

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.547 of 2020

Arising Out of PS. Case No.-84 Year-2015 Thana- TARABARI District- Araria

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ZAKIR S/o Idrish @ Idris Resident of Village-Jhamta, P.S.-Tarabari, District-
Araria. Appellant

Versus

The State of Bihar Respondent

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Appearance :

For the Appellant	:	Mr. Md. Naushad Uzzoha, Advocate
	:	Mr. Nafisuz Zoha, Advocate
For the Respondent	:	Mr. Anita Kumari Singh, A.P.P.

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CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY
ORAL JUDGMENT

Date : 05-12-2024

1. This appeal is filed challenging the judgment of conviction dated 02.12.2019 and order of sentence dated 07.12.2019 on the file of Ist Additional Sessions Judge cum Special Judge, Araria, passed in Special (POCSO) No. 22/2015 (CIS No. 68/2017) arising out of Tarabari P.S. Case No. 84 of 2015, wherein the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 50,000/- for the offences punishable under Section 376 of the Indian Penal Code (hereinafter referred to as I.P.C.) and in case of default of payment of fine, the appellant shall undergo simple imprisonment for a period of six



months. Further, the appellant was sentenced to undergo rigorous imprisonment of 10 years and to pay a fine of Rs. 50,000/- for the offence punishable under Section 4 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) and in default of payment of fine, the appellant shall undergo simple imprisonment for six months.

2. The case of prosecution, in brief, is that the informant/P.W.-2, namely, Md. Ishrail, father of the victim, preferred *Fardbeyan* at Sadar hospital, Araria which was recorded by S.I. Sunil Kumar, Station House Officer, Araria, Tarabari P.S. on 21.10.2015. The contents of the *Fardbeyan* disclose that, on 21.10.2015, at about 09:00 A.M. the victim went to of her father's field to serve him breakfast. P.W.-2/father of the victim had his breakfast then the victim returned back at about 10:00 AM. After lapse of about half an hour, his second daughter i.e. P.W.-4 raised an alarm, informing that the victim was lying unconscious in their paddy field. On hearing that, P.W.-2 rushed to the spot and found the victim half-naked



and unconscious. P.W.-2 brought his daughter/victim to his house. She regained to consciousness after sometime and revealed that the appellant, namely, Zakir caught her in the paddy field, gagged her mouth with cloth and forcibly raped her. Thereafter, the injured/victim was taken to Sadar hospital, Araria for the treatment, where the informant i.e. P.W.-2 gave his *Fardbeyan*.

3. Basing on the *Fardbeyan* of P.W. 2, a case was registered against the appellant *vide* Araria Tarabari P.S. Case No. 84 of 2015 dated 21.10.2015, for the offences punishable under Section 376 of the I.P.C. and Section 4 of the POCSO Act. After due investigation, the Police submitted a charge-sheet against the appellant for the said offences. The Special Court concerned took cognizance for the aforesaid offences on 23.06.2017.

4. On 06.07.2017, the Special Court framed charges against the appellant for the offences punishable under Section 376 of the I.P.C. and Section 4 of the POCSO Act.



5. It is pertinent to mention that, in the charge framed against the appellant, the age of the victim was mentioned as 'Eight' years. However, as per the *Fardbeyan* given by the informant/P.W.-2 was silent about the age of the victim girl. In spite of this omission, the case was registered against the appellant for the offences punishable under Section 4 of the POCSO Act. It is important to note that the Police did not make any effort to get the statement of the victim, recorded by the Magistrate under Section 164 of the Criminal Procedure Code (hereinafter referred to as Cr.P.C.). It is also important to note that there was an amendment in Act 13 of 2013 for Section 164 of the Cr.P.C. and Section (5-A) (a) was incorporated w.e.f. 03.02.2013, which mandates recording statement of victims in sexual offences cases. It reads as follows:

“¹[(5A) (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, ²[section 376A, section 376AB,



section 376B, section 376C, section 376D, section 376DA, section 376DB], section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.”

6. The Police did not adhered to the mandatory provision under Section 164 sub-clause (5-A) (a) of



Cr.P.C. in this case. It is surprising to note the age of the victim was stated as eight years in the charge, which was read over and explained to the appellant on 06.07.2017.

7. However, there is no material available on record, as on 06.07.2017, before the Special Court, to substantiate that the age of the victim girl was eight years. As stated supra, the *Fardbeyan* also do not contain the age of the victim.

