

**IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.3 of 2021**

Arising Out of PS. Case No.-136 Year-2018 Thana- MAHILA P.S. District- Patna

The State of Bihar

... .. Petitioner

Versus

Arvind Kumar @ Raj Singhania Son of Baidhnath Singh Resident of Biscuit
Factory, Sabjpura, P.S.- Phulwarisharif, District- Patna.

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 218 of 2021

Arising Out of PS. Case No.-136 Year-2018 Thana- MAHILA P.S. District- Patna

Arvind Kumar @ Raj Singhania S/O Baijnath Singh R/O Biscuit Factory,
Sabjpura, P.S-Fulwarisharif, District-Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 285 of 2021

Arising Out of PS. Case No.-136 Year-2018 Thana- MAHILA P.S. District- Patna

Abhishek Kumar S/O Surendra Kumar, Resident of Shiv Narayan Chowk,
Mitramandal Colony, P.S.- Phulwari Sharif, District- Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In DEATH REFERENCE No. 3 of 2021)

For the Petitioner : Mr.Xxxxxx

For the Respondent : Mr.Rajesh Singh, Amicus Curiae
Ms. Surya Nilambari, Amicus Curiae

(In CRIMINAL APPEAL (DB) No. 218 of 2021)

For the Appellant : Mr. Baxi S.R.P. Sinha, Sr. Advocate
Mr. Prem Ranjan Kumar, Advocate
Mr. Rupesh Kumar, Advocate.
Mr. Mrigendra Pratap Singh, Advocate
Mr. Brajesh Kumar ,Advocate

For the Respondent : Mr. Ajay Mishra, APP

(In CRIMINAL APPEAL (DB) No. 285 of 2021)

For the Appellant : Mr. Baxi S.R.P. Sinha, Sr. Advocate
Mr. Prem Ranjan Kumar, Advocate
Mr. Rupesh Kumar, Advocate.
Mr. Mrigendra Pratap Singh, Advocate
Mr. Brajesh Kumar ,Advocate



For the Respondent : Mr. Ajay Mishra, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)**

Date : 19-10-2022

The appellants in Cr. Appeal (DB) No. 218 of 2021 and Cr. Appeal (DB) No. 285 of 2021 have been convicted by the learned Additional Sessions Judge VI-cum-Special Judge, POCSO, Patna in Special POCSO Case No. 186 of 2018 (arising out of Mahila P.S. Case No. 136 of 2018 registered for the offences punishable under Sections 376, 376 (b), 504, 506, 354(D), 120(B) of the Indian Penal Code (in short 'IPC') and Sections 4, 6, 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act').

2. Learned trial court has convicted them for the offences under Sections 376(DB) IPC and under Section 6 of the 'POCSO' Act read with Section 120(B) IPC. So far as appellant Arvind Kumar @ Raj Singhania of Cr. Appeal (DB) No. 218 of 2021 is concerned, he has been further convicted under Sections 506 IPC.

3. The appellant Arvind Kumar @ Raj Singhania has been awarded capital punishment / death penalty for the offence under Section 376(DB) read with Section 120(B) of the IPC and



under Section 6 of POCSO Act and a fine of Rs. 01 lakh. He has been sentenced rigorous imprisonment for two years and a fine of Rs. 05 thousand under Section 506 IPC. After awarding the death penalty the learned trial court has made a reference under Section 366 of the Code of Criminal Procedure (in short 'Cr.P.C.') to this Court for confirmation of the death penalty. The reference has been registered as Death Reference Case No. 03 of 2021 and the same is under consideration together with the two appeals.

4. The appellant Abhishek Kumar in Cr. Appeal (DB) No. 285 of 2021 has been awarded a term of life imprisonment and fine of Rs. 50 thousand for the offence under Section 376(DB) read with Section 120(B) of the IPC.

5. We appointed Sri Rajesh Singh, learned Senior Counsel together with Ms. Surya Nilambari an Advocate as Amicus Curiae to assist this Court in the matter.

6. Heard Mr. Baxi S.R.P. Sinha, learned Senior Counsel assisted by Mr. Prem Ranjan Kumar, learned Advocate for the appellants and Mr. Ajay Kumar Mishra, learned Additional Public Prosecutor for the State as also the learned Amicus Curiae.

Prosecution Case

7. A first information report was registered on 19.09.2018 with Phulwarisharif Mahila Station giving rise to P.S.



Case No. 136 of 2018 under sections 376, 376(b), 120(B), 504, 506, 354(D) IPC and Sections 4, 6 and 12 of POCSO Act. The informant is mother of the victim girl. It is alleged in the written complaint that the victim 'X' aged about 11 years was a student of New Central Public School, Phulwarisharif. She was studying in Class V for about one year. The School Principal Arvind Kumar (appellant in Cr. Appeal (DB) No. 218 of 2021) sexually exploited the victim girl and by making her video, under threat that the same will be made viral, he was blackmailing her. At this stage, it is alleged that in this act one Teacher of the said school namely, Abhishek Kumar aged about 26 years (appellant in Cr. Appeal (DB) No. 285 of 2021) was also helping the principal. The informant (PW 3) alleged that there is a bed room of the principal adjacent to the class room and in the name of checking of writing, the victim girl was being taken to the said room where she was being exploited. The victim girl, it is alleged that, was not disclosing these happenings as she was frightened but after convincing her to disclose the entire facts, she disclosed that her principal was calling her on the pretext of writing check through Abhishek and then he was indulging in wrong act. As per allegations, this led to stoppage of menstruation of the victim and she had a bout of vomiting which led to a suspicion in the mind of



of her mother and she got her pregnancy tested wherein the pregnancy was confirmed. The alleged act were being done under threat showing a knife. The written complaint, registration of the case by officer-in-charge of Mahila Police Station and formal FIR are Exhibit 2, 2/1 and 3 respectively.

8. The case was investigated, I. O. submitted a chargesheet against both the accused under Sections 376, 376(B), 504, 506, 354(D), 120(B) of IPC and under Sections 4, 6 and 12 of POCSO Act. Cognizance was taken and after hearing the parties charges were framed against both the accused persons which were read over and explained to them in Hindi for the offences under Sections 120(B), 376(DB), 504, 506 IPC and Section 6 of POCSO Act. The accused persons pleaded not guilty and claimed to be tried.

9. The accused persons claimed that they have committed no offence and have been falsely implicated in this case. It was also submitted as a defence that the victim was not a student of school in question and that there was some transaction of money in between the mother of the victim and the accused Arvind Kumar. By way of defence it was also suggested that due to non-payment of school fee by the parents of the victim a dispute arose which led to lodging of this false case.



