



2025:DHC:4871



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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI*****Reserved on: 5<sup>th</sup> April, 2025******Pronounced on: 3<sup>rd</sup> June, 2025***

+ CRL.A. 1067/2024

KARAN KUMAR

.....Appellant

Through: Mr. M.P. Sinha, Mr. Yatharth Sinha,  
Mr. Neeraj Kanwar, Mr. Hitesh  
Thakur, Mr. Arnav Jain, Mr. Govind  
Pareek, Mr. Vikas Kumar, Mr. Satyam  
Mishra, Mr. Shwetabh Sharma, Mr.  
Shubham Tyagi, Mr. Arjun Singh  
Didaliya, Mr. Ankit Sahu and Ms.  
Kanchan Bharti, Advocates.

versus

STATE &amp; ANR.

.....Respondents

Through: Ms. Shubhi Gupta, APP for the State.  
SI Bharti Singh, P.S. Aman Vihar.  
Ms. Tanya Agarwal, Adv.(DHCLSC)  
For R-2.

**CORAM:****HON'BLE MR. JUSTICE AMIT SHARMA****JUDGMENT****AMIT SHARMA, J.**

1. The present appeal under Section 415 of the Bharatiya Nagrik Suraksha Sanhita, 2023 (for short, 'BNSS') has been filed assailing the judgment of conviction dated 04.06.2024 and order on sentence dated 03.10.2024 passed by learned ASJ-01 (POCSO) North District, Rohini Courts, Delhi, whereby



the Appellant has been convicted in SC No. 597/2017, arising out of FIR No. 613/2017, under Sections 376 of the Indian Penal Code, 1860 (for short, "IPC") and Section 6 Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act") registered at Police Station Aman Vihar.

2. The appellant by way of the impugned judgment of conviction and order on sentence was convicted for the offences punishable under Section 376(2)(f) of the IPC and Section 6 of the POCSO Act. The appellant has been sentenced to undergo Rigorous Imprisonment of 10 years alongwith a fine of Rs.1000/-, and in default of payment of fine, to further undergo rigorous imprisonment for 1 month for the offence punishable under Section 376(2)(f) of the IPC.

### **BRIEF FACTS**

3. Brief facts necessary for the disposal of the present appeal are as follows:

- i. On 30.05.2017 *vide* DD No. 24 B information was received at PS Aman Vihar regarding the survivor (respondent no.2) aged about 17 years of being admitted in BSA Hospital. The survivor had given birth to a child and was unmarried at that time.
- ii. On receiving the said information IO Nishu reached the hospital and collected the MLC (EX.PW-3/A) of the survivor wherein it was stated that the survivor's cousin aged about 30 years had forcefully established physical relations with her. The doctor then handed over certain samples of the new born child and the survivor to the IO.



- iii. Thereafter the statement of the survivor was recorded wherein she alleged that about 10 months prior to the registration of the present FIR, her distant relative Karan i.e. appellant came to her family's house and started residing there. It was further alleged that one day when there was no family member at the house, the appellant forcefully established physical relations with her and thereafter, threatened her not to disclose the said incident to anyone. It was further stated that she did not tell anyone regarding the aforesaid incident due to the threat made by the appellant. Thereafter on 30.05.2017 she experienced abdominal pain due to which her mother took her to the hospital and she was informed regarding her pregnancy, and gave birth to a child.
- iv. During investigation the statement of the survivor was recorded in the hospital and on the basis of the said complaint (EX.PW1/A) the present FIR was registered under Section 376 of the IPC and Section 6 of the POCSO Act. Thereafter, the appellant was arrested and medical examination of the appellant was conducted *vide* MLC No. 9391/17 (Ex.PW-8/A) and the samples of the survivor and the new born child were sent to the FSL by the IO.
- v. During the investigation certain documents were collected by the IO from the school of the survivor which reflected the date of birth of the survivor as 03.08.1999. After the completion of investigation chargesheet dated 21.07.2017 was filed *qua* the appellant under Section 376 of the IPC and Section 6 of the POCSO Act. Consequently, the learned Trial Court *vide* order dated 03.11.2017 framed charges *qua* the appellant for the offences punishable under Section 5(m) POCSO Act and Section 376(2)(f) IPC.



