

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.682 of 2019

Arising Out of PS. Case No.-850 Year-2017 Thana- BHAGALPUR KOTWALI District-
Bhagalpur

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RAJEEV KUMAR @ RAJEEV KUMAR SINGH Son of Abhimanyu Prasad
Singh Resident of Village - Khadampur, P.S.- Rajoun, Distt - Banka.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 864 of 2019

Arising Out of PS. Case No.-850 Year-2017 Thana- BHAGALPUR KOTWALI District-
Bhagalpur

=====

MANISH @ BAUA @ ABHINASH @ MANISH KUMAR @ AVINASH
KUMAR Son of Sri Chandra Kishor Singh Resident of Village - Nagrah, P.S.
- Naugachhia, District - Bhagalpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 682 of 2019)

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate
		Mrs. Vaishnavi Singh, Advocate
		Mr. Ritwik Thakur, Advocate
		Ms. Kiran Kumari, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP

(In CRIMINAL APPEAL (DB) No. 864 of 2019)

For the Appellant/s	:	Ms. Surya Nilambari, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

and

HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 23-09-2024



The instant appeals have been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Code') challenging the common judgment of conviction dated 13.05.2019 and order of sentence dated 17.05.2019/20.05.2019 passed by the learned 1st Additional District and Sessions Judge-cum-Special Judge, POCSO Act, Bhagalpur in G.R. Case No. 6214 of 2017, arising out of Kotwali (Jogsar) P.S. Case No. 850 of 2017, whereby the concerned Trial Court has convicted the present appellants under Section 17 of the POCSO Act and sentenced them to undergo rigorous imprisonment for life and imposed a fine of Rs. 25,000/-. However, they have been acquitted of the charge levelled under Sections 363 and 365 of the Indian Penal Code.

2. The prosecution case, in brief, is as under:-

“The informant/victim girl has stated, in her *fardbeyan*, that she passed her Xth examination in the year 2016. Her mother is A.N.M. at Bihpur and her father is a farmer. She was studying in XIIth from Open Nalanda University, Bihpur. Since last 8-9 months, she was living at Sheela Complex at S.M. College Road, Bhagalpur and was taking tuition classes for Physics, Chemistry, Biology and English from Lalan Kumar, Ajay Kumar, Sandhya Kumari and Mithilesh Kumar respectively. On 15.11.2017, at about 17:00 in the evening, she was going to Sheela Complex after taking her English tuitions. While on the way, she was taken forcibly on a vehicle by Manish @ Baua @ Avinash Kumar whom she knew from earlier. Her mouth was gagged and she was made unconscious. On 15.11.2017, at around 10:30-11:00 in the night, she regained consciousness and found that she was in



the room of Manish @ Baua @ Avinash at Bhagwati Apartment. When she raised *hulla*, she was locked inside the room by Manish. Manish had broken her SIM card that is why she could not call anyone. Manish used to do indecent activities(rape) with her everyday by threatening her with a gun. Manish @ Baua @ Avinash Kumar along with 2-3 boys used to take her to Bihpur every day to take her exam at Open Nalanda University. After the exam was over, Manish @ Baua @ Avinash Kumar used to bring her to Bhagalpur with 2-3 boys. She was kept very scared. On 19.11.2017, at around 09:00-10:00 p.m., Manish @ Baua @ Avinash forcibly made her consume alcohol. After consuming alcohol, Sunny did indecent activities(rape) with her and went away. After Sunny left, Manish @ Baua @ Avinash Kumar did indecent activities(rape) with her. When she protested, he scratched her cheek with knife and nails. Manish @ Baua @ Avinash Kumar hid her clothes which she was wearing at the time of incident. She started shouting loudly. Manish @ Baua was heavily drunk. He fell down due to the intoxication of alcohol. She somehow ran down to save her life, from where the Police brought her to Sadar Hospital, Bhagalpur for treatment.”

3. After registration of the F.I.R., the Investigating Officer started the investigation and, during the course of the investigation, he had recorded the statement of the witnesses and thereafter filed the charge-sheet against the appellants/accused before the concerned Magistrate Court. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the same to the Sessions Court where the same was registered as G.R. Case No. 6214 of 2017.



4. In Criminal Appeal (DB) No. 682/2019, we have heard Mr. Ajay Kumar Thakur assisted by Mrs. Vaishnavi Singh, Mr. Ritwik Thakur and Ms. Kiran Kumari and Mr. Sujit Kumar Singh, learned APP for the Respondent-State.

4.1. In Criminal Appeal (DB) No. 864/2019, we have heard Ms. Surya Nilambari and Mr. Sujit Kumar Singh, learned APP for the Respondent-State.

