

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.268 of 2016

Arising Out of PS. Case No.-236 Year-2013 Thana- MAJHAULIA District- West Champaran

Naveen Kuwar S/o late Babunand Kuwar Resident of Village- Patbandi, Babu
tola, PS Majhauriya, District West Champaran. Appellant/s
Versus

The State Of Bihar Respondent/s

Appearance :

For the Appellant/s : Mr.Sanjeev Kumar, Adv
For the Respondent/s : Mr. Z.Hoda, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

18-12-2019

Vide judgment of conviction dated 19.03.2016

and order of sentence dated 28.03.2016, appellant, Naveen Kuwar has been found guilty for an offence punishable under Section 376 IPC and sentenced to undergo RI for ten years as well as to pay fine of Rs. Three Lacs in default thereof, to undergo RI for two years additionally by the Additional Sessions Judge-6th, West Champaran at Bettiah in connection with Sessions Trial No. 1124/2013 arising out of Majhauriya PS Case No. 236/2013.

2. Victim, PW-1 (name withheld) filed a written report on 09.06.2013 disclosing therein that about five months age, she had gone to the house of Naveen Kuwar S/o late Babunand Kuwar in order to give her service as a cook for 2-3 days and during course thereof, Naveen committed rape on her. As, she became terrified by way of threatening at the end of accused, Naveen, she did not dare to speak about the occurrence. At present, she found herself to be impregnated.

3. It is further evident from the records that after some time, victim was married and, at her Sasural, female folk,



on account of their perception, identified the victim to be pregnant, whereupon, she was kicked out. Then she came to know that she was pregnant as she was novice till then. The accused and his wife on being approached in order to raise grievance, tried to persuade her and during course thereof, wife of the accused, administered one tablet, whereupon she developed complication as a result of which, she was taken to hospital and during course thereof, she aborted. After institution of case, investigation was taken up and, witnesses including victim were examined and on the basis thereof, after completing the investigation, I.O. had submitted charge-sheet against Naveen Kuwar only, keeping investigation pending against remaining including his wife.

4. Accordingly, on the basis of material so produced under Section 173 CrPC, followed with order of cognizance, there happens to be commencement of trial and after concluding the same, as is evident, appellant has been acquitted for an offence punishable under Section 312 of the IPC, on the ground that his wife has not been made an accused irrespective of the fact that there was ample material and, from the order sheet of the lower court, it is evident that neither prosecution nor the court on its own exercised its power either



under Section 193 CrPC or under Section 319 of the CrPC, coupled with the fact that investigation against her was already pending though convicted and sentenced under Section 376 IPC, subject matter of the instant appeal. (Wife is not an accused as observed under para-26), though investigation against her remains pending.

5. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the CrPC is that of complete denial. Furthermore, it has specially been pleaded that this case has purposely been filed at the instance of father of the victim with false and frivolous allegation in the background of dispute having with Naveen, appellant/accused and for that, oral evidences have also been led.

6. In order to substantiate its case, altogether six PWs have been examined who are PW-1, Victim, PW-2, Ramesh Singh PW-3, Janak Dulari, PW-4, Ram Joti Kuwar, PW-5, Surendra Kumar, I.O., and PW-6, Dr. M. S. Rahim. Side by side, has also exhibited Ext-1, Signature of victim over Fardbeyan, Ext-2, signature of victim over statement recorded under Section 164 CrPC, Ext-3, endorsement over written report, Ext-4, Formal FIR, Ext-5, Medical Report. Defence has



also examined three DWs, DW-1, Chuman Kunwar, DW-2, Abhimanyu Kuwar and DW-3, Satyanarayan Sah. No documentary evidence has been adduced.