- vi. During the course of the trial the prosecution examined 12 witnesses including the parents of the survivor. Thereafter, the statement of the appellant under Section 313 of the CrPC was recorded wherein he stated that he had established physical relations with the survivor with her consent and she was not a minor at the time of the incident. Further the appellant did not opt to lead to any evidence in his defence. After hearing final arguments on behalf of the parties, the impugned judgment of conviction dated 04.06.2024 and order on sentence dated 03.10.2024 was passed.

### **SUBMISSIONS ON BEHALF OF THE APPELLANT**

4. Learned counsel appearing on behalf of the appellant submitted that there are material and substantial contradictions with regard to the period during which the appellant is alleged to have resided at the survivor's residence. It is pointed out that the survivor in her complaint has categorically stated that the appellant came to her residence 10 months prior to the registration of the present FIR i.e. July, 2016 and returned to his native village in the month of October-November that year. However, in her deposition before the learned Trial Court she stated that the appellant was residing at her residence from July, 2017 to September, 2017. The said contradiction casts serious doubts on the case of the prosecution.

5. It is further submitted that the survivor in her initial statement alleged that the appellant had forcefully established physical relations with her but in her deposition before the learned Trial Court as PW-1 she categorically denies



the aforesaid allegation and stated that she out of her own free will established physical relations with the appellant/accused.

6. Learned counsel for the appellant also pointed out that on the date of the incident the age of the survivor was 19 ½ years and the same has been confirmed by the survivor during her examination before the learned Trial Court. The survivor stated that she was born on the day of *Holi* in March 1998. Further, Smt. Rama (PW-2) the Principal of the St. Glory Public School in her deposition before the learned Trial Court stated that the survivor was admitted in the school on 08.07.2005 in 'LKG' and no birth certificate of the survivor was furnished by the parents at the time of admission. The date of birth recorded in the school's admission register (EX-PW/2A) is 03.08.1999, however, the said record also reflects that the same was conveyed by the parents of the survivor. Further, it was pointed out that the name of the mother of the survivor is also wrongly recorded in the certificate furnished by the school (Annexure-A9). Hence, reliance cannot be placed on the documents furnished by the school to determine the age of the survivor.

7. It is also pointed out that there are several contradictions in the testimonies of PW-4 (mother of the survivor) and PW-5 (father of the survivor) with regard to the date of birth of the survivor. PW-4 in her testimony before the learned Trial Court has stated that as on the date of registration of FIR, the survivor was of 17-17 ½ years of age. PW-5 in his deposition has stated that the survivor was below the age of 18 years, when the FIR was registered however, he does not mention anything regarding the date of birth of the survivor. Thereafter, he voluntarily stated that the survivor was born in the month of August- September. From the said statements of



PW-4 and PW-5 before the learned Trial Court, it can be said that the parents were not sure regarding the age of the survivor and no document reflecting the age of the survivor was furnished at the time of admission. Also, admittedly the survivor was in Class XII at the time of the incident but no efforts have been made to procure her matriculation certificate to prove her age in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short “JJ Act”).

8. Learned counsel appearing on behalf of the appellant further submitted that the testimony of the parents of the survivor PW-4 and PW-5 cannot be trusted on account of the fact that, as per their version, only when the survivor gave birth to a child, they realized that she was expecting. It was submitted, on behalf of the learned counsel appearing on behalf of the appellant, it is unbelievable that the parents PW-3 and PW-4 did not notice 9 months of pregnancy till the last day. It was submitted that the parents of the survivor knew about their relationship and they had no objection to the same.

9. Learned counsel for the petitioner submitted that the scientific evidence on record in the present case is inadmissible as evidence. The MLC (Ex.PW-8/A) of the survivor has been conducted in contravention of Section 27(2) of the POCSO Act. Further, no consent for conducting a medical examination was taken from the survivor or her legal guardians. It is also pointed out that that blood samples of the survivor and the child were taken for DNA sampling however, the same do not find any mention in the MLC and the same is in violation of Section 164(A)(2) of the CrPC.



10. It is further submitted that the charge framed by the learned Trial Court against the appellant was for the offence punishable under Section 5(m) of the POCSO Act, which is punishable under Section 6 of the POCSO Act. However, Section 5(m) of the POCSO Act deals with the offence of aggravated penetrative sexual assault on a child below 12 years of age and in the present case it is the admitted case of the prosecution that the survivor was around 17 years old. From the aforesaid it is clear that the appellant has been convicted by the learned Trial Court under a wrong substantive charge.

