

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.221 of 2020**

Arising Out of PS. Case No.-40 Year-2018 Thana- MAHILA PS District- Jamui

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Anil Pandey, Son of Late Ramswarup Pandey, Resident of Village - Maujhwe,
P.S.+ District- Jamui

... .. Appellant/s

Versus

1. The State of Bihar
2. XXX

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Shashank Shekhar Sinha, Advocate Mr. Shyam Sunder Pandey, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP
For Respondent no.2	:	Ms. Akanksha Malviya, <i>Amicus Curiae</i>

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

and

HONOURABLE MR. JUSTICE ARUN KUMAR JHA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ARUN KUMAR JHA)

Date : 14-05-2026

The present appeal has been filed by the appellant against the judgment of conviction dated 23.12.2019 and order of sentence dated 06.01.2020 passed by the learned Special Judge-cum-Additional District and Sessions Judge-1, Jamui, in Protection of Children from Sexual Offences (POCSO) Special Case No. 23/2018, arising out of Jamui Mahila P.S. Case No. 40/2018, whereby and whereunder the appellant has been convicted for the offences punishable under Sections 315 and 506 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred



to as the “POCSO Act”). Accordingly, he has been sentenced to undergo rigorous imprisonment for ten years with fine of Rs.5,000/- under Section 315 IPC and in default of payment of fine, the appellant has been directed to undergo further one year imprisonment. The appellant has also been sentenced to undergo six months rigorous imprisonment under Section 506 IPC with fine of Rs. 1,000/- and in default of payment of the same, he has been further directed to undergo one month imprisonment. The appellant has also been sentenced to undergo life imprisonment under Section 4 of POCSO Act with fine of Rs.10,000/- and in default of payment of fine, he has been further sentenced to undergo one year imprisonment. However, all the sentences have been directed to run concurrently.

2. Shorn of unnecessary details, the facts of the case are that the informant/victim gave her written statement to the effect that approximately 4-5 months prior to 07.07.2018, at about 4.00 A.M. in the morning, her parents had gone to harvest wheat crop in Anil Pandey’s (appellant herein) field. The appellant is her neighbour and her parents worked for him. It is alleged that when her parents left to harvest the field, she was alone and when she went out to attend the call of nature, the appellant called her and when she refused to go, he forcibly



dragged her to his porch and raped her after gagging her and then threatened her that if she told anyone, he would kill her entire family. Fearing for her life, the informant/victim did not disclose the incident to anyone. Thereafter, she was raped multiple times by the appellant and consequently, she became pregnant. Coming to know about her pregnancy, the appellant, on 06.07.2018, on the pretext of treatment, took the victim to Jamui. When the family members of the informant came to know about the incident, the appellant fled away leaving behind the victim. The informant/victim also stated that earlier she did not disclose this fact to anyone due to fear of life and shame.

3. On the basis of the aforesaid written statement of the informant/victim, a formal FIR being Jamui Mahila P.S. Case No. 40/2018 dated 07.07.2018 was instituted under Sections 376, 315 IPC and 3/4 of the POCSO Act. The police investigated the matter and submitted charge sheet under Sections 376, 315, 506 IPC and Sections 3, 4 of the POCSO Act on 07.09.2018 against the appellant finding the case to be true. After taking cognizance on 10.09.2018, charges were framed on 27.11.2018 against the appellant under Sections 376, 315, 506 of the IPC and Sections 3/4 of the POCSO Act to which, the appellant pleaded not guilty and claimed trial.



4. During trial, the prosecution has examined altogether eleven witnesses in support of its case. P.W.-1 is Naresh Pandit, who is a co-villager. P.W.-2 is Shivdani Pandit, who is the cousin of the victim. P.W.-3 is Mahendra Yadav, who is also a co-villager. P.W.-4 is Pramod Pandit, who is also a cousin of the victim. P.W.-5 is victim herself. P.W.-6 Pradeep Pandit is the father of the victim. P.W.-7 Dr. Shweta Kumari Singh is a Medical Officer, who conducted medical examination of the victim. P.W.-8 Dr. Devendra Kumar was one of the members of the Medical Board. P.W.-9 is Rita Kumari, who was the first Investigating Officer. P.W.-10 is Ramadhar Yadav, who was the second Investigating Officer. P.W.-11 Manish Kumar Pandey is the Judicial Magistrate, who recorded the statement of the victim under Section 164 Cr.P.C.

5. Following documents have been exhibited by the prosecution during trial:-

Exhibit 1 is the signature of the victim on written report.

Exhibit 2 is the signature of the victim on the statement recorded u/s 164 Cr.P.C. before the Ld. Court.

Exhibit 3 is the signature of Dr. Shweta Kumari Singh on her medical report.

Exhibit 4 is the signature of Dr. Shweta Kumari



Singh on the report of medical board.

Exhibit 5 is the signature of Dr. Devendra Kumar on Radiology Report.

Exhibit 6 is the signature of Rita Kumari (Investigating Officer) on the memo of arrest.

Exhibit 7 is the signature of Rita Kumari (Investigating Officer) on the formal FIR.

Exhibit 8 is the signature of Sarita Kumari on the death certificate of the infant.

Exhibit 9 is the letter with reference to handing over the child to Nari Gunjan Institute.

Exhibit 10 is the application for postmortem report of the infant.

Exhibit 11 is the certified Copy of the Infant's treatment slip.

Exhibit 12 is the letter regarding enrollment of the infant.

Exhibit 13 is the order of the District Child Welfare Committee, Patna.

Exhibit 14 is the treatment slip.

Exhibit 15 is the Infant's examination papers.

Exhibit 16 is the application of Child Welfare Committee, Patna.

Exhibit 17 is the signature of Shri Manish Kumar Pandey (Judicial Magistrate, First Class, Jamui) on the 164 Cr.P.C. statement of the victim.

6. Defence has not examined any witness in support of its case.



7. However, one document Exhibit-A has been exhibited by the defence during trial, which is the application for permission to close supplementary investigation.

8. The learned trial court, after consideration of the evidence, came to the finding that the appellant was guilty of commission of offences under Sections 315, 506 IPC and Section 4 of the POCSO Act and thus he was sentenced in the manner as already mentioned hereinbefore *vide* judgment of conviction dated 23.12.2019 and order of sentence dated 06.01.2020. Being aggrieved by the aforesaid judgment of conviction and order of sentence, the appellant has preferred the present memo of appeal.

9. Since there has been no representation on behalf of the respondent no. 2 despite valid service of notice, this Court, *vide* order dated 05.01.2026 has appointed Ms. Akanksha Malviya, Advocate as *Amicus Curiae* to assist this Court on behalf of the respondent no. 2/the victim girl. Accordingly, Ms. Malviya assisted the Court after thorough preparation.

