



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 16.06.2021

Pronounced on : 03.09.2021

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THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

CRL.A(MD).No. 195 of 2016

Suresh @ Sureshkumar : Appellants / Accused

Vs.

State rep. by
The Inspector of Police,
Ponmalai All Women Police Station,
Thiruchirappalli.

(Crime No. 151 of 2015)

: Respondent / complainant

PRAYER:- Criminal Appeal filed under Section 374 Cr.P.C., to call for the records relating to the judgment dated 06.04.2016 made in Spl.S.C.No.18 of 2015 passed by the Sessions Judge, Mahilar Court, Thiruchirappalli and set aside the same and acquit the appellant/accused.

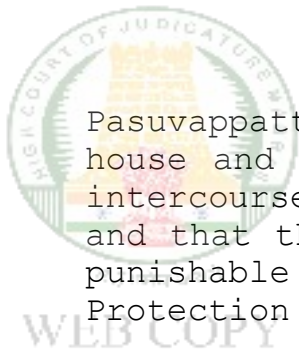
For Appellant : Mr.S.Krishna Moorthy,
Legal Aid Counsel.

For respondent : Mr.T.Senthil Kumar,
Government Advocate (Crl.side)

JUDGMENT

The Criminal Appeal is directed against the judgment of conviction passed in Spl.S.C.No.18 of 2015, dated 06.04.2016 on the file of the learned Sessions Judge, Mahilar Court, Thiruchirappalli.

2. The Inspector of Police, All Women Police Station, Ponmalai, Trichy City, has laid the final report against the accused alleging that the victim and two other girls, who were the inmates of Annai Ashram, had left the Ashram on 06.05.2015 at 22.30 hours without informing anybody, that after visiting some places, they had reached the Villupuram Bus Stand on 10.05.2015 at 04.30 hours, that the accused after receiving phone call from the victim, came to Villupuram Bus Stand at 11.00 pm on 10.05.2015 and kidnapped her with intention to rape her, that the accused had taken the victim to



Pasuvappatti Village of Chennimalai, Erode District and rented a house and stayed there till 29.05.2015, that the accused had sexual intercourse with the victim girl many times during the said period and that thereby, the accused is said to have committed the offences punishable under Section 366(A) IPC and under Section 5 (1) r/w 6 of Protection of Children from Sexual offences, Act 2012.

3.After receipt of the final report, the case was taken on file in Spl.S.C.No.18 of 2015 on the file of the Mahila Court, Thiruchirappalli. After appearance of the accused, copies of records were furnished to him under Section 207 Cr.P.C., on free of cost. The learned Sessions Judge, on perusal of records and on hearing both the sides, being satisfied that there existed a *prima facie* case against the accused, framed charges under Section 366(A) IPC and under Section 5(1) r/w 6 of Protection of Children from Sexual Offences Act, 2012 and the same were read over and explained to him and on being questioned, the accused denied the charges and pleaded not guilty.

4.The prosecution, in order to prove its case, had examined 24 witnesses as P.W.1 to P.W.24 and exhibited 27 documents as Ex.P.1 to Ex.P.27 and eight material objects as M.O.1 to M.O.8.

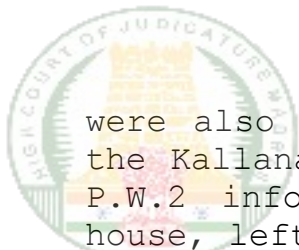
5.The case of the prosecution emerging from the evidence adduced on their side, in brief is as follows:

(a) P.W.2 victim is the daughter of P.W.10 ; P.W.3 is her sister and P.W.4 is her stepmother. P.W.6 was the Superintendent; P.W.1/ defacto complainant was the Children Welfare Officer; P.W.3 and P.W.5 were cooks and P.W.7 was the Watchman of Annai Ashram, Trichy, during the occurrence period. P.W.2, P.W.8 and P.W.9 were the inmates of the Ashram before the occurrence.

(b) On 06.05.2015 at about 10.30 pm, when P.W.1 was taking rollcall, she found that P.W.2, P.W.8 and P.W.9 were missing. After receiving the information, P.W.6 came to the Ashram and she along with P.W.1, P.W.5 and P.W.7 searched in the adjoining places and bus stand, but their efforts were of no avail. Thereafter, P.W.1 has preferred a complaint before the Trichy Airport Police Station at about 07.00 am on the next day morning under Ex.P.1.

(c) P.W.22 Sub Inspector of Police who was on duty at Airport Police Station received the complaint from P.W.1 and registered a case in Crime No. 151 of 2015 as 'Girl missing' and prepared the First Information Report under Ex.P.18.

