IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.914 of 2022

Arising Out of PS. Case No.-356 Year-2018 Thana- GAYA KOTWALI District- Gaya

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Satyabrat Ashok @ Satya Vrat Ashok @ Pappu Sharma @ Pappu Son of Ramyad Sharma Resident of Mohalla- Vishunupuri Colony, Chand Chaurah, P.S- Vishnupad, Distt- Gaya

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate.
Mrs. Kiran Kumari, Advocate.
Mrs. Vaishnavi Singh, Advocate.
Md. Imteyaz Ahmad, Advocate.
Mr. Ritwik Thakur, Advocate.
Mr. Ritwaj Raman, Advocate.

For the State : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE JITENDRA KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)

Date : 28.06.2024

The present appeal has been preferred against the impugned judgment of conviction and order of sentence dated 22.10.2022 and 04.11.2022 respectively passed by Ld. Special Judge, POCSO Court-cum-Additional Sessions Judge-VI, Gaya,

Bihar, in POCSO Case No. 79 of 2018 arising out of Kotwali P.S. Case No. 356 of 2018, whereby the sole appellant has been convicted for the offences punishable under Section 376 of the Indian Penal Code and Section 4(2) of POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for 20 years and pay a fine of Rs. 25,000/- for offence punishable under Section 4(2) of POCSO Act, 2012 and in case of default of payment of fine additional rigorous imprisonment of three months. The appellant has not been sentenced under Section 376 of the Indian Penal Code in view of the provisions of Section 42 of the POCSO Act, 2012.

2. The FIR bearing Kotwali P.S. Case No. 356 of 2018 was lodged at 11:00 O' Clock on 20.07.2018 against the sole accused Satyabrat Ashok @ Pappu Sharma, who is appellant herein, for offence punishable under Section 376 of the Indian Penal Code and Section 8 of POCSO Act, 2012 on the written report of the victim on 20.07.2018 to the Officer-in-Charge Kotwali Police Station, Gaya.

3. The prosecution case as has emerged from the written report is that the informant/victim was born on 14.04.2000. She took examination of Matriculation in March, 2015 and thereafter, she started living with her uncle and aunt

since 2015 at Buxar. It is alleged that since then, he started misbehaving with her and on the false promise to marry, he established physical relationship with her. When she asked to marry her, he refused and promised that he will marry only on her becoming a major. However, he reneged from his promise. None the less, the affair continued for three years. He had given her mobile phones twice for talking to him. He made physical relationship several times by taking her to hotel at Tower Gali near Bengali Ashram situated under Police Station Vishnupad, Gaya. On 20.07.2018, he clearly refused to marry her under any condition.

4. After registration of the F.I.R., investigation commenced and after investigation, charge-sheet bearing no. 156 of 2019 dated 17.06.2019 was submitted against the appellant for offences punishable under Section 376 of the Indian Penal Code and Section 4 of POCSO Act, 2012. Cognizance of offence punishable under Section 376 of the Indian Penal Code and Section 4 of POCSO Act was taken by the learned POCSO Court and charges were framed.

5. During trial, the following six witnesses were examined:-

(1) **P.W.-1** - Atit Kumar
(ii) **P.W.-2** - Victim

(iii) **P.W.-3** – Father of the victim
(iv) **P.W.-4** - Dr. Shakuntala Naag
(v) **P.W.-5** – Mother of the victim
(vi) **P.W.-6** - Seema Kumari (I.O. of the case)

6. During trial, the prosecution has also brought on record the following documentary evidence:-

(i) **Ext. 1** - Written application of FIR;
(ii) **Ext. 2** - Signature of victim on her statement under Section 164 Cr.PC;
(iii) **Ext. 3** - Photocopy of Matriculation Mark-sheet of victim.
(iv) **Ext. 4** – Medical Report
(v) **Ext. 5** – F.I.R.
(vi) **Ext. 6** – Endorsement

7. After closure of the prosecution evidence, the appellant was examined under Section 313 Cr.PC, confronting him with the incriminating circumstances which had come in the prosecution evidence, so as to afford him the opportunity to explain them. However, during his examination, the only thing which he stated was that he is innocent.

8. The appellant did not examine any witness in his defence. However, he brought the following documentary evidence on record:-

(i) **Ext.A** – Statement of victim dated 06.03.2019

9. The learned Trial Court after appreciating the evidence on record and considering the submissions of the

parties, passed the impugned judgment of conviction and order of sentence finding that the victim/informant was fourteen (14) years of age at the time of commission of the offence against her and the appellant could not discharge his onus to rebut the presumption raised against him.

10. We have heard the learned Counsel for the appellant and the learned APP for the State.

11. Learned Counsel for the appellant submitted that the impugned judgment of conviction and order of sentence passed by learned Trial Court is not sustainable either in law or on facts. The Trial Court has not applied its judicial mind and has failed to appreciate evidence on record properly. He further submitted that the prosecution has failed to prove the foundational facts for raising presumption against the appellant in regard to the offence alleged to have been committed by him against the victim. He further submits that P.W.-1,who is the Maternal Uncle of the victim, has deposed that the victim has performed her marriage with the appellant three months ago of her own volition. He also submitted that P.W-2, who is victim herself, has also deposed that she was forced to file the instant case and she had performed marriage with the appellant and had been leading happy conjugal life. P.W-3, who is father of the

victim, also stated that the victim had voluntarily married the appellant and was living with him. The doctor who has been examined as P.W.-4, found that the victim was 17 years and 6 months old and there was no sign of any rape. Even the mother of the victim has not deposed anything which proved that the appellant had used force against the victim. At the time of the marriage, the victim was a major.

