

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-D-1158-DB-2018 (O&M)

Reserved on : January 07, 2020

Date of Decision: March 17, 2020

Pardeep Kumar @ Balram

...Appellant

Versus

State of Punjab

...Respondent

2.

CRA-S-4406-SB-2018 (O&M)

Rajinder Parshad

...Appellant

Versus

State of Punjab

...Respondent

3.

CRA-AD-354-2019 (O&M)

Surjit Singh

...Appellant

Versus

State of Punjab and another

...Respondents

AND

4.

CRR-907-2019 (O&M)

Surjit Singh

...Petitioner

Versus

State of Punjab and another

...Respondents

**CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA,
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU**

Present: Mr. L.M.Gulati, Advocate for the accused - appellants in
CRA-D-1158-DB-2018 and CRA-S-4406-SB-2018.

Mr.Amit Sharma, Advocate
for the complainant - petitioner in CRR-907-2019 and
for the appellant in CRA-AD-354-2019.

Mr.H.S.Grewal, Additional A.G., Punjab.

HARINDER SINGH SIDHU, J.

Since common questions of law and facts are involved in the aforesaid appeals, arising out of the same FIR, these are taken up together and disposed of by a common judgment.

2. Criminal Appeal No.CRA-D-1158-DB-2018 and CRA-S-4406-SB-2018 have been filed by the accused – appellants Pardeep Kumar @ Balram and Rajinder Parshad, respectively, against their conviction and sentence vide judgment and order dated 05.11.2018 of the learned Additional Sessions Judge/ Exclusive Court, Amritsar in Sessions case No.124 of 2018 whereby they, along with one Baldev Raj were charged with and tried for offences punishable under Sections 363, 366-A, 120-B, 376, 506 of the Indian Penal Code (in short 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'). The appellants were convicted and sentenced as under:-

Name of Convict-Appellant	Sentence
Pardeep Kumar	Under Section 363 IPC – Rigorous Imprisonment for Seven years, fine Rs.10,000/- and in default of payment of fine, he shall further undergo rigorous imprisonment for six months. Under Section 366 IPC – RI for ten years, fine Rs.10,000/- and in default of payment of fine, to undergo further RI for six months. Under Section 6 of the POCSO Act - RI for Life, fine Rs.20,000/- and in default of payment of fine, to undergo further RI for one year.

Rajinder Parshad	Under Section 17 of the POCSO Act - RI for ten years, fine Rs.20,000/- and in default of payment of fine he shall further undergo RI for one year.
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The sentences were ordered to run concurrently. Baldev Raj was acquitted.

3. Criminal Revision No.907 of 2019 and Criminal Appeal No.AD-354-2019 have been filed by Surjit Singh – complainant. In the revision, he has sought enhancement of sentence of Rajinder Prashad, whereas in the appeal, he has challenged the acquittal of Baldev Raj.

4. The case of the prosecution in a nutshell is that on 12.09.2017, complainant Surjit Singh got his statement recorded before ASI Kabal Singh to the effect that he is agriculturist and is residing at village Sangoana, P.S.Jhander. He has two children. The date of birth of his daughter (the prosecutrix) is 07.09.2001. She is studying in 10th Class at St. Peter Marry Convent School, Dial Bharang. His younger son is studying in the same school in 5th class. He usually takes his children to school in the morning. After school, they come back home on the school bus. On 11.09.2017, his son Prince Pal informed him on returning home that the prosecutrix was not in the school when classes got over. He went to the school to inquire about the whereabouts of his daughter. On inquiry the clerk of the school revealed that one young boy claiming to be her cousin had taken the prosecutrix from the school at about 1.20 pm. On seeing C.C.T.V footage, they came to know that one Pardeep Kumar son of Baldev Raj who was known to him had taken her daughter in a car driven by Kartar Singh. He alleged that his daughter has been allured by said Pardeep Kumar on the pretext of marrying

her. On the basis of his statement FIR Ex. PW 9/B under section 363,366-A, 120-B Indian Penal Code was registered. On 16.09.2017, supplementary statement was got recorded by complainant Surjit Singh against Baldev Raj and his daughter Radhi, wife of Sanjeev Kumar. On the basis of said supplementary statement, Baldev Raj was arrested on 19.09.2017. His daughter Radhi was found innocent during inquiry. Accused Rajinder Parshad was arrested on 25.09.2017. The prosecutrix and accused Pardeep Kumar were arrested on 25.09.2017. Statement Ex.PW2/B of the prosecutrix under section 164 of Cr.P.C was recorded in which she stated that she wanted to go with accused Pardeep Kumar. She refused to get her medico-legal examination conducted. She was sent to Gandhi Vanita Ashram, Kapurthala by the Magistrate. On 14.10.2017, her statement was again got recorded as Ex.PW2/C. On completion of formalities challan under Sections 376, 363, 366-A, 120-B, 506 of IPC and Section 6 of Prevention of Children from Sexual Offences Act against accused Rajinder Parshad, Pardeep Kumar and Baldev Raj was presented in the Court.

5. The prosecution examined number of witnesses in its support. The statement of the accused under Section 313 Cr.P.C. was recorded. In his statement, accused Rajender Parshad stated that he was innocent and was falsely involved in the case. He was not aware of the affair of the prosecutrix with the accused Pardeep Kumar. He had been searching for the prosecutrix with her family members till they falsely implicated him by concocting a false story. He did not, in any manner, help the accused and the prosecutrix in their plan to stay together. He was not aware about the movements of the prosecutrix and Pardeep Kumar. He was falsely

Kumar.

6. Accused Pardeep Kumar in his statement under Section 313 stated that he was innocent and had been falsely implicated in the case. The prosecutrix was having an affair with him since considerable time. The prosecutrix accompanied him of her own sweet will and had solemnized marriage with him and had also filed a petition in the High Court of her own sweet will. His father and any other family member had no role to play and had no knowledge of their plans. He and the prosecutrix had surrendered before the police on their own. The prosecutrix initially refused to get medico-legal examination conducted and also to accompany her family members. Later, under the family pressure she got the false case registered against him. He had not committed rape with the prosecutrix ever at any place. The prosecutrix had claimed that she was major. Under that impression, they planned to perform marriage against the wishes of their family members. The prosecutrix is major. She has not disclosed her correct age in order to falsely implicate him.

