

IN THE HIGH COURT OF JUDICATURE AT PATNA

Pawan Kumar

Vs.

State of Bihar

CRIMINAL APPEAL (DB) No. 822 of 2022

[Arising Out of PS. Case No.-504 Year-2018 Thana- JAHANABAD District- Jehanabad]

16 May, 2023

(Hon'ble Mr. Justice A. M. Badar and Chandra Shekhar Jha, JJ.)

Issue for Consideration

Whether judgment of conviction and the consequent order for sentence passed by the learned District and Sessions Judge VI-cum-Special POCSO Judge, Jehanabad, in Special POCSO Case No. 44/2018 arising out of Jehanabad P.S. Case No. 504/2018 is correct or not?

Headnotes

Indian Penal Code, 1860—Sections 366A, 376—Protection of Children from Sexual Offences Act, 2012—Section 4—as per informant, her niece was enticed and taken away by appellant, with intension of committing sexual assault.

Held: Informant failed to produce any documents in favour of date of birth of victim as issued by her first attending school—doctor assessed age of victim on the basis of radiological examination ranging between 19-20 years—at time of occurrence, victim was major and no wrong act was committed upon her by appellant—she specifically deposed that appellant was her neighbour and she went with him out of her own sweet will—doctor found no external or internal injuries upon victim—principle of law that rape is a legal finding not a medical one—judgment and order of conviction set aside—appeals allowed—appellant acquitted of the charges levelled against him.

(Paras 28, 29, 30)

Case Law Cited

Jarnail Singh vs. State of Haryana, (2013)7 SCC 263—**Relied Upon.** Tukaram and Another vs. State of Maharashtra, AIR 1979 SC 185; Karnel Singh vs. State of Madhya Pradesh, AIR 1995 SC 2472—**Referred To.**

List of Acts

Indian Penal Code, 1860; Indian Evidence Act, 1872; Protection of Children from Sexual Offences Act, 2012.

List of Keywords

Victim, entice, kidnapping, rape, assault, age of victim, minor, major.

Case Arising From

From judgment of conviction dated 20.09.2022 and the consequent order for sentence passed by the learned District and Sessions Judge VI-cum-Special POCSO Judge, Jehanabad, in Special POCSO Case No. 44/2018 arising out of Jehanabad P.S. Case No. 504/2018.

Appearances for Parties

For the Appellant: Mr. Mrigendra Kumar, Advocate.

For the Respondent: Mr. Sujit Kumar Singh, APP.

Headnotes Prepared by Reporter: Abhas Chandra, Advocate.

Judgment/Order of the Hon'ble Patna High Court

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.822 of 2022**

Arising Out of PS. Case No.-504 Year-2018 Thana- JAHANABAD District- Jehanabad

Pawan Kumar S/o Shatrughan Singh R/o Mohalla- Shyam Nagar, P.S.-
Jehanabad, Distt- Jehanabad.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Mrigendra Kumar, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP

**CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA)**

Date : 16.05.2023

Heard Mr. Mrigendra Kumar, learned counsel
appearing for the appellant as well as learned APP for the State.

2. The present appeal preferred by above
named appellant/convict challenging the judgment and order of
conviction dated 20.09.2022 and order for sentence dated
23.09.2022 passed in Special POCSO Case No. 44/2018 arising
out of Jehanabad P.S. Case No. 504/2018, whereby and
whereunder learned District and Sessions Judge-VI-cum-Special
POCSO Judge, Jehanabad convicted the appellant under
Sections 366-A and 376 of the Indian Penal Code (In short



‘IPC’) and Section 4 of the Protection of Children from Sexual Offences Act, (in short ‘POCSO’) convicting the appellant under Section 366-A of the Indian Penal Code and sentencing him to undergo RI for seven (07) years and fine of Rs. 10,000/- (Ten Thousand) in default of payment of fine, further to undergo SI for six (06) months, further appellant also convicted under Section 376 of the Indian Penal Code and sentenced to undergo RI for whole life and fine of Rs. 10,000/- (Ten Thousand) and in default of payment of fine, further to undergo SI for six (06) months. Appellant was also convicted under Section 4 of the POCSO Act and sentenced to undergo RI for whole life and fine of Rs. 10,000/- (Ten Thousand) and in default of payment of fine further to undergo SI for six (06) months.

