

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.4080 of 2022

Arising Out of PS. Case No.-128 Year-2021 Thana- ISLAMPUR District- Nalanda

Rahul Kumar, Son of Mithlesh Paswan, Resident of village- Khirauti, P.S-
Parwalpur, Dist- Nalanda.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 55 of 2023

Arising Out of PS. Case No.-128 Year-2021 Thana- ISLAMPUR District- Nalanda

Sujeet Kumar, Son of Manoranjan Prasad, Resident of village- Korwa, P.S.-
Islampur, District- Nalanda.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 4080 of 2022)

For the Appellant/s : Mr. Rajesh Kumar Singh, Advocate
Mr. Anil Kumar Singh, Advocate
Mr. Gaurav Singh, Advocate
For the Respondent/s : Mr. Mukeshwar Dayal, APP

(In CRIMINAL APPEAL (SJ) No. 55 of 2023)

For the Appellant/s : Mr. Sanjeev Kumar, Advocate
Mr. Priya Ranjan, Advocate
Mr. Mukesh Kumar, Advocate
Ms. Chandani Kumari, Advocate
Mr. Nitish Kumar, Advocate
For the Respondent/s : Mr. Abhay Kumar, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 08-08-2024

1. At the outset, it is important to mention
that both above named appeals are disposed herewith
through this common judgment, as same arises out of
POCSO Case No.-44/2021 arising out of Islampur P.S.



Case No.-128/2021 disposed of by learned Special Judge (POCSO ACT)-cum-Additional District and Sessions Judge VII, Nalanda, Bihar Shariff, through common judgment as passed in POCSO Case No. 44 of 2021.

2. Heard Mr. Rajesh Kumar Singh, Advocate assisted by Mr. Anil Kumar Singh, Advocate and Mr. Gaurav Singh, Advocate appearing for the appellant/convict and Mr. Mukeshwar Dayal, learned APP appearing for the State in Cr. Appeal (SJ) No. 4080 of 2022 and Mr. Sanjeev Kumar, Advocate assisted by Mr. Priya Ranjan, Advocate, Mukesh Kumar, Advocate, Chandni Kumari, Advocate and Nitish Kumar appearing for the appellant/convict and Mr. Abhay Kumar, learned APP appearing for the State in Cr. Appeal (SJ) No. 55 of 2023.

3. Both above mentioned appeals preferred under Section 374 (2) of the Criminal Procedure Code (in short Cr.P.C.) challenging the judgment and order of



sentence dated 06.09.2022 and 12.09.2022 respectively passed by learned Special Judge (POCSO ACT)-cum-Additional District and Sessions Judge VII, Nalanda, Bihar Shariff in POCSO Case No.-44/2021 arising out of Islampur P.S. Case No.-128/2021, by which the learned trial court convicted the appellants and sentenced them to undergo Rigorous Imprisonment (R.I.) for 10 years and fine of Rs. 5,000/-, and in default of payment of fine, they shall further undergo simple imprisonment for a period of 3 months for the offences under section 366A of the Indian Penal Code and R.I. for 7 years and fine of Rs. 5,000/-, in default of payment of fine, they shall further undergo S.I. for 3 months for the offences under section 363 of the Indian Penal Code and rigorous imprisonment for 3 years and fine of Rs. 2,000/-, each in default of payment of fine, they shall further undergo Simple Imprisonment (S.I.) for 3 months for the offences under section 8 of the POCSO Act and R.I. for 3 years and fine of Rs. 2,000/-, each in default of



payment of fine, they shall further undergo Simple Imprisonment (S.I.) for 3 months for the offences under section 12 of the POCSO Act. All sentences shall run concurrently.

4. The brief prosecution case, as it appears from the fardbeyan of informant/PW-6 namely, Niva Devi, that on 09.03.2021, her daughter/victim/PW-5, who was 16 years old went to Korma Girls School, Islampur for study and after that she went near to school gate for eating "*gupchup*", in the meantime, two boys namely (1) Rahul Kumar and (2) Sujeet Kumar, came near the school gate with white coloured Indigo CS car bearing Registration No.-BR-301BG-6534 and forcefully took her inside the car and started fleeing towards the Biharshariff side. During course of kidnapping, her daughter started shouting for help near to May Petrol Pump, Parwalpur, on which several people gathered there and took them to the Parwalpur Police Station. Thereafter, she received information from the petrol



pump regarding occurrence and then she also went to the Police station, where her daughter narrated her about whole incident. Both accused persons are men of criminal antecedents and she had doubt that they kidnapped her minor daughter with intention to rape her and they also sexually molested her daughter during kidnapping.

