw, in the torch light, eight boys. The informant is said to have enquired from said Sunaina Devi as to why had she brought them there, whereafter Sunaina Devi started running away. In the meanwhile, all the eight boys came and caught hold of the informant and her younger sister. Pointing a gun towards V-2, they dragged both the sisters to some place and committed 'wrong' with them. She disclosed in her written report the names of seven persons including these seven appellants, all co-villagers of V-1



and V-2. She also alleged that one of the boys had video-graphed the occurrence.

6. The statements of V-1 and V-2 were recorded under Section 164 of the CrPC by the learned Judicial Magistrate First Class on 22.06.2019. V-1, in her statement under Section 164 of the CrPC, reiterated that the said seven persons had taken her and her younger sister (V-2) to an orchard after pressing her mouth. Kamlesh, Anil, Sujit and Nagendra committed rape upon her one by one, whereas Raju Kumar @ Dakma @ Dakma Kumar @ Shatrughna, Pashuram and Govinda committed rape on her younger sister (V-2) one by one. After committing rape, they fled away. She further stated that the appellant Raju @ Dakma had pointed a pistol towards her sister (V-2) and had threatened her of killing her. V-2, in her statement under Section 164 of the CrPC, stated that when she and V-1 were walking at 8:30 pm near a pond, all the seven accused persons came and upon pressing their mouths they took both of them to a distant place in an orchard. Govinda, Dakma and Parsuram committed rape upon her one by one, whereas Kamlesh, Anil, Nagendra and Sujit committed rape upon V-2. Pashuram had closed her mouth.

7. At this juncture itself, we consider it apt to mention that, according to the written report of the informant, none of the



victims nor Sunaina Devi were carrying torch. There is no reference to identification of the appellants with the aid of torch in the statements of V-1 and V-2, recorded under Section 164 of the CrPC. It is rather the case of the prosecution that accused persons were carrying torch. Secondly, whereas in the written report V-1 had mentioned Sunaina Devi as the persons with whom she had gone to have a walk in the night, there is no reference of her presence at the place from where V-1 and V-2 were kidnapped, in their statements recorded under Section 164 of the CrPC.

8. It further transpires that V-1 and V-2 were put to medical examination by a medical board on 21.06.2019 in the afternoon at Sadar Hospital, Sitamarhi. The Medical Board opined the age of the victims to be between 16 to 18 years. No external injury was found on the person of either of the victims nor signs of any struggle were found. The Board further opined that it was difficult to say whether rape had occurred or not and that they were habituated to regular sex.

9. The police, upon completion of investigation, submitted charge-sheet against all the seven accused persons including these appellants for the commission of the offences punishable under Section 376-DA, 376-DB, 354-B, 354-C, 354-D and 506 read with 34 of the IPC, Section 6 and 8 of the POCSO



Act, Sections 67, 67-A, 67-B of the IT Act and Section 3(2)(v-a) of ST/SC Act. From the charge sheet, it transpires that, according to the police, adequate materials were collected for submission of charge-sheet against Sunaina Devi also. However, the charge-sheet was filed against seven persons, already in custody, including these appellants, on 30.08.2019. Based on the charge-sheet submitted by the police before the learned First Additional Sessions Judge-cum-Special Judge (POCSO), Sitamarhi, cognizance was taken of the offence punishable under Sections 566, 376-DA, 354-A of the IPC, Section 3(2)(v) of the ST/SC Act, Section 6 of the POCSO Act and Section 67-B of the IT Act. Subsequently, charges were framed against these appellants for the offences punishable under Sections 506, 354-A, 354-B, 376-DA of the IPC, Section 3(2)(v) of the ST/SC Act, Section 6 of the POCSO Act and Section 67-B of the IT Act against all the seven persons including these appellants.