12. However, the learned APP defended the judgment and sentence and submitted that there is no illegality or infirmity in the impugned judgment and the appellant has also been appropriately sentenced. He further submits that marriage of the appellant with the victim did not absolve him of his offence punishable under Section 376 of the Indian Penal Code and Section 4 of POCSO Act.

13. Before proceeding to consider the rival submissions of the parties, it would be relevant to take note of Sections 29 and 30 of the POCSO Act which provide for presumptions in view of the object of the Act. These Sections read as follows:

> **"29. Presumption as to certain offences -** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

> **30. Presumption of culpable mental state -**
> (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
> **Explanation -** In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

14. From the reading of these Sections, it transpires that the presumptions as provided are those of law and mandatory in nature, but are rebuttable.

15. Section 29 provides for reverse burden on the accused facing prosecution under Sections 3, 5, 7 and 9 of the POCSO Act to prove his innocence, creating an exception to the ordinary rule of presumption of innocence available to an accused in a criminal trial.

16. Section 30 stipulates that in a prosecution under the POCSO Act, 2012 where the offence requires the existence of a culpable mental state, the court is to presume the existence of such culpable mental state on the part of the accused; but giving right to the accused to rebut it.

17. The meaning and import of the presumptions as provided in the POCSO Act, 2012 have been examined and

explained by Hon’ble Apex Court and High Courts on several occasions. Before raising the presumption against the accused under Section 29 and 30 of the POCSO Act, 2012 the prosecution is first required to prove the foundational facts as required under Sections 29 and 30 of the POCSO Act, 2012 beyond all reasonable doubts by relevant and legally admissible evidence and only thereafter the burden of proof would shift to the accused to rebut the presumptions on the touchstone of preponderance of probability and not proof beyond reasonable doubts. The accused may rebut the presumption by leading defence evidence or by discrediting prosecution witnesses through cross examination or by exposing the patent absurdities or inherent infirmities in the prosecution case by analyzing special features of the particular case. Presumption does not take away the essential duty of the court to analyze the evidence on record in the light of special features of a particular case. The courts are required to be on the guard to see that application of presumptions does not lead to any injustice or mistaken conviction. In this regard, the following case laws may be referred to:

18. In **Babu Vs. State of Kerala, (2010) 9 SCC 189, Hon'ble Apex Court** has observed as follows:

"27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden on proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. (Vide: Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16; Narendra Singh v. State of M.P., (2004) 10 SCC 699: AIR 2004 SC 3249; Rajesh Ranjan Yadav v. CBI, (2007) 1 SCC 70: AIR 2007 SC 451; Noor Aga v. State of Punjab, (2008) 16 SCC 417; and Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54: AIR 2008 SC 1325)."

(Emphasis supplied)

[Also refer to **Attorney General Vs. Satish, (2022) 5 SCC 545; Navin Dhaniram Baraiye Vs. State of Maharashtra, 2018 SCC Online Bom 1281; Joy V. S. Vs. State of Kerala; (2019) SCC Online Ker 783; Sahid Hossain Biswas Vs. State of West Bengal; 2017 SCC Online Cal 5023; Dharmender Singh Vs. State (Govt. Of NCT of Delhi) (2020 SCC Online Del 1267); Sachin Vs. State of Maharashtra MANU/MH/3940/2015; Monish Vs. State of U.P, CRIM. MISC. BAIL APPLICATION No. - 55026 of 2021; Marriappan Vs. The Inspector of Police, (Crime No.27/2018) Crl.M.P.**

(MD) No.1396 of 2023 and Latu Das Vs. State of Assam, 2019 SCC OnLine Gau 5947]

19. Before we proceed to consider whether the prosecution has proved the foundational facts of the crime beyond reasonable doubts, it would be necessary to find out what is "proof beyond reasonable doubts" and when the accused is entitled to get benefit of doubt.

20. In regard to proof beyond reasonable doubts, **Hon'ble Supreme Court** in **Collector of Customs Vs. D. Bhoormal (1972) 2 SCC 544**, has observed as follows:

> "30. ..... All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case. "
>
> (Emphasis Supplied)

21. In **Shivaji Sahabrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793, Hon'ble Supreme Court** has held as follows:-

> "6. ……. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude

> reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned Author [Glanville Williams in 'Proof of Guilt'.] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted "persons" and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent …." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."
>
> (Emphasis Supplied)
>
> [Also refer to **Dilavar Hussain Vs. State of Gujarat, (1991) 1 SCC 253]**

22. Now coming to the evidence on record, we find that the **victim/informant** has been examined as **P.W.-2.** In her **examination-in-chief**, she has deposed that she had lodged the case against the appellant. The occurrence is of the year 2015. At that time, she had completed her 10th class. According to the matric certificate, her date of birth is 21.02.2001. She has further deposed that there was physical relationship established with the appellant but thereafter, he refused to keep her and that is why she

