

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

CRA 128 of 2021

**Sayan @ Falguni Bauri
Vs.
The State of West Bengal & Anr.**

**For the petitioner : Mr. Dipankar Dandapath, Adv.,
Mr. Bhaskar Seth, Adv.**

**For the State : Mr. Narayan Prasad Agarwala, Adv.,
Mr. Pratick Bose, Adv.**

Heard on : 13.06.2022 & 14.06.2022

Judgment on : 14.06.2022

Bibek Chaudhuri, J.

The instant appeal is directed against judgment and order of conviction and sentence dated 6th September, 2019 and 7th September, 2019 respectively passed by the Learned Additional Sessions Judge, Khatra in the district of Bankura in Special Case No. 6/2018 convicting

the appellant for committing offence under Section 376 of the Indian Penal Code as well as Section 4 of POCSO Act, 2012. The appellant was further convicted for committing offence under Section 417 of the Indian Penal Code. For the offence under Section 376 of the Indian Penal Code as well as Section 4 of the POCSO Act, the Learned Trial Judge handed down sentence to the appellant for rigorous imprisonment for seven years with fine of Rs.50,000/-, in default, to suffer further imprisonment for three months. For the offence under Section 417 of the Indian Penal Code the appellant was sentenced to suffer rigorous imprisonment for one year with fine of Rs.10,000/-, in default, simple imprisonment for one month. The aforesaid judgment and order of conviction and sentence is assailed in the instant appeal.

Vide order dated 13th April, 2022 this Court dispensed with the formality the preparation of paper book and proposed to hear out the instant appeal on the basis the materials in lower Court record.

Indpur Police Station Case No. 18/2018 was registered on 7th March, 2018 under Sections 376/417 of the Indian Penal Code and Section 4 of the POCSO Act on the basis of a written complaint submitted by one Bharati Bauri. It is alleged in the said written complaint that the daughter of the de facto complainant who was at the relevant point of time aged about 16 years had love affair with the

appellant. The appellant cohabited with the said daughter of the de facto complainant for last one year on false assurance of marriage. On 4th March, 2018, the de facto complainant came to know that the appellant was making arrangement to marry another girl. After getting such news the de facto complainant and her daughter asked the appellant as to why he did not want to marry the daughter of the de facto complainant. At this, the appellant straightway refused to marry her. It is also alleged that on 4th March, 2018 the appellant called the daughter of the de facto complainant stating that he would marry her.

Police took up the case for investigation and on completion of investigation submitted charge-sheet under the above stated penal provisions against the appellant. Since the offence under the POCSO Act is triable by the Learned Special Judge, the case was transferred to the Court of the Learned Special Judge at Khatra for trial and disposal. The Learned Trial Judge framed charge against the accused, examined as many as 12 witnesses on behalf of the prosecution, examined the accused under Section 313 of the Code of Criminal Procedure and finally delivered the impugned judgment and passed the order of conviction and sentence.

The Learned Advocate for the appellant has assailed the judgment passed by the Trial Court on the ground that the

prosecution has failed to prove that the victim girl was a minor. In the absence of such proof with all reasonable certainty, an accused cannot be held guilty under any provision of the POCSO Act, 2012. It is further submitted by the learned advocate for the appellant that even if the evidence of the witnesses on behalf of the prosecution is accepted, it would be found that at the relevant point of time the victim was aged about 16 years and six months. It is the case of the prosecution that there was a love affair between the appellant and the victim. As a result of such love affair they cohabited. Thus, the victim was a consenting party as she had reached the age of discretion, knew the effect of such physical relationship with the accused, charge under Section 376/417 of the Indian Penal Code would not lie. Thirdly, it is submitted by the learned advocate for the appellant that prosecution has failed to establish the place of occurrence. In this regard he takes me to the sketch map and index of the place of occurrence where the place of occurrence was shown as an east facing pucca built urinal of Choukighata primary school situated at village Choukighata. According to the learned advocate for the appellant the incident of sexual intercourse between two persons cannot be possible in a public urinal where it is supposedly used by all the students of the said primary school. There is absolutely no

evidence on behalf of the prosecution that the said urinal remained open even after school hours. It is also urged by the learned advocate for the appellant that the witnesses on behalf of the prosecution was consistently trying to develop the prosecution case. The prosecution also failed to produce the admit card which relied upon to prove the date of birth of the victim girl. The victim girl herself stated that the date of birth was recorded in the admit card as per her statement. The parents of the victim girl could not say even the date, month or year of the birth of the victim girl. Under such circumstances, the Court below committed an apparent error in relying on the photostat copy of the admit card of the victim girl which was marked exhibit after objection. In view of such lacuna in the prosecution case, it is submitted by the learned advocate for the appellant that the accused is entitled to be acquitted from the charge.