5. Learned counsel Ms. Surya Nilambari appearing for the appellant Manish in Criminal Appeal (DB) No. 864 of 2019 would mainly submit that, in the present case, the prosecution has miserably failed to prove the age of the victim by leading cogent evidence before the Trial Court. It is contended that before the provisions of POCSO Act can be applied, it must be established that the victim is a child within the meaning of Section 2(1)(d) of the POCSO Act, i.e a child below the age of 18 years. It is further submitted that the burden to establish this fact of age rests on the prosecution. Learned counsel, at this stage, referred the provisions contained in The Juvenile Justice (Care and Protection of Children) Act, 2015 and, more particularly, Section 94(2) of the said Act. Learned counsel thereafter submitted that, in the present case, the prosecution has failed to produce any documentary evidence with regard to the age of the victim. It is



further submitted that PW-2 (Doctor), who had examined the victim, has though opined the age of the victim below 18 years, the said opinion was given on the basis of radiological report. However, the said radiological report was not exhibited.

6. Learned counsel further submits that PW-1 (victim) deposed before the Court with regard to her matriculation certificate, wherein the age of the victim has been mentioned. However, the victim did not produce the said certificate before the Court. It is also submitted that PW-5 (Investigating Officer) has also specifically admitted that he has not made any investigation pertaining to the age of the victim.

7. Learned counsel has placed reliance upon the following decisions:-

(i) **Luko Thakur @ Awadh Kishore Thakur @ Luko Babaji & Another Vs. The State of Bihar in Criminal Appeal (DB) No. 257 of 2021.**

(ii) **Sakindar Yadav Vs. The State of Bihar in Criminal Appeal (DB) No. 945 of 2017.**

(iii) **Subir Kumar @ Chhotiya Vs. The State of Bihar in Criminal Appeal (DB) No. 104 of 2022 and reported in 2024(1) PLJR 46.**



8. Learned counsel Ms. Surya Nilambari further submits that PW-1 (victim) cannot be considered as a sterling witness. Learned counsel has referred the deposition of PW-1 (victim) and thereafter submitted that, as per the case of the victim, she was subjected to penetrative sexual assault while she was kept in confinement after being kidnapped. However, the said story with regard to the kidnapping and confinement itself stands belied through the testimony of the victim herself. Learned counsel has referred Para-3 & 9 of the deposition of the victim (PW-1). It is further submitted that the story put forward by the victim cannot be believed. Thus, victim cannot be termed as sterling witness. Hence, further corroboration is required. Learned counsel submits that PW-2 (Doctor), who had examined the victim, has specifically opined that there is no evidence of recent sexual intercourse.

9. Learned counsel has placed reliance upon the following decisions in support of her contention:-

(i) **Rai Sandeep @ Deepu Vs. State (NCT of Delhi)**, reported in **(2012) 8 SCC 21**.

(ii) **Manak Chand @ Mani Vs. The State of Haryana**, reported in **2023 SCC OnLine SC 1397**.

10. Learned counsel, therefore, urged that the prosecution has failed to prove the case against the



appellant/convict beyond reasonable doubt and, therefore, the present appellants be acquitted and the impugned judgment and order be quashed and set aside.

11. Learned counsel Mrs. Vaishnavi Singh, appearing for the appellant Rajeev Kumar in Criminal Appeal (DB) No. 682 of 2019, has adopted the submissions canvassed by the learned counsel Ms. Surya Nilambari. However, learned counsel further submitted that the victim has not made any allegation against appellant Rajeev Kumar that he had committed rape on her. The only allegation levelled by the victim against the said accused is that he used to beat her. Learned counsel, therefore, urged that the order of conviction and sentence recorded by the Trial Court against the said appellant be quashed and set aside.

12. Learned counsel Mrs. Vaishnavi Singh has placed reliance upon the following decisions in support of her contention:-

(i) **P. Yuvaprakash Vs. State Rep. By Inspector of Police**, reported in **2023 SCC OnLine 846**.

(ii) **Arvind Kumar @ Arvind Vs. The State of Bihar**, in **Criminal Appeal (DB) No. 731 of 2022**.

13. Learned APP, on the other hand, has opposed the present appeals. He would mainly submit that PW-1 (victim)



has levelled specific allegation against the appellant Manish that she was forced to consume alcohol and Manish started beating her, he scratched her face and hands under influence of alcohol. It is submitted that the said aspect has been corroborated by the deposition given by PW-2 (Doctor). PW-2 found multiple abrasions all over the face and interior except on neck. The victim was restless and presence of alcohol was detected in breath, blood and urine of the victim. Learned APP, therefore, submitted that victim can be considered as sterling witness and her version has been corroborated by the medical evidence. Thus, the Trial Court has not committed any error while passing the impugned order. He, therefore, urged that both these appeals be dismissed.

14. We have considered the submissions canvassed by the learned counsels for the parties. We have also perused the evidence of prosecution witnesses and also perused the documentary evidence exhibited.

