

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.246 of 2024

Arising Out of PS. Case No.-40 Year-2021 Thana- MAHILA P.S. District- Samastipur

Gaurav Kumar @ Gaurav Singh, S/o Late Lalan Singh, R/o Village- Alampur,
P.S.- Vidyapatinagar, Distt.- Samastipur.

... .. Appellant

Versus

1. The State of Bihar.

2. [REDACTED] R/o Village + P.O.- Simri, Ward No. 11,
P.S.- Vidhyapati Nagar, District- Samastipur.

... .. Respondents

Appearance :

For the Appellant/s : Mr. Bhola Prasad, Advocate
Mr. Ujjwal Kumar, Advocate
Mr. Vijya, Advocate

For the Respondent/s : Mr. Binod Bihari Singh, Addl. P.P.

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and

HONOURABLE MR. JUSTICE SOURENDRA PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SOURENDRA PANDEY

Date : 10-09-2025

We have heard learned counsel for the appellant and learned Additional Public Prosecutor for the State. Despite service of notice on respondent no. 2, she has chosen not to enter appearance to contest the appeal. In course of hearing, we have also perused the trial court records.

2. This appeal has been preferred for setting aside the judgment of conviction dated 25.01.2024 (*hereinafter referred to as the 'impugned judgment'*) and the order of sentence dated 30.01.2024 (*hereinafter referred to as the 'impugned order'*)



passed by learned Additional District & Sessions Judge-VI-cum-Spl. Judge, POCSO Act, Samastipur (*hereinafter referred to as the 'learned trial court'*) in T.R. No.111 of 2024 arising out of Mahila P.S. Case No. 40 of 2021.

3. By the impugned judgment, the appellant has been convicted for the offences punishable under Sections 376(D), 363, 341, 504 and 506 of the Indian Penal Code (*in short 'IPC'*) and Section 6 of the Protection of Children from Sexual Offences Act (*in short 'POCSO Act'*). By the order of sentence, he has been ordered to undergo rigorous imprisonment for 20 years with a fine of Rs.50,000/- under Section 6 of the POCSO Act and in default of payment of fine, he shall further undergo rigorous imprisonment for six months.

Prosecution Case

4. The prosecution case is based on a written information submitted by the mother of the victim (PW-2) on 14.06.2021 in Mahila Police Station, Samastipur. She has stated in her written information that she is a resident of village-Simri, Ward No.11 under Vidyapati Nagar Police Station in the District of Samastipur. On 19.05.2021 at about 3.45 AM, she had gone to ease out outside her house in a field with her mother-in-law, namely, Most. Panwati Devi (not examined) and her minor daughter ('X') (PW-1) and



minor daughter ('Y') (PW-3). At this stage, she has stated that the four accused persons, namely, (1) Raushan Kumar, (2) Gaurav Kumar, (3) Rupesh Kumar and (4) Kundan Kumar, who were waiting there with a pre-plan, pointed pistol on the informant and asked her to remain silent otherwise her head would be blown. The informant (PW-2) alleged that thereafter all the four persons took away her minor daughter (PW-1) aged about 15 years forcibly in a Scorpio vehicle. She alleged that all the four persons had kidnapped her daughter with an intention to commit gang rape and for prostitution. She has stated that after putting pressure on the guardians and under societal pressure, the victim girl was left/thrown at 10 O' Clock in night on 21.05.2021. The informant alleged that from 19.05.2021 to 21.05.2021 all the four persons had committed rape on the victim. She alleged that when she used to go to police or for treatment then all the four criminals and their dozens of guardians and associates armed with weapons were threatening her to kill all the family members. She expressed apprehension that she may be killed by all the four accused persons, their guardians and the associates. On the written information, there is a thumb impression which is said to be of the informant (PW-2), but nobody has identified the thumb impression on the written application.



5. On the basis of this written application, Mahila P.S. Case No. 40 of 2021 dated 14.06.2021 was registered under Sections 376(DA), 363, 341, 323, 504, 506 and 34 IPC, Sections 8 and 10 the POCSO Act and Section 27 of the Arms Act.

