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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 30.01.2025

+ **CRL.L.P. 10/2022**

STATE

.....Petitioner

Through: Mr. Yudhvir Singh Chauhan,
 APP with SI Himanshu, PS
 Jaffarpur Kalan

Versus

HITESH

.....Respondent

Through: Mr. Vinay Kumar Sharma, Mr.
 Prince, Mr. Aaditya, Ms. Ritu
 Kumari, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

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

1. This is an application filed by the State seeking leave to appeal challenging the judgment dated 10.02.2020 passed by the learned ASJ-04 (POCSO), South-West, Dwarka Courts, New Delhi in SC No. 440648/2016 arising out of FIR No. 317/2014 registered at PS Jaffarpur under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ("*POCSO Act*").
2. *Vide* impugned judgement, the respondent was acquitted under Section 4 of POCSO Act.

FACTUAL BACKGROUND

3. The brief facts of the case are that on 10.12.2014 at about 12:25 AM, the father of the prosecutrix registered a complaint regarding the missing of

his daughter aged about 17 years and studying in Class 12th. The prosecutrix had gone for tuition but did not return home. The complainant expressed his doubt on the respondent who was also missing from his house.

4. During the course of investigation, the prosecutrix and the respondent were apprehended on 12.12.2014 at Dharuhera and were brought to Delhi.
5. The prosecutrix was medically examined and her statement under Section 164 CrPC was recorded. The respondent was also arrested.
6. On 06.08.2015, charges under Section 4 of the POCSO Act were framed against the respondent, to which he pleaded not guilty and claimed trial.
7. The prosecution examined a total of 12 witnesses and the statement of the accused under Section 313 CrPC was recorded, wherein he claimed himself to be innocent and having been falsely implicated in the case by the prosecutrix and her parents. The respondent did not lead any defence evidence.
8. The learned Trial Court after considering the entire evidence *vide* the impugned judgement, acquitted the respondent under Section 4 of the POCSO Act.
9. Aggrieved by the impugned judgment, the State prefers the present appeal.
10. The operative paragraphs of the impugned judgement are as follows:
“23. In the case in hand the prosecution did not examine the uncle of the child victim, whose affidavit was submitted in the school. The prosecution failed to establish on what basis her date of birth was mentioned in the affidavit of her uncle,



Ex.PW-10/C. Just on the ground that the date of birth of the child victim was recorded in her school on the basis of her guardian/uncle, particularly when the said guardian was neither her father nor her mother, is not sufficient to prove her age. It is also important to mention here that PW-1, the child victim deposed that her correct date of birth was 22.12.1998. PW-2, mother of child victim deposed that the date of birth of the child victim was 22.12.1998. Thus, according to the child victim and her mother, her date of birth is 22.12.1998, however, in the school her date of birth was recorded as 20.01.1998 and it further creates doubt about the correct date of birth of the child victim. The date of birth stated by the child victim and her mother cannot be taken into consideration because the date of birth of the child has to be determined as per section 94 of the Juvenile Justice Act. On the basis of oral testimony of the mother of child victim, the prosecution cannot discharge the burden to prove the correct date of birth / age of the child victim.

37. In view of the above discussions, I am of the considered view that the prosecution has duly proved that the accused made physical relation with the child victim in the intervening night of 11.12.2014 and 12.12.2014. However, the prosecution failed to prove beyond reasonable doubt that the child victim was less than 18 years old on the date of incident and on the other hand it is also established that the accused made physical relation with the child victim with her consent. It is well settled



law that the benefit of doubt always goes in favour of the accused. Accordingly, accused Hitesh is acquitted under section 4 r/w section 3 of POCSO Act.”