7. The accused were convicted and sentenced as referred to above. Hence, these appeals.

8. We have heard learned counsel for the parties and have gone through the judgment and record.

9. PW1 Surjit Singh deposed that he was an agriculturist. He had two children, one daughter (prosecutrix) and a son. The date of birth of his daughter is 07.09.2001. She was studying in class-X. He used to leave his son and daughter in their school on motorcycle. They used to come back from school on the school van. On 11.09.2017, his son Prince Pal told him

that his daughter (prosecutrix) was not in the school. She had also not come

back with him in the school van. PW1 immediately went to the school and enquired from the school authorities about the whereabouts of his daughter. Harry, the Clerk told him that one boy had come to the school who stated that he was the cousin of the prosecutrix. He took her away from the school at about 1.20 pm. The clerk however, could not give any description of the person. However, after seeing the footage of the CCTV camera installed in the school, PW1 identified the said person as Pardeep Kumar s/o Baldev Raj r/o Village Bhure Gill. PW1 further stated that the accused had taken his daughter from the school to the house of Rajender Parshad. The same day, he (PW1) along with his father went to the house of Rajender Parshad to enquire about the whereabouts of his daughter. Rajender Parshad told him that he would leave her home in the evening. He (Rajender Parshad) requested PW1 not to move any complaint to the Police against them. As Rajender Parshad did not bring his daughter as promised, the next morning he again went to the house of Rajender Parshad, where, Baldev Raj father of accused Pardeep Kumar also met them. He asked about his daughter, but they did not give any satisfactory reply. Thereafter, he came back home and got his statement Ex.PW1/A recorded before the police. He gave a supplementary statement to the police after about 4-5 days in which he suspected that his daughter was with Rajender Parshad. He however did not remember the other facts mentioned by him in his supplementary statement. He identified his signatures at point 'A' on supplementary statement Ex.PW1/B

10. In cross-examination by Ld. Counsel for the accused, he stated that he had got recorded in Ex.PW1/A that he along with his father had gone

got recorded in Ex.PW1/A that Rajender Parshad told him that he would leave his daughter at his home in the evening. He had got recorded in Ex.PW1/A that he waited till evening and next morning he went to the house of Rajender Parshad where Baldev Raj father of the accused Pardeep Kumar also met them. He had got recorded in Ex.PW1/A that he had asked them about his daughter, but they did not give any satisfactory reply. His attention was drawn to Ex.PW1/A wherein, it was not so recorded. He had not moved any complaint regarding the missing of his daughter from 1.20 PM on 11.09.2017 till 9.00 PM on 12.09.2017. Rajender Parshad had been accompanying them to look for their daughter. He admitted that the name of Rajender Parshad does not figure in his statements Ex.PW1/A or in Ex.PW1/B. Baldev Raj and his son Pardeep Kumar were on visiting terms to his house. His father (PW1's father) was also on visiting terms with Baldev Raj, but other family members were not on visiting terms to their house. He admitted that Baldev Raj had a separate house and family and Rajender Parshad had a separate house and family. He admitted that as per the school certificate the date of birth of the prosecutrix was 07.11.2001. He had not given any documentary proof regarding her date of birth. He had not handed over any such documents to the Police during the course of investigation. He denied that his daughter was major and that she had accompanied accused Pardeep with her own sweet Will.

11. PW2 (the prosecutrix) stated that at the time of occurrence, she was studying in 10th class. Her brother was studying in the same school in 6th class. Her father used to drop her and her brother to the school on motorcycle. They used to come back to house in the School Van. On

her class, who told her that one person who claimed to be her cousin, had come to take her. When she came out from the School gate, she saw Pardeep Kumar @ Balram along with Kartar Singh. They were in a vehicle. Pardeep Kumar pushed her inside the car. He told her that her father was not well and stated that they were taking her to the Hospital. They then took her to the Hospital at Ajnala. Pardeep Kumar took her to the house of Rajender Parshad, his uncle. Baldev Raj was also present along with Rajender Parshad in the house. All three threatened her that if she disclosed anything to anyone, they would kill her brother and father. They would attack her with acid. Thereafter, accused Pardeep Kumar kept her for five days in the house of Rajender Parshad, his uncle. Pardeep Kumar committed rape upon her against her wishes and also caused internal injuries. Thereafter, accused Pardeep Kumar along with Rajender Parshad and Suraj s/o Rajender Parshad took her to some unknown place in a car. Rajender Parshad was having a pistol. She was kept at that unknown place. Accused Pardeep Kumar committed rape upon her against her wishes. Thereafter, Rajender Parshad made a phone call on the mobile of Pardeep Kumar that the matter has gone out of his control. He advised him to take her to Chandigarh, where court marriage would be performed. Accused Pardeep Kumar took her to Chandigarh. Rajender Parshad was already present there. He arranged a counsel for performance of their court marriage. She was produced in Court, where the Presiding Officer on seeing that she was underage asked them to go out. Thereafter, she was taken to a Mandir, but the priest in the Mandir also refused to perform her marriage with Pardeep Kumar. Thereafter, some photographs of her's with Pardeep Kumar were clicked to show that her marriage with him had been

performed. Accused Rajender Parshad arranged a room in a hotel for them. She was threatened that if she disclosed the facts to anybody, they would pour acid on her. She was kept in the hotel for about 3-4 days. During this period accused Pardeep Kumar committed rape upon her. Thereafter, Rajender Parshad made a phone call to Pardeep Kumar to bring her back to his house at Ajnala. There Rajender Parshad again threatened her. He asked Pardeep Kumar to arrange a job for him at Ludhiana and take her to Ludhiana, where, if possible, they would sell her to someone. Accused Rajender Parshad and Pardeep Kumar were taking her to Ludhiana, but in Amritsar they were apprehended by the Police on 25.09.2017. She got recorded her statement Ex.PW2/A before the Police on 25.09.2017. She identified her signatures at point 'A' on the said statement. She was medico-legally examined on 09.10.2017. She got recorded her statement Ex.PW2/B before JMIC, Ajnala on 26.09.2017. She identified her signatures on the statement. She stated that she had got recorded the statement out of her own sweet will and without any threat or pressure. She also proved her statement dated 14.10.2017 Ex.PW2/C, which bore her signatures at point 'A' and stated that the statement had been got recorded by her by her own sweet will, without any threat or pressure. At the time of occurrence, she was 15½ to 16 years of age. She identified the accused in Court. She stated that accused Pardeep Kumar @ Balram is already married.

