

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPLICATION NO.1756 OF 2022
IN
CRIMINAL APPEAL NO.402 OF 2022**

Sarfaraj s/o. Iqbal Shaikh,
Age : 18 years, Occ. Education,
r/o. Borawakenagar, Daund,
Tq. Daund, Dist. Pune

..Applicant

Vs.

1. The State of Maharashtra
2. XYZ

..Respondents

Mr.N.S.Ghanekar, Advocate for applicant
Mr.A.M.Phule, APP for respondent no.1
Ms.Ashwini A. Lomte, Advocate (appointed) for respondent no.2

**CORAM : R.G.AVACHAT AND
R.M.JOSHI, JJ.
DATE : OCTOBER 20, 2022**

ORDER (*Per R.G.AVACHAT, J.*):-

This is an application under Section 389 of the Code of Criminal Procedure. Vide order dated 26.04.2022 passed by learned Judge, Special Court (POCSO Act), Shrigonda, in Special Case No.97 of 2021, the applicant/appellant has been convicted for the offences punishable under Sections 376(2)(j),(n) and 506 of Indian Penal Code (I.P.C.) and Sections 3 and 4 of the Protection of Children from Sexual

Offences Act. For the offence under Section 376(2)(j),(n) of I.P.C., the applicant has been sentenced to imprisonment for life, which shall mean imprisonment for the remainder of his natural life and to pay a fine of Rs.25,000/-, in default, to undergo simple imprisonment for six months. And for the offence under Section 506 of I.P.C, he has been sentenced to rigorous imprisonment for one year and to pay a fine of Rs.2,000/-, in default, to undergo simple imprisonment for one month .

2. Heard learned counsel for the parties. Perused the impugned judgment and the evidence relied on.

3. The evidence indicates that it was emotional relationship between the applicant and the victim. The applicant was eighteen years of age, while the Charge was framed in November, 2021. The victim was around sixteen years of age by then. To be specific, as per the case of the prosecution, the victim was 15 years and 8 months old, while the FIR was lodged. Same indicates the victim was of the age of understanding. As a result of the sexual intercourse between the two, the victim conceived and has even delivered a baby.

4. Learned APP and learned counsel representing respondent no.2 – victim, would submit that the consent of the victim was immaterial as she was below 18 years of age. The applicant is the biological father of the new born. D.N.A. report indicates the same. The applicant was in jail pending trial.

5. A moot question that is involved in this case is as to whether the prosecution has proved the victim to have been below 18 years of age at the material time. In proof of her age, the victim, in her oral evidence, gave her date of birth as 29.09.2005. Her evidence as regards her date of birth is necessarily hearsay. Admittedly, in proof of the date of birth of the victim, none of her parents or family members, has been examined. What is relied on is the birth certificate issued by Gramsevak. It is at Exh.63. The details therein have been recorded on the basis of the information given by one Anganwadi Sevika. As per the birth certificate, the date of birth of the victim is 29.09.2005. The entries in the birth register were made on the very day of birth. Necessarily the name of victim was not recorded in the said register since the registration was made on the birthday itself. The name of the victim came to be recorded lateron. There is no evidence to indicate, on whose

information, her name came to be recorded. The Anganwadi Sevika, on whose information the birth certificate came into being, was also not examined as prosecution witness.

6. Learned APP and learned counsel for the victim would submit that it was one of the duties of the Anganwadi Sevikas to report birth of child in the village, to the concerned authorities for preparing birth certificate. They relied on the judgment of the Apex Court in the case of **Mahadeo Vs. State of Maharashtra and anr., 2013(4) CCR 365**, to submit that the school record can be relied on in proof of age of a juvenile. The facts thereof indicate that age of a juvenile in conflict with law was a matter in issue. Rule 12 of the Juvenile Justice Rules, 2007, was relied on.

Since those Rules were under the Juvenile Justice (Care and Protection of Children) Act, 2015 and being for the benefit of the juvenile in conflict with law, the same, in our view, cannot be *ipso facto* relied on to determine the age of the victim of rape, for which offence, sentence of 20 years or life, has been prescribed. These are our *prima facie* observations.

7. The Apex Court in the case of **Birad Mal Singhvi Vs. Anand Purohit, 1988 AIR 1796** has observed thus:-

..... Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. 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 the 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. In [Raja Janaki Nath Roy & Ors. v. Jyotish Chandra Acharya Chowdhury](#), AIR 1941 CAL. 41 a Division Bench of the Calcutta High Court discarded the entry in school register about the age of a party to the suit on the ground that there was no evidence to show on what material the entry in the register about the age of the plaintiff was made. The principle so laid down has been accepted by almost all the High Courts in the country, see [Jagan Nath v. Moti Ram & Ors.](#), AIR 1951 Punjab 377; [Sakhi Ram & Ors. v. Presiding Officer, Labour Court, North Bihar, Muzzafarpur & Ors.](#), AIR 1966 Patna 459; [Ghanchi Vora Samsuddish Isabhai v. State of Gujarat](#), AIR 1970 Gujarat 178 and [Radha Kishan Tickoo & Anr. v. Bhushan Lal Tickoo & Anr.](#), AIR 1971 J and K 62. In addition to these decisions the High Courts of Allahabad, Bombay, Madras have considered the question of probative value of an entry regarding the date of birth made in the scholar's register or in school certificate in election cases. The Courts have consistently held that the date of birth mentioned in the scholar's register of secondary school certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined."