7. In order to assail the finding recorded by the learned lower court, it has been submitted at the end of learned counsel for the appellant that from perusal of the judgment impugned, it is evident that the learned lower court acted in a slip-slot manner which, if would have been taken into consideration, would not have led the said result, along with the inherent lacuna, the first and foremost argument is that prosecution case could not be accepted as, it lacks truthfulness on account of (a) had there been commission of rape at the end of appellant, then in that circumstances, there would not have been continued presence of the victim subsequently, at his place, more particularly, in the background of the fact that she had not shown herself as a consenting party, (b) the victim had not claimed herself to be a minor, that being so, is major and her continued presence at the place of appellant is indicative of the fact that she was a consenting party, (c) had there been commission of rape at the end of appellant, resulting her pregnancy, ought to have been known to her just after a month having stoppage of menstruation, would have an opportunity to



disclose the same at least to her mother but, keeping mum gives otherwise inspiration than so alleged, (d) the victim had no grievance till she was ousted from her *Sasural* on the ground of being pregnant since before, then in that circumstance, there would have been proper connectivity so far appellant is concerned, (e) there happens to be no corroborative evidence relating to the allegation having at the end of the victim, (f) there happens to be inconsistency amongst the initial version as well as statement recorded under Section 164 CrPC in consonance with the evidence and on that very score, her attention has duly been drawn, (g) Apart from others, her mother also dislodged her allegation. That being so, the judgment impugned does not justify its sustenance, whereupon, is fit to be set aside.

8. Learned APP controverted the submission made on behalf of the appellant and submitted that from the judgment impugned, it is manifest that after proper scrutiny of the medical evidence in consonance with materials available on the record including evidence of the victim having been adduced at the end of prosecution as well as defence version, learned lower court has arrived at the conclusion which happens to be just, legal and proper and is, accordingly, fit to be



confirmed.

9. PW-1 is the victim herself. She has deposed to the effect that the occurrence is of about a year ago. As wife of Naveen Kuwar, her co-villager was unwell, under the aforesaid pretext, Naveen came at her house and disclosed to her parents, that for the time being, she, (victim) be directed to cook his food. Considering thereupon, she was instructed to cook food for them at their place. Accordingly, she began to visit the place of accused in order to cook the food. About 5-6 days thereafter, Naveen committed rape upon her which he continued on successive days. Being thunders, trucked with baffled situation, she could not resist at the relevant moment. But, when she resisted his further attempt, he threatened her of dire consequence. Due to timidness as well as lack of courage and further in order to protect her own prestige as well as that of her family, out of shame, she could not disclose. Further, she was so novice that she failed to perceive changes. Subsequently, she was married and, when she had gone to her Sasural, the experienced, curious eyes of the female folk caught hold of the changes who disclosed and then, she acknowledged herself to be pregnant. Then thereafter, she was kicked out therefrom. She came to her Maika where, she narrated the whole event. Then,



she had gone to the place of Naveen along with her father where she busted and said that *“you have spoiled my life, now she has no option.”* Naveen said, *“all will be corrected, you have nothing to say to anybody.”* At that very moment, wife of Naveen came from inside of her house and gave her a medicine instructing her to swallow as, the situation will be properly cared with. As soon as, she consumed the medicine, she began to bleed. Then she was taken to Manjhaulia Hospital by her father where doctor, after examination, disclosed that on account of administration of medicine, abortion has been effected. Then she has disclosed to the doctor that on account of giving medicine by the wife of Naveen, she has been confronted with such situation. Thereafter, she immediately, rushed to the police station and narrated the incident which was ascribed and then, her signature was taken thereupon,(exhibited). Thereafter, she was taken to Bettiah court where her statement was recorded by a Magistrate. After going through the same, she had put her signature thereupon, (exhibited). Identified the accused. During cross-examination, she at para-2 has stated that she was married about four months ago. After marriage, she resided at her Sasural for 2-3 days and then thereafter, she was chased away. At para-3, she has stated that at the time of marriage, her parents



