

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.586 of 2023

Arising Out of PS. Case No.-321 Year-2020 Thana- SABAUR District- Bhagalpur

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DEEPAK KUMAR Son of Upendra Mandal Resident of village - Simro, P.S. -
Sabour, Distt. - Bhagalpur

... ... Appellant

Versus

THE STATE OF BIHAR.

... ... Respondent

=====

with

CRIMINAL APPEAL (DB) No. 857 of 2023

Arising Out of PS. Case No.-321 Year-2020 Thana- SABAUR District- Bhagalpur

=====

NIKESH MANDAL @ NIKESH KUMAR S/O SUNIL MANDAL R/O
VILLAGE - SIMARO, P.S.- SABOUR

... ... Appellant

Versus

The State of Bihar.

... ... Respondent

=====

Indian Penal Code--- Section 363, 366A, 376, 120B—POCSO Act—Section 4, 17--- allegation against Appellants is to entice away informant's minor daughter (victim) for the purpose of marriage—during course of investigation, victim girl was recovered from Delhi with Appellant Nikesh Mandal and thereafter victim's statement under section 161 and 164 of CrPC were recorded—in statements recorded under sec. 161 of CrPC, victim stated that she voluntarily left her house and got married with Appellant – Nikesh Mandal and were staying in Delhi for last 2-3; months while in her statement recorded under 164 of CrPC she tried to implicate both the Appellants in alleged occurrence--- *Held*; the victim changed her version from time to time and there are major contradictions in her statements u/s 161 and 164, hence, she cannot be termed as sterling witness--- failure of prosecution to prove the age of victim—the prosecution failed to produce any documentary evidence, except the radiological report, to prove the age of victim—even as per the radiological report, the age of victim appears to be between 14-16 years and a judicial notice can be taken that the margin of error in age ascertained by radiological examination is two years on either side—therefore, age of victim can safely be treated to be between 16-18 years--- prosecution failed to discharge its duty to prove that victim was minor on the date of occurrence-- no evidence of recent sexual assault and no physical or chemical injury on the body including private part of the victim-- impugned judgment and order convicting and sentencing the appellants set aside. – Appeal allowed.

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NIKESH MANDAL @ NIKESH KUMAR S/O SUNIL MANDAL R/O VILLAGE - SIMARO, P.S.- SABOUR

... .. Appellant

Versus

The State of Bihar.

... .. Respondent

Appearance :
(In CRIMINAL APPEAL (DB) No. 586 of 2023)
For the Appellant : Mr. Ramakant Sharma, Senior Advocate
Mr. Rakesh Kumar Sharma, Advocate
For the State : Mr. Sujit Kumar Singh, APP
(In CRIMINAL APPEAL (DB) No. 857 of 2023)
For the Appellant : Mr. Praveen Kumar, Advocate
Mr. Raushan Kumar, Advocate
For the State : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 28-02-2024

Criminal Appeal (DB) No.586 of 2023 has been filed by
accused Deepak Kumar against the judgment of conviction dated
02.05.2023 and order of sentence dated 09.05.2023, passed by



learned Exclusive Special Court (POCSO Act)-cum-7th Additional Sessions Judge, Bhagalpur in POCSO Case No.31/2021, arising out of Sabour (Goradih) P.S. Case No.321/2020, whereby the said appellant has been convicted for the offences punishable under Sections 366A, 376/120B of the Indian Penal Code as well as under Sections 4/17 of the POCSO Act and sentenced to undergo RI for 20 years and a fine of Rs.20,000/- under Sections 4/17 of the POCSO Act and in default of payment of fine, he is further sentenced to undergo S.I. for six months. The appellant, namely, Deepak Kumar is further sentenced to undergo R.I. for 5 years and a fine of Rs.10,000/- under Section 366A of the Indian Penal Code and in default of payment of fine, he is further sentenced to undergo S.I. for three months. All the sentences were directed to run concurrently.

1.1. Criminal Appeal (DB) No.857 of 2023 has been filed by accused Nikesh Mandal @ Nikesh Kumar against the judgment of conviction dated 12.07.2023 and order of sentence dated 19.07.2023, passed by learned Exclusive Special Court (POCSO Act)-cum-7th Additional Sessions Judge, Bhagalpur in POCSO Case No.95/2023, arising out of Sabour (Goradih) P.S. Case No.321/2020, whereby the said appellant has been convicted for the offences punishable under Sections 363, 376/120(B) of the



Indian Penal Code as well as under Section 4 of the POCSO Act and sentenced to undergo RI for 20 years and a fine of Rs.20,000/- under Section 4 of the POCSO Act and in default of payment of fine, he is further sentenced to undergo S.I. for six months. The appellant, namely, Nikesh Mandal @ Nikesh Kumar is further sentenced to undergo R.I. for 2 years and a fine of Rs.10,000/- under Section 363 of the Indian Penal Code and in default of payment of fine, he is further sentenced to undergo S.I. for three months. All the sentences were directed to run concurrently.