11. Learned counsel appearing on behalf of the appellant has placed reliance on the following judgments:

- i. *State vs. Hitesh*<sup>1</sup>
- ii. *Ashik Ramjaii Ansari vs. State of Maharashtra and Anr.*<sup>2</sup>
- iii. *State (Govt of NCT of Delhi) vs. Shailesh Kumar*<sup>3</sup>
- iv. *Mohelal vs. State of MP, passed in Crl. A. 2018/1998 on 21.12.2021 by the Madhya Pradesh High Court.*
- v. *Arif Khan vs. State and Another*<sup>4</sup>
- vi. *Arjun Kumar vs. State of Bihar*<sup>5</sup>
- vii. *P. Yuvaprakash vs. State Rep. by Inspector of Police*<sup>6</sup>
- viii. *Abuzar Hossain Gulam Hossain vs. State of West Bengal*<sup>7</sup>
- ix. *Riyaz vs. State (Govt. of NCT of Delhi)*<sup>8</sup>
- x. *Sahjan Ali vs. State Through SHO*<sup>9</sup>

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<sup>1</sup> 2025 SCC OnLine Del 962

<sup>2</sup> 2023 SCC OnLine Bom 1390

<sup>3</sup> 2019 SCC OnLine Del 8318

<sup>4</sup> 2024 SCC OnLine Del 138

<sup>5</sup> 2021 SCC OnLine Pat 1353

<sup>6</sup> 2023 SCC OnLine SC 846

<sup>7</sup> (2012) 10 Supreme Court Cases 489

<sup>8</sup> 2024 SCC OnLine Del 5918



*xi. Alamelu & Another vs State*<sup>10</sup>

*xii. Rajak Mohammad Vs. State of Himachal Pradesh*<sup>11</sup>

### **SUBMISSIONS ON BEHALF OF THE RESPONDENTS**

12. *Per Contra*, learned APP for the State assisted by learned counsel for the survivor submitted that during the cross-examination of the survivor, on the basis of a suggestion made by the defence counsel, she stated that she had voluntarily made physical relations with the appellant. It is further pointed out that the deposition made by the survivor before the learned Trial Court shall be considered alongwith the FSL report as per which the newly born was the biological child of the appellant and the survivor.

13. It is submitted that the documents procured during investigation from the school of the survivor clearly reflect the date of the birth of the survivor as 03.08.1999 and at the time of the incident which had taken place around July-August, 2016 (10 months prior to the registration of FIR), the survivor was around 17 years i.e. a minor and thus the conviction of appellant for the offences punishable under Section 376(2)(f) of the IPC and Section 6 of the POCSO Act is clearly sustainable as the consent of the survivor is immaterial in the present case being a minor.

14. It is further submitted that that the willingness/consent of the survivor or her parents to initiate legal proceedings against the present appellant is

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<sup>9</sup>2024 SCC OnLine Del 9079

<sup>10</sup> (2011) 2 Supreme Court Cases 385

<sup>11</sup> (2018) 9 Supreme Court Cases 248





immaterial. Section 19 of the POCSO Act provides for reporting of offences and sub-clause (1) of the aforesaid provision states that any person who has ‘apprehension’ or ‘knowledge’ that an offence under POCSO Act has been committed or is likely to be committed shall inform the local Police or Juvenile Police Unit. The aforesaid provision is a mandatory provision as Section 21(1) of the POCSO Act stipulates that any person who fails to report the commission of an offence as provided under Section 19(1) of the POCSO Act shall be punished with imprisonment for a term extending upto 6 months or fine or both.

**15.** It is further submitted that the testimony of PW-4 (mother) and PW-5 (father) is reliable to the effect that the survivor was a minor on the date of the incident. Further, both of the them have clearly denied the suggestion that the survivor was born on the day of *Holi* in 1998. It is also submitted that the point of admissibility of scientific evidence does not arise in the present case as the Appellant has himself admitted in his statement under Section 313 of the CrPC that he established physical relations with the survivor.