15. At this stage, we would like to appreciate the relevant extract of entire evidence led by the prosecution before the Trial Court.

16. Before the Trial Court, the prosecution examined 5 prosecution witnesses and 6 defence witnesses.



17. PW-1 is the informant/victim of this case. In her examination-in-chief, she has stated that the said incident is of 15.11.2017. On the same day, at 06:00 p.m., when she was returning from her English class, a four-wheeler car came there. She was made to sit in it. She fainted when a handkerchief was put on her face. There were 2-3 persons in the car, including Baua @ Manish @ Avinash. When she gained consciousness, she was in Manish @ Avinash's room. She shouted but she was forcibly locked in the room. She was also beaten. They kept her there for 4-5 days. Manish @ Avinash used to rape her. He used to make her consume alcohol. Two more boys used to rape her whom she knows. These people used to rape her daily by forcibly making her consume alcohol. Her SIM card was broken by Manish @ Avinash. Because of alcohol consumption, she was not able to walk properly and was not able to run. She told him that her exams were going on then after threatening her with gun, he used to take her to the exam centre at Open Nalanda University, Bihpur. From there, he used to bring her back to his room in Bhagwati Apartment. He used to give her medicines to prevent pregnancy. On 19.11.2017, a meeting was held at Bhagwati Apartment. Manish @ Avinash did not attend that meeting. A man came to call him. Manish @ Avinash left his mobile in the room. She tried to



call her mother and father but it did not connect. Then she called Sanjay Kumar and told him everything. When Manish came to know about this, he started beating her. He scratched her face and hands. He was under influence of alcohol. He picked up the pistol and fell down after which she locked him in the room. She wore whatever clothes she had and came outside. She met an uncle there and told him everything upon which he called the Police. The Police took her to the hospital. She was taken to Mayaganj Hospital where she was treated for 1-2 weeks. After gaining consciousness, she gave her statement to a lady Police Officer.

17.1. In her cross-examination, she has stated that Avinash's sister Manisha is her roommate and lived with her. Two girls shared the same room in Sheela Complex. She never saw Avinash in the lodge. Sunny used to meet Manisha. Sunny is the son of Manisha's aunt. She saw Sunny for 2-3 times in the room. She did not go out with Avinash before the incident. She has stated that Manish took her to the ATM at the time of her confinement during night hours. When she was giving her exam in the upper room, she was shown guns from the car standing downstairs. Out of fear, she did not tell anyone. She went there four times but did not tell anyone in the examination hall. She did not see the Police. She has further stated that Manish used to make



her talk to her mother by keeping a gun on her temple. Her father and mother did not come to meet her during the exams. She had given her statement before the J.J. Board but did not understand the questions. She had not seen Rajiv Kumar in the lodge. She saw Rajiv for the first time at the apartment of Manish @ Avinash. He did not do anything wrong with her. He only used to beat her. He bate her as long as she was there. It was a two-room apartment where she was confined. She was locked in one room. She has further stated that her date of birth mentioned on the matric certificate is 15.03.2001.

17.2. The victim girl, in her statement under Section 164 of the Code, has stated that Manisha lived in the same lodge where she (victim) used to live. She lived with her brother. He gave her number to Manish. Then Manish used to call her off and on. She has further stated that Manish used to give her some medicines before raping her. Manish deals in liquor business. He used to do this with other girls also but no one spoke against him out of fear. She has also stated that she took a chip from the place of incident and gave it to the Police in which there were photographs, videos etc.



18. PW-2 Dr. Priyanka Rani has stated that she was posted as Medical Officer at Sadar Hospital, Bhagalpur. On 20.11.2017, she examined the victim girl and noted the following:-

“- Multiple abrasion all over the face and interior expect on neck. She is restless, disoriented.

- Two vaginal swab taken shield and sent to Pathology Department, JLNMCH, Bhagalpur for detection of spermatozoa.

- USG lower abdomen to rule out pregnancy.

- She sent to X-ray department of JLNMCH, Bhagalpur for X-ray of wrist joint, elbow joint and pelvic joint for determination of age.

- To detect presence of alcohol in breath, blood, urine.

MARK OF IDENTIFICATION

- Til on left cheek.

- I received report on dated 21-11-2017.

- According to X-ray report No.- 476 dated 20-11-2017 epiphysis of iliac press, distal and end of radius ulna not fused completely age on radiological ground appears below 18 years.

- according to USG report no.- 40966 dated 21-11-2017 no intra uterine gestational sac see.

- according to pathology- momo 580 dated 2011-17 spermatozoa not found.

OPINION

- She is below 18 years.

- No evidence of recent sexual intercourse.

- She is not pregnant at present.

This report is written and signed by me and I identified and marked as Ext. No.-01.”



