



2026:CGHC:4046-DB
NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 1099 of 2021

Amit Rajak S/o Shri Bisali Rajak Aged About 19 Years R/o Village Chitapar
Police Station And District Bemetara, Chhattisgarh.

--- Appellant

versus

State Of Chhattisgarh Through The Station House Officer, Police Station
Bemetara, District Bemetara, Chhattisgarh.

--- Respondent

CRA No. 1191 of 2021

Tekram Rajak S/o Late Chhoturam Rajak Aged About 31 Years R/o
Chhitapar, Police Station And District - Bemetara (Chhattisgarh), District :
Bemetara, Chhattisgarh

---Appellant

Versus

State Of Chhattisgarh The Station House Officer, Police Station - Bemetara,
District - Bemetara (Chhattisgarh), District : Bemetara, Chhattisgarh

---Respondent

(Cause title taken from Case Information System)

For Appellants	:	Ms. Sareena Khan and Mr. Veer Verma, Advocates (in CRA No. 1099 of 2021) Mr. Jameel Akhtar Lohani, Advocate (in CRA No. 1191 of 2021)
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For Respondent/State	:	Mr. Nitansh Kumar Jaiswal, Deputy G.A.
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Hon'ble Shri Ramesh Sinha, Chief Justice
Hon'ble Shri Ravindra Kumar Agrawal, Judge

Judgment on Board

Per Ramesh Sinha, Chief Justice

23/01/2026

1. These two criminal appeals are arising out of the same Sessions Trial and a common judgment, therefore, they are being heard and decided together.
2. Both these criminal appeals have been filed by the respective appellants under Section 374(2) of the Code of Criminal Procedure, 1973 against impugned judgment of conviction and sentence dated 31.08.2021, passed by learned Additional Sessions Judge, Fast Track Special Court (POCSO Act), Bemetara, in Special Case No. 10 of 2020, whereby the appellants have been convicted and sentenced in the following manner:-

CONVICTION	SENTENCE
U/s. 376-DA of Indian Penal Code, 1860	Imprisonment for life i.e. imprisonment for rest of life and fine of Rs. 5000/-, in default of payment of fine 3 years additional R.I.
U/s. 3 read with Section 4 of POCSO Act, 2012	Life imprisonment and fine of Rs. 5000/-, in default of payment of fine 3 years additional R.I.
Both the sentences are directed to run concurrently.	

3. The case of the prosecution is that, on 29.12.2019, the father of the victim/PW-3 made a written complaint to the police station Bemetara with the allegation that on 28.12.2019, he had gone to Baiji Mela and

his elder daughter, aged about 15 years had gone to her elder mothers' house. She returned back, at about 11:00 PM in the night. In the next morning i.e. on 29.12.2019, at about 6:00 AM, his daughter has informed him and his wife that when she returned back from her elder mothers' house yesterday night, she found her house locked and she again going to her elder mothers' house. At about 9:30 in the night, on the way near the house of Bhagbali Rajak both the accused persons dragged her to the under construction house of Kishun Rajak and committed rape upon her. Based on the written report (exhibit P-6), the FIR (exhibit P-7) was registered against the appellants for the offence under section 376-D of IPC and section 4 and 12 of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act'). The victim was sent for her medical examination to District Hospital, Bemetara, where she was medically examined by Dr. Yashika Thawre/PW-4, who gave her report (exhibit P-13). While medically examining the victim, the doctor has not noticed any external injury. However, on internal examination, she found her hymen torn, red and inflamed and she opined that 'hymen torn and inflamed shown sign of forceful intercourse'. Two vaginal slides were prepared and handed over to the police for its FSL examination. The victim was also advised for X-ray examination for confirmation of her age.

Spot map (exhibit P-4) was prepared by the police and exhibit P-5 was prepared by the patwari. The underwear of the victim was seized vide seizure memo (exhibit P-3). The primary school progress card of the victim has been seized vide seizure memo (exhibit P-8), in which the date of birth of the victim is recorded as 09.07.2004.