10. The learned counsel, Mr. Shashank Shekhar Sinha, appearing on behalf of the appellant vehemently submitted that the impugned judgment of conviction and order of sentence are bad in the eyes of law as well as on facts. It is a



case of false implication. The prosecution has miserably failed to prove that rape was even committed on the victim by the appellant and the whole occurrence is doubtful and not believable. There are material contradictions in the evidence of prosecution witnesses and some of the material witnesses have not even been examined. But the learned trial court has not considered these aspects and declared the appellant guilty in casual manner.

11. The learned counsel for the appellant further submitted that the FIR has been registered after a delay of 4-5 months and the reason given for such delay is not proper and satisfactory and for this reason, not believable. Referring to the written report of the victim, the learned counsel submitted that the manner of occurrence is not believable. From the written report, it appears the victim was subjected to rape on a number of occasions but surprisingly, she did not tell anybody about her ordeal. The falsity of the allegation is also apparent from the contradictions in the FIR and the evidence of witnesses especially the victim herself who has deposed as P.W.5. The learned counsel thus, submitted that there is no satisfactory reason given for not registering the FIR promptly and it makes the whole case of the prosecution suspect. This delay in lodging



the FIR immediately after commission of offence coupled with inability of prosecution to prove foundational facts would negate the presumption of Section 29 of the POCSO Act, which provides that the accused is presumed to have committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

12. On the point of delay in lodging the FIR, the learned counsel relied on a decision of the Hon'ble Supreme Court rendered in the case of *Thulia Kali vs. The State of Tamil Nadu*, reported in *(1972) 3 SCR 623* wherein the Hon'ble Supreme Court has held that the delay in lodging the FIR would raise considerable doubt regarding the veracity of the evidence of the witnesses and point to an infirmity in that evidence and would render it unsafe to base the conviction of the appellant. The Hon'ble Supreme Court has further held that the first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well



as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of after thought. It is, therefore, essential that the delay in lodging the report should be satisfactorily explained.

13. The learned counsel for the appellant has further submitted that the prosecution has failed to discharge its duty in proving the age of the victim. The victim, deposing as P.W.5, has stated that she has studied till Class-8, but the prosecution did not come forward with any definite proof of age of the victim. Under the provisions of the POCSO Act, it has been made clear that if any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record its reasons in writing for such determination. For determination of age of a victim of sexual offence, the Hon'ble Supreme Court in the case of *Jarnail Singh vs. State of Haryana*, reported in **(2013) 7 SCC 263**, considering the issue of determination of age of the victim, has held that Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to 'JJ Rules, 2007) should be the basis of determining age, both for a



child in conflict with law and a child who is victim of crime. Thus, age of the victim/prosecutrix was required to be determined by adopting procedure under Rule 12 of the JJ Rules, 2007. The Hon'ble Supreme Court has further held that under Rule 12 of the JJ Rules, 2007, age of a child is to be ascertained by adopting first available basis out of a number of options postulated in Rule 12(3) of the JJ Rules, 2007. It has further been held that if, in scheme of options under Rule 12(2), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause and highest rated option available would conclusively determine age of a minor. It has also been held that in scheme contemplated under Rule 12(3) of JJ Rules, 2007, it is not permissible to determine age in any other manner and certainly not on the basis of an option mentioned in a subsequent clause.

14. The learned counsel for the appellant has further submitted that Rule 12 of JJ Rules, 2007 provides that the age determination 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*. The learned counsel further submitted that only in absence of all the above documents, a Medical Board could be constituted to conduct ossification test or other test to estimate the age. The learned counsel further submitted that the same finds mention in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as JJ Act, 2015) wherein it has been provided that in case the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining (i) the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or a *panchayat*; (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board. The learned counsel has submitted that in the present case the prosecution has failed to bring on record



any documentary evidence regarding the age of the victim to show that she was a child on the date of occurrence. Even for ossification test, no Medical Board was constituted, although Medical Board was constituted to give opinion regarding termination of pregnancy of the prosecutrix. However, Dr. Devendra Kumar (P.W.8) is said to have conducted a test for age determination of the prosecutrix and he recorded the finding that age of the victim was about 15 years. The radiological report submitted by the P.W.8 has been marked as Exhibit-5, but the said report does not contain the thumb impression/signature of the victim. Thus, it appears the Dr. Devendra Kumar (P.W.8) had given a conclusion about the age of the victim/prosecutrix on 07.07.2018. But another doctor P.W.-7 Shweta Kumari Singh in her deposition has specifically mentioned that the age would be determined by the Board of Doctors, however, no such Board was constituted. On the adverse effect of thumb impression not being obtained on the report and the prosecution not proving the age, the learned counsel relied on a decision of this Court rendered in the case of ***Uday Kumar Singh @ Uday Kumar Kushwaha @ Uday Pratap Singh vs. the State of Bihar (Cr. Appeal (DB) No. 183/2019)***. The learned counsel has further relied on a decision of the Hon'ble Supreme Court rendered in



the case of *Rajak Mohammad vs. State of Himachal Pradesh*, reported in *(2018) 9 SCC 248* to stress the point that radiological examination may not be an accurate determination. Thus, the learned counsel for the appellant submitted that the prosecution has failed to prove the age of the prosecutrix beyond reasonable doubt.

15. The learned counsel for the appellant has further submitted that admittedly the victim gave birth to a child, but no DNA profiling was done to show that the appellant was the father of the child. This would have conclusively proved the culpability of the appellant, but the prosecution utterly failed in its duty and did not bring on record any scientific proof like DNA sampling to bring home the charge against the appellant.

16. The learned counsel for the appellant has next submitted that the prosecution story does not appear to be believable also for the reason that though four and half month has elapsed, but no one noticed the pregnancy. The mother of the victim was not examined, who would have been the best witness in these circumstances to depose about the situational facts. Even the scribe, who wrote the written report leading to registration of FIR, has not been examined. So there are chances of manipulation in the written report. For the sake of argument,



if it is taken that rape was committed with the prosecutrix, considering her age as claimed by the prosecution, she must have suffered injuries, but no such report has been brought on record for any injuries suffered by the victim/prosecutrix. The learned counsel also pointed out that the occurrence is stated to have taken place in the month of *Chaitra* and time of the occurrence is said to be 5.00 A.M; when in the villages, a large number of persons wake up early and it is also not believable that no one saw anything when the alleged occurrence took place. All these facts go to show that the prosecution case is on shaky grounds. If foundational facts have not been proved, the prosecution story cant not be sustained and in this regard, the learned counsel has relied on a decision of this Court rendered in the case of ***Heera Das vs. State of Bihar***, reported in, **2025(2) BLJ 617**.

