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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

*Reserved on: 11<sup>th</sup> July, 2024**Date of decision: 7<sup>th</sup> August, 2024*

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**CRL.A. 738/2023**

STATE

.....Appellant

Through: Mr. Ritesh Kumar Bahri, APP for  
State with Mr. Lalit Luthra Adv.  
Inspector Ramesh with SI Suman, PS  
Dwarka South.

versus

TOFIL AHMAD @ SONU SINGH

.....Respondent

Through: Mr. Rajesh Mahajan, Adv./Amicus  
Curiae with Mr Ranjeeb Kamal Bora,  
MS Jyoti Babbar, Advs. M:  
9811243112)

**CORAM:****JUSTICE PRATHIBA M. SINGH****JUSTICE AMIT SHARMA****JUDGMENT****PRATHIBA M. SINGH, J.**

1. This hearing has been done through hybrid mode.

**Background to the present appeal**

2. The present appeal under Section 378 CrPC has been filed by the Appellant-State, challenging the judgment of acquittal of the Respondent-Tofil Ahmad @ Sonu Singh dated 21<sup>st</sup> December, 2019, passed by Id. ASJ, South West District, Dwarka Courts (*hereinafter*, 'Trial Court') in FIR No. 227/2014 dated 12<sup>th</sup> April, 2014, under Sections 6 read with Section 5(l) of the Protection of Children from Sexual Offences Act, 2012



(hereinafter, 'POCSO Act').

3. Before the Trial Court, the case of the Prosecution was that on 11<sup>th</sup> February, 2014, a 17-year-old girl, accompanied by her uncle (*Chacha*), reported to the Dwarka South Police Station that the Appellant had forcible sexual relationship with her. The survivor was then sent for medical examination to the DDU Hospital. Additionally, the survivor gave a handwritten complaint after returning from the hospital.

4. In the said handwritten complaint, the survivor stated that she was a student of 10<sup>th</sup> class. The survivor's case is that the incident that took place on the intervening night of 10<sup>th</sup>-11<sup>th</sup> April, 2014. On 10<sup>th</sup> April, 2014, the survivor was at her home, and at about 12:30 AM, the Appellant called the survivor to leave her house, and forcibly made physical relations with her. The survivor in her handwritten stated that the Appellant once again made physical relations with her after the first time. The Appellant also asked the survivor not to relay about the incident to anyone. As per the survivor, later, when her family members enquired her, she narrated the incident to them and came to the Police Station along with her Chacha.

5. An FIR was registered being FIR No. 227/2014 on 12<sup>th</sup> April, 2014.

6. Charges under Section 211 CrPC were read over and explained to the Respondent on 23<sup>rd</sup> May, 2014. Charges framed regarding the Appellant are that he had committed aggravated penetrative sexual assault on the person of the survivor aged 17 years at two locations i.e., firstly, at the office where the Respondent was stated to be working, and thereafter at his friend's house. This constituted an offence under Section 6 read with Section 5(l) of the POCSO Act.

7. The Respondent had pleaded not guilty and sought trial. The



Prosecution had examined 14 witnesses. The Defence had led evidence of two witnesses. The list of witnesses is as follows:

| <b><i>Prosecution Witnesses</i></b> | <b><i>Defence Witnesses</i></b>            |
|-------------------------------------|--------------------------------------------|
| <i>PW-1 Survivor</i>                | <i>DW-1 Sh. Harish Kumar Yadav</i>         |
| <i>PW-2 Sh. Pritam Singh</i>        | <i>DW-2 Chacha (Uncle) of child victim</i> |
| <i>PW-3 Dr. Shefali</i>             |                                            |
| <i>PW-4 Dr. Shweta Sinha</i>        |                                            |
| <i>PW-5 ASI Azad Singh</i>          |                                            |
| <i>PW-6 Dr. Ramesh</i>              |                                            |
| <i>PW-7 WPSI Manisha Yadav</i>      |                                            |
| <i>PW-8 Ct. Anjani Kumar</i>        |                                            |
| <i>PW-9 Ms. Manu Vedwan, Ld. MM</i> |                                            |
| <i>PW-10 HC Lalu Ram</i>            |                                            |
| <i>PW-11 Const. Rajeev</i>          |                                            |
| <i>PW-11 Ct. Sudhir Yadav</i>       |                                            |
| <i>PW-12 W/ASI Vinod Kumari</i>     |                                            |
| <i>PW-13 SI Manjeet Singh</i>       |                                            |
| <i>PW-14 Ms. Amita Raghav</i>       |                                            |

8. Various documents including the statement/complaint of the survivor (Ex. PW-11/A & 5/B), the statement of the survivor under Section 164 CrPC (Ex. PW-1/B & 9/A) dated 15<sup>th</sup> April, 2014 and Extracts of Admission & Withdrawal Register (Ex. PW-2/A) were tendered in evidence. The survivor was presented with a bunch of handwritten letters written by her to the Respondent, which were exhibited as Ex. PW1-/D1. Defence witnesses were the uncle and cousin uncle of the survivor.