(d) P.W.2 and P.W.3 and one boy Selvakumar were born to P.W.10 through his first wife. He had married P.W.4 as second wife. P.W.2 and P.W.3 were brought up in the Ashram. The accused was working in a Mosque situated behind the Ashram and he became accustomed with P.W.2 and thereafter they loved each other. The accused directed the victim to come out from the Ashram and accordingly P.W.1 had left the



were also willing to come out of the Ashram. All the three visited the Kallanai, Mukkombu and thereafter, reached Villupuram Bus Stand. P.W.2 informing her friends that she is going to her relative's house, left that place and thereafter, contacted the accused.

(e) The accused came to Villupuram Bus Stand and took her to Chennimalai of Erode District. They had rented a house and stayed there. Both of them were living as husband and wife. Since there was no money, both of them had visited the father of the accused and got money. After seeing the children of the accused born through his wife, when they were waiting for Bus at Jeyanthi Bus stop, Uraiyur, Airport Police came and took them to the Police Station.

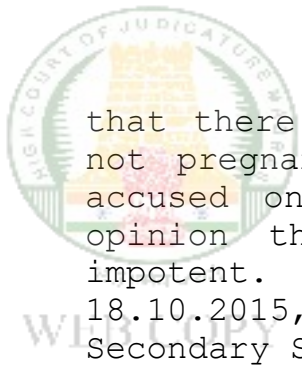
6. P.W.23 Inspector of Police, after receiving the First Information Report, took up the investigation and visited the Annai Ashram and examined the witnesses. After getting the information, a special team went to Villupuram and brought the P.W.8 and P.W.9 to Trichy and subsequently, produced them before the concerned Court. Thereafter, on 30.05.2015, after receiving an information, P.W.23 along with his team went to Uraiyur Jeyanthi Bus stop and arrested the accused, while he was standing in the bus stop along with victim girl. On enquiry at about 09.00 am, the accused gave a voluntary confession statement and P.W.13 recorded the confession statement of the accused at 09.45 hours in the presence of P.W.11 Palanivel and P.W.12 Vadivel. The admitted portion of confession statement is Ex.P.5.

7. P.W.23 recovered the Lungi and shirt wore by the accused at the time of intercourse (M.O.7 and M.O.8) through Seizure Mahazar Ex.P.22 and he also recovered the dresses wore by the victim (M.O.1 to M.O.6) through Form-95 under Ex.P.21. After getting legal opinion, P.W.23 has submitted the alteration report, altering the case from 'girl missing' to Section 366 (A) IPC and 5(1) r/w 6 of Protection of Children from Sexual offences Act, 2012 under Ex.P.19.

8. P.W.24, as per the order of the Assistant Commissioner, Trichy, has taken up the case for further investigation, examined the victim girl and her family members and recorded their statements. She submitted a requisition to the learned Judicial Magistrate for recording the statement under Section 164 of Cr.P.C.

9. P.W.20, the learned Judicial Magistrate, after receiving the proceedings of the learned Chief Judicial Magistrate, Trichy under Ex.P.15, recorded the statement of the victim girl under Ex.P.2, after complying with necessary requirements for recording the statement under Section 164 Cr.P.C. P.W.24 has then sent a requisition for examining the accused and also the victim girl. P.W.14 Doctor was on duty on 03.06.2015 at 08.45. pm, P.W.2 was brought to the Hospital by Police and as per direction given by the Court, she conducted the examination and gave her report under Ex.P.8, that

<https://hcservices.courts.gov.in/hcservices/>



that there is no external or local injuries and that the victim is not pregnant. P.W.15 Doctor, who conducted the examination of the accused on 09.06.2015 gave his report under Ex.P.11, giving his opinion that there is nothing to suggest that the accused is impotent. She examined the Medical Officers. Thereafter, on 18.10.2015, she examined the Headmistress of the Annai Higher Secondary School and recorded her statement.

10. P.W.19 Scientific Officer attached to the Trichy Forensic Laboratory after examining the clothes sent for chemical examination, has given biological report under Ex.P.12 stating that blood or semen or any other foreign substance was not found. They have received the report from the Chennai Forensic Laboratory to the effect that the result of grouping test was inconclusive.

11. P.W.24 has then examined P.W.11, P.W.12, P.W.19 and recorded their statements. After completion of investigation, she has filed the report against the accused for the offence under Section 366 (A) IPC and Section 5(1) r/w 6 of Protection of Children from Sexual Offences Act, 2012. With the examination of P.W.24, the prosecution has closed their side evidence.

12. When the accused was examined under Section 313(1) (b) of Cr.P.C., with regard to incriminating aspects against him, he denied the evidence as false and further stated that a false case has been foisted against him. Though the accused has stated that he is having defence evidence, he has not adduced any evidence subsequently.

