

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.303 of 2022

Arising Out of PS. Case No.-449 Year-2019 Thana- DIGHA District- Patna

Deepak Kumar, Son of Shankar Rai @ Shankar Ray Resident of Village -
Azad Nagar, Amarudi Bagicha, P.S.- Rajiv Nagar, Distt.- Patna.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Vindhyachal Singh, Sr. Advocate Mr. Kamlesh Kumar Pathak, Advocate Mr. Kundan Prasad Singh, Advocate Mr. Abhay Kumar, Advocate
For the Respondent/s	:	Mr. Dilip Kumar Sinha, APP
For the Amicus	:	Ms. Soni Srivastava, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 10-10-2023

We have heard Mr. Vindhyachal Singh, learned Senior Advocate and Mr. Kamlesh Kumar Pathak, learned Advocate for the sole appellant and Mr. Dilip Kumar Sinha, learned APP for the State. Ms. Soni Srivastava, learned Advocate has assisted this Court as an Amicus.

2. The appellant has been convicted under Sections 363, 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012 vide judgment dated 28.02.2022 passed by the learned Additional Sessions Judge-VI-cum-



Special Judge, POCSO Act, Patna in connection with Spl. (POCSO) Case No. 149 of 2019, CIS No. 149 of 2019, arising out of Digha P.S. Case No. 449 of 2019 and *vide* order dated 10.03.2022, he has been sentenced to undergo R.I. for five years, to pay a fine of Rs. 5000/- for the offence under Section 363 of the IPC; R.I. for 20 years for the offence under Section 376 of the IPC read with Section 4 of the POCSO Act, 2012, to pay a fine of Rs. 10,000/-, in default of which to further suffer S.I. for one month.

3. The sentences have been directed to run concurrently.

4. The appellant is a person of young age, who is alleged to have kidnapped the victim from outside of her school campus; took her to a friend's house and raped her. The occurrence is said to have taken place on 30.07.2019 in the morning hours but the report was lodged on 03.08.2019.



5. The father of the victim has lodged the written report dated 03.08.2019, in which he has stated that his his daughter (victim) is 13 years old, who studied in St. Paul's High School, Digha and went to school every day on an auto-rickshaw. While going to and coming back from school, she had developed friendship with the appellant, who had given his mobile telephone with SIM No. 7488751961 to the victim and had been pressurizing her to talk to him on that mobile telephone. However, this was stoutly refused by the victim.

6. On 30.07.2019, when the victim went to the school early in the morning at about 7:20 and got down from the auto-rickshaw, the appellant is said to have called her and forcibly made her sit in a car, which was being driven by one Rahul Kumar. The victim could know about Rahul Kumar from the conversation between him and the appellant. The victim was taken to a house belonging to a friend of the appellant, where the victim was raped. Thereafter, she was made to sit in the car by three persons



including the appellant, Rahul Kumar and one unknown person, who brought her to the school gate at about 1:20 P.M. in the afternoon. Thereafter, the victim came back home but did not narrate about the incident to anyone. She, for the first time, stated about the incident on 03.08.2019 to her mother, who communicated it to the informant, whereafter the written report was filed.

7. On the basis of the aforementioned written report, a case *vide* Digha P.S. case No. 449 of 2019 dated 03.08.2019 was registered for investigation for offences under sections 376, 506, 363 and 34 of the IPC.

8. It appears from the records that only the appellant and no other was put on trial.

9. The Trial Court after having examined seven witnesses on behalf of the prosecution and two on behalf of the defence, convicted and sentenced the appellant as aforesaid.

10. We must state, at the outset, that a preliminary argument was raised on behalf of the appellant



that the Trial Court did not record its satisfaction about the victim being a minor, but even then proceeded to try the appellant under the POCSO Act, 2012. It was argued that it is a violation of Section 34(2) of the POCSO Act, 2012.

11. Section 34 of the POCSO Act, 2012 (hereinafter called the 'Act') is reproduced below for the sake of completeness:

34. Procedure in case of commission of offence by child and determination of age of Special Court. -(1)

Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015.

(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.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.