3. The crux of prosecution case as it appears from the written information/ferdbeyan of informant Nishant Kumar (PW-1), who is the uncle of victim (PW-6) that her niece a student of class-IX, aged about 14 years is missing since 18.06.2018. He tried his best to search his niece/victim (PW-6), but he failed in his search and subsequently, on 20.06.2018, his friend, namely, Suryadeo Prasad (PW-4) told him that he saw his niece/victim (PW-6) on 16.06.2018 at about 8:00 AM at Patna Junction along with Pawan Kumar (appellant/convict),



son of Satrugan Singh resident of mohalla Shyamnagar, district- Jehanabad. On the basis of said information, informant (PW-1) went to residence of appellant/convict and asked about his whereabouts from his parents, where he came to know that appellant/convict is also missing since 15.06.2018, for which information in writing was also given to Jehanabad Police Station. Informant (PW-1) expressed his suspicions that his niece/victim (PW-6) was kidnapped by appellant/convict, namely, Pawan Kumar for purpose of marriage.

4. After completion of investigation, police submitted charge-sheet against appellant/convict vide charge-sheet no. 492/2018 dated 30.09.2018 under Section 366-A/376 of I.P.C. read with Section 4 of the POCSO Act, where charges were also framed under Section 366-A and 376 of Indian Penal Code against appellant/convict alongwith Section 4 of the POCSO Act on 25.04.2019. Aforesaid charges were duly explained to appellant/convict, where he pleaded “not guilty” and claimed trial.

5. To establish its case before the learned trial court the prosecution altogether examined total of eight (08) witnesses, namely, Nishant Kumar (PW-1), Mother of the victim (PW-2), Father of victim (PW-3), Surya Deo Prasad (PW-4), Dr.



Binod Kumar (PW-5), Victim (PW-6), Dr. Nahid Sirin (PW-7) and Durgesh Kumar Gehlout (PW-8), who is Investigating Officer of this case.

6. The prosecutions also exhibited the following documents during the trial which are as:

1. **Exhibit 1** - Written application
2. **Exhibit 2** - Medical Report
3. **Exhibit 3** - Signature of the victim on
164 Cr.P.C. statement
4. **Exhibit 4** - Forwarding on the written
application
5. **Exhibit 5** - Formal FIR
6. **Exhibit 6** - Memo of arrested
7. **Exhibit 7** - Transit Remand
8. **Exhibit 8** - Date of birth certificate
9. **Exhibit 9** - Medical Requisition for
victim

7. After closure of the prosecution case, the statement of appellant/convict was recorded under Section 313 of the Code of Criminal Procedure (In short 'Cr.P.C.'), where he shows his complete innocence by denying all incriminating circumstances explained to him.

8. No witness was examined in defence during trial.



9. After conclusion of trial, learned trial court by taking note of evidences available on record, legal positions and argument advanced by the parties, convicted the appellant for the offences under Section 366-A and 376 of the Indian Penal Code along with Section 4 of the POCSO Act, where upon conviction, appellant/convict sentenced for life imprisonment for offence committed u/s 376 of I.P.C. & 4 of POCSO Act and seven years imprisonment u/s 366-A of I.P.C. alongwith fine, being aggrieved with aforesaid order of convictions and sentences appellant/convict preferred the present appeal.

