

Neutral Citation No. - 2024:AHC:16667

Judgement Reserved on 18.12.2023

Judgement Delivered on 01.02.2024

A.F.R

Court No. - 89

Case :- APPLICATION U/S 482 No. - 34899 of 2022

Applicant :- Puspendra Singh

Opposite Party :- State Of U.P And Aother

Counsel for Applicant :- Binod Kumar Tripathi

Counsel for Opposite Party :- G.A.,Geetam Singh,Shweta Singh Rana

Hon'ble Anish Kumar Gupta,J.

1. Heard Sri Binod Kumar Tripathi, learned counsel for the applicant, Sri Geetam Singh, learned counsel for opposite party no.2 and Sri Pankaj Srivastava, learned A.G.A. for the State.
2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing the charge-sheet no.33 of 2022 dated 16.03.2022, arising out of Case Crime No.27 of 2022, under Sections 363, 366, 376 I.P.C. and Section 5/6 Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as '*the POCSO Act*') Police Station Dholna, District Kasganj.
3. The facts in brief in the instant case are that the opposite party no.2, the father of the victim, had lodged an F.I.R. on 12.02.2022, alleging that on 26.12.2021 when his daughter went to the tubewell, in the evening at 5:00 P.M., from where the accused/applicant herein, namely Puspendra Singh, took away the daughter of the opposite party no.2, in which his brothers Prem Singh and Rajendra Singh have also assisted the applicant herein. On the basis of the aforesaid F.I.R., the investigation was started and the victim was recovered. In her statement under Section 161 Cr.P.C., the victim stated that her age is 17 years and she is educated upto Class VIII and she stated that she had gone alongwith the applicant out of her own free will and

thereafter they went to Mathura and from there they went to Allahabad and she has solemnized the court marriage and both are living together as husband and wife. She further stated that she is pregnant for two months. This statement was recorded on 28.02.2022. In her statement she has further stated that she still want to live with the the applicant herein. In her medical examination, she was found pregnant and her age, as per the X-Ray Examination, was stated to be about 20 years. Such medical examination was conducted on 02.03.2022. During her medical examination, she has stated that her father used to shout at her, therefore, she ran away with the applicant. Subsequently, in her statement under Section 164 Cr.P.C., she claimed that she is 19 years old and had gone with the applicant out of her own free will and she knew Puspendra Singh for about 45 months. Now, she is pregnant and she further stated that she don't want go with her father but she want to go with her husband, namely the applicant herein. After due investigation, having found the victim being minor on the date of incident, the charge-sheet was filed on 16.03.2022 against the applicant for offences under Sections 363, 366 and 376 I.P.C. and Section 5/6 of the POCSO Act. The instant application has been filed challenging the aforesaid charge-sheet dated 16.03.2022 as well as the order dated 13.05.2022 passed by the learned Additional District and Sessions Judge/Special Judge, POCSO Act, Kashganj, whereby the cognizance has been taken by the learned Special Judge on the aforesaid charge-sheet.

4. Learned counsel for the applicant submits that as per the Ossification Report, the age of the victim at the time of incident has been found to be about 20 years and in her statements under Section 161 and 164 Cr.P.C., the victim has categorically stated that she has gone with the applicant out of her own free will and she has married with the applicant and she is pregnant. After her 164 Cr.P.C., statement, she was sent alongwith her father. However, she has again left the house of her father and came to the applicant and both are living as husband and wife. Therefore, learned counsel for the applicant submits that as per the Ossification Report the victim was found to be a major, therefore, no offence whatsoever is made out against the applicant, as the victim has come alongwith the applicant out of her own free

will and there was no force used by the applicant herein and both are adults and they are married and living together as husband and wife. Therefore, learned counsel for the applicant prays for quashing of the entire proceedings of the case. In support of his arguments, learned counsel for the applicant relied upon the judgement of the Apex Court dated 18.07.2023 in the case of ***P. Yuvaprakash v. State : 2023 SCC OnLine SC 846.***

5. *Per Contra*, learned counsel for the opposite party no.2 submits that as per the school records the date of birth of the victim is 19.01.2005. In support of the same, the opposite party no.2 has filed the counter affidavit annexing School Leaving Certificate issued by Primary Junior High School- Athaiya, District- Kasanj, in which the date of birth of the victim is mentioned as 19.01.2005. The said Certificate has been annexed as **CA-1** to the counter affidavit filed by the opposite party no.2. In view of the same, learned counsel for the opposite party no.2 submits that on the date of first incident i.e., 26.12.2021, the victim was minor, therefore, *prima facie* a case under Sections 363, 366 and 376 I.P.C. and under Section 5/6 of the POCSO Act, has been made out against the applicant herein.