(emphasis provided)

12. Section 34 of the Act provides for the procedure in case of commission of offence by child and



determination of age by the Special Court. Section 34(1) of the Act specifies that if the offender is a child, he shall be dealt with under the provisions of *Juvenile Justice (Care and Protection of Children) Act, 2015*. However in Section 34 (2), it has been provided that 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.

13. There appears to be a special reason for employing the word "person" in place of "child". Therefore, the determination of the age of a person, whether he be a child or not, has to be carried out by the Special Court but only if such question arises or objections are raised with respect to the victim not being a child, or an offender/accused being a child.

14. If the Special Court determines the age of the victim (in case of a child who is an offender, the provisions



of *Juvenile Justice (Care and Protection of Children) Act, 2015* shall apply), such determination will not be deemed to be invalid only for the reason of any subsequent proof that the age of such person as determined by the Special Court was not the correct age of that person.

15. What is plainly evident from the reading of Section 34 of the Act is that such determination by the Special Court of the age of a person, holding him to be a child or not, in case of either the victim or the offender, is a must if such an issue is raised.

16. However, the mandate of Section cannot be extended and be read to mean that such determination should be the starting point for a Special Court to assume jurisdiction to proceed with the trial.

17. No doubt, a Special Court dealing with the Act, would not have the jurisdiction to try an offender unless the victim is a child, which in turn requires that the Court must be satisfied that the victim is a child. If the offender claims that he is a juvenile, and such contention is



rebutted, it has to be decided by the Special Court with recorded reasons. If the offender is found to be a juvenile, his case will be sent to the Juvenile Justice Board if the objection is not sustained, the Special Court shall proceed with the matter.

18. Likewise, if there is an issue raised about the age of the victim, that shall also be required to be decided by the Special Court. But such determination may not be without the issue being raised by the parties.

19. We must clarify here that such issue could be raised by the Special Court himself, if he, on his rough/guesstimate, is not convinced that the person concerned, victim or the offender, is not a child.

20. Thus, whether such determination shall be made even without any objection or any issue being raised about it in the beginning of the trial is the question which is required to be answered.

21. POCSO Act, 2012 was enacted to effectively address the heinous crimes of sexual abuse and sexual



exploitation of children. Precisely for this reason, a comprehensive law in that regard has been enacted which also provides for child friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated Special Courts.

22. The expression "*child*" is gender-neutral.

23. With respect to a child offender, Section 34(1) provides the answer that he/she shall be dealt with under the *Juvenile Justice (Care and Protection of Children) Act, 2015*.

24. Section 34(2) refers to the child victim as also the child offender.

25. True it is that no law can take away the right of an accused to have a fair trial in accordance with the law which would be applicable to him. A designated Special Court under the Act assumes jurisdiction when the victim is a child. The Act provides for stringent punishments for graded offences. Sections 29 and 30 of the Act provide that if any offender is charged for committing, abetting or



attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume that such offender has committed the act, unless the contrary is proved. The culpable mental state of the offender shall also be presumed but the offender would be entitled for a defence to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

26. Thus, the Act incorporates the doctrine of reverse burden, which is a special provision and which is not existent in general law under which an offender is tried, if the victim is not a child. Subjecting an offender, for an offence, the victim of which is not a child, with such stringent provisions in the Act is neither warranted nor fair as it would emasculate his rights to be tried under the applicable existing laws.

27. The Special Court, therefore, has to be satisfied that the trial is for an offence involving a child victim.



28. But this does not necessarily mean nor has it been provided in the Act that such determination about the age of the victim should be made as a preliminary exercise to assume jurisdiction unless the Special Court doubts about the juvenility of either the victim or the offender, or such issue is raised by the parties.

29. Precisely for this reason, Section 34(2) has been couched in such a way that such occasion to determine the age of a person, especially the victim or the offender, would arise only if an objection is raised about the age of the victim.

30. It would be necessary to refer to Section 27 of the Act which reads as follows:

27. Medical Examination of a child.-(1) *The medical examination of a child in respect of whom any offence has been committed under this Act, shall notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164-A of the Code of Criminal Procedure, 1973.*



(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

31. The starting point for dealing with the offence under the Act is the examination of the victim, which would *prima facie* indicate whether the victim is a child.

