

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 CRL. M. C. 5989/2019 & Crl. M.A. 41053/2019

Reserved on : 25.11.2019
Decision on : 24.12.2019

IN THE MATTER OF:

SURAJ PURI

..... Petitioner

Through: Mr. Ashok Agrawal and Mr. Anuj Kapoor,
 Advocates

Versus

STATE

..... Respondent

Through: Ms. Manjeet Arya, APP for State with
 SI Jitender Kumar, P.S. Sonia Vihar

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present petition impugns the order dated 25.09.2019 passed by Addl. Sessions Judge (North-East) in FIR No.359/2014 registered under Sections 363/366/376 IPC and Section 6 of POCSO Act at Police Station Sonia Vihar whereby the petitioner's application filed under Section 311 read with Section 233 Cr.P.C. for recalling Abhimanyu Kumar, father of the child victim and summoning the school records, was dismissed.
2. Learned counsel for the petitioner submitted that the prosecution has sought to prove the age of the child victim by producing on record her matriculation certificate through Prabhas Kumar, Assistant Secretary Regional Office, *Madhyamik Shiksha Parishad*. As per the matriculation certificate, the child victim's date of birth is recorded as 10.10.1997.
3. Learned Counsel for the petitioner has contended that as per the testimony of child victim's father, the child victim had initially studied at their native place in District Faizabad and later admitted to a school in Shiv

Vihar which were prior to the school attended at the time of matriculation. He thus urged that Abhimanyu Kumar, child victim's father is required to be called for further cross examination to find out the details of earlier schools so that the child victim's birth record in earlier schools can be summoned. In support of his submission, reliance was placed on the decisions rendered in Natasha Singh v. CBI reported as **(2013) 5 SCC 741**, State v. Shailesh Kumar reported as **2019 SCC OnLine Delhi 8318** and Satpal Singh v. State of Haryana reported as **2010 8 SCC 714**.

4. Additionally, learned counsel for the petitioner submitted that the procedure outlined in Section 34(2) of the POCSO Act, 2012, in view of the use of word "person" in the subsection, is not only restricted to determine the age of the 'child who committed the offence' but also applicable to determine the age of the 'child victim' as well. In simpler term, he urged that the word 'person' refers to a 'child who committed the offence' as well as the 'child victim'. In support of his submission, he has placed reliance upon the decision rendered in Umesh Kumar Choudhary v. State of M.P. reported as **(2016) SCC OnLine MP 6441**.

5. Per contra, learned APP for the State has supported the impugned order and submitted that Abhimanyu Kumar, father of the child victim was cross-examined and discharged on 26.07.2016. The petitioner filed the application only on 20.08.2019 when the case is at the stage of final arguments. It is thus submitted that the same is filed only to delay the trial.

6. I have heard the learned counsels for the parties and gone through the case records.

7. Briefly, the facts of the prosecution case are that on 08.08.2014, the petitioner called the child victim on her mobile phone and asked her to meet

at 5th Pusta. When the child victim reached, the petitioner threatened her and took her to Haridwar, where he made forcible physical relations with her on number of occasions. The father of the child victim had lodged a missing report on 09.08.2014 where he gave the age of the child victim as 17 years. The statement of the child victim under Section 161 Cr.P.C. was recorded on 19.08.2014.

8. The prosecution has produced material on record as per which the date of birth of the child victim is 10.10.1997. The offence was committed on 08.08.2014 and later. As such, on the date of offence, the age of the child victim was less than 17 years. To prove the date of birth of the child victim, the prosecution examined Shri Prabhas Kumar, Assistant Secretary Regional Office, *Madhyamik Shiksha Parishad*, as PW11. He brought the original register with respect to child victim's roll number & particulars which were noted at the time of matriculation. In the cross-examination, he stated that date of birth in the records was noted on the basis of examination form of class 10th submitted on behalf of the child victim. It is relevant that the aforementioned witness was not summoned from the child victim's school but from the Uttar Pradesh Board.

9. Abhimanyu Kumar, father of the child victim. was examined as PW-6. In his examination-in-chief, he did not depose about child victim's date of birth. In cross examination, it was stated that he got married in the year 1991 and the victim is his eldest child. He further stated he had no knowledge in which year the child victim was admitted and what was her age at that time.

10. The word 'child' is defined in Section 2(d) of the POCSO Act as any person below the age of 18 years. The provisions of POCSO Act, 2012 are

attracted only if the child victim is less than 18 years of age else the provisions under the POCSO Act would not be applicable.

11. To appreciate the contention raised by the Id. Counsel for the petitioner on the interpretation of the word ‘person’ appearing in subsection 2 of Section 34 of the POCSO Act, I deem it profitable to reproduce the same herein under:

“34. Procedure in case of commission of offence by child and determination of age by 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.”

12. Whereas subsection (1) of Section 34 of the POCSO Act is restricted to a ‘child who committed an offence’, the use of the expression “whether a person is child or not’ in subsection (2) is wider in sense. The determination ‘whether a person is a child or not’ is to be done by the special court. The satisfaction of the special court shall further need to be justified by recording of reasons. Although the POCSO Act does not outline any procedure for such determination but a cue can be taken from subsection (1) of section 34

which provides that a ‘child who committed an offence’ shall be dealt with under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000. The procedure to determine the age of a person is provided in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rule 2007 and later in Section 94 of The Juvenile Justice (Care and Protection of Children) Act, 2015.

