

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

+ **CRL.A. 594/2017 & CRL.M.(BAIL) 1966/2019**

Date of Decision: 10.11.2022

**IN THE MATTER OF:**

**SHRI KISHAN YADAV  
S/O SHRI RAM VRIKSH YADAV  
(PRESENTLY CONFINED IN CENTRAL  
JAIL NO.13, MANDOLI, DELHI)**

**.....APPELLANT**

*[Through: Ms. Sunita Arora, Advocate (DHCLSC)]*

**AND**

**STATE (NCT OF DELHI)**

**..... RESPONDENT**

*(Through: Mr. Utkarsh, APP for the State)*

**CORAM:**

**HON'BLE MR. JUSTICE PURUSHAINDR KUMAR  
KAURAV**

**J U D G M E N T**

**PURUSHAINDR KUMAR KAURAV, J. (ORAL)**

1. This appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.') is directed against the judgment of conviction dated 08.09.2016 and order on sentence dated 26.12.2016 passed by the learned Additional Sessions Judge-01, South-West District, Dwarka Courts, New Delhi, in SC No. 32/2/14 convicting and sentencing the appellant for the offence punishable under Section 366 of the IPC and for the offence punishable under Section 6 read with Section 5(1) of the Protection of Children from

Sexual Offences Act, 2012 (hereinafter referred as 'POCSO Act'). The appellant has been sentenced to undergo five years of rigorous imprisonment for the offence punishable under Section 366 of the IPC alongwith payment of fine of Rs.2,000/- and was further sentenced to undergo ten years of rigorous imprisonment for the offence punishable under Section 6 read with Section 5(l) of the POCSO Act alongwith payment of fine of Rs.3,000/-. In default of fine, the appellant has been directed to undergo three months of simple imprisonment for each of the offences. Both the sentences were directed to run concurrently and benefit of Section 428 of the Cr.P.C. was extended to the appellant.

2. The prosecution case is that on 09.08.2016, the father of the prosecutrix appeared before the Police Station *Najafgarh*, Delhi, and had stated that he was a labourer and was residing with his family at *House No. 58, Gali No.2, Nanli Vihar, Nangli Dairy, Najafgarh, Delhi*. According to him, the appellant was residing in his house on rent in the year 2012 and within a month, the appellant vacated the said house. He further stated that his daughter (prosecutrix) aged about 15 years, was enticed by the appellant on 11.06.2013 and thereafter kidnapped by him. Later on, the complainant's daughter informed the complainant about her location at Village *Rautpur*. The complainant alongwith his wife went there and had taken back the prosecutrix to their house. He further stated that on 16.07.2013 again, the appellant had taken away his daughter/prosecutrix from the school to Village *Rautpur*, District, *Gorakhpur*. The complainant goes on to state that he alongwith his wife reached Village *Rautpur*, District *Gorakhpur* on 28.07.2013, where, they found that their daughter was residing with the appellant and the appellant had promised to send her back on the following day. The father of the prosecutrix and her

mother, both stayed for a night at Village *Rautpur* and on the following day, the appellant refused to send their daughter back with them. Therefore, after coming back from the Village, the complainant went to the Police Station on 09.08.2013 to lodge the report.

3. The police on the basis of the information received, registered the FIR and conducted the investigation. After collecting evidence and recording statement of the witnesses, the appellant was arrested and after completion of the investigation, the chargesheet was filed. The trial court *vide* order dated 05.04.2014 framed the charges against the appellant for the offences punishable under Sections 366/506 of the IPC and under Section 6 read with Section 5(l) of the POCSO Act. The appellant pleaded not guilty and claimed trial. The trial court, thereafter, conducted the trial and convicted and sentenced the appellant, as mentioned above.

4. Learned counsel appearing on behalf of the appellant submits that the entire case of the prosecution is based on 'no material evidence'. The findings given by the trial court are perverse. According to learned counsel for the appellant, the prosecutrix with her free consent went with the appellant twice to his hometown. If the entire evidence is examined carefully, the same would demonstrate that not only the prosecutrix remained with the appellant at his hometown but the prosecutrix had also been to various other places including *Goa*. She further submits that at no point of time the prosecutrix had raised any alarm or tried to inform the police about the objectionable act, if any, of the appellant. She further submits that the age of the prosecutrix has also not been proved, in accordance with law. Only a photocopy of Class X marksheet was produced, which was exhibited. However, such a document cannot be read in as evidence. She further states that school Register of admission in Class

XI has been produced, whereas the age of the prosecutrix was required to be proved in accordance with the mandate of the Juvenile Justice (Care and Protection of Children) Rules, 2007.

