

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

1. CRA-D-250-DB-2014

Lokesh

... Appellant

Versus

State of Haryana

... Respondent

2. CRA-D-390-DB-2014

Deepak

... Appellant

Versus

State of Haryana

... Respondent

**Reserved on : 16.08.2019
Date of decision : 27.08.2019**

***CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR.JUSTICE HARINDER SINGH SIDHU***

Present: Mr.Yashpal Thakur, Advocate
for the appellants.

Mr.Vivek Saini, DAG, Haryana.

RAJIV SHARMA, J.

Since common questions of law and facts are involved in the
aforesaid appeals, therefore, these are taken up together and disposed of by
a common judgment.

2. These appeals are instituted against the judgment and order
dated 14.01.2014 and 16.01.2014 rendered by the Additional Sessions

Judge, Faridabad, in Sessions Case RBT no.185 of 2013 whereby the

appellants were charged with and tried for offences under Sections 376-D, 323, 342 and 506 of the Indian Penal Code (in short 'IPC') and under Section 4 of Protection of Children from Sexual Offences (POCSO) Act, 2012. They were convicted thereunder and sentenced as under:-

Name of Convict	Offence under Section	Period of sentence (RI)	Fine Imposed (Rs.)	Period of sentence in default of payment of fine (SI)
Deepak	376-D IPC	Twenty years	1,00,000/-	One year
	323 IPC	Six months	1,000/-	7 days
	342 IPC	Six months	1,000/-	7 days
	506 IPC	One year	2,000/-	15 days
Lokesh	376-D IPC	Twenty years	1,00,000/-	One year
	323 IPC	Six months	1,000/-	7 days
	342 IPC	Six months	1,000/-	7 days
	506 IPC	One year	2,000/-	15 days

The punishment was not awarded under Section 4 of POCSO Act, 2012 as punishment awarded under Section 376-D IPC is greater in degree to Section 4 of POCSO Act.

3. The case of the prosecution in a nutshell is that on 17.06.2013 SI Mahender Kumar along with HC Pawan Kumar was present at Pyali Chowk for patrolling and crime detection duty. He received an intimation from B.K. Hospital, Faridabad, that one girl (name withheld) was admitted in the hospital in an injured condition. They reached B.K. Hospital. Complainant Raj Kumar (PW-12) got recorded his statement Ex.PM to the effect that he was resident of House no.323, Nangla Enclave, Part I, near Bhadana Chowk, NIT Faridabad. He had seven daughters and two sons. His daughter (prosecutrix) was number four in the siblings. She was student of 7th standard. On 16.06.2013 his whole family was sleeping on the roof of

the house. At about 10.00 P.M., his elder daughter Manisha asked the prosecutrix to put the bench inside which was lying in the street. The prosecutrix went down. When the prosecutrix did not come back for a long time on the roof, they went down to find her. They searched for her. When he was passing by his neighbourhood to search his daughter, he heard the sound of thud of falling of some heavy object from inside. He looked through the hole of the wall. He found his daughter lying with her face down on the floor near the folding bed. Her hands, feet and mouth were tied with a *chunni*. He with the help of nephew Harinder and neighbour Babu Lal broke door. They untied the hands, feet and mouth of his daughter. She narrated the incident and the manner in which Deepak son of Suraj Pal and Lokesh son of Sukh Ram caught hold of her forcibly when she had gone down to put the bench inside. Before she could raise an alarm, they gagged her and dragged her into a room of the house of Deepak. They put her on the bed with her mouth, hands and feet tied. Deepak and Lokesh raped her against her wishes forcibly, turn by turn many times on the same night. They also administered beating to her. FIR Ex.PD was registered. The prosecutrix was got medico legally examined. Site plan was prepared. Statement of the prosecutrix under Section 164 Cr.P.C. was also recorded. Investigation was completed. Challan was put up after completing all the codal formalities.

4. The prosecution examined a number of witnesses. Statements of accused were recorded under Section 313 Cr.P.C. They denied the case of prosecution. Accused had also examined three witnesses in support of their case. The appellants were convicted and sentenced, as noticed hereinabove.