1.2. No separate sentence is awarded to the appellants for the offences under Sections 376/120(B) of the Indian Penal Code in terms of the provision under Section 42 of the Protection of Children from Sexual Offence Act, 2012.

2. As the evidence led by the prosecution in both the cases is same, both these appeals are being taken up for final disposal with the consent of learned counsels appearing for the parties. At this stage, it is pertinent to note that trial was proceeded against both the accused. However, as both the accused were on bail and after recording the statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), both the accused were not available, therefore, N.B.W. came to be issued and pursuant to which initially accused Deepak



Kumar came to be arrested and, therefore, the Trial Court passed the separate order in May, 2023 against him. Subsequently, accused Nikesh Mandal @ Nikesh Kumar came to be arrested and, therefore, in July, 2023, the Trial Court passed the order in case of the said accused-appellant Nikesh Mandal @ Nikesh Kumar.

3. The factual matrix of the present case is as under:

A written report/complaint came to be given by the mother of the victim on 12.11.2020 in which the complainant has stated that on 10.11.2020 at 04:00 PM, Nikesh Mandal came to her house and enticed away her daughter for the purpose of marriage. When the complainant informed about this incident to Sunil Mandal, father of Nikesh Mandal, Anil Mandal, uncle of Nikesh Mandal, Santosh Mandal, uncle of Nikesh Mandal, Rajesh Mandal, brother of Nikesh Mandal, Brajesh Mandal, brother of Nikesh Mandal and Deepak Kumar, they started abusing and assaulting her.

3.1. On the basis of the said written complaint, formal FIR came to be lodged on 12.11.2020 at 16:45 hours before Sabour Police Station.

3.2. After registration of the FIR, the Investigating Officer carried out the investigation and during the course of investigation, the victim girl as well as the accused Nikesh Mandal



were found at Delhi and they were brought to Bhagalpur. During the course of investigation, the Investigating Officer had recorded the statement of the witnesses. The statement of the victim under Section 161 of the Code came to be recorded. Immediately thereafter the statement of the victim under Section 164 of the Code came to be recorded by the concerned Magistrate. Thereafter the Investigating Officer filed charge-sheet before the concerned competent court.

4. In order to prove the charges levelled against the appellants, the prosecution has examined altogether six witnesses and also produced documentary evidence. The defence has also examined four witnesses and prior to that statement of the accused under Section 313 of the Code came to be recorded. After conclusion of the trial, the Trial Court passed two separate judgments, as observed hereinabove, and in both the cases, the respective appellants came to be convicted against which the concerned convicts filed the respective appeals, as stated hereinabove.

5. Heard Mr. Ramakant Sharma, learned Senior Counsel assisted by Mr. Rakesh Kumar Sharma for appellat Deepak Kumar, Mr. Praveen Kumar, learned counsel for appellant Nikesh



Mandal @ Nikesh Kumar and Mr. Sujit Kumar Singh, the learned APP in both the appeals.

6. Learned counsels appearing for the appellants would mainly submit that the prosecution has failed to prove the age of the victim by leading cogent evidence before the Trial Court. It is submitted that as per the radiological report, age of the girl/victim is 14-16 years. However, as per the decision rendered by the Hon'ble Supreme Court in the case of **Jaya Mala vs. Home Secretary, Government of Jammu and Kashmir & Ors.**, reported in **AIR 1982 SC 1297**, the margin of error of two years on either side is to be given and, therefore, the age of the victim can be treated between 16-18 years. It is also submitted that as per the case of the prosecution, the victim was school going girl and she was studying in the coaching class of Deepak Kumar. Thus, it was the duty of the prosecution to place on record the school register or birth certificate of the victim. However, the prosecution has failed to produce such document before the Trial Court.

6.1. At this stage, learned counsels for the appellants have also placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of **Jarnail Singh vs. State of Haryana**, reported in **(2013) 7 SCC 263**. It is submitted that in the said decision, the Hon'ble Supreme Court has discussed about the



provisions of law contained in Juvenile Justice (Care and Protection of Children) Act, 2000 and the Rules framed thereunder. It is submitted that the Hon'ble Supreme Court in paragraph 22 and 23 has discussed the procedure to be followed by the investigating agency to prove the age of the victim.

