IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.233 of 2023
Arising Out of PS. Case No.-204 Year-2018 Thana- BARAULI District- Gopalganj

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Ranjeet Sah, S/O Late Paras Sah, R/V- Barauli, Ward No. 9, P.O. and P.S.- Barauli, District- Gopalganj. ... ... Appellant

Versus

The State of Bihar ... ... Respondent

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Appearance :
For the Appellant : Mr. Amish Kumar, Amicus Curiae
Mr. Prabhakar Kumar Thakur, Advocate
Mr. Satish Kumar Mehta, Advocate
Mr. Raghav Prasad, Advocate
Mr. Amish Kumar, Amicus Curiae
For the State : Mr. Sujit Kumar Singh, APP

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

Date : 07-10-2025

Heard learned counsel for the appellant, learned Amicus Curiae and learned Additional Public Prosecutor for the State. We appreciate that learned Amicus Curiae has rendered his services pro-bono.

2. Though the informant-victim has entered her appearance by filing *Vakalatanama* and the name of Advocate is appearing in the daily cause list but no one appeared on her behalf to oppose the appeal.

3. This appeal has been preferred for setting aside the judgment of conviction dated 05.01.2023 (hereinafter referred to as the ‘impugned judgment’) and the order of sentence dated 18.01.2023 (hereinafter referred to as the ‘impugned order’)

passed by learned Additional Sessions Judge-VI-cum-Special Judge (POCSO), Gopalganj (hereinafter referred to as the 'learned trial court') in POCSO Case No. 91 of 2018, C.I.S. No. 91 of 2018 arising out of Barauli P.S. Case No. 204 of 2018. By the impugned judgment, the appellant has been convicted for the offences punishable under Sections 376(3) of the Indian Penal Code (in short 'IPC') and Section 5(m)/6, 9(m)/10 of the Protection of Children from Sexual Offences Act (in short 'POCSO Act'). By the impugned order, he has been ordered to undergo rigorous imprisonment for twenty years with a fine of Rs.50,000/- under Section 376(3) IPC and in default of payment of fine, he shall further undergo three months simple imprisonment. He has also been ordered to undergo five years rigorous imprisonment under Section 9(m)/10 of the POCSO Act with a fine of Rs. 20,000/- and in default of payment of fine, he shall further undergo three months simple imprisonment. Both the sentences shall run concurrently.

Prosecution Case

4. The prosecution case is based on the *fardbeyan* of the mother of the victim recorded by S.I. Sarita Kumari, SHO, Mahila P.S. Gopalganj on 09.09.2018 at 15:30 Hours at the Mahila P.S. Gopalganj. In her *fardbeyan* (Exhibit '1/1'), the informant (PW-1)

has stated that on 08.09.2018 at about 04:00 PM, her daughter came crying from '*bathan*' which is situated near her house and after much asking, she fell asleep crying. On the next day i.e. 09.09.2018, her daughter told her that yesterday at 03:00 PM, when she was playing near the '*bathan*', this appellant came there and took her to his house to boil milk where he closed the door and threatened her to kill with a sword, thereafter, committed wrong act with her. The informant alleged that the appellant threatened her not to tell this to anyone otherwise he will kill her with sword. Because of this threat, her daughter did not tell her anything last night. The informant alleged that a boy of his village, namely, Raju when heard the crying of her daughter knocked the door of the appellant and when he opened the door, the victim somehow managed to escape. The informant alleged that this appellant committed wrong act with her daughter.

5. On the basis of this fardbeyan, Barauli P.S. Case No. 204 of 2018 dated 09.09.2018 was registered under Sections 376(2) IPC and Section 4/5(m)/6 of the POCSO Act against this appellant. After investigation, police submitted chargesheet bearing Chargesheet No. 238 of 2018 dated 17.11.2018 under Section 376(2) IPC and Section 4/6/8/10 of the POCSO Act.

Thereafter, vide order dated 17.12.2018, learned trial court took cognizance of the offences under above-mentioned Sections.

6. Charges were read over and explained to the appellant in Hindi to which he pleaded not guilty and claimed to be tried, accordingly, vide order dated 02.01.2019, charges were framed under Section 376(2) IPC and Section 5(m)/6 and 9(m)(n)/10 of the POCSO Act.

7. In course of trial, the prosecution has examined altogether seven witnesses and exhibited several documentary evidences. The description of prosecution witnesses and the exhibits are given hereunder in tabular form:-

List of Prosecution Witnesses

PW-1	Mother of the Victim
PW-2	Victim
PW-3	Raju Kumar
PW-4	Sarita Kumari
PW-5	Dr. Supriya Suman
PW-6	Raju Chaudhary
PW-7	Surendra Ray

List of Exhibits on behalf of the Prosecution

Exhibit ‘1’	Signature of mother of the victim on Fardbeyan
Exhibit ‘2’	Signature of mother of the victim on the statement of the victim recorded by Mahilla Daroga
Exhibit ‘2/1’	Signature of the Victim on the fard-beyan
Exhibit ‘2/3’	Signature of the Victim on her statement u/s 164 CrPC
Exhibit ‘1/1’	Fardbeyan related to occurrence

Exhibit ‘2/2’	Statement of the victim recorded by Mahila Daroga
Exhibit ‘3’	Medical Report of the Victim
Exhibit ‘3/1’	X-Ray and findings on Medical Report
Exhibit ‘1/2’	Pagination
Exhibit ‘4’	Formal FIR
Exhibit ‘5’	164 CrPC Statement

8. Thereafter, the statement of the appellant was recorded under Section 313 of the CrPC. He took a plea that he is innocent. No oral or documentary evidence has been adduced on behalf of the Defence.

