



\$~2

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 30.01.2025

+ CRL.A. 483/2016, CRL.M.A. 7490/2021, CRL.M.(BAIL) 799/2022
RAJ KISHOREAppellant

Through: Mr. Krishan Kumar, Mr.
Kishan Bedi, Advs.

versus

STATE

....Respondent

Through: Mr. Pardeep Gahlot, APP

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is an appeal seeking to challenge the judgment dated 08.01.2016 and order of sentence dated 11.01.2016 passed by the learned ASJ-01, Rohini District Courts, New Delhi in SC No. 58/2014 pertaining to FIR No. 372/2013 registered at PS Khanjawala under Sections 363 of the Indian Penal Code ("IPC").
2. *Vide* the impugned judgement, the appellant was acquitted under Sections 363 and 366 of IPC and was convicted under Section 6 of the Protection of Children from Sexual Offences Act, 2012 ("*POCSO Act*").
3. *Vide* the impugned order of sentence, the appellant was sentenced with rigorous imprisonment of 10 years with a fine of Rs. 10,000/- under Section 6 of POCSO Act.

FACTUAL BACKGROUND

4. The brief facts of the case are that on 12.11.2013, the father of the prosecutrix registered a complaint regarding the missing of his daughter aged about 13 years. The prosecutrix had gone to school but did not



return home. The complainant expressed his doubt on the appellant.

5. During the course of investigation, the prosecutrix and the appellant were apprehended on 28.11.2013 at Abu Fazal Enclave, Sarita Vihar, Delhi.
6. The prosecutrix was medically examined and her statement under Section 164 CrPC was recorded. The appellant was also arrested.
7. On 29.04.2014, charges under Sections 363 and 366 of IPC and under Section 5(l) punishable under Section 6 of POCSO Act, alternatively under Section 376(2)(n) of IPC, were framed against the appellant, to which he pleaded not guilty and claimed trial.
8. The prosecution examined a total of 15 witnesses and the statement of the accused/appellant under Section 313 of CrPC was recorded, wherein he claimed himself to be innocent and having been falsely implicated in the case by the prosecutrix at the instance of her parents. The appellant did not lead any defence evidence.
9. The learned Sessions Court after considering the entire evidence *vide* the impugned judgement, acquitted the appellant under Sections 363 and 366 of IPC and convicted him under Section 6 of POCSO Act and *vide* the impugned order, he was sentenced with rigorous imprisonment of 10 years with a fine of Rs. 10,000/- under Section 6 of POCSO Act.
10. Aggrieved by the impugned judgement, the appellant has filed the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANT

11. Mr Kumar, learned counsel appearing on behalf of the appellant challenges the impugned judgement and submits as follows:



- A. Learned Trial Court has failed to appreciate that the prosecution has not been able to prove the age of the prosecutrix and the opinion of the learned Trial Court that the prosecutrix was a minor at the date of incident i.e. on 11.11.2013 is against the facts and circumstances and even without any cogent evidence. Reliance is placed on the case of *P. Yuvaprakash vs. State Rep. By Inspector of Police, (2023) SCC OnLine 846* to urge that mere production of school register is not sufficient to prove the age of the prosecutrix.
- B. Learned Trial Court failed to appreciate the fact that the prosecution has not been able to prove the alleged offence of POCSO Act. Learned Trial Court was of the view that the prosecutrix had willingly gone with the appellant. Further, the prosecutrix has categorically stated that during the period she stayed with the appellant, he did not commit any wrong act with her.
- C. Thus, learned Trial Court has erred in holding that the prosecution has been successful in establishing the guilt of the appellant beyond reasonable doubt in respect of offence levelled against the appellant. Therefore, the impugned judgment and order on sentence is liable to be set-aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

12. Mr Gahlot, learned APP appearing on behalf of the respondent supports the impugned judgement and submits that:
- A. The date of birth as per school record of the prosecutrix is 20.09.1999 and as such she was about 14 years of age at the time of the incident. The school record has been proved by PW-1/Admission Incharge of



the school. It is thus submitted that the age of the prosecutrix has been proved to be a minor.

