

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.461 of 2022

Arising Out of PS. Case No.-42 Year-2020 Thana- MAHILA P.S. District- Vaishali

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Sangita Devi @ Sangeeta Devi, W/o Sant Lal Sah, Resident of Village -Maudah
Buzurg, P.S.- Patepur, Distt.- Vaishali (Bihar).

... ... Appellant

Versus

1. The State of Bihar
2. 'X' c/o Bhulan Rai R/o vill and P.O - Modah Bujarg, P.S. - Patepur, Distt.-Vaishali

... ... Respondents

=====

with

CRIMINAL APPEAL (DB) No. 546 of 2022

Arising Out of PS. Case No.-42 Year-2020 Thana-MAHILA P.S. District Vaishali

=====

Sanjeet Paswan, Son of Bishuni Paswan, Resident of Village and Post- Maudah
Buzurd, Ward No. 10, Police Station- Patepur and District- Vaishali (Bihar)

... ... Appellant

Versus

1. The State of Bihar
2. 'X' c/o Jhulan Rai, Resident of Mahudah, P.S. - Patepur, District - Vaishali

... ... Respondents

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Indian Penal Code, 1860—Sections 376(2)(n) and 109—Protection of Children from Sexual Offences Act, 2012—Sections 5(1), 5(j)(ii) and 6/17—appellant committed rape upon victim for almost six months as a result of which she became pregnant—prosecution has not succeeded in conclusively proving that the prosecutrix was a minor on the date of the alleged occurrence—appellants would deserve their acquittal of the charge under Section 6 Act, 2012 on benefit of doubt—prosecution has also failed to prove that appellant (in 461) had facilitated the alleged occurrence of rape upon the victim—Sangeeta Devi (in 461) was acquitted from the charge under Section 376(2)(n)/109 IPC, giving her benefit of doubt—appellant (in 546) found biological father of the baby born from the victim—appellant (in 546) never took a plea of consensual sex with the victim—prosecution has established its case under Section 376(2)(n) IPC against appellant (in 546)—conviction of the appellant (in 546) under Section 376(2)(n) is sustained—sentence and order modified.

(Paras

Crl. Ref. 2/2024—Relied Upon.

2018 SCC Online Del 10448; 2023 SCC Online Del 2782; 2023 SCC Online Del 5852—Referred to.

(2021) 15 SCC 241; (2018) 9 SCC 248—Distinguished.

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Sanjeet Paswan, Son of Bishuni Paswan, Resident of Village and Post-
Maudah Buzurd, Ward No. 10, Police Station- Patepur and District- Vaishali
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Versus

- 1. The State of Bihar
- 2. ‘X’ c/o Jhulan Rai, Resident of Mahudah, P.S. - Patepur, District - Vaishali

... .. Respondents

Appearance :

(In CRIMINAL APPEAL (DB) No. 461 of 2022)

For the Appellant/s : Ms. Shama Sinha, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 546 of 2022)

For the Appellant/s : Mr. Manish Kumar No2, Advocate

For the Respondent/s : Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

and

HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 23-01-2025

These two appeals have been preferred for setting aside the
judgment of conviction dated 18.04.2022 (hereinafter referred to as the
‘impugned judgment’) and the order of sentence dated 22.04.2022



(hereinafter referred to as the 'impugned order') passed by learned Exclusive Special Court, POCSO-cum-ADJ-VI, Vaishali at Hajipur (hereinafter referred to as 'the learned trial court') in Mahila P.S. Case No. 42 of 2020/POCSO G.R. No. 40 of 2020 whereby and whereunder the learned trial court has been pleased to convict the appellants Sangeeta Devi and Sanjeet Paswan for the offences punishable under the Protection of Children from Sexual Offences Act (in short 'POCSO Act') as well as under the Indian Penal Code (in short 'IPC'). The appellant Sanjeet Paswan has been convicted for the offences committed under Sections 5(1) and 5(j)(ii) of the POCSO Act which is punishable under Section 6 of the POCSO Act as also under Section 376(2)(n) of the IPC. The appellant Sangeeta Devi has been found guilty for abetment of the offence of aggravated penetrative sexual assault on the person of the victim 'X' which is punishable under Section 6/17 of the POCSO Act. She has been further held guilty for the offence under Sections 376(2)(n) with the aid of Section 109 of the IPC.

