

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 09.05.2018

% **Judgment delivered on: 02.07.2018**

+ **CRL.A. 334/2018**

STATE (GNCT OF DELHI)

..... Appellant

Through: Ms. Aashaa Tiwari, Additional Public
Prosecutor for the State with SI
Shailendra Kr. Singh, PS – Gokulpuri

versus

HARGOVIND

..... Respondent

Through: Mr. S.S. Ahluwalia and Mr. Jatin
Teotia, Advocates (DHCLSC)

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT BY THE COURT

1. The State has preferred the present appeal against the judgment dated 15.09.2016 delivered by the learned Additional Sessions Judge -01, North East District, Karkardooma Courts, Delhi in Sessions Case No.44750/2015 titled as *State vs. Hargovind*, arising out of FIR No.36/2013 registered under Section 363/366/376 IPC and Section 4 of the POCSO Act at Police Station Gokalpuri, Delhi, whereby the accused/respondent was acquitted from the charges leveled against him.

2. The facts in brief are that on 22.01.2013, complainant- PW4 lodged a complaint at Police Station Gokalpuri that his daughter, aged about 13 years, has been kidnapped by someone. On the basis of his complaint, the case was registered under Section 363 of IPC. Subsequently, on 27.02.2013, the victim was found present at the bus stop, Yamuna Vihar by the complainant and his uncle (phoofa) Prabhu Dayal. The accused Hargovind- 'Chacha' of the prosecutrix was also present with her. The intimation in this regard was given to the Police Station and statement of the victim was recorded under Section 161 of Cr.P.C. On the basis of the statement of the victim, penal Section 4 of the POCSO Act was added in the FIR. Subsequently, the statement of victim under Section 164 of Cr.P.C. was recorded in which the allegations of kidnapping and rape were leveled against the accused/respondent and therefore section 366/376 of IPC were also added in the FIR. Investigation was conducted and completed and charge sheet was filed against the accused/respondent Hargovind.

3. Charge for the offence punishable under Sections 363/366 IPC and Section 4 of the POCSO Act, and alternate charge under Section 376 IPC was framed against the accused to which he pleaded not guilty.

4. To prove its case, the prosecution has examined 18 witnesses, including PW1-the victim, PW4-the father of the victim, who is also the complainant, PW7- the landlady of the premises where the accused resided with the victim and, PW5-the principal of the school where the victim studied- to prove her date of birth. After completion of prosecution evidence, statement of the accused under Section 313 Cr.P.C. was recorded

in which he claimed that he never enticed the victim, nor committed rape upon her, nor kept her at his house. However, he did not lead any evidence in his defence.

5. After considering the material placed on record and the depositions of witnesses, the learned Additional Sessions Judge acquitted the accused/respondent from the charges framed against him. The Ld. ASJ held that it was proved that the victim was found in the company of the accused at Yamuna Vihar from where they both were apprehended. He also held as proved, the fact that the accused had resided in the house of PW7 on rent for about five days in the year 2013 at District Jalaun, UP, with the victim. The Ld. ASJ held that the victim had gone with the accused with her consent, and no force was used by the accused. On the aspect whether the accused had established sexual relationship with the victim, the Ld. ASJ held that the evidence on record was not sufficient to establish the said fact. He held that the prosecution had not established that the prosecutrix/ victim was about 13 years and 3 months when she eloped with the accused. He held that the prosecution had not established that the victim/ prosecutrix was a minor on the date of the incident. Being aggrieved by the judgment of acquittal, the State had preferred the instant appeal.

6. For the prosecution to succeed in its present appeal, it is essential for the State to establish, firstly, that the victim/ prosecutrix was below the age of discretion i.e., 16 years at the relevant time. To establish the offence of penetrative sexual assault, the prosecution has to also establish the same on the basis of the evidence led in the case.

7. Learned APP for the State argued that as per school records, i.e. Admission Register (Ex.PW-5/A), Admission Certificate (Ex. PW-5/B) and the certificate (Ex. PW-5/D) issued by the Principal of MCD Girls Primary School, the date of birth of the victim was 28.10.1999 and prosecutrix was admitted in school on 11.07.2006 and had passed 5th standard on 31.03.2010. Despite the prosecution proving the fact that the victim was a minor – about 13 years and 3 months of age on the date of incident, the accused/respondent has been acquitted. Ms. Tiwari submits that consent of the victim– who is of 13 years of age is immaterial, and the deposition of the victim that she resided with the respondent/accused as his wife, was sufficient for conviction of the accused even in the absence of medical evidence. She further submits that as per Section 375 IPC, having sexual intercourse with a girl less than 16 years of age is an offence, and consent does not obliterate the offence. She further submitted that if the testimony of the prosecutrix is found to be reliable, the same needs no corroboration, even by medical evidence.