8. During the course of trial, in order to prove the case against the appellant beyond the reasonable doubt, the prosecution has examined altogether eleven witnesses and Exhibits 1 to 4 were marked, which are as follows:

<u>Prosecution Witness Number</u>	<u>Prosecution Witness Name</u>
P.W.-1	Triloki Nath Yadav
P.W.-2	Md. Ishrail
P.W.-3	Shakir
P.W.-4	Shabila
P.W.-5	Sanjeera
P.W.-6	Wajool
P.W.-7	Umer
P.W.-8	Amir
P.W.-9	Prabhakar Bharti
P.W.-10	Dr. Sabooni Nasren
P.W.-11	Md. Anish



<u>S. No.</u>	<u>Exhibit Number</u>	<u>Details</u>
1.	Exhibit – 1	Formal F.I.R.
2.	Exhibit – 2	Signature of Zakir on Seizure List
3.	Exhibit – 2/A	Signature of Quaium on Seizure List
4.	Exhibit – 2/B	Signature of Khurshid on Seizure List
5.	Exhibit – 3	Fardbeyan
6.	Exhibit – 3/1	Endorsement of S.H.O., Sunil Kumar on Fardbeyan
7.	Exhibit – 4	Medical Report of Dr. Soboobi Nasreen.

9. The point of determination in the appeal is:

(i). Whether the trial Court erred in convicting the appellant for the offences punishable under Section 376 of the I.P.C. and Section 4 of the POCSO Act?

(ii). Whether the prosecution was able to prove the guilt of the appellant for the aforesaid offences beyond the reasonable doubt?

10. **Section 376** of the **I.P.C.** envisages ***punishment for rape***, which reads as follows:-

“376. Punishment for rape. -(1)
Whoever, except in the cases provided for in sub-section (2), commits rape, shall be



punished with rigorous imprisonment of either description for a term which ¹[shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine]

(2) Whoever, -

(a) being a police officer, commits rape-

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

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

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

(d) being on the management or on the staff of a jail, remand home or other



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

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

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

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

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

¹[***]

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

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

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



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

(n) commits rape repeatedly on the same woman,

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

Explanation. - For the purposes of this sub-section, -

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force the paramilitary forces and any auxiliary forces that are the under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence



or of persons requiring medical attention or rehabilitation;

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

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

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

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



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

11. Section 4 of the POCSO Act envisages ***punishment for penetrative sexual assault***, which reads as follows:

“4. Punishment for penetrative sexual assault. ²[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ³[ten years] but which may extend to imprisonment for life, and shall also be liable to fine.

⁴[(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and



paid to the victim to meet the medical expenses and rehabilitation of such victim.]”

12. The minimum punishment prescribed under Section 376 of the I.P.C. is ten years which it may extend to imprisonment for life, and the offender shall also be liable to fine.

13. Section 4 sub-clause (2) of the POCSO Act stipulates that punishment shall not be less than twenty years but may extend to life, which means imprisonment for the remainder of natural life of that person, and the offender shall also be liable to fine, if the child/victim is below the age of 16 years.

14. In the present case, the trial Court has come to the consideration that the victim is a child aged about 16 years, but awarded punishment for 10 years, which is against the Law, prescribed under Section 4(2) of the POCSO Act.

15. In order to determine the abovementioned points, it is necessary to re-appreciate the evidence of the prosecution witnesses.



16. P.W.-1, namely, Trilokinath Yadav is the A.S.I. of Tarabari Police Station examined in chief. However, he could not be cross-examined as defence was not ready. The evidence of P.W.-1 disclose that he took charge of investigation visited the place of occurrence, noted the details of the scene of offence and recorded the statements of P.W.-2, namely, Md. Ishrail and other persons, namely, Bibi Shabila (P.W.-4), Shakir (P.W.-3), Wajool @ Wazuddin (P.W.-6), Md. Motim (not examined) and Anishul Rehman (not examined). Basing on the material available, a charge-sheet was submitted against the appellant for the offences punishable under Section 376 of the I.P.C. and Section 4 of the POCSO Act.

17. The record reveals that the appellant is an under-trial prisoner and has not engaged any Advocate to defend his case. In spite of it, the Court has not provided any legal assistance to the appellant.

18. P.Ws.-2, 3 and 4 are the father, brother and elder sister of the victim girl respectively. While, P.W.-5 is the victim herself in this case.