5. Learned counsel for the appellant has placed reliance on the decisions of the Hon'ble Supreme Court in the cases of *Alamelu & Anr. v State*<sup>1</sup>, *Biradmal Singhvi v. Anand Purohit*<sup>2</sup>, *Anvar PV v. PK Basheer*<sup>3</sup>, *Ravinder Singh v. State of Punjab*<sup>4</sup>, *State of MP v. Munna*<sup>5</sup> and *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*<sup>6</sup> and the decisions of this court in the cases of *Vijay Kumar v. State (NCT of Delhi)*<sup>7</sup>, *State (GNCTD) v. Hargovind*<sup>8</sup>, *Vipin Yadav v. State*<sup>9</sup>, *Shakuntla v. State*<sup>10</sup>, *State NCT of Delhi v. Umesh*<sup>11</sup>. She also placed reliance on the decision of the Karnataka High Court in the case of *State of Karnataka v. Gowtham*<sup>12</sup>, the decision of the Uttarakhand High Court in the case of *Vivek v. State of Uttarakhand*<sup>13</sup>, the decision of the Telangana High Court in the case of *Guda Mahender v. State of Telangana*, Criminal Appeal No. 219/2021 and the decision of the Patna High Court in the case of *Arjun Kumar @ Prince v. State of Bihar*<sup>14</sup>.

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<sup>1</sup> (2011) 2 ACC 385

<sup>2</sup> AIR 1988 SC 1796

<sup>3</sup> (2014) 10 SCC 473

<sup>4</sup> AIR 2022 SC 2726

<sup>5</sup> (2016) 1 SCC 696

<sup>6</sup> (2020) 7 SCC 1

<sup>7</sup> 2015 SCC OnLine Del 11291

<sup>8</sup> 2018 SCC OnLine Del 9607ya

<sup>9</sup> 2016 SCC OnLine Del 3095

<sup>10</sup> 2011 SCC OnLine Del 1514

<sup>11</sup> 2015 SCC OnLine Del 10596

<sup>12</sup> 2016 SCC OnLine Kar 8718

<sup>13</sup> 2019 SCC OnLine Utt 1227

<sup>14</sup> 2021 SCC OnLine Pat 1353

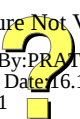
6. The submissions made by learned counsel for the appellant have strongly been opposed by the learned APP for the State. He submits that the judgment on conviction and sentence passed by the court below does not call for any interference. According to him, the testimonies of victim (PW-1), father (PW-2) & mother (PW-3) clearly proves the case beyond all reasonable doubt. Learned APP for the State while taking this court through various other witnesses, submits that the prosecutrix was a minor at the time of the incident and that her consent does not matter. He further submits that the evidence of (PW-7), *Roopwati, Vice Principal, Govt. Girls Sr. Secondary School* clearly states that the prosecutrix was admitted in Class XI with the said school where the date of birth of the prosecutrix was recorded as 30.03.1998, which clearly indicates that at the time of the incident she was only about 15 years of age. He further submits that the date of birth of the prosecutrix was recorded on the basis of the production of Class X marksheet. He highlights that the marksheet of Class X is admissible evidence as per Juvenile Justice (Care and Protection of Children), Rules 2007 and no fault can be found in proving the date of birth of the prosecutrix.

7. I have heard Ms. Sunita Arora, learned counsel appearing on behalf of the appellant and Shri Utkarsh, learned APP for the State and perused the record.

8. The child victim (PW-1) in her evidence before the court has stated that the appellant was staying in her house as a tenant in the year 2012. On 11.06.2013 at about 11:00 a.m., she left her house for school and when she reached in front of the main gate of the school, the appellant asked her to accompany her on the pretext that he will drop her at her house. She further stated that the appellant took her to New Delhi Metro Station by metro and thereafter from New Delhi

Metro Station the appellant took her to his native place, i.e. Village *Rautpur*, District *Gorakhpur*, U.P. by train. According to her evidence, the appellant kept her at his house at Village *Rautpur* and after few days, she got married with the appellant. She further stated that she was not ready for marriage but it was insisted on by the family members of the appellant to which she agreed. She further stated that in the month of June, 2013, she made a telephonic call to her mother from the mobile phone of the appellant and gave the details of the place. Thereupon, the parents of the prosecutrix reached to take her to Delhi. She further goes on to state in her evidence that again on 16.07.2013, after attending the school, when she came out from her class and reached near the main gate, the appellant met her and asked her to accompany him. She further stated that she was threatened by saying that if she does not accompany him, the appellant would kill her and her family members. She stated that due to fear, she again accompanied the appellant and the appellant had again taken her to his native place, i.e. Village *Rautpur* District *Gorakhpur*, U.P. by train. She stayed there for about ten days and then again she made a call to her mother and thereupon her parents reached the said Village and wanted to take her back to Delhi. But according to her, the family members of the appellant did not allow them to take the prosecutrix back to Delhi. She stated that thereupon her parents returned to Delhi. Thereafter, the appellant had taken her to *Goa* from *Gorakhpur* by train where they stayed for about three months and then again they came back to their native Village.