10. On behalf of the prosecution following witnesses were produced:-

- (1) PW 1- Maternal uncle of the victim,
- (2) PW 2 – The victim herself,
- (3) PW 3- The mother of the victim,
- (4) PW 4- The father of the victim,
- (5) PW 5- Ravi Ranjana Kumari, S.I. of Police -cum-

I.O. of this case,

- (6) PW 6- Dr. Amita Singh (one member of the Medical Board who had examined the victim).

The following documentary evidences were brought on record on behalf of the prosecution:-

- (1) Exhibit 1- Signature of victim on the statement u/s 164 Cr.P.C. recorded by learned Judicial Magistrate,
- (2) Exhibit 2- written report,
- (3) Exhibit 2/1 – registration of case by the Officer-in-charge-cum-S.H.O. Mahila Police Station,
- (4) Exhibit 3 – Formal FIR,
- (5) Exhibit 4- Seizure list,
- (6) Exhibit 5- forwarding letter for examination of D.N.A. Test to the Forensic Science Laboratory, Patna,



(7) Exhibit 5/1- Serum of the chorionic Villi of baby,
Forensic Laboratory, Patna,

(8) Exhibit 6- Medical Report,

(9) Exhibit 7- Medical Report,

(10) Exhibit 8- Birth Certificate issued by the Govt. of
Bihar, Department of Planning and Development,

(11) Exhibit 9 – Report of the Director, Forensic Science
Laboratory, Bihar, Patna regarding genetic D.N.A. Test.

The defence examined the following witnesses:-

(1) DW 1- Sarvjeet Kumar (own brother of accused
Arvind Kumar),

(2) DW 2 -Baijnath Singh (father of Arvind Kumar)

(3) DW 3- Shalu Kumari (sister of Abhishek Kumar),

(4) DW 4 – Upendra Kumar.

11. The defence brought on record the Admission-cum-
Registration Forms related to New Central Public High School,
Kisan Colony, Phase I, Anishabad of the victim and Shaijal
Kumari which is dated 01.11.2017 marked as Ext. A, B, C and
B/1. Two photographs of Aadhar Card have been brought on
record by defence of the victim and Saijal Kumari which has been
marked as Ext. 'X' and 'X/1'.



Findings of the Trial Court

12. The learned trial court analysed the evidence of the victim (PW 2) who disclosed her age in her examination-in-chief as 11 years. In course of her cross-examination, the defence did not put any question to her challenging her age. The learned trial court, therefore, held that at the time of occurrence the victim's age was 11 years. It was further held that the accused Abhishek Kumar was sending her in the room of the Principal on the pretext to examine her handwriting but there, in the room, the Principal was committing rape on her and this was done for 5-6 times. This act of heinous nature led to the pregnancy of the victim girl. She was treated at PMCH, Patna and her pregnancy was terminated by the doctors.

13. PW 1 who is the maternal uncle of the victim deposed that he came to the house of the victim where he knew about the alleged occurrence from the victim as well as from her mother.

14. PW 3 who is the mother of the victim has stated that her daughter aged about 11 years was a student of standard V at the New Central Public School, Patna. She alleged that the Head Master of the said school and Abhishek Kumar who was a teacher on the pretext of checking handwriting was sending her daughter



in the room of the Principal. She has stated that the Principal was committing rape with her daughter and Abhishek Kumar was vigilant at the door of the Principal's room. She has stated that the victim narrated her all episodes and stated that the Principal was committing rape upon her and he was giving threatening to chop the head of his brother. She has stated that she get the pregnancy test done by pregnancy kit and result was found positive, thereafter she went to the police station Phulwarisharif from where she was sent to Mahila police station. She had given a written petition, the petition was written by one Himanshu Kumar, she had put her signature. She proved the written report as Exhibit '3'.

15. This witness was suggested in paragraph '3' of her deposition that the age of the victim girl is more but suggestion was denied by PW 3. The defence lawyer brought two photocopies of Aadhar cards and one of them was identified by PW 3 as that of the victim girl whereas the second one was of her second daughter. Both the photocopies of Aadhar cards were marked as 'X' and 'X/1' for identification.

16. PW 4 who is the father of the victim girl also supported the prosecution case. He also deposed that her daughter was a student of New Central Public School in standard V and her age was 11 years. He stated that the victim was always going for



tuition at evening time and the Principal committed rape on her. Learned trial court has recorded that no question was put to this witness on the point of age of the victim girl. PW 4 denied the suggestion that there was any dispute over the payment of school fee. He has stated that after taking a written acknowledgment on a stamp paper, his wife had given a sum of Rs.1 lakh to the accused Arvind Kumar. He has further stated that Arvind Kumar often return the said amount to her. In paragraph '31' of his evidence, he has stated that his children studied in several schools because of changing of residence. The defence did not put any question to this witness on the point of the age of the victim girl.

17. PW-5 Ravi Ranjana Kumari, the I.O. of this case had visited the place of occurrence along with the victim girl, her mother, Jugeshwar Kumar and Rajesh Kumar. She had seized three mobile phones, one school register and one knife and prepared the seizure list. She has proved the seizure list as Exhibit-4. She got collected the blood sample of the two accused (Exhibit-A and Exhibit-B) and she has further proved the forwarding letter (Exhibit-5). She has further stated to have collected the serum of chorionic villus sample for paternity test and sent all the blood samples of the accused persons and victim to the Forensic Science Laboratory, Patna for examination. This letter has been marked as



Exhibit-5/1. She has stated that the examination of victim was done in the local hospital as well as in the PMCH, Patna. She further stated that all the recovered material exhibits as per seizure list had been kept in the police malkhana. In cross-examination, I.O. (PW 5) has stated in paragraph-33 of her deposition that she had not got any documentary proof showing that the victim was studying in New Central Public School. She had not examined any of the neighbours in the boundary of the School. She had not investigated as to in how many rooms the school is running. She had not recorded this in the case diary. She had not recorded the statement of the seizure list witnesses in the case diary and seizure list witnesses were not made chargesheet witness. In paragraph-49 of her evidence, she has stated that it is SR case and this type of case is required to be supervised by Dy.S.P. or the Officers above him. She has not stated in the case diary that this case was sent for supervision and no supervision note of Senior Police Officer is recorded in the case diary. No guideline/instruction was received from the senior Officers prior to the filing of the chargesheet and she has stated that she had filed chargesheet without any instruction from senior officer as 60 days period is going to expire.



18. The defence suggested in paragraph-53 that if someone had 14 teeth on the upper lower side both then the said person will be treated major. In paragraph-56 of her evidence, this witness was suggested that from her physical appearance itself the victim looks major, therefore, the I.O. had not recorded anything about the brothers and sisters of the victim and their statements were not recorded. In paragraph-57 of the deposition, the I.O. denied the suggestion that because the victim was major, therefore, the date of birth certificate was not taken either from the earlier school or from the present school.