8. Learned APP submits that the prosecutrix was a minor girl at the time of the alleged incident and the said fact has been duly proved by the prosecution. The age given by the father of the prosecutrix in the FIR is 13 years. The prosecutrix during her statement recorded under Section 164 Cr.P.C. as well as at the time of recording her testimony gave her age as 14 years. Even during medical examination, she had given her age as 14 years before the doctor. Thus, it was established that the prosecutrix was a minor girl at the time of her kidnapping. She further submitted that it has come in the testimony of the prosecutrix that she was taken away by the accused to

Aurai, Jalaun and she was in constant touch with the accused on mobile phone, which makes a case of allurement against the accused that he had taken away the prosecutrix from the lawful custody of her guardian for the purpose of commission of sexual intercourse.

9. Learned APP has relied on the judgments reported in *Vijay alias Chinee vs. State of Madhya Pradesh*, (2010) 8 CC 191; *State of Punjab vs. Gurmit Singh and Others*, AIR 1996 SC 1393; *Raju Yadav vs. State*, 2016 (2) Crimes 392 (Del); *Radhu vs. State of Madhya Pradesh*, 2007 Cri.LJ 4704; *Parkash vs. State of Haryana*, (2004) 1 SCC 339.

10. In response to the contentions raised on behalf of the State, Ld. counsel for the respondent/accused has urged that the impugned judgment is a well reasoned one, and does not call for any interference by this court.

11. Learned counsel for the respondent/accused has submitted that there is no evidence on record to connect the accused with the kidnapping of the prosecutrix. He submits that as per the testimony of the prosecutrix, she of her own had gone to the native place of the accused and there was no allurement. He also submits that the prosecutrix was a major and not a minor, as alleged by the prosecution, so, no case of taking away of the prosecutrix from the custody of lawful guardianship is made out and, since she was a major girl, no offence of rape is made out as they had performed marriage. Ld. counsel further submitted that no case of commission of rape, or an offence under the POCSO Act is made out for the reasons that the prosecutrix was a major, and it has come in her deposition that accused did not have any sexual intercourse, but only tried to do so.

12. In support of his submissions, learned counsel for the respondent relied upon *Anil Kumar vs. State of U.P.*, 2004 (4) RCR (CrI.) 358; *Devki Nandan vs. State of Haryana and Another*, 2015(4)RCR(CrI.)64; *Alamelu and Another vs. State Rep. by Inspector of Police*, 2011AIR 715, *Shyam and Another vs. State of Maharashtra*, 1995 AIR(SC) 2169. We shall deal with these decisions a little later in our opinion.

13. We have gone through the submissions made by the parties and given our thoughtful consideration to the matter.

14. The victim (PW1) is the most important witness in the present case. She deposed that in the month of December 2012, Hargovind was residing in her house. On 22.01.2013, she had left her house at about 7 a.m. At that time, she was wearing school uniform and was having school bag in which two pairs of her clothes were lying. She went to Ghaziabad railway station and there she changed her school uniform. She had gone to the railway station to catch a train to Aurai, District Jalaun. She had boarded the train for Aurai and reached there. During the duration of journey, she was alone. She had gone to Aurai to meet Hargovind as he had called her there. Hargovind called her through telephone and called her at Aurai. Hargovind was present at Aurai railway station when she reached there. Hargovind took her to his house. She stayed there for one night. Father of Hargovind had arranged one room on rent on 23.01.2003. It was meant for residence of her, and Hargovind. She along with Hargovind resided in that room and on 27.01.2003, she had married Hargovind at Shiv Mandir. Thereafter, she along with Hargovind resided in the said room as husband and wife from

23.01.2003 to 25.02.2003. On 25.02.2003, she had asked Hargovind to take her to Delhi at her parents' house. She had assured Hargovind that her parents would agree to their relationship. She, along with Hargovind, left for Delhi and reached Delhi next morning. From the railway station, they had come to Yamuna Vihar bus stop. Some of her neighbours had noticed their presence at the bus stop and informed at her house. Thereafter, her father with his foofa (uncle) came there. Her father called the police. Police came and took her and Hargovind to the police station. She further stated that her statement under Section 164 Cr.P.C. was recorded vide Ex.PW1/A and she identified her signatures thereon. She was also taken to the hospital where she refused for her medical examination. She told her date of birth as 29.10.1999. PW1 duly identified the accused in the Court during her deposition.