B. The prosecutrix was a minor on the date of the incident, thus, her consent has no legal sanctity. She has admittedly remained with the appellant at his residence from 11.11.2013 to 28.11.2013. Through medical and forensic evidence, the prosecution has proved beyond reasonable doubt that the appellant had established sexual relations with the prosecutrix during the said period.

C. Thus, the prosecution has proved its case beyond reasonable doubt and the learned Trial Court has correctly passed the impugned judgement and convicted the appellant.

ANALYSIS AND FINDINGS

13. I have heard learned counsel for the parties and perused the material on record.

14. Before discussing the merits of the contentions and evidence in this case, it is pertinent to note that the Hon'ble Supreme Court in the case of *Jarnail Singh v. State of Haryana, 2013 (7) SCC 263*, has held that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would be applicable to also determine the age of a child, who is a victim of crime. The Hon'ble Apex Court opined that there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law and a child who is a victim of crime. The relevant of paragraph of the said judgement is extracted below:-

“23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the



view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. ...”

- 15.** On 15.01.2016, the Juvenile Justice (Care and Protection of Children) Act, 2015 (“JJ Act”) replaced the Juvenile Justice (Care and Protection of Children) Rules, 2007. Therefore, Section 94 of the JJ Act will be relevant and applicable in the present case which is *pari materia* with Rule 12 of the JJ Rules. The relevant part of Section 94 is extracted below:-

“94. Presumption and determination of age. -

(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.”

- 16.** Thus, it is evident from reading of the above provision that whenever the dispute with respect to the age of a child arises in the context of her or him being a minor, whether an accused or a victim, the Courts should take recourse to the steps indicated in Section 94(2) of the JJ Act. The three documents in order of which the JJ 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.”

- 17.** In the present case, the exhibits which show the date of birth of the victim as 20.09.1999 are:-



- A.** Exhibit PW15/H as marked in the document / Exhibit PW1/A as mentioned in the testimony of PW-1: Application Form for Admission in School: Date of Birth: 20.09.1999.
- B.** Exhibit PW15/J as marked in the document / Exhibit PW1/B as mentioned in the testimony of PW-1: Affidavit of father of the prosecutrix: Date of Birth: 20.09.1999.
- C.** Exhibit PW5/G as marked in the document / Exhibit PW1/C as mentioned in the testimony of PW-1: School Certificate: Date of Birth: 20.09.1999.
- D.** Exhibit PW5/F as marked in the document / Exhibit PW1/D as mentioned in the testimony of PW-1: Student Details: Date of Birth: 20.09.1999.
- 18.** The prosecution has examined PW-1, admission in-charge of the school who produced the school record regarding date of birth of the prosecutrix and deposed that as per the school record, prosecutrix was admitted in the school in 6th class on the basis of admission form and affidavit of her father. Her date of birth was entered in the school record as 20.09.1999. She also proved the certificate issued by the school in this regard. There was no documentary proof with regard to the date of birth of the prosecutrix at the time of her school admission. Thus, as per the school records, the prosecutrix was aged about 14 years 1 month 22 days on the date of incident.
- 19.** PW-8/father of the prosecutrix in his court testimony has deposed as under:-

“I got my daughter J admitted in the school three years back in



6th class. Earlier to this admission, I do not have any school leaving certificate since she was receiving informal education in an anganwadi. My daughter J was born in the native village. It is correct that my daughter J was 14 years of age at the time of her admission in the school. I am illiterate. I can only write my name. It is correct that I had undermentioned date of birth of my daughter J in the affidavit submitted for the purpose of her admission in the school. It is correct that after the statement of my daughter J recorded u/s. 164 CrPC, she informed me that she gave her said statement under pressure of NGO and police officials. It is correct that while making my complaint Ex.PW-8/A in the PS, police officials were repeatedly asking me to undermention the age of my daughter J. I did not go through the contents of Ex. PW-8/A before signing it as I am illiterate nor the same were read over to me by the police. The accused Raj Kishore is known to me for the last 8 - 10 years. It is correct that my daughter J had told me that she had gone and stayed with accused Raj Kishore with her own free will. My daughter J is presently studying in 9th class in the same school. ... (Emphasis added)''