18.1. In her cross-examination, she has stated that the victim girl was habituated to consuming alcohol but she smelt of consuming alcohol. The scratch marks on her face were caused by nails but she has no idea as to how this mark would have occurred. She did not write the size of the mark. Looking at the medical report, it is clear that she was not a drug addict. She did not see any wound on the victim girl's private part/thigh which would indicate violence. No mark of any kind was found on the back side also. Abrasion was about an hour ago. After checking the entire body, she did not see any molar teeth. She has stated that molar teeth emerge at least at the age of 18 years. Teeth plays a major role in determining the age. She did not count her teeth. No foreign hair was found. She has also stated that she is not a radiologist or pathologist. Both the reports were prepared by the radiologist and pathologist and not by her. This report was prepared after the radiologist's report had come.

19. PW-3 Sanjeev Kumar Pandey is a resident of Bhagwati Apartment. He has stated, in his examination-in-chief, that the incident is of the year 2017. A meeting was going on in their apartment at the time of incident. He got a call from co-resident from the apartment asking him to come. When he went there, he saw that a girl was sitting in the parking and was shouting



that she had been forced to consume alcohol and that Manish Kumar had misbehaved with her. All the persons present there thought it expedient to inform the Police and the Police was informed. The Police came there along with DSP. The girl was feeling restless, so he took her in a private vehicle along with two other Policemen to Sadar Hospital.

19.1. In his cross-examination, he has stated that he knows Manish Kumar because he is a tenant in the apartment. He did not see him misbehaving. He did not see him making anyone drink. The girl can be taken into the apartment if he introduces her as a relative and signs the register. He had also stated that if the girl does not wish, the guard will not allow her to be taken inside the apartment. The guard at that time was Mrityunjay Paswan. He had also stated that there were 8-9 people in the meeting and he did not inform the Police.

20. PW-4 Mrityunjay Paswan has stated, in his examination-in-chief, that he was the guard on duty of the apartment at the time of incident. On the day of incident, a meeting of the members of the apartment was going on at about 08:20 p.m. The meeting was over at about 09:00-09:15 p.m. After that, when he was preparing meal then a girl, whose name he did not know, came running and asked him to save her. He rang the phone



numbers of some members of the apartment. Then, all the members of the apartment came and the Police was informed. The Police came and she was taken to the hospital.

20.1. In his cross-examination, he has stated that he did not know as to what was written on the paper on which he signed. He has stated that no one can be taken into the apartment by force. An outsider has to sign to enter the apartment. The signature of the person living in the apartment is not made in the register.

21. PW-5 Shashibhushan Kumar Paswan is the Investigating Officer of this case. He has stated that on 20.11.2017, he was posted as A.S.I. at Joksar Police Station. On that day, an F.I.R. was registered on the basis of the statement of the victim girl. After the F.I.R. was registered, he was given the charge of investigation of this case. He has stated, in his examination-in-chief, that he had taken the statement of Mrityunjay Paswan in Para-6 of the case diary. The statement of Sanjeev Pandey was taken in Para-7 of the case diary. The Medical Examination Report has been received in Para-24 of the case diary. The CDR has been extracted in Para-49 of the case diary. The statement of the victim girl has been taken under Section 164 in Para-70 of the case diary. In Para-95 of the case diary, the clothes worn by the victim girl



were seized and in Para-96 there is mention of Seizure List. Order of TIP has been received in Para-163 of the case diary. Test Identification Parade has been dealt in Para-191 of the case diary. The Incharge of Sarvodaya Vidyalaya, namely Naresh Kumar, was interrogated in Para-215 of the case diary. Para-218 of the case diary is about the examination of the victim girl. In Para-224 of the case diary, a Medical Board was constituted, the report of which was not received.

21.1. In his cross-examination, he has stated that statement of other girls of the lodge were taken where the girl was living. Again he said that he has not taken the statement of other girls. He prepared the Seizure List. He had not sent the seized clothes for forensic analysis. He again said that it has been sent for investigation and the report has not been received. In the second Seizure List, he has stated that, during the investigation process, he did not know for how long the victim girl was using the ATM of Bihar Gramin Bank nor could he find out from where she had made purchases using this card. Other girls had told that that the victim girl used to go out on the pretext of studying and came back at 09:00 in the night and that she had no interest in studies. The owner of Sheela Complex had told him that, on 11.11.2017, she had left with all her belongings and that she did



not live in that lodge. There is a photocopy of the page of the attendance register where this overwriting was done. The statement of Naresh Kumar Verma, who was the incharge of the school, had been taken where the girl went to take the examination. The school incharge told him that she had come to take the Physics examination at 09:00 hours on 14.11.2017. He had also told that she had also come for Chemistry exam on 15.11.2017. She did not have to appear at any exam on 16.11.2017 and had come to appear in the English exam on 17.11.2017. She came to appear in Hindi exam on 18.11.2017. The Headmaster had also told that the victim girl used to come and go in a four wheeler car with a driver. The Headmaster said about the victim girl that the girl had given the exam correctly and her condition was fine and that she used to give the exam happily and that she always used to come for the exam in a four wheeler car with a driver. He had not demanded for the call details of the mobile and had not enquired about how many friends she had. He had not verified the date of birth of the victim girl from where she gave her matriculation examination. He had further stated that the calls of the people with whom Rajeev Kumar spoke from his mobile were not recorded.