One birth registration kotwari panji has also been seized vide seizure memo (exhibit P-10), in which also the date of birth of the victim is recorded as 09.07.2004. Further the police has seized the school register with respect to the date of birth of the victim from Govt. Primary School, Chhitapar vide seizure memo (exhibit P-11) and after retaining its attested true copy (exhibit P-15C), the original school register was returned back. In the said school register, the same date of birth has been recorded. The accused persons were arrested on 02.01.2020. Their underwears have been seized vide seizure memo (exhibit P-26 and P-27). They have also been sent for their medical examination to District Hospital, Bemetara, where they have been medically examined by Dr. P.P. Pradhan/PW-7, who gave his MLC report (exhibit P-16 and P-17). After medically examined the accused persons, the doctor found them capable to perform sexual intercourse. The underwear of the victim, her vaginal slides and the underwears of the accused persons were sent for chemical examination to State FSL Raipur, from where report (exhibit P-21) was received and according to the FSL report, the semen and sperms were found on all the articles. Along with the police memo, these articles were sent for DNA test report and from the FSL Raipur, DNA report (exhibit P-22) was received and according to the DNA report, the DNA profile of the semen found on the underwears of the accused persons were matched with the semen found on the vaginal slide and underwear of the victim.

Statement of the witnesses were recorded and after completion of usual investigation, charge sheet was filed against the

accused persons before the learned trial Court for the offence under section 376-DA of the IPC and sections 4 and 12 of POCSO Act.

4. The learned trial Court has framed charges against the accused persons for the offence under section 376-DA of the IPC and sections 3 read with section 4 of POCSO Act. They denied the charges and claimed trial.
5. In order to prove the charge against the appellants, the prosecution has examined as many as 12 witnesses. Statement of the appellants under Section 313 of CRPC have also been recorded, in which they denied the circumstances that appears against them, pleaded innocence and have submitted that, they have been falsely implicated in the offence, the victim was found in compromising position with another boy and they get them separated by assaulting him, therefore, they have been falsely implicated in the offence. One defence witness Dharam Rajak/DW-1 has been examined by the appellants in their defence.
6. After appreciation of oral as well as documentary evidence led by the parties, learned trial Court has convicted the appellants for the offences under section 376-DA of the IPC and sections 4 and 12 of POCSO Act and sentenced them in the earlier part of this judgment. Hence this appeal.
7. Ms. Sareena Khan, learned counsel appearing for the appellant- Amit Rajak would submit that, the prosecution has failed to prove its case beyond reasonable doubt. There are material omissions and contradictions in the evidence of prosecution witnesses. The victim was found in compromising position with another boy, on which the

present appellants have objected and get them separated after some altercation and due to that, they have been falsely implicated. The victim is a major girl and the prosecution could not prove that she was minor on the date of incident by producing sufficient reliable evidence. She would further submit that, there is no external injury on the body of the victim and the manner in which, she allegedly suffered with the offence, the injury must have been found on her body. She also submits that, the prosecution has also failed to establish, as to when the blood samples of the accused persons were collected for DNA test and in absence of that, the DNA report loses its efficacy. The alleged place of incident is adjacent to the main road and it is not possible that, no one could hear the voice of the victim at the time of alleged incident, if she actually raised any alarm or suffered by any offence of rape. Therefore, the impugned judgment of conviction and sentence suffers from illegality and perversity and the appellant is entitled for acquittal.

8. Mr. Jameel Akhtar Lohani, learned counsel appearing for the appellant- Tekram Rajak would submit that, there is no corroborative evidence in the record to hold beyond reasonable doubt that the appellant has committed offence with the victim. A total improbable story has been developed by the prosecution. The victim was allegedly suffered the incident at about 9:30 in the night and she had gone to her elder mothers' house, but till the morning no any complaint has been made to anyone. As per the FIR itself, her father came back at about 11:00 in the night, but she stayed for whole of night at her elder mothers' house without any complaint. Had she suffered any incident, they would have immediately taken action

against the accused persons. Atleast, they immediately informed the parents of the victim, but they did not do so. He would also submit that, no external injury has been found on the body of the victim and the manner in which, she alleged to have suffered the incident, injury must have found on her body. Absence of the external injuries give support the defence that she was in compromising position with the person, with whom she was found on the spot and objection raised by the appellants. The evidence of prosecution is full of contradictions and exaggeration and it requires corroboration. The prosecution could not proved the age of the victim that, she was minor on the date of incident and below 16 years of age, yet the appellant has been convicted for the alleged offences. Therefore, the applicant is entitled for acquittal.