17. The learned counsel for the appellant has also assailed the credibility of the victim as a sterling witness and regarding the qualities of sterling witness, learned counsel has referred to the case of ***Rai Sandeep @ Deepu vs. State (NCT of Delhi)***, reported in **(2012) 8 SCC 21**. The learned counsel for the appellant has submitted that for proving the allegation of rape, the victim should be a sterling witness. But there are



material contradictions in the story made out in the written report and the statement made before the learned Judicial Magistrate recorded under Section 164 Cr.P.C. as also in the deposition recorded before the court inasmuch as the prosecutrix has made improvement upon her statement. There are even material contradictions and inconsistencies in her statement. The learned counsel further submitted that in the written report, she stated that she was alone in her house and when she was called by the appellant, she refused to go and he forcibly took her to the porch of his house and committed rape with her by putting her on a *chauki* and gagging her mouth with *gamachha*. But in her statement under Section 164 Cr.P.C., she stated about her siblings, who were also present in her house and were sleeping. She further deposed in her statement under Section 164 Cr.P.C. that the appellant put her on the floor and also described in detail how the rape was committed. In the written report, the prosecutrix has not stated about her being given any injection by the appellant, but in her deposition before the court, she stated about administration of an injection to her. The learned counsel has further submitted that in her cross-examination, she has stated that adjacent to the house of the appellant, there are a number of houses and it was a dense locality and all the houses



are contiguous. She has also admitted that the time of occurrence was in the month of *Chaitra* and there was hustle and bustle and everybody was going to the fields for agriculture work. The learned counsel further submitted that there are even contradiction between the statement of prosecutrix and her father. The father of the prosecutrix, who deposed as P.W.6, in his cross-examination, was not able to give details about *Aanganwari* Centre where the prosecutrix was taken after she complained of pain in her stomach. Thus, learned counsel has submitted that the prosecutrix, who deposed as P.W.5, does not have the qualities of a sterling witness.

18. The learned counsel has further submitted that the prosecutrix in her deposition has stated that she first told about the occurrence to her *chacha* and *mama*, but these witnesses have not been examined. Similarly, the mother of the prosecutrix has also not been examined. If these witnesses would have been examined, true facts of the case would have become clear. Thus, learned counsel submitted that there are a number of inconsistencies and contradictions and improvement in the statement of prosecutrix, hence conviction cannot be based on such inconsistent evidence.

19. The learned counsel has lastly submitted that the



prosecution has failed to prove the allegations made against the appellant beyond reasonable doubt and reiterated that the impugned judgment of conviction and order of sentence passed against the appellant are otherwise bad in law as well as on facts and are liable to be set aside.

20. On the other hand, the learned APP for the State, Mr. Sujit Kumar Singh, has vehemently contended that there are no contradictions or inconsistencies in the prosecution case and the victim has narrated the manner in which occurrence took place and her version could not be doubted. The learned APP further submitted that the victim girl has clearly stated that she was threatened by the appellant and due to his fear, she did not report the matter when rape was first committed. The prosecution witnesses are natural witnesses and even the so called hearsay witnesses have witnessed the subsequent events and their evidence is also relevant. The learned APP further submitted that the matter was investigated and it was found that the victim was pregnant and this fact has come in the deposition of P.W.7, Dr. Sweta Kumari Singh. The prosecution has further proved all the allegations by cogent evidence. The relevant documents including the report of Medical Board as well as report of radiology have been marked as exhibits. The written



report leading to lodging of the FIR was also proved without any objection. The death certificate of the child of the prosecutrix was also brought on record and proved. Supported with the oral evidence, these documents go on to prove the charge against the appellant and, hence prosecution has effectively discharged its obligation and proved the case against the appellant.

21. The learned *Amicus Curiae*, appointed to represent the respondent no.2/victim, rebutting the contention of the appellant, has submitted that the prosecution has been able to prove its case beyond all reasonable doubts through its evidence. The learned *Amicus Curiae* has submitted that the delay in lodging the FIR is not much material in the given facts and circumstances of the case and the delay has satisfactorily been explained.

22. The learned *Amicus Curiae* has further submitted that in sexual offences the delay in lodging of the FIR can be for a number of reasons particularly due to the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. Hence, delay in lodging the first information report cannot be used as a



ritualistic formula for doubting the prosecution's case and discarding the same on the ground of delay. She further submitted that delay in lodging the FIR is immaterial if it stands explained and appellant cannot be discharged merely on the ground of delay in lodging of the FIR. In support of her contention, she has placed reliance on the following judgments ***Dildar Singh v. The State of Punjab Dildar Singh v. State of Punjab, (2006) 10 SCC 531 ; Deo Narayan Yadav v. State of Bihar, 2024 SCC OnLine Pat 3010 ; Manendra Prasad Tiwari v. Amit Kumar Tiwari, (2022) 20 SCC 757.***

23. On the point of determination of age of the victim, the learned *Amicus Curiae* has submitted that there could be no quarrel with the proposition of law as laid down in the case of ***Jarnail Singh*** (supra). She also referred to Section 94 of the JJ Act in this regard and submitted that since no matriculation or school certificate was available, the next mode provided for determination of age of the victim had been adopted and a medical examination was conducted to determine the age of the victim and her age came out to be 15 years. She relied on a decision of the Hon'ble Supreme Court rendered in the case of ***Shah Nawaz vs. State of UP***, reported in ***(2011) 13 SCC 751*** in support of her contention. She has further submitted



that the background of the victim is also to be considered as the victim comes from a lower strata of society and absence of documentary evidence is natural. She stressed that there is no specific provision under the POCSO Act for determination of age of the victim, hence Section 94 of the JJ Act is applicable for all such determination of age.

24. The learned *Amicus Curiae* has further submitted that even in the FIR, the victim has claimed her age to be 16 years at the time of registration of the FIR and 4-5 months back she was 15 years and 6 months when the occurrence took place. Therefore, the doctor coming to a finding that the age of the victim was about 15 years is not incorrect. Therefore, foundational facts for prosecution under the POCSO Act has been clearly laid down as age of the victim has been proved firstly through the assertion of the victim and secondly by way of medical evidence. She further submitted that, moreover, admittedly the victim had been studying in Class-8 and a reasonable presumption about the student of Class-8 would be that she would be aged about 15 years. Moreover, the doctor did not put the age of the victim in a bracket and she relied on a decision of this Court rendered in the case of ***Deo Naryan Yadav vs. State of Bihar***, reported in ***2024 SCC OnLine Pat***



3010 wherein it has been held that medical opinion could be very useful guiding factor to be considered along with attending circumstances. She has also relied on a decision of the Hon'ble Supreme Court rendered in the case of ***Mukarrab vs. State of UP***, reported in **(2017) 2 SCC 210** in this regard. The learned *Amicus Curiae* has further submitted that it is not a case of marginal minority to take out the case from the ambit of POCSO Act.