Findings of the Learned Trial Court

9. Learned trial court, after analysing the evidences on record found that the the sole testimony of the prosecutrix is wholly reliable and she comes in the ambit of sterling witness. Learned trial court found that the mother of the victim and independent witness as well as other prosecution witness corroborated the evidence of the victim. Learned trial court found that the cumulative result of the testimony of PW-1 to PW-6 and Medical Report (Exhibit ‘3’), Statement u/s 161 CrPC (Exhibit ‘2/2’) and Statement u/s 164 CrPC (Exhibit ‘5’) established the fact that the accused Ranjeet Sah committed rape upon the victim.

10. Learned trial court after considering all the facts and circumstances of the case found that the prosecution has been able

to stand on its own leg and the onus shifts on the defence to prove contrary but the defence has failed to prove. Accordingly, learned trial court held the appellant guilty of the offence punishable u/s 376(3) IPC and Section 5(m)/6, 9(m)/10 of the POCSO Act.

Submissions on behalf of the Appellant

11. Learned counsel for the appellant submits that there is a delay of more than 24 hours in lodging the FIR, which remains unexplained; such unexplained delay seriously undermines the prosecution case and casts doubt on its authenticity.

12. It is submitted that there has been non-examination of certain crucial witnesses, which has seriously affected the prosecution case. The girl who was allegedly accompanying the victim at the time of occurrence was not examined during the course of trial, and significantly, she was introduced for the first time only in the testimony before the court. Likewise, the neighbours of the informant, who were specifically named in various depositions and could have been important independent witnesses to corroborate the occurrence, were also not examined. It is further noteworthy that not a single independent witness has been produced by the prosecution.

13. It is submitted that no clothes of the victim, worn at the time of the occurrence, were ever seized or subjected to

forensic examination. The explanation offered by the prosecution in this regard is wholly unsatisfactory and creates a serious doubt about the veracity of the case. Moreover, the appellant was not medically examined as mandated under Section 53A of the Code of Criminal Procedure, which is a statutory requirement in cases of this nature. The non-compliance of this mandatory provision has caused grave prejudice to the defence and strikes at the root of fair investigation, thereby weakening the prosecution case.

14. Learned counsel further submits that the ocular testimony of the victim suffers from serious inconsistencies. Learned counsel submits that she did not disclose anything about the alleged occurrence on the very day of its occurrence, and only narrated the same to her mother on the following day. Furthermore, there are evident improvements in her deposition when compared with her statement recorded under Section 164 Cr.P.C. She has also admitted during cross-examination that the Investigating Officer did not demand or seize the clothes allegedly worn at the time of occurrence. Importantly, she further admitted the existence of land dispute between the parties. These material contradictions, omissions, and admissions create serious doubt about the veracity of her testimony.

15. Learned counsel submits that the prosecution has relied upon the testimony of Raju Kumar (PW-3), who was examined as an eye-witness. However, his presence at the place of occurrence appears to be merely by chance and does not stand established beyond doubt. There are material contradictions in his deposition. PW-3 himself admits that his residence is situated about 2 kilometers away from the place of occurrence, yet he neither informed anyone about the incident on the very day of its alleged happening nor raised alarm at any stage. Significantly, he surfaced only during the course of investigation. Such conduct is unnatural and inconsistent with the normal behavior expected of a truthful eye-witness. Hence, his testimony does not inspire confidence and cannot be safely relied upon for sustaining conviction.

16. Learned Amicus Curiae appointed in this case has submitted that there are serious and material defects in the conduct of the trial. It has been pointed out that the trial court, after recording the statement of the accused under section 313 of the Cr.P.C., proceeded to alter the charge without informing the accused/appellant and without affording him any opportunity to defend himself against the newly altered charge. Such a course adopted by the trial court is a clear violation of the settled

principles of criminal jurisprudence, as the accused has a fundamental right to be aware of and defend against the specific accusations brought against him.

17. Learned Amicus Curiae submits that the alteration of the charge was done solely on the basis of the statement of a prosecution witness, who was neither further examined nor subjected to cross-examination in respect of the altered charge. This omission has caused serious prejudice to the appellant, as the right of effective cross-examination – a vital facet of fair trial guaranteed under Article 21 of the Constitution was completely denied.

18. Learned Amicus has also contended that the trial court committed a grave error in sentencing the appellant under the amended provisions of the POCSO Act, which were not in existence on the date of the alleged occurrence. Such retrospective application of penal provisions is strictly prohibited in criminal law, as it violates the constitutional safeguard enshrined under Article 20(1) of the Constitution of India, which mandates that a person cannot be convicted or punished under a law that was not in force at the time of commission of the alleged offence.