5. After investigation of this case, police submitted the charge sheet against the appellants on 01.06.2021 vide charge sheet no.- 229 of 2021, thereafter cognizance has been taken against both the appellants and after that charges has been framed by learned trial court on 20.07.2021, for the offences under sections 363, 366(A) and 34 of the Indian Penal Code and section 8/12 of the POCSO Act.

6. To established its case before the learned trial court, the prosecution altogether examined total of eight witnesses, namely, **PW-1** Suban Pathak (Staff of Petrol Pump), **PW-2** Chandramauli Pandey (Staff of



Petrol Pump), **PW-3** Niranjana Pathak (Staff of Petrol Pump), **PW-4** Sanjeev Kumar (Staff of Petrol Pump), **PW-5** Victim, **PW-6** Niva Devi (Informant- mother of victim) **PW-7** Ravindra Prasad Rai (I.O.) and **PW-8** Priti Kumari Sinha (I.O.).

7. The prosecution also exhibited following documents during the trial to substantiate its case which are as:-

Exhibit 1 -Signature of the victim on a written statement.

Exhibit 1/1- Signature of the informant namely, Niva Devi on a written statement.

Exhibit -1/2 - Order of Officer-in-charge to investigate the case.

Exhibit -1/3 - Complete fardbeyan

Exhibit -2- Signature of the victim on statement under Section 164 of Cr.P.C.



Exhibit- 2/1 - Statement under
Section 164 of Cr.P.C.

Exhibit - 3- Signature of Niva Devi on
the seizure list

Exhibit - 3/1- Whole seizure list
written by Harendra Singh, SHO.

Exhibit - 4- Birth Certificate of the
victim issued by the School.

Exhibit - 5- Complete Charge-sheet

Exhibit - 6- Formal FIR

Exhibit - 7- Attested copy of FIR
bearing Islampur P.S. Case No. 01/19

Exhibit - 7/1 Attested copy of charge-
sheet of Islampur P.S. Case No. 01/19

Exhibit -8- Attested copy of FIR bearing
Islampur P.S. Case No. 168/19

Exhibit -8/1- Attested copy of charge-
sheet of Islampur P.S. Case No. 168/19



Exhibit -9- Attested copy of FIR
bearing Islampur P.S. Case No. 239/19

Exhibit - 9/1- Attested copy of
charge-sheet of Islampur P.S. Case No.
239/19.

8. On the basis of evidences, as surfaced during the trial, both appellants/convicts were examined under Section 313 of the Cr.P.C., where they denied all the evidences as surfaced against them and claimed their complete innocence and false implication.

9. One witness also examined during trial on behalf of appellants in their defect, who is:

(i) DW-1 Virendra Prasad.

10. learned trial court on the basis of evidences surfaced during trial convicted both above-named appellants and passed judgment of conviction and sentences as mentioned aforesaid. Being aggrieved with aforesaid judgment of conviction and order of sentence, both appellants/convicts preferred the present appeals.



11. Hence the present appeals.

12. It is submitted by learned counsel appearing on behalf of the appellants/convicts that maximum of the prosecution witnesses i.e. PW-1, PW-2, PW-3 and PW-4 declared hostile during the trial. It is stated that PW-5/victim though supported the factum of kidnapping but it is nowhere appears from her deposition that she was kidnapped as to forced or seduced to join illicit intercourse with another person, therefore, the conviction as recorded under Section 366 A of the Indian Penal Code appears bad in eyes of law. In support of his submission, learned counsel relied upon the legal report of Hon'ble Supreme Court as available through ***Sat Parkash Vs. State of Haryana and Another***, reported as ***(2015) 16 SCC 475***. It is also submitted that the victim disclosed her date of birth as of year 2006, which was said to be proved on the basis of transfer certificate and not on the basis of certificate issued from the first attending school. It is also