22. DW-1 Naresh Kumar Verma was the Principal Incharge of Madhusudan Sarvodaya Madhyamik Vidyalaya from 31.01.2017 to 31.01.2018. He knew the victim girl. She was his student. He has stated that she used to appear in the examination in a four wheeler vehicle. He cannot say who brought her. She used to return in a four wheeler vehicle after giving exams. While giving the exams, she did not inform any invigilator about her abduction. She used to take the exam normally. He had shown the attendance register of her examination to the Inspector.

23. DW-2 Sheela Devi is the owner of Sheela Lodge which is in Sheela Complex. She has stated that only girls used to live in that lodge. The victim girl lived in her lodge. She left with all her belongings on 11.11.2017. After leaving the lodge, she never returned. She had signed the register in front of her while leaving but later noticed that it had been overwritten. No men were allowed to stay in the lodge.

24. DW-3 Rupam Kumari is the roommate of the victim girl. She has stated that the victim girl did not spend much time in her room. She stayed out for a long time. She did not have much contact with the victim girl. She did not know what she did outside. She never saw her consuming alcohol in the room. She used to spend more time on travelling.



25. DW-4 Manisha Kumari has deposed that she lived in the hostel of Sheela Lodge. She knew the victim girl since August, 2017 as she used to live in her hostel. The victim girl studied in XIIth class but gave very little attention to her studies. She always used to roam around and sometimes when she returned to the hostel in the evening, her mouth had the stench of alcohol and sometimes she had even seen her vomiting.

26. DW-5 Lakhan Mahto has deposed that the victim girl was in the company of bad boys when she was studying in the school. The girl had run away 2-4 times. She used to drink alcohol.

27. DW-6 Baalachanand Chaudhary has deposed that the victim girl used to roam around with ten persons and smoked marijuana and when she did not get the money, she files a case. He had never seen her giving marijuana to anyone. He has further stated that he heard that she smokes marijuana.

28. Looking to the aforesaid evidence led by the prosecution and looking to the facts of the present case, following two main points which are required to be considered by this Court are:-

(i) Whether the age of the victim (PW-1) has been proved by the prosecution?



(ii) Whether the victim (PW-1) can be termed as a 'sterling witness'?

29. At the outset, it is required to be observed that before the provisions of the POCSO Act can be said to be applicable, it must be established that the victim is a child within the meaning of Section 2(1)(d) of POCSO Act i.e. a child below the age of 18 years. The burden to establish this fact of age rests on the prosecution.

30. At this stage, we would like to refer the decision rendered by the Division Bench of this Court on 07.03.2024 in the case of **Arvind Kumar (supra)**. The Division Bench of this Court has considered various decisions rendered by the Hon'ble Supreme Court and thereafter observed, in **Para-21 to 25**, as under:-

"21. In view of the aforesaid discussed evidence adduced on behalf of the parties, it appears that the first issue which is to be decided in this case as to whether the victim is a child or not within the meaning of Section 2(1)(d) of the POCSO Act. When the date of birth of the victim is in dispute, it is well settled that it is bounded duty of prosecution to establish the age of child victim during the course of trial within the meaning of Section 2(1)(d) of the POCSO Court.

*22. To determine the age of prosecutrix, the Coordinate Bench of this Court in **Abhinandan Sah @ Abhinandan Kumar Sah Vs. State of Bihar** reported in (2024) 1 BLJ 512 in paragraph nos.34 to 38 observed as under:-*

"34. In a case pertaining to the POCSO Act, it needs no reiteration that it is imperative to establish the age of the victim and



*thereby her minority. The age of the prosecutrix has an extremely crucial bearing in the case. The age of victim has to be determined on the basis of settled statutory criteria. Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 provides for determination of age of the child in conflict with law and child in need of care and protection. The law is well settled that the method to determine the age of a juvenile is also applicable to determine the age of the victim. The Hon'ble Supreme Court in **P. Yuvaprakash Vs. State** (Criminal Appeal No.1898 of 2023) vide judgment dated 18.07.2023 observed that in view of Section 34 (1) of the POCSO Act and Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, whenever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. 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.*