19. Thus, the action of the trial court in altering the charge without due compliance of law, followed by sentencing the

appellant under an ex-post facto penal provision, has caused grave prejudice and miscarriage of justice, thereby vitiating the entire trial and its outcome.

20. It is further submitted that the victim girl claimed herself as a student of Kanya Madhya Vidyalaya, Barauli, studying in class-V but in course of investigation she did not produce any proof of her age or admission in the school to the I.O. (PW6). PW-6 was posted as ASI in Barauli police station on 09.09.2018, on that day he had assumed the charge of investigation of this case. In paragraph '21' of his deposition, he has stated that during investigation he had not perused any paper regarding the age of the victim, the informant side had not given him any paper and he had only perused the medical report for age verification. It is submitted that as per the medical report, the victim was aged between 15-16 years. The defence has suggested to the victim (PW-2) that she was more than 18 years of age on the date of occurrence which the PW-2 denied. It is submitted that in view of the judgment of the Hon'ble Delhi High Court in the case of **Court on its own Motion vs. State of NCT of Delhi vs. State of NCT of Delhi (Crl. Ref.2/2024 judgment dated 02.04.2024) 2024 SC OnLine Delhi 4484** and the Hon'ble Supreme Court in the case of **Rajak Mohammad v. State of H.P. (2018) 9 SCC 248** if the plus minus

two years is done to the age of the victim, the upper extremity of her age would come to 16+2=18 years.

21. Learned counsel further submits that at the fag end of the trial the prosecution produced CW-7 with a so-called school admission register of Kanya Madhya Vidyalaya. PW-7 claimed himself headmaster of the school and had come with some papers of an admission register of the school with effect from 01.04.2016 till date. It is submitted that at his instance some pages were marked court exhibit no. 01 (with objection). The pages were manually paginated only. In course of his cross-examination, this witness has stated that the entries made on page no.50 at serial no.66 was done on 26.05.2018 and in the register the basis of the date of birth of the victim girl was not mentioned. He has also admitted in his cross-examination that during his tenure the said register was never produced before any senior officer of the Education Department. The defence suggested that this admission register was a forged document and wrong entry had been made in collusion which this witness denied but the court exhibit no.01 is not a reliable piece of evidence with regard to the age of the victim girl.

22. It is submitted that during investigation I.O. had not recorded the statement of the victim. The learned trial court has

treated Exhibit-2/2 as statement of the victim under Section 161 Cr.P.C. which is not a correct approach. Exhibit-2/2 is the beyan of the victim recorded by PW-4 even prior to the beyan of the informant (PW-1) but that was not made basis of FIR. PW-6 never recorded statement of the victim.

23. On the abovementioned grounds, prayer has been made to set aside the impugned judgment and acquit the appellant.

Submissions on behalf of the State

24. On the other hand, learned Additional Public Prosecutor for the State has defended the impugned judgment and order. It is submitted that the learned trial court has examined the evidences available on the record and found that the allegations made in the FIR (Exhibit-4) and the statement of the victim under Section 164 Cr.P.C. (Exhibit-5) corroborate the prosecution version and nothing substantial could be brought out by the accused in the cross-examination of either PW-1, PW-2 and PW-3 which may impeach her credibility as to the manner of the occurrence.

25. It is submitted that the I.O. (PW-6) had verified the place of occurrence. His deposition has been found corroborated from the deposition of PW-1, PW-2 and PW-3, Exhibit-2/2 i.e. the

statement of the victim under Section 161 Cr.P.C. and Exhibit-4 (FIR).

26. Learned Additional Public Prosecutor further submits that the age of the victim has been duly proved by PW-7 through court exhibit no.01 (with objection). The trial court has also taken note of the medical examination report proved by the doctor (PW-5) who has disclosed that the age of the victim was 15-16 years at the time of the examination. It is, thus, submitted that the school admission register of the victim has established that she was minor below 12 years at the time of occurrence. Thus, it is contended that the victim comes under the ambit of definition of "child" as defined under Section 2(d) of the POCSO Act. It is submitted that the learned trial court has rightly held the victim in this case a sterling witness. In this connection, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **Vijay @ Chinee Vs. State of Madhya Pradesh (2010) 8 SCC 191** and **Rai Sandeep @ Deepu vs. State (NCT of Delhi) (2012) 8 SCC 21**. It is contended that in this case the victim would come in the category of a wholly reliable witness. On the other hand, the accused has failed to furnish any explanation on the incriminating evidences associated with him despite an opportunity granted to him during his examination under Section 313 Cr.P.C.

27. Learned Additional Public Prosecutor submits that Section 29 of the POCSO Act raises presumptions that the charged person has committed or abetted or attempted to commit the offence unless the contrary is proved. In this case, the defence did not adduce any oral or documentary evidence as to draw any inference against the statutory presumptions of Section 29 of the POCSO Act. It is, thus, submitted that the impugned judgment and order of the learned trial court are based on reasons supported by the evidences on the records, hence, no interference is required.

Consideration

28. We have heard learned counsel for the appellant, the amicus curiae and the learned Additional Public Prosecutor for the State. As recorded hereinabove, though the informant-victim has entered appearance by filing vakalatnama but no one appeared on her behalf to oppose the appeal. This Court has also perused the trial court records.