**16.** With regard to the issue of conviction of the appellant under wrong substantive charge, it is submitted that basic requirement is for the charges to be framed in a manner to give the accused a fairly reasonable idea of the case he is to face. In the present case the order on charge is detailed and sets out the contents of ‘aggravated penetrative sexual assault’ which the appellant was called upon to answer. Further, the appellant was aware of the charges being urged against him and the same is clear from his statement before the learned Trial Court under Section 313 of the CrPC.



17. Learned APP for the State assisted by learned counsel for the survivor places reliance on the following judgments:

- i. *Manikanta@Puli (Now in Judicial Custody, Central Prison) vs. State of Karnataka and Anr.*,<sup>12</sup>
- ii. *Main Pal vs. State of Karnataka*,<sup>13</sup>

### **ANALYSIS AND FINDINGS**

18. Heard the learned counsel for the parties and perused the records.

19. The survivor in her initial statement dated 30.05.2017 (PW-1/A) on the basis of which the FIR was registered had stated that the appellant had made forcible physical intercourse with her. However, in her statement under Section 164 of the CrPC dated 02.06.2017(Ex.PW-1/B) she stated as under:

“मुझे लड़की हुई है। जो हुआ वो मेरी गलती से हुआ। मैंने उस लड़के करण से सम्बन्ध बनाए। करण मेरे घर पे रहने आया था। हमारी उससे जान पहचान है। उसने मुझे मना किया लेकिन मेरी गलती है कि मैं नहीं मानी। इसलिए मुझे case नहीं करना। मैंने अपने घरवालों को भी कुछ नहीं बताया था। बस। अपनी लड़की को अनाथ आश्रम में छोड़ूंगी। बस।”

20. Thereafter, her statement before the learned Trial Court on 04.01.2018 is reproduced as under: -

“Main apne pariwar ke saath rehti hoon. Mere pariwar main mere alawa mere mummy-papa aur ek chhota bhai hai. Main 12th class main padhti hoon. Mere papa electricity ka kaam karte hain aur meri mummy housewife hai. Muljim Karan, jo ki aaj adalat main hajir hai (witness has correctly identified the accused through

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<sup>12</sup> 2024:KHC:21233-DB

<sup>13</sup> (2010) 10 SCC 130



wooden partition), ko main janti hoon, kyonki wo mere door ka rishtedaar hai.

Karan mere ghar per kaam ke silsiley main aakar rehne laga. Muljim Karan Rajmistri ka kaam karta tha. Karan ne kuch din kaam kiya aur fir usse dhang se kaam na milne per wo wapis gaon chala gaya. Muljim hamare ghar per July, 2017 se September, 2017 tak raha tha. Ek din mere ghar per koi nahi tha, to muljim Karan ne mere saath sharirik sambandh banaye, aur ye baat maine apne ghar main kisi ko nahi batayi thi, kyonki main dar gayi thi. May, 2017 ko ek din mere pet mai dard hua to mere mummy papa mujhe hospital le gaye, to wahan jakar mujhe pata chala ki main pregnant hoon. Wahan per maine ek ladki ko janam diya. Hospital walon ne enquiry karne ke baad police ko ittala kar di, kyonki main shadishuda nahi thi. Police aayi aur fir police ne meri mummy ke samne mujhse puchtach ki thi aur mere bayan likhe the, jo ki **Ex.PW1/A** hai, jis per A point per mere and point-B per meri mummy ke sign hain. Hospital main judge bhi aayi thi, aur unhone mera bayan bhi likha tha. Mujhe tarikh yaad nahi hai, ki judge madam ne mera bayan kab likha tha. Police mujhe ek baar CWC, Avantika, main lekar gayi thi, jahan per mujhse puchtach ki gayi thi aur mujhe samjhaya gaya tha, wahan per maine mere papa ne meri ladki ko Anath Asharam main bhejne ke liye ek application bhi lagai thi.

Main pehld St. Glory Public School, Sector-21, Rohini, main padhti thi, aur wahan per maine LKG main dakhila liya tha. School main mere janam ki tarikh 03.08.1999 hai (Vol. Jo ki galat hai). Mere janam ki sahi tarikh Holi wale din Marh, 1998 hai.

Mujhe yaad nahi ki police mere ghar per aayi thi ya nahi, kyonki main hospital main ek hafta admit rahi thi.