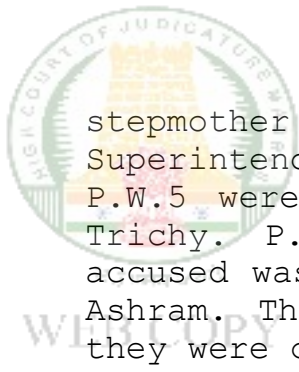
13. The learned Sessions Judge, upon considering the evidence adduced and on hearing the arguments of both sides, has passed the impugned judgment, on 06.04.2016 acquitting the accused for the offence under Section 366 (A) IPC and convicting the accused for the offence under Section 5 (1) r/w 6 of Protection of Children from Sexual offences, Act 2012 and sentencing him to undergo ten years rigorous imprisonment and to pay a fine of Rs.1,000/- , in default to undergo three months simple imprisonment. Aggrieved by the said judgment of conviction and sentence, the accused has preferred the appeal, now under consideration.

14. Heard Mr.S.Krishna Moorthy, learned counsel appearing for the appellant and Mr.T.Senthil Kumar, learned Government Advocate (Crl.side) appearing for the respondent.

15. Whether the impugned judgment dated 06.04.2016, made in Spl.S.C.No.18 of 2015 on the file of the Mahila Court, Thiruchirappalli, is liable to be set aside ?, is the point for consideration.

16. The facts not in dispute are :

<https://hcservices.ecourts.gov.in/hcservices> P.W.10 is the daughter of P.W.10; P.W.4 is the



stepmother and P.W.3 is the sister of P.W.2. P.W.6 was the Superintendent; P.W.1 was the Children Welfare Officer, P.W.3 and P.W.5 were the cooks and P.W.7 was the watchman of Annai Ashram, Trichy. P.W.2, P.W.8 and P.W.9 were inmates of the Ashram. The accused was working as Coolie in the Mosque situated behind the said Ashram. The accused became accustomed with P.W.2 and subsequently, they were on love.

17. The case of the prosecution is that P.W.2, P.W.8 and P.W.9 had left the Ashram on 06.05.2015 at about 10.30 pm without permission from the Ashram authorities and without informing anybody, that they had visited some places and reached the Villupuram Bus stand on 10.05.2015, that the accused after getting phone call from P.W.2, came to Villupuram Bus stand and took her to Chennimalai of Erode District, that the accused had taken a rented house at Pasuvappatti and stayed there till 29.05.2015, that the accused had sexual intercourse with the victim girl many times against her wish and consent and that thereby, the accused had committed the offence under Section 366 (A) IPC and Section 5(1) r/w 6 of Protection of Children from Sexual offences, Act 2012.

18. Before entering into further discussion, it is necessary to refer Section 29 of POSCO Act, which deals with reverse burden and the same reads as follows :

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

19. The beginning words of the above Section 'Where a person is prosecuted' covers a complete exercise on the part of prosecution to prove the charge framed against the accused during the course of trial, which is rebuttable subject to developing the strong defence contrary to that established by prosecution till cross examination by defence.

20 .It is pertinent to note that the reverse burden contemplated under Section 29 of POSCO Act must not only be required to be strictly complied with, but also may be subject to proof of some basic facts as envisaged under the statute. The subject of reverse burden of proof can only be made applicable in a case, where prosecution has already let substantial evidence with regard to the offence complained. The prosecution has to establish a prima facie case beyond reasonable doubt and only when the foundational facts are established by the prosecution, the accused will be under an obligation to rebut the presumption that arise, by adducing evidence of proof of preponderance of probability.



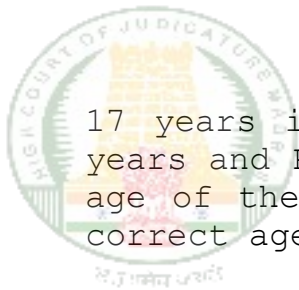
21. It is pertinent to mention that foundational facts in a POCSO case include the proof that the victim is a child, that alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, to establish it with supporting medical evidence. If the basic and foundational facts of the prosecution case is laid by adducing legally admissible evidence, then burden gets shifted to the accused to rebut it, by establishing from the evidence on record that he has not committed the offence or that no such incident was occurred or that the victim is not a child.

22. In case on hand, the main contention of the appellant is that the P.W.2 victim was above the age of 18 years at the alleged occurrence time and hence, she was not a child and that therefore, the POCSO Act itself has no application to the present case. On the other hand, it is the specific case of the prosecution that P.W.2 victim was aged 17 years on the occurrence date and that therefore, the provisions of POCSO Act have rightly been invoked.

23. Considering the above, the main issue to be decided is as to whether the victim girl was a child as contemplated under the POCSO Act on the date of occurrence or was above 18 years. In Ex.P.1 complaint, P.W.1 defacto complainant who was the Children Welfare Officer of Ashram has mentioned the age of P.W.2 as 14 years in the year 2015. As rightly pointed out by the appellant side, the Investigating Officer, who has laid the final report, stated that P.W.2 victim was aged 17 years in the year 2015, but she has not mentioned the date of birth of P.W.2.