29. Before we analyze the evidences on the record and take a view on the merit of the case, at the outset it would be appropriate to deal with the submissions of learned amicus curiae with regard to alteration of charge by the learned trial court after recording of the statement of the accused under Section 313 Cr.P.C.

In this case, the FIR was registered under Section 376(2) IPC and Section 4/5 (m)/6 of the POCSO Act on 09.09.2018 at 20.15 Hrs with respect to the occurrence which took place on 08.09.2018 at about 4.00 PM. After investigation, police submitted chargesheet under Section 376(2) IPC and Section 4/6/8/10 of the POCSO Act. Cognizance of the offences were taken vide order dated 17.12.2018 by the learned Additional Sessions Judge No.1. On 02.01.2019, charges were framed under Section 376(2) IPC and under Section 5(m) (n), 6/9 (m) (n)/10 of the POCSO Act. The Charges were read over and explained in Hindi to the accused, he pleaded not guilty and claimed to be tried. Thereafter, the prosecution witnesses were examined and the last prosecution witness (PW-7) was examined and cross-examined on 21.09.2021 whereafter he was discharged.

On 25.01.2021, statement under Section 313 Cr.P.C. was recorded. On 04.03.2022, the defence requested the court to close the defence evidence, accordingly, the defence evidence was closed. Thereafter, the records of the case was fixed for hearing and the hearing started which continued on several dates. After arguments on several dates, one application was filed in the trial court on 04.11.2022 on behalf of the prosecution with a prayer for alteration of the charges. A request was made to alter the charge of

Section 376(2) IPC to Section 376(3) IPC on the ground that on 08.09.2018 Section 376(3) was already there but due to a typographical error Section 376(2) IPC was mentioned. The said application was moved on 02.12.2022. On perusal of the order dated 02.12.2022, it appears that the defence side did not raise any objection and made a submission that if the charge is altered then the defence would not cross-examine the prosecution witnesses. The trial court noted that the date of occurrence is 08.09.2018, therefore, charge should be framed under Section 376(3) in place of Section 376(2) IPC. Accordingly, the charge was altered which the accused denied. The trial court has recorded that because the defence does not want to cross-examine the wintesses on the alteration of charge, therefore, the record is fixed for argument.

30. At this stage, this Court would first reproduce Section 376(2) and 376 (3) IPC as existing on the date of occurrence, hereunder:-

> "376(1) ……
> (2) Whoever,—(a) being a police officer, commits rape—
> (i) within the limits of the police station to which such police officer is appointed; or
> (ii) in the premises of any station house; or
> (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant;or

[c][(i)* * * *]

(j) commits rape, on a woman incapable of giving consent;or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

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[c] Omitted, ibid.

Explanation.—For the purposes of this sub-section,—(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

[d][(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:" (underline is mine)

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.]]

31. It is evident on reading of the aforementioned provisions that while Section 376 (2) IPC prescribed a rigorous

[d] Inserted, ibid.

imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine, Section 376(3) prescribed rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. If a person is convicted for offence punishable under sub-section(3) of Section 376 IPC, he would have to suffer minimum sentence of rigorous imprisonment for not less than 20 years.

32. Section 216 Cr.P.C. provides that any court may alter or to add any charge at any time before judgment is pronounced. Section 216 and 217 Cr.P.C. are as under:-

> "**216**. **Court may alter charge**.
> (1)Any Court may alter or add to any charge at any time before judgment is pronounced.
> (2)Every such alteration or addition shall be read and explained to the accused.
> (3)If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4)If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5)If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. **Recall of witnesses when charge altered.**

Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed—

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material."

33. In the case of **R. Rachaiah vs. Home Secretary, Bangalore (2016) 12 SCC 172**, the appellant-accused were initially charged under Section 306 and 365 read with 34 IPC. Trial proceeded on the basis of those charges. After 27 prosecution witnesses were examined, the prosecution filed application under Section 216 Cr.P.C. for framing of additional charge under Section 302 IPC. Application was resisted by appellants, however, their

objections were rejected and trail court framed alternative charge under Section 302 read with Section 34 IPC. The appellants were not convicted of the original charge framed under Section 306 or Section 365 IPC, instead the appellants were convicted in respect of alternative charge under Section 302 IPC. Likewise, they were charged under Section 365 IPC but the conviction was recorded under Section 364 IPC. The High Court upheld the conviction but the Hon'ble Supreme Court in paragraph '9' of its judgment held that the conviction under Section 302 IPC was clearly vitiated as the same was in violation of the mandatory procedure prescribed under Sections 216 and 217 of the Code. Paragraph '10' and '11' of the judgment reads as under:-

> "10. The bare reading of Section 216 reveals that though it is permissible for any court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and (4) of Section 216 of the Code. Sub-section (3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further

clear from the bare reading of sub-section (4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.

11. Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or resummon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the court is to even allow any further witness which the court thinks to be material in regard to the altered or additional charge."