6. Learned counsel for the opposite party no.2 has also relied upon Section 29 of the POCSO Act and submits that as per the provision of Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of this Act, there is a presumption that such person has committed the said offence unless the contrary is proved. Therefore, a presumption against the applicant in view of Section 29 of the POCSO Act is made out. However, it is further submitted that in the instant case when the statement of the victim was to be recorded before the Special Judge, the applicant and the other accused persons have again took away the victim forcibly at the gun point and by assaulting the other family members and making them unconscious, for which another F.I.R. No. 82 of 2023 was lodged by the opposite party no.2 on 01.04.2023, PS- Dholna, District- Kasanj, wherein it has been apprehended that the applicants are threatening to kill the victim if the opposite party no.2 proceeds against them. However, learned counsel for the

applicant submits that so far as the second F.I.R., is concerned, the same has already been quashed by this Hon'ble Court in Criminal Misc. Writ Petition No. 15211 of 2023, filed by the applicant and 3 others, vide judgement and order dated 31.10.2023, on the basis of the fact that on the second date of incident the victim had become major which could not be disputed by the opposite party no.2.

7. Learned counsel for opposite party no.2 further submits that as per Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred as '*the Act, 2015*'), in the presence of the School Certificate, the age determination through medical examination is not permissible and such determination of age on the medical examination is of no consequence. Therefore, so far as the instant case is concerned *prima facie* the victim has been found to be a minor as per the School Leaving Certificate as she was less than 18 years of age on 26.12.2021, and therefore, the charge-sheet has rightly been filed against the applicant herein. Therefore, since a *prima facie* case has been made out against the applicant in the instant case, there is no ground for quashing of the proceedings before conclusion of the trial at this stage.

8. In the rejoinder affidavit, the applicant has stated that now the marriage between the applicant and the victim has already been registered on 15.04.2023, and admittedly even as per the School Certificate the victim was a major girl and she has duly married to applicant as per her choice. Therefore, the applicant and the victim are adult and they have solemnized their marriage out of their own choice, therefore, no offence can be alleged to have been made against the applicant herein.

9. Learned counsel for opposite party no.2 has relied upon the judgments of this Court dated 29.03.2023 passed in ***Application U/S 482 No.2941 of 2023 (Praveen Kumar Singh @ Pravin Kumar and 2 others Vs. State of U.P. Thru. Prin. Secy Home Deptt, Lko. and another)*** and also the judgment of Apex Court in the case of ***Independent Thought Vs. Union of India and another : 2017 10 SCC 800.***

10. Learned counsel for the State has also submitted that since *prima facie* on the date of incident in the instant case i.e., on 26.12.2021, the victim was minor as per the school records and *prima facie* a case has been made out against the applicant. The charge-sheet has rightly been filed against the applicant for the offences under Sections 363, 366, 376 I.P.C., and Section 5/6 of POCSO Act. Therefore, as per Section 29 of the POCSO Act, there is presumptions against the applicant and *prima facie* a case has been made out against the applicant. Therefore, there is no ground available for quashing of the instant proceedings at the behest of the applicant.

11. Having heard the submissions made by learned counsels for the parties, this Court has carefully gone through the record of the case.