9. The findings of the Trial Court in the impugned judgment dated 21<sup>st</sup> December, 2019 are as under:



- The burden to prove the date of birth of the survivor was upon the Prosecution. PW-2, who is a teacher from the school of the survivor, was examined by the Prosecution.
- An affidavit dated 27<sup>th</sup> April, 2002 (i.e., *Shapath patra*) exhibited as Ex.PW-2/B was filed by the guardian DW 1 at the time of admission, stating that the survivor's date of birth was 2<sup>nd</sup> April, 1997.
- No birth certificate showing date of birth of the survivor was produced. The Prosecution did not produce DW 1 i.e., guardian of the survivor as a witness.
- Defence summoned the DW1 i.e., the guardian of the survivor, who could not sufficiently establish the correct date of birth of the survivor.
- Prosecution did not provide any basis to show that the survivor was under the age of 18 at the date of the incident.
- The fact that the survivor was less than 18 years of age at the date of the incident was an important ingredient to acquit the Respondent under the POCSO Act. Since this ingredient was not proved by the Prosecution beyond doubt, the charge against the Respondent under Section 6 read with Section 5(1) of the POCSO Act could not be sustained.
- On the question as to whether penetrative sexual assault under Section 6 read with Section 5(1) of the POCSO Act had been committed, the Trial Court examined the evidence, including the Report of the Forensic Science Laboratory, Rohini dated 9<sup>th</sup> January, 2018 (Ex.PW-14/A) which detected semen of the Respondent from the swabs collected from the survivor.



- The Trial Court concluded that it had been established beyond reasonable doubt that the Respondent had a physical relationship with the survivor. The Trial Court held that, based on various facts, including that the survivor had voluntarily accompanied the Respondent, there was sufficient doubt as to whether the physical relationship was forcible or not. Though the aspect of the physical relationship was proved, since the Prosecution failed to prove beyond reasonable doubt that the survivor was under 18 years of age, the benefit of the doubt was given to the Respondent. Hence, the Respondent was acquitted under Section 6 read with Section 5(1) of the POCSO Act.

### **Procedural history**

10. Notice was issued in the leave petition under Section 378(3) CrPC on 20<sup>th</sup> December, 2021. Vide order dated 10<sup>th</sup> January, 2023, the Respondent was stated to have been served, and appeared in person. On the said date, Mr. Rajesh Mahajan, Id. Counsel was appointed as an *Amicus* for the Respondent. On 5<sup>th</sup> September, 2023, this Court granted leave to appeal under Section 378(4) CrPC, and admitted the present appeal for hearing.

### **Grounds of appeal**

11. In the present appeal, the Appellant-State argues that the Trial Court's judgment ought to be set aside. The Trial Court acquitted the Respondent by erroneously concluding that the Prosecution failed to prove beyond reasonable doubt that the survivor was less than 18 years old at the date of the incident. It is claimed that the Trial Court did not adequately appreciate the consistency of the survivor's testimony, which is enough to support the



Prosecution's case.

12. Further, the Trial Court is stated to have disregarded documentary evidence, including the School Admission/Withdrawal Register and the Affidavit from the *Chacha* (uncle) of the survivor, which indicated the survivor's date of birth as 2<sup>nd</sup> April, 1997. The Appellant also contended that the Trial Court did not give due weight to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, (*hereinafter*, '*JJ Act*') and the POCSO Act, which considers school certificates as sufficient evidence for establishing a minor's age. The Trial Court allegedly gave undue importance to the fact that the survivor and the Respondent knew each other, despite the survivor's testimony that she did not consent to the physical relationship and that the Respondent had forced her.

13. Another ground of appeal is that that the Respondent failed to rebut the presumption under Section 29 of the POCSO Act, and thus ought to have been convicted.

**Submissions of Id. Counsels for the parties**

14. The main issue raised by Mr. Bahri, Id. APP for the State, is that the Trial Court has acquitted the accused on the ground that the date of birth of the survivor i.e., 2<sup>nd</sup> April, 1997, could not be proved. It is his submission that despite the Extracts of Admission and Withdrawal Register from the school having been produced by the Prosecution, the Trial Court disbelieved it and gave the benefit of doubt to the Respondent. Reliance is placed upon the *Shapath patra* given by DW 1, which was proved on record along with the Admission and Withdrawal Register, both of which clearly stated that the survivor's date of birth is 2<sup>nd</sup> April, 1997. He submits that under the JJ Act and the Juvenile Justice (Care and Protection of Children) Rules 2007,



(hereinafter, 'JJ Rules') such a document is sufficient evidence under Section 94 of the JJ Act read with Section 34 of the POCSO Act. The school certificate from the survivor's school is sufficient evidence, and thus there was no need to conduct an ossification test in the present case. Reliance is also placed on Section 35 of the Indian Evidence Act, 1872, to argue that the Admission and Withdrawal Register is a public record, which ought to have been taken into consideration.