10. As the accused persons denied the charge and claimed to be tried, they were put on trial. At the trial, altogether 11 witnesses came to be examined including father of the victims (PW-2), Manoj Ram (PW-3), the Doctors, who were members of the medical board (PW-4 and PW-5), Investigation Officer (PW-6), second Investigating Officer (P.W. 7), V-2 (PW-8), Jitendra



Paswan (PW-9) and Ravindra Paswan (PW-10), who proved their signatures on the seizure list of seizure of the admission registers of Middle School Inderwa-II. Devendra Ram (PW-11) proved the seizure list of seizure of obscene videos and photographs prepared by the appellant Kamlesh, which was sent by the appellant Kamlesh on the mobile phone of Manoj Ram (PW-3). He also proved his signature on production-cum-seizure list relating to seizure of the clothes of V-2 and V-1.

11. After closure of the evidence of the prosecution's witnesses, the trial court questioned the accused persons in accordance with the requirements under Section 313 of the CrPC. The appellants, however, answered the questions in negative and claimed that they were innocent.

12. The trial court, after having appreciated the evidence adduced at the trial, reached a conclusion that the prosecution had been able to prove its case beyond all reasonable doubts against all the seven accused persons for commission of the offence punishable under sections 506, 354-A, 354-B, 378-DA of the IPC, Section 3(2)(v) of the ST/SC Act, Section 6 of the POCSO Act and Section 67-B of the IT Act. After recording the finding of conviction, the trial court sentenced the appellants for imprisonment with fine, as noted above, for the charge under



Section 376-DA of the IPC and considering the provision under Section 42 of the POCSO Act, the trial court has not imposed any separate sentence for other offences of the IPC, POCSO Act and Section 67-B of the IT Act. However, for the offence punishable under Section 3(2)(v) of the SC/ST Act, separate punishment to undergo R.I. for life with fine has been imposed by the trial court. The trial court has also awarded compensation to the victims in terms of Section 33(8) of the POCSO Act.

13. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellants, has submitted that the prosecution has failed to establish at the trial that the victims fall within the definition of 'child' within the meaning of POCSO Act inasmuch as no cogent evidence was adduced at the trial in support of the minority of the victims. He has contended that since the prosecution has failed to prove at the trial that the victims fell within the definition of 'child', conviction of these appellants for the offence punishable under Section 6 of the POCSO Act is not sustainable.

14. He has further argued that the narration of the prosecution's case by the informant differs substantially from the statement of the victims recorded under Section 164 of the CrPC. According to him, the prosecution's case appears to be highly



improbable as it was impossible for the victims to have recognized the accused persons with the aid of torch light, which the accused persons were carrying. No other source of identification has been disclosed by the prosecution. He has submitted that it is evident from the question, which was put by the learned trial court under Section 313 of the CrPC, that the torch light was flashed from the opposite direction by the accused persons. In such circumstances, the evidence of the victims that they could identify all the accused persons in the said torch light is not reliable and should be disbelieved. He has argued that as the victims do not appear to be trustworthy and they cannot be treated to be witness of sterling character. In that background, since the medical evidence does not support their evidence/accusation, finding of guilt of the appellants recorded by the trial court for commission of the offence punishable under Section 376-DA of the IPC is wholly unjustified. Assailing the finding of conviction recorded by the trial court for commission of offence punishable under Section 67-B of the IT Act, he has submitted that it was PW-3, the uncle of the victims, who had produced a video and photograph before the investigation agency and deposed at the trial that photocopy of the video was taken from his mobile phone by the police. Contrary to his deposition, the Investigating Officer, in his evidence, deposed that



the photocopy of the photographs and the C.D. of the video was produced by Manoj Ram. P.W. 11, Devendra Ram, deposed in his evidence that the video was prepared by Manoj Ram (PW-3) before it was produced before the police. He argues that the possibility of the video having been tampered with cannot be ruled out and such photographs cannot be taken in evidence in the absence of requisite proof stipulated under Section 65-B of the Evidence Act. He has argued that no witness, other than the close relatives of the victims, have supported the prosecution's case. The land-holder of the land, where the occurrence of rape had allegedly taken place, was neither examined by the police during the course of investigation nor at the trial, he contends. He submits, accordingly, that as the prosecution has failed to establish commission of the offences punishable under the aforesaid provisions of IPC, POCSO Act and IT Act, conviction of these appellants for the offence punishable under Section 3(2)(v) of the SC/ST Act is not at all sustainable.