6. After investigation, police submitted a chargesheet, bearing No. 117/2021 dated 16.11.2021 against the accused. Later on, a supplementary chargesheet, bearing No. 65 of 2022 dated 31.10.2022, under Sections 376(DA), 363, 341, 323, 504, 506 and 34 IPC and Sections 4 and 6 of the POCSO Act against the appellant keeping investigation pending against Raushan Kumar. Thereafter, vide order dated 11.11.2022, learned trial court took cognizance of the offence under Sections 376(DA), 363, 341, 504, 506 and 34 IPC and Sections 4 and 6 of the POCSO Act. Charges were read over and explained to the appellant in Hindi to which he pleaded not guilty and claimed to be tried, accordingly, vide order dated 21.11.2022, charges were framed under Sections 363, 376(DA), 341, 504 and 506/34 of the IPC and Section 4 and 6 of the POCSO Act against the appellant.

7. In course of trial, the prosecution has examined altogether six witnesses and exhibited several documentary evidences. The description of prosecution witnesses and the exhibits are given hereunder in tabular form:-



List of Prosecution Witnesses

PW-1	Victim
PW-2	Informant (Mother of the Victim)
PW-3	Sister of the Victim
PW-4	Pushplata Kumari (SHO)
PW-5	Maternal Uncle of the Victim
PW-6	Dr. Pratibha Kumari

List of Exhibits on behalf of the Prosecution

Exhibit ‘P1/PW-4’	Chargesheet
Exhibit ‘P2/PW-6’	Signature of the Doctor on the Medial Report
Exhibit ‘P3’	The age certificate of the victim issued by Bihar School Board.

8. Thereafter, the statement of the appellant was recorded under Section 313 of the CrPC. He took a plea that on the day of occurrence, he was not present at the place of occurrence. He had gone to his brother’s wedding.

9. The defence adduced no oral evidence but exhibited two documents which are mentioned hereinbelow in tabular form:-

List of Exhibits on behalf of Defence

Exhibit ‘A’	Certified Copy of Receipt of Toilet
Exhibit ‘B’	Certified Copy of Paid Receipt of Toilet



Findings of the Learned Trial Court

10. Learned trial court after analyzing the evidences on the record found that the appellant along with other co-accused kidnapped the victim and committed gang rape upon her, when she had gone to ease out with her family members.

11. Learned trial court, as regards the delay in lodging of the FIR, observed that it is not fatal to the prosecution case because in such type of cases, delay is not material and bound to occur as people do not want to go in the court for the sake of name and status of the family. Learned trial court found that PW-2 has stated in paragraph '6' of her cross-examination that after her daughter (PW-1) got kidnapped, she went to the guardians of the accused persons and also went to Vidyapati Police Station but they did not register the case.

12. Learned trial court as regards the age of the victim found that her age certificate has been filed which is marked Exhibit 'P3' without any objection and according to this document, her date of birth is 15.10.2006, hence, on the date of occurrence, she was below 15 years. Therefore, learned trial court observed that her consent is immaterial.

13. Learned trial court after properly appreciating the evidences on the record held that the ingredients of the offences



under Sections 376D, 363, 341, 504 and 506 IPC and Section 6 of the POCSO Act are made out and the charges are proved beyond all reasonable doubts. Accordingly, the appellant has been convicted for the offences punishable under Sections 376D, 363, 341, 504 and 506 IPC and Section 6 of the POCSO Act.

Submissions on behalf of the Appellant

14. Learned counsel for the appellant assailed the impugned judgment and order and submitted that the learned trial court has committed grave error in appreciating the evidences available on the record.

15. Learned counsel for the appellant submits that in this case, there is an inordinate delay of 26 days in lodging of the FIR for which there is no explanation at all. This would raise doubt over the prosecution story.

16. Learned counsel submits that the place where the victim (PW-1) was allegedly raped between 19.05.2021 and 21.05.2021 has not been proved by the prosecution.

17. Learned counsel submits that medial examination report completely rules out a case of sexual assault, which would prove fatal to the prosecution case.



Submissions on behalf of the State

18. On the other hand, learned Additional Public Prosecutor for the State has contested the appeal and submitted that the learned trial court has rightly convicted the appellant.