Prosecution Case

2. The prosecution story is based on the written application (Exhibit 'P-01/PW-1') of the victim ('X'). In her written application, she has stated that her father is mentally sick and her mother died eight years ago. She is being taken care of by her aunt. The accused Sanjeet Paswan is married and has two children. Accused Sangeeta Devi and her daughter Anchal Kumari, on the instruction of Sanjeet Paswan, used to allure her to take her to his house. The accused Sanjeet Paswan



committed rape upon her person on the pretext of giving her money but when she protested, he threatened her that he would kill her if she would disclose this to anyone. Out of fear, she did not disclose the incident to anyone. Sanjeet Paswan committed rape with her for almost six months as a result of which she became pregnant. Sanjeet Paswan used to do money transactions on interest basis with Sangita Devi. For this reason, at his instance, Sangita Devi used to call her. When her aunt got to know about this, she went at the house of Sanjeet Paswan to inquire but Sanjeet Paswan threatened that he would kill them and would make to disappear their bodies.

3. On the basis of the written application of the victim, Mahila P.S. Case No. 42 of 2020 dated 15.10.2020 under Section 376/34/504/506 IPC and under Section 3/4 of the POCSO Act was registered. After investigation, the Investigation Officer (in short 'I.O.') submitted a chargesheet. Cognizance of the offences were taken by the learned Special Judge, POCSO Act. After compliance with the formalities towards framing of charge, the charges proposed to be framed against the accused persons-appellants were explained to them which they denied and claimed to be tried. The charges were framed against the accused persons. Sanjeet Paswan was charged for committing offence under Section 376 IPC and under Section 6 of the POCSO Act whereas the appellant Sangeeta Devi was charged for the offence under Section 376/109 IPC and Section 6/17 of the POCSO Act.



4. The defence of the accused persons remained that they have been falsely implicated in this case. According to the defence, the uncle of the victim had taken loan from the accused Sanjeet Paswan and when the accused demanded the money from him then the uncle of the victim girl got registered this false case. The defence of Sangeeta Devi was that she was innocent and that the cousin brother of the victim who is PW-5 in this case had taken a loan of Rs. 30,000/- from her which he was not returning and when she demanded that money from him then he got implicated her in this case.

5. The prosecution examined altogether nine witnesses and exhibited documentary evidences from Exhibit ‘P-01’ to Exhibit ‘P-16’. The defence got examined one witness on behalf of accused Sangita Devi but no documentary evidence has been exhibited on behalf of the defence.

6. The complete description of the prosecution and defence witnesses and the documentary evidences adduced on behalf of the prosecution are being provided hereunder for a ready reference:

List of Prosecution Witnesses

PW-1	Victim (‘X’)
PW-2	Amla Devi
PW-3	Ramkali Devi
PW-4	Dr. Deepti Sinha



PW-5	Pappu Ray
PW-6	Amresh Rai
PW-7	Dr. Jyotsna
PW-8	Ashu Kumar Jha
PW-9	Sarita Chaudhary

List of Defence Witness

DW-1	Birju Sah
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List of Court Witness

CW-1	Pooja Kumari
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List of Exhibits

Exhibit ‘P-01/PW-1’	Written statement of the victim ‘X’
Exhibit ‘P-02/PW-1’	Statement of the victim ‘X’ recorded under Section 164 CrPC
Exhibit ‘P-03/PW-1’	Written application of the victim ‘X’ given to the S.H.O. Mahilla P.S. to get DNA test done to establish the paternity of the child.
Exhibit ‘P-04/PW-4’	Dental report of the victim.
Exhibit ‘P-05/PW-7’	Medical report of the victim ‘X’
Exhibit ‘P-06/PW-7’	Dental requisition sent by PW-7 to the Dentist
Exhibit ‘P-07/PW-8’	Biological Specimen Authentication Card for DNA test of baby which contain signature of I.O., Circle officer, Hajipur and Pathologist Sadar Hospital and contains photograph of baby.
Exhibit ‘P-08/PW-8’	Biological Specimen Authentication Card for DNA test of the victim ‘X’ which contains her photograph and signature of the I.O., Circle Officer and Pathologist.
Exhibit ‘P-09/PW-8’	Biological Specimen Authentication and for DNA testing containing



	photograph of accused Sanjeet Paswan (A-1) and signature of I.O. Circle Officer and the pathologist
Exhibit ‘P-10/PW-8’	F.S.L. report of DNA testing to establish the paternity of the child
Exhibit ‘P-11/PW-8’	Covering letter giving information regarding DNA test to the court
Exhibit ‘P-12/PW-9’	Formal FIR of this case
Exhibit ‘P-13/PW-9’	Forwarding letter regarding sending of the blood sample of the victim ‘X’, accused A-1 and the baby to get DNA test done.
Exhibit ‘P-14/PW-9’	Formal Chargesheet
Exhibit ‘P-15/PW-9’	Arrest memo of the accused A-2 Sangeeta Devi
Exhibit ‘P-16/PW-9’	Arrest Memo of the Accused A-1 Sanjeet Paswan.