12. In the case of ***Independent Thought Vs. Union of India and another*** : (2017) 10 SCC 800, the Apex Court has observed as under:

20. *As a first step in this direction, child marriages were criminalised by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 IPC, as it existed in 2006, to decriminalise marital rape of a girl child.*

21. *The National Charter was followed by the National Policy for Children notified on 26-4-2013. The National Policy explicitly recognised in Clause 2.1 that every person below the age of 18 years is a child. Among the Guiding Principles for the National Policy was the recognition that every child has universal, inalienable and indivisible human rights; every child has the right to life, survival, development, education, protection and participation; the best interest of a child is the primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative authorities, public, private, social, religious or cultural institutions.*

23. *The National Plan of Action for Children recognises that the early marriage of girls is one of the factors for neo-natal deaths; early marriage poses various risk for the survival, health and development of young girls and to children born to them and most unfortunately it is also used as a means of trafficking.*

(Emphasis Supplied)

13. While, dealing with the conflict with the provisions of the POCSO Act and the Exception -2 to Section 375 I.P.C., the Apex Court has held as under:-

"107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us : (i) To let the incongruity remain as it is — this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC — in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years — this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC — this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) **To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."** It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus.

Relief

88. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl Child below 18 years is liable to be struck down on the following grounds:-

iii.....

Sexual intercourse or sexual act by a man with his own wife, the wife not being under 18 years, is not rape."

(Emphasis Supplied)

14. Thus, from the aforesaid declaration of law any sexual relations with a girl of less than 18 years of age would amount to rape, by any person, whether he is her husband or otherwise would amount to offence of rape in terms of Exception -2 to Section 375 I.P.C, as has been laid down by the Apex Court.

15. Therefore, in the instant case, if it is found that the victim was minor on the date of incident, when the first sexual intercourse (with or without her consent) was committed by the applicant, then the offence of rape shall be made out against the applicant herein.

16. Thus, the primary question arises in the instant case is with regard to the determination of age of the victim and what should be the procedure to determine the age as there is no provision in the POCSO Act or under the I.P.C. for determination of the age of the victim.

17. In *Ravinder Singh Gorkhi v. State of U.P. : (2006) 5 SCC 584*, the Apex Court has observed as under:

*21. Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. **Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties.** Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.*

*38. **The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.***

*39. **We are, therefore, of the opinion that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted.** It is no doubt true that the court must strike a balance. In case of a dispute, the court may appreciate the evidence having regard to the facts and circumstances of the case. It would be a duty of the court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim. In this case, the appellant had never been serious in projecting his plea that he on the date of commission of the offence*

was a minor. He made such statement for the first time while he was examined under Section 313 of the Code of Criminal Procedure.

(Emphasis Supplied)

18. The Apex Court in ***Jarnail Singh vs. State of Haryana : (2013) 7 SCC 263***, has relied upon the provisions of Juvenile Justice (Care and Protection of Children) Model Rules, 2007, for determination of age of the victim as well. The Apex Court in para '23' has held as under:

"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. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion."

(Emphasis Supplied)

19. Thus, the aforesaid opinion expressed by the Apex Court in *Jarnail Singh (supra)*, in the absence of any specific provision for determination of the age of the victim of the offences under the POCSO Act or under the provisions of Indian Penal Code, the provisions of the Juvenile Justice Act, 2015 for the determination of the age of the victim can safely be applied.

20. In *Rishipal Singh Solanki vs. State of Uttar Pradesh and Others : (2022) 8 SCC 602*, the Apex Court had laid down the following principles with regard to the determination of age of the child in conflict of laws, which reads as under:

"33.6. That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

33.7. This Court has observed that a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

*33.8. If two views are possible on the same evidence, the court should lean in **favour of holding the accused to be a juvenile in borderline cases.** This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.*

*33.9. That when the determination of age is on the basis of evidence **such as school records, it is necessary that the same would have to be considered as per Section 35 of the Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.***

*33.10. **Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the court or the JJ Board provided such public document is credible and authentic as per the provisions of the Evidence Act viz. Section 35 and other provisions.***

*33.11. **Ossification test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015.***

(Emphasis Supplied)

21. In *Manoj Alias Monu Alias Vishal Chaudhary vs. State of Haryana and Another* : (2022) 6 SCC 187, the Apex Court has interpreted the procedure to be followed for determination of the age of a child, in conflict of laws, which reads as under:

"7. The appellant relies upon three documents such as a birth certificate; school leaving certificate and the report of the ossification test in support of his plea of being a juvenile, whereas the State relies upon the family register prescribed by the Family Register Rules.