had lodged the case. The appellant is the uncle (*Mausa)* in relationship. She has further deposed that physical relationship between the accused and her was going on for about 7-8 months since prior to lodging the present case. Their relationship was established in Buxar and in Gaya. On the pressure of first wife, the accused refused to marry her. She identified the written report and her statement made under Section 164 Cr. PC. She has also deposed that photostat copy of the matric marksheet is on record and she identified the same and claimed that it is true photostat copy of the original and hence, the photostat marksheet of matric was exhibited as Exhibit-3. In her **cross-examination** she has deposed that she had come to the Court for deposing along with the appellant. She also deposed that she had also filed the marriage certificate on the record. The marriage was solemnized in the temple of Srimata Mundeswari Darbar, Mandvi, Jehanabad. She has further deposed that she had also filed a photostat copy of the affidavit, which was filed before marriage officer. Under Section 164 Cr. PC, she had stated that she was forced to lodge this case and that she wanted to live with the appellant throughout her life and that he had done nothing wrong and whatever he had done was with her consent. She has further deposed that she had given another statement on 06.03.2019 before Court and she

identified the signature put thereon. This statement has been exhibited as Exhibit-A. In this statement, She again made it clear that she wanted to marry the appellant. She had solemnized marriage in temple on 20th June, 2020 and since then she had been living with him. She also continued her studies.

23. The **father of the victim** has been examined as **P.W.-3**. In his **examination-in-chief**, he has deposed that the victim has passed matriculation in 2015. After the matric examination, the victim was taken by the appellant and his wife to Buxar. She lived there for 15-20 days and thereafter, she was brought back to her home but thereafter the appellant increased his frequency of meeting the victim and started taking her to hotel and established physical relationship with her. At the time of occurrence, the victim was 16-17 years old. In 2018, the appellant took the victim to Buxar in his vehicle. She was under his influence and therefore, she was not willing to come with him and subsequently he came to know that both have solemnized marriage. He has identified the accused standing in the dock. In his **cross-examination**, he has deposed that his daughter had been living with the accused for the last three years. In 2018 they got married. He got the information about their marriage from others. He did not want to meet his daughter.

24. The **mother of the victim** has been examined as **PW-5**. In her **examination-in-chief**, she has deposed that the occurrence with her daughter had taken place in 2015. In that year, she had taken the matriculation examination. After the exams, she had gone to the house of accused who was living with his wife. In 2017, she came to know that the accused had outraged her modesty of her daughter. When she slapped her daughter, she gave her the mobile with which she used to talk to appellant frequently. On further enquiry, she told the truth that the appellant used to meet her in college and take her to a hotel in Bodhgaya and established physical relationship a number of times. After knowing all these, she asked her daughter to lodge the case. The appellant had enticed her for about three times, the time being in 2018 at 9:30 PM. Thereafter her daughter did not come back and stopped talking. She thereafter once called her on Holi and told her that she was being ill-treated. In **her cross-examination**, she has deposed that after giving her statement under Section 164 Cr.PC, her daughter had come to her and stayed for about 15 months and then left for the home of the appellant at Buxar. She was not aware whether her daughter and the appellant had solemnized marriage, but her daughter had informed her on telephone in 2018 that she had got married with

the accused and she should stop interfering in her life. **To the Court question,** she has deposed that wife of the appellant is her own sister. She was also not aware whether the appellant had divorced his wife.

25. The **maternal uncle of the victim** has been **examined as P.W.-1**. In his **examination-in-chief**, he has deposed that occurrence had taken place in 2015 and at that time, the victim was only 15 years old. He has further deposed that after matric examination, the victim had gone to the house of the appellant at Buxar. The appellant had established physical relationship with the victim. After knowing this incident, he went to Buxar and brought the victim back to her house. The appellant has one house at Gaya also. During college time, there used to be meeting between the appellant and the victim when they got into touch with each other. The appellant is married to his sister and there is one son and daughter from the wedlock. In his **cross-examination**, he has confirmed that the victim is presently living with the appellant for the last 2-3 years. She has also been continuing her studies. He had come to know that the victim has married the accused and is living with him.

26. **P.W.-4** is **Dr. Shakuntala Naag,** who had examined the victim on 22.07.2018. In her examination-in-chief,

she has deposed that incident is nearly 10 days old and her findings are as follows:-

> "1. Mark of identification- One black mole seen on left upper side of forehead. On black seen on tip of nose.
>
> 2. General examination- Fair colour young girl in fully conscious state. Well responding to all stimuli with average built. Eyes and hairs are black. Clothes are not original. Height-5 feet 3½ inches. Weight-44 Kgs, Teeth-7+7/8+8.
>
> 3. P/A-NAD. Mar of violence-Nil
>
> 4. Secondary sexual character- Both breast axillary and pubic hairs are well developed. LMP-6.6.18. With ameno of one month 6 days. Pregnancy test-Negative twice done. Menarche attended 4-5 years back.
>
> 5. Local examination- HVS taken sealed and handed over to police and refer to ANMMCH, Gaya. Hymen-absent. Old healed radial lacerations are seen. Vagina admits index finger of right hand without exertion. Cervix and vagina pink. No abnormal findings noted. Uterus nulliperous size retroverted mobile, non tendered, perineum lax.
>
> 6. Refer to ANMMCH, Gaya radiology department for age determination and USG for lower abdomen.
>
> 7. I have received HVS report on 25.07.2018 with report No- 144/24.07.2018 and following findings are noted.
>
> i. HVS shows no alive or dead spermatozoa, only squamous epithelial cells are seen.
>
> 8. X-ray report-I have received X-ray report on 02.08.2018 with report No and plate No. 18739/23.07.2018 and three x-ray plates. Following findings are noted.
>
> i. X-ray pelvis- Illiac crest of the illium is not completely fused with illac bone.
>
> ii. X-ray wrist Joint- the lower end of the radius is near to be fused and line of fusion is seen.
>
> iii. X-Ray knee joint-lower end of the femur and upper end of tibia is fused.
>
> 9. Conclusion- There is no sign and symptoms of present sexual intercourse but intercourse in past may not be denied. There no abnormal findings noted. 3. Whether she has been raped or not is not sure.
>
> 10. Based on above physical and radiological findings the age of victim is 17 years and 6 months.