submitted that the school register was not produced in this connection, as to read certificate within the meaning of Section 35 of the Indian Evidence Act, therefore, it can be said safely that victim/PW-5 was not proved child within the meaning of Section 2(1)(d) of the POCSO Act. It is submitted that even the statement of victim is not suggesting that she was touched with sexual intent by accused/appellants during the course of kidnapping and therefore, the conviction as recorded under Section 8/12 of the POCSO Act also appears bad in eyes of law. It is pointed out that victim was not examined medically as to ascertain her date of birth by way of any scientific/radiological examination. In support of his submission, learned counsel relied upon the legal report of ***Jarnail Singh Vs State of Haryana*** reported as ***(2013) 7 SCC 263*** and also relied upon ***Satpal Singh Vs. State of Haryana*** reported as ***(2010) 8 SCC 714***. While travelling over the argument, learned counsel appearing on behalf of the appellants pointed out



that the informant/PW-6 is not the eye-witness of the occurrence and her entire testimony based upon hearsay input as gathered from PW-5/victim. It is submitted that she arrived police station only after arrival of victim, who alleged to be apprehended by police, when police patrolling party came to petrol pump on alarm of the victim. It is submitted that the best witness of the kidnapping occurrence would be the staff of the petrol pump, who made witnesses in support of prosecution case but either they turned hostile or did not support the case of prosecution and in view of same, the entire prosecution case appears failed. While concluding the argument, it is submitted that even to established a case beyond reasonable doubt under Section 363 of the Indian Penal Code, the victim must be minor, which prosecution failed to established in view of aforesaid submission. It is submitted that from the deposition of victim herself, it can be gathered that appellants were acquainted with her prior to this occurrence and she



accompanied with them out of her own sweet will and therefore, it cannot be said that she was taken forcibly against her will from lawful guardianship. It is submitted that accompanying of victim with appellants/convicts, nowhere suggest that the act was committed for any moral or unlawful purpose. Hence the judgment of conviction and order of sentence may be quashed and set aside.

13. The learned APP while opposing the appeal submitted that victim was apprehended by police during course of kidnapping itself, when appellants were taking petrol and thereafter, she alongwith appellants were brought to concerned police station. It is also submitted by learned APP that the victim was minor on the date of occurrence as per her school certificate issued by In-charge Headmaster, where her date of birth was shown as 08.09.2006 **(Exhibit-4)**, but he fairly conceded that it was not the first attending school of the victim, neither any school register was produced in this connection. It is submitted that victim categorically



deposed against appellants that they took her forcibly after dragging inside car while she was eating "*Golgappa*" in front of her school gate. It is also pointed out by learned APP that when the vehicle was taken to a petrol pump for fuel refilling, an alarm was raised by the victim and thereafter, the matter was reported to the police, where police patrolling party arrived at petrol pump and arrested victim and appellants at Parwalpur. While concluding the argument, it is submitted that the impugned judgment is well reasoned and therefore, there is no occasion to interfere with.

14. I have perused the trial court records and proceedings carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

15. As to re-appreciate the evidence, while disposing the present appeal, it would be apposite to discuss the evidences available on record, which are as



under:-

16. PW-1 Suban Pathak, **PW-2** Chandramauli Pandey, **PW-3** Niranjana Pathak and **PW-4** Sanjeev Kumar, all were working with Indian Oil Petrol Pump in year 2009 at Parwalpur, when the vehicle through which the victim/PW-5 was kidnapped was taken for fuel refilling but none of these prosecution witnesses supported the case of occurrence and as such they were declared hostile. PW-1, Suban Pathak categorically stated that he is not aware about the occurrence and even police did not ask anything to him whereas upon cross-examination, he stated that he said to depose voluntarily before court without any pressure and no occurrence as alleged ever took place at petrol pump, where he was working. PW-2 also deposed on same line as it was deposed by PW-1.

17. PW-3 is Niranjana Pathak, who also stated that he was working with Indian Oil Petrol Pump, Parwalpur, since last 12 years but he never heard about



this occurrence. It was also deposed by him that PW-1 Suban Pathak is his younger brother, who was also working with said petrol pump. He categorically stated that he never made any statement with police regarding occurrence.

17.1 Upon cross-examination PW-3 stated that he deposed voluntarily before the court and no such occurrences took place at petrol pump.

18. PW-4 Sanjeev Kumar, who said to work with petrol pump since last five years also deposed in his examination-in-chief that the police never inquired him regarding occurrence and upon cross-examination he said that no such occurrence was ever took place before him and he did not even heard about any such occurrence. He also claimed to depose voluntarily before the trial court. Hence, it appears in view of depositions of all such prosecution witnesses, that no such occurrence took place as alleged by prosecution or deposed by PW-5/victim, though they turned hostile.



