

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.262 of 2022

Arising Out of PS. Case No.-342 Year-2020 Thana- KHUSRUPUR District- Patna

RAUSHAN KUMAR S/O BACHU YADAV R/o village- Mahmadpur Balwa,
P.S.- Harnaut, District- Nalanda

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 311 of 2022

Arising Out of PS. Case No.-342 Year-2020 Thana- KHUSRUPUR District- Patna

NAKUL KUMAR Son of Chotan Singh Resident of Village - Baruna, P.S.-
Fatuha, Distt.- Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 262 of 2022)

For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mr. Ritwik Thakur, Advocate
Mrs. Vaishnavi Singh, Advocate
Mr. Amrendra Kumar, Advocate

For the Respondent : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 311 of 2022)

For the Appellant : Mr. Ramakant Sharma, Senior Advocate
Mr. Lakshmi Kant Sharma, Advocate
Mr. Rajesh Kumar, Advocate

For the Respondent : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE JUSTICE SMT. G. ANUPAMA

CHAKRAVARTHY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 15-12-2023

These appeals have been preferred by the appellants under Section 374(2) of the Code of Criminal Procedure, putting to challenge the impugned judgment of conviction dated



28.02.2022 and the order of sentence dated 09.03.2022, passed by learned Additional District & Sessions Judge-VII-cum-Special Judge (POCSO), Patna, arising out of Khushrupur P.S. Case No. 342 of 2020, Special POCSO Case No. 191 of 2020, whereby the appellants have been convicted and sentenced as under:

Cr. Appeal (DB) No. 262 of 2022				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Raushan Kumar	Under Section 363 of the Indian Penal Code	R.I. for five years	25,000/-	S.I for one year
	Under Section 365 of the Indian Penal Code	R.I. for five years	25,000/-	S.I for one year
	Under Section 376 of the Indian Penal Code	R.I. for twenty years	50,000/-	S.I for one year
	Under Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act)	R.I. for twenty years	50,000/-	S.I for one year
Cr. Appeal (DB) No. 311 of 2022				
Appellant	Penal Provision	Sentence		
		Imprisonment	Fine (Rs.)	In default of fine
Nakul Kumar	Under Section 363 of the Indian Penal Code	R.I. for five years	25,000/-	S.I for one year
	Under Section 365 of the Indian Penal Code	R.I. for five years	25,000/-	S.I for one year
	Under Section 376 of the Indian Penal Code	R.I. for twenty years	50,000/-	S.I for one year
	Under Section 4 of the POCSO Act	R.I. for twenty years	50,000/-	S.I for one year

2. All the sentences have been ordered to run concurrently.

3. We have heard Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant in Criminal Appeal (DB) No. 262 of 2022 and Mr. Ramakant Sharma, learned Senior



Counsel assisted by Mr. Rajesh Kumar, learned counsel appearing on behalf of the appellant in Criminal Appeal (DB) No. 311 of 2022. Ms. Shashi Bala Verma, learned Additional Public Prosecutor had represented the State in both the appeals.

4. The foremost version of the occurrence is in the written report of the informant (PW-3), who is the father of the informant, which is the basis for registration of the police case, i.e., Khushrupur P.S. Case No. 342 of 2020, dated 28.10.2020. The formal FIR indicates that the information was received at the police station at 03:30 pm on 28.10.2020. The distance of the police station from the house of the informant, near which the place of occurrence was said to be situated, was two kilometers, as mentioned in the formal FIR. The appellants herein were named in the FIR. In the light of the evidence led at the trial by the prosecution's witnesses, we deem it proper to describe the accusation in the said written report against these appellants, in detail. The informant described the age of the victim (PW 5) to be 13 years and, according to him, on the previous day, i.e., 27.10.2020 at 08:00 am, she had left her house to ease herself. Late till evening, she did not return. He attempted to search her out, in course of which, he learnt that these appellants had taken the victim away in a motorcycle after enticing her. On 28.10.2020,



the victim returned home at 05:00 am and disclosed to the informant that these appellants had taken her to Patna on a motorcycle. He alleged that the appellant Raushan Kumar committed wrongful acts (दुष्कर्म) on her daughter, a child, in Patna, in his residence.