> 11. This victim was examined, report was prepared and signed by me which is marked as exhibit 4.

27. During her **cross examination,** she has deposed as follows:

> "12. General examination of victim does not show any evidence of rape with her.
> 13. I am not involved in preparation of any report prepared by radiological and pathological department of ANMMCH, Gaya.
> 14. The pregnancy report of victim was found negative.
> 15. The injury over the private part of the victim may be due to itching or any other physical interruption. The minor injuries may heal within two to three days.
> 16. The description of radiological findings can be explained by radiologist.
> 17. It is wrong to say that no sign of present or past intercourse were found on the person of victim and my report is not fair."

28. **P.W.-6** is **Sima Kumari,** the I.O. of the case. In her **examination-in-chief**, she has deposed that according to the Matriculation marksheet, the date of birth of victim is 21.02.2001 and as per the medical test, her age was assessed as 17 years and six months.

29. The **first and foremost question** is whether the prosecution has proved that the victim was a child i.e. below 18 years of age on the date of occurrence in terms of Section 2(1)(d) of the POCSO Act, 2012. It is one of the foundational facts to be proved by the Prosecution, as it is a prerequisite for application of the POCSO Act against the appellant. Section 34 of the

unamended POCSO Act, 2012 reads as follows:-

> **“34. Procedure in case of commission offence by child and determination of age of Special Court.-**
> (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000).
> (2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.
> (3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”
>
> (Emphasis Supplied)

30. Sub Section (2) of Section 34 of the POCSO Act only provides that question regarding the age of the victim can be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination. However, in the land mark judgment of **Jarnail Singh Vs. State of Haryana; (2013) 7 SCC 263,** which is still holding the field and being followed by all courts, **Hon’ble Apex Court** has held that the procedure provided for determination of age of juvenile in conflict with law should be adopted for determination of age of the victim of crime also, because there is hardly any difference, insofar as issue of minority is concerned, between a child in conflict with law and a child who is the victim of a crime. At the time of consideration of the **Jarnail Singh Case (supra)**, the Juvenile Justice (Care

and Protection of Children Act), 2000, was in operation. The **Supreme Court** in **Jarnail Singh Case (supra)** held that the procedure provided for determination of age of juvenile in conflict with law as provided in Rule 12 of the J.J. Act, 2000 will be applicable, even for determination of age of the victim of a crime. The relevant paragraph of **Jarnail Singh Case (supra)** may be referred to, which is as follows:-

> "23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even 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……."
>
> (Emphasis Supplied)

31. Similar view has been taken by Hon'ble Supreme Court in recent case of **P. Yuvaprakash Vs. State; 2023 SCC Online SC 846,** referring to Section 34 of the POCSO Act and Section 94 of the J.J. Act, 2015, which was effective at the time of the consideration by the court and sub - Section 1 of Section 34 of the POCSO Act was already amended in 2019 in view of the J J Act 2015 coming into force since 01.01.2016.

32. Section 34 of the POCSO Act, as it stands after amendment in 2019, reads as follows:-

> **"34. Procedure in case of commission offence by child and determination of age of Special Court.-**
> (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).
> (2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.
> (3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person."

33. Section 94 of the J.J. Act, 2015 dealing presumption and determination of age reads as follows:

> "**Presumption and determination of age.-** (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.
>
> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—
>
> (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
>
> (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> (iii) and only in the absence of *(i)* and *(ii)* above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:
>
> Provided such age determination test conducted

on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

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

34. Hon'ble Apex Court in **P. Yuvaprakash Case (supra),** after considering Section 34 of the POCSO Act and Section 94 of the J.J. Act, 2015 held as follows:

"13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

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

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

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

35. From the aforesaid authorities, it clearly emerges that procedure for determination of age of the victim of a crime is the same as provided for determination of age of a child in conflict with law in the prevailing Juvenile Justice Act at the relevant time.

36. As such, the procedure for determination of the

age of the alleged victim of a crime in the case on hand would be the same as provided in the J.J. Act, 2000, because the alleged offence in the case on hand has been committed between the year 2015 and 2018. It is relevant to mention that J.J. Act, 2000 has been repealed by J.J. Act, 2015 coming into operation on 01.01.2016 and as per the prosecution case, as emerging from the written report, physical relationship was established by the accused since 2015 after her matriculation exams in March, 2015 on false promise of marriage.

37. Hence, it becomes pertinent to refer to relevant statutory provisions of the J.J. Act, 2000 regarding determination of age. Section 49 of the J.J. Act, 2000 deals with presumption and determination of age. It reads as follows:

> **"Section 49. Presumption and determination of age.—**
>
> (1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.
> (2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person."

38. The Rule 12(3) of Juvenile Justice (Care and

Protection of Children) Rules, 2007 made under the Act provides for the procedure to be followed in determination of age. It reads as follows:

> "**12. Procedure to be followed in determination of age.**
> (1)……..
> (2) …….
> (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-
> (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
> (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.
>
> (4)……..
> (5)……..

(6)……."