5. Learned counsel appearing on behalf of the appellants has vehemently argued that the prosecution has failed to prove the case against the appellants.

6. Learned counsel appearing on behalf of the State has supported the prosecution case.

7. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

8. PW-5 Dr.Saroj Lochab examined the prosecutrix. She led her evidence by filing affidavit Ex.PW5/A. She had proved copy of MLR Ex.PF. According to the contents of affidavit Ex.PW5/A, there was no mark of external injury. Secondary sexual character were well developed. L/E labia: majora, minora were well developed. Hymen was torn with irregular healed margins. The prosecutrix was referred to Radiology and Dental department for age verification. According to Ex.PF, the possibility of sexual intercourse could not be ruled out.

9. PW-6 Dr.Amardeep Singh had medico legally examined Lokesh. In his cross-examination, he deposed that accused Deepak was examined on 18.06.2013 at about 8.03 P.M.

10. PW-1 Rishi Kumar deposed that as per record, name of the prosecutrix was mentioned at serial no.754 dated 02.04.2012. Her date of birth was 06.03.1999. She had taken admission in their school in 6th class. Photostat copy of admission and withdrawal register was Ex.PA. He had also brought admission form of the prosecutrix. He had seen the certificate issued by Mrs. Meera Sharma, Headmistress, vide Ex.PC. In his cross-examination, he admitted that there was overwriting at serial no.754 by mistake.

11. PW-2 Harinder deposed that on 16.06.2013 at 10.45 P.M. he had received a telephonic call from his uncle Raj Kumar that the prosecutrix had gone missing. He asked him to come. He along with Raj Kumar and other family members searched for the prosecutrix. Next day, they had also searched for her but failed. On 17.06.2013 at about 5.00/6.00 P.M. when they were passing through the house of Deepak, they heard the noise of falling of some heavy object. When they saw from the hole of wall, they found the prosecutrix lying on the floor and her hands, legs and mouth were tied with *chunni*. They entered in the house of Deepak after breaking its lock. They had taken out the prosecutrix. The prosecutrix deposed the manner in which Deepak and Lokesh kidnapped and dragged her inside the house of Deepak. Both of them committed rape with her without her consent. In his cross-examination, he admitted that they had not gone to the police station on that night. He did not go to his house on 17.06.2013 till evening.

12. PW-8 Sarwan Kumar had prepared site plan Ex.PK on 18.06.2013.

13. The prosecutrix appeared as PW-9. According to her, on 16.06.2013 at about 10.00 P.M., her sister Manisha asked her to go down stairs and put the bench inside the house. She went down stairs. When she was placing bench inside her house, accused Deepak and Lokesh came from the back side and gagged her mouth. They dragged her to the room of Deepak. They tied her hands and mouth with the *dupatta* which she was wearing. When she tried to get herself freed, they gave her severe beatings. Both of them committed rape with her. They threatened to kill her and her father. Accused gave kick and fist blows on her breast. She became

unconscious. On 17.06.2013 in the evening, her father, her cousin and friends of her father got her freed from the room. After committing rape with her, the accused ran away from the spot. They locked the door from outside. They tied her with the *dupatta*. She was taken to the hospital. Police recorded her statement Ex.PJ. Her statement under Section 164 Cr.P.C. was got recorded before the Illaqa Magistrate vide Ex.PL. In her cross-examination, she deposed that her date of birth was 06.03.1999. Accused Deepak used to reside adjacent to their house in the house of Raju. Deepak was tenant in the house of Raju. He used to ply tempo. Raju along with his wife and two children was living in his house. On the day of occurrence, nobody was available in the house from the family of Deepak and Raju. Deepak's wife Shanti came to their house to invite on the birthday function of her daughter Lovely. She did not attend the function. Her two younger sisters attended the function. There was house of Akhilesh in front of the house of Raju. She admitted that her mother filed a complaint against Shankar for teasing her.