24. P.W.2 in her chief examination has not whispered anything about her date of birth or her age, but in her cross examination, she would say that she was admitted in the Ashram when she was 6 years old, that she was born in the year 1998 and that it is incorrect to say that she was born in the year 1996. She would further say that herself and P.W.9 were aged 17 years. P.W.3, elder sister of P.W.2 would say in her chief examination that P.W.2 was admitted in Ashram when she was one year old and in cross examination, she would say that she was aged 10 years when her sister P.W.2 was admitted in the Ashram, that there was 3 years difference between herself and her sister and that she was aged 23 years on the date of giving evidence before the Court. But subsequently, in cross examination she would say that she does not know whether P.W.2 was aged 19 years at that time.

25. P.W.10, father of P.W.2 in his cross examination would say that there was two years difference between her two daughters P.W.2 and P.W.3. P.W.1 Children Welfare Officer of Annai Ashram in her



17 years in the complaint, that the victim girl was aged above 14 years and P.W.9 was above 17 years and that they have not entered the age of the victim in the admission register, after ascertaining the correct age.

26. P.W.1 would admit that the victim and other girls were admitted in their Ashram after Tsunami, that they have not determined the age of the victims at the time of their admission and that therefore, their age is likely to be higher.

27. The learned Additional Public Prosecutor appearing for the respondent would submit that the prosecution has produced the copy of the 10th mark sheet issued by the State Board of School Examination, whereunder the date of birth of P.W.2 is shown as 10.12.1998, that the prosecution has also examined the Headmistress of the Annai Higher Secondary School as P.W.21, where P.W.2 had studied, that P.W.21 had given evidence with respect to issuance of certificate under Ex.P.16 on the basis of 10th mark sheet and the transfer certificate stating that P.W.2 had studied in their school from 6th standard to 10th standard and that she had issued a true copy of 10th mark sheet of P.W.2 to the Police as per their requisition.

28. He would further submit that P.W.2 has also given evidence that she was born in the year 1998, that the prosecution has also examined her father as P.W.10 and her sister as P.W.3 and they have also deposed with respect to the age of P.W.2 and that therefore, the prosecution with the ample evidence has categorically proved that P.W.2 was a minor on the date of occurrence.

29. The learned counsel for the appellant would submit that the prosecution has only produced the Xerox copy of the mark sheet under Ex.P.17, that the date of birth shown in the school record cannot be taken into account unless the person, who made the entry or who gave the date of birth is examined, that the best evidence for determining the age of the victim is of her parents, if it is supported by unimpeachable documents and that in the absence of any evidence to show that the entry of date of birth in Ex.P.17 was made by the Official In-charge, the same cannot be admitted as evidence under Section 35 of the Indian Evidence Act.

30. He would further submit that P.W.10, father of P.W.2 and P.W.3, sister of P.W.2 have neither mentioned the date of birth of P.W.2 nor the age of P.W.2, that P.W.1 care taker of the Ashram has given evidence that since P.W.2 and other inmates were admitted in the Ashram subsequent to Tsunami, they have not entered their age after ascertainment of the same, that P.W.2 victim herself has not mentioned her date of birth in her evidence and that the prosecution has utterly failed to prove that P.W.2 was the minor on the date of occurrence. In support of the above contention, the learned counsel

<https://hccs.ceramics.gov.in/cases> has relied on the following decisions:



(i) AIR 1988 Supp.SCC 1796 :

Birad Mal Singhvi Vs. Anand Purohit :

"3(a) To render a document admissible under section 35 of the Evidence Act 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.

(b) An entry relating to date of birth made in the school register is relevant and admissible under section 35 of the Act, but the entry regarding the age of 3 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.

(c) Parents or near relations having special knowledge are the best persons to depose about the date of birth of a person. If entry regarding date of birth in the school's register is made on the information given by parents or someone having special knowledge of the fact, the same would have probative value.

(d) The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.

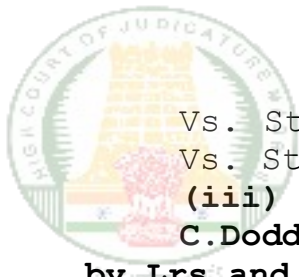
(e) The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by Someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value."

(ii) (2010) 9 SCC 209 :

Madan Mohan Singh and others Vs. Rajni Kant and another :

"17. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable 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. (Vide: Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors. AIR 1965 SC 282;

<https://hcservices.ecourts.gov.in/hcservices/> Birad Mal Singhvi Vs. Anand Purohit AIR 1988 SC 1796; Vishnu



Vs. State of Maharashtra (2006) 1 SCC 283; and Satpal Singh Vs. State of Haryana JT 2010 (7) SC 500)."