19. PW-5 is the victim of the case, who stated that at the time of occurrence, she was 16 years old and was student of girls school, Korma. It was deposed that on 9th March, 2021, somewhere between 3-4 PM, while she was eating "*Golgappa*" in front of school gate, both appellants namely, Rahul and Sujeet came over there and forcibly dragged her inside a four wheeler vehicle. She asked her to leave her but they started to play music loudly inside the vehicle, but in the meantime, due to shortage of petrol, the vehicle was taken to Parwalpur petrol pump for refilling of fuel, where she asked for a mobile from the persons available at petrol pump and thereafter, she called her mother/PW-7. It was deposed that the persons who were at petrol pump took out the key of vehicle and thereafter, they called police. It was deposed that vehicle was of white colour and the appellants were talking on video call with some one that whether she be taken to Biharsharif or Patna. In the meantime, police came over there and she was brought



to Parwalpur police station alongwith appellants. Her mother also came there and lodged present case. She also signed upon written information, which she identified before the trial court and upon her identification same was exhibited as **Exhibit-1**. Thereafter, she was brought to Islampur police station, from where she was taken to court where her statement was recorded under Section 164 of the Cr.P.C. She also identified her signature on her said statement, which upon her identification, exhibited as **Exhibit-2**. She identified both appellants before the court.

19.1 Upon cross-examination, she stated that she admitted in Korma school in class IX. She denied the suggestion that she was not the student of Korma girls school. It was stated by her that on the date of occurrence, her school was closed at 3:00 PM. She stated that at the time of eating "*Golgappa*" she was alone, which was just ahead of 5-10 steps from school gate. It was stated that by that time she was not visited



the school. It was also stated by her that the said school road was a busy road. It was also stated that during the occurrence, she raised alarm also and by that time 2-3 persons were also passing from there but they did not pay any attention to her alarm *qua* occurrence. She stated as not to saw the vehicle through which she was kidnapped while she was eating "*Golgappa*". It was stated that the occurrence took place instantly. She was forced to sit on the rear seat of the car alongwith appellant Sujeet, while Rahul was driving. She failed to disclose the vehicle number. It was stated by her that she tried to stop the driver but both of them said that don't do this otherwise, we all three will die. She failed to disclose the name of owner of the petrol pump and also the name of person who took out the key of the vehicle. It was also stated that none of the appellants tried to run away from the place of occurrence. It was stated that the appellants usually followed her prior to this occurrence but she never made any complaint



regarding that. She denied any relations with appellants and stated that both are from different village but some of their friends are from her village. She denied the suggestion of any tutoring and also that she was not outraged by appellants.

20. PW-6 – is the informant and mother of the victim/PW-5. She stated that at the time of occurrence her daughter was 15 years old and she was eating "*Golgappa*" near to her school gate, when both appellants came over there and dragged her daughter inside vehicle and while kidnapping, due to shortage of petrol, they stopped the vehicle at petrol pump near to Parwalpur, where the persons of petrol pump took out the key of vehicle, from where she was informed on her mobile phone by a person working with petrol pump, consequent upon she went to said petrol pump but by that time, her daughter was taken alongwith appellants to Parwalpur, police station, thereafter, she went to Parwalpur, police station, where she lodged present case



as per statement of her daughter/PW-5. She identified her signature on written information, which upon her identification exhibited as **Exhibit -1/1**. Police also seized the vehicle and other materials. She also identified signature on seizure list, which upon her identification exhibited as **Exhibit-3**. She also stated to identify the appellants before the court.

20.1 Upon cross-examination, it was stated that victim is her daughter, who already solemnized her marriage with someone else at Islampur. She disclosed that the name of her son-in-law is Aditya Kumar, who is still student. It was deposed that marriage was solemnized after this case. It was also stated by her that the parents of appellants threatened her to withdraw the present case but she did not lodged any complaint with police regarding said threat. She was stated that her daughter/PW-5, on the date of occurrence went to school at about 9.00 AM. She went alone. She usually returned by 3:00 PM but on the date of occurrence, she



did not return. She also searched her with all available probabilities and finally when she failed to find her, she was waiting for her daughter. She also went to police station for giving information in this regard but when she went to police station by that time her daughter was already there. She categorically stated that she did not said anything to police personnel *qua* occurrence. It was stated that before her arrival to police station, everything was already disclosed to the police personnel. She stayed in police station for about 4-5 hours. Thereafter, she came to Islampur police station and remained in night there, where on next day, she came to Biharsharif court. She stated that before occurrence, she was not aware about either of the appellants, namely Rahul or Sujeet. It appears from her cross-examination that a compromise petition was shown to her, which she denied.