15. Ld. APP places reliance on the decision of the High Court of Chhattisgarh in *Lacchuram Mandavi v. State of Chhattisgarh* (CRA No. 2230 of 2023, judgment dated 16<sup>th</sup> April, 2024) wherein under similar circumstances, the *dakhil kharij* register maintained by the school was held to be sufficient evidence. He also relies upon the decision of the Supreme Court in *Jarnail Singh v. State of Haryana* (2013) 7 SCC 263 wherein while referring to Rule 12 of the JJ Rules, an identical provision was considered by the Supreme Court. In the said decision, it was held that date of birth entered in the school first attended by the child would be final & conclusive, and no other material would be required. The Supreme Court also held that only if such certificate is not available, that the ossification test is required.

16. *Per contra*, Mr. Mahajan, Id. *Amicus* appearing for the Respondent, submits that the relationship between the Respondent, who was in his early 20's at the time of the incident, and the survivor, who was 17/18 years of age, was consensual. He relies on various letters written by the survivor to the Respondent, expressing love and affection. He submits that on the date of the incident, the survivor voluntarily accompanied the Respondent around midnight. She jumped over the wall, rode with the Respondent on his scooter as a pillion rider, and spent one night at a friend's place. When they returned



home and saw that her parents had noticed her absence, they went back and stayed at another friend's house. During this period, they again had sexual intercourse. However, upon returning home, the survivor had a change of heart and filed a complaint, upon advice of the family members.

17. He further submits that, unfortunately, in India, the proximate-age exception does not exist as it does in the U.K., where such cases would not be treated as an offense.

18. He specifically relies on the testimonies of DW-1 and DW-2. The father of the survivor had already passed away. In view thereof, the survivor's uncle had her admitted to school. The uncle appeared as DW-1, stated in his evidence that he does not remember the exact date of birth of the survivor, and was not aware if any birth certificate was obtained from the Registrar of Births & Deaths. He further stated that the survivor's father had expired in 1995-96, but he was not sure of the exact date. Based on the evidence of DW1 and DW2, it is his submission that the mention of the date of birth in the *Shapath patra* did not have any basis. Even DW-2 stated in his evidence that the survivor's father had passed away in mid-1996, and denied that her date of birth was 2nd April, 1997. Thus, he concludes that from the statements of DW-1 and DW-2, it was clear that neither of them was aware exactly was to when the survivor was born.

19. It is the further submission of Mr. Mahajan, Id. *Amicus*, that the school Admission and Withdrawal Register by itself was not enough to prove the age of the survivor. The said Admission and Withdrawal Register is an admissible piece of evidence, but the probative value of such a document ought to have been examined. In a situation where there are no other documents supporting the said Admission and Withdrawal Register and the Defence has led



evidence to show that there was no basis for the mentioned date of birth in the *Shapath patra*, the benefit of doubt ought to be given to the Respondent. Reliance is placed upon the *State of Madhya Pradesh v. Munna (2016) 1 SCC 696*, wherein the Supreme Court under similar circumstances held that if the exact age of the survivor cannot be determined and the approximate date is not supported by any other independent evidence, the same cannot be the basis for a conviction.

20. Thereafter, he relies upon the decision in *State v. Shailesh Kumar (2019 SCC OnLine Del 8318)*, wherein the Id. Division Bench of this Court also took a similar view by holding that the entry of the date of birth in the school Admission and Withdrawal Register would have evidentiary value only if there is material to support the basis on which age was recorded. The probative value of such a document ought to be examined; failing that, the said Admission and Withdrawal Register would be of no consequence. In the said decision, the Id. Division Bench also takes into consideration that it is common for parents and relatives to mention incorrect dates of birth to gain advantages, such as for public employment. It has been categorically held that the mere production of a school register is not sufficient to prove the age of the survivor.

21. He also submits that the minimum sentence in a case registered under the POCSO Act is 10 years, and if the Court starts applying the standard of an approximate date of birth, it would lead to hazardous consequences for the accused. It has also been stated that the person who made the Admission and Withdrawal Register ought have been examined by the Prosecution. Thus, unless there is a reliable source of information of the date of birth of the survivor, the same would be of no value.



22. The next proposition argued by Mr. Mahajan, Id. Counsel, is that the principle of interference in appeals against acquittals is well settled. If the Trial Court has taken a plausible view, then the Appellate Court would not interfere. Reliance is placed on ***H.D. Sundara v. State of Karnataka, (2023) 9 SCC 581***, wherein the Supreme Court held that the Appellate Court can reappreciate the oral and documentary evidence, but if the Trial Court has taken a plausible view, the Appellate Court would not overturn the order of acquittal.

23. He also relies upon the MLC record (Ex.PW-3/A) to argue that the survivor had a sexual relationship even 3 to 4 months prior to the incident and is, therefore, mature enough to understand the consequences of her actions.