(iii) (2020) 4 SCC 695 :

C.Doddanarayana Reddy (dead)by LRs Vs. C.Jayarama Reddy (dead) by Lrs and others :

"15. School Leaving Certificate has been produced by the plaintiff and said to be signed by his father. The person who has recorded the date of birth in the School Register or the person who proves the signature of his father in the School Transfer Certificate has not been examined. No official from the School nor any person has proved the signatures of his father on such certificate. Apart from the self-serving statement, there is no evidence to show that the entry of the date of birth was made by the official in-charge, which alone would make it admissible as evidence under Section 35 of the Indian Evidence Act, 1872. However, the High Court has not found any other evidence to prove the truthfulness of the Certificate (Ex.P/1)."

31. To counter the arguments of the learned counsel for the defence, the learned Additional Public Prosecutor has relied on the following decisions.

(i) 2013 (7) Supreme Court Cases 263 :

Jarnail Singh Vs. State of Haryana :

"22.On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

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



evidence by obtaining -

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

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

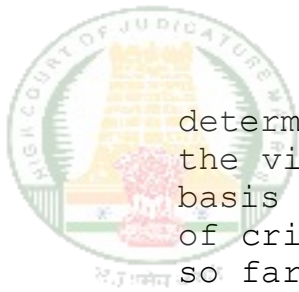
(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in subrule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."



determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

(ii) 2016 (12) Supreme Court Cases 744 :

Parag Bhati (Juvenile) through Legal Guardian Mother-Rajni Bhat Vs. State of Uttar Pradesh and another :

"36) It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in **Abuzar Hossain Vs. State of West Bengal** [(2012) 10 SCC 489], an enquiry for



determination of the age of the accused is permissible which has been done in the present case."

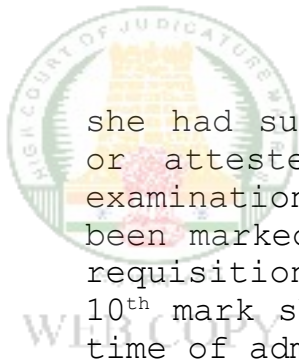
32.As rightly contended by the learned Additional Public Prosecutor, the provisions of the previous enactment i.e., Juvenile Justice (Care and Protection of Children) Act, 2000 and Juvenile Children (Care and Protection of Children) Rules, 2007 are applicable to the case on hand.

33. No doubt, the learned counsel for the defence has raised a plea halfheartedly that Rule 12 of the Juvenile Justice Rules 2007 can only be applied to the child in conflict with law and not to the victim of crime. But the Honourable Apex Court, has specifically answered for the said question in the first judgment referred above i.e., **Jarnail Singh's** case that there is no difference with respect to the issue of minority is concerned, between the child in conflict with law and a child who is a victim of crime and that therefore, Rule 12 of 2007 Rules can be applied to determine the age of the victim.

34. A combined reading of Section of 7 (a) of Juvenile Justice Act and Rule 12 of Juvenile Justice Rules 2007 along with the legal dictum laid down by the Honourable Apex Court above stated, make the position clear that matriculation (or equivalent) certificate of the child concerned is the highest rated option for determining the age of the child and that the date of birth mentioned in the matriculation certificate has to be treated as conclusive proof of the date of birth. No doubt, it is always open to the other side to challenge the correctness of the date of birth shown in the matriculation certificate or other certificates as contemplated under Section 12 of 2007 Rules.

35.Admittedly, in the case on hand, the prosecution has produced the Secondary School Leaving Certificate issued by the Tamil Nadu State Board of School Examination and according to the learned Additional Public Prosecutor, Ex.P.17 is the best document available and that the trial Court has rightly relied on the same and gave a finding that the victim P.W.2 was the minor at the occurrence time. But as rightly contended by the learned counsel for the defence, the main issue to be decided as to whether Ex.P.17 certificate was proved in accordance with law.

36.Admittedly, the prosecution has not produced the original of Ex.P.17. It is evident from the records that Ex.P.17 has been marked during the re-examination of P.W.21 Headmistress of Annai Higher Secondary School. P.W.21 would only say that Ex.P.17 is a down loaded copy, but the defence has raised serious objections that it is not a down loaded copy and it is only a Xerox copy and that the same was not certified as a true attested copy. No doubt, in Ex.P.17, P.W.21



she had subscribed her signature certifying that it was a true copy or attested copy of the original mark sheet. During the cross examination of P.W.21, certificate issued by her to the Police has been marked as Ex.P.16. P.W.21 would say in her evidence that as per requisition of the Police, she gave the Ex.P.16 after verifying the 10th mark sheet and the transfer certificate of P.W.2 produced at the time of admission.

37. Admittedly, P.W.21 has not annexed the copy of 10th mark sheet and Transfer Certificate along with her Ex.P.16 certificate. But on perusal of Ex.P.16, it is evident that the same was not issued as a certificate, but as a letter or statement stating that as per the requisition of the Police, she had signed in the Xerox copy of the 10th mark sheet of P.W.2 as true copy. In Ex.P.16, P.W.21 has neither referred the date of birth nor the age of P.W.2.