19. The evidence of P.W.-2 (informant), father of the victim girl, namely, Md. Ishrail, disclose that his two daughters, the victim/P.W.-5 and P.W.-4 went to deliver food and P.W.-4. Later, he was informed that the victim was lying unconscious in the field. On that, P.W.-2 rushed to the place of occurrence and found the victim unconscious and in naked condition. It is specifically testified by P.W.-2 that the victim did not tell him anything, but three persons told him that ‘the appellant had strangulated her neck and hit her on her eye’, which caused her to become unconscious. Subsequently, the victim told that Zakir had raped her. However, P.W.-2 did not state the names of the three persons who allegedly witnessed the incident i.e., appellant committing rape.

20. In the cross-examination, it was testified by P.W.-2 that P.W.-4 (his elder daughter) saw the victim lying unconscious and she called her brother. In turn, his son came to him and informed that the victim was lying unconscious. There is a contradiction between the testimony of P.W.-2 and the *Fardbeyan*. In the *Fardbeyan*,



P.W.-2 specifically stated that he came to know that the victim was lying unconscious through P.W.-4. However, in the cross-examination, he has given a different version, stating that his son informed him about the victim lying unconscious. Furthermore, in the *Fardbeyan*, it is stated by P.W.-2 that he took the victim to his house, but in the cross-examination, it was stated by P.W.-2 that he took the victim to Sadar hospital, Araria, and that the victim regained consciousness three days after the incident. As per the evidence of P.W.-1, apart from three persons, who informed him about the incident, neither he nor his elder daughter or his son witnessed the incident, and the victim has not informed anyone about the incident, as she was unconscious for three days. As to how the *Fardbeyan* was made by P.W.-2, alleging that the appellant had committed rape is not explained by any of the prosecution witnesses i.e. P.Ws.-2, 3, 4 or others. Further, his evidence disclose that P.W.-4 told him the name of the appellant, that she saw the appellant in the agricultural fields, and P.W.-4 also informed the other witnesses that she could not tell the



name of the person, whom she saw in the agricultural fields.

21. P.W.-3, namely, Sakir is the brother of the victim. His evidence disclose that between 10:00 A.M. to 11:00 AM, while he was cutting wood for fire at Sindhiya Dam, the victim was supposed to bring the breakfast, but she did not reach him. On that, he asked P.W.-4 why the victim had not brought the breakfast, and while looking for her, he found the victim lying unconscious in the agricultural fields.

22. For the first time, the age of the victim was mentioned during the examination of P.W.-3 i.e., on 2nd February, 2018, alleging that the victim was aged about eight years old at the time of the incident.

23. Further, his evidence disclose that he saw the appellant fleeing away and when P.W.-3 questioned the appellant, the reason for running, he did not respond. Later, P.W.-3 came to the place of occurrence, saw the victim unconscious and also saw the blood oozing out from the victim's urinary tract. The evidence of P.W.-3



further disclose that they took the victim to their house and from there to Sadar hospital, Araria for treatment. Further, he stated that the Sub-Inspector seized the bloodstain cloths of the victim under a seizure list, which he signed. The signature of the informant on the seizure list is marked as Exhibit – 2, the signature of one Quaium is marked as Exhibit – 2/A and the signature of one Kurshid is marked as Exhibit – 2/B.

24. In the cross-examination, it was testified by the P.W.-3 that he had gone to Md. Ishrail's agricultural field to cut the wood at about 07:00 A.M. and while cutting the wood, he noticed his sister and the appellant roaming between 07:00 AM to 08:00 AM. It is specifically testified by P.W.-3 in the cross-examination that the appellant came to saddle the horse, and after saddling the horse, he left the place. P.W.-3 waited for breakfast until 11:00 A.M., but the victim did not come to him with the breakfast and on that, he moved from the place of cutting the wood and saw the victim lying unconscious in the



agricultural field. On his cry, his father came to the place of occurrence and he saw the appellant fleeing away.

25. P.W.-4, namely, Sabila @ Sambula is the elder sister of the victim. The evidence of P.W.-4 changes the entire version of the *Fardbeyan* and also contradicts the evidence of P.W.-2 on many aspects.

26. The details of the appellant roaming in the fields, witnessed by P.Ws.- 2 and 3 are not mentioned either in the *Fardbeyan* or testified by P.W.-4.