Learned P.P.-in-charge, on the other hand, submits that the prosecution has been able to bring home the charge against the accused. It is proved by satisfactory evidence that the victim girl was a minor at the time of sexual intercourse committed upon her by the appellant. It is also submitted that the date of birth recorded in the admit card issued by the West Bengal Board of Secondary Education is a relevant document on the basis of which the Court in the

absence of any other material can come to a conclusion on the age of a particular person, her in this case the victim girl.

Having heard the learned advocates for the parties, it is apparent before the Court that the fate of this case mainly depends upon the question as to whether the learned trial Judge was justified in holding the victim girl a minor on the basis of a photostat copy of the admit card.

It is found from the record that during investigation the Investigating Officer seized the original admit card from the possession of the victim girl in the seizure list. The father of the victim girl put his signature and her mother put her L.T.I. After seizure the original admit card was kept under the custody (Zimma) of the father of the victim girl by executing a custody bond (Zimmanama). Both the seizure list and the custody bond were exhibited. The photostat copy of the original admit card was kept in the case diary and it was exhibited during trial with objection on behalf of the defence.

It is needless to say that the admit card seized by a public authority is admissible in evidence and entries thereof are relevant when such entries are made in public record or an electronic record made in performance of duty under Section 35 of the Evidence Act.

Section 35 of the Evidence Act runs thus:-

"35. Relevancy of entry in public record or an electronic record made in performance of duty.- *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."*

The question as to whether an entry of date of birth in the school certificate or an admit card or school register is a contentious issue debated at the Bar for long. In **Munna vs. Kameshri: AIR 1929 Oudh 113** it was held that entry as to age in school register based on the statement of deceased father is admissible. In **Liladhar vs. Mabibi: AIR 1934 Nagpur 44** it was held that the school certificates are admissible in evidence. Subsequently in **State of Chhattisgarh vs. Lekhram** reported in **AIR 2006 SC 1749** the Hon'ble Supreme Court was pleased to hold that a register maintained in a school is admissible in evidence to prove date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act. Such dates of

births are recorded in the school register by the authorities in discharge of their public duty. An entry in school register with regard to age is not conclusive but it has evidentiary value. Subsequently, in **Babloo Pasi vs. S.O. Jharkhand** reported in **(2008) 13 SCC 133** the Hon'ble Supreme Court observed that it is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely, (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially 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 the 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.

In **Smt. Dimple vs. Rajesh Baluni** reported in **AIR 2016 Uttarakhand 17** it is held that the entry of date of birth made in school certificate is relevant to determine that the petitioner was under 21 years and thus was not entitled to contest election of Zila Parishad. In **Desh Raj vs. Bodh Raj** reported in **(2008) 2 SCC 186** it is held by the Supreme Court that having regard to the provision of

Section 35, entries in school admission registers in regard to age, caste etc. have always been considered as relevant and admissible. In **Ravinder Singh Gorkhi vs. S.O. U.P.** reported in **AIR 2005 SC 2157** the Hon'ble Supreme Court held that determination of the date of birth of a person before a Court of Law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.

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

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

We are, therefore, of the opinion that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted. It is no doubt true that the court must strike a balance. In case of a dispute, the court may appreciate the evidence having regard to the facts and circumstance of the case. It would be a duty of the court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim.

Relying on the above principles let us now consider the evidence on record of the instant case. It is true that except the admit card issued by the West Bengal Board of Secondary Education in the name of the victim girl prosecution could not produce any evidence in

support of the age of the victim. It is needless to say that entries in the admit card is made by a statutory authority, i.e., the Board of Secondary Education in discharge of its official duty. Therefore, the recording of date of birth of the victim on the admit card issued by a statutory authority is relevant and admissible under Section 35 of the Evidence Act. However, it is also found from the record that the parents of the victim could not state the date of birth of the victim. There is only one document i.e., the photostat certified copy of the admit card wherefrom the age of the victim can be ascertained. At this stage this falls for consideration as to whether the trial Court was wrong in accepting such entry in the admit card to calculate the age of the victim. In the absence of any document with regard to the date of birth or the age of the victim, the evidence adduced by the prosecution must be taken into consideration because it is not the case of the defence that the victim was major at the time of alleged incident. In a case of rape or penetrative sexual assault, the victim is the best witness, if her evidence is trustworthy, unblemished and free from any contradictions. In other words, if the evidence of the victim is of sterling quality, the Court can accept such evidence without any corroboration. The victim girl stated that she was aged 16 years and six months at the time of occurrence. Mere arithmetical calculation