19. Learned Additional Public Prosecutor submits that the appellant along with other co-accused persons committed rape upon the victim, who is a minor. Learned Additional Public Prosecutor submits that the victim (PW-1) and the informant (PW-2) supported the occurrence which had taken place on 19.05.2021 and the matter was reported on 14.06.2021 and the reason for delay was that the accused persons were threatening the informant and her family members.

20. Learned Additional Public Prosecutor submits that the occurrence had taken place on 19.05.2021 and the victim was examined on 15.06.2021 and as such, it is not necessary that in case of sexual assault there might be injury on the person of the victim.

Consideration

21. We have heard learned counsel for the appellant and learned Additional Public Prosecutor for the State and also perused the trial court records.



22. The prosecution case is based on a written information submitted by the mother of the victim (PW-2) on 14.06.2021 in Mahila Police Station, Samastipur. She has stated in her written information that she is a resident of village-Simri, Ward No.11 under Vidyapati Nagar Police Station in the district of Samastipur. On 19.05.2021 at about 3.45 AM, she had gone to ease outside her house in a field with her mother-in-law Most. Panwati Devi (not examined) and her minor daughter ('X') and minor daughter ('Y'). At this stage, she has stated that the four named accused persons, who were waiting there with a pre-plan, pointed pistol on the informant and asked her to remain silent otherwise her head would be blown. The informant (PW-2) alleged that, thereafter, all the four persons took away her minor daughter ('Y') aged about 15 years forcibly in a Scorpio vehicle. She alleged that all the four persons had kidnapped her daughter with an intention to commit gang rape and for prostitution. She has stated that after putting pressure on the guardians and under societal pressure, the victim girl was left/thrown at 10 O' Clock in the night of 21.05.2021. The informant alleged that from 19.05.2021 to 21.05.2021 all the four persons had committed rape on the victim. She alleged that when she used to go to police or for treatment then all the four criminals and their dozens of guardians and



associates armed with weapons were threatening her to kill all the family members. She expressed apprehension that she may be killed by all the four accused persons, their guardians and the associates. On the written information, there is a thumb impression which is said to be of the informant (PW-2) but nobody has identified the thumb impression on the written application.

23. It is evident that the victim (PW-1) had already come back to her home on 21.05.2021 at 10 O' Clock in night but the written application giving rise to the present FIR was submitted after one month three weeks approximately. In course of trial, the attention of the informant (PW-2) was drawn towards the date of occurrence, wherein she has stated that the occurrence was of 19.05.2021 and on the same day at around 03:45 AM, her daughter was kidnapped. PW-2 has also stated that she had gone to Vidyapati Nagar Police Station after the kidnapping of her daughter. She has specifically stated that Vidyapati Nagar Police Station did not receive her application and thereafter she has, again, stated that they had not registered the case, however, they received the written report. PW-2 has further deposed that she does not remember the date when she has lodged the case. She, in paragraph '9' of her deposition, has stated that the Mahila Police Station was delaying in registering the case and that was the reason



for the delayed lodging of the FIR. PW-2 has also stated that the case was lodged after one and half months of the occurrence. She further submits that she had not gone to the local Police Station (Vidyapati Nagar Police Station). The defence suggested this witness that the present case was lodged on false grounds; that her daughter wanted to marry one Raushan Kumar and she had also sent her brother for a *Panchayati*. She has denied the aforesaid fact and has also denied the fact that her brother has stated that if Raushan would have married her daughter, then no case would have been lodged.

24. On the point of delay in lodging of the FIR, the I.O. (PW-4) has stated in paragraph '5' of her deposition that the informant (PW-2) had not stated about the reasons for delay in lodging of the FIR. This Court, therefore, finds that there is a delay of 26 days in lodging of the FIR. There is no explanation at all as to why this delay has occurred, raising serious doubts over the prosecution story.

25. On the question of delay and its effect, the Hon'ble Supreme Court has observed in the case of **Meharaj Singh (L/Nk.) vs. State of U.P.** reported in **(1994) 5 SCC 188** in paragraph '12' as under:-

“**12.** FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for



the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an after-thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a



promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW-8.”