19. PW-6 is the Medical Officer who was posted at Gardhanibagh Hospital, Patna on 20.09.2018. On that day, a Medical Board was constituted to examine the victim girl. The victim girl was brought by S.I. Ravi Ranjana Kumari (PW-5) and ASI, Sangeeta Kumari. She had examined the victim girl. In the pregnancy test she was found positive. Her last mensuration was on 08.08.2018. No sign of violence was found on her private parts. Vagina admits two fingers, vaginal swab was taken on slide and sealed and sent to Pathology Department, PMCH for determination of spermatozoa. For age determination, the victim was sent with Constable to Radiology Department, PMCH Patna. PW-6 found that for confirmation of pregnancy ultrasonography of



lower abdomen was to be done. Opinion was reserved till reports are received from PMCH. She has proved the report prepared at Gardanibagh Hospital as Exhibit-6. PW-6 has further perused the radiological, pathological and ultrasound report of the victim and found that according to the report, age of the victim is between 13-14 years. This report has been marked as Exhibit-7. In paragraph-20 of her evidence, she has stated that when the victim was brought to her, she has physically examined her and found that she had 14 teeth on both upper and lower sides. She has stated that upper jaw has four incisor, two canine, four pre-molar and six molars in the upper side. These are the characteristics of being Major.

20. In paragraph '24', she has stated that first molar comes out at the age of 6 years. Second molar comes at the age of 12 years whereafter the third one comes out at the age of 25 years which is wisdom tooth. The victim was not having the third molar. In paragraph '26' PW 6 states that without ossification test, she cannot give any opinion. In paragraph '38', she has stated that as per 20.09.2018 report, victim was sent to PMCH Radiology Department for age determination. The said report was received on 03.11.2018 but it was not sent to the court. She had got a copy of the same. The said report was not sent to the I.O. PW 6 has further



stated that in this case, no DNA test has been done for parental finding and the I.O. had not sent the victim girl for parental finding. PW 6 had not received any DNA test report, parental finding and forensic science report.

21. On behalf of the defence, DW 1 deposed that accused Arvind Kumar is his brother, the victim girl was studying in New Central Public School situated in Kisan Colony Phase-I, Anisabad which is within the jurisdiction of Gardhanibagh police station. The said school is operated by one Ramjee Paswan. According to this witness because the name of school is common, therefore, the police has arrested Arvind Kumar. In his school students up to class III and IV are only taught.

22. DW 2 has also deposed on similar lines. He has proved Exhibit A, B, B/1 and C. Exhibit A is the school registration-cum-admission form of the victim girl which bears the signature of her father. Signature of her father has been marked as Exhibit B. The date of birth of the victim girl mentioned on the said form is 12.07.2000 showing that she was a student of class VIII in the academic session 2017-18. The second certificate is of the sister of the victim which bears the signature of her sister and father and both have been marked as Exhibit 'C' and 'B/1' respectively.



23. DW 2 has been cross-examined at length on behalf of the prosecution. He has been suggested that the registration-cum-admission form is a forged and fabricated document. The said school registration form did not bear the seal of the school and signature of the Head Master or any Employee.

24. DW 3 is the sister of accused Abhishek Kumar who has stated that the victim and her sister were not studying in the New Central Public School and her parents were never seen going to the school.

25. DW 4 claims that his daughter was studying in New Central Public High School, Kisan Colony, Phase-I, Anisabad which is running in the house of one Manohar Rai and school was operated by Ramjee Paswan. Principal of the said school is Sanjay Kumar @ Raj Singhania. He has stated that he knew the informant and her daughter. The informant was coming to the school because her daughter was studying there. He denied the suggestion that there is no school in the name of New Central Public High School and there is no one like Ramjee Paswan who is operating the said school.

26. After the examination of the witnesses, statements of the accused were recorded under Section 313 Cr.P.C. The



questions put to the accused in course of their statements which
are being reproduced hereunder:

“प्रश्न : क्या आपने अभियोजन का साक्ष्य सुना?

उत्तर : जी हाँ।

प्रश्न : आपके विरुद्ध अभियोजन का साक्ष्य है कि आपने पीड़िता को अरविन्द कुमार उर्फ राज सिंहानिया के न्यू सेन्ट्रल पब्लिक स्कूल स्थित रूम में हेण्ड राइटिंग चेक कराने के बहाने भेजा था, क्या कहना है ?

उत्तर : यह झूठ है।

प्रश्न : आपके विरुद्ध अभियोजन का यह साक्ष्य है कि आप पीड़िता को अरविन्द कुमार उर्फ राज सिंहानिया के न्यू सेन्ट्रल पब्लिक स्कूल स्थित रूम में हेण्ड राइटिंग चेक कराने के बहाने भेजा करते थे और खुद दरवाजे के बाहर खड़े होकर निगरानी किया करते थे, क्या कहना है?

उत्तर : यह झूठ है।

प्रश्न : आपके विरुद्ध अभियोजन का यह साक्ष्य है कि आपने अरविन्द कुमार उर्फ राज सिंहानिया के साथ मिलकर पीड़िता का शारीरिक शोषण किया है, क्या कहना है?

उत्तर : यह गलत है।

प्रश्न : आपके सफाई में कुछ कहना है?

उत्तर : मैं निर्दोष हूँ।

प्रश्न : क्या आपने अभियोजन का साक्ष्य सुना?

उत्तर : हाँ सूना है।

प्रश्न : आपके विरुद्ध अभियोजन का साक्ष्य है कि आपने पीड़िता के जन्मदिन 12 जून के 10 दिन बाद उसे गिफ्ट के तौर पर कपड़ा दिया था तथा कपड़ा देते समय पीड़िता की बाँह को टच किया था, क्या कहना है?

उत्तर : यह सब झूठ है।

प्रश्न : आपके विरुद्ध अभियोजन का यह साक्ष्य है कि पीड़िता अपनी माँ के कहने पर जब आपको कपड़ा लौटाने गयी तब भी आपने पीड़िता की बाँह को टच किया था, क्या कहना है?

उत्तर : यह सब झूठ है।

प्रश्न : आपके विरुद्ध अभियोजन का यह भी साक्ष्य है कि जब पीड़िता आपके न्यू सेन्ट्रल पब्लिक स्कूल स्थित रूम में हेण्ड राइटिंग



चेक कराने आयी थी तो आपने रूम का दरवाजा बंद कर उसका मुँह दबा दिया तथा उसके साथ गलत काम किया और इस क्रम में उसका विडियो बनाया और फिर इस विडियो को पीड़िता को भी दिखाया, क्या कहना है?