(i) Birth Certificate

8. First, we shall examine the truthfulness of the birth certificate issued by the Government of Uttar Pradesh wherein the date of birth is mentioned as 13-5-1993. Such date of birth was registered on 19-11-2014 after the filing of the application under Section 7-A of the Act on 7-10-2014.

9. We find that such date of birth certificate has been arranged to claim benefit under the 2000 Act. The date of birth certificate produced by the appellant cannot be relied upon as it was obtained after filing of the application under Section 7-A of the Act on 7-10-2014. As per the birth certificate, the appellant was born at house. Therefore, in terms of Sections 8(1)(a) and 10(1)(i) of the Registration of Births and Deaths Act, 1969 ("the Registration Act"), birth had to be reported to the Registrar by the head of the household or by the nearest relative of the head present in the house or by the oldest adult male person present. In case birth is reported within 30 days, it shall be registered on payment of such late fee as may be prescribed. There are other conditions for registration of birth after 30 days as well.

10. The relevant provisions of the Act read thus:

"8. Persons required to register births and deaths.—(1) It shall be the duty of the persons specified below to give or cause to be given, either orally or in writing, according to the best of their knowledge and belief, within such time as may be prescribed, information to the Registrar of the several particulars required to be entered in the forms prescribed by the State Government under sub-section (1) of Section 16,—

(a) in respect of births and deaths in a house, whether residential or non-residential, not being any place referred to in clauses (b) to (e), the head of the house or, in case more than one household live in the house, the head of the household, the head being the person, who is so recognised by the house or the household, and if he is not present in the house at any time during the period within which the birth or death has to be reported, the nearest relative of the head present in the house,

and in the absence of any such person, the oldest adult male person present therein during the said period;

10. Duty of certain persons to notify births and deaths and to certify cause of death.—(1) It shall be the duty of—

(i) the midwife or any other medical or health attendant at a birth or death,

(ii) the keeper or the owner of a place set apart for the disposal of dead bodies or any person required by a local authority to be present at such place, or

(iii) any other person whom the State Government may specify in this behalf by his designation.

to notify every birth or death or both at which he or she attended or was present, or which occurred in such areas as may be prescribed, to the Registrar within such time and in such manner as may be prescribed.”

(ii) School leaving certificate

11. Therefore, the courts have rightly not relied upon date of birth certificate which was granted on 19-11-2014 as it was obtained after filing of the application and registered many years after the birth and not immediately or within the prescribed time period.

12. The school leaving certificate (Ext. A-3) has been proved by examining Umesh Kumar, Head Teacher of Adarsh Siksha Sadan, Pinna. As per the statement of the witness, the school was functioning in the year 1999 in Village Kheri, Dudadhari and was shifted to Village Pinna in the year 2009-2010 where he had been working as Head Teacher from the year 2000. As per the certificate, the appellant was a student of such school from 12-7-1999 till 2-7-2003. In cross-examination, he admits that the school **is a private school and the father of the appellant has not produced any certificate of the appellant attending the first class.** The appellant was admitted directly in the 2nd standard. He admits that Ext. A-1, the admission form, is a loose sheet prepared in his handwriting and it does not bear any counter-signature of any higher authority. He has not even produced any proof of registration of the school with the Education Department.

(iii) Ossification test report

16. The Medical Board has opined the age of the appellant between 23 to 24 years, when the appellant was examined on 13-5-2016. This report has been relied upon by the learned Additional Sessions Judge to allow the plea of juvenility raised by the appellant. However, it is to be noted that ossification test varies based on individual characteristics and hence its reliability has to be examined in each case.

17. A textbook of Medical Jurisprudence and Toxicology by Modi, 26th Edn., p. 221, delineates the factors relevant to determining the age:

(1) Height and weight.—It is opined that progressive increase in height and weight according to age varies so greatly in individuals that it cannot be depended upon in estimating age in medico-legal cases.

(2) Ossification of bones.—This sign is helpful for determining the age until ossification is completed, for skiagraphy has now made it possible to determine even in living persons, the extent of ossification, and the union of epiphysis in bones.