were not knowing that she was pregnant. After marriage, when menstruation was stopped, she came to know that she is carrying pregnancy. Before marriage, menses was going on. 5-6 days after marriage, she perceived the same. At para-4, she has stated that she had not shown herself to the doctor before marriage nor her husband took her to the doctor after marriage. In para-5, she has stated that her mother-in-law, after seeing her belly, perceived her pregnancy. In para-6, she has stated that she is not remembering how much days after coming from her Sasural, she was taken to the doctor. She is not remembering whether she was medically examined or not. In para-7, she has stated that she is not knowing whether her Sasuralwala ever talked after her departure therefrom. In para-9, she has stated that she had gone to the place of Naveen in order to cook food for 2-3 days. Then thereafter, she had not gone there. In para-11, she has stated that whenever she had gone to the place of Naveen to cook, his wife was present in the house. She had not gone to any other place for cooking. She visited the place of Naveen at the morning as well as at evening hour. At that very moment, she also used to provide nursing to the wife of Naveen. In para-12, she has stated that Naveen had not engaged any other maid-servant or servant. In para-13, she has stated that



she had discharged all kinds of domestic work, like cleaning of utensil, washing clothes etc. She was not to be paid. In para-14, she has stated that neither she nor her parents had demanded. In para-15, she has stated that after having been ousted from her Sasural, she came at her Naihar where she disclosed regarding her pregnancy. Her parents have not said anything. In para-16, she has stated that after having been ousted from her Sasural, she had not gone to her Sasural, subsequently. Then she denied the suggestion at Para-16 that she is telling lie. She aborted herself and during course thereof, she took all kinds of help from her Sasural. At para-17, she has stated that she is not knowing what the police had recorded. She has simply put her signature. Then at para-18, she denied the suggestion that she was not raped rather in order to have her wages, this false case has been instituted with false and frivolous allegation. Then she also denied the suggestion that Naveen happens to be respectable person of the locality, and he never committed rape upon her.

10. PW-2 is the father of PW-1 who during his examination-in-chief has stated that on account of illness of wife of Naveen, he came at his house and requested him to send his daughter to his place in order to cook food, whereupon, he



allowed his daughter to go to the place of Naveen for cooking food. After 5-6 days condition of Pramila improved. During midst thereof, he finalized affiance of his daughter and, after four months, she was married. After going to her Sasural, the family members of her Sasural raised eyes as, they had found her pregnant since before whereupon, she was ousted. He brought her to his place and then, on query, she disclosed that while she was cooking at the place of Naveen, he committed rape on her and also threatened that in case of disclosure to her family members, she will be eliminated. Then thereafter, he along with his daughter have conjointly gone to the place of Naveen and raised voice against illegal activity. At that very time, the wife of Naveen said that all the matter is going to be resolved within a fraction of minute. Then thereafter, she had gone inside her house, came out with a medicine, got administered the same to her. Within fifteen minutes, she perceived pain. She was taken to the Govt. Hospital where she was examined and during course thereof, the doctor opined that it was a case of abortion on account of administration of medicine. He has further stated that they had gone to the police station where his daughter had filed written report. Identified the accused. During cross-examination at para-2, he has stated that



at the time of marriage of his daughter, she was aged about 18 years. Then there happens to be cross-examination relating to her husband, father-in-law and the status of the family. In para-3, he has stated that till the time when his daughter had gone to her Sasural, he was knowing nothing. His daughter remained at her Sasural for 4-5 days. Mother-in-law of his daughter had telephonically informed his sister, Gulrani Devi. In para-4, he has stated that he had gone to her Sasural on the following day after receiving telephonic information and then, on the following day, he accompanied his daughter. Since thereafter, she is residing at his place. In para-5, he has stated that his daughter had already disclosed regarding the incident to his son-in-law whereupon, his son-in-law disclosed that he is not inclined to keep the child going to be begotten at the instance of Naveen. He also came to his village and communicated to each and every person. In para-6, he has stated that he had not inflicted any kind of punishment to his daughter even after coming to know about her pregnancy. After coming from Sasural of his daughter, he had gone to the place of Naveen. After coming from the place of Naveen, he had gone to the doctor. His daughter remained there for a day and then, she was referred to Bettiah Hospital. While she was at Majhauriya