उत्तर : यह सब झूठ है।

प्रश्न : आपके विरुद्ध अभियोजन का यह भी साक्ष्य है कि आपने पीड़िता को चाकू दिखाते हुए बोला कि उस चाकू से तुम्हारे भाई को काटकर ज़मीन में गाड़ दूँगा और अगर तुम मुझे नहीं करने दोगी तो तुम्हारी जुड़वा बहन के साथ भी यही करूँगा और इस तरह आपने उसे रूम में बुलाकर 5-6 बार उसका बलात्कार किया, क्या कहना है?

उत्तर : यह सब झूठ है।

प्रश्न : आपके विरुद्ध अभियोजन का यह भी साक्ष्य है कि जब पीड़िता का ब्लीडिंग होने लगा तो आपने उसे दवा खिलाकर अपने न्यू सेटल पब्लिक स्कूल स्थित कमरे में आराम करने को कहा और जब छुट्टी का समय हुआ तो उसके भाई के साथ गाड़ी से घर पहुँचवा दिया, क्या कहना है?

उत्तर : यह सब झूठ है।

प्रश्न : आपके विरुद्ध अभियोजन का यह साक्ष्य है कि आपने अपने सहयोगी अभिषेक के साथ मिलकर पीड़िता का शारीरिक शोषण किया जिससे वह गर्भवती हो गयी और अंततः उसका गर्भपात कराना पड़ा, क्या कहना है?

उत्तर : यह सब झूठ है।

प्रश्न : आपको सफाई में कुछ कहना है?

उत्तर : मुझे षड्यंत्र के तहत फँसाया गया है।”

27. Learned trial court came to the conclusion that at the time of occurrence the age of the victim was 11 years. For this finding, the learned trial court has relied upon the statement of the prosecution witnesses supported by Exhibit ‘8’ which is the date of birth certificate prepared by Registrar, Department of Planning and Development, District-Nalanda, State of Bihar. According to the learned trial court, these are oral and documentary evidences



which show that at the time of occurrence, the victim was aged about 11 years.

28. The learned trial court took note of the fact that the I.O of this case claims to have seized the knife on the place of occurrence where the rape was being committed by the accused Arvind Kumar on the victim in connection with which the seizure list Exhibit '4' has been proved but unfortunately in course of trial the seized materials- knife, mobile phones and school registers were not brought on the record by the prosecution. The learned trial court held that when attention of the prosecution was drawn and the said knife, mobile phone and school registers have been called for as per Section 165 of the Evidence Act, the seized materials were produced before the court but having said so learned trial court has further recorded that the prosecution has not called for the said material at the time of examination of prosecution witnesses which shows that the I.O. of this case had not produced the said seized materials at the time of remand of the accused persons. The learned trial court held that the prosecution has successfully proved the offence under Section 376(DB) of the IPC and Section 6 of the POCSO Act, 2012 against both the accused persons in furtherance of common intention of both the accused with criminal conspiracy. So offence under Section 120B



IPC is also proved. The rape was being committed by accused Arvind Kumar on the point of knife with fear that if the victim would tell this occurrence to any person, accused would chop the head of his brother and bury her in the land. So offence under Section 506 IPC has also been proved against the accused Arvind Kumar.

Submission on behalf of the appellants

29. Mr. Baxi S.R.P. Sinha, learned Senior Counsel for the appellants in both the appeals has assailed the impugned judgment of conviction and order of sentence on the ground that for conviction under section 376(DB) IPC the prosecution had a duty to prove beyond all reasonable doubt that the victim girl is aged below 12 years. In this case, according to learned Senior Counsel the prosecution has not proved the age of the victim girl and as per the evidence of the Medical Officer (PW 6), the victim was aged between 13-15 years. It is stated that after the last witness in this case had already been examined, Exhibit '8' was brought on record by the prosecution and the same has been admitted in evidence with objection without there being any tender of document by any witness.

30. It is further submitted that in this case, the only eye witness is the victim herself. As regards the involvement of



accused Abhishek Kumar, she has only stated that Abhishek had sent her to the room of the Principal for writing check. She has not stated that Abhishek Kumar was doing this repeatedly or that he was vigilant there at the door. She has not stated that after the alleged occurrence for the first time when she was again called by the Principal in his room, she had shown any reluctance. It is stated that the act of Abhishek in sending the victim girl to the room of the Principal cannot be said to be in furtherance of common object much less any common intention. It is, thus, submitted that the evidence of PW 3 is only a hearsay witness by way of improvement and it would not safe to rely upon the exaggerated version of PW 3. She has not supported by the victim (PW 2) on the point that accused Abhishek Kumar was sending the victim girl to the room of the Principal and was himself standing outside the door keeping a vigil over the same.

31. Learned Senior Counsel, therefore, submits that the conviction of both the accused under Section 376(DB) of the IPC cannot be sustained.

32. As regards the conviction of the appellants under Section 6 of the POCSO Act, learned Senior Counsel submits that Section 6, as it stood on the alleged date of occurrence, provided a punishment of not less than ten years but may extend to



imprisonment for life and shall also be liable to fine. So far as Abhishek is concerned, he cannot be convicted even under Section 6 of the POCSO Act because admittedly he is not indulged in commission of any penetrative sexual act.

33. Mr. Rajesh Singh, learned Senior counsel while appearing as Amicus Curiae has submitted that the prosecution has proved the age of the victim girl approximately 11 years by adducing oral evidence and in this connection, the evidence of PW-1, PW-2 and PW-3 may be seen. It is submitted that the defence did not put any question to PW-1 and PW-2 to challenge the age of the victim disclosed by them. It is stated that though in course of cross-examination, PW-3 was challenged on the point of age of the victim girl but nothing substantial could be extracted from PW-3. It is stated that the date of birth certificate brought on record as Exhibit '8' is a public document and no fault may be found with the approach of the learned trial court in taking Exhibit '8' on the record.

34. Contrary to the stand of Mr. Rajesh Singh, learned Senior counsel, Ms. Surya Nilambari, learned Advocate has vehemently submitted that in this case, the prosecution has miserably failed to prove the age of the victim girl being below twelve years. It is her submission that the burden to prove each



and every ingredient of an offence rests entirely upon the prosecution. In the offence covered by the IPC, there is no question of presumption of guilt on prima-facie case, as contained in the POCSO Act. According to learned counsel, on the age of the victim, the prosecution has brought on record Exhibit '8' i.e. birth certificate of the victim girl issued by the Department of Planning and Development, Nalanda, Biharsharif on 27.08.2015. The date of birth is 12.06.2007 as per this document. This document is referred in para '15' of the impugned judgment and based on this document and the oral testimony of PW-1 to PW-4, the learned trial court has accepted the age of the victim to be eleven years at the time of occurrence.