32. This Court is conscious of the fact that the Supreme Court in ***Jarnail Singh vs State of Haryana (2013) 7 SCC 263*** had opined that even though Rule 12 of *Juvenile Justice (Care and Protection of Children) Rules, 2007* under the *Juvenile Justice Act, 2000* was strictly applicable only to determine the age of a child in conflict with law, such statutory provision would also be the basis



for determining the age even of a child, who is the victim of the crime.

33. At the time when this judgment was reported, POCSO Act, 2012 had already been enacted. But in that case, the offence had been committed in the year 1993 and while the trial was going on, the provisions of the *Juvenile Justice (Care and Protection of Children) Act, 2000* and *Juvenile Justice (Care and Protection of Children) Rules, 2007* was in currency. In that case, a plea was raised that the victim was not a child. It was in that circumstance that the provisions contained in Rule 12 of the *Juvenile Justice (Care and Protection of Children) Rules, 2007* was referred to, which prescribed the procedure to be followed in determination of age of a child in conflict with law. The Bench was of the view that such Rule, viz., *Rule 12 of the Juvenile Justice Rules, 2007* would also be applicable for determining the age of a child who is a victim of the crime because there is no difference



in so far as the issue of minority is concerned, be it for a child in conflict with law or a child who is a victim of crime.

34. With the promulgation of the POCSO Act, 2012, the confusion in this regard has been done away with. Section 34 provides for several contingencies. If the offender is a child, Section 34(1) clearly excludes the application of the Act to him, who would be dealt under the *Juvenile Justice (Care and Protection of Children) Act, 2015*.

35. Section 94 of the *Juvenile Justice (Care and Protection of Children) Act, 2015* which provides for the procedure for determination of age of a child [the provisions under Section 94 of the *Juvenile Justice (Care and Protection of Children) Act, 2015*, is in *pari materia* same as Rule 12 of the Juvenile Justice Rules, 2007 referred to above]. But if an issue arises about the age of a person, the Special Court shall determine the age and once it is satisfied that the victim or the offender is a child, it shall record in writing its reasons for such determination.



In case, no such issue is raised, there would be no need of any preliminary determination for the Special Court to assume jurisdiction to try an offender. The provisions contained in Section 27 of the Act is mandatory and the medical examination of a victim would provide a *prima facie* evidence that the victim is a child as in medical examination, the age is roughly determined. Even then, if an issue is raised before the Special Court that the victim is not a child, then the mandate of Section 34 would apply and the Special Court would be under an obligation to determine it. Otherwise also, an offender/accused will have the defence to bring it out during trial that the victim is not a child.

36. All that we say is that such exercise is not legally required to be undertaken by a Special Court for assuming jurisdiction to begin the trial, without there being any issue arising before it with regard to the age either by the Court itself or by the parties.



37. The construction of an Act must be made from the bare words of the Act. The grammatical and ordinary sense of the words in an Act has to be construed and be given effect to unless it would lead to some absurdity, repugnance or inconsistency with the rest of the statute; in which case, the grammatical and ordinary sense of the words may be modified so as to avoid such absurdity or inconsistency but no further. It is not in keeping with the well established judicial principles to put any extra gloss over an Act, the words of which are plain and simple and the obedience to which does not create any mischief or repugnancy or absurdity.

38. The words of statute are chosen by the legislature to express its meaning. The Courts ought not to, in normal circumstances, add or subtract from the statute unless there is any occasion for such moulding or any creative interpretation of the legislation.

39. It would be interesting to refer to the facts of

Ms. Eera through Dr. Manjula Krippendorf vs. State



(Govt. of NCT of Delhi) & Anr. (2017) 15 SCC 133,

wherein the Supreme Court was called upon to interpret Section 2(i)(d) of the Act to include in its connotative expanse even the mental age of a person or the age determined by the prevalent science pertaining to Psychiatry so that a mentally retarded person or an extremely intellectually challenged person, who even has crossed the biological age of 18 years, can be included within the holistic conception of the term child.