10. Hence, the present appeal.

11. PW-1 is Nishant Kumar, who is the informant and uncle of the victim (PW-6). It is deposed by him that victim, who is his niece was minor aged about 14 years at the time of occurrence and was student of class-IX. It is deposed that the occurrence is of 15.06.2018 and while he was sleeping at about 10-12 PM in his house located in Mallahchak Area, where victim (PW-6) was also sleeping in next room, he found after some time that she is not available in her room and door of her room was open. It is deposed by him that he searched but failed to find his niece. It is deposed that on next day, he was informed by Satrugan Singh of Shyamnagar mohalla that his



son Pawan Kumar is also missing since 15.06.2018. Thereafter, a joint search was made by them and during the course of search his relative, namely, Suryadeo Prasad (PW-4) told him that on 16.06.2018 at about 9-10 AM, he saw victim (PW-6) and Pawan Kumar (appellant/convict) together at Patna Junction. It is deposed that on search when victim was not found, written information was lodged with police station, he identified his signature and hand-writing on his written information before trial court, which on his identification exhibited before the learned trial court as **Exhibit No. 1**. It is deposed by him that after 26 days of occurrence his niece/victim (PW-6) was recovered by police from Dadar & Nagar Haweli, Gujarat and she was brought from there by police. It was deposed that on inquiry victim (PW-6) told him that Pawan Kumar (appellant/convict) assaulted her and forcibly established physical relations and also a threat was advanced to her that if she will not accompany with him, will kill her parents. It is also deposed by him that appellant/convict Pawan Kumar usually threatens him on phone to see him after his release. It is also deposed that medical examination was conducted upon victim (PW-6) and her statement was also recorded by Magistrate/Court. He also deposed that his statement was



recorded by police and he identified appellant/convict through video conferencing during trial.

On cross-examination, it was deposed by him that primary education of his niece/victim (PW-6) was completed in Public School, Distt - Jehanabad but he cannot produce any certificate in this connection. He denied suggestion that he is saying so intentionally as to conceal the actual date of birth of her niece/victim (PW-6). It is deposed by him that father of victim (PW-6) and father of appellant/convict jointly run a coaching institute. It is stated by him that victim is the only daughter of his brother and she also called by her nickname and said nickname was entered in the register of Shantikunj School. He denied that his niece/victim (PW-6) was student of Government Residential School, though he admitted that she applied there for her admission. It is stated by him that victim (PW-6) was student of Manas Vidyalaya. It is also stated by him that father of victim was the accused of a murder case and he received information regarding missing of appellant/convict from his father, namely, Satrugan Singh, who also accompanied with him at the time of lodging first information with police. It is also stated that Satrugan Singh also lodged missing report of appellant/convict and it was Satrugan Singh



who told him that appellant/convict may go to Gujarat and thereafter only, he went to Dadar & Nagar Haweli, Gujarat along with police in search of victim (PW-6), where he found victim and appellant/convict in a rented room. It is also stated that police arrested both of them with the help of local people and he was not allowed there to talk with his niece/victim (PW-6). It is also stated by him that after 3 days of train journey, he came to Patna and police take away both victim (PW-6) and appellant/convict with them, they were not accompanied with police. It is also stated by him that victim (PW-6) was taken away for her medical examination and recording her statement before court by police and after that she was sent to observation home, from where she was released after two days. It is stated that appellant/convict Pawan Kumar is a married person and father of one female child. It is also stated that Satrugan Singh lodged an informatory petition before the learned C.J.M., Jehanabad against him as to demand extortion money. He denied suggestion of defense that appellant/convict is a witness in a murder case lodged against his brother. He stated that father of victim (PW-6) who is his brother, is an accused of murder case of a boy who was resident of Mallahchak, Area. He denied the suggestion that to get acquittal in said case, under conspiracy he



lodged present false case against appellant/convict.

12. PW-2 is mother of the victim who deposed that at the time of occurrence victim was of 14 years, she also supports the occurrence and her deposition in examination-in-chief is appearing in the tune of PW-1, who is the informant of this case.