7. Upon completion of the prosecution evidence, the statement of the accused persons were recorded under Section 313 of the Code of Criminal Procedure (in short ‘CrPC’) wherein the accused persons denied all the allegations and stated that they are innocent and have been falsely implicated in this case.

Findings of the Learned Trial Court

8. The learned trial court examined the evidence available on the record and after hearing the rival submissions came to a conclusion that in this case, PW-1 who is the victim herself is the star witness of the case who is an eye witness. She has suffered at the hand of the accused persons. In the opinion of the learned trial court, the other prosecution witnesses who are the family members of the victim (‘X’) are not the eye witnesses of



the incident but they have narrated certain circumstances which they found when the victim became pregnant and she disclosed that she had been raped repeatedly by the appellant Sanjeet Paswan. The learned trial court has carefully examined the evidence of the prosecutrix/victim (PW-1) and found that the victim is a minor girl whose mother is dead and her father is mentally unsound. The victim was a school going child at the time of occurrence who had been ravished by accused Sanjeet Paswan and accused no. 2 Sangita Devi had facilitated the commission of that offence upon the person of the victim.

9. The learned trial court rejected the contentions with regard to the delay in lodging of the FIR as according to the court, there are substantial facts present on the record which show and explain the delay in lodging of the FIR. The learned trial court held that a delay in lodging of the FIR is not illegal *per se* and though a prompt and immediate lodging of the FIR is ideal as that would give the prosecution a clean advantage but the demerits of the delayed FIR cannot prove as fatal to the prosecution case when there are variety of genuine causes for lodgement of the FIR with some delay. Here, it has been noted that the victim was a child without any mother having invalid father and she was getting exploited by the accused persons for a long time. She was a rural



girl and was not able to comprehend the enormity of the exploitation she was undergoing. She was also under fear and for all these reasons, she could not report the matter immediately to police.

10. The learned trial court found that the medical report of the victim proved by the doctor (PW-7) clearly establishes that she was eight months pregnant at the date of her medical examination and on the basis of ultrasound report, the opinion was given that she was carrying foetus of thirty-three weeks and two days. This all goes to establish the prosecution story and explains logically the reason for delay in lodging the FIR. For these reasons, the contention of the defence with regard to the delay in lodging of the FIR has been rejected.

11. The learned trial court analysed the evidence of the prosecution witnesses including that of PW-8 who is the Assistant Director, Forensic Science Laboratory, Patna and had conducted the DNA test on the samples of blood provided to him by the victim ('X'), the accused (A-1) and the baby. The DNA test established that that victim and A-1 were the biological parents of the baby.

12. The learned trial court held that the accused Sangita Devi aided the commission of rape on the person of victim by



facilitating the accused to commit rape on the person of the victim at her house. The learned trial court took note of the statement of the accused Sanjeet Paswan recorded under Section 313 CrPC in which he has stated that he was married and had three children. According to the learned trial court, this shows that the said incident did not occur at the house of Sanjeet Paswan as the married wife and children could have resisted the move of the accused.

13. The argument of the defence is that the age of the victim as per Exhibit 'P-04/PW-01' has been ascertained between 17-18 years and the medical report of the victim which is Exhibit 'P-05/PW-7' shows that the age of the victim was between 17-18 years. Therefore, the benefit of error in calculation in age must be given to the accused. The learned trial court, however, rejected this contention by taking note of the duration of the pregnancy of nine months from the date (29.11.2020) when she gave birth to the child. The learned trial court concluded that the victim was below eighteen years of age when she was subjected to rape. Referring to Section 29 of the POCSO Act, the learned trial court held that the mandate of Section 29 is that if any person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the POCSO Act, 2012, the court has to



presume that the offence is committed by the person who is prosecuted unless the accused proves to the contrary. This presumption is, though, rebuttal presumption of law but there would be a reverse onus and it would be for the accused to rebut the said presumption by disproving the same otherwise the statutory presumption shall always be against the accused.

14. The learned trial court concluded that both A-1 and A-2 are liable for conviction and accordingly convicted them and sentenced as stated at the top of the judgment hereinabove.