20. The question that arises for consideration is whether the documents exhibited as above in the present case as well as the testimonies of PW-1 and PW-8 are sufficient to hold that the prosecutrix was a minor at the date of the incident.
21. On perusal, PW-8 has claimed that he provided the date of birth of the



prosecutrix at the time of her school admission as 20.09.1999 and also stated that she was 14 years old at the time of her school admission in the year 2011. He further stated that he had undermentioned the age and the date of birth of the prosecutrix at the time of her school admission for the purpose of her school admission. Hence, as per the above testimonies of PW-1 and PW-8, on the date of incident i.e. 11.11.2013, the prosecutrix was aged about 16-17 years.

22. Therefore, from the above discussion, it is clear that there is no clinching evidence with regard to the date of birth of the prosecutrix and the age of the prosecutrix at the date of the incident has been calculated primarily on guess work and speculation.
23. In the case of *Alamelu & Another v. State, Represented by Inspector of Police, (2011) 2 SCC 385*, the question of determination of the age was involved, the Hon'ble Supreme Court observed that the transfer certificate issued by the government school duly signed by the headmaster would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. The relevant paragraph of the said decision is extracted below:-

“38. ... However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate



would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. ...”.

24. In the present case, the admission in-charge of the school testified that in the absence of any documentary proof of age of the prosecutrix, the date of birth was recorded solely on the basis of the affidavit of her father. Additionally, the father of the prosecutrix claimed that he provided her date of birth during school admission but admitted that he had inaccurately under-mentioned her date of birth at the time of her school admission. This creates inconsistencies regarding the age of the prosecutrix at the date of the incident as the school admission records lack corroboration from her father. Consequently, the prosecution has failed to establish beyond a reasonable doubt that the prosecutrix was below 18 years old at the time of the alleged incident.
25. In the case of ***Rajak Mohammad v. State of Himachal Pradesh, 2018 SCC Online SC 1222***, it has been categorically stated that if the prosecution has failed to prove the age of the prosecutrix as per Section 94 of the JJ Act, the benefit of doubt must accrue in favour of the accused. Hence, balancing the rights of the accused with the protection of minors is essential to ensure justice is served appropriately, given the harsh, severe and stringent penalties under the POCSO Act. The said judgement was referred in paragraph 39 of ***Court on its own motion v. State of NCT of Delhi, Criminal Reference No. 02/2024***, which reads as:-

“39. In context of said all important aspect of ‘granting of benefit of doubt to accused at every stage’, we may also refer to



Rajak Mohammad v. State of Himachal Pradesh whereby the Hon''ble Supreme Court allowed the appeal of the convict who was facing charges of kidnapping and sexual assault and acquitted him while observing as under:-

9. While it is correct that the age determined on the basis of a radiological examination may not be 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...."

- 26.** In cases like the present one, where the prosecutrix was about 16-17 years old at the time of the incident and there is no conclusive proof of age as required under Section 94 of the JJ Act, it is unsafe to apply the provisions of the POCSO Act against the appellant. I am of the view that to convict an individual under the POCSO Act without definitive proof of the age of the prosecutrix, especially when the age difference between the prosecutrix and the age of majority is of only one or two years, would be harsh and unjust.
- 27.** However, this principle may not apply if other documents, such as a school attendance register or an affidavit from a parent, which is further corroborated by evidence, indicate that the victim is under 14 or 15 years old. Since the age gap in such cases is large, disregarding the POCSO



Act in such cases would be a miscarriage of justice.