On cross-examination, it is deposed by her that her statement was recorded by police after 2-3 days of the occurrence, and she was never examined by police thereafter. It is deposed by her that victim (PW-6) was the student of Shantikunj School and she can produce certificate of that effect. It is also deposed by her that appellant/convict is not the resident of her locality and he never visited her residence. She denied any acquaintances with appellant/convict prior to this occurrence. It is stated by her that her husband is professor and running a coaching institute up to 12th level but he is not a teacher of any college. She also stated that father of appellant/convict never met with her but she was informed by her brother-in-law (PW-1) that appellant/convict is also missing and this fact was disclosed to her by PW-1. It is also stated by her that she met with her daughter/victim (PW-6) at her residence in village when she came back and this meeting was



after one month of the occurrence. It is stated by her that victim (PW-6) told her that they were in rented room, where appellant/convict was doing job and she was busy with cooking work. It is further stated by her that at the time of occurrence the victim was the student of Manas School Babhna. It is also stated by her that her daughter/victim (PW-6) was attending her school from residence. She denied the suggestion of defense that her daughter/victim (PW-6) was major at the time of occurrence and she also denied that she went with appellant/convict out of her own sweet will. She denied that certificate as regard to date of birth of victim (PW-6) is forged. She also denied suggestion that her daughter/victim (PW-6) never admitted to Manas School.

13. PW-3 is the father of the victim who also deposed that at the time of occurrence, the age of his daughter was about 14 years. It is deposed by him that at the time of occurrence he was at Patna and he received information over telephone from his brother (PW-1), who is the informant of this case. The deposition of PW-3 appears in the tune of deposition of PW-1 and PW-2 and same not required to repeat.

On cross-examination, it was deposed by him that at the time of occurrence the age of his daughter/victim (PW-6)



was 19 years. It is stated that for educational purpose her age was recorded less than actual. It was deposed by him that informant (PW-1) mentioned the age of victim (PW-6) wrongly. It is also stated that he never discussed anything with his daughter/victim (PW-6) regarding present occurrence. It is stated that PW-1 discussed with victim (PW-6) regarding occurrence. He also stated that his daughter/victim (PW-6) initially got her education in one private school at Jehanabad.

14. PW-4 is Suryadeo Prasad who denied to know anything about the occurrence before trial Court. He also denied to be examined by the police during the course of investigation. He was declared hostile.

On cross-examination by learned APP nothing specific surfaced which may use as a corroborative piece of evidence as he denied the every suggestion as advanced by learned APP regarding occurrence. He identified the appellant/convict during the trial. On cross-examination, he simply stated that his village is about 15 kilometer away from Jehanabad district headquarter.

15. PW-5 is Dr. Binod Kumar, who was posted as Medical Officer at Sadar Hospital, Jehanabad on 13.07.2018. On that day a medical board was constituted to examine the



victim of Jehanabad P.S. Case No. 504/2018 by the orders of Deputy Superintendent, Sadar Hospital, Distt- Jehanabad. He was one of the members of the board . On that date at 4:55 PM he examined the victim on police requisition on the point of age and found the followings:-

(i) X-ray of elbow A.P. and Lateral view showed all epiphysis fused.

(ii) X-ray wrist A.P. and Lateral view showed all epiphysis fused.

(iii) X-ray of Pelvis A.P. & Lateral view showed iliac crest about to fuse.

On the basis of dental examination the findings are as such:-

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On the basis of above findings the victim was about 19 to 20 years of age. On the identification of this witness the medical report was marked as **Exhibit No. 2**. The victim was between 19 to 20 years of age. The signature of victim (PW-6) was taken on her consent.

16. PW-6 is victim herself, it is deposed by victim that the occurrence is prior to three years now. It was deposed that at the time of occurrence, she was student of Class-



X. She deposed that on the date of occurrence at about 5:00 PM while she was returning to her home after attending class appellant/convict asked her to go for Gujarat and accordingly, she accompanied him. It is deposed that in Gujarat they live together for one month, where appellant/convict was doing job. It is also deposed by her that they were living together in a rented room from where she was brought by police. It is deposed that appellant/convict was produced before the court of Gujarat and from there he was brought to Jehanabad under Court order. She also deposed that her statement was recorded by magistrate and was also examined by Dr. Binod Kumar (PW-5). She deposed during the trial that she stated before magistrate that Pawan Kumar (appellant/convict) kept her with him in rented room and established physical relations, she identified her signature on her statement recorded under Section 164 of the Cr.P.C., which was exhibited as **Exhibit No. 3** before learned trial court. She deposed that her date of birth was recorded as 22.11.2004, victim claimed to identify Pawan Kumar (appellant/convict) before court. It was observed by the Court that the learned counsel appearing on behalf of the appellant/convict before the learned trial court not disputed the identification of appellant/convict.