40. The Supreme Court, on a careful consideration of all the cases where creative interpretation was given by the Courts for a better understanding and implementation of laws and the contours of the methods of interpretation, found that any addition of the word "mental" by taking recourse to interpretative process would not come within the purposive interpretation of the POCSO Act, 2012. The purpose of POCSO Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards



sexual assault, sexual harassment and sexual abuse. In that context, the age of the child would only include the chronological age as including the mental age in such definition would create immense and anomalous situation, without there being any guidelines or statutory provisions providing for calculation of mental age.

41. Thus, adding anything more to the plain words of the statute would amount to inflicting violence on the very purpose for which the Act has been promulgated.

42. Fixing a pre-condition that without any objection or any issue being raised about the age of the person, the Trial Court ought to determine the age of the person and record its finding in the first instance for it to assume jurisdiction to proceed with the trial, would only subvert the very purpose of the Act, *viz.*, the protection of Children from Sexual Offences.

43. Even at the risk of repetition, we say that it is not a necessary exercise to be carried out by the Special



Court in every case before proceeding with the trial without there being an objection raised by anyone.

44. It may be profitable here to refer to Section 94 of the *Juvenile Justice (Care and Protection of Children) Act, 2015* which is being extracted for ready reference:

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.

45. A look at this Section provides that if it is obvious to the Committee or the Board, based on the appearance of the person brought before it under the Act that the said person is a child, the Committee or the Board shall record such observation, stating the age of the child and proceed with the inquiry under Section 14 or Section 13, without waiting for further confirmation of the age.



46. Section 9 of the *Juvenile Justice (Care and Protection of Children) Act, 2015* would also be relevant in this context, which provides for a procedure to be followed by a Magistrate who has not been empowered under the Act.

9. Procedure to be followed by a Magistrate who has not been empowered under this Act.-(1) *When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.*

(2) *In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:*

Provided that such a claim may be raised before any court and it



shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.

47. Thus, under the *Juvenile Justice (Care and Protection of Children) Act, 2015*, the Board or the Committee can hold a person to be juvenile on his physical assessment even without holding any such inquiry about his or her age.

48. This is true for the POCSO Act, 2012 also.

49. We have already noted that examination of an accused and the victim are necessary in cases of rape



or any other incidents of sexual harassment. In such medical examination, roughly the age of the victim and the offender is assessed. Under such situation, it would be adding unnecessary words to the statute of the POCSO Act, 2012 in Section 34 by suggesting that for the Designated Court to assume jurisdiction, the assessment of the age of the victim is a must.

50. Thus, if a designated Court has proceeded on the assumption that victim is a child, without any objection or issue raised about her age, it cannot be flawed only on that ground alone.

51. In the case at hand, it clearly appears that the Special Court did not, of his own, doubt about the victim being a child, nor such an issue was raised. It was only during the progress of the trial that such an effort was made by the defence, which as we will see, has not been taken into account by the Special Court.



52. We, however, express our gratitude to the assistance rendered by Ms. Soni Srivastava, learned Amicus over the issue.

53. We now come back to the facts of this case.

54. The parents of the victim have been examined as P.Ws. 2 and 3. Before analyzing the evidence of the victim, it would be first necessary to go through deposition of the parents as P.W. 2 (father) had lodged the FIR and P.W. 3 (the mother) was first told by the victim (P.W. 1) about the incident. At the trial, P.W. 2/the informant has iterated that the victim is 13 years of age and that the occurrence took place on 30.07.2019.

55. As opposed to what was stated in the FIR that the victim spoke about the occurrence to her mother first on 03.08.2019, P.W. 2 has stated that his wife called him at 2 O' clock in the afternoon of 30.07.2019 only.

56. He was informed about the occurrence thus on the same day *i.e* on 30.07.2019. He also learnt from the victim about the sequence of events. He was told by



his daughter (victim) that the appellant had called her, when she had alighted from the auto-rickshaw to enter the school campus and after gagging her, made her sit in a vehicle which was being driven by one Rahul Kumar, who has surprisingly neither been investigated nor has been put on trial.

57. The victim had told him that she was taken to a room of a house where the appellant had raped her and thereafter the victim was reached to her school by about afternoon. For the first time, he has stated before the Trial Court that the victim was forcibly made to write on a piece of paper and a photo of that document was taken. She was also photographed and was threatened that in case she narrated about the incident to anyone, she and her brother would be killed.