24. The Id. Counsel for the Respondent relies upon the following decisions:

- *State of M.P. v. Munna (2016) 1 SCC 696*
- *State (NCT of Delhi) v. Shailesh Kumar 2019 SCC OnLine Del 831*
- *Brij Mohan Singh v. Priya Brat Narain Sinha AIR 1965 SC 282*
- *Birad Mal Singhvi v. Anand Purohit 1988 Supp SCC 604*
- *Sushil Kumar v. Rakesh Kumar (2003) 8 SCC 673*
- *Satpal Singh v. State of Haryana (2010) 8 SCC 714*
- *H.D. Sundara v. State of Karnataka (2023) 9 SCC 581*
- *Babu v. State of Kerala (2010) 9 SCC 189*
- *Chandrappa v. State of Karnataka (2007) 4 SCC 415*
- *Sheo Swarup v. King Emperor AIR 1934 PC 227 (2)*
- *Ghurey Lal v. State of U.P (2008) 10 SCC 450*
- *State of Rajasthan v. Naresh (2009) 9 SCC 368*



25. In rejoinder, Mr. Bahri, Id. APP submits that even in the letters written by the survivor, there was no sexual intimacy or physical intimacy which is mentioned. These are general letters, and just because the survivor and accused were having a love affair, does not mean that forcible intercourse is permitted. The survivor in her evidence clearly states that intercourse was forcible and therefore the acquittal is incorrect. Finally, he submits that the sexual history or the character of survivor is completely irrelevant in such a matter.

### **Analysis and Conclusions**

26. The Supreme Court recently reaffirmed in ***Mallappa & Ors. v. State of Karnataka (2024 INSC 104)*** that under Section 378 of the CrPC, the High Court has the power to reappreciate evidence on record when considering a judgment of acquittal. The Supreme Court has held that the High Court's power to re-appreciate evidence in cases of acquittal is qualified. The primary considerations are whether the Trial Court thoroughly reviewed the evidence, considered all material pieces, and whether its findings are legally sound and free of factual errors. If these conditions are met, the High Court should only overturn the acquittal if the Trial Court's view is not reasonably possible. An acquittal should not be reversed merely due to a difference of opinion. The relevant portions of the said decision are as follows:

*“5. No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to re-appreciate or re-visit the evidence on record. **However, the power of the High Court to re-appreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost***



**question to be asked is whether the Trial Court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the Trial Court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the Trial Court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.**

26. It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The 'two-views theory' has been judicially recognized by the Courts and it comes into play when the appreciation of evidence results into two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the very existence of an equally plausible view in favour of innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. And therefore, when two views are possible, following the one in favour of innocence of the accused is the safest course of action. **Furthermore, it is also settled that if the view of the Trial Court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eyes of law.**"

27. Thus, in an appeal against acquittal, this Court ought to remain mindful that if, upon reappreciation of the evidence, the view taken by the Trial Court is plausible, then such an appreciation of evidence ought not to be interfered with by the Appellate Court.



## **28. Evidence of Prosecution Witnesses**

### **28.1 Evidence of PW-1 Survivor**

- PW-1 confirms that she knew the Respondent prior to the incident as he used to work in the neighbourhood of PW-1 as a driver. PW-1 also confirms that they used to have regular conversations and exchange of letters. PW-1 states “*gradually we became friends*”.
- The allegation is that on the day of the incident, PW-1 met the Respondent around midnight of 10<sup>th</sup> April, 2014, and she was taken to the office of the employer of the Respondent where he committed rape forcibly.
- PW-1 was then dropped off at her residence by the Respondent at which stage PW-1 realised that her family members were awake and the Respondent refused to accompany her to the residence. The two of them then went to the Respondent’s residence, but when the family members of the Respondent did not allow the Respondent to enter the house with PW-1, she claims that he took her to her friend’s house where they again have physical relations, forcibly. The Respondent’s friend then dropped her to her residence on bike.
- She later in the evening narrated the facts of the incident to her sister and brother-in-law, after which a complaint was lodged by her uncle at PS Dwarka South. Medical examination of the PW 1 was then conducted.
- PW-1 identified her signatures on the statement recorded under Section 164 CrPC. PW-1 also identified the Respondent correctly. In her cross-examination, she confirmed that she knew the Respondent for more than one and a half years. She was confronted by letters running



into 18 pages which she admitted as having been written by her.

- In the complaint, the second place of incident i.e., the residence of the friend was not mentioned. She admitted that she did not tell the elders in the house i.e., her grandmom, uncle, and the brother that she was going with the Respondent.
- She confirmed that she had jumped over the boundary wall to ride with the Respondent on his scooter as a pillion rider. She also confirmed that she did not raise any alarm about the sexual intercourse as the Respondent had promised to marry her. There was no discussion between the family members on the issue of marriage till then. She confirmed that both of them were in love with each other.
- She also confirmed that in the initial statement exhibited as PW-1/A, the complaint did not contain all the facts, including the facts leading up to the filing of the complaint. Her father had expired before her birth and she did not have any birth certificate.