25. The learned *Amicus Curiae* has further submitted that absence of injury on the victim does not necessarily imply false allegation or consent to sexual intercourse and in support of this argument, she has relied on a judgment of the Hon'ble Supreme Court rendered in the case of ***State of Rajasthan v. N.K.***, reported in **(2000) 5 SCC 30**. She has further submitted that the absence of detailed medical evidence or external injuries does not automatically weaken the prosecution case when other evidence is robust and in support of this argument, she has relied on a judgment rendered by the Hon'ble Supreme Court in the case of ***Deepak Kumar Sahu v. State of Chhattisgarh***, reported in **2025 SCC OnLine SC 1610**. She has then submitted that the sole testimony of the prosecutrix can certainly be relied upon for conviction provided that the



testimony is found to be credible and consistent. She has submitted that even if there was certain minor discrepancies in the testimony of the *prosecutrix*, it does not render the testimony unreliable as such discrepancies are not fatal to the case, and in support of her contention, she has placed reliance on a judgment rendered by the Hon'ble Supreme Court in the case of ***Phool Singh v. State of M.P.***, reported in ***(2022) 2 SCC 74***.

26. The learned *Amicus Curiae* has further submitted that a defective investigation cannot be fatal to the prosecution when ocular testimony is found credible and cogent and she has relied on a decision rendered by the Hon'ble Supreme Court in the case of ***Munna Lal vs. State of Uttar Pradesh***, reported in ***2023 SCC OnLine SC 80 :: (2023) 18 SCC 661***. She has further submitted that the accused cannot take advantage of faulty investigation if there exists other clinching evidence and has relied on a decision rendered by the Hon'ble Supreme Court in the case of ***Zindar Ali Sheikh vs. State of West Bengal***, reported in ***(2009) 3 SCC 761 :: 2009 SCC OnLine SC 258***.

27. The learned *Amicus Curiae* has reiterated that the victim is a sterling witness and the contradictions or inconsistencies pointed out by the learned counsel for the appellant are not only minor but insignificant considering the



whole occurrence and the persons involved. She has further submitted that in the context of Indian society, no female would like to get stigmatized by falsely claiming herself to be a victim of rape. There is no reason for the prosecutrix to come up with allegation of rape against the appellant and whatever she has stated, she has only deposed the truth and the learned trial court has rightly relied upon her statement and the evidence adduced on behalf of the prosecution and rightly convicted and sentenced the appellant. Thus, no interference is required by this Court in the impugned judgment of conviction and order of sentence.

28. We have given our thoughtful consideration to the rival submission of the parties and perused the material available on record.

29. The issue before this Court is whether the prosecution has been able to prove its charge against the appellant beyond all reasonable doubt and whether the judgment of the learned trial court is correct and does not suffer from any infirmity.

30. The prosecution has examined altogether eleven witnesses in support of its case before the learned trial court. But the defence has not examined any witness in support of its



case.

31. P.W.-1 Naresh Pandit is a co-villager of the prosecutrix and he has deposed in his examination-in-chief that the occurrence took place six months back and his deposition was recorded on 30.01.2019. This witness further deposed that Anil Pandey committed rape with prosecutrix and she became pregnant. The prosecutrix was threatened by Anil Pandey that if she told about this incident to any person, her parents would be killed and for this reason, the prosecutrix did not tell about the incident to anybody. Due to sudden surge of pain in the stomach of the prosecutrix, she was taken to *Anganwari Kendra* by her parents where the fact came to notice that she was pregnant. This witness also deposed that Anil Pandey used to tease his labourers.

In his cross-examination, this witness has deposed that the prosecutrix told him about her pregnancy about six months back in her house. This fact was also told to Mahendra Yadav, Pradeep Pandit, Shivdani Pandit, Pramod Pandit and other villagers. At that time, pregnancy of prosecutrix was two and half months old. This witness also deposed in his cross-examination that Anil Pandey took the prosecutrix to the doctor for abortion about eight and half months back and the parents of



the prosecutrix had been knowing the fact that Anil Pandey had taken the prosecutrix to the doctor for abortion. This witness also deposed that there is no dispute between this witness and Anil Pandey and he is a family man having wife and children, who stays with them in his house.

32. P.W. 2 Shivdani Pandit is the cousin of the prosecutrix and his deposition was recorded on 21.02.2019. This witness deposed in his examination-in-chief that the occurrence took place eight months back as some commotion took place in the village and he went there and came to know that Anil Pandey committed rape with the prosecutrix. This witness further deposed that he heard about Anil Pandey taking the prosecutrix to Jamui for abortion. When the prosecutrix returned, she was asked about it by her parents and she told them that she went to Jamui for abortion. He came to know about this fact from the villagers as well as prosecutrix.

In his cross-examination, this witness deposed about his relationship with the prosecutrix and her father stating that they are his cousin and his uncle, respectively. This witness further deposed in his cross-examination that he came to know on 06.07.2018 that rape was committed with the prosecutrix and it was committed 2-3 months prior to 06.07.2018. This witness



also deposed that the parents of the prosecutrix were not knowing that she had been taken to Jamui for abortion. But she returned in the evening accompanied by the appellant. This witness admitted that prior to that the prosecutrix did not tell him that she was subjected to rape. She did not tell him the name of doctor nor has shown him any documents for the treatment. This witness has further deposed that the prosecutrix used to do work of labourer with Anil Pandey and her parents also used to work with Anil Pandey. This witness deposed that the parents of the prosecutrix did not tell him about the commission of rape. This witness has further deposed that the appellant is married having two daughters and two sons and his wife is alive and she is beautiful and Anil Pandey stayed with wife and children in his house.

33. Not much reliance can be placed upon the evidence of this witness (P.W.2) as he appears to be a hearsay witness and it seems that he was not told about the commission of rape either by the prosecutrix or by her parents.

34. P.W.3 Mahendra Yadav recorded his deposition on 11.03.2019 wherein he deposed in his examination-in-chief that the occurrence took place 8-9 months back. This witness further deposed that while he was going towards the market, he saw a



big crowd at the house of the prosecutrix and he went there and asked why the crowd had assembled, then the prosecutrix told him that Anil Pandey forcibly committed rape with her and she became pregnant. This witness further deposed that he inquired from the prosecutrix as to why she did not disclose about it in the village earlier, then she told him that she was threatened by Anil Pandey with life. When the prosecutrix went for examination at the *Anganwari*, she was told about her pregnancy. Thereafter, Anil Pandey took the prosecutrix for abortion.