27. Further, P.W.-4 testified that on the date of incident, at about 07:00 AM to 08:00 AM, the appellant forcibly raped the victim in the agricultural field. The age of the victim girl was mentioned as seven to eight years by P.W.-4. It is specifically testified by P.W.-4 that she witnessed the appellant committing rape on the victim girl in the field and on that, she called her father and brother, who were working in the adjacent fields. The evidence of P.W.-4 further improves the case, which is not found from the *Fardbeyan* or from the evidence of the P.W.-2. However, P.W.-4 in her cross-examination, admitted that



when she was about to leave home, she saw her sister lying unconscious in the fields and started screaming. On that, her father and brother came to the place of occurrence. She further testified that she, along with P.W.-3, saw the appellant fleeing from the fields.

28. P.W.-5, the victim, testified that the incident took place at about 08:00 A.M., when she was going to the dam to serve breakfast to P.W.-2. She specifically testified that the appellant caught hold of her, opened her clothes and committed wrong deeds with her in her urinary tract, from which blood started oozing out, and that she became unconscious due to pain. Later, her father and brother shifted her to Sadar hospital, Araria for treatment. Thereafter, her statement was recorded by the Police.

29. In the cross-examination, it is admitted by the victim that she knew the appellant for a long time and she along with P.W.-4 went to serve breakfast to her brother and father, who were working in different agricultural fields. It is important to note that the place of occurrence, as mentioned by the victim is the agricultural field



belonging to her father and no one witnessed the incident and that she regained her consciousness in the hospital. Later, she told the name of the appellant to her father and brother at the hospital.

30. The evidence of P.W.-6, namely, Wajul @ Wajuddin disclose that at about 08:30 A.M., while going to his agricultural fields, he saw son of Idrish running away and also saw the victim lying in unconscious state. Later, P.W.-2 informed him that the appellant had committed rape on his daughter.

31. As the counsel for the appellant was not present, the cross-examination of this witness was closed by the trial Court.

32. The evidence of P.W.-7, namely, Umer, disclose that he heard uproar and went to the house of P.W.-2 and saw the victim in unconscious state and on inquiring, P.W.-2 informed him that the appellant had committed rape on his daughter.

33. The evidence of P.W.-8, namely, Amin disclose that he had gone to the paddy field, near the dam



and saw the appellant fleeing away and also found the victim aged about eight years lying in unconscious state due to sexual assault. He specifically testified that villagers picked her up and took her to the hospital. The evidence of this witness rules out the evidence of P.Ws.-2, 3 and 4 as they saw the victim unconscious and took her to home and then to the hospital, for treatment.

34. The evidence of P.Ws.- 6, 7 and 8 cannot be taken into consideration as they are hearsay witnesses.

35. P.W.-9 is the S.H.O of Tarabari Police Station, who partially investigated the case as the previous Investigating Officer fell sick. P.W.-9 identified the signature of one Sunil Kumar, S.H.O. and the *Fardbeyan* was marked as Exhibit-3. He testified that the appellant was arrested and that he recorded the statement of one Manuddin (not examined) and Quaium (not examined). It is further testified by him that he submitted the charge-sheet on the basis of the statement of the witnesses, Medical Test report of the victim and on report of his Senior Officer.



36. It is relevant to mention that P.W.-1 claims of filing of charge-sheet before the Court and at the same time P.W.-9 also claims that he filed the charge-sheet. However, the charge-sheet contains the signature of P.W.-9. In the cross-examination, it is specifically testified by P.W.-9 that he did not visit the place of occurrence and he recorded the statement of only two witnesses. He further testified that he does not remember whether the statements were recorded at informant's house or somewhere else.

37. P.W.-10 is the lady Doctor, namely, Dr. Sabooni Nasreen. The evidence of P.W.-10 disclose that she examined the victim on 21.10.2015. She mentioned the age of the victim as eight years and found the following injuries:

“Injury: Fresh lacerated wound on valve with fresh bleeding, coming from vagina, multiple abrasion over the neck.

M/E: Swab taken from vagina for presence of spermatozoa. No spermatozoa, either dead or alive, present in any of the



micro-field slide examined & reported by I/C
DS Dr. Salik Azam.”

38. It is opined by her that as per the above findings, it may be a case of sexual assault and the age of the injury was within twelve hours. The Medical Report is Exhibit-4.

