

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 09 OF 2021
WITH
INTERIM APPLICATION NO. 2384 OF 2021
IN
CRIMINAL APPEAL NO. 09 OF 2021**

Maherban Hasan Babu Khan ...Appellant

Versus

The State of Maharashtra and Anr. ...Respondents

...

Mr. Jagdish Kumar Sanjeev Hegde for the Appellant.

Mr. N.B. Patil, APP for the Respondent No.1-State.

Ms Rebecca Gonsalves for Respondent No.2-victim.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGMENT DATED : 02nd MAY, 2023.

JUDGMENT :-

1. This Appeal is directed against the judgment dated 18.12.2019 in Special Atrocity Case No.11 of 2016, passed by learned Special Court at Mangaon, District Raigad. By the impugned judgment, the learned Judge has held the Appellant guilty of offences punishable under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and Sections 376(2)(i) and 376(2)(j) of the Indian Penal Code. He has been sentenced to undergo (i) rigorous imprisonment for 7 years with fine of Rs.10,000/- i.d.

simple imprisonment for 6 months for offence punishable under Section 4 and (ii) rigorous imprisonment for 10 years with fine of Rs.10,000/- i.d. simple imprisonment for 6 months for offence under Section 6 of the POCSO Act. Both sentences have been ordered to run concurrently. The Appellant was in custody since 21.05.2016, hence the Appellant has been given benefit under section 428 Cr.P.C. for setting off the period of detention he had undergone. No separate sentence is passed for offence under Section 376(2) (i) and (j) of the Indian Penal Code.

2. The crime against the Appellant, was registered pursuant to the First Information Report lodged by the victim (PW.2), who at the relevant time was a 10th standard student in Vighavali Vibhag High School. The victim has stated her birth date to be 19/12/2000. She alleged that the Appellant had sexual relationship with her under the pretext of marriage. He thereafter went to his native place at Uttar Pradesh. On 25/03/2016, the victim informed the Appellant that she was pregnant and requested him to fulfill his promise of marriage. She called him two days later only to learn that his phone was switched off. The Appellant did not receive her calls and did not return to Mumbai. The victim claimed that she is a member of scheduled caste and was a

minor as on the date of the incident. She therefore lodged the FIR against the Appellant for subjecting her to penetrative sexual assault and committing offence of rape despite knowing that she was a member of the Scheduled Caste. Pursuant to the FIR lodged by the victim, PI-Nisha Jadhav registered the crime against the Appellant for offences punishable under Sections 4 and 6 of the POCSO Act, 376 (2) (i), (j) and (k) of the IPC and Section 3(1)(xii) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (the SC and ST Act).

3. PW8-Datta Nalawade was the Sub Divisional Police Officer of Mangaon Police Station. He took over the investigation in view of registration of crime under SC & ST Act. He conducted the scene of offence panchanama, recorded statements of the witnesses, referred the victim for medical examination and arrested the Appellant. The victim gave birth to a child at Sion Hospital, Mumbai. PW8 collected the relevant documents from the Hospital and sent the blood sample of the child, the victim and the Appellant for DNA testing. He also collected the CDR records from the Airtel Mobile Company and Tata Company. Upon completion of investigation, he submitted a charge-sheet against the Appellant for the offences as stated above.

4. The Appellant pleaded not guilty to the charge and claimed to be tried. The prosecution examined 9 witnesses. The statement of the Appellant was recorded under Section 313 of the Cr.P.C. The Appellant has not denied having sexual relation with the victim. He has stated that they were in love with each other and had planned to marry. He had gone to his native place to inform his mother about his marriage plan. While he was at his native place, the victim informed him that she was pregnant. He told her that he would marry her on his return. He could not trace the victim after he returned from his native place. In the meantime, the police arrested him without disclosing any cause. He claims that the brother of the victim had opposed the marriage and threatened to send him to jail. He asserts that he is ready to marry the victim and take care of the child.

5. Learned Special Judge, after considering the evidence on record and hearing the respective parties, held that the Appellant had sexual relationship with the victim, who was below 18 years of age and a child within the meaning of Section 2(d) of the POCSO Act. The learned Judge further observed that the victim had informed the Appellant about her pregnancy while he was at his native place. The

Appellant thereafter switched off his phone and did not try to contact the victim. The victim gave birth to a child and as per the DNA report the Appellant is the biological father of the child. Learned Judge therefore held that the Appellant had subjected the victim to penetrative sexual assault and rape and hence held him guilty of offences punishable under Sections 4 and 6 of the POCSO Act and Section 376(2)(i), (j) and (k) of the IPC and sentenced him as stated above. The learned Judge held that the prosecution has failed to prove that the victim is a member of Scheduled Cast or Scheduled Tribe and hence acquitted the Appellant of offence under Section 3 (1) (xii) of SC ST Act. Being aggrieved by the conviction and sentence, the Appellant has filed this appeal.