15. Learned Additional Public Prosecutor appearing for the State, on the other hand, has submitted that the prosecution brought on record by way of exhibits, the Admission Registers of the victims of the school where they had first studied, which go to suggest that the victims fell within the definition of 'child' under



Section 2(1)(d) of the POCSO Act. She has submitted that overwritings, noticed in the Admission Registers of the school, where the victims had first studied, show that as per the original entries, the victims fell under the definition of 'child', but, by overwriting, years of their births have been altered. She has submitted that the age of V-1 was assessed as 16 years on the date of recording of her statement under Section 164 of the CrPC and that of V-2 as 15 years on the said day. She accordingly contends that the learned trial court has rightly concluded that the victims fell within the definition of 'child' under the provisions of POCSO Act. She has submitted that there is evidence to the effect that the vulgar video of commission of rape was uploaded by the appellant Kamlesh Kumar, which was sent by him through Whatsapp on the mobile phone of PW-3. She contends that considering entire facts and circumstances, the trial court has rightly convicted the appellants of various offences based on correct analysis of the evidence adduced at the trial.

16. Ms. Alka Verma, learned counsel appearing on behalf of the informant, has vehemently argued that the primary evidence of the victims regarding commission of rape by these appellants has not weakened the prosecution's case of commission of gang rape on the ground that the electronic evidence could not



be proved at the trial. In support of her submission, she has placed reliance on the Supreme Court's decision in the case of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, reported in (2020) 7 SCC 1.

17. We have perused the impugned judgment and order of the trial court and we have considered the rival submissions made on behalf of the parties. In the facts and circumstances of the case, first moot question, which this Court is required to consider, is as to whether the prosecution was able to conclusively prove at the trial that the victims fell within the definition of 'child' within the meaning of Section 2(1)(d) of the POCSO Act. In support of the prosecution's case that V-1 and V-2 fell within the definition of 'child', a seizure list (Exhibit-8) regarding seizure of the School Admission Register from April 2011 till 03.07.2019 (Page 1-168). A photocopy of the entries at Sl. No. 31 and 32 over one of the sheets of the Admission Register came to be marked as Exhibit-9 and 9/1 respectively, in which there are overwritings and cuttings as regards year of birth of both the victims. As per the photostat copy of the said sheet of the Admission Register, both the victims were admitted in the school on 06.04.2011. Against names of both the victims, at one point of time 2006 was mentioned as the year of birth, which was subsequently corrected to 2002 in case of V-1.



There are initials put by someone against the corrections of date of birth. The victims were admitted in class 1 in April, 2011. There is a remark column in the said photo-stat copy of the relevant sheet of the Admission Register with following entries against the names of the victims:-

‘अविभावक तीन बार में उम्र बच्चे का लिखवाएं’

(the guardian had got entered the date of birth of the students in three attempts).’

18. The prosecution got examined Jitendra Paswan (PW-9) and Ravindra Paswan (PW-10) to prove their signatures on the seizure list of seizure of the Admission Register. There is no evidence as to who had put the initials while altering the dates of births of the victims.

19. We consider it desirable to notice, at this juncture, the Supreme Court's decision in the case of ***Jarnail Singh v. State of Haryana***, reported in **(2013) 7 SCC 263**, when the Supreme Court had occasion to deal with the procedure for determination of age of victim of rape for the purpose of application of the provisions of the POCSO Act. The Supreme Court held, dealing with the Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (‘Rules of 2007’ for short), framed under the provisions of Juvenile Justice (Care and Protection of



Children) Act, 2007 ('Act of 2007' for short) that the aforesaid provision should be the basis for determination of age even of a child, who is victim of crime. The Supreme Court has remarked that there was hardly any difference so far 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, being relevant, is being reproduced herein below:-

“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as “the 2007 Rules”). The aforesaid 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:

12. Procedure to be followed in determination of age.—(1) *In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

(2) *The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.*

(3) *In every case concerning a child or juvenile in conflict with law, the age determination*



inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

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

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

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year;

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules



and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3),



matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.”