#### 28.2 PW-2 Pritam Singh

- PW-2 was Mr. Pritam Singh from the Gyan Sagar Public School, P-Block, Raj Nagar-II, Palam Colony, New Delhi. He stated that in the school records the date of birth is mentioned as 2<sup>nd</sup> August, 1997 which was based on a certificate given by the guardian of the child. He confirmed that at the time of admission, no birth certificate was issued by the MCD or any government authority was produced or filed with the school.

#### 29. Statement of the Respondent

- The Respondent denied that he had proposed to marry the survivor. He claimed that the survivor had actually asked him to marry her. Most



of the suggestions put to the Respondent were denied by him.

- He claimed that the survivor was his friend, and it was when her uncle came to know regarding their friendship that she was pressurised to make a false complaint against her.

### **30. Evidence of Defence Witnesses**

#### **30.1 DW-1 Harish Kumar Yadav**

- DW-1, the uncle of the survivor stated that he was not sure of the exact date when his brother i.e., father of the survivor expired.
- He also did not remember the exact date of birth of the survivor and whether any birth certificate from the Registrar Births and Deaths was issued pertaining the survivor's birth.
- He identified his signatures on the *Shapath patra* (Ex.PW-2/B) which he submitted to the school at the time of her admission. He claimed that the date of birth of the survivor may have been told to him by his mother or his father, i.e., the grandfather of the survivor. He denied the suggestion that the survivor was born in April 1996, and confirmed that he did not file any document to support the date of birth of the survivor. He also confirmed that he was not sure of the exact date of birth of the survivor.

#### **30.2 DW-2 Chacha (uncle) of survivor**

- DW-2, the second uncle (*chacha*) of the survivor also stated that his elder brother i.e., the father of the survivor died sometime in mid-1996. The survivor was born after the death of the father. At the time when the father died, her mother was pregnant two to three months. He also did not know the exact date of birth.



- He confirmed that DW-1 who is the real uncle i.e., *chacha* of the survivor had got her admitted in school. He stated that the survivor was born sometime in 1996 or 1997. He also did not have any documentary proof regarding the death of the child's father.
- He knew the Respondent, who was working as a driver with a neighbour, but was not aware of the friendship between them.
- On the date of the first incident, when they searched for the survivor and found her not present in the house, he stated that a call was made at number 100 to the police authorities who were informed.
- She then arrived on the next date when the family was informed about the rape committed on her twice after which he took her to the police station along with the survivor's sister.

31. In the present appeal, the question that arises is whether the Trial Court's decision requires to be interfered with. The decision in the present appeal primarily lies on the question as to whether the age of the survivor has been established by the Prosecution or not.

32. The survivor does not have parents and her main guardian was her *chacha* who appeared as DW-1. Survivor's father passed away before she was even born. He was not produced as a Prosecution witness. He accepted that he had produced the *Shapath patra* at the time of admission of the survivor in school. However, he could not recall as to the basis on which he had written date of birth in the said *Shapath patra*. He also did not know whether he had learnt the date of birth of the survivor from the survivor's mother. The evidence of DW-1 and DW-2 read conjointly reveals certain facts:



- i) Father of the survivor had passed away when the mother was pregnant with the survivor;
- ii) Father had passed away in the mid of 1996 itself;
- iii) Survivor was born a few months after the death of the father;
- iv) That the mother also expired later.

33. Considering the testimony of witnesses DW-1 and DW-2, even if the mother was pregnant in the initial stages at the time of death of the father in the year 1996, the date of April, 1997 does not appear to be the correct date of birth. Considering the family background of the survivor, no one from her family knew the exact date of birth of the survivor, and at best the members could connect her date of birth with certain events which had taken place contemporaneously. One specific and identifiable event was the demise of her father. Though the specific correct date of birth cannot be ascertained, it is clear that the date of birth given in the School Admission and Withdrawal Register i.e., 2<sup>nd</sup> April, 1997 is not the correct date of birth of the survivor.

34. In *P. Yuvaprakash v. State Rep. By Inspector of Police [2023] 10 S.C.R. 478* the Supreme Court laid down the manner in which age of a minor is to be determined under the POCSO Act. The Court clearly held that recourse may be had to Section 94 of the JJ Act as well for determination of age. The Supreme Court also categorically observed that the burden is always on the Prosecution to establish what it alleges i.e., the date of birth of the survivor. The observations in the said judgment are set out below:

*“13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section*



**94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:**

*"(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".*

14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. **The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a**



document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.”

35. Further, in *State v. Shailesh Kumar (2019 SCC OnLine Del 8318)*, the Id. Division Bench was dealing with a similar situation wherein the Court was considering an issue regarding the determining the age of the survivor. Following the decision of the Supreme Court in *Jarnail Singh v. State of Haryana (2013) 7 SCC 263*, the Id. Division Bench held that no probative value can be attached to a record unless and until the parents or guardians are examined or the person on whose information the entry may have been made, is examined. The relevant portion of the said decision reads as follows:

“18. It is well settled that an entry of the date of birth made in the school admission register would have evidentiary value **only if there is material available based on which the age was so recorded. In the case of Brij Mohan Singh v. Priya Brat Narain Sinha reported as AIR 1965 SC 282, the Supreme Court held that an entry of birth recorded in the school register maintained by an illiterate Chowkidar, was not admissible and had no probative value within the meaning of Section 35 of the Indian Evidence Act.**

...