In his cross-examination, this witness deposed that Anil Pandey is married man and his wife is alive and they have five children. This witness also deposed that he could not say whether any medicine was administered by Anil Pandey to abort her pregnancy and the prosecutrix did not tell him about administration of any such medicine. This witness also deposed that the prosecutrix did not tell him about the time period of pregnancy and also did not tell him about the time when the rape was committed. This witness also deposed that he did not accompany them to the doctor. He was also not told when the rape was committed and he did not go to the doctor at *Anganwari* and did not accompany the parents of the



prosecutrix. This witness further deposed that he did not know whether the prosecutrix was taken to abort her pregnancy by Anil Pandey with consent of her parents. This witness further deposed that he stayed at the place for half an hour and did not know what happened thereafter. He has been deposing what he heard from others and also from the prosecutrix. This witness also deposed that he was told by the father of the prosecutrix that his name was given in the list of the witnesses and he has brought him for deposition.

35. This witness also appears to be a hearsay witness and no reliance can be placed on the evidence of such witness.

36. P.W.4 Pramod Pandit was examined on 25.03.2019 and he is nephew of the father of the prosecutrix and he is a shopkeeper. This witness deposed in his examination-in-chief that occurrence took place 8-9 months back. There was uproar in the village that rape has been committed by Anil Pandey. Hearing the noise and uproar, he went to the house of the prosecutrix where he was told by the prosecutrix about Anil Pandey committing rape with the prosecutrix and she becoming pregnant.

In his cross-examination, attention of this witness was drawn to his statement made under Section 161 Cr.P.C. and he



denied the suggestion that he did not give any statement before the police that on hearing uproar in the village, he went to the house of the prosecutrix. This witness also denied the suggestion that he did not give statement before the police to the effect that he went to the house of the prosecutrix and the prosecutrix told him that Anil Pandey had committed rape with her.

37. P.W.5 is the victim/prosecutrix in this case and her deposition was recorded on 03.05.2019. In her examination-in-chief, this witness deposed that about one year and six month back at 5.00 A.M., her parents had gone to the field of Anil Pandey for cutting wheat crops and she was alone in her house. When she went outside to ease herself, Anil Pandey called her and she went to his porch where he put her down on a *chauki* and gagged her mouth with *gamachha* and committed rape with her. He threatened that if she raised any alarm, then she and her family members would be killed. She did not tell anybody about the occurrence due to fear. This witness further deposed that four and half month, thereafter she had pain in stomach. She told her mother about pain and she was taken to *Anganwari Centre* for treatment where, after examination, the doctor told them that she was pregnant. Subsequently, she told everyone



about the incident. Thereafter, Anil Pandey brought her to Jamui for treatment and she was administered an injection in her arm. Her parents followed there. Meanwhile, Anil Pandey went to his house leaving her behind. This witness further deposed that she returned to her house and on the next day, i.e., 07.07.2018, the police personnel came and took her written statement on which she put her signature and on her identification, her signature on written report was marked as Exhibit 1. This witness also deposed that she was sent to the hospital for treatment on the same day by the police. This witness also admitted her signature on the statement made before the police and this document was marked as Exhibit 2. This witness further deposed that thereafter she went to Indira Gandhi Hospital at Patna where she stayed for one and half month and gave birth to a child by operation. Child was handed over to an orphanage.

In her cross-examination, this witness deposed that near the house of Anil Pandey, there are houses of Rahul Pandey, Vijay Pandey, Pankaj Pandey, Ashok Pandey, Hathiya Pandey and also of some other persons. The place where the house of Anil Pandey is situated is a densely populated locality. She also deposed that her house is adjacent to the house of Anil Pandey. This witness further deposed that the occurrence took



place in the month of *Chaitra* and it was the period when wheat crop is cut. The persons of neighbourhood had been going for cultivating their fields. This witness also deposed that next day after the commission of rape, she told the police about the occurrence. In her cross-examination, this witness further deposed that the police came to her door a day after lodging of the case and she met the police for the first time at her house. This witness also deposed that she has studied till Class-8 but left her studies after the occurrence. This witness further deposed that prior to lodging of the case, the family members deliberated upon the same as to how the case was to be lodged. This witness in her cross-examination admitted that for aborting her pregnancy, she was taken by Anil Pandey to the hospital where he left her behind and she returned with her parents. She was brought alone for treatment by Anil Pandey. She further deposed that after the occurrence, she did not meet the persons of neighbourhood and she told her *Mama* and *Chachi* about the occurrence but she could not name them. This witness also deposed that she did not know whether she was taken to a government hospital or a private hospital.

38. P.W.6 Pradeep Pandit, who is the father of the prosecutrix, was examined on 17.05.2019. In his examination-



in-chief, this witness deposed that the prosecutrix is his daughter and the occurrence took place 8-10 months ago. This witness also deposed that the prosecutrix is his daughter and she suffered stomach pain and the womenfolk came and examined her pain, who told that she was pregnant. When she was taken to *Anganwari*, her pregnancy was confirmed. Thereafter, when he enquired from his daughter as to how this has happened, then his daughter told him that Anil Pandey committed rape with her and she has been carrying his child in her womb. Thereafter, he went to the house of Anil Pandey and scolded him and he told him that he did not do anything. Afterwards, he brought his daughter to Jamui for treatment and the doctor told him that his daughter was pregnant. Anil Pandey fled away from the place leaving behind his daughter.

In his cross-examination, this witness deposed that prior to the occurrence, Anil Pandey never did any wrongful act either with this witness or his family. This witness also deposed that Anil Pandey was married and he has five children. His daughter is the eldest, who is aged about 17-18 years and she is already married. This witness described the boundary of the house of Anil Pandey and further deposed that adjacent to the house of Anil Pandey, there are houses of other villagers. This



witness further deposed in his cross-examination that on any other day, his co-villagers wake up at 5-5.30 A.M. However, this witness showed his ignorance about the place of *Anganwari* where his daughter was taken for treatment, rather he deposed that he does not know whether any doctor sits in *Anganwari Centre*. This witness further deposed that no document was handed over to him for treatment of his daughter either at *Anganwari* or at Government Hospital, Jamui.

39. P.W.7 Dr. Shweta Kumari Singh is the doctor, who examined the prosecutrix. In her examination-in-chief, this witness deposed that she examined the prosecutrix on 07.07.2018 at around 7.55 in the evening. After examination, she recorded her findings as follows :

“Physically Examination- (i) Mark of identification- (1) Mole on upper lip (2) Mole on right arm.

(ii) No sign of external injury on hands, legs, arms, chest etc.

(iii) Pubic hair and axillary hairs present.

(iv) P/A- Uterus 16-18 weeks size.

(v) Vagina admits one finger loose.