6. Learned counsel for the Appellant strenuously argued that the prosecution has failed to examine the author of the School Leaving Certificate at Exhibit-46, which is relied upon to prove the age of the deceased. He therefore contends that the School Leaving Certificate at Exhibit-46 cannot be relied upon to determine the age of the victim. He submits that there is no cogent and conclusive evidence to prove that the victim was below 18 years of age. He submits that it was a consensual relationship between two adults, which would not attract

penal provisions of rape or penetrative sexual assault.

7. Per contra, learned APP and Ms Gonsalves, learned counsel for the victim submit that the victim was a 10th standard student and at the time of the incident she was about 14 to 15 years of age. The School Leaving Certificate was issued in the year 2010, much prior to the incident and hence there is no possibility of fabricating the document. It is further contended that the genuineness of the certificate was not disputed and as such it is too late in the day to question the age of the victim as recorded in the said certificate. It is further submitted that the Ossification test also corroborates the documentary evidence and amply proves that the victim was a child within the meaning of Section 2(d) of the POCSO Act. She has relied upon decision of the Hon'ble Supreme Court in *Mohd. Ikram Hussain vs. State of Uttar Pradesh and Ors., (1964) 5 SCR 86*, decision of this Court, Aurangabad Bench in *Damodar Pratapram Jangid vs. The State of Maharashtra 2016 ALL MR (Cri) 82* and *Baburao Vs. The State of Maharashtra and Ors., 2016 ALL MR (Cri) 4719*.

8. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

9. The Appellant has been held guilty of offences under Sections 4 and 6 of the POCSO Act which has been enacted to protect children from offences of sexual assault, sexual harassment and contains stringent provisions as to safeguard the interest and the well being of the children. 'Child' within the meaning of Section 2(d) of the POCSO Act means any person below the age of 18 years. Hence, in order to attract the provisions of the POCSO Act, the onus is on the prosecution to prove that the victim was a 'child' within the meaning of section 2(d) of the POCSO Act.

10. It may be mentioned that Section 34 of the POCSO Act prescribes the procedure to be followed in case of Commission of offence by child and determination of age by a Special Court under the POCSO Act. Section 34 reads thus:-

“ 34. Procedure in case of commission of offence by child and determination of age by Special Court

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

(2) If any question arises in any proceeding before

the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person. ”

11. In ***Jarnail Singh vs. State of Haryana, 2013 (7) SCC 163***, the Hon'ble Supreme Court, while considering the issue of determination of age of a minor victim, has analysed the scope of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as 'J.J. Rules 2007'). The Supreme Court has held that though Rule 12 is strictly applicable only to determine the age of the child in conflict with law, the said statutory provision should also be the basis for determining age, even of a child, who is a victim of crime.

12. It may be mentioned that J.J. Rules 2007 were framed in terms of Section 68 of Juvenile Justice Act, 2000, which has been

repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 and corresponding amendment has been made in Section 34 (1) of the POCSO Act by substituting the words 'Juvenile Justice (Care and Protection of Children) Act 2000' with 'Juvenile Justice (Care and Protection of Children) Act, 2015'. Hence, the age of the victim has to be determined as per Section 94(1) of 2015 Act, which enables the Committee to determine the age of the person based on the appearance of the said person brought before it. It is only in case of reasonable doubt that the Committee or board has to follow the prescribed procedure for determination of age as provided under Section 94(2) of 2015 Act, which reads thus:-

“ Section 94 Presumption and determination of age:-

(1) .xxx

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board;

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) xxx. ”

13. The procedure prescribed under section 94, to determine the age of a person, is not materially different from the procedure prescribed under Rule 12(3) of 2007 Rules, except for some minor variations. A plain reading of section 94 indicates that when there is doubt about the age of the person, the age has to be determined first on the basis of the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination board and if no such material is available then on the basis of birth certificate given by a Corporation or a Municipal Authority or Panchayat and in the absence of such evidence on the basis of

ossification test or any other medical age determination test. Section 94 does not contain provision regarding benefit of margin of error to be given to the child or juvenile as provided in Rule 12(3)(b) of 2007 Rules, which provided for benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

14. Reverting to the facts, it is the case of the prosecution that the victim was below 18 years of age. The evidence on record reveals that she was a student of 10th standard. The victim has deposed that her date of birth is 19/12/2000. The prosecution has relied upon the School Leaving Certificate at Exhibit – 46, which was sought to be proved through PW7 Netaji Krishna Jadhav, the Head Master of Vighavali Vibhag High School, Mangaon. He has deposed that on 14/06/2010 the victim was given admission in the said school in 5th standard and the birth date of the victim as per the General Register of the School is 19/12/2000. He has stated that the victim had taken primary education in Raigad Zilla Parishad School, Tilore. The said School had issued School Leaving Certificate, which was submitted before Vighavali Vibhag High School, Mangaon, while taking admission. He has deposed that as per the School Leaving Certificate issued by Raigad Zilla Parishad School, the birth date of the victim is

19/12/2000. He has produced School Leaving Certificate issued by Zilla Parishad School, Raigad at Exhibit-46. He has admitted in the cross examination that at the time of admission of the victim, he was not associated with the school and that his evidence is only on the basis of the records i.e. General Register maintained by the School.