*35. The Hon'ble Supreme Court in case of **Jarnail Singh Vs. State of Haryana (2013) 7 SCC 263** has held that "though Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 have been framed under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 is applicable to determine the age of child in conflict with law, the aforesaid provision should be the basis for determination of age of a child who is victim of crime. The Court remarked that there was hardly any difference between a child in conflict with law, and a child who is a victim of crime. Identical provision is thereunder Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 which came into effect from 15.01.2016.*

*36. In case of **Rajak Mohammad Vs. State of H.P. (2018) 9 SCC 248**, the Hon'ble Supreme Court has noted that the age determined on the basis of a radiological examination may not be an*



*accurate determination and sufficient margin either way has to be allowed. In **State of Madhya Pradesh Vs. Munna @ Shambhoo Nath (2016) 1 SCC 699**, the Hon'ble Supreme Court held that the evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of victim. If there is doubt with regard to correct age of prosecutrix, the benefit, naturally, must go in favour of the accused.*

*37. In case of **Rishipal Singh Solanki Vs. State of Uttar Pradesh and Others**, reported in **Manu/SC/1081/2021** the Hon'ble Supreme Court discussed the law on this point and culled out the principles with regard to the determination of age. It is observed therein that when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or Subsection (2) of Section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised. It is further observed therein that when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.*

*38. The Hon'ble Supreme Court through the three Judge bench in **Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal (2012) 9 SCR 224** held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. It is now well settled that the burden is always upon prosecution to establish what is alleges."*

*23. The Hon'ble Supreme Court in **Mukarrab & Ors. vs. State of U.P. (2017) 2 SCC 210** observed that medical examination leaves a margin of two years on either side even if ossification test of multiple joints is conducted. It has further been observed that the Courts have always held that the evidence afforded by radiological examination is no doubt a useful*



guiding factor for determining the age of a person but the evidence is not conclusive and incontrovertible nature and it is subject to a margin of error. It is difficult to determine the exact age of the person concerned on the basis of radiological/ossification test or other tests.

*24. The margin of error in age has been judicially recognized by Hon'ble Supreme Court in the case of **Jay Mala vs. Home Secretary, Government of Jammu & Kashmir and Others (1982) 2 SCC 538** wherein the Hon'ble Supreme Court observed that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.*

*25. The age of prosecutrix has an extremely crucial bearing in the case and it is imperative to establish the age of victim and thereby her minority. The law is now well settled that the method to determine the age of a juvenile is also applicable to determine the age of victim. As stated above, the Hon'ble Supreme Court in **P. Yuvaprakash Vs. State** represented by Inspector of Police reported in **2023 SCC OnLine SC 846** observed that whenever the dispute with respect to the age of a person arises in the context of her/him being a victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Section 94 of the J.J. Act."*

31. From the aforesaid observation made by the Division Bench of this Court after considering the various decisions rendered by the Hon'ble Supreme Court, it can be said that whenever the dispute with respect to the age of the person arises in the context of her or him being a victim under the POCSO Act, the Courts have to take recourse to the steps indicated in Section 94 of The Juvenile Justice (Care and Protection of Children) Act, 2015. Section 94(2)(iii) of Act of 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. Further, the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. Further, the evidence of approximate age of the victim would not be sufficient to come to any conclusion about the exact age of victim. If there is doubt with regard to the correct age of prosecutrix, the benefit must go in favour of the accused. It has been further observed that when a claim of juvenility is raised, the burden is on a person raising the claim to satisfy the Court to discharge the initial burden. Further, the burden proving that someone is a juvenile is upon the person claiming it and the said burden is always upon the prosecution to establish what it alleges. It has been also observed that the evidence afforded by radiological examination is, no doubt, a useful guiding factor for determining the age of a person but the evidence is not conclusive and incontrovertible nature and it is subject to a margin of error.

32. Now, keeping in view the aforesaid observation made by the Division Bench of this Court, relying upon various decisions rendered by the Hon'ble Supreme Court, if the evidence led by the prosecution, in the present case, is examined, it is revealed that PW-1 (victim) has stated, during



cross-examination, that her date of birth mentioned on the matric certificate is 15.03.2001. However, she did not produce the said certificate before the Court. Further, PW-2 (Doctor), who had examined the victim had determined the age of the victim below 18 years on the basis of radiological report. However, she has admitted, during cross-examination, that she is not a radiologist or pathologist and thereafter, PW-2 has stated that it emerges that the victim is below the age of 18 years. It is pertinent to observe, at this stage, that the prosecution did not examine the radiologist. At this stage, it is also required to be observed that PW-5 (Investigating Officer) has specifically admitted, during cross-examination, that he had not verified the date of birth of victim girl from where she gave her matriculation examination. Thus, though it was the duty of the prosecution to prove the age of the victim girl by producing the documentary evidence, the prosecution has failed to produce such documentary evidence from which it can be established that victim girl in the present case was minor on the date of incident. Further, even from the radiological report, PW-2 has opined that the victim girl was below the age of 18 years. However, in view of the decision rendered by this Court as well as the Hon'ble Supreme Court, it can be said that the evidence afforded by radiological examination is a useful guiding factor for



determining the age of a person, but the said evidence is not conclusive and incontrovertible nature and it is subject to a margin of error. Further, as per the decision rendered by the Hon'ble Supreme Court in the case of **Jaya Mala Vs. Home Secretary, Goverment of Jammu and Kashmir**, reported in **AIR 1982 SC 1297**, one can take judicial notice that margin of error in age ascertained by the radiological examination is two years on either side.