20. It is pertinent to note that the Act of 2007 has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 ('Act of 2015' for short) sub-Section (2) of Section 94 of the Act of 2015 lays down the provision for determining the age of a person in conflict with law. Procedure for age determination now laid down under Section 94 (2) of the Act of 2015 is substantially the same as was prescribed under 2007 Rules, which reads as under:

"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.”

21. Indisputably, no exercise was carried out by the prosecution to establish that V-1 and V-2 were under the age of 18



years as on the date of occurrence by following the procedure prescribed under the Act of 2015 in the light of the reasoning put forth by the Supreme Court in case of **Jarnail Singh** (supra). Further, in the present case, the medical board opined the age of the victims between 16 to 18 years based on radiological examination. The Supreme Court, in case of **Rajak Mohammad v. State of H.P.**, reported in **(2018) 9 SCC 248**, has held that the age determined on the basis of radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. The Supreme Court, taking into account the facts and circumstances of that case, opined in case of **Rajak Mohammed** (supra) that the report of radiological examination left room for ample doubt with regard to correct age of the prosecutrix.

22. In the present case, the prosecution relied on the admission register instead of making attempts to obtain birth certificates from the school. Further, the prosecution got examined, at the trial, the teachers of the school (PW-9 and PW-10), who simply proved the seizure of the admission register. The Police Officer, according to the deposition of PW-9, had obtained the admission register from the Headmaster of the school. The Headmaster of the school was not examined. Further, the contents of the admission register were not proved, as is evident from the



depositions of PW-9 and PW-10. PW-10, in his deposition, went to the extent of stating that he was simply asked to put his signature and he did not have any knowledge about the facts anymore.

23. In our considered opinion, in the aforesaid circumstances, based on the date of birth, as found mentioned in the admission register, it cannot be conclusively held that the victims were below 18 years of age as on the date of occurrence and, therefore, fell within the definition of 'child' under Section 2(1)(d) of the POCSO Act.

24. Coming now to the medical evidence as regards the age of the victims; the Medical Board opined that the age of the victims could be between 16 to 18 years. In our considered view, the prosecution thus failed to conclusively prove at the trial that the victims were below 18 years of age as on the date of occurrence. In order to attract the penal provisions under the POCSO Act, it is obligatory on the part of the prosecution to prove, with cogent evidence, the fact that the victims were under 18 years of age. We are, therefore, of the considered view that the conviction of the appellants for the offence punishable under Section 6 of the POCSO Act cannot be sustained.



25. Let us now consider the charge against appellants of commission of offence punishable under Section 67-B of the IT Act, Section 67-B of the IT Act reads thus: -

67-B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form.—Whoever,—

(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or

(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or

(d) facilitates abusing children online; or

(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children,

shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that provisions of Section 67, Section 67-A and this section does not extend to any



book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purposes.

Explanation.—For the purposes of this section, “children” means a person who has not completed the age of 18 years.”

26. The charge of commission of offence punishable under Section 67-B of the IT Act is based on the accusation that after having videographed the occurrence of rape, the same was made viral and video was sent by accused Kamlesh through Whatsapp to PW-3. In paragraph 8 of his deposition, PW-3 testified that he had given his mobile phone to the police at the police station and the police had taken print-outs of the video and photo from his mobile phone. We do not find any admissible evidence adduced at the trial that PW-3 had received any electronic message from the mobile phone of the appellant Kamlesh. The mobile phone of PW-3 was not seized nor the contents of electronic record were proved at the trial in accordance with the requirement of Section 65-B of the Evidence Act. The prosecution has relied on the print-outs said to have been taken out



by the police from the mobile phone of PW-3. It would be apposite to notice the evidence of PW-11, at this juncture, who is said to have accompanied PW-3 to the police station for handing over the video and photo-stat copies of the photographs. In his evidence, PW-11 deposed that PW-3 had come with a prepared video.

27. It has been laid down in no uncertain terms in the case of *Anwar P.V. v. P.K. Basheer*, reported in (2014) 10 SCC 473, that only if an electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof. The Evidence Act, the Supreme Court has held, does not permit or contemplate the proof of an electronic record by oral evidence, if the requirements under Section 65-B of the Evidence Act are not complied with.