6.2. Learned counsels for the appellants further submit that the version of the victim in her statement recorded under Section 161 of the Code, her statement recorded under Section 164 of the Code and the deposition given before the Court are different and there are major contradictions in the deposition of the said witness. It is submitted that even as per the victim, one Sunil has committed rape upon her while she was in Delhi. However, the prosecution has not inquired/investigated with regard to the said Sunil.

6.3. Mr. Ramakant Sharma, learned Senior Counsel appearing on behalf of the accused Deepak Kumar submitted that the allegation of rape has not been levelled against Deepak Kumar whereas learned counsel appearing on behalf of Nikesh Mandal @ Nikesh Kumar submitted that the victim girl in her statement recorded under Section 164 of the Code before the Magistrate has specifically stated that there was no fault on the part of Nikesh and one Sunil had committed rape upon her. It is further submitted that



Deepak Sir has forcibly sent her to Delhi with Nikesh Mandal. Learned counsels for the appellants, therefore, urged that the victim has not implicated both these appellants with regard to commission of rape while giving her statements recorded under Sections 161 and 164 of the Code.

6.4. It is further submitted that PW-6, Dr. Alpana Mitra has also stated that there is no physical or chemical injury on body of victim including private parts and there is no evidence of recent sexual assault on the victim. Learned counsels, therefore, urged that the medical evidence also does not support the case of the prosecution and hence, both these appeals be allowed and the impugned judgments passed by the Trial Court be quashed and set aside.

7. On the other hand, learned APP has vehemently opposed the present appeals by contending that the victim girl has specifically deposed before the Court that rape has been committed by accused Nikesh Mandal upon her and she has also narrated about the role played by another convict Deepak Kumar. It is further submitted that ingredients of provisions contained in Sections 361, 366A and 376 of the Indian Penal Code as well as POCSO Act are attracted and, therefore, the Trial Court has not committed any error while passing the impugned judgments. It is



submitted that when the appellants have been sentenced to suffer RI for 20 years, this Court may not entertain the present appeals.

8. We have considered the submissions canvassed by learned counsel for the parties. We have also gone through the evidence produced by the parties before the Trial Court. It would emerge from the record that the written complaint was given by mother of the victim on 12.11.2020 in which she has referred the names of seven persons including the present two appellants and the role played by them is also described in the said written report/complaint. It is pertinent to note that the said written complaint was registered as formal FIR on 12.11.2020 at 16:45 hours. It is the case of the prosecution that the victim girl and the accused Nikesh Mandal were found in Delhi and they were brought from Delhi to Bhagalpur. The statement of the victim was immediately recorded under Section 161 of the Code by the police. In the statement given by the victim under Section 161 of the Code she has stated that she and Nikesh Mandal solemnized marriage voluntarily at Delhi and they were living as husband and wife. Thereafter the friend of her husband informed them about lodging of case on their family. Thereafter her mother and police officer took her to Goradiah Police Station from Delhi. Nikesh Mandal did not pressurize her to accompany him. We were willing to marry. It



is also pertinent to note that immediately the victim was taken to the Magistrate Court and her statement under Section 164 of the Code came to be recorded wherein the victim has stated that she is giving her statement after understanding the questions well. She has further stated that on 10.10.2022, she had gone to study at Deepak Sir's coaching. Deepak Sir threatened her to go with Nikesh Mandal to Delhi. He gave her train tickets and Rs.2000/-. Deepak Sir forcibly sent her to Delhi with Nikesh. There she lived with Nikesh for two months. She did not want to go to Delhi and then Deepak's friend Sunil forcibly raped her. Deepak always told her to implicate Nikesh falsely. She has further stated in her statement recorded under Section 164 of the Code that Nikesh has not done anything wrong. She was forcibly sent to Delhi to falsely implicate Nikesh and she wants to go to her parents.

9. At this stage, we would like to refer the deposition given by PW-4, the victim before the Court. In her deposition before the Court she has stated as under:

9.1. In the evening, she went to Deepak Sir's place in Simroh village to study. There Nikesh was saying that he will marry her. She said that she does not want to get married. It is further deposed that Deepak gave her water to drink. After drinking water she started feeling dizzy. She became unconscious.