35. Learned counsel submits that the challenge to the age of the victim being less than twelve years at the time of occurrence is not founded on a categorical argument that she was not of such age when the offence was committed rather it dwells on whether the said claim by the prosecution with regard to age of the victim was proved in accordance with law. It is submitted that the process of proving the age of the victim, had it been undertaken in accordance with law, may have led to the confirmation of the assertion made by the prosecution that the victim was under twelve years of age at the time of occurrence.



36. It is submitted that the birth certificate (Exhibit '8') was marked on 29.04.2019 after examination of all the prosecution witnesses. The examination of last witness Dr. Amita Singh (PW-6) concluded on 26.03.2019. It is submitted with reference to the judgment of the Hon'ble Supreme Court in the case of **State of Bihar vs. Durgawati Devi** reported in **2021 (4) PLJR 516** that the principle that marking of a document as an exhibit does not dispense with its proof is well-settled.

37. The document in itself may be genuine but its contents, date of birth as recorded in Exhibit '8' had to be proved by the witness. This essential exercise of proving the content of the document through the evidence of the witness or any of the witness, was not undertaken in the case at hand. It is submitted that the oral testimony of PW-1 and PW-4 is not suffice as proof of the age of the victim to be under twelve years. PW-1 to PW-4 stated in their examination-in-chief that the victim was eleven years of age at the time of occurrence. Out of these witnesses, save PW-3 mother of the victim, no cross-examination was made by the defence with regard to the said claim by the PWs. Paragraphs '24' and '31' of the deposition of PW-3 refers two suggestions by the defence disputing the assertion made with regard to the age of the victim. The effect of non cross-examination of witness in a civil or



criminal trials on a particular point has been decided by the Hon'ble Supreme Court in the case of **Laxmibai through LRS. another versus Bhagwanthuva (Dead) Through Lrs. & Others** reported in **AIR 2013 SC 1204: (2013) 4 SCC 97** (paragraph '40') referred to in **Gangabhavani V. Rayapati V. Reddy** reported in **(2013) 15 SCC 298; Mudassani vs. V. Narasiah (D) through Lrs v M. Sarojana** reported in **AIR 2016 SC 2250** (paragraph '16'). In the 2016 decision, the Hon'ble Supreme Court has referred to the decision rendered by the various High Courts including Patna High Court in the case of **Karnidan Sarda Vs. Sailja K. Mitra** reported in **AIR 1940 Patna 683**. It has been held that the defence by ineffective cross-examination undertakes a huge risk. Learned counsel submits that the Hon'ble Supreme Court has held that the cross-examination is a matter of substance not procedure.

38. Learned counsel submits that keeping in view the aforesaid principles in mind when the issue raised is considered, it may be noticed that the credibility of the prosecution case with regard to the age of the victim was sought to be impeached through the cross-examination of the mother of the victim, PW-3, the investigating officer (PW-5) (paragraphs '13', '16', '19 and '56') and also through the medical officer (PW-6). Thus, some efforts were made by the defence to throw doubt surroundings the



prosecution case with regard to age of the victim. It did not remain completely unchallenged, therefore, it would have been prudent approach on the part of the learned trial court to conduct an inquiry into the age of the victim under the scheme of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the Act of 2015'). The process of age determination of the victim under the 'POCSO' Act is required to be undertaken in the same manner as that to be followed while determining the age of a child in need of care and protection or a child in conflict with law. Learned counsel relied upon the judgment of the Hon'ble Supreme Court in the case of **Jairnail Singh vs. State of Haryana** reported in (2013) 7 SCC 263.

39. It is further submitted that so far as conviction of Arvind Kumar and Abhishek Kumar under Section 376 (DB) of the IPC is concerned, it is liable to be set aside. Further conviction of the accused Abhishek Kumar under Section 6 of the POCSO Act cannot be sustained. Ms. Surya Nilambari, learned Advocate submits that she would, however, not challenge the conviction of Arvind Kumar @ Raj Singhania under Section 6 of the POCSO Act.

40. It is submitted that Section 6 of the POCSO Act has been substituted by Amending Act 25 of 2019 (w.e.f. 16.08.2019).



It prescribes punishment for aggravated penetrative sexual assault. Under this provision, the punishment with rigorous imprisonment for a term which shall not be less than twenty years but which may be extended to life imprisonment, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death may be imposed. So far as the present case is concerned, the date of alleged occurrence is that of prior to the coming into force of the Amending Act, therefore, the accused Arvind Kumar may be sentenced under Section 6 of the POCSO Act as existing on the date of the alleged occurrence.

41. Learned Amicus Curiae has vehemently submitted that Section 6 of the POCSO Act penalizes aggravated penetrative sexual assault, which term is defined under Section 5 of the POCSO Act. Commission of gang penetrative sexual assault on a child amounts to aggravated penetrative sexual assault as per Section 5(g) of the POCSO Act. It is submitted that so far as accused Abhishek Kumar is concerned, he did not actually committed any penetrative sexual assault on the victim girl. The term “penetrative sexual assault” has been defined under Section 3 of the POCSO Act and four kinds of Acts have been enumerated therein, anyone of which would result in commission of penetrative sexual assault. These four acts as laid down in Section



3 of the POCSO Act are the same as those contained in Section 375 IPC, defining rape. The prerequisite of common intention between Abhishek Kumar and Arvind Kumar which is the essence of gang penetrative sexual assault is not proved beyond all reasonable doubts in the present case.

42. Learned counsel submits that Sections 29 and 31 of the POCSO Act burdened the presumption under the POCSO Act but such presumption cannot be arrived in the absence of foundational facts which the prosecution prima-facie must establish for the operation of the legal fiction envisaged in these Sections. Reliance in this regard has been placed in the case of **Noor Aga vs. State of Punjab** reported in **2008 (16) SCC 417** rendered by the Hon'ble Supreme Court in the context of Section 35 and 54 of NDPS Act, Section 29 and 31 of POCSO Act are being *pari materia*.

43. Learned counsel endorsed the submission of Mr. Baxi, S.R.P. Sinha, learned Senior Counsel that in her testimony PW-2 refers to a single instance that she was sent to the Principal office by Abhishek Kumar where she was raped by the Principal. It is stated that her testimony lacks any substance from which it can be deduced that in so sending her to Arvind Kumar, Abhishek Kumar was aware that she would be raped by Arvind and that



consequently he was instrumental in commission of rape on the victim girl by Arvind Kumar. It is pointed out that the victim (PW-2) herself stated that she was repeatedly taken to the room in which she was raped by Arvind Kumar himself and not by Abhishek. The victim's deposition does not contain any evidence to show rape committed on her by Abhishek and any element of participation of Abhishek Kumar which could establish a meeting of minds of both the convicts.