39. In the cross-examination, it is specifically testified by P.W.-10 that she did not find any type of spermatozoa.

40. The evidence of P.W.-11, namely, Md. Anish@Anishul Rehman disclose that P.W.-2 filed the case against the appellant and that the victim was aged about eight years, on the date of incident. He heard the screams, went to the agricultural field, saw the victim clothes torn and also found her unconscious. His evidence further disclose that P.W.-2 shifted the victim to the house and informed him that the appellant had committed the rape on the victim girl and later, victim was taken to the hospital. It is specifically testified in the cross-



examination that he was informed about the incident by P.W.2 at his house.

41. On appreciation of the entire evidence, it can be construed that there are many contradictions in the evidence of the witnesses. As per the evidence of some of the witnesses, the victim was initially taken to the hospital, but as per the evidence of P.Ws.-2 and 11, she was first taken to the house. It is an admitted fact that the victim regained her consciousness, after three days in the hospital and she informed about the incidence to her family members only after three days. If at all, P.W.-4 witnessed the incident, what made the informant not to mention the same in the *Fardbeyan*. There are improvements in the evidence of P.Ws.-3 and 4, as to the witnessing of the appellant moving in and around the fields and about the appellant running away from the fields. It is also important to note that the timing stated by the prosecution witnesses also differ from each other. Some of them testified that the incident took place at



08:00 A.M, on the other hand, some deposed that it took place between 10:00 A.M. to 11:00 A.M.

42. In a case of rape or of sexual assault, it is for the prosecution to prove that the appellant had committed the rape on the victim. As per the evidence of all the prosecution witnesses, the victim fell unconscious and her internal parts were bleeding, and she was shifted to the Sadar hospital, Araria. The evidence of P.W.-10 clearly disclose that swabs were taken from the vagina, for the presence of spermatozoa, but no dead or alive spermatozoa was found on the swabs. It is the duty of the prosecution to connect the accused with that of the crime.

43. It is important to reiterate that the appellant was sentenced for the offence punishable under Section 4 of the POCSO Act and there is no proof before the Court to show that the victim was a minor on the date of offence. The age of victim was not mentioned in the *Fardbeyan* of P.W.-2 and P.W.-2 did not testify the age of the victim. Whereas P.Ws.-3 and 4 testified the age of the victim as eight years as on the date of the incident. Furthermore, the



Doctor/P.W.-10 mentioned the age of the victim as eight years. No age determination test was conducted by the Doctor while the victim was in the hospital.

44. The Protection of Children from Sexual Offences, 2012 defines the word 'Child' under Section 2(1)(d) as:

(d). "Child" means any person below the age of eighteen years.

45. The Act is applicable only if the age of the victim is below eighteen years. Furthermore, if the Court has taken the age of the victim as eight years, the Court ought to have punished the accused for a term, which shall not be less than twenty years and which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also liable to fine.

46. The Learned counsel for the appellant placed reliance on the decision of the Division Bench of this Court passed in ***Criminal Appeal (DB) No. 277 of 2022*** dated 08.01.2024, wherein the Division Bench of this



Court again placed reliance on another decision of Division Bench of this Court rendered on 15.12.2023 in Criminal Appeal (DB) No. 262 of 2022, wherein the Court referred to the decision in case of ***Jarnail Singh v. State of Haryana*** reported in ***(2013)7 SCC 263*** and ***P. Yuvaprakash vs State Rep. By Inspector of Police (AIR 2023 SC3525)*** following has been held in paragraphs 20 and 21 as under:-

“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.”

47. There is no gain saying 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 as held in case of ***Jyoti Prakash Rai v. State of Bihar***, reported in ***(2008) 15 SCC 223***.

48. At this juncture, we reiterate again the observation made in ***Criminal Appeal (DB) No. 262 of 2022*** in the case of ***Raushan Kumar vs The State of Bihar***, paragraphs 25 to 27 of which are relevant and are being reproduced hereinbelow:-

“.....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.”



49. In the present case, the prosecution cannot be said to have proved in accordance with law that the victim was child within the meaning of Section 2(1)(d) of the Act, therefore, the appellant's conviction for the offences punishable under Section 4 of the POCSO Act cannot be sustained and is accordingly set aside. However, the trial Court has also found the appellant guilty for the offences punishable under Section 376 of the I.P.C. But I find major lacuna in the case of the prosecution. Surprisingly, the statement of the victim was not recorded by the Judicial Magistrate of 1st Class as per Section 164 Sub-clause (5-A) (a) of the Cr.P.C.