33. Thus, in view of the aforesaid discussion, we are of the view that the prosecution has failed to prove the age of the victim by leading cogent evidence from which it can be established that PW-1 (victim) was minor on the date of incident. Hence, we are of the view that conviction recorded by the Trial Court under the provisions of the POCSO Act is not tenable in the eyes of law.

34. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Rai Sandeep (supra)**, wherein the Hon'ble Supreme Court has observed, in **Para-22**, as under:-

“22. . In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test



the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”



35. We would also like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Manak Chand (supra)**, wherein the Hon'ble Supreme Court has observed, in **Para-5**, as under:-

"5. The prosecutrix was medically examined by PW-1 Dr. Kulwinder Kaur on 28.10.2000 at 11.30 AM. PW-1 states that the age of the prosecutrix, as told to her by the mother of the prosecutrix, was 16 years and the details of the medical examination of the prosecutrix were as follows:

***GENERAL EXAMINATION:** Well-built adult female, fully conscious, moderately nourished. There was no external mark of injury over breast, neck, face, abdomen & thigh.*

***LOCAL EXAMINATION:** She had well-developed public hairs; external genitalia were fully developed & normal. There was no external mark of injury.*

***PER VAGINAL EXAMINATION:** Labia minora was hypertrophied, hymen was ruptured admitted 2 fingers. There was no sign of acute inflammation in & around vulva. There was discharge. Uterus non gravid, firm and mobile and fornix free.*

Her Vaginal swab not taken because pt had menstruated 5 days back & the history of assault is 1 ½ two months before. Ex.PB in the true copy of the MLR. Firstly, the age of the prosecutrix was recorded as 15 on the information of her mother which was later on corrected to 16 years. That was also done on the information of the mother of the prosecutrix.

At the time of medical examination of the patient, no force seems to have been used against her. I cannot opine about the age of the patient on the basis of development of her public hairs and genitalia etc. The patient was habitual to sexual intercourse because her labia minora was hypertrophied and hymen admitted two fingers."



36. Keeping in view the aforesaid observations made by the Hon'ble Supreme Court, wherein the Hon'ble Supreme Court has discussed with regard to "sterling witness", if the evidence led by PW-1 (victim) is examined, we are of the view that view that, for the reasons stated hereinabove, PW-1 cannot be termed as "sterling witness". Thus, by simply relying upon the deposition given by the said witness, conviction cannot be recorded.

37. From the *fardbeyan* given by the informant/victim girl, it is revealed that, on 15.11.2017 at about 17:00 hours (05:00 p.m.), she was going to Sheela Complex after taking her English tuition. While on the way, she was taken forcibly on the vehicle by Manish whom she knew from earlier. Her mouth was gagged and she became unconscious. However, while giving deposition before the Court, PW-1 has stated that the incident took place at 06:00 p.m. when she was returning from her English class and a four wheeler car came there. She was made to sit in the car. She fainted when the handkerchief was put on her face and there were 2-3 persons in the car including Manish. It is further revealed from the deposition of PW-1 that she was kept in the house of Manish for 4-5 days and Manish used to rape her. He also used to make her consume alcohol. When she told the accused



Manish that her exams were going on, then Manish, after giving threat to her with gun, used to take her to the exam centre at Open Nalanda University, Bihpur. From there, Manish used to bring her back to his room at Bhagwati Apartment. However, during cross-examination, she has stated that she was giving her exam in the upper room and she was shown gun from the car standing downstairs. Out of fear, she did not tell anyone. She went at the examination centre four times but did not tell anyone in the examination hall.

37.1. At this stage, we would like to refer the deposition given by PW-5 (Investigating Officer). The said witness has admitted, during cross-examination, that he had recorded the statement of one Naresh Kumar Verma, who was Incharge of the school, where the victim girl went to take the examination. The school incharge told him that she had come to take the Physics exam at 09:00 hours on 14.11.2017. He had also told that the girl had also come for Chemistry exam on 15.11.2017. She did not have exam on 16.11.2017. Thereafter, she, once again, had to appear in the English exam on 17.11.2017. She came to appear in Hindi exam on 18.11.2017. The Headmaster had also told that the victim girl used to come and go in a four wheeler car with a driver. The Headmaster said about the victim girl that girl had given the



exam correctly and her condition was fine and that she used to give exam happily and she always used to come for the exam in a four wheeler car with a driver. Thus, PW-5 (Investigating Officer) narrated every aspect which was told to him by witness Naresh Kumar Verma. However, it is relevant to note that the prosecution did not examine the said witness as a prosecution witness. Thus, the defence examined Naresh Kumar Verma as DW-1. DW-1 has specifically stated that, while giving the exam, the girl did not inform any invigilator about her abduction. She used to take the exam normally.