5. The Victim's (PW-5) statement under Section 164 of the CrPC (exhibit-3) was recorded on 30.10.2020. Again, we deem it proper to describe what the victim narrated in her statement under Section 164 of the CrPC. It is manifest from her statement that these appellants and the victim are neighbours. The appellants, according to her, offered her to come along with them for roaming around in the market. On the proposal of these appellants, the victim went with the appellants on their bike. It is clear from statement of the victim that the informant's disclosure in the First Information Report, that the victim had left the house for easing herself was incorrect. It is also apparent that the association of the victim with these appellants was such that she could go with them on a motorcycle for market on their asking. She further stated before the learned Magistrate that the appellants forcefully brought the victim to Patna and kept her in a room where the appellant Raushan Kumar committed wrongful acts (गलत काम) with her. He (Raushan Kumar) suggested for elopement and proposed to marry



the victim, which the victim declined. Thereafter, at 11:30 am, the appellants dropped her at a place called *Bhuski Bazar*. Scared of being chastized by her parents, she did not return to her house and, therefore, she caught a tempo (*auto rickshaw*) and went to Bakhtiyarpur. At Bakhtiyarpur Railway Station, she met a boy, her co-villager, Rakesh (not examined), who brought the victim back to her home. She further stated in her statement under Section 164 of the CrPC before the learned Magistrate that she wanted to marry the appellant Raushan Kumar, who had given her a mobile phone, which she had been using for talking to him. Her family members were not knowing about her relationship with the appellant Raushan Kumar.

6. Before that, on 28.10.2020, the victim was examined by a doctor. Based on radiological report, the Medical Officer (PW-4) posted at Gardanibagh Hospital, Patna, found the age of the victim to be 14-16 years. The report of the medical examination (exhibit-2) suggests that the medical officer did not find any violence mark on the victim's private part. Vaginal swab was taken and, upon sealing, the same was sent to Pathological Department, PMCH for microscopic examination.

7. Be that as it may, the police, upon completion of investigation, submitted charge-sheet against these appellants for



commission of the offences punishable under Sections 363, 365, 376 read with 34 of the IPC and Sections 4 and 6 of the POCSO Act, whereupon cognizance was taken of the aforesaid offences. The trial court subsequently framed charges against these appellants for commission of the offences punishable under Sections 363, 365 and 376 read with Section 34 of the IPC and Sections 4 and 6 of the POCSO Act. The appellants pleaded not guilty and claimed to tried. Accordingly, the appellants were put to trial.

8. At the trial, the prosecution got examined altogether seven witnesses including the victim (PW-5), the victim's father and the informant (PW-3), the victim's mother (PW-2) and the victim's uncle (PW-1). The two Investigating Officers deposed at the trial as PWs- 6 and 7.

9. In addition to the oral evidence of the prosecution’s witnesses, the prosecution also brought on record following documentary evidences, in support of the charges framed against the appellants:

S.No.	Description	Exhibit No.
1.	Signature of the Informant on the written report	Exhibit-1
2.	Medical Report of the victim	Exhibit-2
3.	Medical Report of the victim	Exhibit-2/1
4.	Signature of the victim under Section 164 CrPC	Exhibit-3
5.	The Transfer Certificate issued from the	Exhibit-4



	School of the victim	
6.	Registration for the endorsement of the case on written reported	Exhibit-5
7.	Informal FIR	Exhibit-6

10. After closure of the prosecution's evidence, the appellants were questioned by the trial court under Section 313 of the CrPC so as to give them an opportunity to explain the incriminating circumstances emerging against them based on the evidence adduced at the trial. The appellants reiterated their plea of innocence and denied the circumstances, which had emerged and were incriminating, according to the trial court.

11. After having appreciated the evidence adduced at the trial, the trial court has held the appellants guilty of the offences punishable under Sections 363, 365 and 376 read with Section 34 of the IPC and Sections 4 and 6 of the POCSO Act and has sentenced them to imprisonment and fine, as has been noted above.

12. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant (Raushan Kumar) of Cr. APP (DB) No. 262 of 2022, has argued that there are manifest inconsistencies in the prosecution's case, as disclosed in the FIR, in the statement of the victim recorded under Section 161 of the CrPC, her statement, recorded under Section 164 of the CrPC and, the depositions of the prosecution's witnesses at the trial. He contends, whereas,



according to the informant, they were searching for the victim till late in the evening of 27.10.2020 and the victim had returned on her own on 28.10.2020, the narration of the occurrence, disclosed by the victim in her statement under Section 164 of the CrPC, is substantially different. Even if the accusation of the victim, having been taken to Patna City by the appellants, is accepted only for the sake of the argument, as per her own statement, she was free at 11:30 AM on 27.10.2020 itself. He contends that, according to the victim's statement under Section 164 of the CrPC itself, instead of going back to her house, she preferred to go to Bakhtiyarpur, where she had met a co-villager, namely, Rakesh, who had brought the victim back to her house. This significant aspect was apparently suppressed by the informant in his written report, which is the basis for registration of FIR. He, accordingly, submits that the informant (PW-3) is not a reliable witness, who misled the Police in his written statement by suppressing the material facts which were within his knowledge. He has secondly submitted that the failure on the part of the prosecution to examine Rakesh is also fatal to the prosecution as he would have been the best independent witness in the light of the statement of the victim recorded under Section 164 of the CrPC. He had drawn our attention to the statement of the Investigating Officers, who had



recorded the victim's statement under Section 161 of the CrPC, during the course of investigation. He has argued that the other prosecution's witnesses, who are family members of the victim, are also not reliable as their evidence at the trial is substantially different from what they had disclosed to the Police during the course of investigation.

13. He has submitted, accordingly, that trial court has committed an error while holding the appellants guilty of the offences, relying on the depositions of the victim and her family members, who are apparently not trustworthy and reliable, considering the patent inconsistencies in their depositions. He has next submitted that it was obligatory for the prosecution and the Special Court (POCSO Act), i.e., the trial court, to have undertaken the task of determination of the age of the victim for reaching a conclusion beyond doubt that the victim was less than 18 years of age and, therefore, a 'child' within the meaning of Section 2(1)(d) of POCSO the Act. He contends that sub-section (2) of Section 34 of the POCSO Act ordains the Special Court to determine as to whether a person is a child or not, in case any such question arises in a proceeding before the Special Court and it has further a duty to record in writing its reasons for the determination of age of the victim. He has placed heavy reliance on a recent



Supreme Court's decision in the case of *P. Yuvaprakash vs State Rep. by Inspector Of Police (AIR 2023 SC 3525)* to contend that in the absence of determination of age of a victim in accordance with the procedure prescribed under Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 ('JJ Act, 2015' for short), the finding of the trial court that the victim was child on the date of occurrence is perverse and not at all sustainable. The appellants' conviction for the offence punishable under Section 4 of the POCSO Act is not sustainable for the same reason as the provisions of the POCSO Act cannot be applied unless it is clearly established that the victim of a crime was a 'child' within the meaning of Section 2(1)(d) of the POCSO Act. He has submitted that it is not the case that the childhood or otherwise of the victim, to attract the provisions of the POCSO Act, was not in question at the trial. Referring to the pattern of the cross-examination of the prosecution's witnesses at the trial on behalf of the defence, this Court can easily infer that the defence disputed the prosecution's case that the victim was a child to attract the provisions of the POCSO Act and, therefore, age determination of the victim, in accordance with the statutory procedure, prescribed therefor, was imperative, he would contend.



14. Mr. Rama Kant Sharma, learned Senior Counsel appearing on behalf of the appellant (Nakul Kumar) in Cr. APP (DB) No. 311 of 2022, while adopting the submissions advanced by Mr. Ajay Kumar Thakur, has contended that this appellant's case is on better footing than that of appellant Raushan Kumar for the reason that it appears from the victim's statement, recorded under Section 164 of the CrPC, that she was in relationship with the appellant (Raushan Kumar) and she had not alleged any conduct in the nature of sexual assault as against this appellant.