Hospital, her statement was recorded by the police. At para-7, he has stated that, for the present, he is unable to disclose as for how many days, her daughter remained in the hospital. In para-9, he has stated that police had recorded his statement after registration of FIR. In para-10, he has stated that he is not remembering whether his daughter had incorporated in the written report that medicine was administered at the place of Naveen. At para-11, there happens to be contradiction. In para-12, he has stated that in his presence also, Naveen had threatened. In para-13, he has stated that he had not seen the accused committing rape upon his daughter. In para-16, he has stated that he as well as Naveen were on cordial relation. Then he denied the suggestion that he was looking after the affairs of Naveen. In para-18, he has stated that his daughter had not gone to the place of any other else for the purpose of cooking. In para-19, he has stated that he inquired from his daughter regarding delay in disclosing the incident, whereupon, she disclosed that out of fear, she did not muster courage to divulge the incident. Then, he denied the suggestion that Naveen resides at Delhi with his family members and, the agriculture work was being looked after by him and, as he misappropriated for which there happens to be persisting demand at the end of Naveen and



in order to pressurize upon him, this false case has been registered with a *mala fide* intention.

11. PW-3 is the mother of PW-1, the victim. She, during course of her evidence, has stated that this case has been lodged by her daughter against Naveen. Naveen had committed sin with her daughter but, she is not knowing whether her daughter became pregnant. She has not made statement before the police, whereupon, she was declared hostile and, during course thereof, she was confronted with her previous statement. During cross-examination at para-4, she has stated that both the family members are on strained relationship. Victim neither had gone to the place of victim nor did Naveen ever come to call her. Victim never became pregnant.

12. PW-4, during her examination, has stated that about two years ago, father of victim as well as Naveen quarreled. She does not know about the occurrence whereupon, she was also declared hostile. During cross-examination, she has stated that she had not seen the victim going to the place of Naveen.

13. PW-5 is the Investigating Officer. He during his examination-in-chief, has stated that after registration of the case, investigation was entrusted to him and accordingly, he



proceeded therewith. He took further statement of the informant. Injury report had already been issued by the O/C. Then he recorded statement of witnesses including her parents. He did not get the victim medically examined rather O/C had sent her along with the police. However, he had received medical report. Then statement of PW-3 has been confronted to him and in likewise manner, that of PW-4. He conducted raid at the house of accused and found him absconding. He had inspected the place of occurrence which happens to be house of accused. Identified the same by the boundary. But as it was closed, so he could not go inside the house. Received supervision note, completed investigation, submitted charge-sheet against the accused, keeping the investigation pending against others. Then has exhibited the relevant documents. During cross-examination at para-2, he has stated that he had not filed any petition before the Magistrate for getting the lock opened in order to inspect the place of occurrence. He had not gone to the Sasural of Naveen in order to trace out his wife. He had not gone to inspect the place of occurrence subsequently. He had not gone to Sasural of the victim. At para-4, he has stated that from PHC report pregnancy followed with abortion is found substantiated but, he had not received any information from Bettiah Hospital where



the victim was referred to. In para-5, he has stated that he had investigated upon how the accused carried the victim for cooking to his house. In para-6, he has stated that he had not investigated whether after the occurrence the victim continued with cooking. In para-8, he has stated that none of the witnesses had claimed to have seen the accused in company of the victim. In para-9, he has stated that he had not investigated over on the point as to whether after cooking in the night, the victim used to stay at the house of the accused. In para-11, he has stated that he had not investigated on which date rape was committed. At para-14, he has stated that he had not inquired from the victim whether she indulged in physical relationship with her husband after the marriage.