At this stage, an envelope sealed with the seal of **SBD**, is opened and a statement U/s 164 Cr.P.C., is taken out. The witness has been. shown the statement and she identifies her signature at points A and the same is **Ex. PW1/B**.

At this stage, Ld. Addl. P.P. for State seeks permission to cross examine the witness as she is resiling from her previous statement. Heard. Allowed.



**XXXX by Ms. Rajrani Kataria, Ld. Addl. P.P. for the State.**

Yeh kehna galat hai ki mere mummy papa ne mere school main dakhile ke samai mere janam ki tarikh bilkul sahi likhwai thi. Vol. Unhone mere janam ki tarikh apni marji se likhwa di thi. Yeh kehna galat hai ki mere mummy papa ko mere saath hone wali kisi bhi ghatna ya anhani ke baare main koi andaja nahi tha aur issiliye unhone meri janam ki tarikh sahi likhwai thi. Mujhe wo tarikh yaad nahi, jis din judge sahab ne hospital main mera bayan likha tha. Maine police ko apne bayan Ex.PW1/A main, ye nahi bataya tha ki, Karan October-November, 2017 main wapis apne ghar chala gaya tha (Confronted with portion A to A in statement Ex.PW1/A, where it is so recorded). Maine police ko ye nahi bataya tha ki, muljim ne mujhe dhamki di thi ki agar iss baare main kisi ko bataya to achcha nahi hoga (Confronted with portion B to B in statement Ex.PW1/A, where it is so recorded). Yeh kehna galat hai ki ghatna ke samai meri umer 16 saal thi, aur main aaj jaanbujhkar apni umer 19 1/2 saal bata rahi hoon, kyonki main muljim ko bachana chahti hoon. Yeh kehna galat hai ki muljim ki taraf se mujhper aur mere pariwar per samajik aur pariwarik dabav hone ki wajah se main aaj jaanbujhkar apni umer jyada bata rahi hoon. Yeh thik hai ki main muljim ko iss case se bari karana chahti hoon.

**XXXX by Sh. M.P. Sinha, Ld. Counsel for the accused.**

Yeh thik hai ki maine muljim Karan se sharirik sambandh apni Marji se banaye the. Yeh bhi thik hai ki muljim Karan ne mere saath koi jor jabardasti nahi ki thi.”

**21.** The defense taken by the appellant was that, his relationship with the survivor was consensual and claimed that she was 18 years of age at that time. It is also pertinent to note that the appellant had accepted the FSL report (Ex. PX-4) prepared by Ms. Manisha Upadhyay, Assistant Director (Biology), FSL Rohini, Delhi under Section 294 of the CrPC *vide* his statement dated 15.02.2022. The result of the aforesaid is that the appellant does not dispute the paternity of the child born from the survivor.



**22.** The issue thus before this Court is whether the survivor was less than 18 years of age or not. The case of the prosecution is that the date of birth of the survivor as per the school records is 03.08.1999 bringing her age on the date of the incident to around 17 years.

**23.** As per the case of the prosecution, the date of birth of the survivor was 30.08.1999. In the statement (Ex. PW-1/A), of the survivor she had stated that the offence had occurred 10 months prior to the registration of the FIR on 30.05.2017. Thus, the offence as per the case of the prosecution had taken place around July-August, 2016 and the survivor at that time was a child as per the provision of Section 2 (1)(d) of the POCSO Act.

**24.** So far as the, age of the survivor is concerned the relevant prosecution witnesses are: -

**24.1** PW-1, Survivor in her examination-in-chief stated that she is studying in 12<sup>th</sup> Class and previously she was studying at St. Glory Public School, Sector-21, Rohini, where she had taken admission in LKG Class and date of birth given to the school was wrong as she was born on Holi in March, 1998. She was cross-examined by the learned APP for the State during which she stated that her parents had given her date of birth to the school on their own and she further denied the suggestion that on the date of the incident she was 16 years and that she is deliberately saying that she was above 19 ½ years because she wants to save the accused. She further denied the suggestion that there is pressure from the society as well as the accused and his family.