44. It is stated that PW-3 is the mother of the victim, admittedly she was not an eye-witness and her testimony to the effect that Abhishek Kumar would often send the victim to the office of the Principal on some pretext where the victim was raped and that Abhishek himself guarded the said room where she was raped, apart from being uncorroborated by the victim herself, is inadmissible, not being direct testimony under Section 60 of the Evidence Act. In fact, in para '5' of her testimony, PW-3 herself reveals that her daughter, PW-2 had only referred to the "Principal" as the person responsible for subjecting her to inappropriate act. It is further submitted that neither Arvind Kumar nor the accused Abhishek Kumar were confronted with the prosecution evidence that the victim was eleven years of age at the time of occurrence. Relying upon the judgment of the Hon'ble



Division Bench of this Court in the case of **State of Bihar vs. Bachesh Kumar Singh** reported in **2021 (3) PLJR 297**, learned counsel submits that the incriminating material in this case both the oral testimony and the documentary evidence with regard to the age of the victim being under eleven years were not put to the accused persons. It is stated that under these circumstances, the testimonies of the witnesses to that effect cannot be used as evidence against them.

On the point of sentence.

45. Learned counsel submits that on a bare perusal of the impugned judgment, it would appear that learned trial court has followed the line of judgments of the Hon'ble Apex Court in which it has been held that it will be a mockery of justice to permit the accused to escape the extreme penalty of law. It is submitted that in the case of death sentence one of the mitigating circumstances is the probability of reformation and rehabilitation of the accused . It is the duty of the State to procure evidence to establish that there is no probability of reformation and rehabilitation of the accused. In catena of judgments, the Hon'ble Supreme Court held that death sentence ought not to be imposed if it is not the rarest of the rare case when the alternative option of lesser punishment is unquestionably foreclosed. To satisfy that the



sentencing aim of reformation is unachievable, requiring alternative imprisonment is complete futile. The Court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **Bachan Singh versus State of Punjab** reported in (1980) 2 SCC 684 and **Md. Mannan versus State of Bihar** reported in (2019) 16 SCC 584. It is submitted that the accused Arvind Kumar is highly educated and comes from a good family background and there is no material either to suggest that he cannot be reformed. He is only 33 years of age as on today, therefore, it would be prudent to follow the reformatory approach while sentencing him under Section '6' of the POCSO Act.

Consideration.

46. Having heard learned counsel for the parties and learned Amicus Curiae as also on perusal of the materials available on the record, this Court finds that so far as the accusation against accused Abhishek Kumar is concerned, the only statement made by the victim girl is that Arvind Sir *ne mujhe Principal Sir ke room me writing check krne bheja tha*. She has not stated that Abhishek had sent her repeatedly to the room of the Principal Sir.



She has stated that Principal Sir *mujhe usi kamre me bulate thhe 5-6 bar mera wahi balatkar kiya.*

47. PW-2 does not say that Abhishek had sent her to the Principal Room on all these occasions. she has not stated that Abhishek was guarding the door of the room in which the Principal was committing rape with her. She is the only eye witness in this case.

48. In the given kind of evidence available on the record, this Court finds it difficult to safely conclude that there was a pre-concert of mind between Abhishek Kumar (teacher) and Arvind Kumar (Principal) on the point of commission of rape of the victim girl and in furtherance of that common object to achieve the victim girl was sent to the room of the Principal.

49. This Court finds substance in the submission of learned Senior Counsel for the appellants and that of Ms. Surya Nilambari, learned Amicus Curiae that the testimony of the sterling witness in this case who is the victim of the crime (PW 2) does not say anything as to the part played by Abhishek Kumar to facilitate commission of rape on PW 2 by Arvind Kumar. In para 1, 2 and 3 of her testimony, the victim girl has stated that she told her mother that Principal Sir Raj Singhania @ Arvind Kumar had committed wrong act with her. In the entire testimony, she refers to



a single instance when she was sent to Principal's Office by Abhishek Kumar. This Court, therefore, agrees with the submission that in so sending her to the Principle Arvind Kumar, the appellant Abhishek Kumar was not aware that she would be raped by Arvind Kumar.

50. Section 376(DB) of the IPC has been inserted by Act 2022 of 2018 which reads as under (w.e.f. 21.04.2018):-

“376-DB. Punishment for gang rape on woman under twelve years of age.—Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death: Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim.”

51. Section 375 IPC defines rape in the following words:-

“[375. Rape.—A man is said to commit “rape” if he—
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any



part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”



52. On the conjoint reading of Section 375 and 376(DB) of the IPC, it would appear that the appellant Abhishek Kumar has not committed any act falling under clause (a) to (d) of Section 375 IPC, therefore, the only way he may be convicted for an offence under Section 376(DB) is if it is proved that he was acting in furtherance of common intention. In this case the prosecution has failed to prove beyond all reasonable doubt that the appellant Abhishek Kumar had pre-meeting of mind with Arvind Kumar and they formed a common intention and in furtherance thereof the victim girl was sent to the room of the Principal Arvind Kumar.

53. This Court is, therefore, of the considered opinion that the charge of gang rape under Section 376(DB) IPC would not be made out. Further since Abhishek Kumar has not been charged for the act of penetrative sexual assault, he cannot be convicted under Section 6 of the POCSO Act as well. This Court, therefore, acquits the appellant Abhishek Kumar (appellant in Cr. Appeal (DB) No. 285 of 2018) giving him benefit of doubt. He is directed to be released forthwith, if not required in any other case.

54. As regards the conviction of appellant Arvind Kumar @ Raj Singhania, first contention of appellant is that the prosecution has failed to prove that the victim girl was aged below 12 years. This Court finds that on the point of age of the victim



girl, PW-1, PW2 and PW-4 all have stated that at the time of alleged occurrence the age of the victim girl was about 11 years. The defence did not cross-examine PW-1 and PW-2 on the point of age. The defence, however, cross-examined the informant (PW-3) on the point of age. The defence brought two photocopies of Adhaar Cards on record out of which one was identified as that of the victim girl and the another was that of the younger sister of the victim girl, both were marked as 'X' and 'X/1' respectively for identification but those two documents were not exhibited in accordance with law. PW-3 denied the suggestion of the defence that the age of her daughter is more. Again no question was asked to PW-4 on the point of age of the victim girl.