58. The explanation for lodging the FIR on 03.08.2019 is that P.W. 2/informant first wanted to confirm about the accusation. From the tenor of his deposition, it further appears that he was shown the house



where his daughter was raped by the victim herself. The other reason given by him for the delayed lodging of the FIR is the future difficulty which the family would be subjected to in the marriage of the victim.

59. However, when the written report was lodged, the victim was made to give her statement under Section 164 of the Cr.P.C. at the instance of the police and was also subjected to medical examination. P.W. 2 has denied the suggestion to him that he had not stated before the police that the victim had developed friendship with the appellant. He has but affirmed that while he was himself enquiring about the occurrence, the victim had told him that the appellant had given his mobile telephone and had been forcing her to talk to him by that mobile telephone but she never did that. The auto-rickshaw on which the victim went to school on a regular basis was used by other students as well. P.W. 2 never enquired about the number of students sitting in the auto-rickshaw when the victim had alighted from the it near the school or about them as



to whether they had seen the occurrence. No such enquiry was made by P.W. 2.

60. He has admitted in paragraph-41 of his deposition that the victim had talked about the incident to her mother (P.W. 3) on 30.07.2019 only, but he did not lodge the FIR on that date. In the FIR, P.W. 2 has referred to the mobile telephone of the appellant, which during trial, he claims to have handed over to the investigator, but no seizure list was prepared of the aforementioned mobile telephone. His attention was drawn to his earlier statement to which he has denied that he had not deposited the mobile telephone to the police.

61. For the first time in the court, P.W. 2 referred to a letter, the contents of which are not known, but marked as Exhibit 'X' about which no mention was made either in the FIR or during the investigation.

62. With respect to the age of the victim, P.W. 2 was not sure about her date of birth. All that he had to state before the Trial Court was that he had got her



admitted in Krishna Niketan Balika Vidyalaya, Patliputra, where she had studied till fifth standard. He could not but say as to in which year was she admitted in such school. After the aforementioned school, the victim was admitted in Sacred Heart School, Kurji, where also the victim had studied only for two years, the details of which P.W. 2/informant did not remember. After that, the victim was admitted in St. Paul's School, Digha when was that admission taken remains unknown.

63. He has finally completely denied the suggestion that the victim had hidden from him that she had an affair with the appellant for a long time and that she had been chatting with him from before or that no such occurrence as reported by him had ever taken place.

64. Similarly, the mother of the victim (P.W. 3) could not make any specific statement about the date of birth of the victim. She has but said that on paper, the date of birth is mentioned as 28.02.2007. Her attention also was drawn to her earlier statements, but she has



denied that she had not made such statements *viz.* that the appellant had gagged the victim or that she was made to write a letter or that her photograph was taken or that the victim was not given the mobile telephone by the appellant who had insisted upon her to talk to him.

65. This takes us to the deposition of the victim (P.W. 1) herself. Much different from what she has stated in her Section 164 of the Cr.P.C. statement, where she has talked about the appellant following her on Facebook and social-networking sites, and that she was given the mobile telephone by the appellant sometimes in the summer-break, she has made a statement before the Trial Court that she was given the telephone on the day of the occurrence *i.e.* on 30.07.2019 only. She has denied before the Court that she had ever talked to the appellant on mobile before the occurrence.

66. She has denied other suggestions also, but has admitted that when she was about to enter the school premises at the time and date of the occurrence, she was



called by the appellant whereafter she was made to sit in a car which was parked there from before.

67. It has not been stated by her during the entire trial that she was blind-folded or kept gagged till she reached the house where she was raped. There were only two persons in the vehicle and one out of them was driving it. The appellant was sitting with her.

68. Was she so immobilized so as not to be able to roll down the window and shout out for help?

69. However, when specifically questioned, she has stated that she had tried to cry out in protest but then she was gagged. She has repeated the story of her having been brought to the school by the appellant, Rahul and one unknown person. She claims to have come back to the house on an auto-rickshaw and narrated about the incident to her parents at 2:30 in the afternoon on the same day.