SUBMISSIONS ON BEHALF OF THE PETITIONER

11. Mr. Chauhan, learned APP appearing on behalf of the petitioner opposes the impugned judgement and submits as follows:

- A.** The date of birth as per school record of the prosecutrix is 20.01.1998. The school record has been proved by PW10/Physical Teacher of the school. It is thus submitted that the age of the prosecutrix has been proved to be a minor. The statement of the prosecutrix is also relied upon in this regard wherein she has stated that her date of birth is 22.12.1998. Thus, the prosecutrix was aged around 16 years on the date of incident.
- B.** The prosecutrix was a minor on the date of incident, thus, it is submitted that her consent has no legal sanctity. She has deposed that the appellant made physical relations with her, thus amounting to penetrative sexual assault.
- C.** Thus, the prosecution has proved its case beyond reasonable doubt and the learned Trial Court has erred in passing the impugned judgement. Therefore, the impugned judgement is liable to be set aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

12. The learned counsel appearing on behalf of the respondent supports the impugned judgement and submits as follows:

- A.** Learned Trial Court has correctly concluded that the prosecution has

completely failed to prove the age of the prosecutrix. Reliance is placed in the case of *State (Govt. of NCT of Delhi) v. Shailesh Kumar, AIR Online 2019 Del 641* to urge that mere production of school registers to prove the age of the prosecutrix is not sufficient.

- B.** Learned Trial Court has correctly concluded that the prosecutrix was the consenting party, whatever happened with her was with her consent and the appellant never forced anything upon the prosecutrix. Reliance is placed in the case of *Sunil Mahadev Patil v. State of Maharashtra, Bail Application No. 1036/2015*.
- C.** Learned Trial Court has also observed the fact that the prosecutrix and the respondent were in love with each other. There was nothing on record that could suggest that the present case was of forceful sexual assault.
- D.** Therefore, the impugned judgement is right in holding that the prosecution has not been successful in establishing the guilt of the respondent beyond reasonable doubt in respect of offence levelled against the respondent.

ANALYSIS AND FINDINGS

- 13.** I have heard learned counsel of both the parties and perused the entire material on record.
- 14.** Before discussing the merits of the contentions and evidence in this case, it is pertinent to note that the Hon'ble Supreme Court in the case of *Jarnail Singh v. State of Haryana, 2013 (7) SCC 263*, has held that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would be applicable to determine the age of a child, who is a victim of crime. The Apex Court opined that there is hardly any

difference in so far as the issue of minority is concerned, between a child in conflict with law and a child who is a victim of crime. The relevant of paragraph of the said judgement is extracted below:-

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

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

“94. Presumption and determination of age. -

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -

(i) the date of birth certificate from the school, or



the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.”

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

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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



(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.

- 17.** In the present case, the exhibits which show the date of birth of the victim as 20.01.1998 are as follows:-
- A.** Exhibit PW-10/A: Admission and withdrawal register of the school: Date of Birth - 20.01.1998.
 - B.** Exhibit PW-10/B: Admission application form of the prosecutrix: Date of Birth - 20.01.1998.
 - C.** Exhibit PW-10/C: Affidavit of uncle of the prosecutrix: Date of Birth - 20.01.1998.
 - D.** Exhibit PW-10/E: School certificate dated 07.03.2015 issued by the school principal: Date of Birth - 20.01.1998.
 - E.** Exhibit PW-10/F: School certificate dated 04.07.2018 issued by the school principal: Date of Birth - 20.01.1998.
- 18.** The prosecution has examined PW-10, a teacher from the school of the prosecutrix and she deposed that as per the school record, the prosecutrix was admitted in the school in 1st standard on 07.07.2003 on the basis of affidavit Ex.PW-10/C of the uncle of the prosecutrix. Her date of birth was entered in the school record as 20.01.1998. As per the school record, the prosecutrix was aged about 16 years, 10 months, 21 days old, on the date of incident.
- 19.** However, the question that arose was whether the date of birth mentioned in the affidavit Ex.PW-10/C is correct or not. As no date of birth certificate of the prosecutrix was submitted in the school at the



time of her admission, therefore the burden was upon the prosecution to prove on what basis her uncle mentioned her date of birth in his affidavit Ex. PW-10/C. On the contrary, the prosecution did not cite the said uncle of the prosecutrix as a witness in the list of witnesses, hence he was not examined by the prosecution.