50. It is also relevant to mention that Act 13 of 2013 came into effect on 03.02.2013. As per the said amendment, under Section 161 of Cr.P.C. the statement of a woman, against whom the offences under Section 354, 354-A, 354-B, 354-C, 354-D and 376 of the I.P.C. is alleged to have been committed or attempted shall be recorded, by a woman Police Officer or any woman Officer. In the present case, the statement of the victim



was not recorded by any Police Officer or women officer, as stipulated under Section 161 of the Cr.P.C.

51. The medical evidence do not corroborate with the oral testimonies of the witnesses. The entire case of the prosecution is that the victim was unconscious at the time of the incident and she regained consciousness only after three days while undergoing treatment at Sadar hospital, Araria. It is not the case of the prosecution that the private parts of the victim was cleaned by any of the family members. Some of the witnesses deposed that she was taken to her house, on the other hand, other witnesses' evidence disclose that she was taken to the hospital. P.W.-10 is the Doctor, who has examined the victim girl and collected the cotton swabs from the vagina, but on examination of the cotton swabs, no spermatozoa, dead or alive, was found, to prove the offence under Section 376 of the I.P.C.

52. This Court is unable to to understand, as to how, the case was registered against the appellant, prior to the version of the victim girl, who was unconscious for



three days. The *Fardbeyan* was given on the same day at evening, alleging that the appellant had committed the rape on the victim girl. The *Fardbeyan* do not disclose about P.Ws.-3 and 4 witnessed the incident or about the appellant moving in and around the agricultural fields. The evidence of the witnesses is conflicting with the facts, which are disclosed in the *Fardbeyan*. This aspect is mentioned at the very beginning. Another disturbing fact, in this case, is the Section 313 Cr.P.C. examination of the accused. The incriminating evidence of the prosecution was not put to the witnesses and no proper opportunity was given to the appellant. Only a single question has been put to the appellant, which reads as follows:

“The allegation and the evidence against you that on 25.10.2015, at about 10:00 A.M., you raped the victim ‘X’, eight years old, resident of Tarabari Police Station, District-Araria, in the paddy field?”

53. The said question was denied by the appellant. In the Section 313 Cr.P.C. examination, the



plea taken by the appellant was that he was residing at his sister's house at Purinda on the date of incident.

54. In order to support his defence, the appellant examined one Nabi Hasan as D.W.-1. His evidence disclose that conversation took place between the P.W.-2 and father of the appellant with respect to selling of the land, which was not agreed by the father of the appellant and later, the informant(P.W.-2) filed a false case against the appellant.

55. It is pertinent to mention that the Apex Court has time and again reiterated that every criminal Court proceedings under Section 313 Cr.P.C. has to shoulder honourus responsibility of scanning the evidence after the prosecution closes its case, to trace the incriminating circumstances in the evidence against the accused and to prepare relevant questions to extent opportunity to the accused to explain any such circumstance in that evidence that could be used against him and for the facts that are in the special knowledge of the accused.



56. The Apex Court in the case of ***Premchand Vs. State of Maharashtra*** reported in (2023) 5 SCC 522(15) has involved the guidelines for examination of the accused under Section 313 of the Cr.P.C. at para 15, which reads as follows:

“15. What follows from these authorities may briefly be summarised thus:

15.1. Section 313CrPC [clause (b) of sub-section (1)] is a valuable safeguard in the trial process for the accused to establish his innocence.

15.2. Section 313, which is intended to ensure a direct dialogue between the court and the accused, casts a mandatory duty on the court to question the accused generally on the case for the purpose of enabling him to personally explain any circumstances appearing in the evidence against him.

15.3. When questioned, the accused may not admit his involvement at all and choose to flatly deny or outrightly repudiate whatever is put to him by the court.



15.4. The accused may even admit or own incriminating circumstances adduced against him to adopt legally recognised defences.

15.5. An accused can make a statement without fear of being cross-examined by the prosecution or the latter having any right to cross-examine him.

15.6. The explanations that an accused may furnish cannot be considered in isolation but have to be considered in conjunction with the evidence adduced by the prosecution and, therefore, no conviction can be premised solely on the basis of the Section 313 statement(s).

15.7. Statements of the accused in course of examination under Section 313, since not on oath, do not constitute evidence under Section 3 of the Evidence Act, yet, the answers given are relevant for finding the truth and examining the veracity of the prosecution case.