14. PW-6 is the doctor who had examined the victim on 09.06.2013 at PHC, Majhauria and found the following:-

1. Found complaint of pain in abdomen followed by instantaneous abortion. No external injury seen over her body. So after giving primary aid patient was referred to MJK Hospital, Bettiah for further treatment.

2. M.I. A mole over left neck.

Over which, he was not at all examined.

15. It is evident that three DWs namely, DW-1, Chuman Kuwar, DW-2, Abhimanyu Singh and DW-3,



Satyanarayan Sah have been examined on behalf of defence.

16. DW-1 has stated that for the last twenty years, Naveen and his wife reside at Delhi. Ramesh Singh has been engaged to look after the affairs at the village and during course thereof, there was an altercation, as a result of which, both families developed strained relationship. He has further stated that daughter of Ramesh is residing at her Sasural after the marriage. Then has stated that at an earlier occasion, Naveen used to visit the village at an interval of 1-2 months. After dispute, Naveen had gone to Delhi. During cross-examination at para-6, he has stated that he came to depose on the request of Naveen. Then at para-10, he has stated that the occurrence relating to the present case took place about 2-3 years ago.

17. DW-2, during course of his evidence, has reiterated the same version. DW-3 who claimed himself to be a Sarpanch of the locality, during course of his examination-in-chief reiterated the same version with an addition that after dispute both the parties were on strained relationship but, in due course of time, they resolved the same and now, they resumed their social relation. During cross-examination, he has stated that he came to depose as instructed by the wife of Naveen.

18. From the record, it is evident that since



inception of the instant case, the victim had not disclosed her status whether she happens to be minor or major. Though, from the deposition form, it is evident that she disclosed her age about 17 years while, the court had estimated her age as 18 years. Even then, she was not tested on that very score but, during course of cross-examination of PW-2, her father at para-2, he was tested on that very score and during course thereof, he replied that at the time of marriage, the victim was aged about 18 years. Marriage was solemnized five months after the occurrence. That means to say, on the alleged date and time of occurrence, she was below the age of 18 years. During course of further cross-examination neither PW-2 has been controverted, suggested contrary to the aforesaid discloser nor, PW-3, mother of the victim was ever tested irrespective of the fact that she became hostile to the prosecution to some extent. On account thereof, the status of the victim has become that of below the age of 18 years. PW-6, the doctor simply examined the victim with regard to the complaint having at her end and nothing more. So, the approximate age of the victim through medical examination is not on the record though, the Hon'ble Apex Court consistently, deprecated the ascertaining the age of the victim through medical examination, on the other hand, allowed



mode of ascertainment of age of the victim in accordance with J.J. Act as held in the case of *Jernail Singh v. Haryana* as reported in **2013 Cr.L.J. 3976** wherein it has been held as follows:-

“20. 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



7A, 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 off 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.

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 for a child who is a victim of crime. For, in our view, there is hardly any difference in so far 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-PW6. 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 concerned child, 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 concerned child, on the basis of medical opinion.

19. In the aforesaid background, now two kinds of eventualities are visualizing from the facts of the case (a) whether the age of the victim on the alleged date of commission of occurrence be considered below 18 years (b) whether she should be considered above the age of 18 years. It has got relevancy in the background of the fact that in case of she being less than 18 years, the whole scenario will change apart from being minor consent has got no relevancy coupled with the fact that prosecution would not have sailed under IPC rather, under the POCSO Act, on the other hand, if she is being treated as major, then in that event, her subsequent conduct has got bearing over the fate of the instant appeal.

20. As stated above, victim on her own, had not disclosed her age, during course of her evidence but from the



deposition form, it is crystal clear that she had shown her age as 17 years while court estimated her age as 18 years. That means to say, on the alleged date of occurrence, she was minor, and that was within full knowledge of the appellant and that happens to be reason behind that ignoring the PW-1 to be cross-examined on that very score, during course of cross-examining PW-2, her father was tested, and during course thereof, at the time of marriage as 18 years is the specific claim which never been challenged nor controverted, subsequently by suggesting PW-2 or PW-3, parents. That being so, there happens to be no occasion to discredit the aforesaid testament. As the date of occurrence happens to be five months prior to the date of marriage and so certainly, she was below the age 18 years, minor under the ambit of POCSO Act.