Lab Findings- (I) Vaginal swab smear examination done by Dr. Arun Kumar Singh shows no spermatozoa, no RBCs but few epithelial cells seen.

(ii) U.S.G. shows single live intrauterine fetus of 17 weeks 1 day +/- days. G.A. with adequate



liquor and volume.

(iii) U.P.T.= positive.

All reports attached.

Age will be determined by the board of Doctors.

Conclusion- Victim had undergone sexual intercourse and is pregnant with 17 weeks 1 day +/- 8 days. Gestational age fetus”.

On identification by this witness, the report prepared by this witness and bearing her signature was marked as Exhibit-3.

This witness further deposed in her examination-in-chief that on 16.08.2018, in the Sadar Hospital, Jamui, a Medical Board was constituted for examining the prosecutrix and the Medical Board recorded the following findings :

(i) L.M.P.-27.02.2018 (ii) P/A- Uterus 24-26 weeks size.

From above findings the G.A. is approx 24 weeks +/- 1 week.

According to M.T.P. Act, 1971 pregnancy of a girl about 15 years old can be advised by two M.O. upto 20 weeks only. And since it is G/A 24 weeks +/- 1 week, so termination of pregnancy can not be possible in this hospital (Sadar Hospital, Jamui).

This witness also deposed that the report of Medical Board was in her writing and signature but it was prepared by



all doctors of the Medical Board including this witness. This report of Medical Board was marked as Exhibit-4.

In her cross-examination, this witness deposed that she did not recommend USG in her report. She also deposed that she does not know how long spermatozoa can be found in vagina following sexual intercourse. This witness also deposed that she did not find any injury in and around vagina. She further deposed that it may or may not cause injury when a full grown male organ (Penis) is inserted into the vagina of a girl.

40. P.W.8 Dr. Devendra Kumar has been examined on 09.07.2019 and in his examination-in-chief, this witness deposed that on 07.07.2018, he was posted in Sadar Hospital, Jamui as Medical Officer and on the same day, he examined the prosecutrix for her age determination and found the following :

Height- 04 feet 8 inch

Weight- 39 Kg.

Teeth- 7/7

7/7

M.I.- Til on right forearm.

Radiology-

X-ray of right elbow (AP & Lat.), Rt wrist (AP & Lat.) ad pelvis done by Sadar Hospital, Jamui on 07.07.2018.

X-ray of right elbow shows epiphysis of radial head and olecranon process fused.

X-ray of right wrist shows there is no



fusion of epiphysis of lower end of radius and ulna.

X-ray of pelvis shows epiphysis of iliac crest has appeared.

From the above finding, it is concluded that the age of the prosecutrix is about 15 years.

This report was in his pen and writing and it was marked as Exhibit-5.

In his cross-examination, this witness deposed that his finding is based on ossification of bone. This witness further deposed that he is not aware of chromosome tally method. It is not true that the report prepared by him is not scientific.

41. P.W.9 Rita Kumari is the investigating officer of this case. This witness deposed in her examination-in-chief that on 07.07.2018, she was holding the post of SHO of Jamui Mahila Police Station. After taking over the investigation of Jamui Mahila P.S. Case No. 40 of 2018, she recorded the further statement of the prosecutrix and sent the prosecutrix for medical treatment at Sadar Hospital, Jamui. Thereafter, she went for examination of place of occurrence and found the place of occurrence to be bricks and cement house of Anil Pandey. This witness further deposed that there was a porch (*veranda*) in front of the house of Anil Pandey. This witness also deposed that she recorded the statement of Shivdani Pandit and Pradeep



Kumar. Thereafter, she arrested the accused from Manjhwe Hill. This witness also deposed that thereafter, she recorded the statement of Mahendra Yadav. The statement of victim girl was got recorded under Section 164 Cr.P.C. This witness also deposed that she submitted charge sheet bearing no. 54/18 on 07.09.2018 under Sections 376, 315, 506 of the Indian Penal Code and Sections 3/4 of POCSO Act. This witness also deposed that she took permission for DNA Test and after her transfer, she handed over the charge to one Gyan Bharti. This witness identified the arrest memo which was in her handwriting and signature and the same was marked as Exhibit-6.

In her cross-examination, this witness deposed that she did not find any sign of incident taking place at the spot. This witness also deposed that she did not record the statement of all persons whose houses were adjacent to the house of the place of occurrence. This witness also deposed that the witnesses whose statement she has recorded were neither called after issuance of notice by her nor any one produced the witnesses. As no DNA test was conducted, she did not get any report.

42. P.W.10 is Ramadhar Yadav, who appears to be the



second investigating officer. This witness in his examination-in-chief deposed that after perusing the records of the case, he found that the blood sample of the mother and child taken by the doctor at IGIMS was not brought before the Magistrate or any Investigating Officer. Thereafter, for conducting the DNA Test during investigation, he reached Nari Gunjan Srijani Dattak Sansthan, Danapur and made contact with its Project Coordinator and recorded her statement who gave her the death certificate of the child and other documents after attestation. Thereafter, he informed the court and found that it was not possible to conduct the DNA Test after the death of child. This witness further deposed that the copy of the death certificate was attested by one Sarita Kumari and the said document has been marked as Exhibit-8. This witness got exhibited certain documents related to child like post mortem report, treatment papers of the child and giving name of the child. All these documents were exhibited after objection.

In his cross-examination, this witness deposed that he gave an application before the learned trial court on 11.07.2019 mentioning the fact that the child has died on 15.01.2019 and for this reason it is not possible to conduct the DNA Test.

43. P.W.11, Manish Kumar Pandey, is the Judicial



Magistrate, who recorded the statement of the victim girl/prosecutrix under Section 164 Cr.P.C. and on identification of this witness, the statement was marked as Exhibit-17.

44. After closing the prosecution evidence, the learned trial court recorded the statement of the appellant on 16.07.2019 under Section 313 Cr.P.C. for enabling him to personally explain the circumstances appearing in the evidence against him, however in his statement, he denied the allegations and claimed himself to be innocent.

45. From the discussion of the evidence of the prosecution witnesses and the exhibits, the first contention of the learned counsel for the appellant about the delay in lodging the FIR could be negated on consideration of the facts discussed hereinafter.

46. It is obvious that the prosecutrix comes from a poor family and her parents are labourers. In such circumstances, if rape was committed by the landlord/ the appellant herein and threat was extended by the appellant to the prosecutrix, keeping mum for quite long period can not be said to be unnatural. Rather, it appears to be believable in the given facts and circumstances of the case as brought on record by the prosecution through its evidence.