34. In the case of **Sabbi Mallesu and others Vs. State of A.P. (2006) 10 SCC 543**, as regards the alteration of charge the Hon'ble Supreme Court observed in paragraph '18' and '19' as under:-

"18. Having considered the materials on record and keeping in view the submissions made at the Bar, we are of the opinion that not only no case has, thus, been made out to interfere with the judgment of acquittal passed as against the respondents in Criminal Appeal arising out of SLP(Crl.) No. 4438/2004 but also the judgment of conviction and sentence passed against the appellants Nos. 3 and 4 in Crl. Appeal No. 784/2004 herein are not sustainable as they are entitled to be given benefit of doubt as no overt act had been attributed as against them. We are also not in a position to subscribe to the

> submissions made by the learned counsel appearing on behalf of the State that the trial Court in a case of this nature was entitled to alter the charges under Section 246 of the Criminal Procedure Code.
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> 19. The power of the Court to alter the charges is neither in doubt nor in dispute but in terms of sub-section (2) of Section 246, Criminal Procedure Code, it was obligatory on the part of the learned Sessions Judge to bring it to the notice of the accused and explain the same to the accused. The same having not been done, it cannot be said that the requirements of Section 246 of the Criminal Procedure Code stood complied with. It must also be borne in mind that all accused were acquitted for commission of an offence under Section 147 of the Indian Penal Code."

35. We have perused the trial court records and have noticed that there is one page application on behalf of the prosecution signed by Spl.P.P. on 04.11.2022 in which prayer has been made to alter the charge to one under Section 376(3) IPC in lieu of 376(2) IPC on the ground that by mistake of typist 376(2) has been typed in lieu of 376(3) IPC. The application has, however, not been acknowledged/shown received by the learned defence counsel. There is no endorsement that the defence counsel had no objection to the same. It is also evident that after alteration of charge the accused-appellant was not given any further opportunity under Section 313 Cr.P.C. Despite all this, since the order dated 02.12.2022 of the trial court specifically records that

the defence did not want to examine the witnesses on recall, we would not rest our judgment on this ground.

Age of the victim

36. It is evident that the age of the victim (PW-2) in this case was required to be determined by the learned trial court keeping in view the evidences available on the record. There were two kind of evidences, one was the court exhibit no.01 (with objection) and the second one was the medical examination report proved by the doctor (PW-6). The defence had suggested that the victim (PW-2) was aged more than 18 years of age and had raised objection with regard to court exhibit no.01 on various grounds but this Court finds that in its judgment the learned trial court has taken note of the statement of the victim and the school register, her age has been taken as below 12 years at the time of occurrence. The trial court has not at all considered the objections before accepting the court exhibit no.01 as a wholly reliable document. In this regard, the defence made the following submissions in its written notes of argument:-

(i) the alleged admission register was dated 26.05.2018 whereas the alleged date of occurrence was 08.09.2018 (ii) PW-7 in his cross-examination had admitted that there was no basis of alleged date of birth of the victim shown in the admission register

(iii) PW-7 had further deposed in para 7 that all the columns of the said register had not been filled up, some of the columns and some of the pages were blank and subsequent pages had got entries (iv) PW-7 had admitted vide para 9 to 11 that there were various cutting and interpolations in the so-called entries in the admission register without its proper authentications. A specific submission was made that the above facts would render the so-called admission register highly vulnerable and as per the judgment of the Hon'ble Supreme Court in the case of **Shri Umed vs. Raj Singh and others** reported in **AIR 1975 SC 43** (paragraph 14 and 15) no reliance can be placed on such documents. Paragraph '14' and the relevant part of paragraph '15' of the judgment in the case of **Shri Umed** (supra) are reproduced hereunder for a ready reference:-

> "14. A crude attempt was further made by another sympathizer of the Arya Sabha to give added credence to the writing Ext. P.W. 5/1. That is P.W. 10 Munshi Ram. He claims to have run the election office of the appellant during the election campaign and in the course of his duties he kept, what is called, a Register which is P.W. 19/1. The Register describes itself as a ""Register of Vehicles--arrivals and departure from 28-2-1972 to 15-3-1972"". It is true that some entries have been made with regard to vehicles therein but alongwith them other memos are also to be seen in some places and there are entries for some payments also. It was an unpaged book before it was produced in court. It was paged by order of

the learned Judge. Pages 39 to 42 relate to entries showing the distribution of voters lists and other materials to the workers of the appellant. The appellant has accepted these entries as genuine but so far as the other entries are concerned they are not accepted by the appellant. In fact the appellant put forward the case that all the other entries were fabrications made by Munshi Ram after the election. We do not think that the appellant is telling the truth in that respect. Many entries may be quite true but the book cannot be described as a book kept in the regular course of business. It is kept in a shoddy manner and most irregularly. Many odd entries have been made at odd places. Some entries and memo, important from our point of view, have the distinct appearance of interpolations. The book is not kept continuously. After making some entries on some pages many pages are left blank and then further entries are made. Then again long notes and memos in Urdu are entered in a queer fashion not merely in the reverse order as Urdu books are written but also after turning the book topsy-turvy. We cannot, therefore, allow this memorandum book the dignity of a book written in the regular course of business. No memo or entry made therein can be accepted, as reliable unless the court is satisfied about the time at which or the circumstances in which it was made or the contest in which it appears. We have no doubt at all, though it was denied by witness Munshi Ram, that he made this book available to the petitioner who produced it alongwith the petition. Some of the entries were deliberately introduced with a view to help the election petitioner.