21. PW-7 Ravindra Prasad Rai, who is the I.O. of this case, who identified the signature of SHO Sharad



Kumar Ranjan on formal FIR, which upon his identification exhibited as **Exhibit -1/2**. He also identified his signature on seizure list, which upon his identification exhibited as **Exhibit-3/1**. As per his examination-in-chief, the place of occurrence is Kasturba Girls+2 High School. It was deposed that the vehicle involved in kidnapping was Indigo bearing registration no. BR-01BG-6534. He said to record the statement of victim under Section 161 of the Cr.P.C. and thereafter, PW-1 Suban Pathak and PW-3 Niranjan Pathak. He stated that PW-1 supported the occurrence. He also said to record the statement of PW-2 Chandramauli Pandey and PW-4 Sanjeev Kumar, who supported the occurrence. He also deposed to produce victim for recording her statement under Section 164 of the Cr.P.C. in Bihar Sharif court and also obtained her birth certificate from concerned school, where victim was the student, showing her date of birth as 08.09.2006. After completion of investigation, he submitted the charge-



sheet under Sections 363, 366A/34 of the Indian Penal Code and under Section 8/12 of POCSO Act through charge-sheet no. 229/2021 dated 21.05.2021, where he also identified his handwriting and signature, which upon his identification exhibited as **Exhibit-5**.

21.1 Upon cross-examination, it was stated by him that the seizure list was prepared at place of occurrence itself, which was prepared by one Harendra Singh (Not examined). He stated that the seizure list generally prepared after lodging a case but in present case, seizure list was prepared first and thereafter case was lodged. He further stated that the victim, accused/appellants and vehicle all brought to police station together and thereafter case was lodged and seizures were prepared. He did not record the statement of any school teacher, where victim was the student. He also stated that he did not investigate this case on the point, whether the victim was married or unmarried at the time of occurrence.



22. PW-8 is Priti Kumari Sinha, who is S.I. of Police, and recorded the statement of PW-6/mother of victim/PW-5 at Parwalpur police station on 09.03.2021 at about 6.40 PM, she identified her signature on fardbeyan which upon her identification exhibited as **Exhibit-1/3.**

22.1 Upon cross-examination, she stated that PW-6 came to police station at her own and lodged present complaint. She only stated to record the statement of PW-6 and no further investigation was carried by her in present case.

23. From the deposition of PW-7, it appears that he obtained only a certificate showing date of birth of victim from Kasturba High School, where the victim was the student, which upon his identification exhibited as **Exhibit-4.** Admittedly, no school register was produced and moreover, it appears from same certificate that victim was admitted in said school in year 2020-21 itself. It was not the first attending school of the victim



in terms of Section 94(2) of the Juvenile Justice Act, 2015. Hence, same cannot be read to established victim as a "child" within the meaning of Section 2(1)(d) of the POCSO Act and same can also not read as evidence in view of Section 35 of the Evidence Act.

24. In this context, it would be apposite to reproduce the legal reports of ***Jarnail Singh's case (supra)*** has observed in paragraph nos. 22 and 23 as under:

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

"12. Procedure to be followed in determination of age. – (1) *In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

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



jail.

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

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

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

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

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

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



of the order shall be given to such juvenile or the person concerned.

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

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

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages



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

25. It would further be apposite to reproduce the legal reports of ***Satpal Singh’s case (supra)*** has observed in paragraph nos. 26 to 29 as under:

"26. In Vishnu Vs. State of Maharashtra (2006) 1 SCC 283, while dealing with a similar issue, this Court observed that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. For determining the age of the child, the best evidence is of his/her parents, if it is supported by unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the un- impeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded.

27. Thus, the entry in respect of age of the child seeking admission, made in the school register by semi-literate chowkidar at the instance of a person who came along with the child having no personal knowledge of the correct date of birth,



cannot be relied upon.

28. Thus, the law on the issue can be summarised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the Court/Authority to examine its probative value. The authenticity of the entry would depend as on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case.