**Submissions on behalf of the Appellant in Cr. Appeal
(DB) No. 461 of 2022**

15. Ms. Shama Sinha, learned counsel for the appellant Sangita Devi in Cr. Appeal (DB) No. 461 of 2022 has submitted before this Court that in this case, the learned trial court has grossly erred in not determining the age of the victim in accordance with law. It is submitted that in course of trial, the prosecution placed on record a letter from the Incharge Headmaster of Government High School situated at village Maudah, P.S. Patepur, District-Vaishali showing the date of birth as 29.06.2004 and her Admission No. being 130 dated 16.05.2019 but the prosecution did not get examine the said Headmaster nor the said letter was exhibited, therefore, the learned trial court has



clearly recorded in paragraph '28' of the impugned judgment that the court would not consider the same. The xerox copy of the school leaving certificate was brought on record but the original was not produced nor the xerox copy could not be exhibited. The victim got examined medically at Sadar Hospital on 16.10.2020, at that point of time, she was having a pregnancy of eight months and in the next month on 29.11.2020, she gave birth to a child. On 16.10.2020, her age was ascertained to be between 17 and 18 years. The learned trial court could not appreciate that in course of trial, the doctors who were examined on this point have clearly opined that on the basis of the ultrasound, radiological report and dental report, the age of the victim was ascertained between 17 and 18 years. In this connection, the evidence of the Doctor (PW-4) has been placed before this Court to demonstrate that exact age of the victim could not be ascertained on the basis of the report of the Dental Doctor. In paragraph '9' of her deposition, PW-4 has stated that no one can say the exact age of the victim on the basis of the dental report.

16. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Ram Vijay Singh vs. State of Uttar Pradesh** reported in **(2021) 15 SCC 241** to submit that the Hon'ble Supreme Court has held that the procedure prescribed



in Rule 12(3)(b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the '2007 Rules') is not materially different than the provisions of Section 94 of the Juvenile Justice (Care and Protection of Children) Act (hereinafter referred to as 'Act') to determine the age of the person. There are minor variations as the Rules 12(3)(a)(i) and (ii) have been clubbed together with slight change in the language. Section 94 of the Act does not contain the provisions regarding benefit of margin of age to be given to the child or juvenile as was provided in Rule 12(3)(b) of the 2007 Rules, however, the Hon'ble Supreme Court has held that the importance of ossification test has not undergone change with the enactment of Section 94 of the Act. The reliability of the ossification test remains vulnerable as was under Rule 12 of the 2007 Rules. On the strength of these observations, it is submitted that what has been observed by the Hon'ble Supreme Court in the case of **Rajak Mohammad v. State of H.P.** reported in **(2018) 9 SCC 248** in paragraph '9' would still hold good and it is to be held that the age determination on the basis of a dental report in this case would not be an accurate determination, sufficient margin either way had to be allowed.

17. Learned counsel further relied upon a Division Bench judgment of the Hon'ble Delhi High Court in the case of



Court on its own Motion vs. State of NCT of Delhi (Crl. Ref. 2/2024 judgment dated 02.04.2024) wherein the Hon'ble Division Bench answered a reference made under Section 395(2) of the CrPC from the court of learned Additional Sessions Judge (SC-POCSO), South District Saket Courts, New Delhi. The question of law read as under:-

- “(i) Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test?
- (ii) Whether the principle of ‘margin of error’ is to be applicable or not in cases under the POCSO Act where the age of a victim is to be proved through bone age ossification test.”

18. Learned counsel submits that while answering the said reference the Hon'ble High Court has held that the legal position is fairly settled and quite apparent. In the POCSO cases, the Court would be required to apply a margin of error of two years in the age of a victim. The Hon'ble Division Bench held that in case of sexual assault wherever the Court is called upon to determine the age of the victim based on ossification test, the upper age given in the reference is to be considered the age of the victim. It is submitted that if the principles laid down by the Hon'ble Division Bench of the Delhi High Court are to be followed, in the present case, the age of the victim ('X') has to be taken as 18 years.



19. Learned counsel has further submitted that the written application which is the basis of the present case, according to the prosecutrix was written by the Officer Incharge of the police station. In her deposition, she has categorically stated in paragraph '6' that she had gone to Mahila Police Station with her aunt and had told everything to the Officer Incharge of the Police Station who had recorded her statement and she had put her signature thereon. The Officer Incharge Sarita Chaudhary has been examined in this case as PW-9. When she was confronted with this question as to whether she had written the written application, PW-9 has deposed that she had not written the application rather the victim had come to the police station with a written application and she cannot say that who had written the application. There is no signature of any witness on the said application and neither date nor year is mentioned thereon. She had recorded the statement of the victim after lodging the FIR.