9. She stated that she used to stay with the appellant in the same room and was subjected to sexual intercourse on several occasions at *Goa* and *Gorakhpur*. She stated that in the month of February, 2014, her mother alongwith police officials came to the house of the



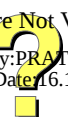
appellant and they had taken the prosecutrix to Delhi and also arrested the appellant. She also stated that she was taken to RTRM hospital for her medical examination. *Vide* MLC exhibit PW-1/A, the report was received where she put her signatures at Point 'A'. Her statement under Section 164 of the Cr.P.C. also got recorded. In her cross examination, she admits that she did not make any complaint either to the driver or conductor of the bus, when she was taken to Village, *Rautpur*, District *Gorakhpur*, U.P., neither did she inform any of the security officials at the Metro Station. She further admits that she got married with the appellant in a temple and the photograph thereof was in the possession of the appellant.

10. The father of the prosecutrix (PW-2) reiterates the contents made in the FIR and he confirms that firstly on 28.06.2013, he alongwith his wife went to take their daughter back to Delhi and they brought her back on 01.07.2013, however, he did not make any complaint with respect to the said incident. He further submits that on receiving call on 27.07.2013 again he alongwith his wife went to Village *Rautpur*, on 27.07.2013 but after returning back from Village *Rautpur*, he did not make the complaint immediately thereafter. However, it is only on 09.08.2013, he went to the Police Station to lodge a complaint. The mother of the prosecutrix (PW-3) further reiterates the same facts in her testimony before the court.

11. The appellant in his statement recorded under Section 313 of the Cr.P.C. explains that the prosecutrix herself had accompanied him on her own free will without any force or pressure. He further explained that the prosecutrix herself got ready to marry him. He, however, denied all the allegations and stated that he has not committed any offence and the prosecutrix was in love with him.

12. A perusal of the testimony of PW-1, PW-2 & PW-3 clearly indicates that the prosecutrix has joined the company of the appellant with her own free will without there being any threat or coercion. According to prosecution, the first incident had taken place on 11.06.2013. In the same month, the prosecutrix was brought back to Delhi by her parents but the fact remains that no report at all was lodged by the prosecutrix or her parents. On 16.07.2013 again according to the prosecutrix, she was taken by the appellant to his native place where she stayed with him and was taken to *Goa*. However, there were no efforts made by her either to lodge any FIR or to register any grievance. According to her evidence, after 16.07.2013, she made a call to her mother and after ten days' her mother alongwith her father reached Village *Rautpur* and tried to take her back to Delhi but on refusal by the family members of the appellant, they were not able to take the prosecutrix to Delhi. However, the fact remains that from the month of July, 2013 to the date when the father of the prosecutrix appeared before the Police Station on 09.08.2013, there is no complaint by any of the parents of the prosecutrix. No explanation has been offered as to why the complaint was not made immediately after 11.06.2013 or after 16.07.2013.

13. To prove charge under Section 366 of the IPC mere finding that a woman was abducted is not enough. The prosecution is required to prove that the accused abducted the women for any of the purposes mentioned in Section 366 of the IPC. The allegation of kidnapping and abduction will only be proved if the taking was by force or the taking or inducing was by deceitful means. The expression deceit means "anything intending to mislead". If a girl without any persuasion on the part of the accused voluntarily goes with an accused to have sex, there is neither any taking or enticing by the accused and Section 361



(kidnapping a minor) goes out of the way, nor Section 362 (abduction) is attracted.

14. It can be seen that it is not the case of the enticement at all, rather it is a case of the victim voluntarily consenting to go with the accused and she remained with him for a substantially long period of time. The fact of her stay was, not only once but twice, taken note of by her parents. Under the facts of the present case, the prosecution story is completely unreliable to prove that the prosecutrix was kidnapped by the appellant by any threat or coercion. On the contrary, the facts of the case would clearly indicate that the prosecutrix herself has joined the company of the appellant and she remained with the appellant for a sufficient long time without raising any grievance or complaint at any stage. No immediate steps were taken to report the matter, therefore, for all these reasons, the offence punishable under Section 366 of the IPC is not made out. The basic element for applicability of Section 366 of the IPC remained absent in the present case.