15. Ms. Shashi Bala Verma, learned Additional Public Prosecutor representing the State, has submitted that in the FIR, the victim's age was mentioned as 13 years by her father (PW-3). When the victim appeared before the learned Magistrate for examination, under Section 164 of the CrPC, learned Magistrate *prima facie* found her age to be approximately 13 years. The Doctor, based on X-ray report/radiological examination, reached a conclusion that the age of the victim was 14-16 years. She has laid considerable emphasis on the reasons assigned in the report of the Doctor for determination of the victim's age. She has contended that the Doctor found that there was incomplete fusion of Distal Ulnar Epiphysis on the both sides and in female, the Distal Ulnar Epiphysis fuses at the age of 17 years. Further, the Doctor found



that in females, the Distal Ulnar Epiphysis fuses at the age of 16.5 years. The Doctor further found non-fusion of the Epiphysis of the iliac crest on both sides. She contends that the Doctor rightly assessed the victim's age to be between 14-16 years upon detailed analysis of the X-Ray as the Epiphysis of iliac crest in female fuses at the age of 17 to 19 years.

16. We have carefully perused the impugned judgment and order of the trial court as well as the trial court's records. Based on the evidence brought on record, we have given our thoughtful consideration to the rival submissions made on behalf of the parties, as noted above. Before entering into the merits of the contentions advanced on behalf of the parties, we consider it useful to deal with the mandatory statutory requirements to bring a criminal offence within the ambit of POCSO Act. The first and foremost requirement to invoke the provisions of the POCSO Act is a clear finding beyond doubt that the victim of sexual assault is a child within the meaning of Section 2(1)(d) of the Act, which defines child to be a person below the age of 18 years. Section 34 of the Act lays down; (i) procedure in case of commission of offence by a child and (ii) determination of age by Special Court. Sub-Section (1) of Section 34 contemplates that where any offence is committed under the Act by a child, such child shall be dealt



with under the Juvenile Justice (Care and Protection of Children) Act, 2015. Sub Section (2) of Section 34 of the POCSO Act casts an obligation on the Special Court to determine the question as to whether a person is a child or not, if any such question arises. The said further required the Special Court to record in writing its reasons for such determination after satisfying itself about the age of such person. Sub-Section (2) of Section 34 of the POCSO Act reads thus:-

“(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.”

17. There cannot be any gainsaying that age determination of a person, victim of sexual assault, is one of the most fundamental questions, which is to be duly addressed while invoking the provisions of the POCSO Act. Sub-Section (2) of Section 34 does not lay down any definite procedure for determination of age of a person, who is a victim of sexual assault. Noticing absence of any specific procedure prescribed for age determination under Section 34(2) of the Act, the Supreme Court in case of ***Jarnail Singh v. State of Haryana***, reported in **(2013) 7 SCC 263**, referred to the then existing Rule 12 of the Juvenile



Justice (Care and Protection of Children) Rules, 2007, framed under Juvenile Justice (Care and Protection of Children) Act, 2000, on the issue of determination of age of a minor and held in paragraph 23 as under:-

“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.”

18. It is apt to mention, at this juncture, that Juvenile Justice (Care and Protection of Children) Act, 2000 has since been repealed with the enactment of Juvenile Justice (Care and Protection of Children) Act, 2015, Section 94 of which lays down the procedure for determination of age of a child under the provisions of the said Act. The said Section reads as under:-

“94. Presumption and determination of age.-(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;



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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

19. Mr. Thakur, learned counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 262 of 2022, has rightly placed reliance on the Supreme Court's decision in case of ***P. Yuvaprakash*** (supra), wherein after having referred to Section 34 of the POCSO Act and Section 94 of the Juvenile Justice Act (Care and Protection of Children) Act, 2015, and upon conjoint reading thereof, the Supreme Court has held that wherever a dispute with respect to the age of a person arises in the context of her or him being the victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Section 94 of the Act. While declaring the law as above, the Supreme Court in case of ***P. Yuvaprakash*** (supra) has laid down as under:-

"13..... ...The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:



*“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.”*

20. In our opinion, it has rightly being argued on behalf of the appellant, referring to the case of ***P. Yuvaprakash*** (supra) that Section 94(2)(iii) of the Juvenile Justice(Care and Protection of Children) Act, 2015 clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred, in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat shall be taken into account. Only in case of absence of these documents, the age is to be determined through “*an ossification test*” or “*any other latest medical age determination test*” conducted on the orders of the concerned authority. We may also usefully refer to the Supreme Court’s decision in case of ***Rishipal Singh Solanki v. State of U.P.***, reported in (2022) 8 SCC 602, paragraph 20 of which reads thus:-



“... 22.Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining : (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; the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year. If a juvenile in conflict with law was found to be below 18 years, an order had to be passed declaring the status of the juvenility by the Court. The said procedure was also applicable to dispose of cases where the status of the juvenility had not been determined in accordance with the Act and the Rules made thereunder...”

21. We need not encumber our decision with the other Supreme Court’s decisions and this Court’s decisions on the point of the statutory mandate of determination of age of a person said to be a victim of sexual assault in accordance with Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 for the purpose of invoking the provisions of the POCSO Act. It is settled legal position by now that to bring an offence within the ambit of the provisions of the POCSO Act, when a question of age of the person, who is said to be victim of sexual assault, arises, the



prosecution and the Court will have to undertake the procedure prescribed under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

22. In the present case, we find that the finding of the trial court that the victim was a child as on the date of occurrence is primarily based on the report of the doctor upon medical examination which in turn is based on radiological examination.

23. The Supreme Court, in the case of ***Jyoti Prakash Rai v. State of Bihar***, reported in **(2008) 15 SCC 223**, has held that a medical report determining age of a person has never been considered by the Courts of law as also by the medical scientists to be conclusive in nature.

24. A question arises in the present case as to whether the age of the victim was at all in dispute or not for the purpose of attracting the provisions of the POCSO Act. We are mindful of the position that if a person appears to be a child to the court upon mere appearance requiring no further determination, no exercise may be required to be undertaken for determination of age of such person. Section 94(1) of the J.J. Act, 2015 stipulates that where it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of the said Act that the person is a child, the committee or the Board shall



record such observation stating the age of the child as nearly as may be and proceed with the inquiry without waiting for further confirmation of the age. That is not the situation in the present case, as the opinion of the trial court that the victim was a child within the meaning of the provisions of the POCSO Act is not based on the obvious appearance of the victim, rather the same is largely based on the Doctor's opinion on analysis of radiological examination. We hold without any demur that the course adopted by the trial court holding the victim to be a child to attract the provisions of the POCSO Act was legally impermissible in view of the law clearly laid down by the Supreme Court in the case of ***Jarnail Singh*** (supra).

25. We reiterate that in a trial relating to an offence punishable under the provisions of the POCSO Act, it is obligatory for the trial court to undertake the procedure for determination of age of the victim of sexual assault under the Act as prescribed under Section 94 of the J.J. Act, 2015. This is for the reason that unless such determination is conclusively made, the provisions of the POCSO Act cannot be applied. It is high time when the trial court must appreciate the significance of the statutory requirement under sub-section (2) of Section 34 of the POCSO Act which casts upon them an obligation to first conclusively determine the age of



the victim of a sexual assault strictly in accordance with the requirement under sub-section (2) of Section 94 of the J.J. Act, 2015 as explained by the Supreme Court in the case of *Jarnail Singh* (supra) and *Jaya Mala v. Govt. of J & K*, reported (1982) 2 SCC 538. This is important also for the reason that the provisions under the POCSO Act are stringent and contain special provision under sections 29 and 30 of the POCSO Act, which cast reverse burden of proof on an accused of the offence of his innocence. There is vast difference between prosecution of a person for an offence punishable under the provisions of the POCSO Act and for those other offences punishable under Indian Penal Code or other penal provisions, which require no reverse burden of proof. A person charged of offence punishable under the provisions of the POCSO Act act is presumed to have committed or abated or attempted to commit the offence under section 29 of the POCSO Act contrary to the general principle of presumption of innocence of an accused under criminal jurisprudence. Culpable mental state of the person facing trial in respect of an offence is presumed under section 30 of the POCSO Act, which is not the general rule.