47. Similarly, absence of exact date of commission of the offence of rape can not be stressed too much to discredit the prosecution story. There is no eye witness to the occurrence of rape and none has claimed himself/herself to be an eye witness. So it leaves us only with the statement of the victim girl and other corroborative circumstances. The victim girl in her deposition has stated that the occurrence took place in the month of *Chaitra* and this fact along with statement of other witnesses and the period of pregnancy of the prosecutrix, a rough estimate of time of occurrence could be gathered. The pregnancy was discovered on 07.07.2018 when the medical examination was done and uterus was found 16-18 weeks of size. This puts the date of commission of offence to be 16-18 weeks prior to 07.07.2018 and it roughly comes to the month of April which corresponds with the Hindu Calendar of *Chaitra*.

48. Much stress has been put on contradictions and inconsistencies as well as improvement made by the witnesses. It has also been harped that the story of prosecution is not believable considering the time gap between the alleged occurrence and discovery of this fact. Further stress has been put on absence of injuries upon the victim/prosecutrix. So far as the so called inconsistencies and contradictions are concerned,



we are of the opinion that these contradictions or inconsistencies are not of such nature so as to disbelieve the allegation against the appellant. The appellant has not been able to show major contradictions or inconsistencies in the statement of the witnesses so as to make the whole prosecution suspect. The learned counsel for the appellant has tried to show that there are different versions in the written report leading to lodging of the FIR and the allegation of the victim girl as well as other witnesses like the victim being forcibly taken to his door by the appellant or the victim voluntarily coming to the door of the appellant on his call or the appellant putting the victim on floor while committing rape or victim being forced on a *chauki*. It is material to take note of the fact that the victim has more or less stuck to her story in the FIR as well as in her deposition. The statement of other witnesses is immaterial as they are not eye witnesses and whatever deposition has been recorded by these witnesses, the same is on the basis of statement of victim/prosecutrix. Similarly, the inconsistencies in the statement of witnesses as to how the victim was taken to hospital as to when and why the victim was taken to hospital or whether her parents accompanied her or not, are not of much significance because the appellant is facing the charges of



penetrative sexual assault on a minor girl and subsequent events and subsequent conduct is not of such nature that it may cast a doubt over the prosecution story. Therefore, these inconsistencies need to be ignored.

49. The credential of the prosecutrix as a sterling witness has been challenged by the appellant. It has been submitted on behalf of the appellant that the prosecutrix deposing as P.W.5 is a tutored witness and she has tried to improve her statement now and then but we are afraid that there is no such improvement from the written report given by the prosecutrix to her deposition as P.W.5. Before assailing her statement made before the police and thereafter before the learned Judicial Magistrate and lastly before the learned trial court, it is to be borne in mind that the prosecutrix is a merely a girl aged about 16 years, who has suffered the agony of rape which casts more aspersion on the victim than the perpetrator in the society even today. It has been rightly said that sexual assault on any count is attack against human dignity and leaves a mental scar on its victim, therefore it is always the victim who is at the receiving end. Hence, the statement of victim girl/prosecutrix needs to be considered in the light of these facts and also the facts and circumstances of the case in hand. The



prosecutrix is consistent in her statement about appellant committing rape with her and consequently, she becoming pregnant. Her pregnancy has also been taken note of by P.W.-7 Dr. Shweta Kumari Singh in her medical examination report. The medical examination report proves beyond doubt that the prosecutrix was sexually ravished and this fact coupled with the statement of the victim girl shows perpetrator of sexual assault is the appellant. No other contradictory fact absolving the appellant as perpetrator of the crime has come on record. Therefore, the argument on behalf of the appellant that no DNA test was conducted on the child also loses its significance. If DNA test would have been conducted on the child as well as the appellant and the result would have come positive, it would have clinched the issue in favour of the prosecution without any doubt. If the said test was not done, that does not mean that the prosecution has failed in its duty to bring home the charges against the appellant. The evidence on record is sufficient to prove that it is the appellant who committed the offence of rape with the prosecutrix. The submission that the prosecutrix is not a sterling witness, does not hold much water. The Hon'ble Supreme Court in the case of **Rai Sandeep** (supra), in paragraph 22, held 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”.

50. Therefore, on the touchstone of the aforesaid parameters laid down by the Hon’ble Supreme Court in the case of **Rai Sandeep** (supra), we have no hesitation in holding that the prosecutrix qualifies as a sterling witness and her version of story can be accepted by this Court without demur.

51. Now, we come to the issue of challenge to the age of the prosecutrix. At this juncture, it is also advantageous to take note of various amendments in the POCSO Act as well as in the Indian Penal Code which have made the punishment for



commission of the sexual offences under these two acts harsher.

52. Both sides have relied on the decision of the Hon'ble Supreme Court in the case of **Jarnail Singh** (supra) regarding the manner in which the age of the victim is to be determined as there is no provision under the POCSO Act. While dealing with the case of the prosecutrix in the aforesaid case, the Hon'ble Supreme Court held that the rules relating to age determination of a child in conflict with law shall equally apply for determination of age of a victim of crime. The Hon'ble Supreme Court further held that in case an entry of date of birth is available in matriculation certificate, the same shall be final and conclusive and no other evidence is to be relied upon. The Hon'ble Supreme Court reiterated that it is only in absence of any of the certificates as mentioned in first three option of Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter refereed to as JJ Rules, 2007), the age of concerned child can be determined on the basis of medical opinion. The observation made in the case of **Jarnail Singh** (supra) regarding determination of age has been given statutory shape in Section 94 of the JJ Act and the said provision reads as under:-

“94. Presumption and determination of age.—(1) Where, it is obvious to the Committee or



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

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

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

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

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

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



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

53. We may now refer to Section 4 of the un-amended POCSO Act, which reads as under :

“4. Punishment for penetrative sexual assault.—Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine”.

54. The POCSO Act was amended in the year 2019 to make punishments more stringent by increasing the minimum imprisonment term from seven years to ten years for general cases, and to twenty years for cases involving a child below sixteen years. Section 4 of the amended POCSO Act, which came in effect from 16.08.2019, reads as under:

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

[(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.]”

55. Nonetheless, the aforesaid amendment would have no bearing upon the case of the appellant as the amendment came into effect on 16.08.2019, however the occurrence in the present case took place in the year 2018.

56. At the same time, Section 376 (1) of the Indian Penal Code prior to its amendment, which came into force on 21.04.2018, reads as under:-

“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 shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine”.

57. However, the Indian Penal Code was amended in the year 2018 and after the said amendment, Section 376(1) reads as under :

“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 shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine”.

58. Further, a new sub-section (3) has been inserted in Section 376 of the Indian Penal Code and it reads as under :

“(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”.