**24.2** PW-2, Smt. Rama, Principal, St. Glory Public School, Ramesh Enclave, Sector-21, Rohini, Delhi, who produced the admission register of the survivor showing that she was admitted in LKG class on 08.07.2005. Her date of birth is mentioned as 03.08.1999 (Ex. PW-2/A). In her cross-examination this witness admitted that no birth certificate was furnished by the parents at the time of the admission and volunteered to state that date of birth of the student was recorded as conveyed by her parents. It is pertinent to note that the attendance register produced by the concerned school is not supported by any application form or an affidavit by the parents of the survivor reflecting that her date of birth is 03.08.1999, only the register has been exhibited without any further documents.

**24.3** PW-4, Mother of the survivor who stated her daughter's age on 30.05.2017 was about 17-17 ½ years and she had not turned 18 by that time. In her cross-examination she stated that at the time of her admission at St. Glory Public School, they did not give any proof of date of birth. She further denied the suggestion that she was aware of the fact that her daughter was pregnant before 30.05.2017. She also denied the suggestion that her daughter was born on the day of *Holi* in 1998.

**24.4** PW-5, Father of the survivor who in his examination-in-chief stated that on 30.05.2017 his daughter was 17 years of age and she had not turned 18 till then. In his cross-examination he has stated that he does not remember as to which Class he had got the survivor admitted in St. Glory Public School, however subsequently volunteered to state that he had got her admitted in



Nursery Class. He further denied the suggestion that he had given the date of birth of the survivor at the time of her admission in school in usual course without any documentary proof. He further denied the suggestion that the survivor was born on the day of *Holi* in 1998 and volunteered to state that the survivor was born in August-September, 1999.

**24.5** PW-10, Investigating Officer, W/SI Geeta Yadav, in her cross-examination stated that she did not ask the parents of the survivor to furnish the MCD birth certificate. She further denied the suggestion that during the investigation, the survivor had told her actual date of birth was on the day of *Holi* in 1998 and the date of birth mentioned in the school records is incorrect. She further denied the suggestion that despite coming to know that the survivor was a major at the relevant time, she showed her age to be on the lower side in order to attract the provisions of the POCSO Act.

**25.** At this stage, it is apposite to refer to the judgment of the Hon'ble Supreme Court in **P. Yuvaprakash v. State Rep. By Inspector of Police [2023] 10 S.C.R. 478**. In the said judgment, the Hon'ble Supreme Court was dealing with the issue of determination of age of a minor under the provisions of the POCSO Act. In the said case, the prosecution had relied upon a school transfer certificate to establish that the survivor therein was a child within the meaning of Section 2 (1)(d) of the POCSO Act. It was observed as under:

“11. Before discussing the merits of the contentions and evidence in this case, it is necessary to *extract* Section 34 of the POCSO Act which reads as follows:

“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."*

12. In view of Section 34(1) of the POCSO Act, Section 94 of the JJ Act, 2015 becomes relevant, and applicable. That provision is extracted below:

*"94. Presumption and determination of age. - (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the 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.*

*(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”*

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.

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17. In *Abuzar Hossain @ Gulam Hossain v. State of West Bengal*<sup>2</sup>, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.

18. Reverting to the facts of this case, the headmaster of M's School, CW-1, was summoned by the court and produced a Transfer Certificate (Ex.C-1). This witness produced a Transfer Certificate Register containing M's name. He deposed that she had studied in the school for one year, i.e., 2009-2010 and that the date of birth was based on the basis of the record sheet given by the school where she studied in the 7<sup>th</sup> standard. DW-2 TMT Poongothoi, Headmaster of Chinnasoalipalayam Panchayat School, answered the summons served by the court and deposed that ‘M’ had joined her school with effect from 03.04.2002 and that her date of birth was recorded as 11.07.1997. She admitted that though the date of birth was



based on the birth certificate, it would normally be recorded on the basis of horoscope. She conceded to no knowledge about the basis on which the document pertaining to the date of birth was recorded. It is stated earlier on the same issue, i.e., the date of birth, Thiru Prakasam, DW-3 stated that the birth register pertaining to the year 1997 was not available in the record room of his office.

19. It is clear from the above narrative that none of the documents produced during the trial answered the description of “*the date of birth certificate from the school*” or “*the matriculation or equivalent certificate*” from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating “*that the age of the said girl would be more than 18 years and less than 20 years*”. In the cross-examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that “*when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor*”. This finding is, in this court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94(2)(i) mandates; nor are they in accord with Section 94(2)(ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical *ossification test*, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said



that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9”.