21. In ***Brij Mohan Singh vs. Priya Brat Narain Sinha and Ors.*** as reported in ***AIR 1965 SC 282*** wherein, it has been held as follows:-

“18.The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high.

22. In ***State of Punjab vs. Gurmit Singh and***



Ors. reported in (1996) 2 SCC 384, it has been held as follows:-

“13.However, in the present case, there is evidence on the record to establish that on the date of the occurrence, the prosecutrix was below 16 years of age. The prosecutrix herself and her parents deposed at the trial that her age was less than 16 years on the date of the occurrence.

23. The occurrence is of the year 2013. On that day, the sexual offence against children properly identified in accordance with Section 2 of the POCSO Act up to the age of 18 years is to be sailed in accordance therewith, irrespective of the fact that the applicability of proper penal Section under IPC or other enactment was also permissible in terms of Section 42 of the Act. However, the charge under POCSO Act must be there. The reason best known to the learned lower court, as is evident, neither cognizance has been taken under POCSO Act nor charge has been framed under the said Act even during course of trial neither prosecution took care nor the court on its own invoked Section 216, 217 CrPC in order to add the charge. Section 221(2) of the CrPC authorizes the court to inflict the sentence under proper head coming out and substantiated from the materials available on the record irrespective of the fact that charge has not been framed under the aforesaid Section and is found properly cared with by Section 464 CrPC.



24. But, criminal law is commanded by the principle based upon natural justice as at every occasion, the person has to be heard before passing of an order against him under the banner of *audi alteram partem* and so, appellant must have an opportunity to be heard more particularly, in the background of presence of Section 29 under POCSO Act which completely changes the basic theory of the criminal jurisprudence, “*prosecution has to prove its case beyond all reasonable doubts*”, as court has to presume and the obligation is on the accused to rebut.

25. After going through Section 29, it is apparent that whenever an offence categorized under Section 3, 5 and 7 come up before the court, the court has to presume commission of the aforesaid offence and the burden lies upon the accused to controvert the same. In case of applicability of Sub-clause-B of 221 of the CrPC, the appellant would be deprived of an opportunity to rebut the presumption. Not only this, in accordance with Section 42A of the POCSO Act, the higher sentence under either of the two is to be inflicted and, by such activity again the prosecution would not be justified, more particularly, in accordance with Section 235 (2) of the CrPC, the accused has to be heard before infliction of the sentence.



26. Now the question remains for consideration whether the aforesaid lapses could be considered as illegal or irregular.

27. In *Rattiram and Ors. vs. State of M.P. through Inspector of Police* as reported in (2012) 4 SCC 561, it has been held as follows:-

“39. The question posed by us fundamentally relates to the non-compliance of such interdict. The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism.

62. We have referred to the aforesaid authorities to illumine and elucidate that the delay in conclusion of trial has a direct nexus with the collective cry of the society and the anguish and agony of an accused. Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple pie order in carrying out the adjective law, would only be sound and fury signifying nothing.



28. In ***Selvi J. Jayalalithaa and Ors. vs. State of Karnataka and Ors*** as reported in ***(2014)2 SCC 401***, it has been held as follows:-

“29. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the *raison d'etre* in prescribing the time frame" for conclusion of the trial.