20. Learned counsel submits that on a bare reading of the written application, it would appear that at the first instance, she has alleged that Sangita Devi and her daughter, at the instance of both and on their allurements, she was being taken to the house of Sanjeet Paswan. Sanjeet Paswan allured her of giving money and committed rape on her which she protested but he threatened her that if she would disclose this to anyone then she would be killed, therefore, she did not disclose it to anyone. According to the victim, thus, the place



of occurrence was the house of Sanjeet Paswan and not the house of Sangita Devi but in course of trial, the victim has changed the place of occurrence. She has stated in her evidence that she used to come and go from her school with Anchal Kumari who took her to her house where her mother took her to a room and there a boy was already present who committed wrong act with her and after committing rape on her, he threatened her that if she would disclose it to her aunt then she would be killed. Learned counsel submits that on a bare perusal of the evidence of PW-1, it would appear that she has changed the place of occurrence and the story of her visit to the house of Sangita Devi would not inspire confidence. Anchal Kumari who is the daughter of the Sangita Devi has already been discharged at the stage of investigation itself as the police did not find sufficient material to proceed against her. Even in her examination-in-chief, PW-1 has not stated that Sangita Devi asked her to establish physical relationship with Sanjeet Paswan or that she allured her on any pretext. Although she has stated that Sanjeet Paswan and Sangita Devi were involved in money transactions on interest basis but the I.O. has stated that in course of her evidence, she had not found any witness on this point.

21. Learned counsel submits that a bare perusal of the evidence of PW-1 would show that she had come to know about the pregnancy at least three months prior to lodging of the first



information report. In paragraph '4' of her deposition, she has stated that when she became pregnant, few days thereafter her aunt had raised suspicion as her physical feature was changing. She has stated that her aunt asked her about it and she had disclosed her the fact. It is, therefore, evident from her statement that only few days after she conceived, her aunt had also come to know about the pregnancy but this was not reported to police. She had submitted the written application on 15.10.2020 i.e. almost about one and half month before the delivery of the child. She has stated in paragraph '25' of her deposition that at least three months prior to her submission of written application in the police station, she was aware of the pregnancy. In paragraph '26', she has stated that even after the knowledge, her uncle or brother did not go to Sanjeet Paswan. In paragraph '28', she has stated that she had gone to the house of Sanjeet Paswan at least 5-6 occasions during six months. Learned counsel submits that the statement of PW-1 in paragraph '27' clearly shows that even though Sanjeet Paswan was married and having three children, the prosecutrix was regularly visiting his house and she herself claims that she had visited at least on 5-6 occasions to the house of Sanjeet Paswan, therefore, finding of the learned trial court that the victim could not have gone to the house of Sanjeet Paswan because he was married and had three children and they would have resisted him is not based on the materials on the record.



Submissions on behalf of the Appellant in Cr. Appeal**(DB) No. 546 of 2022**

22. Mr. Manish Kumar No.2, learned counsel for the appellant, has submitted that the learned trial court failed to appreciate from the evidences on the record that it is not a case of rape rather a relationship was developed by both the sides with consent. It is his submission that the victim never said that she had protested at the time of sexual intercourse with the appellant.

23. It is further submitted that the learned trial court failed to appreciate that the Doctor examined the victim and assessed her age between 17-18 years, therefore, she was virtually major and was in a position to understand the consequences in spite of that with consent she developed relationship with the appellant.

24. Learned counsel submits that a lenient view be taken on the point of sentence, if occasion so arises.

Submissions on behalf of the Prosecution

25. Ms. Shashi Bala Verma, learned Additional Public Prosecutor for the State, has opposed the appeals. It is submitted that the learned trial court has found that the prosecutrix/victim was a minor aged below 18 years at the time of occurrence. She was allured by Sangeeta Devi who took her to her house where Sanjeet Paswan committed rape upon her on the pretext of giving her money. Thereafter, she was made to establish repeated physical relationship



and sexual act with Sanjeet Paswan under threat that she would be killed if she would disclose this to anyone.

26. It is submitted that on record there are sufficient and cogent materials in the form of evidence of the prosecutrix to establish the prosecution case beyond all reasonable doubts. So far as the plea of Sanjeet Paswan in the present appeal is concerned, it is only an afterthought as it would appear from the pattern of cross-examination that he never suggested the victim/prosecutrix that it was a consensual sex. In fact, in his statement under section 313 CrPC, Sanjeet Paswan completely denied his acquaintance with the victim and has stated that he had never established any physical relationship with her.

Consideration

27. We have heard learned counsel for the appellant in both the appeals and learned Additional Public Prosecutor for the State as also perused the trial court records.

28. First of all, we will take into consideration the evidences with regard to the age of the prosecutrix/victim who has been examined as PW-1 in the present case. In her *fardbeyan*, the prosecutrix has disclosed her age as 16 years. Her statement under Section 164 CrPC was recorded in which again she has claimed her age as 16 years. As it appears from the judgment of the learned trial court, in order to prove the age of the prosecutrix, the prosecution