14. PW-11 SI Mohinder Kumar was the investigating officer. He moved application Ex.PN to seek the opinion of doctor whether the patient was fit to make statement. He recorded the statement of the prosecutrix under Section 161 Cr.P.C. He got the prosecutrix medically examined. He also got prepared site plan Ex.PO. Accused were arrested on 18.06.2013. Accused Deepak made disclosure statement Ex.PQ. Accused Lokesh made disclosure statement Ex.PR. Accused were also medico legally examined. The school certificate of the prosecutrix was obtained, i.e. Ex.PC. In his cross-examination, he deposed that he did not know why the blood sample of the accused was taken. There was no DNA report on the file. The *chunni*

was not sent for FSL examination.

15. PW-12 Raj Kumar was the father of the prosecutrix. He testified that on 16.06.2013 at about 10.00 P.M. he along with his family was sleeping on the roof of his house. His daughter Manisha asked the prosecutrix that bench was lying in the street. She asked the prosecutrix to put the bench inside the room. The prosecutrix went down but did not come back. He searched her. He made telephonic call to his nephew Harinder Kumar and his neighbour Babu Lal Verma. He informed them about missing of the prosecutrix. They searched for her. They came back at about 2.30 A.M. In the morning, they also made inquiry from neighbour. When he was passing through the house of Deepak in the street, he heard the noise of falling of some article. He peeped through hole in wall in the house of Deepak. He saw his daughter lying facing ground. Her hands, legs and mouth were tied with *chunni*. The prosecutrix told them the manner in which accused had raped her. Police had come and recorded his statement Ex.PM. In his cross-examination, he deposed that it was 5.00/6.00 P.M. when he saw the prosecutrix in the house of Deepak. He and Harinder had broken the lock of the house of Raju. Raju was present at that time. The prosecutrix was shifted to BKH, Faridabad. The prosecutrix was discharged from the hospital on 19.06.2013. He denied the suggestion that one day prior to the occurrence, function was organized in the house of Deepak and a quarrel took place between him and Deepak.

16. PW-15 HC Pawan Kumar deposed that from the place of occurrence, two bed sheets and one *chuuni* were taken into possession. Accused were arrested. They were interrogated. They made disclosure statements Ex.PQ and Ex.PR respectively. Accused were also medico

legally examined.

17. DW-1 Mukesh Kumar had led his evidence by filing affidavit Ex.DW1/A. According to the contents of the affidavit, Birbal father of the deponent expired on 15.06.2013. His brother-in-law Deepak came to the house of deponent on 15.06.2013 and stayed there upto 18.06.2013.

18. DW-2 Shanti had also led her evidence by filing affidavit Ex.DW2/A. According to the contents of her affidavit, her father died on 15.06.2013. Deepak and daughter namely Lovely visited to their native village Nangla Gathauli, Post Jatipura, District Mathura, U.P.

19. DW-3 Shankuntla deposed that on 16.06.2013 she was at her house. Her family members were at home. Her son Lokesh was working as AC helper. Her son came from duty at about 05.30 P.M. Police came at 11.30 P.M. and arrested her son.

20. According to FSL report Ex.PX, human semen was detected on exhibit-3 (underwear), exhibit-4 (underwear) and exhibit-7a (bedsheet). However, semen could not be detected on rest of the exhibits.

21. The case of the prosecution precisely is that the prosecutrix had gone down to put the bench inside the house. She was gagged and dragged by the accused. She was taken to the house of Deepak which he had taken on rent from Raju. The family members went in search of her. However, when PW-12 Raj Kumar was searching for her, he heard the sound of thud. The sound came from the house of Deepak. He peeped through the hole in wall in the house of Deepak. He saw the prosecutrix inside the room.

22. The statement of the prosecutrix was also recorded under Section 164 Cr.P.C. Ex.PL. According to her statement recorded before the Magistrate, on 16.06.2013 she had gone down to bring the bench at about

10.30 P.M. When she was lifting the bench, accused came from behind. They gagged her mouth. They took her to their room. She was given beatings by them. They threatened her. Lokesh went outside the room. Deepak misbehaved with her. Deepak tied her hands, feet and mouth. He hit her head against the wall. She became unconscious. They locked the room from outside and went away. On the next day, she was traced. Police broke the door and took her out. When she appeared as PW-9, she deposed the manner in which she was forcibly dragged to the room rented by Deepak and she was raped.