15. Having thus seen that the so-called register P.W. 19/1 is not reliable in itself we have now to refer to a long entry made therein in Urdu which seems to have

considerably impressed the learned Judge on this subject of payment of Rs. 1,000/-…..”

(underline is mine)

37. We have also perused the pages of the so-called school admission register which has been brought on record in this case. By no stretch of imagination, it would inspire confidence of this Court. The pages are not printed in the same and one style, the serial number of the pages are not printed as is generally done in case it forms part of a register. The pages have been manually given serial number. On page ‘50’ the name of the victim girl is mentioned at serial no. ‘66’ but the page number of the admission register manually marked (8) contains the names from serial no.67 to 88. On page ‘50’ serial no. ‘66’ containing the name of PW-2 has been encircled and in the left hand column “T.C. issued” has been recorded but without any signature of any teacher or date. Column 14 of the admission register manually shown as page 51 in case of victim (PW-2) records “पांचवा”. This register was brought on record to demonstrate that PW-2 was a student of the school in fifth class and was admitted there on 26.05.2018 showing her date of birth as 01.01.2007. The pages of the admission register as adduced in evidence are apparently separate sheets and not from any register. This is also not the school admission register of the victim (PW-2) which she had first

attended. The pleas raised by defence as regards genuineness of the entries made in respect of the age of the victim cannot be brushed aside. In the cases under POCSO Act the principle that presumption must prove the guilt beyond all reasonable doubt is not done away with. The trial court relied upon it without considering the objection. In our opinion, it would not be safe to attach any evidentiary value to these pages of so-called admission register (court exhibit no.01). It does not fall within the scheme of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which is required to be followed in the matter of age assessment of a victim or a child in conflict with law.

38. As regards the assessment of age of a victim in a POCSO case, the Hon'ble Delhi High Court has in the case of **Court on its own Motion** (supra) held as under:-

> "46.As an upshot of our foregoing discussion, the Reference is answered as under:-
>
> (i) Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test?
>
> Ans: In such cases of sexual assault, wherever, the court is called upon to determine the age of victim based on 'bone age ossification report', the upper age given in 'reference range' be considered as age of the victim.
>
> (ii) Whether the principle of 'margin of error' is to be applicable or not in cases under the POCSO Act where the

> age of a victim is to be proved through bone age ossification test.
>
> Ans: Yes. The margin of error of two years is further required to be applied."

39. In the case of **Rajak Mohammad** (supra), the Hon'ble Supreme Court has held as under:-

> "9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused."

40. In view of the aforementioned judicial pronouncements when we consider the age of the victim (PW-2) taking her age as disclosed in the medical examination report, the upper extremity of the age would come to 18 years. Thus, in our considered opinion, the learned trial court has committed grave error in relying upon the court exhibit no.01 and thereby taking a view that the victim girl was below 12 years on the date of occurrence.

<u>Fardbeyan of the victim- not made basis of the F.I.R.</u>

41. At this stage, we would briefly examine the evidence as adduced by the prosecution in this case. We have noticed that a fardbeyan of the victim (X) was recorded by S.I. Sarita Kumari (PW-4) who was the SHO of Mahila police station, Gopalganj, on

09.09.2018 at 15.00 hrs at Mahila police station, Gopalganj but that is not the basis of registration of FIR. FIR has been registered on the basis of fardbeyan of the mother of the victim (X) which was also recorded by same PW-4 at 3.30 PM. There is no explanation for this. According to the victim 'X' (PW-2) she was playing near a Bathan at some distance from her house in between 3-4 PM on 08.09.2018. In her evidence, the victim has disclosed in paragraph '17' of her deposition that her house is situated at a distance of 40-50 steps from the Bathan and in between her house and Bathan there are houses of two persons namely, Kashi and the name of another person she did not remember.

Place of occurrence

42. It is her further case in the fardbeyan that the appellant who is aged about 24 years came near her and told her that his mother had gone in *Shiv charcha*, therefore, she should boil the milk in his house. She came into his words and along with him she went inside his house where there was no one else. As regards the place of occurrence, the victim (PW-2) has stated in her deposition in paragraph '16' that the place of occurrence is at a distance of 30 steps from Bathan and in between the two places, the houses of four persons are there, those are of (1) Mahavir (2)

Dipiak Sah (3) Umesh and (4) Naresh Sah. She has also stated that in all these four houses family members were residing.

Occurrence-not disclosed by victim to her mother on returning home.

43. The Victim ‘X’ has further stated in her fardbeyan that inside the house the appellant threatened her with a sword, locked the door from inside, lifted his lungi, untied her trouser and committed wrong act with her. She has also stated that when she was weeping and crying then one boy of the village, namely, Raju (PW-3) got opened the door whereafter she went to her house weeping and crying, her mother asked her but she was very much afraid so she did not tell her anything and slept in the night. Next day, she disclosed the occurrence to her mother then her mother and father came to the police station and told the entire occurrence in the police station.