59. The purpose of the amendment of the Indian Penal Code brought in the year 2018 seems to bring in a deterrent effect by making the punishment severe and stringent and making it subjective to the age of the victim as also to protect such children from the roving eyes of sexual marauders so that such person would refrain from any misadventure considering the severity of the sentence. However, it is a matter of study whether making punishment more severe has/had the desired effect. The amendment in the Indian Penal Code providing for harsher punishment would come into play in the light of Section



42 of the POCSO Act, 2012. Section 42 read as under :

“42. Alternate punishment.- Where an act or omission constitutes an offence punishable under this Act and also under sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376DB, 376-E, section 509 of the Indian Penal Code (45 of 1860) or section 67-B of the Information Technology Act, 2000 (21 of 2000), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree”.

60. Therefore, it is clear that when an offence which is punishable under POCSO Act, 2012 is also an offence under the Indian Penal Code, the law provides that offender shall be liable to be punished either under the POCSO Act or under the Indian Penal Code so far as it provides for punishment which is greater in degree.

61. A bare perusal of Section 94 of the JJ Act, 2015 makes it clear that for determination of age of the victim, the documentary evidence in the form of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board is to be first looked into and in



absence thereof; the birth certificate given by a corporation or a municipal authority or a *panchayat* is to be looked into and only in absence of the above documents/certificates, the age shall be determined by an ossification test or any other latest medical age determination test.

62. In the case at hand, there could be no matriculation or equivalent certificate as the victim girl deposing as P.W.5 has stated in her cross-examination that she has studied only up to Class-8 and then she has dropped her studies after the occurrence. Then comes to the consideration of the birth certificate given by a Corporation or a municipal authority or a panchayat or the school first attended to prove the age of the prosecutrix, but the prosecution has failed to bring on record any such document and has further failed to show why the said document was not produced. Nonetheless, we find that the victim girl was subjected to medical examination for determination of her age and on the basis of X-ray of right elbow, right wrist and pelvis area, the doctor has concluded that the age of the victim was about 15 years.

63. It is pertinent to take note of the fact here that no Medical Board was constituted for determination of age of the prosecutrix though victim was referred to radiologist for



determination of her age. Similarly, the reference range in determination of age has not been mentioned in the report of doctor (P.W.8), rather the doctor has concluded that the age of the victim was about 15 years. It is to be noted that the medical test though gives us the estimation of age but it does not provide us with the precise and definite age. It rather gives us a reference range which, generally has a margin error of ± 2 years. The Hon'ble Supreme Court in the case of ***Jaya Mala vs. Home Secretary, Govt. of Jammu & Kashmir***, reported in ***AIR 1982 SC 1297***, has held that judicial notice can be taken that the error of margin to be applied in the determination of age of the victim is two years on either side. In the present case, as per the report of doctor, the age of the victim was about 15 years and therefore, taking the margin of two years in favour of the appellant, it can safely be said that the age of the victim on the date of occurrence could be more than 16 years. However, the age of the victim would still come to be below 18 years and therefore, she would be a child for the purpose of POCSO Act.

64. Moreover, the opinion has been given by an individual medical practitioner and not by any medical board which might have consisted of a psychologist, radiologist and a dentist. Therefore, there appears to be some doubt over the



correct age of the victim/prosecutrix. It is a well settled law that in case there is any doubt over the age of the victim, under the criminal law jurisprudence, the benefit would go to the accused and in the instant case the appellant. The Hon'ble Supreme Court in the case of *Sunil vs. State of Haryana*, reported in *(2010) 1 SCC 742* has held that in a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date. This observation was made when the appellant was facing allegation of rape of a minor.

65. Thus, we are of the view that the appellant has succeeded in proving that the prosecutrix was aged more than 16 years on the date of occurrence, hence the appellant could avoid the severity of minimum punishment as the punishment which could be inflicted upon the appellant would be a minimum of 7 years and maximum of life imprisonment.

66. There is yet another aspect of the matter that the amendment in the Indian Penal Code prescribing minimum sentence of 10 years for penetrating sexual assault came into effect on 21.04.2018. We have already discussed and found the prosecution story about the appellant committing rape with the



prosecutrix in the month of *Chaitra* 2018 to have been proved beyond all reasonable doubts. Now taking *sua sponte* judicial notice of the calendars of the year 2018, it appears that *Chaitra* started from 22.03.2018 and ended on 21.04.2018, thus it can be safely assumed that the occurrence took place in-between 22.03.2018 and 21.04.2018. As the amendment in Section 376 of Indian Penal Code came into effect on 21.04.2018, the case of the appellant would be covered by the sentence provided under the un-amended Section 376 of Indian Penal Code which prescribes a minimum sentence of 7 years, which may extend to life imprisonment for life.

67. Therefore, the minimum sentence which can be imposed upon the appellant would be 7 years which may extend to life imprisonment with fine, however in the present case, the learned trial court has imposed the sentence of life imprisonment upon the appellant herein.

68. In the light of the discussions made here-in-before and for the forgoing reasons, we have no hesitation in holding that the appellant has rightly been convicted by the learned trial court, hence the judgment of conviction dated 23.12.2019 passed by the learned court of Special Judge-cum-Additional District and Sessions Judge-1, Jamui, against the appellant is



hereby confirmed.

69. No doubt, the offence committed by the appellant is heinous and reprehensible, still considering the fact that the appellant is stated to be a middle aged man having wife and five children and further considering the fact that the appellant is in custody since 07.07.2018, *i.e.*, since about quarter to eight years as also considering the clean antecedent of the appellant, we are of the considered opinion that a liberal view can be taken on the issue of sentence by reducing the term of sentence to the period of imprisonment already undergone by the appellant in this case.

70. Consequently, the judgment of conviction dated 23.12.2019 is upheld and the order of sentence dated 06.01.2020, passed by the learned court of Special Judge-cum-Additional District and Sessions Judge-1, Jamui in Protection of Children from Sexual Offences (POCSO) Special Case No. 23/2018, arising out of Jamui Mahila P.S. Case No. 40/2018, is modified and reduced to the period of imprisonment already undergone by the appellant. However, the amount of fine as imposed by the learned trial court will remain the same and in default of payment thereof, the appellant shall undergo six month's additional imprisonment. Accordingly, the appellant is directed to be released from jail forthwith unless required in any



other case.

71. With the aforesaid modification in the order of sentence dated 06.01.2020, the present appeal is partly allowed to the said extent.

72. Let the lower court records be sent to the learned trial court, henceforth.

73. *Ms. Akanksha Malviya, Amicus Curiae* was appointed to assist this Court on behalf of the respondent no.2. We put on record our words of appreciation for able assistance rendered by her. The Patna High Court Legal Services Committee is hereby directed to pay a sum of Rs. 10,000/- (Rupees Ten Thousand Only) to her towards her professional fee.

(Mohit Kumar Shah, J)

(Arun Kumar Jha, J)

V.K.Pandey/-

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