15. The age of the victim is sought to be proved on the basis of the entry of the birth date in the School Register of Vighavali Vibhag High School, Mangaon, wherein her date of birth is recorded 19/12/2000. The evidence on record reveals that the victim had taken admission in Primary School at Raigad Zilla Parishad School. The entry in the School Register of Vighavali Vibhag High School, Mangaon is based on the School Leaving Certificate at Exhibit-46, issued by Raigad Zilla Parishad School. The question for consideration is whether the entry in the School Register and the School Leaving Certificate (Exhibit-46), which record the date of birth of the victim are admissible in evidence and can be relied upon without any corroboration. A similar question was considered in ***Satpal Singh Vs. State of Haryana (2010) 8 SCC 714*** wherein the Hon'ble Supreme Court has observed thus :-

“ 20. A document is admissible under Section 35 of

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

21. In State of Bihar & Ors. Vs. Radha Krishna Singh & Ors. AIR 1983 SC 684, this Court dealt with a similar contention and held as under :-

"40. ... Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil. ...

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53. ... Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight.

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145.(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

22. Therefore, a document may be admissible, but as

to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases. Such entries may be in any public document, i.e. school register, voter list or family register prepared under the Rules and Regulations etc. in force, and may be admissible under Section 35 of the Evidence Act as held in Mohd. Ikram Hussain Vs. The State of U.P. & Ors. AIR 1964 SC 1625; and Santenu Mitra Vs. State of West Bengal AIR 1999 SC

1587.

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

24. While dealing with a similar issue in Birad Mal Singhvi Vs. Anand Purohit AIR 1988 SC 1796, this Court held as under :-

" 15. ... To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. "

25. A Constitution Bench of this Court, while dealing with a similar issue in Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors. AIR 1965 SC 282, observed as under :-

"18. ... The reason why an entry made by a public servant in a public or other official book,

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

26. In Vishnu Vs. State of Maharashtra (2006) 1 SCC 283, while dealing with a similar issue, this Court observed that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. For determining the age of the child, the best evidence is of his/her parents, if it is supported by unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded.

27. Thus, the entry in respect of age of the child seeking admission, made in the school register by semi-literate chowkidar at the instance of a person

who came along with the child having no personal knowledge of the correct date of birth, cannot be relied upon.

28. Thus, the law on the issue can be summerised that the entry made in the official record by an official or person authorized in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the Court/Authority to examine its probative value. The authenticity of the entry would depend as on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case. ”

16. It is thus well-settled that an entry of the date of birth, as recorded in the School Register, is relevant and admissible in evidence under section 35 of the Evidence Act. However, such entry would be of no evidentiary value in the absence of the material on the basis of which the age was recorded. Reliance is also placed on the decision of the Apex Court in *Alamelu and anr. v/s. State, Represented by Inspector of Police, AIR 2011 SC 715* and the decision of the Division Bench of this Court in *State of Maharashtra v/s. Ramesh Babulal*

Rewatkar, 2017 ALL MR (Cri) 3980. In view of this settled proposition, it is not necessary to refer to the decisions of the learned Single Judge of this Court in ***Damodar Pratapram Jangid*** and ***Baburao*** (supra).

17. In ***Mohd. Ikram Hussain*** (supra), the challenge before the Apex Court was to the orders passed in Habeas Corpus Petition and section 491 of the old Code of Criminal Procedure and one of the questions raised was about the age of the girl. Relying upon the entries in the School Register and the affidavit filed by the father of the girl, the Hon'ble Supreme Court observed that the girl was below 18 years of age.

18. In the instant case, as stated earlier, the date of birth of the victim was recorded in the School Register of Vighavali Vibhag High School on the basis of the School Leaving Certificate issued by Raigad Zilla Parishad School. PW7, the Head Master, who had produced the School Register was admittedly not associated with the School on the date the said entry was effected. There is absolutely no evidence to prove as to who had given the date of birth of the victim as 19/12/2000 at the time of her initial admission in Raigad Zilla

Parishad School. The prosecution has not examined the person who had recorded the date of birth of the victim in the School Register of Raigad Zilla Parishad or any other person conversant with the said fact. It is also to be noted that PW1 and PW5, the elder siblings of the victim have not disclosed the date of birth of the victim. In such circumstances and in the absence of evidence as regards the material on which the date of birth was recorded in the School Register and the School Leaving Certificate, the entry regarding the age of the victim as recorded in the School Register and School Leaving Certificate has no probative value. In such circumstances, the decision in the case of ***Mohd. Ikram Hussain*** (supra) is distinguishable on facts.