Introduction of Isha subsequent to the fardbeyan

44. This Court finds that in her statement under Section 164 Cr.P.C. PW-2 introduced one Isha as her companion when Ranjit Sah told her to boil the milk in his house. In course of trial, for the first time, she said that she along with Isha had gone inside the house of Ranjit Sah. Ranjit sent Isha to a shop to bring Shikhar, then closed the door and confined her in the room whereafter he had forcibly committed rape with her. It is evident from the

fardbeyan of the victim that her mother and father had gone to the police station and they had told the entire things in the police station but Isha was brought into picture one day after the registration of FIR. Her (X) fardbeyan was recorded after almost 24 hours of the occurrence, fardbeyan of her mother was also recorded and both were sent to Barauli police station where the case was registered on 09.09.2018 at 20.15 hours. In paragraph '7' of her examination-in-chief, PW-2 has categorically stated that in Mahila police station her mother had made a statement, then the Daroga of the Mahila police station had read over the application and made her to understand, thereafter her mother had put her signature and her father had also put his thumb impression. This Court finds that the fardbeyan of the victim has been recorded by the same S.I. Sarita Kumari on 09.09.2018 at 15.00 hours and at an interval of 30 minutes beyan of her mother was recorded at 15.30 hours. The FIR has, however, been registered showing the mother of the victim (PW-3) as the informant of the case. By no stretch of imagination the fardbeyan of 'X' (Exhibit-2/2) may be taken as her statement under Section 161 Cr.P.C. Thus, the trial court is not correct in taking exhibit-2/2 as her statement under Section 161 Cr.P.C.

45. The I.O. (PW-6) has stated in his evidence that he had taken over charge of the investigation on 09.09.2018 and had reached the place of occurrence on the same day at 9.45 PM. He had recorded the statement of the informant (PW-1) and the statement of the witnesses Raju (PW-3) and Isha (not examined). He has stated to have inspected the place of occurrence at the instance of the informant and the witnesses. In paragraph '17', he has stated that at the time he reached the place of occurrence, there was a deep darkness, the door was opened by the brother of the accused. The mother and brother of the accused were present in the house. He had seen the room in which the occurrence was allegedly committed but he had not found any suspicious material there. He had not recorded the size of the room and the articles kept in the room in the case diary. He had also not recorded the boundary of the room in which the occurrence had taken place. In paragraph '18' of his deposition, he has recorded that he had not recorded any statement of the persons in the houses situated in the boundary of the place of occurrence. The I.O. has clearly stated in his deposition in paragraph '15' that he had not mentioned in the case diary the time when he had left the police station for going to the place of occurrence and the time at which he reached the place of occurrence. With him, Munna Singh, Mahal Dafadar had gone

to the place of occurrence from the police station. He was only two persons who had gone there. He had not recorded the statement of Munna Singh, Mahal dafadar during investigation.

46. It is evident from the deposition of the I.O. that even though he claims to have visited the place of occurrence but his statement on this point seems to be highly doubtful. He is not mentioning the time of reaching the place of occurrence, he is going to the place of occurrence only with Mahal dafadar who has not been examined, he is not giving the boundary of the room in which the alleged occurrence is said to have taken place, he is not giving even the size of the room and he has not examined any person residing in the houses which are there in the boundary of the place of occurrence. In paragraph '25' of his deposition, this witness has categorically stated that during his entire investigation, he had not recorded the statement of the victim girl. We, therefore, find that after taking charge of the investigation of the case, the I.O. (PW-6) did not record the statement of the victim under Section 161 Cr.P.C. Her fardbeyan recorded by S.I. Sarita Kumari (PW-4) in Mahila police station has been taken note of by the learned trial court to mean and understand that this is her statement under Section 161 Cr.P.C. We are afraid that such a view would be unknown to the criminal jurisprudence and the scheme of the Code

of Criminal Procedure. A bare perusal of 162 Cr.P.C. would show that sub-section (1) of Section 162 clearly mandates that "No statement made by any person to a police officer in course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made..."

47. If the victim was not with the I.O. (PW-6) at the time of inspection of the place of occurrence then who took him to the room where alleged occurrence had taken place. Only victim could have identified the actual place of occurrence.

48. The victim had made her statement under Section 164 Cr.P.C. The said statement was recorded on 10.09.2018. In her statement, she has stated that she and Isha were playing and thereafter she has stated that the accused had caught hold of her, opened her pant and he opened his own lungi and slammed her down on the chowki and touched her lower part, caught her and came over her, when Isha came then he did not open the door then she brought Raju Mama (PW-3), she claimed that he got the door

opened and got her out. In course of trial, PW-2 has not stated that Isha had called Raju Mama and he got the door opened rather she said that when she was weeping and crying then one boy namely, Raju from the village got the door opened whereafter she ran away to her house weeping and crying.

49. Isha has not been examined in course of trial. In course of trial, PW-2 states that Isha had also gone inside the house of the accused-appellant but she was sent to a shop to bring gutka. Isha was a material witness in this case but has been withheld by the prosecution. The I.O. has categorically stated in his deposition that the witness Raju Kumar, Isha Kumari and Ranju Devi, none of them had made statement before him that the accused had committed rape with the victim.