39. Here, again it would be relevant to refer to **Jarnail Singh (supra)** which has discussed and elucidated the procedure for determination of age as provided under Rules 12 of J.J. Rules, 2007. The relevant paragraph of the case reads as follows:

> "23……...The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion."
>
> (Emphasis Supplied)

40. Now, the question is whether the prosecution has proved that the alleged victim was below 18 years of age as per

the procedure as prescribed in J.J. Act, 2000 and the Rules made thereunder.

41. In the case on hand, we find that the victim/informant had taken matriculation examination conducted by Bihar School Examination Board, Patna before the alleged occurrence and during trial, the prosecution has brought on record photostat copy of the mark-sheet of the matriculation examination of the victim showing her date of birth as 21.02.2001. It also transpires that during the trial, the defence has not raised any objection regarding the genuineness of the document or its admissibility. It further transpires that even the mode of proof by secondary evidence of the document (Matriculation Mark-sheet) without complying with the pre-conditions for leading secondary evidence was not objected to by the appellant when the photostat copy of the Matriculation Marksheet was being marked as an Exhibit and admitted to record. Hence, the photostat copy of the mark-sheet has been admitted on record and exhibited as **Ext.-3.** It is also found that even during the entire trial, the genuineness of the matriculation mark-sheet or its admissibility or mode of its proof has never been questioned or protested by the appellant. As such, matriculation marksheet stands legally proved, as per which, age of the victim in March, 2015 comes to 14 years and

about one month, and at the time of lodging the F.I.R. on 20.07.2018, it comes to 17 years 4 months and 29 days.

42. As such, the initial burden of the prosecution to prove age of the victim stands discharged, proving beyond reasonable doubts that the victim at the time of occurrence was below 16 years of age in March, 2015, when the offence was first committed by the appellant against the victim.

43. However, the learned Counsel for the appellant submits that prosecution has adduced secondary evidence of the matriculation certificate of the prosecutrix without bringing on record any evidence to fulfill the pre-conditions for proving the document by secondary evidence and hence, the matriculation marksheet of the prosecutrix could not be legally proved and hence, it had to be excluded from consideration of the Court. He refers to and relies upon **Jagmail Singh Vs. Karamjit Singh; (2020) 5 SCC 178,** wherein Hon'ble Supreme Court in para-11 of the judgment has held as follows:-

> "**11.** A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as

to why the original evidence has not been furnished."

44. We have no disagreement with the submission of the learned Counsel for the appellant in that regard, but the appellant was required to lodge protest/objection to the secondary evidence being admitted and taken on record. In the absence of such protest, it would be deemed that such an objection was waived by the appellant. Subsequently, the appellant will not be allowed to raise objection to the mode of proof at the appellate stage.

45. In, **R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple; (2003) 8 SCC 752,** the Supreme Court has held as follows -

> "20. …… Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the

> appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. ……... Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence……..."

46. Similar view has been taken by the Supreme Court in **Dayamathi Bai Vs. K.M. Shaffi; (2004) 7 SCC 107** also. In this case, the secondary evidence of sale deed was adduced and admitted in evidence without fulfilling the pre-conditions for leading secondary evidence. But the appellant had not taken objection to the sale deed being marked and admitted in evidence. Later, at the appellate stage, the appellant took such objection, which was not sustained. The Supreme Court held that:-

> "12. Ms Kiran Suri, learned counsel appearing on behalf of the appellant submitted that once the document becomes incapable of being proved for want of primary evidence, the foundation of secondary evidence must be laid, without which such secondary evidence was inadmissible. That in the present case, no steps were taken by the plaintiff to produce the original sale deed. That no steps were taken to prove the loss of the original sale deed. That no steps were taken to establish the source from which certified copy was obtained. She submitted that if the foundation is laid under Section 65 and if the plaintiff was able to prove that the original sale deed was lost then the secondary evidence was admissible but in the absence of such a foundation, the High Court erred in holding that the registered certified copy of the sale deed was admissible in evidence as the document produced was more than 30 years old.
>
> 13. We do not find merit in this civil appeal. In

> the present case the objection was not that the certified copy of Ext. P-1 is in itself inadmissible but that the mode of proof was irregular and insufficient. Objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. They have to be taken before the document is marked as an exhibit and admitted to the record …….”
>
> (Emphasis supplied)

47. In a recent case viz. **Lachhmi Narain Singh Vs. Sarjug Singh, (2022) 13 SCC 746,** the Supreme Court has followed R. V. E. Venkatchala Gounder Case (supra), Dayamathi Bai Case (supra) and two Privy Council Cases viz. Padman v. Hanwanta, 1915 SCC OnLine PC 21 and Gopal Das v. Sri Thakurji, 1943 SCC OnLine PC 2, and has held as follows:

> “21. In such scenario, where no protest was registered by the probate applicant against production of certified copy of the cancellation deed, he cannot later be allowed to take up the plea of non-production of original cancellation deed in course of the appellate proceeding. As already noted, the main contention of probate applicants was that the mode of proof of cancellation deed was inadequate. However, such was not the stand of the probate applicants before the trial court. The objection as to the admissibility of a registered document must be raised at the earliest stage before the trial court and the objection could not have been taken in appeal, for the first time……. .”
>
> (Emphasis supplied)

48. The next foundational fact required to be proved by the Prosecution is whether the appellant has committed penetrative sexual assault against the Informant/Child punishable under Section 4 of the POCSO Act and Section 376 of the Indian Penal Code.

49. On perusal of the evidence on record, we find that

the written report has been lodged by the victim/informant on 20.07.2018 alleging that the appellant had established physical relationship with her for last three years on false promise of marriage.

