

(2023) 08 DEL CK 0054

In the Delhi High Court

Case No : Criminal Appeal No. 313 Of 2022

Rahul

APPELLANT

Vs

State Of Nct Of Delhi

RESPONDENT

Date of Decision : 07-08-2023

Acts Referred:

Indian Penal Code, 1860 — Section 363, 376D, 506
Protection of Children from Sexual Offences Act, 2012 — Section 4, 6
Juvenile Justice (Care and Protection of Children) Act, 2015 — Section 94, 94(2), 94(2)(i), 94(2)(ii), 94(2)(iii)
Evidence Act, 1872 — Section 35

Citation : (2023) 08 DEL CK 0054

Hon'ble Judges : Amit Bansal, J

Bench : Single Bench

Advocate : Rajat Katayal, Kanishk, Mayank, Rahul, Priyanka Tomar, Megha, Ritesh Kumar Bahri

Final Decision : Disposed Of

Judgement

Amit Bansal, J

CRL.M.(BAIL) 854/2022 (for suspension of sentence)

1. The present application has been filed seeking regular suspension of sentence during the pendency of appeal in FIR No.121/2016 under Sections 363/376D/506 of the Indian Penal Code, 1860 (IPC) and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) registered at Police Station Najafgarh.

2. The applicant in the present case was convicted of offence under Section 4 of the POCSO Act vide judgment dated 31st January, 2022. Subsequently, vide order of sentence dated 5th March, 2022, the applicant was sentenced to 9 years simple imprisonment along with a fine of Rs.5,000/-.

3. Counsel for the applicant makes a reference to Section 94 of the Juvenile

Justice Act, 2015 (J.J. Act) to submit that the factum of prosecutrix being a minor has not been proved in accordance with the aforesaid section. He also places reliance on the recent judgment of the Supreme Court in P. Yuvaprakash v. State Rep. by Inspector of Police, 2023 SCC OnLine SC 846, in support of his submissions that School Leaving Certificate cannot be the document to determine age of the prosecutrix. Counsel for the applicant further submits that even in respect of the School Leaving Certificate (Exhibit PW-9/D), the prosecution has failed to produce the principal/officer of the School, who had issued the said document, as a witness in the present case.

4. Learned APP appearing on behalf of the State opposes the present application. He submits that all the aforesaid aspects have been dealt with in the impugned judgment.

5. Learned APP further submits that a School Leaving Certificate would constitute a public document under Section 35 of the Indian Evidence Act, 1872 and therefore, the same can be relied upon to determine age of the prosecutrix. Further, no objection with regard to mode of proof of minority of the prosecutrix was also taken at the time of examination of the PW-9, Ms. Pushp Lata, TGT, Government Girls Senior Secondary School No.3, Najafgarh.

6. I have heard the counsels for the parties and perused the record of the case.

7. At this stage, a reference may be made to Section 94(2) of the J.J. Act.

“94 Presumption and determination of age.

(1)

(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.”

8. In the present case, the document relied upon by the prosecution to determine the age of the prosecutrix is a School Leaving Certificate. A reading of

the aforesaid provision would show that School Leaving Certificate is not included in the documents prescribed in Section 94(2) of the J.J. Act.

9. As regards the submission on behalf of the prosecution with regard to Section 35 of the Indian Evidence Act, 1872, it has been held in the judgment of the Supreme Court in *Alamelu And Anr. V. State Represented by Inspector of Police*, (2011) 2 SCC 385, that the date of birth mentioned in the transfer certificate can only be considered if the person who made the entry or the person who gave the date of birth is examined. Relevant observations are set out below:

"40. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. 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."

10. Relying on the aforesaid judgment, the counsel for the applicant submits that in the present case the prosecution has failed to prove the aforesaid School Leaving Certificate in accordance with law.

11. In *P.Yuvaprakash (supra)*, the age of the prosecutrix was also sought to be determined by the prosecution on the basis of a transfer certificate and it was held by the court that a transfer certificate is not a relevant piece of evidence in terms of Section 94(2)(i) and 94(2)(ii) of the J.J. Act. The relevant observations of the Supreme Court, as given in paragraph 19 of the said judgment, are set out below:

"19. It is clear from the above narrative that none of the documents produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating "that the age of the said girl would be more than 18 years and less than 20 years". In the cross-examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining

factor". This finding is, in this court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94(2)(i) mandates; nor are they in accord with Section 94(2)(ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9."

12. In view of the aforesaid judgments, mere production of School Leaving Certificate cannot be the basis for determining age of the prosecutrix in absence of the material on the basis of which the age of the prosecutrix was recorded.

13. It is also pertinent to note that in paragraph 35 of the impugned judgment, the learned Trial Court records that there was a consensual sexual relationship between the accused and the prosecutrix. Even as per the prosecution, the age of the prosecutrix was around 17 years at the time of the incident. Therefore, the issue whether the prosecutrix was a minor or a major on the date of the incident assumes importance in the present case.

14. As per the Nominal Roll on record, the applicant has served almost 4 years in custody. Further, the applicant does not have involvement in any other case and his conduct in the jail has been satisfactory.

15. Considering the totality of aforesaid facts and circumstances and taking into account that the appeal is unlikely to come up for hearing in the near future, this Court deems it fit to suspend the sentence of the applicant during the pendency of the appeal.

16. Accordingly, the application is allowed. The sentence of the applicant is hereby suspended during the pendency of the appeal and he shall be released on bail on furnishing a personal bond in sum of Rs. 25,000/- with one surety of the like amount, subject to the satisfaction of the Trial Court and further subject to the following conditions:

- i. The applicant shall not leave the country without prior permission of the Court.
- ii. The applicant shall provide permanent address to the Trial Court. The petitioner shall intimate the Court by way of an affidavit and to the Investigating Officer (IO) regarding any change in residential address.
- iii. The applicant shall appear before the Court as and when the matter is taken up for hearing.

iv. The applicant shall provide all mobile numbers to the IO concerned, which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned. The mobile location shall be kept on at all times.

v. The applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, the complainant/victim or any member of the complainant/victim's family or tamper with the evidence of the case or try to intimidate any witnesses in the case.

17. Accordingly, the application stands disposed of.