50. At this stage, when we take a glance over the evidence of Raju (PW-3), we find that he claims himself a chance witness. He is a vendor who was going to Barauli Bazar to bring vegetable. On way, he claims to have/had stopped to ease out behind the house of the appellant where Isha came shouting and told him that the appellant had locked the victim whereafter PW-3 claimed that he went to the house of the appellant and pushed the door opened whereafter the victim started weeping saying mama-mama and told him that the appellant had committed rape on her.

Thus, PW-3 claims that he himself got the door opened by pushing the door whereas the victim girl claimed in paragraph ‘28’ of her deposition that at the time of occurrence the door was closed from inside and the accused had opened the door. PW-3 did not choose to go to the house of the victim to tell about the occurrence to her mother. He simply told the victim to go and tell the occurrence to her mother and father. This seems to be a highly unnatural conduct of PW-3 who, later on, in course of his cross-examination drastically improved upon his statement and claimed in paragraph ‘15’ of his deposition that he had seen committing rape by her own eyes. His attention was drawn towards his previous statements made before police in which he had not stated that the appellant had committed rape upon the victim girl, this witness denied the suggestion of the defence but I.O. (PW-6) has categorically stated that Raju had not made statement before him that the appellant had committed rape upon the victim.

51. It is evident that PW-3 has his house at a distance of 1-1 and ½ kilometer from the place of occurrence. His house is in mohalla Sundarnagar whereas the house of the appellant is in mohalla Barauli Bazar. He is not able to give the correct boundary of the place of occurrence. The defence suggested him that he happens to be Mama in relation of the victim, therefore, he was

falsely deposing in this case. The conduct of PW-3 raises a suspicion as to his actual presence at the place of occurrence at the time when the victim girl claims to have been locked inside the room by the appellant. He has stated that the appellant had pushed him causing injury on his head whereafter he had taken treatment of that injury, still he is not going to the house of the victim which is only after 4-5 houses from the place of occurrence and hardly within 50-70 steps and then not bringing on record any medical paper showing his treatment for any injury would only add to the disbelief of this Court that this witness has been introduced in this case with an afterthought to support the prosecution case. No one from the vicinity of the house of the appellant has claimed that the victim girl was seen going inside the house of the accused. The defence has suggested that she was more than 18 years of age and her medical examination report (Exhibit -3/1) clearly suggests that there was no mark of sexual violence on the private part of the victim. There was also no tear or laceration in the component of the vagina. It was also found that the victim was habitual to sexual intercourse. We have noticed from the evidence of the doctor (PW-5) that the following opinion were given by the doctor:-

> "Opinion-
> (i) X-ray Findings-B/L wrist AP-Lower and epiphy is of Radius and Ulna appeared and fusion not started.

(ii)Pelvis AP-Iliae crest epiphysis appeared and fusion not started.

(iii) There is no evidence of Hymen Vaginal wall lax non tender seems like habitual sexual relationship made.

(iv) No tear or laceration seen.

(v) she is not virgin.

(vi) Age is between 15 to 16 years."

52. In her cross-examination, PW-5 has clearly stated that there was no mark of sexual violence on the private part of the victim, there was no tear or laceration in the component of the vagina. It is, thus, evident that so far as the medical examination of the victim is concerned, the doctor has not found any sign of recent sexual act, though the victim was habitual to sexual intercourse. It is further found that the appellant in this case was arrested immediately on the next day i.e. on 10.09.2018 but he was not taken for medical examination. The I.O. has stated that during the investigation he had not seized the clothes worn by the victim at the time of occurrence because the informant side had not produced the clothes.

53. In the kind of the evidences on the record, this Court finds that the prosecution has not been able to prove that there was any penetrative sexual act by the appellant with the victim (X). We have also noticed that while in her examination-in-chief the victim has stated that the appellant lifted his lungi and committed wrong act with her, in her own cross-examination, the victim has stated in

paragraph ‘34’ that the accused was wearing a towel. The defence has suggested all the prosecution witnesses that it is a case of false implication because of land dispute as the prosecution side was trying to usurp the land of the accused which is adjacent to his house and for this reason a false case has been concocted in connivance between PW-2 and PW-3.

54. On overall analysis of the evidences on the record, we are of the considered opinion that in this case neither the age of the victim girl has been properly assessed by the learned trial court nor the ocular and documentary evidences on the record have been duly appreciated. The testimony of the victim does not inspire confidence, PW-3 claims that when he pushed opened the door of the appellant, the victim told her that the appellant had committed rape on her, still his conduct in not informing this occurrence to the family of the victim and then not going with them to the police station even on the next day would compel this Court to take a view that he has been introduced in this case with an afterthought. The witnesses being untrustworthy, the delay of more than 24 hours in a case where PW-3 claims herself a witness of the circumstances at place of occurrence would further go against the prosecution. In these materials, it would not be safe to sustain the findings of the learned trial court.

55. In result, we set aside the impugned judgment and order and acquit the appellant of the charges giving him benefit of doubt.

56. The appellant is said to be in custody, hence he is ordered to be released forthwith, if not wanted in any other case.

57. The appeal is allowed.

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

(Rajeev Ranjan Prasad, J)

(Sourendra Pandey, J)

Sushma2/Arvind

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