18. Hence, it cannot be reasonably expected to formulate a uniform standard for determination of the age of the union of epiphysis on account of variations in climatic, dietetic, hereditary and other factors affecting the people of the different States of India.

19. Furthermore, this Court in a judgment in *Jyoti Prakash Rai v. State of Bihar* [*Jyoti Prakash Rai v. State of Bihar*, (2008) 15 SCC 223 : (2009) 3 SCC (Cri) 796] **held that the medical report determining the age of a person has never been considered by courts of law as also by the medical scientist to be conclusive in nature. It was also found that though the Act is a beneficial legislation but principles of beneficial legislation are to be applied only for the purpose of interpretation of the statute and not for arriving at a conclusion as to whether a person is juvenile or not.**

(Emphasis Supplied)

22. In the judgement of *P. Yuvaprakash (supra)*, which has been heavily relied upon by learned counsel for the applicant, the Apex Court has observed as under:

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.

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.

(Emphasis Supplied)

23. The Co-ordinate Bench of this Court in **Sanjay v. State of U.P., : 2020 SCC OnLine All 1397**, has observed as under:

"25. Thus it is clear that for the determination of age of victim, primacy shall be given to Date of Birth (hereinafter referred to as 'DoB') mention in matriculation (or equivalent) certificate, in absence thereof DoB mention in the school first attended by the victim shall be taken into consideration, in absence of both, the entries made by a corporation or a municipal authority or a panchayat regarding DoB shall be taken into account and finally if none of the aforesaid document containing DoB is available, medical evidence regarding age of victim, shall be taken into consideration. It is further clear that neither merely ocular evidence nor any other document shall be considered for determination of age."

(Emphasis Supplied)

24. With regard to the determination of age of a prosecutrix, the Rajasthan High Court in **Bajrang Lal v. State of Rajasthan : 2006 SCC OnLine Raj 1392**, has observed as under:

"19. So far, as the present case is concerned, as mentioned above, there are three types of evidence in respect of the age of the prosecutrix Manohari. Her parents have stated her age to be 12 years at the time of occurrence whereas as per the school certificates, which have been proved by the Headmaster of the Government School, the age of the victim approximately comes to 13 years and 7 months on the date of incident, whereas as per the ossification test it comes in between 15 to 17. years. The trial Court, after considering the evidence relating to her age, as referred above, determined the age of

the prosecutrix Manohari as 15 years on the date of occurrence. I have also considered the statements of the parents of the prosecutrix Manohari, who have stated her age as 12 years but (hey have also admitted in their cross-examination that they do not remember her exact date of birth. So far as the documents Exhibit P-12 and Exhibit P-18 are concerned, the age of the victim from 15 to 17 years **is based on ossification test, which cannot be said to be a conclusive evidence but, in fact, it is an evidence of advisory character as observed by the Hon'ble Supreme Court in Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204.** In the present case the date of birth entered in the school certificates of the prosecutrix Manohari has been proved by PW. 10 Shivpal Nai, the Headmaster of the school where the prosecutrix studied. PW. 10 Shivpal Nai, the Headmaster, also brought the originals of Exhibit P-14A to Exhibit P-17. If the statements of the parents of the prosecutrix Manohari are read with the documentary evidence Exhibit P-14A to Exhibit P-17 (her school certificates) relating to the age of the prosecutrix, then certainly her age approximately comes in between 12 to 14 years. As per ossification test of the victim, her age comes from 15 to 17 years. **This Court in Ganga Ram's case (Supra), has observed that of-course the ossification test of bones is helpful but even that is not also very sure test as owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different States of India. There is not a uniform standard for determination of age of the union of epiphysis for the whole of India. According to Modi the range of error in ossification test may be upto three years. In Narendra Singh's case (Supra), the Madhya Pradesh High Court has also observed that margin of three years could be on either side. As per Exhibit P-12 and Exhibit P-18 the age of the victim is from 15 to 17 years and it can vary on either side to three years. If 15 years age varies to 12 to 15 years then it is corroborated with the statement of her parents as well as school certificates, therefore, school certificates are more reliable.** The exact date of birth was not known to the parents as they are illiterate villagers and it is not possible for each and every such person, who resides in interior parts of the country to know and remember the exact date of birth of their kids but approximate years of age stated by them is nearer to the date of birth of victim i.e., 31.12.1985 mentioned in the school certificates proved by PW. 10 Shivpal Nai, the Headmaster of the school in which the prosecutrix studied. The learned trial Court has not determined the age of the victim taking her date of birth as 31.12.1985 but it determined her age as about 15 years and after considering all the facts and circumstances of the case I do not find any illegality or perversity in the finding of the learned trial Court regarding the age of the prosecutrix Manohari whereby her age has been determined as about 15 years and in view of it, the consent of victim becomes immaterial."