38. It is pertinent to mention that P.W.21 in her cross examination has specifically admitted that original 10th mark sheet of P.W.2 was not available in their school at that time. If that be so, it is not known as to how P.W.21 had issued Ex.P.17 as true copy of original mark sheet, as alleged by her.

39. P.W.2 in her cross examination would say that she was born in the year 1998 and that she was deposing the date of birth on seeing the 10th mark sheet. It is not known, as to whether P.W.2 was having the original mark sheet at the time of giving evidence before the trial Court. P.W.21 in her evidence would admit that the original 10th mark sheet is available with P.W.2. It is not the case of the prosecution that they have taken steps to get the original mark sheet from P.W.2 during the investigation, but the same was not available with P.W.2 or that P.W.2 had refused to produce the same.

40. Moreover, the prosecution has also not taken any steps for production of the original mark sheet before the trial Court. As rightly pointed out by the learned counsel for the defence, Ex.P.17 is not a down loaded copy and is only a Xerox Copy. The learned trial Judge has observed that when the original document is not available, Xerox copy of the document shall be accepted as secondary document. But in the case on hand, the prosecution has not accounted for the original mark sheet nor assigned any reason for non production of the original and in that scenario, Xerox copy cannot be received as secondary evidence. At this juncture, it is necessary to refer the judgment of Division Bench of Sikkim High Court in **State of Sikkim Vs. Amit Darjee (Criminal Appeal No.1 of 2015, dated 25.09.2015;**

"9. The Birth Certificate (Exhibit -2) on its face would show that it was neither original nor a certified copy. At one place, it has been mentioned in this Photostat copy that it was certified by the Registrar of Births. The Registrar has also been examined as PW-14. Though he deposed

<https://hcservices.echustg.gov.in/hcservices/> had certified the said Photostat copy of the



Certificate after comparison with its original, but it does not appear in the document that on which date he certified it. The contents of his evidence would show that he did not compare the said Photostat copy either with the original copy retained in the office or with the entries made in the relevant register. It is clear from his evidence that he had not brought the Birth Register in Court while recording of his evidence. He admitted in the cross-examination that he did not tally the Certificate (Exhibit - 2) with the Birth Register before certifying it. According to him, the original was produced before him and he tallied it with the original and certified it to be true. The mother of the victim, Rubina Rai (PW-1), has deposed in her evidence that the Photostat copy of the Certificate (Exhibit - 2) was seized from her possession. In fact, the original was also with her, which was returned by the Investigating Officer to her and the certified true copy (Exhibit - 2) was taken. Chezum Lepcha (PW-16) is the Investigating Officer. Her evidence would show that the family members of the victim (PW-2) had the original of the Photostat copy of the Birth Certificate and since they had Photostat copy, she opted to file a Photostat copy, which was certified to be a true copy.

10. If the evidence of PW-14 is appreciated in the light of the evidence of the Investigating Officer (PW-16), it would appear that PW-14 had simply attested the Photostat copy to be a true copy on the basis of a certified copy, which was allegedly in the possession of the family members of the victim (PW-2). Who took it for attestation, whether the Investigating Officer or the family members, on which date it was taken for attestation, why the original was not produced before the Court and many other circumstances like above are unexplained. Therefore, the fact remains that a simple Photostat copy, said to be attested by the Registrar of Births & Deaths, was filed before the Court.

11. The prosecution, thus, utterly failed to produce a certified true copy of Exhibit - 2 and Exhibit - 2, attestation of which was doubtful, cannot be held as admissible for proof of contents thereof and no presumption can be drawn from such document under Section 79 of the Indian Evidence Act."

41. In the case on hand also, the prosecution has failed to produce the original or the certified true copy of Ex.P.17, but whereas, a simple Xerox copy alone was filed before the Court, without any acceptable evidence to show that it is the real Xerox copy of the original. Considering the above, this Court has no hesitation to hold that the prosecution has miserably failed to prove



42.P.W.24 Investigating Officer in her cross examination would admit that she was not in a position to say as to whether Ex.P.17 is a Xerox copy or downloaded copy, since the same was not disclosed by the Headmistress in her statement. She would also admit that she had not enquired P.W.2 and P.W.10 about the date of birth and age of P.W.2. P.W.22 would also admit that she has not gathered any particulars about the date of birth and age of P.W.2, while examining her.

43.Considering the ocular testimonies of P.W.1, P.W.3 and P.W.10, it is evident that they did not depose about the date of birth of P.W.2 or the year of her birth and that their evidence was not giving any clear picture about the age of the victim. As already pointed out, P.W.2 has deposed about the year of her birth, but not about her date of birth.