20. The probative value of the entry regarding the date of birth made in a school register has come up for consideration by the Supreme Court and the High Courts in several other cases and the common view



**expressed is that no probative value can be attached to such a record unless and until the parents are examined or the person on whose information the entry may have been made, is examined.**

23. In the present case, the father of the victim, PW-5 deposed that he did not know the date of birth of his daughter as he was illiterate, nor was he in a position to state her current age. He stated that he got the victim admitted in the school in class-I in the village and at that time, she was about 3-4 years old. In his cross-examination, PW-5 admitted that he did not have any proof regarding his daughter's date of birth. It is therefore clear that the father of the victim had not submitted any document to the school at the time of getting his daughter admitted in class-I, on 12.08.2005, to establish her date of birth as 10.01.2000, as recorded by the school. He was candid enough to state that being illiterate, he did not know the date of birth of the victim and that she was between 3-4 years old when she was admitted in class-I.

**24. In the absence of any primary material based on which the age of the victim was recorded in the school register, it is not possible to accept her date of birth as 10.01.2000. Moreover, even the teacher from the school in question, who had appeared as PW-3, had stated that he had given a handwritten document to the police on 17.12.2014 (Ex.PW3/C), wherein he had recorded that when a child attains the age of 5+ years, the parents approach the school for their admission. If one goes by the said statement, then the testimony of the victim's father to the effect that he had got her admitted in class-I when she was about 3 -4 years, cannot be accepted, as it is premised on mere guess work.**



36. Perusal of Section 94 of the JJ Act shows that any of the following documents are required for establishing the age of the minor:

- i) Date of birth certificate from school;
- ii) Matriculation or equivalent i.e., Class 10<sup>th</sup> certificate issued by an Examination Board;
- iii) Date of birth certificate from the Corporation or Municipal Authorities;
- iv) In the absence of any of the above, by an ossification test or any advanced test as may be ordered.

37. In the present case, the only document that is available is the *Shapath patra* signed by DW 1 at the time of admission of the child in the school. The said guardian, who appeared as DW-1, and DW-2, another uncle of the survivor, could neither justify nor confirm the stated date of birth i.e., 2<sup>nd</sup> April, 1997. There is no other document as contemplated under Section 94 of the JJ Act to establish the date of birth of the survivor.

38. Further, the Prosecution did not conduct any ossification test or any other similar test to establish the date of birth of the survivor.

39. This Court agrees with the view taken by the Trial Court that the date of birth of the survivor mentioned in the School Admission and Withdrawal Register cannot be taken in evidence, and hence the Prosecution has not been able to establish beyond reasonable doubt that the survivor was under the age of 18 years when the incident took place.

40. It is well-settled that in a situation where the Prosecution has not been able to establish the age of the survivor beyond reasonable doubt, the benefit of doubt ought to be given to the accused. In ***Rajak Mohammad v. State of Himachal Pradesh [(2018) 9 SCC 248]***, the Supreme Court held as follows:



**“4. In view of the above, the focal point for decision would be the age of the prosecutrix in order to determine as to whether she was a major so as to give her consent.**

5. In this regard, we have considered the evidence and materials on record. The age of the prosecutrix has been sought to be proved by the prosecution by bringing on record the School Admission Form (Exhibit PW5/A) and the certificate (Exhibit PW5/B) issued by one Jasdeep Kaur (P.W.5), JBT Teacher of Government School Dungri Plate. P.W.5 in her deposition has stated that the 4 writings in the School Admission Form (Exhibit PW5/A) are in her handwriting and the signature affixed is that of the mother of the prosecutrix. In cross-examination, P.W.5 had stated that the details mentioned in Exhibit PW5/A have been obtained from the School Leaving Certificate issued by the Government Primary School, Tambol. **The certificate issued by the Government Primary School Tambol on the basis of which the details in the Admission form (Exhibit PW5/A) was filled up by P.W.5 has not been exhibited by the prosecution. Nothing hinges on the document exhibited by the prosecution as Exhibit PW5/B as that is the consequential certificate issued on the basis of the entries in Exhibit PW5/A. The mother of the prosecutrix who had allegedly signed Exhibit PW5/A has not been examined by the prosecution.**

6. On the other hand, we have on record the evidence of Dr. Neelam Gupta (P.W.8) a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.



7. While it is correct that the age determined on the basis of a radiological examination may not an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

8. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.

9. We will, therefore, have to conclude that the accused appellant deserves to be acquitted on the benefit of doubt. We, consequently, set aside the order of the High Court and the conviction recorded as well as the sentence imposed and acquit the accused appellant of the offences alleged. We further direct that the accused appellant be released from custody forthwith unless his custody is required in connection with any other case.