with the help of the admit card of the victim girl supports the case of the prosecution. On careful perusal of the cross-examination made on behalf of the accused to the victim and her parents it was not even suggested that the victim was more than 18 years or at least attained the age of 18 years at the time of alleged occurrence. Therefore, the evidence adduced by the victim with regard to her date of birth, i.e., the entry of her date of birth in the admit card shall be accepted by the Court on the ground of non-traverse. From the statement of the victim recorded under Section 164 of the Code of Criminal Procedure as well as the statement made by her during her medical examination and also at the time of evidence the victim did not suppress that he had love relation with the accused and she cohabited with the accused for 10/12 times during the span of one year. The said fact was recorded by the Medical Officer (P.W.10). P.W.10 was specifically asked during cross-examination that if two fingers will admit easily into the vagina and if the girl had sexual intercourse with a man for 10/12 times in a span of one year. The Medical Officer replied in the affirmative. I fail to understand as to why this assertion in cross-examination will not be tagged with the affirmative statement on oath by the de facto complainant. Thus, on careful appreciation of the evidence on record and the points of law involved on the subject this

Court is of the view that the learned trial Judge correctly held that the victim was minor and the accused/appellant had committed penetrative sexual assault upon the victim on promise of marriage and, therefore, he was rightly convicted under Section 4 of the POCSO Act. It is submitted by the learned advocate for the respondent that the accused cannot be held guilty under the charge of Section 376 of the Indian Penal Code because of the fact that she has already attained the age of discretion. Cohabitation between the daughter of the de facto complainant and the accused was the result of love affair. The victim knew the consequence of such consent. Therefore, the alleged act ought to be considered as a consensual sex.

However, in my considered view the law relating to the age of discretion has undergone an important change after pronouncement of the judgements by the Supreme Court in **Satish Kumar Jayanti Lal Dabgar vs. State of Gujarat; (2015) 7 SCC 359** and **State of Madhya Pradesh vs. Preetam: (2018) 17 SCC 658**.

In **Satish Kumar** (supra) the appellant kidnapped a minor below the age of 16 years and enticed her away to marry and had sexual intercourse. The Hon'ble Supreme Court affirmed the order of conviction and sentence passed under Section 376 of the Indian Penal Code.

In **Preetam** (supra) it was held on the basis of admission register of the school and evidence of P.W.8, the Headmaster of primary school who had stated that the date of the birth of the prosecutrix was 16th May, 1981 which means that on the date of occurrence she was aged about 12 years. The High Court refused to consider the evidence of P.W.8 and also the school certificate on the ground that person who had admitted the prosecutrix in school was not examined. The Hon'ble Supreme Court was pleased to hold that such appreciation of evidence was improper since each and every case of the prosecution cannot be expected to do so. Thus, the prosecutrix was held to be a minor and charge under Section 376 of the Indian Penal Code was held to be proved.

Last but not the least the offence under the POCSO Act enjoins a provision of reverse burden in Section 29 of the said Act. I am not unmindful to note that the reverse burden will come into play only when the prosecution is able to prove the foundational fact. In the instant case, the prosecution proved the foundational fact before the trial Court. Therefore, burden shifts upon the accused to prove that he was not guilty on which he fell.

However, in the instant case, the learned trial Judge committed an error in convicting the accused under Section 417 of the Indian

Penal Code because in order to prove charge under Section 417 of the Indian Penal Code. Prosecution was required to be proved that from the very beginning the appellant had an intention to cheat the victim. The evidence on record is otherwise. Both of them fell in love which went up to establishment of physical relationship. Subsequently, the boy retracted from his proposal to marry her. The subsequent action on the part of the appellant cannot be said to be a case of cheating within the meaning of Section 415 of the Indian Penal Code.

For the reasons stated above, I do not find any error in the judgment and order of conviction passed by the learned trial Court under Section 376 of the Indian Penal Code and also under Section 4 of the POCSO Act. However, the order of conviction and sentence for the offence under Section 417 of the Indian Penal Code is set aside.

With regard to the sentence I do not find any scope to interfere because the appellant was awarded minimum sentence and this Court has no authority to alter the order of sentence in the instant case. Accordingly, the appeal is allowed in part. The order of conviction and sentence passed under Section 376 of the Indian Penal Code read with Section 4 of the POCSO Act is affirmed. However, the order of conviction and sentence passed under Section 417 of the Indian Penal Code is set aside.

The appeal is, thus, disposed of.

The appellant is directed to surrender before the trial Court within two weeks from the date of communication of this order.

Let a plain copy of this judgment duly countersigned by Assistant Court Officer of this Court be handed over to the learned advocate for the appellant free of cost.

The appellant be informed that he is at liberty to file an appeal against the instant judgment before the Hon'ble Supreme Court and he is also entitled to have free legal aid by the West Bengal Legal Services Authority.

(Bibek Chaudhuri, J.)