9. Per contra, learned counsel appearing for the State opposes the submissions made by learned counsel for the respective appellants and has submitted that, the case of the prosecution is based on the evidence of the victim, who suffered the alleged offence of rape by the accused persons. But for minor omissions or contradictions her evidence is duly supported the prosecution's case and it is not required for any corroboration. The victim received injuries on her private part, which has been proved by the doctor, who medically examined her. In the FSL report, semen and sperms were found on the vaginal slides and underwear of the victim as well as the underwears of the accused persons and the semen on all these articles were matched that, it was the semen of accused persons, as per the DNA report. There is no reason for false implication of the accused persons and the defence taken by the accused persons that

the victim was found in compromising position with another boy, and they get them separated, is not sufficient to rebut the evidence available in the case. There are sufficient evidence on record to hold that the victim was minor and less than 16 years of age on the date of incident and the learned trial Court after appreciating the entire facts and circumstances of the case and evidence available on record, convicted the accused persons, which does not suffer from any irregularity and perversity and the appeal filed by the appellants are liable to be dismissed.

10. We have heard learned counsel for the parties and considered their rival submissions made herein above and also gone through the records of the trial court with utmost circumspection.
11. The first question arises for consideration would be the age of the victim, as to whether she was minor on the date of incident and less than 16 years of age or not?
12. PW-1, the mother of victim has stated in her evidence that, the victim is her eldest daughter. She could not remember her date of birth, but she born in the year 2004. In cross-examination, he stated that, he could not remember the day, date and year. PW-2 is the victim, who disclosed her date of birth as 09.07.2004 and stated that, she is studying at class 9th.
13. PW-3, the father of the victim has also stated in hie evidence that, he could not remember the date of birth of his daughter, but she is 16 years of age at present. In cross-examination, he stated that he disclosed the age of the victim on assumption. He further admitted that, he disclosed the date of birth of his daughter on the basis of the

date of birth mentioned in school record. The date of birth of the victim was recorded by his father and if he recorded her date of birth after reducing 3-4 years of age, he could not tell. He also did not know as to whether his father has produced any document regarding her date of birth at the time admission in the school or not. In para 14 of his evidence, he further stated that, he could not tell, as to whether in the Aadhar card, her date of birth is correctly mentioned or not.

14. The prosecution has further relied upon the school register (exhibit P-15C) seized by the police from the school of the victim. The said school register (exhibit P-15C) is sought to be proved by PW-5, who is the teacher of the school. He stated in his evidence that the police has seized the school register vide seizure memo (exhibit P-11) and after retaining its attested true copy, the original register was returned back. In the school register (exhibit P-15), the date of birth of the victim is recorded as 09.07.2004. She has got admitted in class 1st of the school on 18.06.2011. In cross-examination, he stated that though he is the author of the school register, but there is no document with respect to the date of birth of the victim. They have also not taken any certificate, affidavit or declaration at the time of her admission in the school. From the evidence of this witness, it could not be established the basis on which the date of birth of the victim is recorded in the school register.
15. The admissibility and evidentiary value of the school register has been considered by the Hon'ble Supreme Court in the matter of **Alamelu and Another Vs. State, represented by Inspector of**

Police, 2011(2) SCC 385. In Para 40, 42, 43, 44 and 48 of its judgment, the Hon'ble Supreme Court has observed as under:

"40. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

42. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi Vs. Anand Purohit*, observed as follows:-

"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.... Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in Issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts,

namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in the case of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal*, where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in

the transfer certificate can not be relied upon to definitely fix the age of the girl.

48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of *Ravinder Singh Gorkhi Vs. State of U.P.*⁴ held as follows:-

"The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the

age of a (2006) 5 SCC 584 party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."

16. In case of **Rishipal Singh Solanki Vs. State of Uttar Pradesh & Others, 2022 (8) SCC 602**, while considering various judgments, the Hon'ble Supreme Court has observed in para 33 as under:

"33. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

33.2.2. If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act,

2015 would have to be applied or read along with sub-section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

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33.3. That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the 33 Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

33.4. The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

33.5. That the procedure of an inquiry by a

Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub- section (2) of section 94 of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

33.6. That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

33.7 This Court has observed that a hyper.

technical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

33.8. If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

33.9. That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, Inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

33.10. Any document which is in

consonance with public documents, such as matriculation certificate, could be accepted by the Court or the 33 Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions.