15. During cross-examination, PW1 stated that she had proceeded from her house for the school on the day of the incident, but she went to Ghaziabad railway station. She reached at Jyoti Nagar red light where accused met her and thereafter they proceeded to railway station. They boarded a train at Ghaziabad railway station at about 9 a.m. She remained at the house of accused for two-three days before marriage. She denied that the accused did not induce her for elopement with him or that she was not kept by the accused at his house or at any other place. She admitted that the accused did not make sexual intercourse with her. She voluntarily stated that the accused tried to do sexual intercourse but was not successful.

16. To deal with the rival contentions of the parties, we have gone through the material available on record. Ex.PW4/A is the complaint made by the father (PW4) of the prosecutrix (PW1) regarding her missing. This complaint Ex.PW4/A shows that PW4 had given the age of his daughter (PW1) as 13 years. This complaint Ex.PW4/A was made the basis for registration of the FIR of the instant case. It is the case of the prosecution that after the apprehension of the accused and the prosecutrix at Yamuna Vihar bus stand, the police took both of them to the police station. The statement of the prosecutrix was recorded under Section 164 Cr.P.C. vide Ex.PW1/A. In her statement under Section 164 Ex.PW1/A and before the Magistrate also, the prosecutrix (PW1) gave her age as 14 years. She was even sent for medical examination vide MLC Ex.PW8/A wherein also she gave her age as 14 years before the doctor.

17. Pertinently, the prosecutrix gave her statement in favour of the accused on other aspects in as much, as, she said that she had, of her own will, eloped with the accused and that she was in love with him. She also stated that she had told the accused, even if her family was against their marriage; she wanted to get married to him. Thus, she made the said statement to protect the accused. However, even while doing so, she gave her date of birth as 28.10.1999 and did not claim that she was 16 years or more on the date of her elopement with the accused.

18. The victim/ prosecutrix was examined medically vide Ex. PW8/ dated 27.02.2013, wherein her age was recorded as 14 years. Pertinently, in the MLC Ex. PW8/A, the doctor has recorded her as “unfit for statement

(appears minor age)”. Pertinently, in the cross examination of the father PW4, though, certain questions were put to him on the aspect of the age of the prosecutrix, it was not suggested to him that the prosecutrix was not 13 years of age on the date of the incident i.e., 22.01.2013. No challenge was raised to his statement that she was studying in 8th class in Govt. School, C-1, Yamuna Vihar, Delhi in the year 2013. No challenge was raised that she was 15 years of age as on the date when the testimony of PW4 was recorded i.e., 3.2.2015. PW5-Principal EDMC Primary School, Yamuna Vihar, C-4, New Delhi, deposed that the victim was admitted in their school on 11.07.2006 in class 2nd. As per the school records, her date of birth was 28.10.1999. The documents led in evidence by PW5 show that her date of birth contemporaneously i.e., in the year 2006 was disclosed by her father as 28.10.1999.

19. The issue that arises for consideration is, as to what approach the Court should adopt in the matter of determination of age of the prosecutrix, if the prosecution – while claiming that the prosecutrix/ victim is below the age of 16 years, or 12 years – as the case may be, does not prove her birth certificate on record. Would the Court be justified in presuming and proceeding on the basis that the prosecutrix/ victim is a major, or above the age of discretion, i.e. 16 years, or the Court is obliged to call for the medical examination of the victim/ prosecutrix to determine her age?