12. In cross-examination, she stated that her statement was recorded by the Police on two occasions and the Magistrate on two occasions. She identified the statement dated 26.09.2017 Ex.D1. The Police first produced her before the Magistrate on 26.09.2017 and her

statement was recorded by the Magistrate. She had not given any statement

to the Police on 26.09.2017. The police had obtained her signatures on blank papers. Her second statement Ex.D2 was recorded on 14.10.2017. On 14.10.2017 her statement was first recorded by the Magistrate and then by the Police. She was produced before the Magistrate on 14.10.2017 at about 10/11 am. Police recorded her statement at 12.00 noon on 14.10.2017 in the Court complex. She had not moved any complaint against any of the accused from 26.09.2017 till 14.10.2017 that they had threatened her or any of her family members in the manner as deposed by her in her examination-in-chief. She had also not disclosed this at the time of recording of her statement by the Magistrate on 26.09.2017. She admitted that when her first statement was recorded on 26.09.2017 all the three accused had been arrested. She had not got recorded the fact that Pardeep Kumar pushed her inside the car on 11.09.2017 in her statements Ex.PW2/B, Ex.PW2/C and Ex.D2. She had got recorded in her statements in Ex.PW2/B, Ex.PW2/C and Ex.D2 that accused Pardeep Kumar had told her that her father was not well and that they were taking her to the Hospital and then they took her to the hospital at Ajnala. She was confronted with her statements, wherein, it was not so recorded. She had got recorded in her statements Ex.PW2/B, Ex.PW2/C and Ex.D2 that the accused threatened her with acid attack. She had got recorded in her statements that she was kept in the house of accused Rajender Parshad for about five days. She had also got recorded that Pardeep Kumar committed rape upon her. She had also got recorded that accused Pardeep Kumar along with Rajender Parsad and Suraj had taken her to some unknown place in a car and Rajender Parshad was having a pistol at that time. She had also got recorded that she was kept at the unknown place and accused Pardeep Kumar committed rape upon her against her wishes.

She had also got recorded that accused Rajender Parshad asked Pardeep Kumar on mobile phone that the matter had gone out of his control and that he would take her to Chandigarh to perform Court marriage. She had also got recorded that Pardeep Kumar took her to Chandigarh where Rajender Parshad was present. They engaged a counsel for Court marriage. She was confronted with her statements where those facts were not recorded. She was also confronted with her statements Ex.PW2/B, Ex.PW2/C and Ex.D2. where the facts regarding the Presiding Officer of the Court asking them to go out because of her being underage, her being taken to a Mandir and the Pujari refusing to perform her marriage with Pardeep Kumar and the clicking of her photographs with Pardeep Kumar to show performance of their marriage were not recorded. She was further confronted with her statements Ex.PW2/B, Ex.PW2/C and Ex.D2 where the other facts regarding Rajender Parshad arranging a room in a hotel, their remaining in the hotel for 3-4 days where accused Pardeep Kumar committed rape upon her, the phone call made by accused Rajender Parshad to Pardeep Kumar asking him to bring her to his house at Ajnala, Rajender Parshad asking Pardeep Kumar to arrange a job at Ludhiana and further asking Pardeep Kumar to take her to Ludhiana and if possible to sell her there and her being apprehended by the Police at Amritsar along with Pardeep Kumar and Rajender Parshad on 25.09.2017, were not mentioned. She denied that improvements had been made by her at the instance of her parents and Police in order to falsely implicate accused Rajender Parshad and Baldev Raj. She denied that she was apprehended on 26.09.2017 in the company of accused Pardeep Kumar only. She asserted that on 25.09.2017, she was

remained in Ajnala till 16.09.2017. From 16.09.2017 till 18.09.2017, she remained in Amritsar. She remained in Chandigarh from 19.09.2017 till 22.09.2017. Then, she was taken to Ajnala, where they remained till the time they were apprehended in Amritsar. She had not informed the Presiding Officer about the threats administered to her by the accused when she went inside the court room in Chandigarh. She admitted that Police was deputed in the Chandigarh Court complex. She admitted that she was taken to the doctor for her medico-legal examination on the same day when she was apprehended, but she refused for medico-legal examination on that day. The same day she was produced before the Magistrate for recording her statement. She admitted that the said statement was made by her on 26.09.2017 in favour of accused Pardeep Kumar. She remained in Women Protection Home, Jalandhar from 26.09.2017 till 8th or 09.10.2017. Thereafter, her parents took her from the said Protection Home and since then she was in the company of her parents. She admitted that accused Pardeep Kumar was on visiting terms to their house 1½ year prior to 11.09.2017. Rajender Parshad had visited their house only once or twice. She had never been to the house of Baldev Raj or Rajender Parshad prior to the incident. She had never shown any place including the house of Rajender Parshad, where she was kept confined or where she was subjected to rape to the Police during the course of investigation. She did not know the name of the hotel where she was kept. Neither she nor her family members moved any complaint against any of the accused till now that they are threatening to kill her family members or attacking her with acid. When she came out of the school on 11.09.2017, she noticed that her cousin brother was not there, but she did not return to the classroom on observing

that her cousin was not waiting outside the school. Her School was to get over by 2.00 pm on the day of the incident. She identified her signatures on the affidavit Ex.D-3 on point A and point B. She stated that she had not appended her signatures on the affidavit after reading the same. She stated that she had not signed Ex.D3 after reading and understanding its contents. She stated that she never moved any complaint to the Court or the police that she had been made to sign the affidavit against her wishes and without reading or understanding its contents.

13. PW3 Chamkaur Singh deposed that he was running a tractor workshop in the area of Lachkari Nangal. On 19.09.2017, he had gone to Ajnala in connection with some work. Accused Rajender Parshad who was known to him earlier was standing near the bus stand Ajnala. He was talking loudly on his mobile phone to his nephew Pardeep Kumar asking him that if he could not arrange any proper place, he should come back and that he (Rajender Parshad) would find some place for him. He further deposed that Rajender Parshad spoke with Pardeep Kumar for long time and that he had heard the entire conversation of Rajender Parshad. He then approached the Police of Police Station Ramdass that if inquiry was made from Rajender Parshad, the prosecutrix could be traced out along with Pardeep Kumar. The prosecutrix was his niece. He firmly believed that the prosecutrix was kidnapped by Pardeep Kumar in connivance with Rajender Parshad.