26. In the light of the aforementioned observations, we hold that it is mandatory for the prosecution to prove and the Special Courts under the POCSO Act to determine the age of the



victim as prescribed by the law, in a proceeding dealing with offences punishable under the POCSO Act.

27. We further hold that age determination based only on radiological examination is impermissible under section 34(2) of the POCSO Act read with Section 94 of the J.J. Act, 2015. There is no gainsaying that the provision under section 34(2) of the POCSO Act is mandatory in character.

28. In the present case, there was a dispute as regards the victim's age, which dispute was apparently raised by the defence during the cross-examination. PW-1, the uncle of the victim, deposed in his cross-examination that he did not know the date of birth of the victim. PW-2, mother of the victim, in her cross-examination, deposed that the victim was illiterate. She could not state in her deposition as to when was she (PW-2) married. The victim, according to her deposition, was her second issue amongst six. The eldest daughter was already married and having a child. PW-3 (father of the victim, the informant), contrary to the deposition of PW-2 testified that the victim had studied upto Class-VI in the same village whereafter, on transfer from the said school, she was admitted in another school. The evidence of the victim (PW-5) is of immense significance in view of the depositions of the PWs 2 and 3 on the point of her age. PW-5 deposed that she



was studying in Chhoti Hasanpur school whereafter she was given a transfer certificate in which her date of birth was mentioned as 02.01.2008. The said transfer certificate was brought on record by her at the trial which came to be marked as Exhibit-4 with objection. In the same breath, she deposed in paragraph no. 19 that she was illiterate. In paragraph no. 14, she deposed that she was studying in Class-V. She asserted in her deposition that both the appellants had committed rape upon her. Further, in paragraph no. 13, she deposed that her elder sister, one year older to her, was married and had a son aged 9 years. These facts go to suggest that the defence disputed the prosecution's case at the trial that the victim was a 'child' within the meaning of the provisions of the POCSO Act. In the aforesaid background, failure on the part of the prosecution and the trial court as well to determine the age of the victim in accordance with the provisions under Section 34(2) of the POCSO Act read with Section 94 of the J.J. Act, 2015 is fatal to the prosecution's case to the extent the same relates to the charge of commission of offence punishable under section 4 of the POCSO Act against the appellants. The finding of the trial court, holding the appellants guilty of the offence punishable under Section 4 of the POCSO Act, is, therefore, unsustainable and is accordingly, set aside.



29. Coming to the question of the offence punishable under Sections 363, 365, 376 read with Section 34 of the IPC, on careful examination of the evidence of the witnesses, particularly the victim herself, we are of the opinion that none of them are reliable and trustworthy. The statement of the victim recorded under section 164 of the CrPC cannot be completely ignored. We are of the view that the narration of the victim in her statement under section 164 of the CrPC is closer to the truth. She appears to have willingly gone with the appellant Raushan Kumar, whom she wanted to marry. Since the victim does not appear to be a truthful witness, we consider it unsafe to uphold the finding of conviction of these appellants for the offences punishable under Sections 363, 365, 376 read with Section 34 of the IPC solely based on her evidence. Further, the prosecution appears to have withheld Rakesh, whose name surfaced in the statement of the victim under Section 164 of the CrPC, whom she had met at the Bakhtiyarpur Railway Station and with whom she had returned home. Taking into account the facts and circumstances and the evidence on record in entirety, we are of the considered opinion that the appellants deserve to be acquitted, giving them benefit of doubt of the offences punishable under Sections 363, 365, 376 read with Section 34 of the IPC.



30. Accordingly, the impugned judgment of conviction dated 28.02.2022 passed by learned Additional District & Sessions Judge-VII-cum-Special Judge (POCSO), Patna, arising out of Khushrupur P.S. Case No. 342 of 2020, Special POCSO Case No. 191 of 2020 is hereby set aside. The order of sentence dated 09.03.2022 is also set aside.

31. These appeals are allowed.

32. The appellants are in custody. Let them be released from jail forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(G. Anupama Chakravarthy, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	15.12.2023.
Transmission Date	15.12.2023.