70. It was then that she was examined by a lady doctor but with no record of her examination on record. She has denied of having made a statement before the



investigator that she knew the appellant from before and that she was introduced to him by one Jai Kumar, an acquaintance of her.

71. Thus, from the deposition of the victim and her parents, it appears that the story of the abduction of the victim is highly exaggerated. The victim had taken an auto-rickshaw to the school as usual and no sooner had she alighted from the vehicle, she was called by the appellant and was made to sit in a car. This must have been witnessed by the other occupants of the vehicle, *viz.* the students and the other persons who would have normally been present at the school gate for chaperoning their children safely to the school. A student in her school-dress would be abducted from in front of the school premises without any objection from anyone of the by-standers appears to be rather unusual.

72. Be that as it may, there is nothing on record to indicate that the victim was blindfolded or was gagged



for all part of the journey to the house where she was allegedly raped.

73. The victim could have been under fear but it does not appear to be so. If she was subjected to rape, then the appellant and his associates would not have had the temerity to bring her back to the school for the fear of the offence being reported immediately. The victim did not make any hue and cry while she came back to school along with the appellant. From the school, she went to her home again on an auto-rickshaw and told her parents about the occurrence.

74. What more information was required by the father of the victim for lodging a case immediately.

75. One explanation might appear to be correct that with such an accusation against a child, later, the societal norms may make it difficult to get her married but then ultimately the FIR was lodged.

76. The other aspect of the case is that in the FIR, there is a reference of the mobile telephone with a



specific number. The mobile telephone was found to be digitally locked. Was it locked by any pass-code which was known to the offender and the offended both? In any view of the matter, it was one of the most important of the materials to be seized by the police for it would have contained the records of the conversation. The investigator has not investigated about such telephone number having been used between the appellant and the victim.

77. In whose name was the telephone registered?
Was it ever in working/operative condition?

78. These are questions which ought to have been answered.

79. Mithilesh Kumar Singh/P.W. 4 is the investigator of this case. He has very conveniently forgotten to investigate all these aspects of the matter. In his cross examination, he has stated that he did not record any statement of anyone of the employees of the school. During the course of investigation, he came to learn that Ratnesh Prasad (P.W. 5) is an employee of P.W. 1 and



one Tribhuwan Kumar Singh (P.W. 7) is also an employee and family-friend of P.W. 2. During the entire course of investigation, he has explained with a peculiar candour, that he did not investigate any person of the neighbourhood of the school nor did he inquire about the house which, he was told, belonged to one Ravi Shankar and that victim was raped in one of the rooms of that house. Who was the owner of that house is not known. Was there any function in that house on that day was also not investigated.

80. However in his cross-examination, he has stated that the victim had told him in her further statement that she had developed friendship with the appellant while coming and going to school. And that the appellant had given her the mobile telephone with number 7488751961. She had also confirmed that she had been in constant touch with the appellant for last one month.

81. These were the facts which were told to him (I.O.) by the mother of the victim also.



82. The cavalier approach of P.W. 4 (investigator) lends support to the argument of the appellant that there has been no fair investigation of the case.

83. Unfortunately, we have found that the Trial Court proceedings have also plummeted to the level of the poor investigation by the investigating agency in adopting an even more casual approach in analyzing the evidence of the witnesses.

84. The doctor (P.W. 6), who examined the victim found her to be 16.5 to 17 years of age and from her medical examination, she was not certain whether the victim was raped. In order to use her expression, she has stated that "*rape is probably not done*".

85. As opposed to the aforementioned evidence through the mouth of prosecution witnesses, two of the young students viz. Niraj Kumar and Jai Kumar have, as defence witnesses, stated that on the day of the occurrence, they had visited the house where rape is alleged to have been committed, in connection with a



function and nothing of what has been alleged had ever happened.

86. With this deficient evidence, the appellant has been convicted and sentenced under section 4 of the POCSO Act, 2012 read with Section 376 of the IPC. The Trial Court never made any assessment of the age of the victim and completely relied upon the medical testimony especially when serious objections were raised at the trial by way of suggestions to the parents of the victim and the victim herself about her date of birth. No document has been brought on record to indicate that the victim was a child at the time of occurrence. The investigator though knew about the schools where the victim had studied in the past, but did not make any efforts to get the age of the victim confirmed.