On cross-examination, it was specifically deposed by her that at the time of occurrence, she was of 20 years old. It is further stated that she recorded her statement under Section 164 of the Cr.P.C. before magistrate as per direction of police. She specifically deposed that appellant/convict not committed any wrong act with her. She also deposed that only after recording her statement she came to her parents, she also stated that she was the student of Bhimrao Ambedkar Uchch Madhyamik Vidyalaya, Karpi (Arwal), where she was admitted by her uncle (PW-1). She also stated that appellant/convict is her neighbour and she went with appellant/convict out of her own sweet will.

17. PW-7 is Dr. Nahid Sirin, who was posted as Medical Officer, Sadar Hospital, Jehanabad on 13.07.2018 and on that date a Medical Board was constituted to examine the victim of Jehanabad P.S. Case No. 504/18 by the order of Deputy Superintendent, Sadar Hospital, Jehanabad. She was also one of the members of the board and examined the victim on police requisition on that day at about 04:55 PM on the point of rape and found the followings:-

- (i) There were no external injuries on the upper part of the body of victim.
- (ii) Breast was well developed.



(iii) Auxiliary hairs present.

(iv) No external injury on the lower part of the body of victim.

(v) Pubic hair present.

(vi) Labia Majora Labia Minora, Vulva Vagina all well developed.

(vii) Hymen ruptured vaginal swab taken and sent for pathological examination and the report showed as follows:-

(a) Spermatozoa not found (b) W.B.C. – None. (c) R.B.C. – None. (d) Epithelial Cell – A few present. (e) Others – None.

(VIII) On the basis of physical and pathological examination of the victim it was concluded that there was no sign of recent rape but possibility of rape cannot be ruled out. The medical report of the victim is in her writing and it bears her signature.

On cross-examination, this witness deposed that hymen may be ruptured due to cycling and motorcycling.

18. PW-8 is the investigating officer of this case, namely, Durgesh Kumar Gehlout, who deposed that he was posted as sub-inspector in Town Police Station, Jehanabad on



27.06.2018 and received the charge of investigation of Jehanabad Town P.S. Case No. 504 of 2018 from SHO Satyendra Shahi. He identified the endorsement and hand-writing of SHO Satyendra Shahi on the written information of informant (PW-1) and on his identification it was exhibited as **Exhibit No. 4** before the learned trial court. He also identified the signature and hand-writing of SHO Satyendra Shahi on formal F.I.R. and on his identification same was exhibited as **Exhibit No. 5**. He after taking charge of investigation found that written information is accompanied with identity card of victim (PW-6) annexed with written information (**Exhibit No. 1**), where date of birth of victim (PW-6) was mentioned as 22.11.2004. It was deposed that he recorded re-statement of informant (PW-1) on 27.06.2018 and also visited the place of occurrence on same day at about 3:25 PM. It is deposed by him that when it came to his knowledge that victim went to Gujarat, he obtained required permission from his senior officers to visit Gujarat in connection with investigation of this case and he obtained the same on 03.07.2018 under the order of SP Jehanabad vide Memo No. 987/Cr. Branch dated 02.07.2018. He also deposed that with the help of Silvassa Police of Dadar & Nagar Haweli/Gujarat, he arrested appellant/convict and