14. In cross examination by the Ld. counsel for the accused, he stated that he had come to know about the fact that the prosecutrix was missing in the evening of 11.09.2017. He had gone to the house of the

them since 11.09.2017 till the day when she was recovered by the Police. Earlier, Rajender Parshad had been helping and accompanying the family to search for the prosecutrix. His village is at a distance of 4/5 kilometers from the village of the prosecutrix. His village is at a distance of 10 kilometers from the place where he had seen Rajender Parshad. He had seen Rajender Parshad at 2/2.30 pm on 19.09.2017. He had gone to inform the Police about this on 20.09.2017 and not on the same day. Rajender Parshad knew that he (PW3) was a relative of the prosecutrix and had been searching for the prosecutrix along with Rajender Parshad in the company of family members of the prosecutrix. He got to know about the person with whom Rajender Parshad was speaking on his mobile as he was taking the name of the said person over the phone.

15. PW4 Lovepreet Singh @ Harry stated that he was working as Clerk in Saint Peter Convent School, Dayal Bharang, Ajnala. On 11.09.2017 Pardeep Kumar came to his room in the school during school time. Pardeep Kumar told him that the prosecutrix was his cousin and that he had come to take her with him. He called the prosecutrix to his room. Pardeep Kumar took her with him from there. The prosecutrix was a student of 10th class in the school. CCTV cameras are installed in the school building. On 23.10.2017 he accompanied ASI Kabil Singh, Investigating Officer to Pawan Kumar Lakshmi Photostat at Ajnala. He transferred the CCTV footage recording to a pen drive from which the CD was prepared. He handed over the CD to the Police during the investigation. He proved the CD Ex.MO/1.

16. In cross-examination, he stated that Pardeep Kumar had come to the School on 11.09.2017 at 01.47 pm. The school gets over at 01.30 pm.

After 01.30 pm, the students can leave the school on their own. After 01.30 pm even the students who are supposed to leave the school with their parents do not report to him while leaving the school with their parents. When he called the prosecutrix to his room on the request of Pardeep Kumar, he enquired from her as to whether Pardeep Kumar was her cousin, to which she replied in the affirmative. Thereafter, she left in the company of Pardeep Kumar of her own sweet will. The Police had come to him for the first time on 12.09.2017 and had seen the CCTV footage, but it did not request for its copy. The Police had not taken into possession the original DVR installed in the School premises.

17. PW5 Suman Dhawan, Principal, Saint Peter Convent School, Dayal Bharang, Ajnala brought the summoned record relating to the date of birth of the prosecutrix. She deposed that as per School record, her date of birth was recorded as 07.11.2001. She proved the certificate Ex.PW5/A which bears her signatures. As per the certificate dated 06.12.2017 Ex.PW5/B issued under her signatures, the prosecutrix had left the school on 11.10.2017. She proved the attested copy of the admission and withdrawal Register maintained by the School Ex.PW5/C. Entry regarding admission of the prosecution was at Sr.No.071 dated 08.04.2010 and her date of birth was 07.11.2001.

18. In cross-examination, she admitted that the date of birth is entered in the School record as per the information given by the parents. The school authorities did not verify the date of birth disclosed by the parents.

19. PW-6 Dr. Prabhjot Kaur, Medical Officer, Mini PHC, Sudhar,

Distt. Amritsar deposed that on 09.10.2017 she was posted as Medical

Officer, at PHC Ramdass. On that day, the prosecutrix who was stated to be about 15½ years was brought to the hospital by LC Navinder Kaur and accompanied by her Maasi Balbir Kaur.

She recorded the following findings:

“The girl examined was conscious, cooperative and oriented to surroundings. History given by the girl herself. Gait was normal. As per the history given by the girl, history of sexual assault on 11.09.2017 at about 10.30 pm as per her statement and FIR No.78 dated 12.09.2017. History of changing clothes and bathing next day. She has passed urine and stool since the incident.

Menstrual History:

Her LMP 25.09.2017.

Menstrual formula 5 to 6 days/28 to 30 days regular as per her statement.

General physical examination:

Secondary sexual characters well developed.

No evidence of any fresh external injuries on the body of the girl at the time of examination.

Local examination:

Labia major and labia minora are found to be well developed. There was no evidence of any bruise, redness, tenderness around vaginal introitus. Hymen was torn. It admits one finger on P/V examination.

Two vaginal swabs were taken.

Swab A: From introitus of vagina.

Swab B: From posterior fornix.

And were sent to chemical examiner Government of Punjab for detection of spermatozoa through LC Navinder Kaur.

Requisition letter to Radiologist Civil Hospital, Amritsar for X-ray for bone age determination as desired by the investigating Officer.

From the above clinical examination, possibility that she has been subjected to sexual intercourse cannot be ruled out. Rest can be quoted after obtaining report of Chemical Examiner.”

She deposed that on 24.05.2018 after going through the original report of Chemical Examiner Ex.PW-6/C which states that no spermatozoa were detected in the content of Exhibit-I, but possibility of sexual intercourse cannot be ruled out, she gave her opinion Ex.PW-6/D that possibility of sexual intercourse cannot be ruled out.

20. In cross examination, she admitted that there was no sign of assault visible on physical examination of the prosecutrix. She admitted that she had earlier given report that possibility of sexual intercourse with the prosecutrix could not be ruled out and kept pending the final opinion till receipt of report of Chemical Examiner. She admitted that a confirmed opinion pertaining to the prosecutrix being subjected to sexual intercourse is given when it is known whether spermatozoa is detected in the sample swabs or not. In the present case, as no spermatozoa were detected, so no confirmed opinion could be given as to whether the prosecutrix was subjected to sexual intercourse.

21. PW7 Constable Karanbir Singh deposed regarding deposit of a sealed parcel containing swabs and sealed envelope containing documents and the seal of the doctor in the office of Chemical Examiner, Kharar after receiving them from MHC Nirmal Singh on 30.10.2017.