brought on record a letter from the In-charge Headmaster from the Government High School situated at village-Maudah, P.S. - Patepur, District - Vaishali showing the date of birth of the prosecutrix as 29.06.2004 *vide* her Admission No. 130 dated 16.05.2019 but the prosecution did not examine the Headmaster of the School and the said letter has not been exhibited. A xerox copy of the School Living Certificate was brought on record but the original was not produced. In such circumstance, the age ascertained by the Medical Board gains importance. The Doctor (PW-4) was posted as Dental Surgeon in Sadar Hospital, Hajipur. He has ascertained the dental age of the victim. According to him, the dental age is in between 17-18 years. He has proved his report which has been marked Exhibit '4'. Keeping in view the evidence of PW-4 and Exhibit '4' when we consider this case on the point of the age of the victim, it appears to us that the judgment of the Hon'ble Supreme Court in the case of **Ram Vijay Singh** (*supra*) and **Rajak Mohammad** (*supra*) both would lead to take a view that the reliability of the dental age as disclosed, remains vulnerable. In such circumstance, the judgment of the Hon'ble Delhi High Court in case of **Court on its own Motion vs. NCT of Delhi** (*supra*) seems persuasive. In the said case, the estimated age of the victim as per Medical Board's report was 16-18 years. The issue was whether the age of the victim should be taken on the lower side or on the upper side of the range. The Hon'ble



Delhi High Court considered as to what ought to be the approach of the court and whether any further “margin of error” is also to be applied on either side, thereby making the age range from 16 to 18 years to 14 to 20 years. Paragraph ‘23’ and ‘24’ of the said judgment are being reproduced hereunder:-

“23. We cannot be oblivious of the fact that we are following adversarial system of law where the presumption of innocence is indispensable philosophy. Though in any criminal trial, the endeavour is to reach the truth, in adversarial system, the judge generally acts like an umpire who watches whether the prosecution has been able to prove the case beyond reasonable doubt or not. Since the adversarial system in India is based on the ‘innocence of the accused’, the burden of proof, generally, falls on prosecution. Our criminal system prescribes that a case against any accused has to be proved beyond doubt. Meaning thereby, if there is an element of doubt, such benefit has to go to the accused.

24. Admittedly, in context of any juvenile wrongdoer, the endeavour of the defence would always be to seek margin of error on the ‘lower side’ as the same would prove to be beneficial for such wrongdoer who would be in a better position for being treated as juvenile in conflict with law, thereby becoming entitled to get due protection in many ways, including sentencing aspect. Thus, though the courts are zealous to see that a juvenile gets benefit of the provisions of JJ Act but at the same time it is also imperative for the courts to ensure that such protection and privileges are not misused by unscrupulous persons to escape punishments for having committed serious offences⁵.”

5. Mukarrab and Others v. State of Uttar Pradesh 2016 SCC OnLine SC 1413



29. The Hon'ble Delhi High Court in the case of **Shweta Gulati vs. State of NCT of Delhi** reported in **2018 SCC OnLine Del 10448** held that the upper age was considered in order to ensure that the accused was not prejudiced in any manner. The Court was of the view that if there was any uncertainty, the benefit of doubt should go to accused and accused only. In another case of **Raju Yadav vs. State of NCT of Delhi** reported in **2023 SCC OnLine Del 2782**, a conflicting view was taken. At this time, the Court took note of the objective of POCSO Act and held that determining the age of a child victim under POCSO Act, the inclination of the Court should be towards considering the lower side of the margin of error as that would be in consonance with the objective of POCSO Act. Taking note of the conflict in the two judgments of the Delhi High Court, the Hon'ble Court referred its own Division Bench judgment in the case of **State v. Basir Ahmad** reported in **2023 SCC OnLine Del 5852** in which the same issue had arisen for consideration. In the said case, the accused who was facing trial for committing sexual assault was acquitted by the learned trial court observing that the age of the prosecutrix was shown to be between 17 to 19 years and therefore, there was no conclusive evidence of her being a minor at the time of alleged offence. The benefit was extended to the accused who was acquitted. The Hon'ble Delhi High Court not only upheld the



factum of consideration of the age on the upper side of the ossification report but also approved the principle of giving further margin of two years to such upper estimated age. The pertinent excerpts from the aforementioned judgment is being reproduced hereunder:-

“12. The question which thus arises is whether the lower or the upper age recommended in the ossification test should be adopted to be the age of the prosecutrix. If benefit of doubt has to be given to the accused under all circumstances, then, it is the higher limit which has to be taken and benefit extended as has been held in the cases of **Triveniben Vs. State of Gujarat (1989) 1 SCC 678** and **Maru Ram Vs. Union of India (1981) 1 SCC 107**. So being the case, we may consider the range of age of the prosecutrix as given in the ossification test to be 17 to 19 years. Applying the margin of error principle of two years on either side, the age of the prosecutrix could be anything between 15 to 21 years. Even if the margin of error is not on the higher side, the upper limit of the age has been estimated by the ossification test as 19 years. Giving the benefit, the age of the prosecutrix has to be held as 19 years. Similar conclusion was taken by the Court in the case of **Shweta Gulati vs. State of NCT of Delhi 2018 SCC OnLine Del 10448**. We thus find that learned ASJ has rightly held the prosecutrix to be major at the time of incident. We find no infirmity in the findings in respect of the age of the prosecutrix.”