19. The prosecution has also sought to prove the age of the victim on the basis of dental examination. PW4 – Dr. Hemant Suresh Kakade, the dentist attached to the Sub-District Hospital, Mangaon had examined the victim clinically as well as radiographically for age assessment. He has produced the dental examination report at Exhibit-29. The testimony of PW4 vis-a-vis the dental examination report at Exhibit-29 reveals that the first and second molar on right and left side of the mandibular as well as maxilla region had erupted. The dental examination report reveals that third molar/wisdom tooth

was not clinically seen. The radiographic report indicated that crown and root of second molar were well formed whereas the crown of third molar was formed but roots were not well formed. PW4 has deposed that he did not notice the wisdom tooth i.e., the third molar and on this basis he opined that the age of the victim was approximately 15 to 17 years. In his cross-examination he has admitted that wisdom tooth can erupt at any time after 18 years of age.

20. The evidence of this witness clearly indicates that he has assessed the age of the victim as 15 to 17 years in view of absence of third molar, which is normally referred to as wisdom tooth. As per Modi's Medical Jurisprudence, the second molars erupt between 12 to 14 years whereas the third molar erupts between 17 to 25 years. It is thus evident that all the permanent teeth except the wisdom tooth, erupt by the time the average boy or girl reaches the age of puberty whereas, wisdom tooth erupts between the ages of 17 to 25 years. Eruption of wisdom tooth may at the most suggest that the age of the person is 17 years or above but non-eruption or absence of wisdom tooth does not conclusively prove that the person is below 18 years of age. Therefore, the mere fact that wisdom tooth has not erupted is not of great importance in assessing the age.

21. The evidence of PW9-Dr. Gautam Keshav Desai, Medical Superintendent in Sub-District Hospital, Mangaon reveals that the Investigating Officer had sent a requisition for ossification test of the victim. This witness has produced the said requisition letter alongwith the report (Exhibit-68) issued by the Medical Officer. The said report at Exhibit-68 reveals that the victim was examined by Dr. Patel, Orthopedic Surgeon and he had opined that Epiphysis of both wrists was not united and hence the victim was below 18 years of age.

22. It is to be noted that this certificate was not admitted under Section 294 of Cr.PC. The prosecution has merely produced this certificate through PW9 -Dr. Gautam, who has stated his qualifications to be MBBS and DGO. He is not the author of the said report. The prosecution has not examined the Orthopedic Surgeon, who had examined the victim, the Medical Officer, who had submitted the report or any other Orthopedic Surgeon or Radiologist, who could explain the basis of such opinion. Hence, the report at Exhibit-68 has no evidentiary value in view of non examination of the Doctor. Moreover, the contents of the report at Exhibit-68 were not put to the Appellant in Section 313 statement, which is a great lacuna in the prosecution case.

23. It is also well settled that Ossification test or other medical test though is a guiding factor for determining the age, it is not conclusive or incontrovertible and leaves a margin of error of two years on either side. It is also a settled position that the benefit of doubt with regard to the age of the victim always goes in favour of the accused. In the instant case, PW4 has assessed the age of the victim approximately as 15 to 17 years. Considering the margin of error in age even as one year, the victim would be 18 years of age and would not be a child within the meaning of Section 2(d) of the POCSO Act.

24. The prosecution has also not adduced any evidence regarding the victim's physical growth and development and secondary sexual character. This discrepancy also leaves room for ample doubt with regard to the correct age of the victim, the benefit of which must necessarily go in favour of the Appellant.

25. The prosecution has therefore failed to prove beyond reasonable doubt that the victim was below 18 years of age. This was relevant as the evidence on record otherwise indicates that the physical relationship between the Appellant and the victim was consensual. In the absence of evidence to prove that the victim was below 18 years of

age, the provisions of the POCSO Act cannot be invoked and consensual relationship would not constitute rape within the meaning of Section 375 of the IPC.

26. Under the circumstances and in view of discussion supra, the prosecution has failed to prove the guilt of the Appellant beyond reasonable doubt. Hence, the Appeal is allowed. The Appellant is acquitted of offences punishable under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and Sections 376(2)(i) and 376(2)(j) of the Indian Penal Code.

27. Appeal stands disposed of in above terms. Interim Application stands disposed of in view of disposal of Appeal.

**PREETI
H
JAYANI**

(SMT. ANUJA PRABHUDESSAI, J.)

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