29. In case, the issue is examined in the light of the aforesaid settled legal proposition, there is nothing on record to corroborate the date of birth of the prosecutrix recorded in the School Register. It is not possible to ascertain as to who was the person who had given her date of birth as 13.02.1975 at the time of initial admission in the primary school. More so, it cannot be ascertained as who was the person who had recorded her date of birth in the Primary School Register. More so, the entry in respect of the date of birth of the prosecutrix in the Primary School Register has not been produced and proved before the Trial Court. Thus, in view of the above, it cannot be held with certainty that the prosecutrix was a major.

Be that as it may, the issue of majority becomes irrelevant if the prosecution successfully establishes that it was not a consent case."

26. It is clear from the evidence as discussed aforesaid that prosecution failed to established the victim as a child within the meaning of Section 2(1)(d), admittedly, the victim was not examined medically, neither her biological age was ascertained by any



scientific/radiological examination. Hence, the conviction under the provision of POCSO Act is not appearing convincing.

27. Nothing appears from the deposition of PW-5, who is the victim herself and also the most important witness of the entire occurrence that she was forced or seduced to illicit intercourse with another person, hence, the conviction under Section 366A of the Indian Penal Code is also appearing non convincing.

28. In this context, it would further be apposite to reproduce the legal reports of ***Sat Parkash' case (supra)*** has observed in paragraph nos. 5 and 6 as under:

"5. The charge with reference to Section 366-A of the Penal Code needs a closer examination. Section 366-A of the Penal Code is extracted hereunder:

"366-A.Procurement of minor girl.—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

A perusal of the aforesaid section reveals that the inducing of the minor to constitute an offence under Section 366-A should have been with reference to an



intent to force or seduce her "... to illicit intercourse with another person ...". In fact, there is no mention of any other person in the sequence of allegations levelled against the appellant.

6. In the above view of the matter we are satisfied that the charge under Section 366-A IPC was also not sustainable against the appellant. For the reasons recorded hereinabove, we are of the view that the impugned order [Sarla v. State of Haryana, 2011 SCC OnLine P&H 124] passed by the High Court convicting the appellant under Section 366-A of the Penal Code is also liable to be set aside. The same is accordingly hereby set aside"

29. This Court finds force in submission as advanced by learned counsel appearing on behalf of the appellants that in view of Section 361 of the Indian Penal Code, which is defining kidnapping from lawful guardianship, the important legal ingredient, in the case of a minor female that her age must be below 18 years. It is the duty of the prosecution to established that victim at the time of occurrence, was below 18 years, which prosecution failed to established, in view of aforesaid discussion, therefore, the conviction as recorded for the offence under Section 363 of the Indian Penal Code is also not appearing convincing and moreover, the important prosecution witnesses, who



could be the best witnesses of the occurrence i.e. PW-1, PW-2, PW-3 and PW-4 did not supported the occurrence and categorically stated that no such occurrence took place at alleged petrol pump near Parwalpur. There is also contradictions in the statement of PW-6, who is the informant of this case that before her arrival, the entire occurrence was narrated to police by her daughter/PW-5 but she was not made informant in present case. Whereas, PW-5 stated that she first stated about the occurrence to her mother/PW-6, who further informed to the concerned police. It also appears from the deposition of PW-5 that police seized the vehicle used in kidnapping and its key was taken out by worker of petrol pump. It also appears from the deposition of PW-6 that the vehicle alongwith appellants and victim were brought to Parwalpur police station but seizure list is not suggesting, that the key of vehicle was ever seized, as same not find place in seizure list. If the version of PW-5 be taken into consideration, then it appears impossible that how



without key the vehicle was brought to police station alongwith victim and appellants at Parwalpur where seizure were effected.

30. Hence, in view of above, it can be said safely that prosecution failed to answer certain major questions during trial which appears essential to prove charges as raised against appellants/convicts beyond reasonable doubts.

31. Hence, appeal stands allowed.

32. Accordingly, the impugned judgment dated 06.09.2022 and 12.09.2022 respectively passed by learned Special Judge (POCSO ACT)-cum-Additional District and Sessions Judge VII, Nalanda, Bihar Shariff in POCSO Case No.-44/2021 arising out of Islampur P.S. Case No.-128/2021 is hereby set aside/quashed.

33. Appellants namely, Rahul Kumar and Sujeet Kumar are in custody in connection with this case, they are directed to be released forthwith, if not required in any other case. Fine if any paid, be returned to



appellants forthwith.

34. Office is directed to send back the trial court records along with a copy of this judgment to the trial court, without delay.

(Chandra Shekhar Jha, J)

veena/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	30.08.2024
Transmission Date	30.08.2024