22. PW8 MHC Nirmal Singh deposed that on 30.10.2017, he handed over a sealed parcel containing swabs and sealed envelope containing documents to Constable Karanbir Singh for depositing the same with the office of Chemical Examiner, Kharar, which he deposited the same day and handed over the receipt to him.

posted at Police Station Ramdass, Amritsar. On that day, Surjit Singh complainant got recorded his statement on which he made endorsement Ex.PW9/A, on the basis of which FIR Ex.PW9/B was registered. He conducted raid on the house of the accused, but did not find anyone present there. Rajender Parshad, uncle of accused Pardeep Kumar met the police party and disclosed that when the accused got to know about the registration of the FIR, he along with his family members went away after locking the house. On 20.09.2017, the mobile used by accused Pardeep Kumar at the time of occurrence was taken into possession from Lovepreet Singh s/o Kewal Singh. Sim card No.99147-02405, which was used by Pardeep Kumar on the day of occurrence was switched off. When the mobile was recovered, it was having sim card No.88728-37751. Lovepreet disclosed that he had purchased the phone from Pardeep Kumar on 12.09.2017 for Rs.3,000/-. He also disclosed that at that time, Pardeep Kumar was using SIM card having No.91159-57566. For getting the call details of this number, a letter was written to Cyber Cell, SSP(R), Amritsar. On 23.09.2017 the call details record was received. The scrutiny of the call details revealed that Rajender Parshad, the paternal uncle of accused Pardeep Kumar, had made 19 long calls to Pardeep Kumar from which it was revealed that accused Rajender Parshad had specific role in the commission of the crime.

24. During investigation on 26.09.2017 offence under Section 376 IPC and under Section 6 of the POCSO Act were added. Accused Balram @ Pardeep Kumar was arrested on 26.09.2017. On 26.09.2017 a written request Ex.PW9/H was made by L/ASI Esthar to the doctor of Civil

Hospital, Ramdass for medico-legal examination of the prosecutrix, but the

prosecutrix refused to get her medico-legal examination conducted. After taking necessary permission from the Court on 9.10.2017 he along with other officials had gone to Vanita Gandhi Ashram at Jalandhar, where the prosecutrix was lodged under the orders of the Court. The prosecutrix was produced before the Magistrate at Ajnala and after getting permission, she was got medico- legally examined at Civil Hospital, Ramdass. After medico legal examination of the prosecutrix, the doctor handed over a sealed parcel containing swabs and one sealed envelope. The same were initially deposited with MHC and thereafter, deposited in the office of Chemical Examiner, Kharar. The bone test of the prosecutrix to determine her age was got conducted from Civil Hospital, Amritsar on 10.10.2017. Thereafter, the prosecutrix was lodged in Vanita Gandhi Ashram at Jalandhar. On 14.10.2017, he moved written request Ex.PW9/K for getting statement of the prosecutrix under Section 164 CrPC recorded which was recorded before the Magistrate at Ajnala. On 23.10.2017 one CD was taken into possession vide memo Ex.PW9/J. He proved the CD Ex.MO/1.

25. In cross-examination, he stated that he had not arrayed Rajender Parshad as an accused in this case and could not tell when he was arrayed as an accused. Rajender Parshad met the Police party on 12.09.2017 when the house of the accused was raided. Lovepreet Singh was not arrayed as an accused in this case. No statement of Lovepreet Singh s/o Kewal Singh is annexed with the challan. His name also does not find mention in the list of witnesses. He admitted that there was no recovery memo pertaining to mobile annexed with the challan. The prosecutrix was subjected to Ossification Test as per which her age was

made pertaining to consent of the prosecutrix for accompanying the accused from the CD pertaining to the CCTV camera installed in the premises as it is of very short duration. Even in the short visual clip, it is visible that the prosecutrix had been accompanying the accused of her own and the accused was not forcing her to accompany him.

26. PW10 Dr. Baljit Singh SMO (Retd.) deposed that on 27.09.2017 he was posted as SMO at PHC Ramdass. On that date he conducted examination of Balram @ Pardeep Kumar. He opined that there was nothing to suggest that he was not capable to perform sexual act.

27. PW11 ASI Pargat Singh deposed that on 16.09.2017 he was posted at Police Station Ramdass, District Amritsar. On that day, he correctly recorded the supplementary statement of Surjit Singh Ex.PW1/B. On 25.09.2017, he correctly recorded the statement of PW Chamkaur Singh. Rajender Parshad was arrayed as an accused on the basis of the said statement. He arrested accused Rajender Parshad on 25.09.2017. On 26.09.2017 on receiving information accused Pardeep Kumar and the prosecutrix were arrested from his house. On the same day, both were taken to Civil Hospital, Ramdass for medico-legal examination. He identified accused Rajender Parshad and Pardeep Kumar. He had not retrieved the call records from the mobile of Rajender Parshad during investigation.

28. PW Pawan Kumar was given up as having been won over. PWs ASI Sukhwinder Singh, HC Takwinder Singh, L/ASI Esthar and L/HC Narinder Kaur were given up as unnecessary.

29. As per Chemical Examiner report, no Spermatozoa were detected in the contents of exhibit I. (two vaginal swabs) of the prosecutrix.

PW1 Surjeet Singh father of the prosecutrix is that the prosecutrix was a student of Class X in St. Peter Convent School, Dayal Bharang. Her date of birth was 07.11.2001. His son also studied in the same school in Class V. He used to leave his son and daughter to their school on motorcycle and they would come back home on the school van. On 11.09.2017 his daughter did not come home in the school van. PW1 immediately went to the school where he was informed by PW4 Lovepreet, the Clerk told him that one boy who claimed to be the cousin of the prosecutrix had come to the school at about 1.20 pm and taken her away. After viewing the footage of the CCTV camera installed in the school PW1 identified the said person as Pardeep Kumar.

31. PW2 while deposing in Court has corroborated the version of her father by deposing that on 11.09.2017 she was in school. She was called by the Chowkidar from her class, who told her that one person who claimed to be her cousin, had come to take her. When she came out from the School gate, she saw Pardeep Kumar @ Balram along with Kartar Singh. They were in a vehicle. Pardeep Kumar pushed her inside the car. He told her that her father was not well and stated that they were taking her to the Hospital. They then took her to the Hospital at Ajnala. Pardeep Kumar then took her to the house of Rajender Parshad, his uncle where Baldev Raj his father was also present. All three threatened her that if she disclosed anything to anyone, they would kill her brother and father. They would attack her with acid. Thereafter, accused Pardeep Kumar kept her for five days in the house of Rajender Parshad where Pardeep Kumar committed rape upon. She was then taken to some unknown place in a car where

accused Pardeep Kumar committed rape upon her against her wishes.

Thereafter she was taken to Chandigarh to perform Court marriage but it could not be performed as the Presiding Officer said she was underage. Even the Pujari at the mandir refused to perform her marriage. After staying in a hotel for 3-4 days where again accused Pardeep Kumar raped her, she was taken back to Ajnala. She and the accused were arrested at Amritsar while she was being taken to Ludhiana.