23. There is variance in the statement Ex.PL of the prosecutrix recorded under Section 164 Cr.P.C. and her statement recorded while appearing as PW-9. In her statement recorded under Section 164 Cr.P.C., she has not attributed any role to Lokesh except that he along with Deepak had given beating to her. According to statement under Section 164 Cr.P.C., Lokesh had gone outside the room and Deepak had misbehaved with her. She further deposed that police broke the door. The prosecutrix in her statement had deposed that her father had traced her and broke the door to free her. The prosecutrix in her statement while appearing as PW-9 had deposed that there was function in the house of Deepak. Her family members were called. Her few family members had attended the function. However, PW-12 Raj Kumar had denied the function organized in the house of Deepak. According to the prosecutrix, Raj Kumar landlord of Deepak was not present. However, it has come in the statement of PW-12 Raj Kumar that when the door was opened, Raj Kumar was present on the spot.

24. The prosecution has placed on record two site plans Ex.PK and Ex.PO where the incident had taken place. According to PW-2 Harinder,

when they were passing through the house of Deepak, they heard the noise of falling some heavy object on 17.06.2013 at about 5.00/6.00 P.M. They saw from the holes of wall. The same version was of PW-12 Raj Kumar, father of the prosecutrix. However, in the site plans, no hole was shown from which PW-2 Harinder and PW-12 Raj Kumar had seen the prosecutrix in the room.

25. The case of the prosecution throughout is that the prosecutrix's hands, feet and mouth were tied. She was found in the same condition when the door was opened. In these conditions, she could not move. Thus, the theory of prosecution that PW-2 Harinder and PW-12 Raj Kumar had heard the noise of thud, cannot be believed.

26. The statement made by the prosecutrix under Section 164 Cr.P.C. was voluntary as per questions put to her by the JMIC, Faridabad, on 20.06.2013. She was not under any pressure also. She went to the Court along with parents, brother and police. In her cross-examination, the prosecutrix deposed that on the evening she raised an alarm to save herself. She could not tell the exact time. Her father, brother and friend of father came there to save her. She could not tell whether any person from neighbourhood came on the spot or not. This is also contrary to the statement of PW-2 Harinder and PW-12 Raj Kumar. According to them, they heard the noise and peeped through holes inside the room. However, the prosecutrix in her cross-examination deposed that she raised an alarm which attracted the family members to save her. In her statement recorded under Section 164 Cr.P.C. she had not averred single word being raped by the accused.

27. The Division Bench of the Allahabad High Court in ***State of U.P. vs. Raees Ahmad, 2011(7) RCR (Criminal) 2303*** has discarded the statement made by the prosecutrix while appearing as witness made contrary to her statement recorded under Section 164 Cr.P.C. The Division Bench held as under:-

“As per the statement of the victim recorded during trial, the accused came to her at about 3:00 - 4:00 A.M. and took her out of the house after threatening her with a country made pistol and also committed rape with her. She was taken from village Rasoola Talib Hussain to village Richhaura and from village Ricchaura to Bakainia. Later she was again brought back to village Richhaura. When both of them were going from village Ricchaura to some other place, they were apprehended by the police. In cross-examination, the victim admitted that in her statement recorded under section 164 Cr.P.C. she stated that she had enticed Raees Ahmad and had gone with him out of her own sweet will and nothing was done with her against her wishes and that she wanted to marry Raees, but she gave an explanation that the statement under section 164 Cr.P.C. was given by her out of fear of the accused. This explanation can hardly be accepted. The statement under section 164 Cr.P.C. was recorded in Court of the Magistrate and at that time the accused was in custody and was in jail. She could have freely stated the facts. It can hardly be believed that she gave her statement under section 164 Cr.P.C. under any pressure or undue influence. She was given in the supurghi of her parents and after a long span of time when the victim was examined in Court, she changed her version and alleged that she was kidnapped and raped by the respondent.”

In the present case, the prosecutrix has made major improvements with her statement made under Section 164 Cr.P.C. when she appeared as PW-9.