30. We also find that in the case of **Rajak Mohammad** (*supra*), the Hon’ble Supreme Court has observed in paragraph ‘9’ as under:-



“9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.”

31. Based on the above discussion, we are of the opinion that in the present case, the prosecution has not succeeded in conclusively proving that the prosecutrix was a minor on the date of the alleged occurrence. The benefit shall go to the accused. In such circumstance, both the appellants would deserve their acquittal of the charge under Section 6 of the POCSO Act, giving them benefit of doubt.

32. This would bring us to consider the another charge. The appellant Sangeeta Devi has been charged under section 376(2)(n)/109 IPC.

33. The prosecutrix (PW-1) has stated that the occurrence took place with her before Durga Puja last year. Prior to the occurrence, she used to go to School with Anchal Kumari. Anchal Kumari had taken her to her house where her mother took the victim in a room, she had called a boy there whose name was Sanjeet Paswan and he committed wrong act with her. Thereafter, both of them threatened her that if she would disclose it to her aunt



then she would be killed. She has stated that Sanjeet Paswan regularly committed rape on her, whereafter she became pregnant. When she was questioned that whether in her written application to the Mahila Police Station, she had stated that she used to go to School, the victim said that she did not remember. We find from the written application (Exhibit '1') that the prosecutrix has not said that she used to go to School. She has stated that Sangeeta Devi and her daughter Anchal Kumari both allured her and took her to the house of Sanjeet Paswan, where Sanjeet Paswan allured her in the name of giving money and committed rape on her. She has stated that when she protested, then he told her that if she would disclose it to anyone, then she would be killed. It is evident from her written application and the evidence in course of trial that PW-1 has changed her statement with regard to the place of occurrence, where for the first time she was subjected to rape. In her written application, she has not stated that she used to go to her School and come back with Anchal Kumari, but in her examination-in-chief, she has claimed that she used to come and go to school with Anchal Kumari and one day Anchal Kumari had taken her to her house. In her written application, the prosecutrix has stated that both Sangeeta Devi and Anchal Kumari allured her and took her to his house (the house of Sanjeet Paswan). On the



point of threat also, while in her written application, she has stated that it was Sanjeet Paswan who had threatened her, in her evidence in trial, she has stated that after the rape, Sangeeta Devi and Sanjeet Paswan had threatened her. We, therefore, find that there is a material inconsistency in the evidence of PW-1 with regard to her first meeting with Sanjeet Paswan and then the place of occurrence where she was subjected to rape. This is also evident from her deposition that during the period of six months, she had visited the house of Sanjeet Paswan on 5-6 occasions. She had been aware of her pregnancy at least three months prior to lodging of the FIR.

34. We have noticed that when the cross-examination on behalf of Sangeeta Devi begun, learned counsel for the accused did not appear to cross-examine. The learned trial court recorded that the victim had been cross-examined by the counsel for the accused Sanjeet Paswan and it was 3:00 PM, hence the court closed the deposition of the victim and discharged her. On record, there is an application dated 07.09.2021 filed on behalf of Sangeeta Devi through her lawyer for recall of victim for cross-examination, copy of the same seems to have been served upon learned Public Prosecutor. The order dated 07.09.2021 of the learned trial court acknowledges filing of the said application. The



said application seems to have been pressed but *vide* order dated 01.10.2021, the learned trial court rejected the said application. The court was of the view that the application filed by the accused was just an abuse of the process of the court so as to linger up the matter. We find from the evidence on the record that the application for recall of PW-1 was filed when the prosecution witnesses were still being examined. PW-7 was examined on 27.08.2021, PW-8 was examined on 24.09.2021 and PW-9 was examined on 03.12.2021, therefore, in our considered opinion, the observation of the learned trial court that the application for recall of PW-1 was filed on behalf of accused Sangeeta Devi only to linger up the matter has no basis to stand. By doing so, the learned trial court only deprived her from cross-examining PW-1 who is the star witness of this case. This, in our opinion has seriously prejudiced the defence of Sangeeta Devi (the appellant in Criminal Appeal (DB) No. 461 of 2022).

35. As we have noticed above, the material inconsistencies in the statement of victim (PW-1) with regard to the place of occurrence, this Court is of the considered opinion that the prosecution has failed to prove that Sangeeta Devi had facilitated the alleged occurrence of rape upon the victim. We would, therefore acquit Sangeeta Devi of the charge under Section



376(2)(n)/109 IPC, giving her benefit of doubt. She would be released forthwith if not wanted in any other case.