15.8. Statement(s) of the accused cannot be dissected to rely on the inculpatory part and ignore the exculpatory part and has/have to be read in the whole,



inter alia, to test the authenticity of the exculpatory nature of admission.

15.9. If the accused takes a defence and proffers any alternate version of events or interpretation, the court has to carefully analyse and consider his statements.

15.10. Any failure to consider the accused's explanation of incriminating circumstances, in a given case, may vitiate the trial and/or endanger the conviction.”

57. In the case of ***Sanatan Naskar and Another Vs. State of West Bengal*** reported in ***(2010) 8 SCC 249*** at para 22 to 25 and 29 read as follows:

“22. As already noticed, the object of recording the statement of the accused under Section 313 CrPC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the



accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and, besides ensuring the compliance therewith, the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or, in the alternative, to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders as may be called for in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used



during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

23. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) CrPC explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered



in isolation but in conjunction with evidence adduced by the prosecution.

24. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 CrPC as it cannot be regarded as a substantive piece of evidence. In Vijendrajit Ayodhya Prasad Goel v. State of Bombay [(1953) 1 SCC 434 : AIR 1953 SC 247 : 1953 Cri LJ 1097] the Court held as under : (AIR p. 248, para 3)

'3. ... As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under Section 342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory part does not seem to be correct. The statement under Section 342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two



facts. The accused admitted that he was in charge of the godown, he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown.'

25. In the light of the abovestated principles it was expected of the accused to provide some reasonable explanation in regard to various circumstances leading to the commission of the crime. He was known to the family along with other accused and by giving just a bare denial or lack of knowledge he cannot tilt the case in his favour. Rather their answers either support the case of the prosecution or reflect the element of falsehood in the statement recorded under Section 313 CrPC. In both these circumstances the Court would be entitled to draw adverse inference against the accused.

29. So, the first and the foremost question that this Court has to examine in



the present case is, whether the prosecution has been able to establish the chain of event and circumstances which certainly points out towards the involvement and guilt of the accused. Even, before we enter upon adjudicating this aspect of the case, it will be appropriate to narrow down the controversy keeping in view the admissions, if any, made by the appellants. The accused, after having known the entire case of the prosecution, is required to be examined under Section 313 CrPC. All the material evidence has to be put to the accused and he has to be awarded the fair opportunity of answering the case of the prosecution, as well as to explain his version to the court without being subjected to any cross-examination. As already noticed, the answers given by the accused can be used against him in the trial insofar as they support the case of the prosecution.”

58. In the case of *Naval Kishore Singh Vs. State of Bihar* reported in (2004) 7 SCC 502 at para 5 and 6 reads as follows:

“5. Counsel for the appellant pointed out that the Sessions Court



committed serious error in not properly examining the accused under Section 313 CrPC. Our attention was drawn to the statement taken from the present appellant. Only three questions were put to the appellant. The first question was whether he heard the statement of the witnesses and the second question was that the evidence given by the witnesses showed that he committed the murder of the deceased and whether he had to say anything in defence. The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in



a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. In various decisions of this Court, the importance of questioning the accused under Section 313 CrPC was given due emphasis, e.g. Rama Shankar Singh v. State of W.B. [AIR 1962 SC 1239 : (1962) 2 Cri LJ 296] , Bhalinder Singh v. State of Punjab [(1994) 1 SCC 726 : 1994 SCC (Cri) 462] , State of Maharashtra v. Sukhdev Singh [(1992) 3 SCC 700 : 1992 SCC (Cri) 705]



and Lallu Manjhi v. State of Jharkhand [(2003) 2 SCC 401 : 2003 SCC (Cri) 544].

6. In the present case, the appellant had not raised any contention in the High Court that he was seriously prejudiced by the way in which the Section 313 questioning was done. If this defect in procedure under Section 313 CrPC had been pointed out, the High Court could have very well remitted the case to the Sessions Court for a proper examination. At this stage, we are not inclined to accept this contention of the appellant especially when the accused was not able to show that he was in any way prejudiced by such irregular procedure.”

59. In the case of ***Kalicharan & Ors. Vs. State of Uttar Pradesh*** reported in **(2023) 2 SCC 583** at para 24 reads as follows:

“24. At this stage, we must refer to the requirement of the examination of the accused under Section 313CrPC. Section 313CrPC reads thus:

“313. Power to examine the accused.—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances



appearing in the evidence against him, the Court—

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or



trial for, any other offence which such answers may tend to show he has committed.