- 28.** For the said reasons and in view of the discussion above, I am of the firm view that in consideration of the school records of the prosecutrix and the testimony of the father of the prosecutrix, it cannot be said with certainty that the prosecutrix was a minor on the date of the alleged incident.
- 29.** Additionally, in the present case, the prosecutrix testified that she left home and stayed with the appellant for about two weeks and stated that he did not commit any wrong act with her during that time. The prosecutrix initially claimed in her statements under Sections 161 and 164 of CrPC that the appellant had established physical relations with her at multiple times, however later, in her court testimony she denied the same. The prosecutrix also stated that she did not disclose about the sexual relations during her medical examination and before the magistrate under Section 164 of CrPC. Further, the prosecutrix expressed her desire to protect the appellant and also stated that the police officials and an NGO official dictated to her the contents of the complaint in the present case. The court testimony is extracted below:

“I have one elder brother and one younger sister. I am studying in class 9th in a government school.

*On 11.11.2013, I was studying in 8th class. On that day, I left home for my school at about 7:00-7:30 AM. My mother had scolded me on that day and so I was angry. I called the accused from mobile phone lying at my home before going to school and he met me outside the gate of my school on that day. **Instead of***



going to school, I went to the house of my friend Raj Kishore, who is present in the Court today (witness has correctly identified the accused), at Lajpat Nagar. I knew accused Raj Kishore since last 4/5 years prior to the incident as he is our distant relative. Accused used to come to our locality to meet his relatives, who were staying near my house. I remained at the house of accused for about 1/2 weeks. Accused did not commit any wrong act with me during the period I stayed with him at his house. Accused was staying alone in his house as his parents were living in their native village at Bihar. I was not aware that my father had filed a police complaint. After about one week, my father came with the police to the house of accused Raj Kishore and took me to PS Kanjhawala. Police made inquiry from me and also recorded my statement.

...

I had written in my complaint Ex.PW-5/A that accused had established physical relations with me 3 - 4 times during my stay with him. Vol. I had written my complaint Ex. PW-5/A as dictated to me by the police. It is correct that my mother Smt. Raj Kumari and one lady from NGO sent when my complaint Ex. PW-5/A was written and given to the police by me.

...

I have not stated in my statement Ex. PW-5/B to the learned MM that accused had established physical relations with me several times. Confronted with the statement Ex. PW-5/B from



point A to A where it is so recorded. It is correct that I want to save accused from legal consequences. It is wrong to suggest that as I want to save the accused, I am concealing the fact of physical relations made by accused with me. I did not tell my parents that police had dictated contents of complaint Ex.PW-5/A to me. I had told the learned MM about the manner in which police had obtained complaint Ex. PW-5/A from me. Confronted with statement Ex.PW-/B where it is not so recorded. It is wrong to suggest that I am deposing falsely in this regard.

NGO Madam was not present on the day my statement u/s. 164 CrPC was recorded by learned MM. The contents of my complaint Ex. PW-5/A were dictated to me by the NGO Madam. NGO Madam was not present in the hospital at the time of my medical examination. It is correct that I did not tell the doctor that accused had made physical relations with me during my stay with him at Lajpat Nagar. It is correct that I myself had gone with the accused Raj Kishore of my own free will. It is correct that I did not tell in my statement u/s. 164 CrPC that the accused had made physical relations with me. I cannot say how these facts have been mentioned in my statement Ex.PW-5/B. It is wrong to suggest that I am deposing falsely.”

30. All the facts proved in this case clearly indicate the willingness of the prosecutrix to accompany the appellant, however, there are



inconsistencies with regard to the sexual relations between her and the appellant. Further, there is no averment either in her chief-examination or cross-examination that sexual relations, if any, were established without her consent.