recovered victim (PW-6). He also deposed that appellant/convict was arrested with the help of Sunil Singh supervisor who was working in Sudarshan Factory. It is also deposed that appellant/convict was living there in a rented room located in front of Sudarshan Factory. He identified his signature and hand-writing on arrest memo which was exhibited before trial court as **Exhibit No. 6**. He also identified transit remand of appellant/convict from Gujarat and further deposed that appellant/convict after his arrest and victim (PW-6) were brought to Civil Hospital Silvasa, where appellant/convict was examined medically thereafter, an application was forwarded with the help of Silvasa police station to Court of learned C.J.M. Silvasa, Dadar & Nagar Haweli for transit remand of appellant/convict. This witness identified said transit remand during the trial and on his identification same was exhibited as **Exhibit No. 7**. It is deposed by him that he brought appellant/convict and victim (PW-6) to Jehanabad with train on 13.07.2018 and produced appellant/convict before the court, he also produced victim (PW-6) before Judicial Magistrate to record her statement. It is also deposed by him that during the course of investigation he visited the school of victim (PW-6) and obtained certificate from in-charge principal regarding date



of birth of victim (PW-6) which was given on the basis of admission register where it was recorded as 22.11.2004, on the basis of identification of this witness the certificate issued by in-charge principal was exhibited before the Court during the trial as **Exhibit No. 08**. He also identified the signature on application for medical examination of victim and same was exhibited as **Exhibit No. 09**.

On cross-examination, he deposed that he was present in police station at the time of lodging of this case. It was deposed that the date is not available on written information with signature of informant (PW-6). It was stated by him that occurrence is of 15.06.2018, whereas case was lodged on 23.06.2018 for the reason that information was given on 23.06.2018 only. It was stated that he examined Suryadeo (PW-4) during the course of investigation and same is available in para 23 of the case diary. It was also deposed by him that informant (PW-1) never disclosed before him during the course of investigation that victim(PW-6) was ever studied with Manas School. It is also deposed by him that as per Dr. Binod Kumar (PW-5), the age of victim appears to be found between 19-20 years. It is deposed by him that he obtained certificate from in-charge principal on the basis of entry as made in register of



school at the time of admission. He deposed that he failed to collect the basis of entry of date of birth from admission register. It is also stated by him that the statement of victim (PW-6) was not recorded at Dadar & Nagar Haweli and also that informant (PW-1) was not accompanied with him for there (Dadar & Nagar Haweli). He also deposed that the statement of owner of the house in which victim (PW-6) and appellant/convict were living together as a tenant, was not recorded by him. Finally, he denied the suggestion that he submitted charge sheet under the pressure of informant (PW-1) and his senior officers against appellant/convict.

ARGUMENT ON BEHALF OF APPELLANT/CONVICT

19. Learned counsel appearing on behalf of the appellant/convict submitted that from the evidence available on record and material exhibits it cannot be said safely that prosecutions established its case beyond reasonable doubt. It is submitted that prosecutions failed to establish the victim girl as a minor at the time of occurrence for the reason that date of birth of alleged victim i.e., 22.11.2004 was not established before the Court during trial in terms of established principles of law. It is submitted that no person from the school was examined in support of alleged date of birth and also no admission register



was produced before the Court during trial. It is submitted that merely a certificate was obtained from the in-charge principal during the course of investigation by PW-8, who is Investigating Officer of this case which was exhibited before the learned trial Court as **Exhibit No. 8**. It is submitted that said document cannot be even read under Section 35 of the Indian Evidence Act. It is argued that the law is very clear that how age of victim girl of crime in question can be proved during the course of trial. In support of his submission learned counsel relied upon the report of *Jarnail Singh vs. State of Haryana* reported as **(2013) 7 Supreme Court Cases 263**. It is also submitted by learned counsel that PW-3, who is the father of victim and also the victim (PW-6), who examined before the learned trial court, categorically stated that at the time of occurrence her age was 19-20 years.

20. It is further submitted that PW-3, who is the father of the victim (PW-6) categorically stated in his cross-examination that at the time of occurrence the age of her daughter/victim (PW-6) was 19 years and moreover, victim (PW-6) herself deposed before the trial court that at the time of occurrence her age was 19-20 years. It is also argued that on radiological examination, which was conducted almost only



about one month of the alleged occurrence by Dr. Binod Kumar (PW-5) found the age of victim between 19-20 years. It is submitted that by taking note of all such evidences in totality it can be safely said that prosecutions failed to establish that victim (PW-6) was minor on the date of occurrence.