When she got consciousness, she found herself at Bhagalpur Station. Deepak got the ticket and took her to Delhi. She was kept in a rented room. Nikesh forcibly raped her. Nitesh also raped her. This witness further deposed that out of the two accused standing in the Court, Nikesh, standing on the right, is the one who raped her. The second accused helped Nikesh in taking her away. She gave statement before the police under Section 161 of the Code. The statement given to the police is absolutely correct. It is further deposed by PW-4 that she had given statement before the Court under Section 164 of the Code.

9.2. PW-4, the victim, has stated in her cross-examination that in the statement given before the police, she had said that Deepak Sir had taken ticket. She had told the police that Deepak gave her water to drink and after drinking the water, she started feeling dizzy and became unconscious and when she regained her consciousness, she found herself at Bhagalpur station. This witness further stated in her cross-examination that she had also said in the Court that Deepak gave her water to drink and after drinking the water, she started feeling dizzy and became unconscious and when she regained her consciousness, she found herself at Bhagalpur station.



10. Thus, from the aforesaid version given by the victim before the different authorities, i.e., the police, the learned Magistrate and before the Special Court, it can be said that she had changed her version from time to time. In her statement recorded under Section 161 of the Code, she has stated that she has voluntarily left her house and gone with Nikesh Mandal and they got married and they were staying in Delhi since last 2-3 months.

10.1. However, in the statement recorded under Section 164 of the Code, she has specifically stated that there was no fault on the part of Nikesh and in fact one Sunil, who is friend of Deepak, had committed rape upon her. She has further stated that Deepak forcibly sent her with Nikesh at Delhi. However, while giving deposition before the Court, she has tried to implicate both Deepak and Nikesh in the alleged occurrence.

11. From the aforesaid material produced by the prosecution before the Court, it can be said that there are major contradictions in the version given by the victim and she has changed her story from time to time.

12. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Rai Sandeep vs. State (NCT of Delhi)**, reported in **(2012) 8 SCC 21**. The Hon'ble Supreme Court has observed in para 22 as under:



“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness”



whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

13. In the present case, in view of the aforesaid different version given by the victim, she cannot be termed as sterling witness. Even otherwise in her version given under Sections 161 and 164 of the Code, she has not levelled any allegation with regard to rape against both the present appellants.

14. Therefore, the next question, which is required to be examined, is with regard to the age of the victim. At this stage, we would like to refer the deposition given by PW-5, Madan Mohan Yadav, the Investigating Officer, who has stated in paragraph 13, 14 and 15 as under:

14.1. No investigation was done regarding where the victim got her ticket. No investigation was done with regard to education of the victim. The *Safai Beyan* of Deepak has not been mentioned in the diary. The victim did not tell in her statement that Deepak Sir took her ticket. Even it was not said in the statement that Deepak gave her water to drink due to which she started



feeling dizzy and became unconscious and when she regained her consciousness, she found herself at Bhagalpur station. It is not that he did not do proper investigation and falsely implicate the accused.

15. At this stage, we would also like to refer the deposition given by PW-6, Dr. Alpana Mitra, which reads as under:

15.1. “2. I examined Victim, D/o Md. Kabil, Village-.Salpur, P.S-. Goradih, Dist-Bhagalpur who was brought to me by lady Police no. 749 Rinki Kumari and Lady police no. 406 K.M Shilpi Raj and noted the following.

A. There is no physical or chemical injury on her body including private parts.

B. Sent her to pathology dept. of JLNMCH, Bhagalpur with two sealed vaginal swabs for detection of spermatozoa and Urine pregnancy test and to radiology dept. for x-ray of wrist, elbow and pelvis for age determination.

3. **Mark of Identification-** Black Til on Left side neck.

4. **I received the reports from JLNMCH 05-02-2021**

A. According to memo no. 9 dated 06-01-2021 spermatozoa not found and urine pregnancy test is negative.

B. According to to x-ray no. 02 dated 06-01-2021 age on radiological ground appear between 14-16 Years.



5. **Opinion-** She is between 14-16 Years of age and there is no evidence of recent sexual assault and with no pregnancy.

6. This medical report is prepared by me in my own writing and my signature which I identified and same is marked as **Ext. -P6 /PW6**

प्रतिपरीक्षण

7. रेडियोलॉजी किस डाक्टर ने किया है यह मुझे मालूम नहीं है। मैंने जांच में पीड़िता के शरीर पर कोई फिजिकल इंजुरी नहीं पाया।

8. पीड़िता जब मेरे पास जांच हेतु आई थी वह पूर्णतः स्वस्थ थी। मैंने पीड़िता के शरीर पर किसी तरह के जख्म का निशान नहीं पाया।”

16. From the deposition of the aforesaid two witnesses, it is revealed that the prosecution has failed to produce any documentary evidence with a view to prove the age of the victim. Learned counsels appearing for the appellants have rightly contended that the victim was studying in the school and she was attending the coaching classes of accused Deepak Kumar. However, the Investigating Officer has failed to produce the school register or birth certificate of the victim with a view to prove her age.