36. So far as the appellant Sanjeet Paswan in Criminal Appeal (DB) No. 546 of 2022 is concerned, learned counsel for the appellant has submitted before this Court that the prosecutrix being a major girl had developed consensual relationship with the appellant and she had never raised any protest at the time of sexual intercourse. She has admitted to have visited the house of the appellant on 5-6 occasions.

37. We find from the pattern of cross-examination of the prosecutrix on behalf of the accused Sanjeet Paswan that she was never suggested by the defence that it was a consensual relationship. She was suggested that Sanjeet Paswan had not established any physical relationship with her which she denied and stated that Sanjeet Paswan had committed wrong act with her. She was suggested by the defence that her uncle had taken loan from Sanjeet Paswan and when Sanjeet Paswan demanded the said loan amount, then her uncle got him implicated in a false case. The prosecutrix denied this suggestion. PW-2 and PW-3 are the family members of PW-1 who are hearsay witnesses and have stated as disclosed by PW-1. PW-5 is the cousin brother of the victim. PW-6 is the full brother of the victim and lives at Guwahati and he had



deposed on the basis of what he came to know from his aunt, sister and villagers. PW-7 is the Doctor who had examined the victim on 16.10.2020 in Sadar Hospital, Hajipur. He had found the victim eight months pregnant. He has also opined on the basis of radiological examination that PW-1 was aged between 17-18 years.

38. Ashu Kumar Jha (PW-8) is the Assistant Director of Forensic Science Laboratory, Patna. He was posted in the DNA Section. He has stated that by the order of the I.O./court, he had collected the blood samples of the victim, accused Sanjeet Paswan and the infant child of the victim for matching the DNA, the blood sample was taken through the Doctor of Sadar Hospital, Hajipur on the format biological specimen card of FSL. He has proved the Biological Specimen Authentication Card for DNA testing of the infant child, victim and the accused as Exhibit '7', '8' and '9' respectively. The conclusion reached in the DNA test is that the source of exhibit marked 'I' (blood source – Sanjeet Paswan) and Exhibit marked 'II' (blood source – victim) are found to be biological parents of the source of Exhibit marked 'III' (blood source – baby). He has proved the report containing Code No. 040478 on which he had put his signature on 19.08.2021 as



Exhibit '10'. From Exhibit '10', it is evident that the accused and the victim are the biological parents of the baby.

39. The I.O. (PW-9) has proved the formal FIR (Exhibit '12'). She had taken the victim to Hajipur Sadar Hospital for medical treatment and also got her statement recorded under Section 164 CrPC. She had also got conducted the DNA test. I.O. has proved the letter written by her to Forensic Science Laboratory, Patna as Exhibit '13'.

40. The statement of Sanjeet Paswan has been recorded under Section 313 CrPC in which he has stated that the allegations against him are false and he did not know the victim. He has also stated that he had not established any physical relationship with the victim.

41. From the entire evidences on the records, we find that the defence never took a plea of consensual sex with the victim. The appellant Sanjeet Paswan has been found to be the biological father of the baby and the prosecution has established its case under Section 376(2)(n) of the IPC against the appellant Sanjeet Paswan. The conviction of the appellant Sanjit Paswan under Section 376(2)(n) is sustained.

42. We find that the learned trial court has imposed a sentence of rigorous imprisonment for life which shall mean



imprisonment for the remainder of the natural life of convict Sanjeet Paswan and he has to pay a fine of Rs.1 lakh for the offence punishable under Section 6 of the POCSO Act. No sentence has been imposed upon him for the offence punishable under Section 376(2)(n) of the IPC. Since this Court has set aside the conviction of the appellant under Section 6 of the POCSO Act, the sentence imposed upon the appellant for this offence is liable to be set aside.

43. For the offence committed under Section 376(2)(n), learned counsel for the appellant has submitted that considering the fact that the appellant Sanjeet Paswan has his wife and three children, who are totally dependent upon him, he may be suitably punished and appropriate view of the matter be taken. Since Section 376(2)(n) provides a minimum sentence of ten years but it 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.

44. We having considered the entire circumstances, are of the opinion that a sentence of fourteen years rigorous physical incarceration of the appellant Sanjeet Paswan would be commensurate to the status of guilt. We, accordingly impose upon him a sentence of fourteen years of rigorous imprisonment with a



fine of Rs. 50,000/- for the offence punishable under Section 376(2)(n) IPC.

45. Cr. Appeal (DB) No. 546 of 2022 is partly allowed.

46. The trial court records together with a copy of the judgment shall be sent to the learned trial court.

(Rajeev Ranjan Prasad, J)

(Ramesh Chand Malviya, J)

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CAV DATE	
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