20. Recently, we had occasion to consider some aspect about the age of the victim in our decision rendered in *State of NCT of Delhi v. Dharmendra*, CrI. A 1184/2017 decided on 13.03.2018. In that case the age

of the victim was disclosed by prosecution as 9 years. The learned ASJ held that the prosecution had not established that the victim was below 12 years of age— which is relevant for the purpose of Section 9 of the POCSO Act. This Court, inter alia, observed as follows in the said decision:

“26. The birth certificate of a child may not have been got made; it may not be available/ preserved, or; it may not have been led in evidence in a given case. In either of these situations, can it be said that the age of the victim would be presumed to be above 12 years or 18 years, even though the other circumstances contra-indicate such an assumption? In our view, no such presumption can be drawn and the Court would have to examine the circumstances and evidence in each case to arrive at its own conclusion on the aspect of age of the victim.

27. The learned ASJ has held that the age of the victim has not been proved to be below 12 years on the premise that the victim’s birth certificate issued by an agency empowered under the law to issue the same has not been brought on record. No other similar document has been placed on record.

28. Section 35 of the Indian Evidence Act, 1872 (the Evidence Act) states that “An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact”.

29. As noticed hereinabove, PW-2 the school principal produced the admission register Ex.PW-2/C; the school application form Ex.PW-2/A and the copy of the affidavit of the mother of the victim Ex.PW-2/B, on the basis of which the date of birth of the victim in the school record was recorded

16.06.2013 when the victim/ child was admitted in Class-II on 18.08.2010. Pertinently, the incident in question is of 15.08.2013. Firstly, the affidavit had been given by the mother of the victim/child and not by a stranger who may not be aware of his date of birth. Secondly, the affidavit and the application form were processed and acted upon by the school, and the date of the birth of the victim/ child recorded in the school record by the school authorities in the discharge of the official duty. Thirdly, the date of birth of the child was disclosed by the mother as 16.07.2013 much before the incident took place and thus, there was no occasion for the mother to falsely declare the date of birth of her child/ victim.

30. The learned ASJ has placed reliance on the judgment of the Supreme Court in **Satpal Singh Vs. State of Haryana**, (2010) 8 SCC 714, in support of his aforesaid conclusion. A reading of the said judgment shows that the learned ASJ has applied the said decision mechanically and without appreciation thereof. In fact, on our reading we find that the said decision supports the case of the prosecution in the present case. **Satpal Singh** (supra) was a case of rape of a girl while she had gone with her brother to the fields for collecting cattle fodder. The prosecutrix had raised an alarm and upon hearing the same, her brother came running to the place of occurrence, by when the appellant/ convict had escaped from the scene. The Trial Court convicted the appellant and the High Court dismissed his appeal. However, his sentence was reduced by the High Court from 7 years to 5 year Rigorous Imprisonment, apart from fine for the offence under Section 376 of the IPC. Before the Supreme Court, the appellant raised primarily two issues. The first was that the making of the FIR was belated and, secondly, that the prosecutrix was a major, and not minor at the time of the incident. We are concerned only with the second aspect in the present case. We consider it appropriate to reproduce the relevant extract from the judgment of the Supreme Court in **Satpal Singh** (supra) dealing with the said aspect. The same reads as follows:

“19. So far as the issue as to whether the prosecutrix was a major or minor, it has also been elaborately considered by the courts below. In fact, the school register has been produced and proved by the Headmaster, Mohinder Singh (PW 3). According to him, Rajinder Kaur (PW 15), the prosecutrix, was admitted in Government School, Sharifgarh, District Kurukshetra on 2-5-1990 on the basis of school leaving certificate issued by Government Primary School, Dhantori. In the school register, her date of birth has been recorded as 13-2-1975. The question does arise as to whether the date of birth recorded in the school register is admissible in evidence and can be relied upon without any corroboration. This question becomes relevant for the reason that in cross-examination, Shri Mohinder Singh, Headmaster (PW 3), has stated that the date of birth is registered in the school register as per the information furnished by the person/guardian accompanying the students, who comes to the school for admission and the school authorities do not verify the date of birth by any other means.

20. A document is admissible under Section 35 of the Evidence Act, 1872 (hereinafter called as “the Evidence Act”) being a public document if prepared by a government official in the exercise of his official duty. However, the question does arise as to what is the authenticity of the said entry for the reason that admissibility of a document is one thing and probity of it is different.