31. It is pertinent to note that the medical evidence as well as the forensic evidence shows that the appellant had established sexual relations with the prosecutrix. However, it does not support the case of the prosecution with regard to the alleged sexual assault as there were no injuries of resistance to the sexual act, thus, showing that the relations between the prosecutrix and the appellant were established with her consent.
32. Learned Trial Court has held that as far as the prosecutrix being a consenting party to the establishment of physical relations is concerned, the prosecutrix was legally not in a position to give consent for the same. However, this Court is of the firm view that while the legal age of consent is important for protecting minors, adolescents should be allowed to express their feelings and engage in relationships without fear of criminalization. The focus of the law should be on preventing exploitation and abuse rather than punishing love.
33. In the case of ***Court On Its Own Motion (Lajja Devi) vs. State (Delhi), 2012 (4) RCR (Civil) 821***, a Full Bench of this Hon'ble Court dealt with the issue that when the girl is more than 16 years of age and makes a statement that she went with her own consent and it can be accepted, the Court would be within its power in quashing the proceedings under Sections 363 and 376 IPC. However, the Full Bench cautioned that there can be no straitjacket formula to be applied and the Court has to be



careful to ensure the personal liberty of the girl and the attending circumstances, which would include the maturity and understanding of the girl, her social background, the age of the boy and girl, would also have to be taken into consideration. The relevant extract of the said decision is extracted below:

“48. We often come across cases where girl and boy elope and get married in spite of the opposition from the family or parents. Very often these marriages are inter-religion, inter-caste and take place in spite of formidable and fervid opposition due to deep-seated social and cultural prejudices. However, both the boy and girl are in love and defy the society and their parents. In such cases, the courts face a dilemma and a predicament as to what to do. This question is not easy to answer. We feel that no straight jacket formula or answer can be given. It depends upon the facts and circumstances of each case. The decision will largely depend upon the interest of the boy and the girl, their level of understanding and maturity, whether they understand the consequences, etc. The attitude of the families or parents has to be taken note of, either as an affirmative or a negative factor in determining and deciding whether the girl and boy should be permitted to stay together or if the girl should be directed to live with her parents. Probably the last direction may be legally justified, but for sound and good reasons, the Court has option(s) to order otherwise. We may note that in many cases, such girls severely oppose and



object to their staying in special homes, where they are not allowed to meet the boy or their parents. The stay in the said special homes cannot be unduly prolonged as it virtually amounts to confinement, or detention. The girl, if mature, cannot and should not be denied her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence. The Court while deciding, should also keep in mind that such marriages are voidable and the girl has the right to approach the Court under Section 3 of the PCM Act to get the marriage declared void till she attains the age of 20 years. Consummation of marriage may have its own consequences.”

- 34.** Therefore, the age of majority as prescribed, must be construed and interpreted in the context of the law for which it is being considered and in a case of this nature, where the minor is certain and unshaken in her opinion and desire, it would not be right and proper for this Court to brush aside her views on the sole ground that she is not 18 years of age as on date.
- 35.** For the reasons as discussed above, what cannot be lost sight of is that, the prosecutrix testified that she wants to save the appellant from legal consequences and even today, the prosecutrix is present in Court to support the acquittal of the appellant. Therefore, to convict the appellant under the POCSO Act would be a perversity of justice.

CONCLUSION

- 36.** Having regard to these overall factors, I am of the view that the



prosecution has not been able to prove the age of the prosecutrix being less than 18 years on the date of the incident beyond reasonable doubt and hence, the benefit of doubt has to accrue to the appellant. Additionally, the prosecutrix has stated that the physical relations between her and the appellant were established out of her own free will and desires.

37. For the said reasons, the impugned judgement dated 08.01.2016 and order of sentence dated 11.01.2016 passed by the learned ASJ-01, Rohini District Courts, New Delhi in SC No. 58/2014, is set aside and the appellant is acquitted of charges under Section 6 of POCSO Act.
38. The appellant is directed to be released forthwith, if not required in any other case.

JASMEET SINGH, J

JANUARY 30, 2025/DM
(Corrected and released on 21.02.2025)