28. In the present case, the mobile phone of PW-3, from which, according to the prosecution's case, print-outs were taken, was not seized nor produced at the trial. As has been noted above, there is no evidence that the video/photocopies of print-outs of which was taken from mobile phone of PW-3 was sent by the appellant Kamlesh. It is apt to mention here that the decision in case of *Anwar P.V.* (supra) has been followed by the Hon'ble Supreme Court in case of *Arjun Panditrao Khotkar v. Kailash*



Kushanrao Gorantyal (supra) has observed in paragraph 73.2, which reads as under:

“73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] which reads as “... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ...” is thus clarified; it is to be read without the words “under Section 62 of the Evidence Act,...”. With this clarification, the law stated in para 24 of Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] does not need to be revisited.”

29. We do not find any justification in failure on the part of the prosecution to produce the original mobile phone of PW-3



and prove further the fact that any message was sent through electronic mode (in this case Whatsapp) by Kamlesh, an appellant.

30. In view of the aforesaid discussion, we are of the view that the appellants' conviction for the offence punishable under Section 67-B of the IT Act cannot be upheld.

31. Coming next to the appellants' conviction recorded by the trial court of the offences punishable under Section 376-DA of the IPC; since we have held that the prosecution failed to prove conclusively the fact that the victims were below 18 years of age, the conviction of these appellants for the offences punishable under Section 376-DA of the Indian Penal Code cannot be upheld as the said penal provision is attracted only if the prosecution proves gang rape on a woman under 16 years of age. Be it noted that the charges in the present case were framed under various sections of IPC including Section 376 thereof. The trial court has held the appellants guilty of the offence punishable under Section 376-DA treating them to be under 16 years of age.

32. The next question, which comes up for consideration by this Court, in exercise of the powers under Section 386 of the CrPC, is as to whether the prosecution was able to prove beyond all reasonable doubts commission of gang rape on the victims, punishable under Section 376-D of the Act based



on the evidence adduced at the trial, which aspect deserves determination based on the evidence of the prosecution's witnesses.

33. As has been noted in the foregoing paragraphs, it was stated by V-1, in her written report, that the victims had gone for a walk in the night at 8:30 p.m. as insisted by one Sunaina Devi. Sunaina Devi was not made an accused on the date of registration of FIR. The charge-sheet was submitted against these appellants on 30.08.2019, keeping the investigation pending against Sunaina Devi, as disclosed in the charge-sheet (Exhibit-7) itself. Her name was added much after submission of the charge-sheet in the formal FIR as an accused based on an order dated 07.12.2019 passed by the learned court below. From the evidence adduced at the trial, we do not find any material available against Sunaina Devi. Her evidence would have been crucial, either way, at the trial. She was neither apprehended nor examined as a witness as the prosecution portrayed her as an accused after submission of the charge-sheet. The second crucial aspect in the present case is the source of identification as disclosed by the informant in the FIR and in the depositions of the victims at the trial. It has never been the prosecution's case that Sunaina Devi or these victims were carrying a torch. It is rather their case that the



appellants had flashed torch light from their end. The prosecution's case that V-1 and V-2 could identify the miscreants in the light emanating from the torch flashed by the accused persons appears to be improbable. A light emanating from a torch is uni-directional and in the present case the torch-light was flashed in a direction from the place where the accused persons were present to the place where the victims were having a stroll.

34. Further, the medical evidence does not support the prosecution's case of gang rape. PW-4 and PW-5, who were members of the medical board, in their depositions at the trial, proved the reports of the medical examination conducted on the victims on 21.06.2019. The medical board did not find any external or internal injuries on the body of the victims. PW-5, in her evidence, also deposed that no external or internal injuries were found on the private parts of the victims nor any sign of struggle was present on the persons of the victims. In her cross examination, PW-5 deposed that the victims were habituated to regular sex or intercourse and it was difficult to say whether rape had occurred or not. In response to the queries on behalf of the appellants during the cross examination, PW-4 and PW-5 answered that in case of gang rape, there must be struggle signs on



external and internal part of the body of the victims, which had not been found.