21. In State of Bihar v. Radha Krishna Singh [(1983) 3 SCC 118 : AIR 1983 SC 684] 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 or its probative value may be nil. ... (SCC p. 138, para 40)

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. (SCC p. 143, para 53)

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. (SCC p. 171, para 145)”

22. 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 v. State of Bihar [(1969) 2 SCC 359] ; Ram Murti v. State of Haryana [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029] ; Dayaram v. Dawalatshah [(1971) 1 SCC 358 : AIR 1971 SC 681] ; Harpal Singh v. State of H.P. [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361] ; Ravinder Singh Gorkhi v. State of U.P. [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632] ; Babloo Pasi v. State of Jharkhand [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266] ; Desh Raj v. Bodh Raj [(2008) 2 SCC 186] and Ram Suresh Singh v. Prabhat Singh [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194] . 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. Such entries may be in any public document i.e. school register, voters list or family register prepared under the rules and regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in Mohd. Ikram Hussain v. State of U.P. [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and Santenu Mitra v. State of W.B. [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587]

23. There may be conflicting entries in the official document and in such a situation, the entry made at a later stage has to be accepted and relied upon. (Vide Durga Singh v. Tholu [AIR 1963 SC 361] .)

24. While dealing with a similar issue in *Birad Mal Singhvi v. Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796] , this Court held as under: (SCC p. 619, para 15)

“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.”

25. A Constitution Bench of this Court, while dealing with a similar issue in *Brij Mohan Singh v. Priya Brat Narain Sinha* [AIR 1965 SC 282] , observed as under: (AIR p. 286, para 18)

“18. ... The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it

himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. We have therefore come to the conclusion that the High Court is right in holding that the entry made in an official record maintained by the illiterate chowkidar, by somebody else at his request does not come within Section 35 of the Evidence Act.”

26. In *Vishnu v. State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] while dealing with a similar issue, this Court observed that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. For determining the age of the child, the best evidence is of his/her parents, if it is supported by unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the municipal corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded.

27. Thus, the entry in respect of age of the child seeking admission, made in the school register by semi-literate chowkidar at the instance of a person who came along with the child having no personal knowledge of the correct date of birth, cannot be relied upon.

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 13-2-1975 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.”

31. From the above extract, it would be seen that in **Satpal Singh** (supra), the evidence led by the prosecution to establish the date of birth/ age of the prosecutrix on the date of the incident was the school register of the Government school, wherein she was admitted on 02.05.1990. The prosecutrix had

been admitted on the basis of the school leaving certificate Issued by the Government primary school. In the said register, her date of birth had been recorded as 13.02.1975. The Supreme Court posed the question whether the date of birth recorded in the school register is admissible in evidence and can be relied upon without any corroboration. This question arose since the Headmaster of the Government school had stated that the date of birth was registered in the school register as per the information furnished by the parents/guardian accompanying the students who came to the school for admission, and the school authorities did not verify the date of birth by any other means. The Supreme Court referred to Section 35 of the Evidence Act. It observed that admissibility of a document is one thing, and probity of the entry made in the said document is a different thing. A document may be admissible but as to whether the entry contained therein has any probative value may still required to be examined in the facts & circumstances of a particular case. It was held that even if an entry is made by an official 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 was made has been exhibited and proved.

32. The Supreme Court referred to **Birad Mal Singhvi** (supra), wherein it was held that 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 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.

33. The rationale behind making the entry made by a public servant in a public or other official register or record as a relevant fact was noticed in **Brij Mohan Singh** (supra). While doing so, the Supreme Court rejected the reliance placed on the entry made in the school register with regard to the date of birth, since the same had been made by an illiterate chowkidar

which could not be relied upon. The entry made in the school register with regard to the date of birth provided by the parents could be disregarded, if it stands belied by unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of a municipal corporation; government hospital/ nursing home, etc.

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35. *The learned ASJ has observed in the paragraph 6 of the impugned judgment, which is extracted hereinabove, that “as per rules the birth certificate of the school first attended is required which has not been produced”. The learned ASJ has made no reference to any specific “rule” in this regard. However, we take it, that the learned ASJ had Rule 12 of the Juvenile Justice (Care & Protection of Children) Rules 2007 (JJ Rules for short) in his mind.*