28. We have also gone through the record Ex.PA. Two lines mentioning serial no.754 and 755 were left blank. Thereafter, serial no.754 dated 02.04.2012 was written and there is overwriting at serial no.754. There is also over writing on the name of prosecutrix. The admission was closed as per signatures of the Headmistress against the entry of name of one Sangita on 01.05.2011. Nine candidates have been admitted in Sessions 2012-2013 but at page 81 of the paper book, it is mentioned that admission was closed at serial no.753 on 24.04.2011. The Nav Bharat High School is a private school. Thus, presumption under Section 35 of the Evidence Act is not attracted in this case. According to Ex.PC, the date of birth of the prosecutrix was 06.03.1999. It is clear from Ex.PB that the prosecutrix has sought admission in 6th standard in Nav Bharat High School. In the application, the name of the school from which she sought her transfer is not mentioned. The reasons for leaving earlier school has not been mentioned and column no.11 has been left blank. The certificate has been issued by Mrs. Meera Sharma, Headmistress, Nav Bharat High School, dated 17.06.2013, but she has not been examined.

In the instant case, in the certificate the name of original school from which the prosecutrix was transferred is not mentioned.

29. Their Lordships of the Hon'ble Supreme Court in ***Jagtar Singh vs. State of Punjab, AIR 1993 Supreme Court 2448*** have held that when in the certificate name of original school from which student was transferred, was not mentioned, such certificate could not be relied upon for proving age

of the accused. Their Lordships have held as under:-

“1. Originally, there were four accused charged for the murder of the victim Kulwant Singh. The present appellant was one of the four accused. He was charged for the offence under Section 302, Indian Penal Code (the 'IPC') as well as under Section 307 read with Section 34, IPC. The rest three accused were charged for the offence under Section 302 read with Section 34 as well as under Section 307 read with Section 34, IPC. Since the victim was only Kulwant Singh for whose death the accused were charged under Section 302, IPC we have not understood the charge framed by the learned Sessions Judge under Section 307, IPC also in connection with the same murder. Nor have we followed the conviction of the present appellant under Section 307 read with Section 34 in addition to his conviction under Section 302 of IPC. It further appears that the High Court has not noticed this anomaly in the convictions and sentences both under Section 302 and Section 307 read with Section 34, of the present appellant.

The facts are in a narrow compass and the finding recorded by both the courts below can hardly be challenged, namely, that it was the appellant who had inflicted the three fatal injuries on the chest of the victim, as a result of which the victim met with his death. We are, therefore, not inclined to interfere with the said finding of fact and the conviction of the appellant under Section 302, IPC.

Mr Sushil Kumar, learned counsel appearing as amicus curiae for the appellant, however, contended that on the date of the incident, i.e. August 31, 1976, the appellant was below 16 years, his date of birth being May 4, 1961, as per the school leaving certificate. This

certificate was produced in this Court at the time of seeking special leave and the enlargement of the accused on bail. There is no dispute that this certificate states that the appellant- Jagtar Singh was admitted into the school in question on September 26, 1975 and he left the school while he was reading in the 8th standard. However, mysteriously, the certificate does not mention the name of the school from which the transfer certificate was obtained and on the basis of which certificate the appellant was admitted to the school. It is not disputed that the date of birth which is given in the certificate produced in this Court is based on the date mentioned in the transfer certificate. Since the name of the school from which the transfer certificate is obtained itself is absent from this certificate, no reliance can be placed on the said certificate. This is apart from the fact that there are certain further facts which have come on the record in this connection.”

30. Their Lordships of the Hon'ble Supreme Court in ***Madan Mohan Singh and others vs. Rajni Kant and another, (2010) 9 Supreme Court Cases 209*** have held that best evidence qua age is of parents. Their Lordships further held that the entries in school register/school leaving certificate are required to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61 etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date time, etc. mentioned therein. Their Lordships have held as under:-

“17. In State of Bihar Vs. Radha Krishna Singh, AIR (1983) 3 SCC 118, this Court dealt with a similar contention and held as under:-

"40.....Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil.

** * **

53.....where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight.