35. We are conscious of the principle that no corroboration by the medical evidence is essential in a case of charge of rape, if the victims of rape appear to be truthful witness of sterling quality. The Court, however, cannot completely brush aside the medical evidence, if it is contrary to the accusation made by the victim and the evidence led at the trial.

36. From the evidence of the Investigating Officer, it appears that the clothes of V-1 and V-2 were seized and the seizure lists were prepared vide exhibit 6/1 and 6 respectively. A golden mobile colour mobile phone and clothes of appellant Kamlesh Kumar were seized and seizure list was prepared (Exhibit -6/2). The underwears of Sujit Kumar (appellant), Parshuram Kumar (appellant), Raju Kumar @ Dakma (appellant), Govinda Kumar (appellant), Nagendra Kumar (appellant) and Anil Kumar (appellant) were seized and the seizure lists were marked at the trial as exhibit 6/3, 6/4, 6/6, 6/7 and 6/8 respectively. The prosecution also adduced following material evidence: -

“Material Ext. I : - Underwear of victim (V-2) in Maroon Colour.

Material Ext. I/a : - Kurta of victim (V-2) in red-blue Colour.



Material Ext. I/b: - Underwear of victim (V-1) in Coffee Colour.

Material Ext. I/c : - Red-blue Kurta of victim (V-1).

Material Ext. I/d : - Underwear of Kamlesh Kumar.

Material II :- Golden colour mobile of Kamalesh Kumar.

Material Ext. I/e : - Underwear of Sujit Kumar.

Material Ext. I/f : - Underwear of Parashuram Kumar.

Material Ext. I/g : - Underwear of Raju Kumar @ Dakma.

Material Ext. I/h : - Underwear of Govinda Kumar.

Material Ext. I/i : - Underwear of Nagendra Kumar.

Material Ext. I/j : - Underwear of Anil Kumar.

Material Ext. III : - Video C.D.”

37. The clothes of the victims and the accused persons, which were seized by the police during investigation, were sent to the Office of the Director, Regional Forensic Science Laboratory, Muzaffarpur. The report of the Forensic Science Laboratory with the results of serological evidence has been marked as exhibit 12. We consider it apt to reproduce the description of articles contained in the parcels sent by the police to the FSL and the result of examination: -



“It contained nine plastic boxes marked as ‘A’, ‘B’, ‘C’, ‘D’, ‘E’, ‘F’. ‘G’, ‘H’ and ‘I’ respectively.

The box marked ‘A’ contained one janghiya and one kurti said to be of victim (V-1). They were further marked as ‘1’ and ‘2’ respectively in this laboratory.

1. The old dirty coffee colour said to be brown janghiya marked ‘A/1’ bore reddish brown stains over small areas. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluorescence in ultraviolet light.

2. The maroon colour said to be red embroidered kurti marked ‘A/2’ bore brownish stains. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluorescence in ultraviolet light.

The box marked ‘B’ contained one janghiya and one kurti said to be of V-2. They were further marked as ‘1’ and ‘2’ respectively in this laboratory.

3. The old maroon colour janghiya marked ‘B/1’ bore reddish brown stains over small 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.

4. The old red-blue kurti marked ‘B/2’ bore brownish stains. 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 box marked ‘C’ contained one old dirty grey colour janghiya said to be of accused Kamlesh Kumar. It bore brownish stains. It also bore greyish stains which were neither stiff to feel nor did



they produce any characteristic bluish white fluoresce in ultra violet light.

6. The box marked 'D' contained one coffee colour janghiya said to be of accused Sujit Kumar. It bore brownish stains. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluoresce in ultra violet light.

7. The box marked 'E' contained one black-grey colour janghiya said to be of accused Parshu Ram Kumar. It bore a dot of reddish brown stain. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluoresce in ultra violet light.

8. The box marked 'F' contained one old navy blue colour janghiya said to be of accused Raj Kumar @ Thakma. It bore brownish stains. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluoresce in ultra violet light.

9. The box marked 'G' contained one sky-blue janghiya said to be of accused Gobinda Kumar. It bore brownish stains. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluoresce in ultra violet light.