The same view has been reiterated by the Hon’ble Supreme Court in the case of **Chotkau vs. State of U.P.** reported in **(2023) 6 SCC 742**. Paragraph ‘69’ of the judgment in the case of **Chotkau** (supra) reads as under:-

“69. On the question of compliance of Section 157(1) along with logical reasoning for doing so, the following passage from the decision in *Jafarudheen v. State of Kerala*⁸ may be usefully quoted as under : (SCC p. 462, paras 28-29)”

“28. The jurisdictional Magistrate plays a pivotal role during the investigation process. It is meant to make the investigation just and fair. The investigating officer is to keep the Magistrate in the loop of his ongoing investigation. The object is to avoid a possible foul play. The Magistrate has a role to play under Section 159 CrPC.

29. The first information report in a criminal case starts the process of investigation by letting the criminal law into motion. It is certainly a vital and valuable aspect of evidence to corroborate the oral evidence. Therefore, it is imperative that such an information is expected to reach the jurisdictional Magistrate at the earliest point of time to avoid any possible ante-dating or ante-timing leading to the insertion of materials meant to convict the accused contrary to the truth and on account of such a delay may also not only get bereft of the advantage of spontaneity, there is also a danger creeping in by the introduction of a coloured version, exaggerated account or concocted story as a result of deliberation and

8. (2022) 8 SCC 440: (2022) 3 SCC (Cri) 436



consultation. However, a mere delay by itself cannot be a sole factor in rejecting the prosecution's case arrived at after due investigation. Ultimately, it is for the court concerned to take a call. Such a view is expected to be taken after considering the relevant materials.”

26. Apart from the inordinate delay in lodging of the FIR, we find from the evidence on the record that while the informant (PW-2) has stated in the FIR that she, her mother-in-law and her two minor daughters had gone to ease out in the field at 03:45 AM, the victim girl (PW-1) has made statement under Section 164 Cr.P.C. on 16.06.2021 before a learned Magistrate where she has stated that she had gone to ease out in the field after she was awoken by her sister (‘X’). She has not stated that she had gone in the field with her mother, grand-mother and her sister. In course of trial, PW-1 has though stated that she had gone to ease out with her mother, grand-mother and sister, this Court finds that the statement of the victim (PW-1) is materially inconsistent with her own statement under Section 164 Cr.P.C. and this would create a dent on her evidentiary value. In course of trial PW-1 has stated that the accused persons took her on 19.05.2021 and dropped her back on 20.05.2021. She has stated that her mother had given the information to the Police on 21.05.2021 and she had not given any information on 20.05.2021. She has further stated that she had neither disclosed to the Police about the Doctor where she was



taken for treatment nor about the place where the accused persons had taken her. The aforesaid statement was in complete contradiction to her statement given under Section 164 Cr.P.C., wherein, she has stated that the accused persons committed wrong with her on 20.05.2021 and 21.05.2021 and, thereafter, she was thrown at her house in the night of 21.05.2021.

27. This Court finds that the I.O. (PW-4) has stated in her cross-examination that it could not be ascertained as to where the daughter of the informant was taken after her abduction. She further states that she did not record any statement of the persons who used to live around the place of occurrence. She has further stated that all the witnesses are the family members of the informant (PW-2) and no independent witness came forward to support the case. This Court, therefore, finds that the place of occurrence where the victim (PW-1) was raped between 19.05.2021 to 21.05.2021 has also not been proved by the prosecution.

28. PW-1, the victim herself, is also liable to be discredited for the reason that while she has stated that the accused persons forcibly took her away in a Scorpio car and committed rape upon her, but Dr. Pratibha Kumari (PW-6), in her medical examination report (Exhibit-P2/PW-6), has not mentioned about



presence of any external injury over whole body of the victim. PW-6, in fact, has deposed that there was no external and internal injury over perineum, vagina valva appeared healthy and the hymen was old healed and ruptured. She has very clearly opined that on the basis of the physical and radio-logical findings, the age of the victim was between 17-18 years and on the basis of the physical findings investigation report, there is no sign of sexual assault at the time of examination. In her cross-examination, the Doctor (PW-6) has not recorded that the victim told her about any sexual assault on her. The extract of the medical report (Exhibit-P2/PW-6) are as under:-

“Mark of identification – Cut mark on forehead

Height – 5’2” feet

weight – 40 kg

Teeth – 7x7/7x7

LMP- Not sure of date

On General examination

Bilateral Breast – well developed

Auxiliary and pubic hair- present

No external Injury over whole body and breast

P/A- NAD

Pelvic examination – Hymen, old, healed and ruptured.