36. *Firstly, we may observe that the Juvenile Justice (Care & Protection of Children) Act 2015 (JJ Act for short) and the JJ Rules have been framed with the object of “catering to the basic needs through proper care, protection, development, treatment, social reintegration, **by adopting a child-friendly approach** in the adjudication and disposal of matters **in the best interest of children** and for their rehabilitation through processes provided, and institutions and bodies established,” (emphasis supplied) (See preamble to the JJ Act). The expression “child-friendly” is defined in Section 2(15) of the JJ Act to mean “any behavior, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child;”. Under Section 7, the Juvenile Justice Board constituted under the JJ Act is obliged to observe its rules in regard to transaction of business, and to ensure that all procedures are child-friendly. The whole approach adopted by the authorities under the JJ Act, in the administration of the said Act, is to lean in favour of the accused/ juvenile in conflict with law. It is in this context that Rule 12 of the JJ Rules – which prescribes the procedure to be*

followed in determination of the age of the juvenile in conflict with law, has to be understood and applied. The said Rules, insofar, as it is relevant reads as follows:

“12. Procedure to be followed in determination of Age.—

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

Pertinently, in cases falling under sub-rule (3)(b), the Court/ Board/ Committee shall, for reasons to be recorded, give benefit to the child or juvenile by considering his/ her age on the lower side within the margin of one year.

*37. No doubt, the Supreme Court in **Mahadeo** (supra) held that the same yardstick could be followed by the Court for the purpose of ascertaining the age of a victim, as is prescribed in Rule 12 of the JJ Rules, however, in our considered view, the said observations of the Supreme Court have to be viewed, firstly, in the factual context in which they were made, and also while keeping in mind the fact that stricto sensu Rule 12 of the JJ Rules is framed with a view to provide protection to the*

accused who may be juveniles, and not with a view to cause prejudice to a victim of a crime who may be a minor.

38. In **Mahadeo** (*supra*), the appellant was convicted of the offence punishable under Section 363, 506 & 376 IPC. The High Court dismissed the appeal of the appellant. The two Courts affirmed the finding of fact that the prosecutrix was 15 years and 4 months of age when the offences were committed. The said findings were premised on the evidence led by the prosecution in the form of school leaving certification of the prosecutrix proved on record by the Headmistress of the school, which disclosed her date of birth 20.05.1990 as also the admission form and the transfer certificate issued by the primary school where the prosecutrix had studied, led in evidence by the Headmaster of the primary school. In the records of both the schools the date of birth of the prosecutrix was recorded as 20.05.1990. On behalf of the appellant, it was argued that the prosecutrix was not below the age of 18 years at the time of occurrence. In this regard, the appellant relied upon the evidence of doctor PW-8 who examined the prosecutrix. She deposed that the age of the prosecutrix could have been between 17 to 25 years at the relevant time. The Trial Court rejected the reliance placed by the defence on the version of PW-8, since the same was not premised on scientific examination of the prosecutrix by conduct of tests such as the ossification test. The mere opinion of PW-8 – the doctor, could not be acted upon. The Supreme Court agreed with the said finding of the Trial Court and in that context made reference to Rule 12 of the JJ Rules. The Supreme Court in the light of Rule 12(3)(b) observed that: “only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.”

39. Pertinently, in **Mahadeo** (supra) as well – like in the present case, the birth certificate of the prosecutrix had not been produced. What had been produced were the school records from the primary school and the Daneshwar Vidyalaya which recorded the date of birth of the prosecutrix consistently as 20.05.1990. The Supreme Court accepted the said evidence as good evidence to prove the minority of the prosecutrix as on the date of the offence. Thus, though the priority/ procedure laid down in Rule 12 of the JJ Rules would be attracted to determine the age of the victim/ prosecutrix, the tendency to lean in favour of the accused (in the case of a juvenile in conflict with the law) would, in such situations, be to lean in favour of the minority of the victim/ prosecutrix while determining the age of the victim/ prosecutrix.”

21. This Court also took notice of the obligation cast on the Ld. ASJ by Section 34(2) of the POCSO Act, Section 311 of the Code, and Section 165 of the Evidence Act to get the victim medically examined. Even Rule 12 of the Juvenile Justice Rules (for short, ‘the JJ Rules’) require the adoption of that course of action if the evidence led by the prosecution on the aspect of age of the victim is not sufficient, and the Court is not in a position to return a definite finding that the prosecutrix/ victim was above the age of 16 or 18 years, as the case may be. We took notice of our own judgment in the **State Govt of NCT of Delhi Vs. Sonu Kumar**, CrI. A. 1137/2017 decided on 07.03.2018, wherein we had observed:

“28. In a given case, where the age of the prosecutrix may be bordering 18 years, and on physical appearance it is not obvious that the prosecutrix was a minor on the date of the occurrence, the Court may, with a view to satisfy itself, direct the conduct of medical examination of the prosecutrix to ascertain her age, or to call for other evidence in exercise of its power under Section 311 Cr PC read with Section 165 of the

Indian Evidence Act.