38. Thus, from the story of the victim that when she was taken to the examination centre in a car, the persons sitting in the car had shown the gun and gave the threats, as a result of which she could not inform the invigilator and the other students sitting in the examination hall. However, in her own deposition, the examination hall was on the first floor whereas the concerned persons were sitting in the car. Further, from the conduct of the prosecution, i.e. Naresh Kumar Verma, whose statement was already recorded by the Investigating Agency, was not examined is also required to be seen from this angle. However, the Investigating Officer has specifically narrated before the Court with regard to the statement given by Naresh Kumar Verma. Even



the said person, while giving the deposition as defence witness, has also specifically stated that the conduct of the victim girl was normal and she was happily giving the examination. Thus, from the aforesaid evidence, the story put forward by the victim that she was forcibly abducted by Manish and kept in confinement in the room and for 4 days permitting the victim girl to appear in the examination, cannot be believed.

39. At this stage, it is also relevant to note that DW-2 (Sheela Devi), who is the owner of Sheela Lodge, has deposed before the Court that the victim girl lived in her lodge. She left with all her belongings on 11.11.2017 and, after leaving the lodge, she never returned. The victim girl had signed the register in front of her while leaving.

39.1. Thus, from the aforesaid deposition of the defence witness, it transpires that the victim girl voluntarily left the lodge with all her belongings.

40. At this stage, we would also like to refer the deposition given by PW-3 (Sanjeev Kumar Pandey), who is the resident of Bhagwati Apartment in which Manish was residing as a tenant in one apartment. The said witness has specifically admitted, during cross-examination, that the girl can be taken into the apartment if he introduces her as a relative and signs the



register. He further stated that if the girl does not wish, the guard will not allow her to be taken inside the apartment. The guard, at that time, was Mrityunjay Paswan.

40.1. PW-4 Mrityunjay Paswan was the guard on duty of the apartment. The said witness has also admitted, during cross-examination, that no one can be taken into the apartment by force. An outsider has to sign to enter the apartment.

41. Thus, from the deposition of the aforesaid two prosecution witnesses, story of the victim girl (PW-1) that when she was forcibly taken into the car, she became unconscious and she regained the consciousness in the room of Manish, cannot be believed. At this stage, it is also relevant to note that the victim PW-1, in her examination-in-chief, has stated that Manish was under the influence of alcohol. He picked up pistol and fell down after which she locked him in the room. She wore whatever cloth she had and got down. She met an uncle there and told him everything upon which he called the Police. The Police took her to the hospital. Thus, it is a specific case of the victim that she had locked the room of Manish. However, it is pertinent to note that though Manish i.e. the accused was locked in the room and was under influence of alcohol in the said room, the Police did not arrest him from the said place. How accused Manish and others



came out of the said room is not on record. On the contrary, Manish was arrested subsequently.

42. At this stage, we would like to refer the deposition given by PW-2 (Doctor), who had examined the victim girl. The said witness has stated that there was no evidence of recent sexual intercourse. During cross-examination, PW-2 has specifically stated that she did not see any wound on the victim girl's private part/thigh which would indicate violence. No mark of any kind was found on the backside also. However, it is true that multiple abrasion all over the face were found. PW-2 has stated, during cross-examination, that the scratch marks on the face of the victim girl were caused by nails. However, she has no idea as to how this mark would have occurred.

43. Thus, from the aforesaid evidence led by the prosecution and considering the deposition of PW-1 (victim), we are of the view that the victim cannot be termed as sterling witness and, therefore, simply relying upon the version given by the victim, conviction cannot be recorded.

44. Accordingly, the impugned judgment of conviction dated 13.05.2019 and order of sentence dated 17.05.2019/20.05.2019 passed by learned 1st Additional District and Sessions Judge-cum-Special Judge, POCSO Act, Bhagalpur in



G.R. Case No. 6214 of 2017, arising out of Kotwali (Jogsar) P.S.
Case No. 850 of 2017 are quashed and set aside.

45. Both the appellants are acquitted of the charges levelled against them by the learned Trial Court.

46. Both the appellants are in custody. They are directed to be released from jail custody forthwith, if their custody is not required in any other case.

47. Both the appeals stand allowed.

48. Interlocutory Application, if any, shall also stand disposed of.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

Sachin/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	01.10.2024
Transmission Date	01.10.2024