20. The Court places reliance on the decision of the Hon'ble Supreme Court in the case of *Alamelu & Another v. State, Represented by Inspector of Police, AIR 2011 SC 715*. In the said judgment, wherein also, the question of determination of the age of the prosecutrix in a case involving an offence punishable under Section 376 of the IPC was involved, the Hon'ble Apex Court observed that the transfer certificate issued by the government school duly signed by the headmaster would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. The relevant paragraph of the said decision is extracted below:

“38. ... However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. ...”

21. Admittedly, in the present case, the school admission record was based on the affidavit of the uncle of the prosecutrix who was not examined,

thus, the school records were not corroborated and the same cannot be relied upon as the conclusive proof of the date of birth of the prosecutrix.

22. Here, it is pertinent to note that the prosecutrix as well as her mother (PW-2) has deposed that the date of birth of the prosecutrix is 22.12.1998. As per their testimony, the prosecutrix was aged about 15 years, 11 months 19 days old, as on the date of incident. However, they did not provide any corroborating evidence for the same. Thus, their testimony cannot be taken into consideration because the date of birth of the prosecutrix has to be determined on the basis of Section 94 of JJ Act.
23. The issue that the prosecutrix was less than 18 years old on the day of the incident is an important ingredient of the offence under the POCSO Act. The burden lies upon the prosecution to prove the same. In the present case in hand, there are inconsistencies with regard to the date of birth of the prosecutrix as the school records are not corroborated by any evidence as mandated under Section 94 of the JJ Act. Thus, the prosecution has failed to establish beyond reasonable doubt that the prosecutrix was below the age of 18 years on the date of the alleged incident.
24. In cases like the present one, where the prosecutrix is nearly 17 years old (16 years, 10 months, and 21 days), and there is no conclusive proof of age as required under Section 94 of the JJ Act, it is unsafe to apply the provisions of the POCSO Act against the accused/respondent. I am of view that to convict an individual under the POCSO Act without definitive proof of the age of the prosecutrix, especially when the age difference between the prosecutrix and the age of majority is of only one

or two years, would be harsh and unjust.

25. However, this principle may not apply if other documents, such as a school attendance register or an affidavit from a parent, indicate that the victim is under 14 or 15 years old. Since the age gap in such cases is large and disregarding the POCSO Act in such cases would be a miscarriage of justice.
26. In light of the judicial trends, as seen in *Rajak Mohammad v. State of Himachal Pradesh, 2018 SCC Online SC 1222* and *Court on its own motion v. State of NCT of Delhi, Criminal Reference No. 02/2024*, emphasize giving the benefit of doubt to the accused/respondent, particularly given the harsh, severe and stringent punishments under the POCSO Act. Hence, balancing the rights of the accused with the protection of minors is essential to ensure justice is served appropriately.
27. Additionally, in the present case, the prosecutrix has categorically stated that the relationship between her and the respondent was with her consent during her statement under Section 164 of the CrPC. During her court testimony as well, she has deposed that the physical relations were made between her and the respondent with her consent. The relevant part of her court testimony is extracted below:

“I know how to drive motorcycle. It is correct that on the day of incident, I was driving the bike of accused Hitesh and accused was riding pillion. I used to play games in the school like badminton, cycling etc.

... ..

It is correct that I had accompanied the accused with my own will.

...

...

...

It is wrong to suggest that accused did not have physical relations with me. Vol. Physical relations with accused took place with my consent.

It is wrong to suggest that I had deposed against the accused regarding having physical relations at the instance of my parents.