(Emphasis Supplied)

25. Thus, from the aforesaid observations and principles as laid down by the Apex Court and the different High Courts, it is crystal clear that the provisions of the Juvenile Justice Act, 2015, can also safely be applied for determination of the age of a victim of crime, specifically the crimes with regard to sexual offences, which are covered under the provisions of the POCSO Act as well as under the Indian Penal Code. The Act, 2015, provides a complete machinery in Section 94 with regard to the presumption and determination of age, which reads as under:

"Section 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."

(Emphasis Supplied)

26. As per the aforesaid provisions, specifically, the provisions of subsection (2) of Section 94 of J.J. Act, in the instant case, a *prima facie*

document i.e., the School Leaving Certificate, which has been issued by the Primary Junior High School, Athaiya, Kasganj, according to which the date of birth of the victim is stated to be 19.01.2005. Therefore, once the Date of Birth Certificate from school is available, the requirement of Ossification Test in the instant case is unwarranted. However, if the prosecution ultimately fails to prove the said Birth Certificate issued by school during trial, the Ossification Test would be relevant for determination of the age of the victim. Since, this Court is exercising the powers under Section 482 Cr.P.C., the limitations are that whether *prima facie* a case, as has been alleged against the applicant is made out or not. From the School Leaving Certificate, which has been produced by the opposite party no.2 as CA-1 to the counter affidavit, it *prima facie* appears that the date of birth of the victim is 19.01.2005. Therefore, the age determined by the Ossification Test by the medical examination loses its significance. Therefore, on 26.12.2021, undisputedly, on the basis of the aforesaid School Leaving Certificate, the victim was minor, which has also been alleged in her statements under Section 161 as well as 164 Cr.P.C. by the victim that she was minor on the date of incident.

27. In the instant case, the applicant has annexed as Annexure-6, the Birth Certificate of the victim. However, the date of registration of the birth of the victim is 17.02.2022, after the date of incident. Therefore, it appears that the said Birth Certificate has been purposefully obtained by the applicant to get away from the clutches of law and the offence against the victim, who was minor at the time of the incident. Therefore, the Birth Certificate which has been obtained by the applicant in considered opinion of this Court, is of not much relevance at this stage. Therefore, on the basis of the School Leaving Certificate, the date of birth of the victim is *prima facie* established to be 19.01.2005. Otherwise also, as per the scheme of Section 94 of the the Act, 2015 once the school certificate is available, the other certificates such as the Birth Certificate issued by the Municipal Corporation becomes a secondary evidence. Therefore, it is concluded that on the date of incident the victim was *prima facie* a minor. The consent of a minor, has no consequence for the offences under the POCSO Act as well as

Section 375 I.P.C. Exception- 2, irrespective of the fact that such minor victim had married to the applicant herein. Thus, *prima facie* offence as alleged against the applicant has been made out. Therefore, there is no ground for interference in the impugned charge-sheet as well as the cognizance order at this stage.

28. For all the reasons stated above and in the light of the judgements of the Apex Court in *Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others : 2021 SCC OnLine SC 315*, *State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426]* and *R. P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866*, the instant application under Section 482 Cr.P.C. is ***dismissed***

29. However, it is made clear that the observation made herein above shall have no bearing on the trial of the case, which shall be concluded on the basis of the evidence led during trial.

Order Date: 01.02.2024

Shubham Arya