44.It is pertinent to mention that P.W.3 has specifically stated that she was aged 23 years at the time of giving evidence in January 2016 and that there was a difference of three years between herself and P.W.2. As already pointed out, P.W.10 in his evidence would also say that there was a difference of two years between P.W.2 and P.W.3. As rightly contended by the defence, if the evidence of P.W.3 and P.W.10 are taken into account then P.W.2 would be aged 20 or 21 years at the time of giving evidence and would be aged between 19 to 21 years at the time of occurrence. It is pertinent to mention that P.W.1 has categorically admitted that they have not entered the correct age of inmates while admitting them after Tsunami. Considering the above, the prosecution has utterly failed to prove that P.W.2 was a minor at the time of occurrence.

45.The case of the prosecution is that P.W.2 along with her two other inmates after reaching Villupuram Bus Stand, called the accused over phone, that the accused came to Villupuram Bus stand and took the victim girl to Pasuvappatti Village of Chennimalai, Erode District, that both of them had stayed till 29.05.2105 and that the accused had intercourse with P.W.2 for many times during the said period.

46.As already pointed out, P.W.2 and the accused were known to each other previously and were in love. P.W.2 in her evidence would specifically say that she alone had contacted the accused through phone and asked him to come over to Villupuram Bus stand, that both of them had gone to Chennimalai and rented a house and that they were living as husband and wife.

47.It is not the case of P.W.2 that the accused had forcibly taken her to Pasuvappati Village and that he had intercourse with her
<https://hcservicesibolts.gov.in/hcservices/> despite her protest. The main case of the prosecution is



that since P.W.2 was a minor, assuming that she was a consenting party, her consent cannot be considered as a valid consent and that therefore, the accused was rightly charged with the offence under Section 5 of POCSO Act, and was rightly convicted by the trial Court. Since this Court has decided that the prosecution has failed to prove that P.W.2 was a minor and that since P.W.2 had voluntarily accompanied the accused to Pasuvapati Village and stayed there, the question of charge of sexual assault does not arise at all.

48. Even assuming that the accused had sexual intercourse, it is evident from her evidence that she did not raise any protest or objection and that her conduct would only show that she was never objected to sexual intercourse and whatever happened against her was on her own will and consent. It is pertinent to note that the victim P.W.2 did not make any complaint to anyone either on the way to Pasuvapatti or even when she was staying with the accused at Pasuvapatti.

49. Even assuming for arguments sake that the prosecution has proved that P.W.2 was a minor at the occurrence time, let us see as to whether the prosecution has proved the offence under Section 5 of POCSO Act. As already pointed out, the prosecution has charged the accused for the offence under Section 5 of POCSO Act alleging that he had committed penetrative sexual assault on P.W.2 more than once or repeatedly. According to the prosecution, the evidence of P.W.2, P.W.11 and P.W.12 are available to prove the main charge under Section 5 of POCSO Act, which stands corroborated by the medical evidence through P.W.14 and P.W.15. P.W.2 in her chief examination evidence would only say that both of them had taken a rented house and they were living as husband and wife therein and it is necessary to refer the evidence of P.W.2 hereunder for better appreciation;

“.....அங்கிருந்து நாங்கள் ஈரோடு சென்னிமலைக்கு சென்றோம். நாங்கள் 2 பேரும் தனியாக வீடு பிடித்து அங்கு தங்கியிருந்தோம். நாங்கள் அங்கு கணவன், மனைவியாக வாழ்ந்து வந்தோம்.”

50. It is pertinent to mention that during investigation, at the instance of Investigating Officer, a statement under Section 164 Cr.P.C was recorded from P.W.2 by P.W.20 Judicial Officer and that the said statement has been marked as Ex.P.2 through P.W.2. But in corss examination, initially she would admit that what she has stated in the statement before the Magistrate is true. Subsequently, she took a 'U' turn and would say that the contents in the statement recorded by the Magistrate are false “நான் நீதிபதியிடம் கொடுத்த வாக்குமூலத்தில் சொல்லியிருப்பது உண்மை தான். அத.சா.ஆ 2ல் எதிரி என்னை ஒன்றும் செய்யவில்லை என்று சொல்லி இருக்கிறேன் என்றால் சரிதான். நாங்கள் கணவன் மனைவியாக வாழ்ந்தோம். நான் நீதிபதியிடம் கொடுத்த வாக்குமூலத்தில் சொன்ன சங்கதிகள் பொய் ஆகும். தற்போது சொன்னது தான் உண்மை. என்னை நான் சொன்னது பொய் என்று சொல்ல வேண்டும் என்று யாரும் கட்டாயப்படுத்தவில்லை.”