10. The box marked 'H' contained one old blue janghiya said to be of accused Nagendra Kumar. It bore brownish stains. It also bore greyish stains which were neither stiff to feel nor did they produce any characteristic bluish white fluoresce in ultra violet light.

11. The box marked 'I' contained one old maroon colour janghiya said to be of accused Anil Kumar. It bore brownish stains. It also bore greyish white stains which were neither stiff to feel and



which produced characteristic bluish white fluoresce in ultra violet light.

Result of Examination

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

(a) Exhibit marked ‘A/1’ - over small areas.

(b) Exhibit marked ‘B/1’ - over small areas.

(c) Exhibit marked ‘E’ - Blood too small.

2. Semen has been detected in the exhibit marked ‘I’.

3. Blood could not be detected in the exhibits marked ‘A/2’, ‘B/2’, ‘C’, ‘D’, ‘F’, ‘G’, ‘H’ and ‘I’.

4. Semen could not be detected in the exhibits marked ‘A/1’, ‘A/2’, ‘B/1’, ‘B/2’, ‘C’, ‘D’, ‘E’, ‘F’, ‘G’ and ‘H’.

5. Blood detected in the exhibit marked ‘E’ was too small for serological test.

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

38. For the purpose of clarity and summarizing the result of the examination with respect to the description of articles as mentioned in the FSL report, the gist of the FSL report is being presented herein below in a tabular form: -

Victims

V-1	A-1 Janghiya	Blood detected over small area	Semen not detected.
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	A-2 Kurti	Blood not detected	Semen not detected.
V-2	B-1 Janghiya	Blood detected over small area.	Semen not detected.
	B-2 Kurti	Blood not detected	Semen not detected.

Appellants.

Kamlesh Kumar	C	Janghiya	No blood, no semen
Sujit Kumar	D	Janghiya	No blood, no semen
Parshuram Kumar	E	Janghiya	Blood in too small quantity, no semen
Raj Kumar	F	Janghiya	No blood, no semen
Gobind Kumar	G	Janghiya	No blood, no semen
Nagendra Kumar	H	Janghiya	No blood, no semen
Anil Kumar	I	Janghiya	Blood not detected, semen detected.

39. On analyzing the result of examination, we notice that blood was found over small area of janghiya of all the victims, which were marked in the laboratory as A/1 and B/1. On one black-grey colour janghiya of appellant Parshuram Kumar, such small quantity of blood was detected which was too small for serological test. The semen was detected on the janghiya of the appellant Anil Kumar. No blood was detected on the kurtis of the victims nor semen on their janghiya marked as A/2 and B/2 at the FSL. No semen was found on janghiya of Kamlesh (appellant) (marked ‘C’ at FSL), Sujit Kumar (appellant) (marked as ‘D’ at FSL), Parshuram Kumar (appellant) (marked as ‘E’ at FSL) and Raju Kumar @ Thakma (appellant) (marked as ‘F’ at FSL),



Govinda Kumar (appellant) (marked as 'G' at FSL), Nagendra Kumar (appellant) (marked as 'H' at FSL). On the janghiya of Anil Kumar (appellant) (marked as 'I' at FSL) semen had been detected. Further, blood was also not detected on the janghiya of Kamlesh Kumar, Sujit Kumar, Parshuram Kumar, Raju Kumar, Govinda Kumar, Nagendra Kumar and Anil Kumar. Thus, from the FSL report, it appears that the janghiya of seven accused persons were seized by the police and sent to forensic examination, however, neither blood nor semen was detected on said under-garments of the accused persons except the janghiya of appellant Anil Kumar in which semen was detected and that of Parshuram Kumar, in which such small quantity of blood was detected that it could not be sent for serological test. In the aforesaid background, the nature of accusation made by the informant in the FIR and sought to be proved at the trial by oral evidence, in the Court's opinion, is contradicted by the medical evidence and forensic test results as well.