29. In ***Jamatraj Kewalji Govani v. State of Maharashtra***, AIR 1968 SC 178, the Supreme Court held that Section 540 of Code of Criminal Procedure, 1898 (which corresponds to Section 311 of Code of Criminal Procedure, 1973) read with Section 165 of the Evidence Act confers wide jurisdiction on the Court, with no limitation on its power to summon any person as a witness, or examine any person present in Court although not summoned, or recall or reexamine a witness already examined. The Supreme Court in this decision, *inter alia*, held:

“10. Section 540 is intended to be wide as the repeated use of the word ‘any’ throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. **The use of the word ‘may’ in the first part and of the word ‘shall’ in the second firmly establishes this difference.** Under the first part, which is permissive, the court may act in one of three ways: (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are, however, two aspects of the matter which must be distinctly kept apart, The

first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly.” (emphasis supplied)

30. Similarly, in **Mohanlal Shamji Soni v. Union of India & Anr.**, AIR 1991 SC 1346, the Supreme Court observed in para 27 of the decision as follows:

*“27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the **criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case”**. (emphasis supplied)*

31. *But this course of action would not even be called for to be adopted, when the prosecutrix is so small and there is no reason to raise a doubt with regard to the age of the prosecutrix on the date of the occurrence – either by the defence, or on the physical appearance of the prosecutrix before the Court.”*

22. The Ld. ASJ has referred to **Rakesh Kumar Vs. State**, 2004 (1) JCC 110 Delhi, wherein this Court held that the transfer certificate does not indicate who got the victim/ prosecutrix admitted initially and on what basis the date of birth was recorded in the school record. In the absence of birth certificated and other reliable material regarding the date of birth, it cannot

be said with certainty that the date of birth was the one claimed by the prosecution on the basis of the school certificate. The Division Bench observed that “ *It is a matter of common knowledge that at the time of admission in the school the parents generally tend to get the age of their ward recorded on the lower side so that they do not become over aged while searching job and they remain in service for longer period*”

23. The Ld. ASJ has also referred to and relied upon ***Harpal Vs. State of Haryana***, 2004 (1) RCR (Crl.), where the school leaving certificate was not believed in the absence of other evidence, and ***Devanand Vs. State of NCT of Delhi***, 2003 (1) RCR Crl., wherein the entry in the school record was based on school leaving certificate and not on birth certificate.

24. If the prosecutrix was a minor on the relevant date, in the face of the evidence brought on record, the accused may not be able to escape the charges framed against him. However, in our view the evidence brought on record does not conclusively establish the age of the prosecutrix to be above the age of discretion i.e. 16 years or more, as on 22.01.2013.

25. Looking to the facts and circumstances taken note of hereinabove, as also the fact that the victim/ prosecutrix had eloped with the accused without use of force or coercion – we are of the considered opinion that the Ld. ASJ should have resorted to medical examination of the prosecutrix in terms of Rule 12 of the JJ Rules, to determine her age before proceeding with the matter. By not doing so, the Ld. ASJ has failed to exercise the jurisdiction and responsibility that vested upon him while trying a serious offence.

26. Thus, we direct the recording of further evidence in exercise of our jurisdiction under Section 311 Cr.P.C. read with Section 165 of the Evidence Act and Section 34 of the POCSO Act on the aspect of age of the prosecutrix during the relevant period, i.e. between 22.01.2013 and 27.02.2013, including by resort to Rule 12 of the JJ Rules, if necessary. We direct the Special Court to record additional evidence on this aspect and send the same to this Court within the next 6 months. The prosecution, and the defence would be entitled to lead additional evidence on the said aspect.

27. The hearing in the appeal is, accordingly, deferred. The matter shall not be treated as part-heard. The trial court record be sent back to the Special Judge forthwith.

28. List the appeal on 06.02.2019.

(VIPIN SANGHI)
JUDGE

(P.S. TEJI)
JUDGE

JULY 02, 2018