It is correct that I never wanted to file any complaint against the accused nor I want any action against the accused. ”

28. All the facts proved in this case clearly indicate the willingness of the prosecutrix to accompany the respondent and the respondent established physical relations with the consent of the prosecutrix.
29. It is pertinent to note that the MLC report of the prosecutrix Ex. PW-1/A does not support the prosecution's case as there were no injuries of resistance to the sexual act, thus, having held that the relations between the prosecutrix and the appellant were established with the consent of the prosecutrix.
30. Furthermore, I believe that societal and legal views on adolescent love should emphasize the rights of young individuals to engage in romantic relationships that are free from exploitation and abuse. Love is a fundamental human experience, and adolescents have the right to form emotional connections. The law should evolve to acknowledge and respect these relationships, as long as they are consensual and free from coercion.
31. While the legal age of consent is important for protecting minors, I feel that adolescents should be allowed to express their feelings and engage

in relationships without fear of criminalization. The focus of the law should be on preventing exploitation and abuse rather than punishing love. I affirm that consensual and respectful adolescent love is a natural part of human development.

32. The legal system must safeguard the rights of young individuals to love while ensuring their safety and well-being. I advocate for a compassionate approach that prioritizes understanding over punishment in cases involving adolescent love.
33. Herein, reliance is placed on the decision of this Hon'ble Court in the case of *Mahesh Kumar v. State (NCT of Delhi), Bail Application No. 3922/2023* which had also held a similar view.
34. The POCSO Act was promulgated for the protection of children. The Act, however, did not choose to draw any distinction as to a girl of less than 18 who chooses a partner out of her own choice and volition. Therefore, any sexual act or intercourse by a man with such a girl would constitute an offence under various provisions of the POCSO Act of 2012.
35. In the case of *Court On Its Own Motion (Lajja Devi) vs. State (Delhi), 2012 (4) RCR (Civil) 821*, a Full Bench of this Hon'ble Court dealt with the issue that when the girl is more than 16 years of age and makes a statement that she went with her own consent and it can be accepted, the Court would be within its power in quashing the proceedings under Sections 363 and 376 IPC. However, the Full Bench cautioned that there can be no straitjacket formula to be applied and the Court has to be careful to ensure the personal liberty of the girl and the attending circumstances, which would include the maturity and understanding of

the girl, her social background, the age of the boy and girl, would also have to be taken into consideration.

36. The relevant extract of the said decision is extracted below:

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

amounts to confinement, or detention. The girl, if mature, cannot and should not be denied her freedom and her wishes should not get negated as if she has no voice and her wishes are of no consequence. The Court while deciding, should also keep in mind that such marriages are voidable and the girl has the right to approach the Court under Section 3 of the PCM Act to get the marriage declared void till she attains the age of 20 years. Consummation of marriage may have its own consequences.”

- 37.** Therefore, the age of majority as prescribed, must be construed and interpreted in the context of the law for which it is being considered and in a case of this nature, where the minor is certain and unshaken in her opinion and desire, it would not be right and proper for this Court to brush aside her views on the ground that she is not 18 years of age as on date and is only 16 years, 10 months, 21 days old.

CONCLUSION

- 38.** Having regard to these overall factors, I am of the view that it has not been proved beyond reasonable doubt by the prosecution that the prosecutrix is a minor as well as the prosecutrix is certain that the relationship was with her consent.
- 39.** For the said reasons, I am of the view that the impugned judgement dated 10.02.2020 passed by the learned ASJ-04 (POCSO), South-West, Dwarka Courts, New Delhi in in SC No. 440648/2016 arising out of FIR No. 317/2014 registered at PS Jaffarpur under Section 4 of the POCSO Act is well reasoned and does not require any interference.
- 40.** The leave to appeal is dismissed.



41. Consequently, the appeal has become infructuous and is disposed of.

JASMEET SINGH, J

JANUARY 30, 2025/DM

Click here to check corrigendum, if any

(Corrected and released on 14.02.2025)