50. The **Victim/Informant (P.W.-2)**, in her examination-in-chief, has deposed that physical relationship between the Accused/Appellant and her was going on for the last 7-8 months since prior to lodging of the present case and the Accused had also established physical relationship with her at Buxar and Gaya. However, in her cross-examination, she has deposed that the case was got forcibly lodged by her. She wanted to live with the Accused/Appellant throughout her life. She has also deposed that the Appellant had not done anything wrong to her and whatever he had done with her he had done with her consent and she wanted to live with the Appellant after marriage and she has even married the Appellant on 20.06.2020 in temple. Such statements of the Informant/child show that she had interred into physical relationship with the Accused with her consent. But we have already found that she was a child at the time of alleged occurrence and the consent of the child is no consent, either under Section 375 of the Indian Penal Code or Section 4 of the POCSO Act. Hence, consent of the child/Informant is immaterial in the

eye of law and does not obliterate the offence committed by the Accused/Appellant against the child/Informant. Even the marriage of Accused/Appellant with the child victim of rape does not absolve the Accused of the offence of the sexual assault. Moreover, even the marriage solemnized between the child/Informant and the Accused/Appellant on the informant becoming major is no marriage in the eye of law. The marriage is *void ab initio* under Section 11 of the Hindu Marriage Act and even punishable under Section 494 of the Indian Penal Code, because the Appellant is already married and his first wife is still alive and her marriage with the Accused/Appellant is subsisting.

51. It is settled principle of law that the evidence of prosecutrix is not required to be corroborated as she is not an accomplice. Her status is at par with an injured witness.

52. However, the evidence of prosecutrix is required to be trustworthy. As such, corroboration of the evidence of prosecutrix is not a demand of law, but a rule of prudence in the given facts and circumstances.

53. In **Dilip Vs. State of M.P., (2001) 9 SCC 452,** wherein, the Supreme Court has held as follows in regard to appreciation of the evidence of the prosecutrix:

> "12. The law is well settled that the prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made the

basis of conviction unless corroborated in material particulars. However, the rule about the admissibility of corroboration should be present to the mind of the Judge. In **State of H.P. v. Gian Chand,** (2001) 6 SCC 71 on a review of decisions of this Court, it was held that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on. This Court relied upon the following statement of law from **State of Punjab v. Gurmit Singh** (1996) 2 SCC 384 (para 21):

> "If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations…."

54. In **State of H.P. Vs. Sanjay Kumar, (2017) 2 SCC 51,** the Supreme Court has held as follows:

> "31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration

> from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See **Bhupinder Sharma v. State of H.P.**, (2003) 8 SCC 551. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

55. In the case on hand, we find that the evidence of the child/Informant is also corroborated by oral evidence of her parents and her maternal uncle and medical evidence on record.

56. The **father of the victim (P.W.-3)** has deposed in his examination-in-chief that after the matriculation examination in 2015 the victim was taken by the Accused to his house where the victim lived for 15-20 days and, thereafter, she was brought back to her home but the Accused increased his frequency of meeting with the victim and taking her to hotel to establish physical relationship with her and in 2018 the victim was taken by the Accused to Buxar in his vehicle and has solemnized marriage with her and since then she is living with the Accused.

57. Mother of the victim (P.W.-5) has also deposed that the alleged occurrence had taken place with her daughter in

2015 and in 2017 she came to know that the Accused used to outrage the modesty of the victim and established physical relationship with her. She has also deposed that the Accused used to meet with the victim in college and take her to hotel in Bodhgaya to establish physical relationship with her and such thing has been done with her many times and after knowing all these things the case was got lodged by the victim and finally in 2018 the victim was enticed away by the Accused from her home and since then she has been living with him. She was also informed in 2018 by the victim that she has got married with the Accused.

58. Maternal uncle of the victim (P.W.-1) has also corroborated the evidence of victim and her parents.

59. Even as per the medico legal examination of the victim on 22.07.2018 by **P.W.-4 Dr. Shakuntala Naag**, hymen of the victim was found to be absent and old healed radial lacerations were also seen in her private part.

60. As such, we find that the prosecution has successfully proved beyond reasonable doubts that the Informant/child was subjected to penetrative sexual assault by the accused/appellant.

61. In view of the evidence of the child victim that

physical relationship between the appellant and her was going on for last 6-7 months since prior to lodging of the case on 20.07.2018 and that finding that date of birth of the victim is 21.02.2001, we find that at the time of penetrative sexual assault, the child/Informant was about 16 years and 10 months old.

62. Hence, the prosecution has discharged its initial burden of proof regarding offence punishable under Section 4(1) of the POCSO Act and 376 (1) of the Indian Penal Code. Sub-Section 2 of the POCSO Act, 2012 is not attracted because the child victim has been found to be above 16 years of age at the time of sexual assault.

63. Hence, foundational facts to raise presumption under Section 29 of the POCSO Act regarding alleged offence punishable under Section 4(1) of the POCSO Act stand proved by the Prosecution beyond reasonable doubts. Consequently, the presumption against the appellant in regard to the commission of the alleged offence is raised including that of the requisite *mens rea* under Section 30 of the POCSO Act.

64. From the perusal of the evidence on record, we also find that no evidence has been adduced by the appellant in his defence during the trial, except bringing on record the statement of the victim dated 06.03.2019. This statement has been

given by the victim by way of an affidavit in which she has stated that she wants to marry the appellant who is his uncle. She has further stated that her aunt (wife of the accused) is still alive. She has further stated that she has birth certificate and her real date of birth is 14.04.2000 whereas date of birth in the High School Certificate is mentioned as 21.02.2001.