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145.(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

18. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh

Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

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20. *So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under [Section 35](#) of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.*

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22. *If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of [Section 32 \(5\)](#) or [Sections 50, 51, 59, 60 & 61](#) etc. of the [Evidence Act](#) by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein. (Vide: *Updesh Kumar Vs. Prithvi Singh*, (2001) 2 SCC 524; and *State of Punjab Vs. Mohinder Singh*, AIR 2005 SC 1868)."*

31.

Their Lordships of the Hon'ble Supreme Court in ***Jabar Singh***

vs. Dinesh and another, (2010)3 Supreme Court Cases 757 have held that since the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country, the entry was not relevant under Section 35 of the Evidence Act for the purpose of determination of age. Their Lordships of the Hon'ble Supreme Court have held as under:-

“27. We are of the considered opinion that the High Court was not at all right in reversing the findings of the trial court in exercise of its revisional jurisdiction. The entry of date of birth of Respondent 1 in the admission form, the school records and transfer certificates did not satisfy the conditions laid down in [Section 35](#) of the Evidence Act inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country and, therefore, the entry was not relevant under [Section 35](#) of the Evidence Act for the purpose of determining the age of Respondent 1 at the time of commission of the alleged offence.”

32. Their Lordships of the Hon'ble Supreme Court in **Satpal Singh vs. State of Haryana (2010) 8 Supreme Court Cases 714** have held that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the court / authority to examine its probative value. It is not possible to ascertain as to who was the person who had given her date of birth as 13.02.1975 at the time of initial admission in the primary school. More so, the entry in respect of the date of birth of the

prosecutrix in the primary school register has not been produced and proved before the trial Court. Their Lordships of the Hon'ble Supreme Court have held as under:-

“28. Thus, the law on the issue can be summarised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under [Section 35](#) of the Evidence Act but the party may still ask the Court/Authority to examine its probative value. The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case.

29. In case, the issue is examined in the light of the aforesaid settled legal proposition, there is nothing on record to corroborate the date of birth of the prosecutrix recorded in the school register. It is not possible to ascertain as to who was the person who had given her date of birth as 13.02.1975 at the time of initial admission in the primary school. More so, it cannot be ascertained as who was the person who had recorded her date of birth in the primary school register. More so, the entry in respect of the date of birth of the prosecutrix in the primary school register has not been produced and proved before the trial court. Thus, in view of the above, it cannot be held with certainty that the prosecutrix was a major. Be that as it may, the issue of majority becomes irrelevant if the prosecution successfully establishes that it was not a consent case.”

In the instant case, the primary school certificate has not been produced. Only certificate issued by the Headmistress of the private school

has been produced.

33. Their Lordships of the Hon'ble Supreme Court in ***Alamelu and another vs. State represented by Inspector of Police, (2011) 2 Supreme Court Cases 385*** have held that 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. The Headmaster has not been examined at all. Their Lordships of the Hon'ble Supreme Court have held as under:-

“40. Undoubtedly, the transfer certificate, Ext.P-16 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, 1872. 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.

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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.

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47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.”

34. According to FSL report, as noticed hereinabove, human semen was detected on exhibit-3 (underwear), exhibit-4 (underwear) and exhibit-7a (bedsheet). No semen was detected on exhibit-1 (pyjama of prosecutrix). No semen was found on exhibit-2 (vaginal swabs). According to the prosecutrix, she was beaten severely by the accused. However, as per medical record, no mark of external injury was found on her body though according to doctor's opinion, the possibility of sexual intercourse could not be ruled out.

35. The prosecution has also not explained manipulation in the admission register of the prosecutrix. PW-5 Dr.Saroj Lochab had referred the prosecutrix to Radiology and Dental department for age verification but the same was not undertaken. The blood sample of accused was taken but no DNA report was obtained. The radiology and dental examination of the prosecutrix was important. There was overwriting in the admission register at serial no.754 as well as on her name.

36. The prosecution has failed to prove the charges against the appellants beyond reasonable doubt. Accordingly, the appeals are allowed and the judgment and order dated 14.01.2014 and 16.01.2014 are set aside.

The appellants are acquitted of the charges framed against them by giving them benefit of doubt. The appellants are in custody. They are ordered to be

released forthwith if not wanted in any other case. Release warrants be prepared.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

August 27, 2019.
Davinder Kumar

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No