13. In Jarnail Singh v State of Haryana reported as **(2013) 7 SCC 263**, Supreme Court while considering the scope of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rule 2007 held that even though Rule 12 was strictly applicable only to determine the age of a ‘child in conflict with law’, however, the same should also be the basis of determining the ‘age of a child victim’. It was held that so far as issue of minority is concerned, there is no difference between a ‘child in conflict with law’ and ‘child victim’ of a crime.

14. In view of the above authoritative pronouncement of law in Jarnail Singh (supra), the procedure to determine the age of a ‘juvenile in conflict with law’ in terms of Rule 12 of Juvenile Justice (Care and Protection of Children), Rules 2007 is also applicable for determination of age of the child victim. Hence, the expression ‘whether a *person is a child or not*’ in Section 34 (2) of the POCSO Act would also include a ‘child victim’. The finding of the trial court that Section 34 of POCSO Act is only applicable to a child who has committed an offence is illegal and set aside.

15. That brings me to the second contention of learned counsel for the petitioner. Whether, Abhimanyu Kumar, father of the child victim needs to be recalled and also if the records of previous schools which the child victim attended also need to be summoned?

16. The petitioner is facing trial for the offences including offence punishable under Section 376 IPC and Section 6 POCSO Act. Section 5 of the POCSO Act defines the offence of “aggravated penetrative sexual assault” and Section 6 provides that the aforesaid offence is punishable with a minimum sentence of RI for 10 years which may extend to imprisonment for life.

17. A fair trial is the hallmark of criminal procedure. It entails not only the rights of the victim but also the interest of the accused and the society. It is the duty of the criminal court to ensure that fair and proper opportunity is granted to the accused for the just decision of the case. Adducing evidence by the accused in support of his defence is a valuable right

18. In Natasha Singh v CBI reported as (2013) 5 SCC 741, while referring to its earlier decisions in *Mir Mohd. Omar v. State of W.B*¹, *Mohanlal Shamji Soni v Union of India*², *Rajeswar Prasad Misra v State of W.B*³, *Rajendra Prasad v Narcotic Cell*⁴, *P. Sanjeeva Rao v State of Andhra Pradesh*⁵, *T Nagappa v Y.R Muralidhar*⁶, the Supreme Court held as under:-

“8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at “any stage” of “any enquiry”, or “trial”, or “any other proceedings” under CrPC,

¹ (1989) 4 SCC 436

² AIR 1991 SC 1346

³ AIR 1965 SC 1887

⁴ 1999 6 SCC 110

⁵ (2012) 7 SCC 56

⁶ (2008) 5 SCC 633

or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

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15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as “any court”, “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the

provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same.”

19. A perusal of the testimony of Prabhas Kumar, Assistant Secretary Regional Office, *Madhyamik Shiksha Parishad* would show that the age of the child victim in the matriculation certificate was entered on the basis of the class 10th examination form submitted in the school. Learned counsel for the petitioner contended that the age of the child victim has been recorded without any supporting document. It has not come on record either in the testimony of the father or the witness Prabhas Kumar as to on what basis the child victim's date of birth was entered in the 10th class form or the school records.

20. The admissibility of a document and its probative value are two different things in Birad Mal Singhvi v. Anand Purohit reported as **1988**

Supp SSC 604, the Supreme Court held as under:

“15...To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.”

21. Later, in Satpal Singh v. State of Haryana reported as **(2010) 8 SCC 714**, a question arose whether the date of birth recorded in the school register is admissible in evidence and can be relied upon without any corroboration. The Supreme Court held that a document may be admissible under Section 35 of the Indian Evidence Act being a public document if prepared by a government official in exercise of his official duty but whether the entry contained therein has any probative value would still require to be examined in the facts and circumstances of a particular case. Citing several earlier decisions, the Supreme Court held that even if the entry was made in an official record by the official concerned in discharge of his official duty, it may have weight, but would still require corroboration by the person on whose information the entry has been made and whether the entry so made has been exhibited and proved. The Supreme Court summarized the law in the following words:-

“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 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. ”

22. The petitioner has set up his defence that the victim was not a child but infact, a major. During cross examination of the child victim and her father, a suggestion was given to them that the victim was more than 18 years of age at the time of incident, which however, was denied. By way of the present application, the petitioner is not setting up a new case but trying to bring on record evidence in support of his existing defence.

23. I find merit in the contention of the learned counsel for the petitioner that summoning the records from the previous schools attended by the child victim shall enable the trial court to reach a definite conclusion as to the age of the child victim. The father of the child victim was examined and discharged on 26.07.2016. The prosecution thereafter, moved an application to summon the Registrar of UP Board to prove the high school certificate of

the child victim on the ground that inadvertently, the name of the witness was not included in the list of witnesses earlier. The application was allowed on 21.02.2017 and the concerned witness was examined on 07.04.2017. Indeed, there is some delay on part of the petitioner to move an application for recall and summoning of school record however, I am of the view that the same is essential for the just decision of the case especially in light of the evidence that has come on the record in the form of testimony of father of the prosecutrix as well as Prabhas Kumar in relation to date of birth of the child victim.

24. In the facts and circumstances of the case, the petitioner's prayers to summon documents from the earlier schools of the child victim and to recall Abhimanyu Kumar (PW6), father of the child victim is allowed subject to payment of cost of Rs 10,000/- to be deposited with Delhi Legal Services Authority within a period of 4 weeks from today. Receipt, evidencing deposit of cost, be filed in the Registry.

25. Petition is disposed of in the above terms. Miscellaneous application is disposed of as infructuous.

26. Needless to add that the observations made hereinabove are only for the purpose of disposal of the present petition and the same shall have no effect on the merits of the case.

27. A copy of this order be communicated to the trial court.

28. Dasti.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 24, 2019

dc/ssc