[(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.]”

(Emphasis supplied)

60. In the case of *Indrakunwar Vs. State of Chhattisgarh* reported in **2023 SCC OnLine SC 1364** at para 34 and 34 reads as follows:

“34. Keeping in view the understanding of the principles of privacy and the propositions of law in regard thereto, we now travel to what, by law, may be required of the convict-appellant in her statement under Section 313 Cr.P.C.

35. A perusal of various judgments rendered by this Court reveals the following principles, as evolved over time when considering such statements.

35.1 The object, evident from the Section itself, is to enable the accused to



themselves explain any circumstances appearing in the evidence against them.

35.2 The intent is to establish a dialogue between the Court and the accused. This process benefits the accused and aids the Court in arriving at the final verdict.

35.3 The process enshrined is not a matter of procedural formality but is based on the cardinal principle of natural justice, i.e., audi alterum partem.

35.4 The ultimate test when concerned with the compliance of the Section is to enquire and ensure whether the accused got the opportunity to say his piece.

35.5 In such a statement, the accused may or may not admit involvement or any incriminating circumstance or may even offer an alternative version of events or interpretation. The accused may not be put to prejudice by any omission or inadequate questioning.

35.6 The right to remain silent or any answer to a question which may be false



shall not be used to his detriment, being the sole reason.

35.7 This statement cannot form the sole basis of conviction and is neither a substantive nor a substitute piece of evidence. It does not discharge but reduces the prosecution's burden of leading evidence to prove its case. They are to be used to examine the veracity of the prosecution's case.

35.8 This statement is to be read as a whole. One part cannot be read in isolation.

35.9 Such a statement, as not on oath, does not qualify as a piece of evidence under Section 3 of the Indian Evidence Act, 1872; however, the inculpatory aspect as may be borne from the statement may be used to lend credence to the case of the prosecution.

35.10 The circumstances not put to the accused while rendering his statement under the Section are to be excluded from consideration as no opportunity has been afforded to him to explain them.



35.11 The Court is obligated to put, in the form of questions, all incriminating circumstances to the accused so as to give him an opportunity to articulate his defence. The defence so articulated must be carefully scrutinized and considered.

35.12 Non-compliance with the Section may cause prejudice to the accused and may impede the process of arriving at a fair decision.”

61. The citations of the Hon’ble Apex Court (supra) squarely applies to the facts and circumstances of the present case. Prosecution has miserably failed to prove the place of occurrence, where the alleged rape is committed. It is also pertinent to mention that P.Ws.-10 and 11 are the Investigating Officers, who claimed to file the charge-sheet, but none of them had given the details regarding the place of occurrence.

62. This Court fails to understand, as to why the Investigating Officers did not resort to the procedure under Sections 161 and 164 of the Cr.P.C. for recording the statement of the victim and as to why they did not



follow the procedure of age determination, in order to prove that the victim falls within the meaning of 'child' under Section 2(1)(d) of the POCSO Act. The evidence of the victim also did not give any specific details except stating that wrong has been committed by the appellant. The Medical evidence also do not corroborate with the testimony of the victim. Admittedly, there is rivalry between the family of victim and the appellant as to the lands, as per the evidence of D.W. 1 as such there is every possibility to make a false complaint against the appellant. Hence, it can be concluded that the prosecution has miserably failed to prove the guilt of the appellant for the charged offences and the trial Court erred in convicting the appellant for the said offences.

63. In view of the aforesaid discussions, the conviction of the appellant for the offence punishable under Section 376 of the I.P.C. and Section 4 of the POCSO Act is sustainable and the impugned judgment of conviction dated 02.12.2019 and order of sentence dated 07.12.2019 passed in Special (POCSO) No. 22/2015 (CIS



No. 68/2017) arising out of Tarabari P.S. Case No. 84 of 2015 on the file of Ist Additional Sessions Judge cum Special Judge, Araria is hereby set aside and the appellant is acquitted from the aforesaid charges by giving him benefit of doubt.

64. In result, the criminal appeal is allowed. The appellant is in jail custody since 23.05.2017. Let him be released forthwith, if he is not convicted in any other case.

(G. Anupama Chakravarthy, J)

Shanu/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	30.01.2025.
Transmission Date	30.01.2025.