Vagina valva appears healthy.

No External and internal injury over perineum

No foreign body found.

Two Vaginal Swab taken for microscopical examination – Reports not present

Investigation, suggestions and findings

X- ray pelvis A.P. View shows epiphysis of both illiac crest appeared but not fused.

X-ray wrist joint- A.P. view shows epiphysis of lower end of radius and ulna not completely fused.



X-ray elbow joint- A.P. view shows epiphysis of upper end of radius and ulna fused completely. USG whole abdomen- normal study.

Urine Pregnancy Test- Negative

On the basis of above Physical and radiological findings the age of victim is in between 17-18 -Years (Seventeen to eighteen years). There is no sign of sexual assault at the time of examination.”

29. We would also take note of paragraph ‘6’ of the cross-examination of PW-6 where she has stated that she had examined the clothes of the victim. At the time of examination, she did not find any sign of sperm on the clothes or any evidence connecting sexual assault on the clothing of the victim. To this Court, therefore, it appears that so far as the medical examination report and the deposition of the Doctor (PW-6) are concerned, they are completely ruling out a case of repeated sexual assault for three days by four persons.

30. We find from the evidence of the own sister of the victim, who has been examined as PW-3, that she is an eye-witness to the occurrence. She has stated that on the fateful day, while she along with her sister (the victim) and mother had gone to ease out in the field at 03:45 A.M., the accused persons, namely, Raushan, Rupesh, Gaurav (the appellant) and Kundan, came there and tied a towel (*Gamcha*) around the mouth of her sister and on the point of pistol, they took away her sister in a car. She has further stated that her sister was thrown at the house in an unconscious state at 10:00 P.M. on 21.05.2021. She has further deposed that her sister



disclosed that she was abducted and thereafter, raped and the accused persons had also tried to sell her off. PW-3 has stated that the four named accused persons committed rape upon her sister, as she was told by her sister (victim). This witness, during her cross-examination, has stated that her mother had gone to Vidyapith Nath Police Station on the same day of the incident, but still the Police did not come. She has further stated that when her sister came back on 21.05.2021, then they had gone to Samastipur Police Station, who were also not accepting the case and were dilly dallying, however, the case was finally accepted. PW-3 has not been able to tell as to where her sister was medically treated. She has denied the suggestion that her sister had friendship with accused/Raushan Kumar for which a *Panchayati* had also taken place. PW-3 has further denied the suggestion that when Raushan denied to marry her sister during the *Panchayati*, the entire family has instituted a false case against him.

31. PW-5, Pradeep Kumar, is the maternal uncle of the victim and is a hearsay witness. He has stated that he had earlier deposed before the Court that the treatment of the victim was done by one Dr. R.K. Shah. He has further stated that he does not have any prescription for the treatment received by Dr. R.K. Shah. It is



relevant to note here that aforesaid Dr. R.K. Shah has not been examined by the prosecution in course of trial.

32. This Court has also taken note of the fact that the grand-mother of the victim, who was present with the victim at the time of her abduction, has been withheld by the prosecution for no plausible reason. She is said to be the eye-witness to the occurrence of 19.05.2021 when the victim girl was being taken away, still withholding of this witness without any explanation would result in drawing of an adverse inference against the prosecution.

33. From the aforementioned discussions, we have come to a conclusion that in this case, not only the huge delay in lodging of the FIR but even the other materials on the record, such as the vacillating statement of the victim (PW-1) and the medical examination report, completely ruling out a case of sexual assault, would prove fatal to the prosecution case. In this case, the age of the victim has been assessed by the medical team which has been proved by PW-6 between 17 to 18 years.