10. The appeal is allowed in the above terms.”

41. In a case of this nature, the consequences for the accused can be extremely serious. The evidence also discloses clearly that the survivor had written several letters to the accused expressing love and affection to him. Even on the date of the incident i.e., intervening night of 10<sup>th</sup>-11<sup>th</sup> April, 2024, she went out of the way to go out of her house, and to accompany the



Respondent. There is evidence which points towards the fact that the relationship was consensual.

42. In her testimony, however, she deposed that there was forcible sexual relationship, but the finding of the Id. Trial Court on this aspect is that the forcible nature of the relationship between the survivor and the Respondent was not established beyond reasonable doubt by the Prosecution.

43. In such cases, where the survivor consented to the relationship, knew the Respondent for a considerable period of time, and accompanied the Respondent, the Prosecution ought to have categorically and unequivocally established the age of the survivor.

44. In various decisions, concern has been expressed in respect of teenagers who are in consensual relationships having physical intercourse. In **Ashik Ramjan Ansari v. The State of Maharashtra & Anr. (2023:BHC-AS:19208)**, Justice Bharati Dangre of the Bombay High Court considered a similar scenario and made some pertinent observations:

*“22. The scenario, which emerges is, in the backdrop of a girl below 18 being considered as minor, with a presupposed notion that she is not expected to indulge herself into a sexual activity and even if she does so, being an active participant in the activity, her consent is immaterial and is no consent in the eyes of law. Such an act would mean to statutory rape as one of the said persons is legally too young to consent to the sex and, since, her consent is no consent in the eyes of law, the act attracts the charge of rape and also attract grave offence under the POCSO Act.*

*As a result of this scenario, even a boy aged 20 indulges with a girl aged 17 years and 364 days, he would be found guilty of committing rape upon her, despite the girl clearly admitting that she was equally*



*involved in the act of sex. The minor is not considered to be capable enough to give valid consent in the eyes of law for entering into consensual sex.*

*No doubt, the age of consent has been kept on increasing by various legislatures, after passing of the Age of Consent Act, 1891 and at present, it has increased to 18 in India with the enactment of special law in form of the POCSO Act, which was intended to protect a minor from being cajoled by the older one for entering into a sexual activity.*

*However, in the cases of the teenagers, who fall for attraction of the opposite sex and enter into a sexual relationship, out of impulsiveness, only one has to take the consequences, on being charged for committing an offence of rape, though the other had also indulged into the same act.*

***The concern about the rising number of cases, where minor are punished under the POCSO Act are being expressed by various fronts in distinct proceedings before the Hon'ble Supreme Court, the High Courts of the country as well as the POCSO Special Court, where the POCSO cases are tried. Despite a clear stand being taken by a female in such an act, that it was a case of consensual sex, the other part i.e. the male stand convicted under the POCSO Act with a specific reasoning, being supporting that POCSO Act was never intended to include consensual sex with the minor.***

***23. A case of physical attraction or infatuation always come forth, when a teenager enter into a sexual relationship and it is high time that our country is also cognizant of happenings around the world. In country like Japan, a movement supported by students is gaining momentum. It is necessary that our country will have to look around and observe all that is happening around the world in this regard, but one***



*thing is sure that in this whole scenario, if a young boy is castigated for being guilty of committing the rape on a minor girl, merely because she is below 18, but an equal participant in the act, he would suffer a severe dent, which he will have to carry lifelong. With no option left to the Courts trying the POCSO cases, to impose punishment lesser than the one prescribed for committing penetrative sexual assault, the accused necessarily has to undertake the maximum punishment and in this scenario, the question that the Madhya Pradesh High Court has recently posed, by referring to the injustice going on with adolescent boys, assumes great significance.*

Ultimately, it is for the Parliament to ponder upon the said issue, but being cognizant of the cases, which are coming before the Courts, with a huge chunk, being the romantic relationship.

24. The United Nations Committee on the Rights of Child (CRC), in General Comment No.20, with respect to the minimum age of consent for sexual intercourse, has urged the States to strike a balance between protection of children from sexual exploitation and abuse and in respect for their evolving autonomy. It has recommended as under :-

*“States parties should take into account the need to balance protection and evolving capacities and define an acceptable minimum age, when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non exploitative sexual activity.”*

25. Whilst all children are entitled to be protected from sexual violence, such protection should also enable young people to extend their boundaries, exercise choices and engage in necessary risk taking though not exposing them to inappropriate response, harm and



*danger. The penal approach towards adolescents' sexuality has impacted their life to a barrier free access to sexual and reproductive health services. The criminalization of romantic relationship has overburdened the criminal justice system by consuming significant time of the judiciary, police and the child protection system and ultimately when the victim turns hostile by not supporting the charge against the accused, in the wake of the romantic relationship she shared with him, it can only result in an acquittal.*

**Though the POCSO Act cannot stop the natural feelings towards the opposite sex, particularly in the age which account for biological and psychological changes, punishing a minor boy, who entered into a relationship with a minor girl, who were in the grip of their hormones and biological changes would be against the best interest of child and though it is the duty of the State to safeguard the ability to take decisions and to protect the autonomy of the individual, the adolescents cannot be deprived of this right. The mere apprehension that adolescents would make an impulsive and bad decision, cannot classify them under one head and by ignoring their will and wishes.** The age of consent necessarily has to be distinguished from the age of marriage as sexual acts do not happen only in the confines of marriage and not only the society, but the judicial system must take note of this important aspect.”