32. The case of the accused in his statement under Section 313 was that he was falsely implicated. The prosecutrix was having an affair with him since considerable time. The prosecutrix accompanied him of her own sweet will and had solemnized marriage with him and had also filed a petition in the High Court of her own sweet will. His father and any other family member had no role to play and had no knowledge of their plans. The prosecutrix initially refused to get medico-legal examination conducted and also to accompany her family members. Later, under the family pressure she got the false case registered against him. He had not committed rape with the prosecutrix ever at any place. The prosecutrix had claimed that she was major and they had planned to solemnized marriage against the wishes of their family members.

33. Though PW2 in her deposition in Court has claimed that she had been forcibly taken away by the accused, that version does not seem credible and appears to be an after thought. After her arrest along with the accused Pardeep Kumar on 26.09.2017, she was produced before the Magistrate where her statement under Section 164 Cr.P.C. Ex. PW2/B was recorded. In that statement, she stated that on 11.09.2017 she had gone with accused Pardeep Kumar as per her own wish. She had called him to the

years. He was on visiting terms to their house. Pardeep had not forcibly taken her. Though she was taken to the doctor for her medico-legal examination, she refused to get herself examined. It was only in her second statement recorded before the JMIC Ajnala on 14.10.2017 that she stated that on 11.09.2017 Pardeep forcibly took her the house of his Uncle instead of dropping her at her house as he had promised.

34. The cross examination of PW2 clearly brings out that the claim of her having been forcible taken away by the accused Pardeep Kumar and the threats executed to her by accused Rajinder Parshad and Pardeep Kumar is not correct. She admitted in cross examination that she had not moved any complaint against any of the accused from 26.09.2017 till 14.10.2017 that they had threatened her or any of her family members in the manner as deposed by her in her examination-in-chief. She had also not disclosed this at the time of recording of her statement by the Magistrate on 26.09.2017 though by then all the three accused had been arrested.

35. She had remained in Ajnala from 11.09.2017 till 16.09.2017. From 16.09.2017 till 18.09.2017 she remained in Amritsar. She remained in Chandigarh from 19.09.2017 till 22.09.2017. Then she was taken to Ajnala, where they remained till the time they were apprehended in Amritsar on 25.09.2107. She had not informed the Presiding Officer about the threats administered to her by the accused when she went inside the court room in Chandigarh. She admitted that Police was deputed in the Chandigarh Court complex but she made no effort to lodge any complaint. She remained in Women Protection Home, Jalandhar from 26.09.2017 till 8th or 09.10.2017. Thereafter, her parents took her from the said Protection Home and since

then she was in the company of her parents. She also admitted that when

she came out of the school on 11.09.2017 she noticed that her cousin brother was not there, but she did not return to the classroom on observing that her cousin was not waiting outside the school.

36. PW4 Lovepreet, the Clerk of the School in his cross examination stated that when he called the prosecutrix to his room on the request of Pardeep Kumar, he enquired from her as to whether Pardeep Kumar was her cousin, to which she replied in the affirmative. Thereafter, she left in the company of Pardeep Kumar on her own sweet will.

37. PW9 ASI Kabal Singh in his cross examination stated that though the CD pertaining to the CCTV camera installed in the premises as it is of very short duration. Even in the short visual clip, it is visible that the prosecutrix had been accompanying the accused of her own and the accused was not forcing her to accompany him.

38. Thus, it is clear that the prosecutrix had accompanied the accused Pardeep Kumar of her own free will and the allegations that she was forcibly taken away by him cannot be accepted. Consequently, there was no question of her being threatened either by the accused Pardeep Kumar and Rajender Parshad as alleged by her in her deposition in Court. During her cross examination, she was confronted with her statements Ex.PW2/B, Ex.PW2/C and Ex.D2, wherein, it had not been recorded that the accused threatened her with acid attack, that she was kept in the house of accused Rajender Parshad for about five days where Pardeep Kumar committed rape upon her, that accused Pardeep Kumar along with Rajender Parshad and Suraj had taken her to some unknown place in a car and Rajender Parshad was having a pistol at that time, that she was kept at the

against her wishes, that accused Rajender Parshad asked Pardeep Kumar on mobile phone that the matter had gone out of his control and that he should take her to Chandigarh to perform Court marriage, that Pardeep Kumar took her to Chandigarh where Rajender Parshad was present. She was further confronted with her statements Ex.PW2/B, Ex.PW2/C and Ex.D2 where the other facts regarding Rajender Parshad arranging a room in a hotel, their remaining in the hotel for 3-4 days where accused Pardeep Kumar committed rape upon her, the phone call made by accused Rajender Parshad to Pardeep Kumar asking him to bring her to his house at Ajnala, Rajender Parshad asking Pardeep Kumar to arrange a job at Ludhiana and further asking Pardeep Kumar to take her to Ludhiana and if possible to sell her there and her being apprehended by the Police at Amritsar along with Pardeep Kumar and Rajender Parshad on 25.09.2017, were not mentioned. It appears that the allegations about the complicity of Rajender Parshad by PW2 are clearly an afterthought and cannot be relied upon.

39. The prosecution further relied upon the statement of Chamkaur Singh (PW3) to show the connivance of Rajender Parshad with Pardeep Kumar. PW3 Chamkaur Singh has deposed that on 19.09.2017 he had gone to Ajnala where he met Rajender Parshad near the Bus Stand. Rajender Parshad was talking to Pardeep Kumar – accused on his mobile phone telling him that if he could not arrange any proper place, he should come back and that he (Rajender Parshad) would arrange some other place for him. Ld. Trial Court rightly did not place any reliance on the evidence of PW3 considering that if he had come to know on 19.09.2017 about the complicity of Rajender Parshad with accused Pardeep Kumar, there was no

complainant when admittedly he was in touch with the complainant all through.