34. For purpose of assessing the age of a victim in a case under the POCSO Act, this Court would rely upon a judgment of the Hon'ble Supreme Court in the case of **Rajak Mohammad vs.**



State of H.P. reported in **(2018) 9 SCC 248**. Paragraph '9' of the said judgment reads as under:-

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

35. The another judgment is that of the Hon'ble Delhi Court in the case of **Court on its own Motion vs. State of NCT of Delhi vs. State of NCT of Delhi (Crl. Ref. 2/2024 judgment dated 02.04.2024)** reported in **2024 SC OnLine Delhi 4484** where while answering the reference in this regard, the Hon'ble Delhi High Court answered the reference in paragraph '46' as under:-

“46. As an upshot of our foregoing discussion, the Reference is answered as under:-

(i) Whether in POCSO cases, the Court is required to consider the lower side of the age estimation report, or the upper side of the age estimation report of a victim in cases where the age of the victim is proved through bone age ossification test?

Ans: In such cases of sexual assault, wherever, the court is called upon to determine the age of victim based on 'bone age ossification report', the upper age given in 'reference range' be considered as age of the victim.

(ii) Whether the principle of 'margin of error' is to be applicable or not in cases under the POCSO Act



where the age of a victim is to be proved through bone age ossification test.

Ans: Yes. The margin of error of two years is further required to be applied.”

36. We have noticed that during trial, just one day prior to the date of closure of the arguments by the parties, *i.e.*, on 13.12.2023, an application along with the School Leaving Certificate as proof of date of birth of the victim was filed by the prosecution, requesting for registering the same as an exhibit. On such application, the learned trial court has exhibited the said document/certificate as Exhibit-3. On perusal of the said document/certificate (Exhibit-3), it would appear that the same is a School Leaving Certificate (SLC) issued by the Headmaster-in-Charge of U.M.S., Balbhadarapur Simri, Vidyapati Nagar, Samastipur. It would be evident that the said document/certificate was not proved through any evidence by the prosecution and was taken on record merely on its presentation by the prosecution.

37. At this juncture, this Court would like to take into account the case of **P. Yuvaprakash vs. State Rep. By Inspector of Police** reported in **2023 SCC OnLine SC 846**, wherein, the Hon’ble Supreme Court in paragraph Nos. ‘14’ to ‘17’ 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.

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*)

3. (2021) 12 SCR 502



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

4. (2019) 9 SCR 735



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.”

38. From the judicial pronouncements hereinabove, it can be said that a judicial notice can be taken that the margin of error in ascertaining of age by radio-logical examination is two years on either side.

39. In the case in hand, we have seen that the prosecution produced a School Leaving Certificate issued by the Headmaster of the said school and not by the Bihar School Examination Board, as referred to in the impugned judgment. The said document/certificate cannot be a basis for documentary proof of the age of the victim as enumerated under Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015.

40. When we apply the aforementioned judicial pronouncements in the facts of the present case, it is found that the upper extremity of the age of the victim would go to $18+2=20$

5. (2012) 9 SCR 224



years. However, the learned trial court seems to have missed out this aspect of the matter and has convicted the appellant for the offences punishable under Section 6 of the POCSO Act and Section 376(D) IPC but has imposed a sentence of 20 years rigorous imprisonment with a fine of Rs.50,000/- for the offence under Section 6 of the POCSO Act and this being the higher sentence, in the light of Section 42 of the POCSO Act, the appellant has been ordered to undergo to said sentence. We are of the considered opinion that in this case the prosecution has failed to establish the primary facts such as the age of the victim to bring it under the POCSO Act and then the burden of the prosecution to belie the principles of presumption of innocence of the accused have not been discharged beyond all reasonable doubts, in our opinion, the judgment of the learned trial court would not sustain and it would not be safe to approve the judgment of the learned trial court.

41. In result, we set aside the impugned judgment and order and acquit the appellant of the charges giving him benefit of doubt.

42. The appellant is said to be in custody, hence he is ordered to be released forthwith, if not wanted in any other case.

43. The appeal is allowed.



44. Let a copy of the judgment along with the trial court records be sent down to the learned trial court.

(Rajeev Ranjan Prasad, J)

(Sourendra Pandey, J)

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