45. In the present case, the Respondent and the survivor were in a relationship which has been proved by the handwritten letters exhibited in evidence. The survivor also admitted to writing the said letters in her cross-examination, where she states as under:

**“(At this stage, the defence counsel has put copies of letters running into 18 pages to the witness). *The witness after seeing the letters admits that same were***



*written by her to the accused. Letters are now collectively exhibited as EX.PW1/D1 (colly)."*

46. PW-1 had stated in her cross-examination that she knew the Respondent for more than one and a half years prior to the date of the incident. She also confirmed that she jumped over the boundary wall and drove with the Respondent on a scooter as a pillion rider. She also admitted in her cross-examination that the Respondent did not use any contraceptives, but she did not raise any alarm as he had promised to marry her. PW-1 does say that she was forced to have sexual intercourse. PW-1 also confirmed that *"both of us were in love with each other"*. She also confirmed that she did not possess a date of birth certificate and that her father expired before her birth.

47. In his statement under Section 313 CrPC, the Respondent confirmed that he knew the survivor and that both had become friends. On a suggestion that he had proposed to marry her, he stated that the survivor had asked for marriage.

48. On a re-appreciation of evidence, this Court does not find any reasons to disagree with the view taken by the Trial Court.

49. Recently, the Supreme Court in ***H.D. Sundara & Ors. V. State of Karnataka (2023 INSC 858)*** has laid down the scope of entertaining appeals against acquittals under Section 378 of CrPC, and had observed as under:

*"7. In this appeal, we are called upon to consider the legality and validity of the impugned judgment rendered by the High Court while deciding an appeal against acquittal under Section 378 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'). The*



principles which govern the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 of Cr.P.C. can be summarised as follows: -

(a) The acquittal of the accused further strengthens the presumption of innocence;

(b) The Appellate Court, while hearing an appeal against acquittal, is entitled to re-appreciate the oral and documentary evidence;

(c) The Appellate Court, while deciding an appeal against acquittal, after re-appreciating the evidence, is required to consider whether the view taken by the Trial Court is a possible view which could have been taken on the basis of the evidence on record;

(d) If the view taken is a possible view, the Appellate Court cannot overturn the order of acquittal on the ground that another view was also possible; and

(e) The Appellate Court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible.

8. Normally, when an Appellate Court exercises appellate jurisdiction, the duty of the Appellate Court is to find out whether the verdict which is under challenge is correct or incorrect in law and on facts. The Appellate Court normally ascertains whether the decision under challenge is legal or illegal. But while dealing with an appeal against acquittal, the Appellate Court cannot examine the impugned judgment only to find out whether the view taken was correct or incorrect. After re-appreciating the oral and



documentary evidence, the Appellate Court must first decide whether the Trial Court's view was a possible view. The Appellate Court cannot overturn acquittal only on the ground that after re-appreciating evidence, it is of the view that the guilt of the accused was established beyond a reasonable doubt. Only by recording such a conclusion an order of acquittal cannot be reversed unless the Appellate Court also concludes that it was the only possible conclusion. Thus, the Appellate Court must see whether the view taken by the Trial Court while acquitting an accused can be reasonably taken on the basis of the evidence on record. If the view taken by the Trial Court is a possible view, the Appellate Court cannot interfere with the order of acquittal on the ground that another view could have been taken."

50. From the above decision of the Supreme Court, it is well-settled that an order of acquittal ought not to be overturned by the Appellate Court merely because another view is possible.

51. In the present case, in the impugned judgment, the Trial Court has pithily discussed the evidence and has applied the correct principles of law. The onus of proving the date of birth of the survivor has been correctly placed on the Prosecution, which the Prosecution has failed to discharge. The Court has also recorded the consensual nature of relationship between the parties, and has given the Respondent the benefit of doubt in relation to the forcible nature of the physical relationship.

52. This Court has again perused the entire evidence and has heard the Id. Counsels for the parties and is of the opinion that the impugned judgment dated 21<sup>st</sup> December, 2019 passed by the Id. Trial Court does not deserve to be interfered with. The acquittal of the Respondent-Tofil Ahmed is accordingly confirmed. The appeal is dismissed. No orders as to costs.



2024:DHC:5823-DB



53. Let the present order be communicated to the concerned Jail Superintendent by the Registry.

**PRATHIBA M. SINGH, J**

**AMIT SHARMA, J**

**AUGUST 07, 2024**

*Rahul/dj/dn*