29. In ***Bablu Kumar and Ors. vs. State of Bihar and Ors.*** as reported in ***(2015) 8 SCC 787*** wherein it has been held as follows:-

“22. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the Court, it can irrefragably be stated that the Court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court, to see that neither the prosecution nor the accused play truancy with the criminal trial or



corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. Law does not countenance a 'mock trial'. It is a serious concern of the society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of the opinion that the material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses. The Public Prosecutor who conducts the trial, has a statutory duty to perform. He cannot afford to take things in a light manner. The Court also is not expected to accept the version of the prosecution as if it is sacred. It has to apply its mind on every occasion. Non-application of mind by the trial court has the potentiality to lead to the paralysis of the conception of fair trial.

30. In *Atma Ram & Anr v. State of Rajasthan* reported in **2019 SCC OnLine SC 523**, it has been held as follows:-

“22. According to Section 366 when a Court of Sessions passes a sentence of death, the proceedings must be submitted to



the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one Under Section 368 (c) of the Code and that is to "acquit the Accused person". Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the Accused challenging his conviction. To that extent the proceedings under Chapter XXVIII which deals with "submission of death sentences for confirmation" is a proceeding in continuation of the trial. These provisions thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the Accused person. The scope of the chapter is wider. Chapter XXIX of the Code deals with "Appeals". Section 391 also entitles the Appellate Court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the Appellate Court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the Accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial". The powers of Appellate Court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering de novo examination of



twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court. There is, thus, no infraction or jurisdictional error on the part of the High Court.

23. It is true that as consistently laid down by this Court, an order of retrial of a criminal case is not to be taken resort to easily and must be made in exceptional cases. For example, it was observed by this Court in *Pandit Ukha Kolhe v. State of Maharashtra* : (1964) 1 SCR 926, as under:

“15. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an Accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the Accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person Accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C.J., in *Ramanlal Rathi v. The State* : AIR (1951)



Cal. 305.

“If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the Accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.”

31. The same view has also been followd in *P.*

Ramesh v. State as reported in *2019 SCC OnLine SC 929*.

32. The Hon’ble Apex Court in the case of

Issac @ Kishor v. Ronald Cheriyan reported in 2018(2) PLJR

57 (SC) dealt with a situation whereunder retrial could be directed, explained under para-11 as follows:-

“10. Under Section 386(a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law.

11. Normally, retrial should not be



ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been satisfactory for particular reasons like..., appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

12. In *K. Chinnaswamy Ready v. State of Andhra Pradesh and Another*, AIR 1962 SC 1788, the accused had been convicted by the trial court. The Sessions Court took the view that an important piece of evidence held against the accused was inadmissible and acquitted him. The High Court in revision by the de facto complainant held that the evidence held to be inadmissible by the Sessions Court was admissible and set aside the acquittal directing the accused to be retried on the same charges. The Supreme Court agreed with the High Court that the acquittal deserved to be set aside. In para (7), this Court has spelt out what could be termed as exceptional circumstances which reads as under:-

"7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a



finding of acquittal into a finding of conviction.

This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision.

These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law.

These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4)....."

33. From the lower court records, as discussed hereinabove, it is apparent that learned lower court had sailed with the trial in mechanical manner, without identifying the status of the victim to be child within the definition of POCSO Act and failed to exercise the privilege so provided under Section 216 and 217 of the CrPC by way of adding the charge



and thus, by such activity, not only deprived of the victim to be protected under the guise of the POCSO Act rather, also put the court in deprivation of drawing of a presumption in accordance with Section 29 and, exonerated the accused to rebut the presumption.

34. That being so, by such lapses, allowed the proceeding to sail in illegal manner whereupon, attracts retrial/*de novo* trial.

35. Consequent thereupon, the judgment impugned is set aside. Appeal is allowed.

36. The matter is remitted back to the learned lower court to proceed afresh after invoking the provisions as envisaged under Section 216, 217 of the CrPC. Appellant who is under custody is to be produced before the learned lower court. Because of the fact that the appellant is under custody, the learned lower court will endeavour to conclude the trial within six months from the date of receipt of the lower court record.

(Aditya Kumar Trivedi, J)

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