15. So far as the commission of offence under Section 6 read with Section 5(1) of the POCSO Act is concerned, the date of birth of the prosecutrix is an important aspect which was required to be proved by the prosecution. The prosecution in order to prove the date of birth of the prosecutrix has examined (PW-7) *Roopwati*, who is *Vice Principal*, of Govt. Girls Sr. Secondary School No. 2, Najafgarh, New Delhi. She stated that she had brought the original Admission Register for the period from 01.07.2013 to 22.06.2015 and original pasting file. According to her, the prosecutrix was admitted in her School in Class XI. As per the record, her date of birth is 23.03.1998. A photocopy of the relevant entry of Admission Register has been marked as Exhibit PW-7/A. She further stated that at the time of the admission of the

prosecutrix, Class X marksheet was submitted by her. The photocopy of the Class X marksheet has been exhibited as Exhibit PW-7/B. She submitted that no birth certificate was submitted at the time of admission in Class XI. Her testimony would clearly indicate that the marksheet of Class X was exhibited as Exhibit PW-7/B, however, the same was only a photocopy. Exhibit PW-7/B would further indicate that the same is a printout of an electronic document. Admittedly neither the original document was produced at the time when the document was exhibited nor the same was seized by the police. The instant case relates to the year 2013, and therefore, the provisions of the POCSO Act would be applicable. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, prescribes for the procedure to be followed while determination of the age. Rule 12 states that in every case concerning a child or a 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.*

16. The provisions of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would have application by virtue of Section 34 of the Act of 2012. It is thus seen that the matriculation or equivalent certificate, if available, would be the first determinative factor for proving the age of a juvenile or a child. The second factor to prove the date of birth would be the certificate from the school other than a play school (first attended) and it is in the absence of matriculation or equivalent certificate or date of birth certificate from the school first attended, the birth certificate given by Corporation or a Municipal Authority or a Panchayat would have relevance. As per Clause-B of sub-Rule 3 of Rule 12, it is only in the absence of the matriculation or equivalent certificate, the date of birth certificate from the school (first attended) and the birth certificate given by Corporation or a Municipal authority or a Panchayat, the medical opinion from duly constituted medical board, will have relevance.

17. In the instant case the record clearly proves that the matriculation or equivalent certificate is not produced in original. A photocopy thereto is exhibited which is not admissible in evidence, unless the course set out in section 65 of the Indian Evidence Act, 1872 is followed, which has not been done in the present case. Please see: *Anvar P.V. v. P.K. Basheer*<sup>15</sup>, *Arjun Panditrao Khotkar v. Kailash Kushanrao*<sup>16</sup> and *Mohd. Arif @ Ashfaq v. State (NCT of Delhi)*<sup>17</sup>

18. The date of birth certificate from school (first attended) has also not been produced nor there is any birth certificate by Corporation or a

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<sup>15</sup> (2014) 10 SCC 473

<sup>16</sup> (2020) 7, SCC 1

<sup>17</sup> (2011) 13 SCC 621

Municipal Authority or a Panchayat, on record. Neither there is any medical opinion with respect to the date of birth of the prosecutrix.

19. The Hon'ble Supreme Court in the case of ***Biradmal Singhvi (supra)*** has held that 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 the 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 not of much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. It has been held that the courts have consistently held that the date of birth mentioned in the school register or 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.

20. The Hon'ble Supreme Court in the case of ***Alamelu & Anr. (supra)*** while considering the decision in the case of ***Biradmal Singhvi (supra)*** & another decision in the case of ***Narbada Devi Gupta Vs. Birendra Kumar Jaiswal***<sup>18</sup> has set aside the conviction in the absence of sufficient evidence and various infirmities in the prosecution evidence with respect to the date of birth of the prosecutrix. The Hon'ble Supreme Court has noted the law laid down in the case of ***Narbada Devi Gupta (supra)*** to state that mere production and marking of a document as exhibit by the court cannot

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<sup>18</sup> (2003) 8 SCC 745

be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

21. Therefore, the exact date of birth of the victim was not brought on record by exhibiting the original document and the prosecution has failed to prove that the victim was below 18 years of age. The evidence of her consent, assumes importance and as noticed in previous paragraphs, the victim was in consensual relationship with the appellant. No charge for offence under Section 6 read with Section 5(l) of the POCSO Act is proved.

22. In view of the aforesaid, the judgment on conviction dated 08.09.2016 and order on sentence dated 26.12.2016 is unsustainable and is hereby set aside. The appellant is set at liberty, if not required in any other case.

23. Accordingly, the appeal is allowed.

**(PURUSHAINDRA KUMAR KAURAV)**  
**JUDGE**

**NOVEMBER 10, 2022**

*p'ma*