65. However, as per Rule 12(3) of the J.J. Rules, 2007, when matriculation certificate or its equivalent is available, any oral evidence or any other material is excluded from consideration of the Court in regard to determination of age of any person.

66. Hence, the accused-appellant has rightly been found guilty for offence punishable under Section 376(1) of the Indian Penal Code and Section 4(1) of the POCSO Act, 2012. Since the punishment provided under Section 4(1) of the POCSO Act and Section 376(1) of the Indian Penal Code is the same, the appellant could be punished, either under Section 4(1) of the POCSO Act, 2012 or under Section 376(1) of the Indian Penal Code, as per which the offender is liable to be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

67. Hence, in view of the facts and circumstances of the case, rigorous imprisonment of ten years and a fine of Rs. One lakh under Section 4(1) of the POCSO Act would meet the ends of justice. The appellant is, accordingly sentenced. The fine is payable by the appellant to the victim. In case of default to pay the fine within two months by the appellant, he would be further liable to undergo additional imprisonment of six months. As per the record, the appellant has been in custody only since 22.10.2022.

68. The impugned judgment of conviction and order of sentence is modified accordingly, allowing the appeal in part.

Compensation

69. We cannot part with the appeal without dealing with issue of compensation to the victim.

70. Sections 33(8) of the POCSO Act provides that in appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

71. Rule 9 of the POCSO Rules, 2020 also deals with compensation which reads as follows:-

> "**9. Compensation.** (1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim

compensation to meet the needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against

whom the offence has been committed so as to determine such child's need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure, 1973 or any other law for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or child's parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

72. However, it is pertinent to mention that till date Bihar State Government has not made any specific compensation scheme for victims under POCSO Act. Bihar Government has made Bihar Victim Compensation Scheme, 2014 under Section 357A Cr.PC providing for compensation to victims of general crime committed against the human body of the victims. This Scheme was amended in 2018 enhancing the amount of compensation payable to the victims. In 2019, the Bihar Victim Compensation Scheme was further amended in view of direction of Hon'ble Apex Court in Civil Writ No. 565/2012 titled "Nipun Saxena and Ors. Vs. Union of Indian and Ors." (2020) 18 SCC 499, incorporating "the compensation scheme for victims/survivors of sexual assault/other crimes-

2018” prepared by NALSA as part-II of the Scheme. However, this part-II of the Scheme is not applicable in case of minor victims under POCSO Act, 2012 as it has been provided in the Explanation to clause 18 of the part-II of the Bihar Victim Compensation Scheme, 2014. This Explanation reads as follows:-

> “**Explanation:** It is clarified that this Chapter does not apply to minor victim under POCSO Act, 2012 in so far as their compensation issue are to be dealt with only by the Ld. Special Courts under Section 33(8) of POCSO Act, 2012 and Rules (7) of the POCSO Rules, 2012.”

73. It is also relevant to refer to **Nipun Saxena and Ors. Vs. Union of Indian and Ors; (2019) 13 SCC 715**, wherein Hon’ble Supreme Court took notice of the fact that no scheme similar to the Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes-2018 as prepared by NALSA has been prepared with regard to victims of Sexual abuse under the provisions of the POCSO Act, 2012. In view of the information provided by Ld. Additional Solicitor General that there is proposal to amend the POCSO Act and the Rules accordingly, Hon’ble Supreme Court has held in para no. 8 to 12 as follows:-

> “**8.** In the interim, therefore, the situation is that there are no guidelines or rules that are applicable on the basis of which the Special Court can pass appropriate orders.
>
> **9.** Keeping this hiatus in mind, we are of the

> opinion, after hearing the learned counsel for the parties as well as the learned Additional Solicitor General, that NALSA'S Compensation Scheme should function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 until the Rules are finalised by the Central Government.
>
> **10.** The Special Judge will, of course, take the provisions of the POCSO Act into consideration as well as any circumstances that are special to the victim while passing an appropriate order.
>
> **11.** We need not emphasise that the legislation is gender neutral and, therefore, the guidelines will be applicable to all children.
>
> **12.** The Special Judge will also pass appropriate orders regarding actual physical payment of the compensation or the interim compensation so that it is not misused or misutilised and is actually available for the benefit of the child victim. If the Special Judge deems it appropriate, an order of depositing the amount in an interest-bearing account may be passed."
>
> (Emphasis supplied)

74. Here, NALSA'S compensation scheme refers to "the Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes-2018". It is this scheme which has been incorporated as part-II by the Bihar State Government in its Bihar Victim Compensation Scheme, 2014.

75. It is further relevant to mention that subsequent to this **Nipun Saxena case (supra),** POCSO Rules, 2020 have been made by the Government of India, replacing the earlier Rules of 2012, but the provision of the compensation as provided in Rule 9 is verbatim the same as it was in Rule 7 of the previous Rules of 2012. Hence, Central Government has made no change in the provisions regrading compensation to the

victims under the POCSO Act subsequent to the **Nipun Saxena case (supra),** nor State Government of Bihar has made any specific scheme for victims under the POCSO Act.

76. As such, at present, the Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes-2018 as prepared by NALSA, which has been incorporated by the Bihar Government in its Victim Compensation Scheme of 2014 as part-II is also applicable to victims under the POCSO Act in addition to Section 33(8) and Rule 9 of the POCSO Rules, 2020, despite stipulation in part-II of Bihar Victim Compensation Scheme, 2014 that part-II will not apply to victim under the POCSO Act, because Hon'ble Supreme Court has held in **Nipun Saxena case (supra)** that till special scheme for victim under POCSO Act is made, the Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes-2018 prepared by NALSA would function as a guideline to the Special Court for the award of compensation to the victim under the POCSO Act.