33.11. Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

17. Recently, in case of **P. Yuvaprakash Vs. State represented by Inspector of Police, 2023 (SCC Online) SC 846**, Hon'ble Supreme Court has held in para 14 to 17 as under:

"14, Section 94 (2)(iii) of the 33 Act clearly Indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of

which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2) (i) as it was a mere transfer certificate, Ex C-1

could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in *Rishipal Singh Solanki vs. State of Uttar Pradesh & Ors.* this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:

"20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (1) 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. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year."

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94 (2) of the JJ Act, this court held in *Sanjeev Kumar Gupta vs. The State of Uttar Pradesh & Ors* that:

"Clause (i) of Section 94 (2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the 2021 (12) SCR 502 [2019] 9 SCR 735 concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i)

and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(1) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In *Abuzar Hossain Gulam Hossain Vs. State of West Bengal*, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference."

18. From perusal of the entire evidence and in view of the aforesaid judgments of the Hon'ble Supreme Court, the finding recorded by the learned trial Court that the victim was minor and less than 16 years of

age is not supported by any cogent and reliable evidence. When the parents of the victim could not disclose any date of her birth, the document with respect to her date of birth has not been proved in accordance with law, the self served statement of the victim could not be said to be sufficient evidence to hold that, she is minor and less than 16 years of age on the date of incident. There is no other evidence, like kotwari register, birth certificate or ossification test report of the victim. Despite referred for ossification test by the doctor, her ossification test was not conducted by the police. Therefore, the finding recorded by the learned trial Court that, the victim is less than 16 years of age on the date of incident is perverse to the evidence available on record.

19. So far as the offence of rape is concerned, we again examined the evidence of the prosecution's witnesses available on record.
20. PW-2, is the victim of the offence. She stated in her evidence that, on 28.12.2019, her parents and brother had gone to enjoy Baiji Mela. Since, she has already enjoyed the Mela, she had not gone with them and she had gone to her elder mother's house. Their parents assured her that they will come back up to 9:00 PM in the night and therefore, she returned to her house from the house of her elder mother. When she found her house locked, she again returned to her elder mother's house, but on the way near the house of Bhagbali and Kishun Rajak, the accused persons dragged her towards the under construction house of Kishun Rajak and committed rape upon her one after another. They also threatened her that, if she disclose the incident to anyone, she would be killed. She returned back to her

elder mother's house and informed the incident to her sister. Since, it was a deep night, she went for asleep there. In the next morning, she informed her parents and then lodged the report. In her cross-examination, she denied that, she was having relation with another boy namely 'X'. She also denied that, the said boy 'X' had come to her house and he was seen by the accused persons and they raised quarrel with him. She admitted that the place of incident is a under construction house, which is visible from the main road. She raised alarm and shouted for help at the time, when the accused persons dragged her, but there was a loud speaker playing due to Ghasidas Jayanti, therefore, her voice could not be heard by anyone. The accused Tekram thrown her on the ground and removed her clothes. She also denied that, on the date of incident she had physical relation with another boy. From her cross-examination nothing could be extracted by the defence that, she has falsely implicated the accused persons in the offence. The defence that the victim was having affair with another boy and she was being seen with him in objectionable position with that boy, has been denied by the victim and leveled allegation with the accused persons that they have committed rape upon her. The nature of evidence given by the victim is satisfactory and it does not suffer from any infirmity or exaggeration and reliable piece of evidence.

21. The evidence of the victim is corroborated with the evidence of her mother/PW-1 and her father/PW-3. Her mother/PW-1 has stated in her evidence that, on 28.12.2019, they had gone to enjoy Baiji Mela and the victim had gone to her elder mother's house. They returned from Baiji Mela at about 11:00 in the night and assured that, her

daughter would be at her elder mother's house. In the next morning, he came along with her sister and informed about the incident that she had suffered the offence of rape by the accused persons and then they lodged the report. Though certain discrepancies were brought in her evidence with that of her 161 CRPC statement (exhibit D-1), but from perusal of her 161 CRPC statement (exhibit D-1), it transpires that the substance of the offence has been disclosed by this witness in her 161 CRPC statement also, which she stated in her deposition and there is no any material discrepancies in her evidence. She stated that, she did not know as to from whom the victim made conversation in the mobile phone in their absence. She also did not know, what happened behind their back, when they were not in the house. Her daughter has not informed her about any other boy 'X' that he came to her house.