40. The prosecution further relied upon the testimony of PW9 ASI Kabil Singh, who stated that on 20.09.2017 the mobile used by accused Pardeep Kumar at the time of occurrence was taken into possession from Lovepreet Singh s/o Kewal Singh. Sim card No.99147-02405 which was used by Pardeep Kumar on the day of occurrence was switched off. When the mobile was recovered, it was having sim card No.88728-37751. Lovepreet disclosed that he had purchased the phone from Pardeep Kumar on 12.09.2017 for Rs.3,000/-. He also disclosed that at that time, Pardeep Kumar was using SIM card having No.91159-57566. For getting the call details of this number, a letter was written to Cyber Cell, SSP(R), Amritsar. On 23.09.2017 the call details record was received. The scrutiny of the call details revealed that Rajender Parshad, the paternal uncle of the accused Pardeep Kumar, had made 19 long calls to Pardeep Kumar from which it was revealed that accused Rajender Parshad had specific role in the commission of the crime. However, the said evidence cannot be relied upon as the prosecution has not proved the ownership of Pardeep Kumar and Rajender Parshad of the said mobile phones. The call detail records have not been exhibited nor the Nodal Officer has been examined to prove the call detail records. Neither the statement of Lovepreet Singh s/o Kewal Singh, who had allegedly purchased the Mobile Phone from Pardeep Kumar was recorded nor was he was examined. Even no recovery memo pertaining to mobile was prepared during investigation. Thus, the charge of abetment against accused Rajender Parshad is not proved.

of the prosecutrix. To prove the age the prosecution examined PW5 Suman Dhawan, Principal, Saint Peter Convent School, Dayal Bharang, Ajnala who brought the record relating to the date of birth of the prosecutrix. She deposed that as per School record, her date of birth was recorded as 07.11.2001. She proved the certificate Ex.PW5/A which bears her signatures. As per the certificate dated 06.12.2017 Ex.PW5/B issued under her signatures, the prosecutrix had left the school on 11.10.2017. She proved the attested copy of the admission and withdrawal Register maintained by the School Ex.PW5/C. Entry regarding admission of the prosecution was at Sr.No.071 dated 08.04.2010 and her date of birth was 07.11.2001.

42. Ld. Counsel for the accused on the other hand referred to the deposition of PW9 ASI Kabal Singh who in cross examination stated that the prosecutrix was subjected to Ossification Test as per which her age was determined within the age group of 16½ to 19 years. This assertion of PW 9 is not sufficient to hold that the prosecutrix was major. The Ossification report has not been proved on record and as such cannot be taken into consideration for determining her age.

43. Hon'ble Supreme Court in various cases has held that the Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which is to determine the age of a child in conflict with law, should be the basis for determining age, even of a child who is a victim of crime. As per Rule 12, while determining the age of a juvenile the Board would first of all consider the matriculation or equivalent certificates, if available; in the absence thereof it would consider the date of birth certificate from the school (other than a play school) first attended; and in the absence thereof it

authority or a Panchayat. It is only in the absence of these three that the medical opinion will be sought from a duly constituted Medical Board for determining the age.

44. The Hon'ble Supreme Court in **Jarnail Singh v. State of Haryana, (2013) 7 SCC 263** observed as under :

“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as “the 2007 Rules”). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12. Procedure to be followed in determination of age.

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

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

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

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

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

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

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

In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

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

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

(5) Save and except where, further inquiry or otherwise

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

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

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages

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

24. *Following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix VW, PW 6 could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied up to Class 3 only, and thereafter, had left her school and had started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW, PW 6 on the next available basis in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW 4) to prove the age of the prosecutrix VW, PW 6. Satpal (PW 4) was the Head Master of Government High School, Jathlana, where the prosecutrix VW, PW 6 had studied up to Class 3. Satpal (PW 4) had proved the certificate Ext. PG, as having been made on the basis of the school records indicating that the prosecutrix VW, PW 6 was born on 15-5-1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view that the High Court was fully justified in*

relying on the aforesaid basis for establishing the age of the prosecutrix VW, PW 6. It would also be relevant to mention that under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix VW, PW 6. The deposition of Satpal, PW 4 has not been contested. Therefore, the date of birth of the prosecutrix VW, PW 6 (indicated in Ext. PG as 15-7-1977) assumes finality. Accordingly it is clear that the prosecutrix VW, PW 6, was less than 15 years old on the date of occurrence i.e. on 25-3-1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW, PW 6 was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW, PW 6 had accompanied the appellant-accused Jarnail Singh of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor.

The Hon'ble Supreme Court in **State of M.P. v. Anoop Singh, (2015) 7 SCC 773**, observed :

“12. We believe that the present case involves only one issue for this Court to be considered, which is regarding the determination of the age of the prosecutrix.

13. In the present case, the central question is whether the prosecutrix was below 16 years of age at the time of the incident? The prosecution in support of their case adduced two certificates, which were the birth certificate and the Middle School Certificate. The date of birth of the prosecutrix has been shown as 29-8-1987 in the birth certificate (Ext. P-5), while the date of birth is shown as 27-8-1987 in the Middle School Examination Certificate. There is a difference of just two days in the dates mentioned in the abovementioned exhibits. The trial

court has rightly observed that the birth certificate, Ext. P-5 clearly shows that the registration regarding the birth was made on 30-10-1987 and keeping in view the fact that registration was made within 2 months of the birth, it could not be guessed that the prosecutrix was shown as underaged in view of the possibility of the incident in question. We are of the view that the discrepancy of two days in the two documents adduced by the prosecution is immaterial and the High Court was wrong in presuming that the documents could not be relied upon in determining the age of the prosecutrix.

14. *This Court in Mahadeo v. State of Maharashtra has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:*

“12. (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.”

15. *This Court further held in para 12 of Mahadeo, as under: (SCC p. 641)*

“12. ... Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.”

This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In para 13, this Court observed: (Mahadeo case, SCC p. 641)

“13. In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the school under Ext. 54, the date of birth of the prosecutrix has been clearly noted as 20-5-1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20-5-1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the

prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any grounds to interfere with the same.”

16. In the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3)(b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P-5 and P-6 cannot be discarded. Therefore, the trial court was correct in relying on the documents.

17. The High Court also relied on the statement of PW 11 Dr A.K. Saraf who took the x-ray of the prosecutrix and on the basis of the ossification test, came to the conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more than 18 years of age at the time of the incident. With respect to this finding of the High Court, we are of the opinion that the High Court should have relied firstly on the documents as stipulated under Rule 12(3)(b) and only in the absence, the medical opinion should have been sought. We find that the trial court has also dealt with this aspect of the ossification test. The trial court noted that the respondent had cited Lakhanlal v. State of M.P., wherein the High Court of Madhya Pradesh said that where the doctor having examined the prosecutrix and found her to be below 18½ years, then keeping in mind the variation of two years, the accused should be given the benefit of doubt. Thereafter, the trial court rightly held that in the present case the ossification test is not the sole criterion for determination of the date of birth of the prosecutrix as her certificate of birth and also the certificate of her medical examination had been enclosed.