21. Learned counsel while traveling over the argument further submitted that as far convictions under Section 366-A and 376 of Indian Penal Code are concerned same also cannot be said established beyond any reasonable doubts in the view of depositions of victim (PW-6) itself for the reason that she categorically stated in her cross-examination before the learned trial court that she went on her own with appellant/convict to Dadar & Nagar Haweli (Gujarat) and she also said that no wrong act was committed upon her while she was there with appellant/convict in a rented house for about one month. It is also submitted by learned counsel that Dr. Binod Kumar (PW-5) and Dr. Nahid Sirin (PW-7), who examined victim (PW-6), nothing said through their medical examination report, which may suggest that victim was Subjected to sexual assault as no external injury was noticed on the lower part of the body of the victim, external injury was also absent on the upper part of the body of the victim. It is submitted that though



possibility of rape was not ruled out as per doctor but it is settled legal principle that rape is a legal finding and not a medical one. In the circumstances when victim (PW-6) herself is stating that no wrong act was committed upon her by appellant/convict, no question arises to draw presumption that rape was committed upon victim. While concluding the argument, it is submitted that in view of above, it can be said safely that prosecution failed to establish its case beyond reasonable doubt against appellant/convict and as such appellant/convict be acquitted from all charges levelled against him by setting aside judgment of conviction and order of sentence as recorded by learned trial court against appellant/convict.

22. Learned counsel while arguing the matter relied upon the legal report of Hon. Supreme Court in the matter of *Jarnail Singh vs. State of Haryana*, reported as (2013)7 SCC 263 and *Tukaram and Another v. State of Maharashtra*, reported as AIR 1979 SC 185.

ARGUMENT ON BEHALF OF STATE

23. It is submitted by learned APP that the certificate issued by in-charge principal is based upon the admission register which is exhibited as **Exhibit No. 08**, suggesting that



the date of birth of victim was 22.11.2004, and same can be read under Section 35 of the Evidence Act. It is submitted that once it is established that at the time of occurrence the victim (PW-6) was minor her consent is of no legal sanctity and as such the conviction under Section 366A and 376 of Indian Penal Code and Section 4 of POCSO Act cannot be said incorrect. It is submitted that though victim (PW-6) stated that she went with appellant/convict out of her own sweet will but it is further submitted that recovery of victim (PW-6) with appellant/convict from Dadar & Nagar Haweli, as supported by PW-1 and PW-2 cannot be ignored and as such learned trial court correctly convicted appellant/convict under Section 366-A and 376 of Indian Penal Code and also under Section 4 of POCSO Act. Learned APP, while concluding the argument submitted that non-finding of injuries does not lead to conclusion *ipso-facto* that rape was not committed upon and in support of his submission he relied upon the report of ***Karnel Singh v. State of Madhya Pradesh*** reported as ***AIR 1995 SC 2472***.

CONCLUSION

24. We have carefully perused the evidences and materials available on the record, we also heard and taken note of argument as advanced, by learned counsel arguing on behalf



of appellant/convict and learned APP arguing on behalf of the State.

25. It would be appropriate to reproduce ***Section 35 of the Indian Evidence Act*** for the sake of better understanding:-

35. Relevancy of entry in public I[record or an electronic record] made in performance of duty. — An entry in any public or other official book, register or I[record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or I[record or an electronic record] is kept, is itself a relevant fact.

26. It would be further appropriate to reproduce Para 22 & 23 of ***Jarnail Singh Case (Supra)*** for better understanding of the fact as how the age of victim in crime in question can be determined;

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.