22. PW-3, the father of the victim has also stated that on 28.12.2019, they had gone to enjoy Baiji Mela and the victim had gone to her elder mother's house. In the next morning, the victim informed him about the incident that, when she found her house locked in the night at about 9:00-9:30 PM and returning back to her elder mother's house, on the way near the under construction house of Kishun Rajak, the accused persons dragged her towards the said under construction house of Kishun Rajak and committed rape upon her one after another, the he lodged the written complaint (exhibit P-6) to the police. The police has recorded the FIR (exhibit P-7), seized the clothes of the victim vide seizure memo (exhibit P-3), school progress card through exhibit P-8 and kotwari register through exhibit P-10 and school register through seizure memo (exhibit P-11). In

cross-examination, he too has remained firm in saying that the victim has informed about the incident to him and he lodged the report. He also denied the relation of the victim with the boy 'X'.

23. PW-4, Dr. Yashika Thawre, who medically examined the victim, though has not found any external injury on her body, but found that her hymen was torn, red and inflamed and opined that the hymen torn and inflamed shown sign of forceful intercourse. In cross-examination, she admitted that, if the victim was being dragged, external injuries may have found on her body and by rape at under construction house, the injury on back may also have caused to the body of the victim. She did not find any external injury on the body of the victim. She further admitted that, if a girl is running for long, the redness and rupture of hymen may have occurred. She also admitted that, if the victim made consensual physical relation, she may receive redness and swelling on her hymen.
24. When the vaginal slides and the clothes of the victim as well as the clothes of the accused persons were sent for FSL examination, it was found contained with semen and sperm, which has been proved by the prosecution by the FSL report (exhibit P-21). As per the FSL report, in the underwear of victim (article-A), vaginal slide of victim (article-B), underwear of the accused- Tekram (article-C) and underwear of accused- Amit Rajak (article-D), human sperm and semen were found present and all these articles were sent for DNA test to the FSL Raipur.
25. The DNA test report (exhibit P-22) also corroborated the allegations leveled by the victim against the accused persons. The DNA profile

extracted from the underwear of accused- Tekram Rajak (article-C) and from the underwear of accused- Amit Rajak (article-D) were also found matched with the DNA profile extracted from vaginal slide of the victim and her underwear (articles-B and A), which is a clinching evidence against the accused persons that, they have committed the offence of rape with the victim. It is not the case that, the DNA profile were extracted from the blood samples of the accused persons and the victim, but the DNA profile were extracted from the semen present on the underwears of the victim and accused persons and the vaginal slide of the victim. Therefore, the submissions made by learned counsel for the respective appellants that the prosecution could not explain as to when the blood samples collected for DNA test and does not have any bearing in the present case.

26. In the matter of “**State of Punjab Vs. Gurmit Singh**” (1996) 2 SCC 384, the Hon’ble Supreme Court has observed in para 21 of its judgment that:-

“21. ...The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. 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.”

27. In the matter of “**Prahlad and another Vs. State of Haryana**” 2015 (8) SCC 688 the Hon’ble Supreme Court has observed in para 17 and 18 that:-

“17. It has to be borne in mind that an offence of rape is basically an assault on the human rights of a victim. It is an attack on her individuality. It creates an incurable dent in her right and free will and personal sovereignty over the physical frame. Everyone in any civilised society has to show respect for the other individual and no individual has any right to invade on physical frame of another in any manner. It is not only an offence but such an act creates a scar in the marrows of the mind of the victim. Anyone who indulges in a crime of such nature not only does he violate the penal provision of IPC but also the right of equality, right of individual identity and in the

ultimate eventuality an important aspect of rule of law which is a constitutional commitment. The Constitution of India, an organic document, confers rights. It does not condescend or confer any allowance or grant. It recognises rights and the rights are strongly entrenched in the constitutional framework, its ethos and philosophy, subject to certain limitations. Dignity of every citizen flows from the fundamental precepts of the equality clause engrafted under Article 14 and right to life under Article 21 of the Constitution, for they are the “fons juris” of our Constitution. The said rights are constitutionally secured.