16.1. From the medical evidence given by Dr. Alpana Mitra, it would reveal that as per the radiological report, age of the victim appears between 14-16 years.

17. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Jarnail**



Singh (supra) wherein the Hon'ble Supreme Court has discussed in detail with regard to the provisions contained in Juvenile Justice (Care and Protection of Children) Rules, 2007 and the Rules framed thereunder. However, the Hon'ble Supreme Court has observed in paragraph-22 and 23 as under:

“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as “the 2007 Rules”). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12.Procedure to be followed in determination of age.—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or,



as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the



Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

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.”

18. In the case of **P. Yuvaprakash vs. State Rep. By Inspector of Police**, reported in **2023 SCC OnLine SC 846**, the Hon’ble Supreme Court has observed in paragraph 14 to 17 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.

15. In a recent decision, in *Rishipal Singh Solanki v. State of Uttar Pradesh*,³ this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in *pari materia*) with Section 94 of the JJ Act, and held as follows:

“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided *prima facie* on the



basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this court held in *Sanjeev Kumar Gupta v. The State of Uttar Pradesh*⁴ that:

“Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was



only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In *Abuzar Hossain @ Gulam Hossain v. State of West Bengal*⁵, 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.

18.1. From the aforesaid decision rendered by Hon'ble Supreme Court, it can be said that the burden of proof that someone is juvenile (or below the prescribed age) is upon the person claiming it. In the present case, the prosecution has claimed that the victim is minor girl, therefore, it was the duty of the prosecution to prove that the victim was minor on the date of occurrence.

19. At this stage, we would also like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Jaya Mala (supra)** wherein the Hon'ble Supreme Court in paragraph 9 observed as under:

“9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention. Growing in age day by day is an



involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert, in October 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school-going boy. It equally appears that there was some upheaval in the educational institutions. This young school-going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed.”

19.1. From the aforesaid decision, it can be said that a judicial notice can be taken that the margin of error in age ascertained by radiological examination is two years on either side.

19.2. In the present case, as discussed hereinabove, except the radiological report, there is no material produced by the prosecution with a view to prove the age of the victim. Even as per the radiological report, the age of the victim appears to be between 14-16 years and, therefore, it can be safely said that the age of the



victim can be treated to be between 16-18 years. Even PW-6, the doctor has specifically stated that there is no evidence of recent sexual assault and there is no physical or chemical injury on the body including private part of the victim.

20. It is pertinent to note that PW-1, Md. Shahbaz and PW-2, Bibi Khatoon have not supported the case of the prosecution.

21. Looking to the aforesaid facts and circumstances of the present case and from the evidence led by the prosecution, we are of the view that the prosecution has failed to prove the case against both the appellants beyond reasonable doubt and, therefore, the Trial Court ought to have acquitted both the present appellants. However, the Trial Court has passed the impugned judgments and, therefore, the present appeals have been filed. Looking to the facts and circumstances of the present case, we are of the view that the Trial Court has committed grave error in passing the impugned judgments and, therefore, both the judgments are required to be quashed and set aside. Accordingly, both the appeals are allowed. The impugned judgment of conviction dated 02.05.2023 and order of sentence dated 09.05.2023 passed by learned Exclusive Special Court (POCSO Act)-cum-7th Additional Sessions Judge, Bhagalpur in connection



with POCSO Case No.31/2021, arising out of Sabour (Goradih) P.S. Case No. 321 of 2020 and the impugned judgment of conviction dated 12.07.2023 and order of sentence dated 19.07.2023 passed by learned Exclusive Special Court (POCSO Act)-cum-7th Additional Sessions Judge, Bhagalpur in connection with POCSO Case No.95/2023, arising out of Sabour (Goradih) P.S. Case No. 321 of 2020 are quashed and set aside. The appellants, namely, Deepak Kumar and Nikesh Mandal @ Nikesh Kumar are acquitted of the charges levelled against them by the learned trial court.

21.1. Since both the appellants, named above, are in jail, they are directed to be released forthwith, if their presence is not required in any other case.

(Vipul M. Pancholi, J.)

(Sunil Dutta Mishra, J.)

Sanjay/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	04.03.2024
Transmission Date	04.03.2024