27. The first and foremost issue which requires to address in present case is the age of victim (PW-6) on the date of occurrence. As per F.I.R., which is **Exhibit No. 1**, age of victim was narrated as 14 years, this fact was also deposed by Nishant Kumar (PW-1), who is the informant of this case and uncle of the victim (PW-6). Informant also failed to produce any documents in favour of date of birth of victim as issued by her first attending school. PW-2, who is the mother of the victim also deposed before the Court that victim at the time of occurrence was 14 years. PW-3, who is the father of the victim, though in his examination-in-chief deposed that age of his daughter was about 14 years at the time of occurrence but in his



cross-examination, it is specifically deposed by him that the age of his daughter/victim (PW-6) was 19 years. Dr. Binod Kumar (PW-5) who examined victim at Sadar Hospital, Jehanabad assessed age of victim on the basis of radiological examination ranging between 19-20 years. Victim (PW-6) first time explained her exact date of birth which was deposed as 22.11.2004, but she stated in her cross-examination that she was 20 years old at the time of occurrence. It is stated by her that she was the student of Bhimrao Ambedkar Uchch Madhyamik Vidyalaya, Karpi (Arwal), where she was admitted by her uncle (PW-1). This fact also appears in corroborations with deposition of PW-3, who is the father of the victim that for the educational purpose the date of birth of his daughter/victim was recorded less than actual. PW-8, who is the Investigating Officer of this case during the course of investigation visited the school of victim and obtained a certificate (**Exhibit No. 08**) from in-charge principal regarding her date of birth which was given on the basis of admission register, where it was mentioned as 22.11.2004. This certificate is **Exhibit No. 08**. This birth certificate of the victim failed to suggest that it was the first attended school (other than a play school) of the victim. No one came from school to prove this document and neither admission



register was produced before the trial court. Accordingly, this certificate (**Exhibit No. 08**) cannot be read under Section 35 of the Indian Evidence Act, as it cannot be said proved as it was not proved by its author. In present case, admittedly victim was the student of Class-X. Therefore, there is no occasion for availability of Matriculation or equivalent certificate. Now, in absence thereof the document, which is available in support of her date of birth i.e., **Exhibit No. 08**, which was not proved by its author and as such date of birth of victim (PW-6) cannot be read as 22.11.2004. There is no any birth certificate of victim (PW-6) available as issued by a Corporation/Municipal Authority/Panchayat. In absence of all the above discussed circumstances, the only option to assess the age of the victim (PW-6) is opinion of the medical board report constituted for the purpose, where it appears as per deposition of Dr. Binod Kumar (PW-5) that age of victim was between 19-20 years on the date of occurrence. This fact was also supported by PW-3, father of victim in his cross-examination and was further affirmed by victim herself in cross-examination that she was 20 years old at the time of occurrence. In the discussed facts and circumstances it can be held safely that victim (PW-6) was major on the date of occurrence, as such prosecutions failed to prove the victim a



minor on the date of occurrence, therefore, the application of POCSO Act does not appear applicable in present case.

28. As far kidnapping of victim and further to commit rape upon her by appellant/convict are concerned, the deposition of victim (PW-6) appears more relevant. It appears from her deposition, as available in her cross-examination that at the time of occurrence she was 20 years old and no wrong act was committed upon her by this appellant/convict. She specifically deposed that appellant/convict was her neighbour and she went with him out of her own sweet will. The deposition of victim (PW-6) clearly negates her kidnapping and sexual assault by this applicant/convict. It also appears from the deposition of Dr. Binod Kumar (PW-5) and Dr. Naheed Sirin (PW-7) that no external or internal injuries were noticed upon victim (PW-6) though possibilities of rape cannot be ruled out as per medical report but in view of specific deposition of victim that no such rape was committed upon her, the medical report is of no bearing, as it is established principle of law that rape is a legal finding not a medical one.

29. Accordingly, the present appeal is allowed.

30. The impugned judgment of conviction dated 20.09.2022 and the consequent order for sentence dated



23.09.2022 passed by the learned District and Sessions Judge- VI-cum-Special POCSO Judge, Jehanabad, in Special POCSO Case No. 44/2018 arising out of Jehanabad P.S. Case No. 504/2018 are set aside. The appellant is acquitted of the charges levelled against him. He is directed to be set at liberty forthwith unless his detention is required in any other case.

31. Fine if any, paid by appellant/convict be returned to him, immediately.

(A. M. Badar, J)

(Chandra Shekhar Jha, J)

Archana/-

AFR/NAFR	
CAV DATE	17.04.2023
Uploading Date	
Transmission Date	