77. If we read Section 33(8) of the POCSO Act and Rule 9 of the POCSO Rules, 2020, we find that procedure for payment of compensation to victims under the POCSO Act is somewhat different from that as provided under Bihar Victim

Compensation Scheme, 2014. Under the Bihar Victim Compensation Scheme, 2014, the Legal Services Authorities make payment to the victims on recommendation by the Court and the quantum of compensation is decided by the Legal Services Authorities as per the Victim Compensation Scheme. However, as per provisions of Section 33(8) and Rule 9 of the POCSO Rules, 2020 read with observation of Hon'ble Supreme Court in **Nipun Saxena case (supra),** it is the Special Court which determines the quantum of compensation, whether interim or final, as per the provisions of Section 33(8) and Rule 9 of POCSO Rules, 2020 seeking guidance from the Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes-2018 as prepared by NALSA, which has been incorporated as part-II of the Bihar Victim Compensation Scheme, 2014. Similar view has been taken by Delhi High Court in **X Vs. State of NCT of Delhi; 2023 Cri. L.J. 18.**

78. We are also of the view that the provisions regarding compensation to victims under the POCSO Act are supplementary to Section 357 and 357A Cr.PC. Hence, general principles of Section 357 and 357A Cr.PC are still applicable to the provisions of POCSO Act in regard to compensation to the extent there is no inconsistent provisions under the POCSO Act

in regard to compensation. It is also pertinent to mention that Section 357 Cr.PC has been modified by the provisions of POCSO Act by providing for payment of the fine imposed on the Convict to the victim. Hence, Special Court has no option but to direct payment of the fine imposed upon the convict as part of the sentence to the victim. The imposed fine is also a factor to be considered by the Special Court while deciding the quantum of compensation payable to the victim under the provisions of the POCSO Act.

79. It is also relevant to mention that in view of the Section 357 and 357A Cr.PC and the provisions of the POCSO Act, it is mandatory duty of the Special Court to give finding at the conclusion of the trial regarding the victim of the crime, clearly stating who is the victim of the crime, irrespective of the fact that the accused has been discharged or trial has resulted into acquittal or conviction of the accused. If someone is found to be victim of the crime, the Special Court is duty bound to direct payment of compensation to the victim, either by way of fine or if fine is insufficient, then by way of direction to the Legal Services Authority to pay compensation, specifying the quantum of compensation and thereafter the Legal Services Authorities are duty bound to disburse this amount to the victim

within 30 days of the receipt of the order. The stipulation of time for payment of the compensation is clearly provided in Rule 9(5) of the POCSO Rules, 2020.

80. As per Rule 9(2) of POCSO Rules, 2020, the Special Courts are empowered to award compensation to the victim not only on application filed on behalf of the victim, but even on its own, if they are satisfied that there is victim and he/she deserves compensation. Here, it would be relevant to refer to **XXX Vs. State of Kerala; 2023 SCC OnLine Ker 6708,** wherein **Kerala High Court** has held as follows:-

> "Despite the binding precedents in *Ankush* (supra), *Suresh* (supra) and the mandate of Section 357A of Cr. P.C. and Section 33(8) of the POCSO Act, it is unfortunate to notice that the Courts in the State often fail to award compensation to the victims as in the instant two cases. The obligation cast upon the Criminal Courts under Section 357A of Cr. P.C. and upon the Special Courts under Section 33(8) of the POCSO Act r/w Rule 9 of the POCSO Rules is a statutory obligation, and its objects and meaning can be achieved only when the Criminal Courts/Special Courts award requisite compensation to the victims in deserving cases ……. without fail. ……"

(Emphasis supplied)

81. Even the Appellate Court is also duty bound to pass order regarding compensation to the victim, because appeal proceedings are also continuation of trial proceedings. Similar view has been taken by **Karnataka High Court** in **State of Karnataka Vs. Rangaswamy, 2015 SCC OnLine Kar 8587.**

82. Coming to the case on hand, we find that the appellant has been found guilty of the offence punishable under Section 4(1) of the POCSO Act and Section 376(1) of the Indian Penal Code and he has been sentenced to undergo rigorous imprisonment of ten years and pay a fine of Rs. 1,00,000/- (One Lac) with stipulation clause regarding default to pay the fine. The fine has been directed to be paid by the appellant to the child victim.

83. We further find that in the case on hand the Informant/Child is undoubtedly a victim of sexual assault by the appellant. It goes without saying that the victim would not only suffer from social stigma, but she would have diminished prospect of marriage in our social milieu. She deserves monetary support for rehabilitation in society. We also find that no interim compensation has been given to the victim during trial.

84. Hence, seeking guidance from the part-II of the Bihar Victim Compensation Scheme, 2014 in regard to quantum of compensation, we direct the Bihar Legal Services Authority to make payment of Rs. 2,00,000/- (Rupees two lakh) within 30 days of receipt of this order.

85. Office is directed to send a copy of this order to

Secretary of Bihar State Legal Services Authority for information and needful.

(Jitendra Kumar, J.)

I agree.

(Ashutosh Kumar, J.)

S.Ali/Ravishankar/
chandan-

AFR/NAFR	AFR
CAV DATE	08.05.2024.
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