55. The I.O. (PW-5) though claimed that she had seized one attendance register, three mobile phones and one knife from the place of occurrence but learned trial court has concluded that those were not brought as material exhibits. I.O. had not investigated on the point of age of the victim girl as per the school admission register (paragraph-15 of her evidence). She had been cross-examined on the point of age of the victim girl as recorded in the school admission register but she answered that she had not done any investigation on this point. In paragraph-15 of her cross-examination, she has stated that at the time of lodging of the FIR,



no documentary prove of age of the victim girl was produced before her. The victim's mother or any other witness had not handed over any documentary evidence to her. Under these circumstances, a question arises for consideration as to whether exhibit '8' which has been brought on record after closure of evidence of the prosecution and the same has been admitted as a public document may be used as a corroborative piece of evidence to support the evidence of PW-1, PW-2 and PW-4 on the point of age. The corollary to this would be as to whether in the nature of evidence adduced and the challenge thrown to the prosecution witnesses, PW-3, the I.O. (PW-5) and on the face of medical report (exhibit-7) showing the age of victim between 13-14 years, was it incumbent upon the learned trial court to conduct an inquiry into the age of victim girl by following procedure as prescribed under the Act of 2015 for determination of age of child in need of care and protection.

56. Learned Amicus Curiae has rightly pointed out that in the case of **Jairnail Singh** (supra), which was a case of gang rape, the Hon'ble Supreme Court inter alia held that "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 of a child



who is a victim of crime. For, in our view, there is hardly any difference insofar 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, PW 6.”

57. No doubt an ineffective cross-examination by defence undertakes a huge risk and the effect of non cross-examination is that the statement of the witnesses has not been disputed. In the case of **Bhoju Mandal v. Debnath Bhagat** reported in **AIR 1963 SC 1906** the effect of non cross-examining the witnesses has been considered. The Hon’ble Supreme Court held that in the cross-examination, party is required to put his version to the witness if no such questions are put, the court would presume that the witness account has been accepted. The High Court of Calcutta in the case of **A.E.G. Carapiet v. A.Y. Derderian** reported in **AIR 1961 Calcutta 359** has laid down that the party is obliged to put his case in the cross-examination of the witnesses for opposite party.

58. In the instant case, this Court finds that even though PW-1 , PW-2 and PW-4 were not cross-examined on the point of age of the victim ,it cannot be said that the defence did not



question the age of the victim girl. The defence suggested to PW-3 who is the informant and mother of the victim girl that the age of her daughter was more which she denied. Further the defence brought on record two photocopies of Aadhar cards one of which was of victim girl and another was of her sister which were exhibited by PW-3. Those were marked 'X' and 'X/1' respectively.

59. This Court further finds that on record, there is an application under Section 7A of the Juvenile Justice Act filed on behalf of the accused persons-appellants in the learned trial court during the evidence. It is stated in the said application that for a just decision of the case, determination of actual age of the victim is necessary. The application was filed on 17.01.2019 and the order dated 17.01.2019 passed by learned trial court specifically mentions about filing of Section 7A application and time was granted to the prosecution to file reply thereto. The subsequent ordersheet would, however, not say anything about the final fate of the said application. After the evidences of the prosecution were closed, the prosecution filed an application under Section 35 of the Indian Evidence Act praying therein to mark the original birth certificate of the victim as exhibit. This application was opposed on behalf of the defence which would be evident from the order dated 29.04.2019 passed by the learned trial court. By the same



order, the birth certificate was marked as Exhibit '8' with objection.

60. Again one petition under Section 293(4)(e) of the Cr.P.C. was filed on behalf of the State to mark the FSL report as exhibit as the same is admissible in evidence as per Section 293(1) Cr.P.C. The learned defence lawyer opposed the prayer and submitted that the report is doubtful so the scientific expert should be summoned and examined in the court. But the learned trial court recorded that the report bears the signs and signatures of Director, Forensic Science Laboratory as well as that of the Assistant Director, Forensic Science Laboratory. Therefore, the report may be used as evidence in inquiry and trial. Accordingly, FSL report was marked exhibit '9'. No expert/author/witness came in the witness box to tender the FSL report.

61. This Court further finds substance in the submission of learned Senior Counsel for the appellant and Ms. Surya Nilambari , learned Amicus Curiae that the principle of marking a document as exhibit does not dispense with the requirement of its proof. The date of birth as recorded in Exhibit '8' had to be proved by the witness. This exercise was not taken up and despite the objections raised by the defence, the same was allowed to be exhibited, though with objection but the said objection has not at



all been considered by the learned trial court in the impugned judgment. Exhibit '8' was not tendered by any witness, therefore in view of the Hon'ble Division Bench judgment in the case of **Durgawati Devi** (supra) it would not have been relied upon.

62. Further, this Court finds that in course of statement under Section 313 Cr.P.C. ,the attention of the accused were not at all drawn towards the incriminating material with regard to the age of the victim girl and they were not at all apprised of the documents placed by the prosecution as Exhibit '8'.

63. It is well settled by catena of judicial pronouncements that the purpose to examine an accused under Section 313 Cr.P.C. is to meet the requirement of principle of natural justice and to see that no one remains unheard. The Hon'ble Division Bench of this Court in the case of **Jagat Prasad versus The State of Bihar & Anr.** reported in **2022 (1) PLJR 568 (SC)** has relied upon the judgment of the Hon'ble Supreme Court in the case of **Khet Singh versus Union of India** reported in 2011 (4) SCC 81; AIR 2002 SCC 1450; 2008 (16) SCC 417; 2009 (12) SCC 161 ; (2004) 10 SCC 562 ; (2011) 5 SCC 123 and (2018) 2 SCC 305 and held in paragraph '74' as under:-

“74. In my view, since no question was asked from the appellant on the circumstances referred to in the aforesaid paragraph, he did not have any chance to explain those circumstances. The circumstances which were never put to the appellant while examining him



under Section 313 of the Cr.P.C. could not have been used for his conviction. Though there was no evidence that the appellant was transporting the narcotic substance in connivance with the drug peddlers from Indo-Nepal border which was being financed by Raj Kumar, the Trial Court put the said question to the appellant. Surprisingly, the circumstances put forth by the witnesses in their testimonies were not brought to the notice of the appellant and the circumstances which have not been led in evidence were put to him while examining him under Section 313 of the Cr.P.C.”

64. The Hon’ble Division Bench while pointing out the purpose to examine the accused under Section 313 Cr.P.C. recorded in Paragraphs ‘67’, ‘68’, ‘69’, ‘70’ as under:-

“67. In this regard, it would be apt to reproduce Section 313 of the Cr.P.C:—

“313. *Power to examine the accused.*-- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under subsection (1).

(3) The accused shall not render himself liable to punishment by refusing to answer



such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

68. The plain reading of Section 313 of the Cr.P.C. would demonstrate that the question under clause (1) (a) is discretionary. It empowers the court to put such questions to the accused as the court considers necessary for the purposes of enabling him personally to explain any circumstances appearing in the evidence against him at any stage without previously warning. However, clause (1)(b) empowers the court to question the accused generally on the day after the witnesses for the prosecution have been examined and before he is called upon for his defence. It casts a duty on court to give an opportunity to the accused to explain the incriminating material against him.