87. This serious omission of P.W. 2 in the FIR and in his deposition is glaring which perhaps and unfortunately, the Trial Court could not notice. The incident was narrated to P.W. 2 on the same day. The explanation



offered by him for delayed lodging of the FIR is hardly acceptable in view of the serious accusation levelled against the appellant. The appellant also was quite young in age at the time of occurrence. The mobile telephone which was given to the victim was never deposited with the police. The statement of P.W. 2 that it was deposited with the police is not supported by the evidence on record. There is no seizure list nor has the I.O. stated about having seized such mobile telephone, though he knew about such mobile telephone.

88. Both P.Ws. 1 and 2 have been contradicted at the trial, when they made statements that the victim saw the appellants for the first time and responded to his call of coming and sitting in the car. The investigator has neither confirmed the place where the rape was committed nor about the participation of other friends of the appellant. The name of Rahul Kumar was specifically stated by the victim as having driven the car in which she had been taken to the place of occurrence. No questions



have been asked by the I.O. to Rahul Kumar or the other person, who brought the victim to the school after the incident. The victim never complained about the occurrence to the school management. She quietly went back to her home.

89. Well, a child could behave in such a manner.

90. But then, as noted above, there is no definite evidence that the victim was a child.

91. There was no reason for holding back the documents demonstrating her date of birth. In that case, it was only an approximation of P.W. 5 about the age of the victim being less than 18 years.

92. Was the victim a major, who had taken a voluntary decision of accompanying the appellant?

93. The poor investigation and lopsided information provided by witnesses, make it difficult for us to assess that the accusation is correct.

94. Something must have gone wrong between the appellant and the victim. The attention of the victim



was drawn towards her earlier statements that she had known the appellant from before and had also been in telephonic contact with him. If an offender forcibly hands over a mobile set to a victim, it is quite unacceptable, logically, that it will be accepted by her.

95. The very fact that the appellant gave the mobile telephone to her which she carried it to her home and also showed it to her parents suggests that the relationship was not of one day, but of some antiquity.

96. The victim knew the appellant.

97. The question is that even if the victim had voluntarily accepted to go with the appellant, will it absolve the appellant of the offence?

98. No, the offence is a strict one.

99. However, for the strict offence to apply, it ought to be proved that the victim was a child and not above 18 years of age.

100. As we have noted, no effort was made by the prosecution to establish that the victim was a child.



The Trial Court also casually relied upon the medical testimony with respect to age. Though we have already held that the satisfaction about the age of either the victim or the offender in the beginning of the trial is not mandatory or *sine qua non* for a trial not being held to be a mis-trial, but when serious objections were raised by way of suggestions to the witnesses, it ought to have been taken into account by the Trial Court for determining whether the victim was a child.

101. The Trial Court has accepted one part of the medical testimony *viz.* the age of the victim being less than 18 years but has completely rejected the finding that there was no evidence of rape.

102. In the case at hand, we find that the Trial Court has behaved like a casual referee in a match and allowed the parties to have their way. No questions were also asked by him from the witness if there was any confusion in the matter.



103. All these lapses cumulatively make us doubt the entire prosecution case.

104. With all these lapses in the prosecution case, we find it highly unsafe to put our imprimatur on the opinion rendered by the Trial Court/Special Court in holding the appellant guilty under Section 376 IPC read with Section 4 of the POCSO Act, 2012 as also Section 363 of the IPC.

105. Per force, we set aside the judgment and order of conviction of the appellant, giving him the benefit of doubt and set him at liberty forthwith.

106. The appellant is directed to be released from jail if not wanted or detained in any other case.

107. The appeal stands allowed.

108. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

109. The records of this case be returned to the Trial Court forthwith.



110. Interlocutory application/s, if any, also stand
disposed off accordingly.

(Ashutosh Kumar, J)

(Alok Kumar Pandey, J)

Krishna/asmit

AFR/NAFR	AFR
CAV DATE	NA
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