18. Thus, keeping in view the medical examination reports, the

statements of the prosecution witnesses which inspire confidence and the certificates proving the age of the prosecutrix to be below 16 years of age on the date of the incident, we set aside the impugned judgment passed by the High Court and uphold the judgment and order dated 24-4-2006 passed by the Third Additional Sessions Judge, Satna in Special Case No. 123 of 2003.”

In State of M.P. v. Ajab Singh, (2015) 13 SCC 383, the Hon'ble Supreme Court observed :

“13. Further, the finding and reasons arrived at by the High Court on the charges framed against the accused are erroneous for the reason that the order of the trial court was based upon proper appreciation of cogent and legal evidence on record particularly the evidence of school admission register and the evidence of PW 15 to prove the entries of the school admission register regarding the age of the prosecutrix and evidence of PW 9, who has asserted in her deposition that the age of the prosecutrix is 13 years. Therefore, the finding of fact recorded by the trial court with regard to the age of the prosecutrix is based on cogent and valid reasons and the same should not have been disbelieved by the High Court while reappreciating the medical report (Ext. P-3) and the evidence of PW 5 and placing strong reliance upon the same to reverse the finding of the trial court. Therefore, the High Court has erroneously held that the age of the prosecutrix is 16½ years, which finding of fact is perverse and bad in law. The same is liable to be set aside. In view of the above, the finding recorded by the trial court that the age of the prosecutrix is below 16 years has to be accepted.

14. Significantly, if the age of the prosecutrix is accepted as below 16 years, then the prosecution has discharged its burden with regard to the offence of rape under Section 376 and the finding recorded on the offence of kidnapping and rape and

there is a presumption under Section 114-A of the Evidence Act in favour of the prosecution that the offence is committed by the accused. The accused have not adduced rebuttal evidence in this regard to disprove that the offence of rape is not committed by them.”

45. In the present case, as per the certificate Ex.PW5/A and the admission and withdrawal Register maintained by the School Ex.PW5/C the date of birth of the prosecutrix is 07.11.2001. Thus, on 11.09.2017, she was aged about 15 years 10 months, clearly a minor and a 'child' within the meaning of POCSO Act.

46. The only question that remains to be determined is whether the accused had sexual intercourse with the prosecutrix, her consent being immaterial as she was a minor.

47. It has come in evidence that the prosecutrix remained in the company of accused Pardeep Kumar from 11.09.2017 till 25.09.2017 when they were arrested. It is the positive case of the prosecutrix that during this period Pardeep Kumar repeatedly raped her. When the prosecutrix was taken for her medico-legal examination on 26.09.2017 after her arrest she refused to undergo the examination. It was only on 09.10.2017 that her medico-legal examination was conducted by PW6 Dr. Prabhjot Kaur, Medical Officer, PHC Ramdass. PW6 proved the MLR Ex.PW6/A, wherein, she had recorded her opinion that from the “*clinical examination of the prosecutrix possibility that she had been subjected to sexual intercourse could not be ruled out. Rest can be quoted after obtaining report of Chemical Examiner.*”

48. She further deposed that on on 24.05.2018 after going through

the original report of Chemical Examiner Ex.PW-6/C as per which no spermatozoa were detected in the content of Exhibit I, she had given her opinion Ex.PW6/D that possibility of sexual intercourse cannot be ruled out.

49. Ld. Counsel for the appellant has argued that PW6 had not given any confirmed opinion that the prosecutrix had been subjected to sexual intercourse. Hence, the offence under Section 6 of the POCSO Act is not made out. We are unable to agree. In her cross examination, PW6 has explained that a confirmed opinion pertaining to the prosecutrix being subjected to sexual intercourse is given when it is known whether spermatozoa is detected in the sample swabs or not. In the present case as no spermatozoa were detected so no confirmed opinion could be given as to whether the prosecutrix was subjected to sexual intercourse.

50. The prosecutrix was medico-legally examined about 14 days after she had left the company of accused Pardeep Kumar. During this period, she was lodged in Vanita Gandhi Ashram at Jalandhar under the orders of the Magistrate. The absence of spermatozoa in the vaginal swabs was natural. PW6 has clearly stated that the possibility of sexual intercourse cannot be ruled out. The prosecutrix has asserted that during the period she remained in the company of the accused Pardeep Kumar from 11.09.2017 to 25.09.2017, she was repeatedly raped by him at various places where they stayed together. Her evidence cannot be disregarded. It is well settled that in sexual offences if the evidence of the victim does not suffer from any basic infirmity and the “probabilities factor” does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be

forthcoming. Moreover, a presumption under Section 29 of the POCSO Act is also attracted in this case in the absence of proof to the contrary by the accused.

51. PW10 Dr. Baljit Singh SMO (Retd.) conducted the medico-legal examination of Balram @ Pardeep Kumar opined that there was nothing to suggest that he was not capable to perform sexual act.

52. Thus, it has to be held that the accused Pardeep Kumar had performed sexual intercourse with the prosecutrix and as such is guilty of the offence under Section 6 of the POCSO Act. As the prosecutrix was a minor, her consent does not absolve or mitigate the offence as held by Hon'ble Supreme Court in **Satish Kumar Jayanti Lal Dabgar v. State of Gujarat, (2015) 7 SCC 359** :

“14. The first thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

“375. Rape.—A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions—

Sixthly.—With or without her consent, when she is under sixteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

15. The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason,

whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

16. Once we put the things in right perspective in the manner stated above, we have to treat it as a case where the appellant has committed rape of a minor girl which is regarded as a heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as a mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind the Protection of Children from Sexual Offences Act, 2012.”

53. Accordingly, the conviction of Pardeep Kumar @ Balram under Sections 363 and 366 IPC and Section 6 of the POCSO Act is upheld. However, his sentence under Section 6 of the POCSO Act is reduced from RI for life with fine of Rs.20,000/- to RI for 10 years with fine of Rs.20,000/. The sentence of RI for 10 years and fine of Rs.10,000/-

awarded under Section 366 IPC is reduced to RI for 05 years with fine of

Rs.10,000/-. All the sentences shall run concurrently. The appeal of Pardeep Kumar @ Balram (CRA-D-1158-DB-2018) is partly allowed to that extent.

54. Criminal Appeal filed by Rajinder Parshad (CRA-S-4406-SB-2018) is allowed. He is acquitted of all the charges against him by giving him benefit of doubt. He be released forthwith, if not required in any other case.

55. In view of above, Criminal Appeal and the Criminal Revision filed by the complainant (CRA-AD-354-2019 and CRR-907-2019) are dismissed.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

March 17, 2020
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Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No