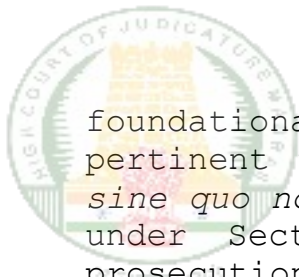
51. During cross examination of P.W.20 Judicial Officer, who recorded the statement under Section 164 Cr.P.C, the contents of Ex.P.2 statement was put to her and she would admit that the victim girl gave her statement that the accused had not done anything while they were staying for 10 days and that they had gone to Chennimalai of Erode and took a rented house and stayed there for ten days.

52.P.W.20 would say “ பாண்டிமீனா கொடுத்த வாக்குமூலத்தில் “10 நாட்களாக தங்கியிருந்ததில் என்னை அவன் ஒன்றும் செய்யவில்லை. மேலும் நானாகதான் விரும்பி சென்றேன்” என்று கூறியிருக்கிறார். “ஈரோட்டில் சென்னிமலைக்கு சென்றோம். வாடகைக்கு ஒரு வீடு எடுத்து தங்கினோம். 10 நாட்களாக அங்கு தங்கினோம்.” No doubt, as rightly pointed out by the learned Additional Public Prosecutor, P.W.11 and P.W.12 would say that the accused came to Pasuvappatti along with P.W.2 that both of them had stayed in the house owned by P.W.12 and that they continued to stay till 29.05.2015. As already pointed out, P.W.2 victim had only deposed that they were living as husband and wife.

53.As rightly contended by the learned counsel for the defence, such a vague statement is not sufficient enough to attract the serious offence under Section 5 of POCSO Act and the the victim has nowhere whispered that she was subjected to penetrative sexual assault repeatedly. No doubt, as rightly contended by the prosecution, P.W.14 Medical Officer, who had examined P.W.2 has given her opinion that victim is not a virgin as her vagina admits two fingers easily. P.W.15 Medical Officer who had examined the accused has given his opinion that there is nothing to suggest that the accused is impotent. As rightly contended by the defence, since there is absolutely no evidence to show that there was a sexual assault on P.W.2, the above Medical evidence does not advance the case of the prosecution any further.

54.It is pertinent to note that living as husband and wife for some days would mean so many things and that the same alone is not sufficient to prove the charge under Section 5 of POCSO Act. As per the Amendment Act, the offence under Section 5 of POCSO Act attracts punishment of rigorous imprisonment for a term which shall not less than 20 years but which may extend to life imprisonment, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death, under Section 6 of the said Act. The Honourable Supreme Court in **Mousam Singha Roy and others Vs. State of West Bengal** reported in (2003) 12 SCC 377, has held that it is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the decree of proof, since the higher decree of assurance is required to convict the accused.

55. No doubt, the accused facing charge under the POCSO Act, is
<https://hcservices.eports.gov.in/hcservices/> discharge his reverse burden, but only on production of



foundational evidence revealing the ingredients of the offence. It is pertinent to note that the proof of penetrative sexual assault, is *sine quo non* prior to making application of the presumption available under Section 29 of POCSO Act. But in the present case, the prosecution has miserably failed to prove the basic and foundational facts to the charge projected by them and as such, the question of burden shifting to the accused does not arise at all.

56. Even assuming for argument sake, that the prosecution has proved the basic and foundational evidence to prove the charges, the accused, through the evidence of prosecution side witnesses, has successfully rebutted the presumption.

57. The case of the prosecution as regards aggravated penetrative sexual assault involving the accused has not been established. The learned Sessions Judge, has not appreciated the evidence of prosecution in proper legal perspective and misread the evidence. Hence, this Court has no hesitation to hold that the prosecution has miserably failed to prove the guilt of the accused beyond reasonable doubt and consequently, the judgment of conviction and sentence passed by the trial Court is liable to be set aside.

58. In the result, the Criminal Appeal is allowed and the impugned judgment of conviction and sentence imposed by the learned Sessions Judge, Mahila Court, Thiruchirappalli in Spl.S.C.No.18 of 2015, dated 06.04.2016 is set aside and the accused is acquitted from the charges levelled against him. It is represented that the appellant is in Jail. The appellant is directed to be set at liberty forthwith, unless his detention is required in connection with any other case. Fine amount if any paid, shall be refunded to him. Bail bond, if any, shall stand cancelled.

Sd/-

Assistant Registrar(CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

das

To

1. The Sessions Judge, Mahilar Court,
Thiruchirappalli.

2. The Jail Superintendent, Central Prison,
Trichy.



3. The District Collector, Trichy.
4. The Commissioner of Police, Trichy.
5. The Inspector of Police,
Ponmalai All Women Police Station,
Thiruchirappalli.
6. The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai. (2 copies)
7. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.N.SHUMUGAVEL, Advocate (SR-28228[F] dated 06/09/2021)

CRL.A (MD) .No. 195 of 2016
03.09.2021

KM(CO)
TR/SKN/SAR-IV(22.09.2021) 19P 10C