40. PW-1 is the father of the victims, who, on the date of occurrence, was in Punjab to earn his livelihood. The information of commission of gang rape was given to him by his wife and his brother Manoj (PW-3). The mother of the victims has not been examined at the trial, though her name figures in the list



of charge- sheet witness. V-2 (PW-8), in her evidence at the trial, deposed that her sister V-1 had sustained injuries while she was attempting to get herself released from the clutches of the accused persons. She also deposed that the appellant Raju @ Dakma had continuously pointed his gun from the beginning till the end of the occurrence and, therefore, no alarm was raised by her. She also deposed that she had become unconscious during the course of commission of rape and she regained conscious at 12:00, whereafter she and her sister (V-1) returned to their house. V-1 (PW-2), supporting the prosecution's case of commission of rape by the accused persons, deposed that the occurrence of rape was videographed and was put on *facebook*. On return, she disclosed about the occurrence to her mother. In the morning, she went to Kanhauli police station, where she was told to go to Harijan Police Station and from there she was asked to go to Mahila Police Station. The FIR was written by her grandfather, who was not examined at the trial. We have already discussed the evidence of PW-3 hereinabove in context of the charge of offence punishable under Section 67-B of the IT Act. He deposed in his examination-in-chief that when he was sleeping in his house, the mother of the victims came to him and woke him up. She told him that the victims were missing and requested him to search them. In order



to search the victims, they gone towards the pond when they found the victims crying. On being asked, they disclosed that the said accused persons had committed rape upon them. It is noticeable, at this juncture, that neither V-1 nor of V-2 deposed at the trial that when they are returning to their house after the occurrence, her mother and uncle (PW-3) had met them on way. It is their consistent deposition at the trial that they have returned to their house and after returning to their house they had disclosed about the occurrence to their mother and grandfather. The deposition of PW-3 is apparently inconsistent and conflicting on this point, with the evidence of PW-2 (V-1) and PW-8 (V-2).

41. In our considered view, non-examination of the mother of the victims adversely affects the case of the prosecution in the absence of any explanation put forth at the trial. The evidence of the I.O. (PW-6) is also relevant on certain aspects. He did not investigate into the matter of the cuttings and overwritings found on the admission register.

42. There being glaring inconsistencies in the prosecution's case, as disclosed by the victim, and as developed at the trial by PW-3, we are of the opinion that it would not be safe to uphold the conviction of these appellants based on evidence of such witnesses, particularly when the charge of commission of



gang rape is not supported by the medical evidence nor by the result of forensic examination. Non-examination of the mother of the victims, who, according to the prosecution's case, was present in the house and to whom the victims had disclosed about the occurrence first, in our opinion, is fatal to the prosecution's case. We are of the considered view that it is the duty of the prosecution to prove beyond all reasonable doubts commission of rape within the meaning of Section 375 of the IPC to constitute offence of rape punishable under Section 376 of the IPC. It is obligatory on the part of the prosecution to establish essential ingredients of rape. In the Court's opinion, the prosecution has not been able to prove beyond all reasonable doubts commission of offence of rape or gang rape punishable under Section 376 or 376-D of the IPC. The statements of a rape victim cannot always be treated to be a gospel truth in all circumstances. In the facts and circumstances, as discussed hereinabove, we are of the view that there are compelling reasons in the present case, which necessitate looking for corroboration of the statements of the victims. We are accordingly of the view that the appellants deserve to be given benefit of doubt. The finding of conviction recorded by the trial court, in our opinion, is not sustainable and requires interference.



43. For the aforesaid reasons, the impugned finding of conviction recorded by the trial court requires interference and the appellants deserve acquittal by giving them benefit of doubt. Accordingly, the judgment of conviction dated 06.03.2020 and order of sentence dated 17.03.2020 passed by learned 1st Additional Sessions Judge-cum-Special Judge (POCSO Act and SC/ST Act), Sitamarhi, in G.R. No. 2454/19, Trial No. 90/19 arising out of Sitamarhi Mahila P.S. Case No. 27/19, are set aside.

44. The appellants are in custody. Consequent upon their acquittal by the present judgment, let them be released forthwith, if they are not required in any other case.

45. These appeals are accordingly allowed.

(Chakradhari Sharan Singh, J)

Chandra Prakash Singh, J: -
I agree.

(Chandra Prakash Singh, J)

Pawan-Suraj

AFR/NAFR	NAFR
CAV DATE	22.12.2022
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