8. Moreover, the Division Bench of this Court in the case of **Gangadhar Gonduram Tadme Vs. Trimbak Govindrao Akingire, 2005 (1) Mh.L.J. 94** has observed as under:-

“5. [Section 19](#) of the said Act speaks of the duty of Registrar to register births and deaths of which notice is given. It provides that every Registrar of Births and Deaths, on receipt of notice of a birth within the local area for which he is appointed, shall, if the notice is given within the prescribed time and in the prescribed mode by a person authorised by the said Act to give the notice, forthwith make an entry of the birth or death in the proper register book. It further provides that if the Registrar has reason to believe that the notice given is false in any respect, he may refuse to register the birth until he receives an order from the Judge of the District Court directing him to make the entry and prescribing the manner in which the entry is to be made and he shall not enter in the register the name of any person as father of an illegitimate child, unless at the request of the mother and of the person acknowledging himself to be the father of the child.

6. The term "person authorised" is not defined under the said Act. However, [Section 20](#) enumerates the persons who can be said to be authorised to give the notice of birth. It enlists that the following person to be the authorised one to give notice of birth:-

- a. the father or mother of the child;
- b. any person present at the birth;
- c. any person occupying, at the time of the birth, any part of the house wherein the child was born and having knowledge of the child having been born in the house;
- d. any medical practitioner in attendance after the birth and having personal knowledge of the birth having occurred;
- e. any person having charge of the child. Obviously the person authorised to give notice of birth is the one who can have the direct knowledge about the birth of the child. It does not include a person who might have mere

information of the birth of a child. On the contrary, the provision of law contained in section 20 of the said Act abundantly makes it clear that such power is given to a person who has got sufficient knowledge about the birth of the child. Undoubtedly, Clause (e) also speaks of “any person having charge of the child” and perhaps it may include a person who comes in possession of an abandoned child. It is, however, not necessary to deal with the said issue here as it is nobody’s case that the child whose birth date was in dispute was an abandoned child but on the contrary it is the specific case of the petitioner as well as that of the respondents that the concerned child was delivered by the petitioner's wife.

7. [Section 22](#) of the said Act deals with the provisions regarding the entry of birth in the register to be maintained under [Section 19](#) of the said Act. Sub-section (1) thereof provides that when an entry of a birth has been made by the Registrar of Births under [Section 19](#), the person giving notice of the birth must sign the entry in the register in the presence of the Registrar, provided that it shall not be necessary for the person giving notice to attend before the Registrar or to sign the entry in the register if he has given such notice in writing and has furnished to the satisfaction of the Registrar such evidence of his identity as may be required by any rules made by the State Government in that behalf. It is not the case of the authorities that there are any specific rules framed by the Government of Maharashtra in relation to the evidence pertaining to the identity of the authorised person to be furnished to the Registrar. However, plain reading of [Sections 19, 20 and 22\(1\)](#) of the said Act would reveal that the register maintained in relation to births by the registrar under the said Act has to disclose the identity of the person giving the notice of birth. In fact, a person giving such notice has primarily to sign the register in the presence of the Registrar. Exemption is granted only to those persons who give notice in writing disclosing sufficient identity of such person and establishes the same to the satisfaction of the Registrar. Obviously therefore, the records before the Registrar must be clear as regards the identity of the person giving the notice of birth. Undisputedly, the certificate to be issued in relation to the birth should also disclose the name and the address of the person giving the notice of birth. The certificate also should

disclose the identity of the person who had attended and witnessed the delivery. Evidently, this information is necessary to give the required authenticity to the records and which carry presumptive value to the correctness of such entries.

8. Sub-section (2) of [Section 22](#) very clearly states that "Until the entry has been so signed or the conditions specified in the proviso to Sub-section (1) have been complied with, the birth or death shall not be deemed to be registered under this Act". Apparently therefore, in order to give the presumptive value to the entries made in the register of birth, the condition specified under Sub-section (1) of [Section 22](#) has necessarily to be satisfied. It is a mandatory provision and non-compliance thereof will result in the registration to be treated as not the one done under the said Act. If the registration ceases to be the one under the said Act, any certificate issued in relation to such entries cannot have legal sanctity. The entries which are made without compliance of the conditions specified in the proviso to Sub-section (1) or in the absence of signature of the person giving notice, would not carry any presumptive value under [Section 114](#) of the Evidence Act. In other words, any certificate issued without compliance of the mandatory requirement under [Section 22\(1\)](#) of the said Act, cannot be considered as a certificate issued under the provisions of the said Act and any such certificate, therefore, will not carry presumptive value under [Section 114](#) of the Evidence Act.

9. Furthermore, in the case of **Madan Mohan Singh and ors. Vs. Rajni Kant and anr., AIR 2010 SC 2933**, the Supreme Court observed thus:-

“ 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 authenticity of the entries in the official record by an official or person authorised in

performance of official duties, would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

10. It is reiterated that it was a consensual relationship. The applicant was just eighteen years of age when the offence took place. He is in jail for more than 1 year and 3 months. In our view, there is an arguable point involved in the appeal, as to whether, really the victim was below eighteen years of age, when none of her parents were examined in proof of her age. The person, on whose information, entry in the birth register was made, was also not examined in proof of her age. The date of birth given by the victim in her oral evidence, is also hearsay. The present appeal is not likely to have its turn for final hearing until next, at least, seven years.

11. For all these reasons, we are inclined to suspend execution of the substantive sentence. Hence, the order:-

- (i) The application is allowed;
- (ii) During pendency of the appeal, the substantive sentence of imprisonment imposed by learned Judge, Special Court (POCSO

Act), Shrigonda, in Special Case No.97 of 2021, vide order dated 26.04.2022, to stand suspended. The applicant be released on bail on executing P.R. Bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand) with one surety in the like amount.

(iii) Fee of learned counsel appointed to represent respondent no.2 is quantified at Rs.6,000/- (Rupees Six Thousand).

[R. M. JOSHI, J.]

[R.G. AVACHAT, J.]

KBP