18. Therefore, regard being had to the gravity of the offence, reduction of sentence indicating any imaginary special reason would be an anathema to the very concept of rule of law. The perpetrators of the crime must realise that when they indulge in such an offence, they really create a concavity in the dignity and bodily integrity of an individual which is recognised, assured and affirmed by the very essence of Article 21 of the Constitution.”

28. In the present case, the appellants have been convicted and sentenced for the offence of section 376-DA of the IPC and section 3

read with section 4 of POCSO Act. Section 376-DA provided the punishment for gang rape on woman under 16 years of age. The provisions of Section 376-DA is reproduced hereinbelow:-

“376-DA. Punishment for gang rape on woman

under sixteen years of age.-- Where a woman

under sixteen 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:

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.”

29. It is also necessary to notice here section 3 and section 4 of the POCSO Act, which provided the definition and punishment for penetrative sexual assault, which reads as under:-

“3. Penetrative sexual assault.—A person is said to commit “penetrative sexual assault” if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a

child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

4. Punishment for penetrative sexual assault-

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

(2) Whoever commits penetrative sexual assault on a child below sixteen years of

age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

30. When the victim is not found to be less than 16 years of age and the prosecution has failed to prove her age that she was less than 16 years of age on the date of incident, the appellants cannot be convicted for the offence under section 376-DA of the IPC, but their offence is punishable under section 376-D of the IPC, which provided punishment for gang rape. The provisions of section 376-D is also necessary to note here, which reads as under:-

“376D. Gang rape.— Where a woman 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 rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean

imprisonment for the remainder of that person's natural life, and with fine:

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.”

31. In the present case, when the victim is found to be more than 16 years of age and she is subjected to gang rape by the accused persons/appellants, their offence would fall under section 376-D and they are liable to be punished under section 376-D instead of section 376-DA of the IPC.
32. Consequently, instead of section 376-DA of the IPC, the appellants are convicted for the offence under section 376-D of the IPC. Their conviction for the offence under section 3 read with section 4 of the POCSO Act are hereby maintained.
33. Section 376-D of the IPC provided the minimum sentence of rigorous imprisonment for 20 years, which may extend to life, which shall mean imprisonment for the remainder of that person's natural life. Section 4 of the POCSO Act also provided the minimum sentence of imprisonment of either description, which shall not be less than 10 years, which may extend to imprisonment for life, and if the victim is less than 16 years of age, the imprisonment shall not be less than 20 years, which may extend to imprisonment for life, which shall mean imprisonment for remainder of natural life of that person. In the

present case, the victim is found to be more than 16 years of age, and therefore, R.I. for 20 years would be the appropriate sentence to the appellants instead of life imprisonment till the natural life of the appellants.

34. Accordingly, the conviction and sentence awarded to the appellants are modified/alterd as below:-

CONVICTION	SENTENCE
U/s. 376-D of Indian Penal Code, 1860	R.I. for 20 years with fine of Rs. 5000/-, in default of payment of fine one year additional R.I.
U/s. 3 read with Section 4 of POCSO Act, 2012	R.I. for 10 years with fine of Rs. 5000/-, in default of payment of fine one year additional R.I.
Both the sentences are directed to run concurrently.	

35. Accordingly, both the appeals i.e. CRA No. 1099 of 2021 and 1191 of 2021 filed by the respective appellants are **partly allowed**.
36. The appellants are reported to be in jail since 02.01.2020. They shall undergo the entire sentence, as awarded by this Court. They are entitled for set off of their undergone period during trial as well as during the pendency of appeal.
37. Registry is directed to send a copy of this judgment to the concerned Superintendent of Jail, where the appellants are undergoing their jail sentence to serve the same on the appellants informing them that they are at liberty to assail the present judgment passed by this Court by preferring an appeal before the Hon'ble Supreme Court with the

assistance of High Court Legal Services Committee or the Supreme Court Legal Services Committee.

38. Let a copy of this judgment and the original records be transmitted to the trial Court concerned forthwith for necessary information and compliance.

Sd/-
(Ravindra Kumar Agrawal)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice

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