69. In **State of U.P. v. Mohd. Iqram & Anr.**, since reported in AIR 2011 SC 2296, the Supreme Court held:

“Attention of the accused must specifically be drawn to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Court is under legal obligation to put all incriminating circumstances before accused to solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused. Circumstances not put to the accused in his examination under section 313, cannot be used against him.”

70. In **Naval Kishore v. State of Bihar**, since reported in (2004) 7 SCC 502, the Supreme Court observed that the opportunity of examination under section 313 given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. In the said case, the Supreme Court further observed that the practice



of putting the entire evidence against the accused in a single question and giving an opportunity to explain the same is improper as the accused may not be in a position to give a rational and intelligent explanation.”

65. In the given kind of materials discussed hereinabove, this Court is of the considered opinion that it is not one of those cases in which the defence has completely failed to raise an issue as to the age of the victim. Informant (PW-3) , Investigating Officer (PW-5) and Medical Officer (PW-6) were duly questioned on this issue. PW-6 went on to prove the medical report (Exhibit 7) showing the age of the victim between 13-15 years. The defence had filed a written application under Section 7A of Act of 2015 seeking determination of the age of the victim. On this application though reply was called for but later on the learned trial court did not consider the same and admitted Exhibit ‘8’ with objection but while passing the impugned judgment, the learned trial court did not consider the objection.

66. For all these reasons, this Court is of the considered opinion that it would not be a prudent and safe approach to accept the prosecution version that the victim girl was below 12 years of age on the alleged date of occurrence. The benefit of doubt on this point must go to the accused- Arvind Kumar.

67. Having said so, this Court finds from the evidence available on the record that so far as the overt act of commission



of rape on the victim is concerned, the same has been duly proved by the prosecution witnesses. the victim herself is an eye witness and she has narrated the entire incident of commission of rape by the appellant Arvind Kumar. This Court finds that the appellant- Arvind Kumar in Cr. Appeal (DB) No. 218 of 2021 has committed sexual offence of rape as defined under Section 375 of the IPC. He is thus liable to be punished under Section 376 of the IPC and Section 6 of the POCSO Act, 2012.

68. This Court finds that in this case charges were framed under Sections 120(B), 376(DB), 504, 506 of the IPC and Section 6 of the POCSO Act, 2012. Since this Court has found that the allegation of the gang rape could not be established and the benefit of doubt as regards the age of the victim girl would go to the accused appellant- Arvind Kumar @ Raj Singhania, this Court is of the opinion that no prejudice would be caused if the appellant- Arvind Kumar is convicted under Section 376 of the IPC and Section 506 of the IPC and also under Section 6 of the POCSO Act, 2012.

69. Section 42 of the POCSO Act reads as under:-

“¹[**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, ²[376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB], ³[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.

42-A. Act not in derogation of any other law. -

The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.]”

70. In the case of **State of Bihar Vs. Rohan Bind** reported in **2018 (4) BLJ 219 (PHC)**, the prosecution had established its case of rape, murder and causing disappearance of evidence of offence. In the said case, the victim was aged only three years and learned trial court held the appellant guilty for commission of offence under Sections 4, 6 and 8 of POCSO Act. Learned Trial Judge convicted the appellant under Section 376 of the IPC but considering the circumstances such early age of the appellant, that he was first offender and nothing was brought before the Court to show that he was accused in any case earlier, the death sentence was converted for imprisonment for life of the appellant till his last breath.

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1. Substituted by Act 13 of 2013, S. 29, for S. 42 (w.r.e.f. 3-3-2013).
 2. Substituted by Act 22 of 2018, S. 25, for “376-A, 376-C, 376-D” (w.r.e.f. 21-4-2018).
 3. Substituted by Act 25 of 2019, S. 10, for “376-E or section 509 of the Indian Penal Code (45 of 1860)” (w.e.f. 16-8-2019).



71. In the case of **State of Bihar Vs Hari Krishna Sada** reported in **2018 (4) BLJ 302 (PHC)**, again in the case of rape and murder of a girl child, this Court considering the early age of the appellant and the fact that there was nothing that he was having criminal antecedent converted the death sentence to imprisonment for life of the appellant till his last breath.

72. In the present case, it has been submitted by learned senior counsel for the appellant as well as by Ms. Surya Nilambani, learned *Amicus Curiae*, that the appellant Arvind Kumar is a young man aged about 32 years. He is not shown to be habitual offender and to the best of the knowledge of his counsel he had no criminal antecedents prior to this case. He is an educated man and from the evidence it may be found that he is said to be an Engineer. Learned counsel for the appellant Arvind Kumar has submitted that he has done Masters in Science. The victim is living happily leading her life normally with the help of family and friends. There is nothing on record to suggest that there is no probability of reformation and rehabilitation of Arvind Kumar @ Raj Singhanian. The conduct of the appellant in jail may also be taken into consideration.

73. To this Court, it appears that this case cannot be equated with the cases where there is kidnapping, rape and murder



of victim. It has been submitted that in the case of **Pappu Vs. State of Uttar Pradesh** reported in **2022(2) BLJ 231(SC)** which was case of rape and murder of a child sentence of death was commuted to life imprisonment.

74. Considering the aforesaid submissions and materials on the record, this Court while sustaining the conviction of the appellant-Arvind Kumar @ Raj Singhania converts it from 376 (DB) IPC to Section 376 IPC. Accordingly his sentence is modified and he is awarded rigorous imprisonment for life and a fine of Rs.1,00,000/- (Rupees One Lakh only) for the offence under Section 376 IPC. His conviction under Section 6 of the POCSO Act is also upheld, however, in view of Section 42 of the POCSO Act no separate sentence is awarded for the offence under Section 6 of the POCSO Act. He is further sentenced under Section 506 IPC for two years rigorous imprisonment with a fine of Rs.5,000/- (Rupees Five Thousand only). All the sentences shall run concurrently.

75. Criminal Appeal (DB) No. 218 of 2021 and Criminal Appeal (DB) No. 285 of 2021 are, thus, allowed to the extent indicated hereinabove.



76. In consequence thereof Death Reference No. 3 of 2021 made by the learned trial court under Section 366 Cr.P.C. is rejected.

77. The Patna High Court Legal Services Committee is hereby directed to pay Rs. 15,000/- (Rupees Fifteen Thousand only) to Ms. Surya Nilambari, learned Amicus Curiae in Death Reference for the services rendered by her.

(Rajeev Ranjan Prasad, J)

(Ashwani Kumar Singh, J)

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