**26.** Thus, in view of aforesaid judgment wherever a dispute with respect to the age of a person arises in context of her/him being a minor, the Court should take recourse to the steps indicated under Section 94(2) of the JJ Act. The three primary documents which would require consideration for the Court would be the following documents: -

- i. First of all, the first entry must be referred in which the priority had been given to date of birth certificate issued by school or matriculation or equivalent certificate.
- ii. If the documents mentioned in first entry are not available, then the documents mentioned in second entry are to be preferred, date of birth can be decided as per birth certificate issued by corporation or municipal authority or a panchayat.
- iii. However, if the documents of second entry are also not available, then the age can be determined on the basis of ossification test or any other latest medical age determination test.

**27.** In the present case, as already pointed out hereinabove, the only document which has been produced on record is a school admission register and no other document. It has also come on record that the entries made in the said register were not on the basis of any proof of birth document issued by any Corporation or a Municipal Authority or a Panchayat. Thus, in absence of the same and in view of the stand taken by the survivor in her statement under Section 164 of the CrPC, it was incumbent upon the prosecution to establish



that her age was less than 18 years by conducting ossification test or any other latest medical age determination test conducted on orders of the Committee or the Board. The burden was on the prosecution to prove that on what basis, the parents had given the date of birth which is mentioned in the admission register of the school. Although, the parents of the survivor have been examined but it is pertinent to note that the survivor has herself categorically stated that she was born in March, 1998 on the day of *Holi* and her age given by the parents is incorrect. When she was examined before the learned Trial Court, she was a major. The survivor was very specific regarding her birth on the day of *Holi* in 1998. She had volunteered to state that information and despite cross by the learned APP she stood by the same.

**28.** The stand taken by the appellant in his statement under Section 313 of the CrPC was that the parents of the survivor knew about their relationship and they wanted the appellant to marry the survivor. It is also peculiar that parents of the survivor did not notice the pregnancy till the birth of the child. In these circumstances, the assertion of the survivor that she was born on the day of *Holi* in March, 1998 assumes significance. The learned Trial Court while convicting the present appellant did not believe the testimony of the survivor with regard to her age and had noted that the initial complaint made by the survivor as well as in her statement under Section 164 of the CrPC she never stated that her date of birth was in March, 1998. It was further noted that normally the date of birth of a child is always informed by the parents to a child and he/she would not know the date of birth. However, the survivor was not confronted with her previous statement or cross-examination on this aspect by the learned APP.



**29.** In the peculiar circumstances of this case, when the age of the survivor as per the prosecution's case was approximately 17 years at the time of the incident, in absence of any documentary proof of the date of birth, the ossification test in terms of Section 94(2)(iii) of the JJ Act ought to have been conducted. In the present case, despite the clear statement given by the survivor that the relationship between the appellant and herself was consensual in nature, he has been convicted under the POCSO Act only for the reason that on the date of incident she was less than 18 years of age. It is also pertinent to note that in her statement under Section 164 of the CrPC the survivor categorically stated that the appellant was reluctant however, she insisted. Thus, there was no inducement on part of the appellant. Moreover, even as per the case of the prosecution, age of the survivor was around 17 years and, in these circumstances, not proving the case beyond reasonable doubt as mandated under Section 94 of the JJ Act, the benefit of doubt ought to go to the appellant.

**30.** This Court is of the considered opinion that the prosecution has failed to discharge its obligation to prove that the survivor was a child in terms of Section 2 (1)(d) of the POCSO Act. In the statements made by the survivor under Section 164 CrPC as well as before the learned Trial Court it is clearly stated that relationship was consensual in nature. In fact, the survivor in her statement under Section 164 of the CrPC has repeatedly stated that the relationship had started at her instance.



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**31.** In view of the aforesaid facts and circumstances, the judgment of conviction dated 04.06.2024 and order on sentence dated 03.10.2024 are set aside and the appellant is acquitted.

**32.** The appeal is allowed in the above terms. All pending applications are disposed of.

**33.** Copy of the judgment be communicated to the concerned Jail Superintendent for necessary information and compliance, *forthwith*.

**34.** Judgement be uploaded on the website of this Court, *forthwith*.

**AMIT SHARMA, J.**

**JUNE 03, 2025/kr/nk**