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**(2019) 04 DEL CK 0195**

**In the Delhi High Court**

**Case No : Criminal Appeal No. 1025 Of 2018**

State (Govt. Of Nct Of Delhi)

APPELLANT

Vs

Shailesh Kumar

RESPONDENT

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**Date of Decision : 29-04-2019**

**Acts Referred:**

Juvenile Justice (Care And Protection of Children) Rules, 2007 — Rule 12, 12(3), 12(3) (a)  
Indian Penal Code, 1860 — Section 363, 366, 376  
Protection Of Children From Sexual Offences Act, 2012 — Section 4  
Code Of Criminal Procedure, 1973 — Section 164  
Evidence Act, 1872 — Section 35

**Citation :** (2019) 260 DLT 344 : (2019) 175 DRJ 369 : (2019) 2 JCC 1283

**Hon'ble Judges :** Hima Kohli, J; Vinod Goel, J

**Bench :** Division Bench

**Advocate :** Aashaa Tiwari, Sumit Gaba

**Final Decision :** Dismissed

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## **Judgement**

Hima Kohli, J

1. The State is aggrieved by the judgment dated 31.5.2018, passed by the learned Additional Sessions Judge-01, West, (ASJ) Special Court under the Protection of Children from Sexual Offences Act, 2012 (in short, "POCSO Act") in Sessions Case No.57589 of 2016 (old No.22 of 2015), arising from FIR No.828/2014, PS Punjabi Bagh, whereunder, the respondent has been acquitted of the charges for the offence punishable under Sections 363 and 366 IPC and Section 4 of the POCSO Act. He has also been acquitted of the alternate charge for the offence under Section 376 IPC.

2. The prosecution case was that on 25.9.2014 at 12.45 A.M., the respondent had kidnapped the prosecutrix, a 15 year old girl from her home at Madipur, New Delhi, forcibly taken her to Lucknow (UP) and from there to Patna (Bihar), where he compelled her to marry him and committed penetrative sexual assault and

rape on her.

3. The trial court rejected the case of the prosecution on the ground that the evidence of the prosecutrix (PW-1), Municipal Corporation Primary School Teacher (PW-3), brother of the prosecutrix (PW-4) and father of the prosecutrix (PW-5) reveals that there is no birth certificate of the prosecutrix available to prove her age and therefore, it cannot be held that she was below 18 years of age at the time of the alleged offence. The sole plea of the State before us is that the trial court fell into an error while appreciating the date of birth of the prosecutrix which when examined in the light of the testimony of PW-3, clearly shows that her date of birth is 10.1.2000 and therefore, on the date of the incident, i.e., on 25.9.2014, she was a minor, aged 14 years, 9 months and 14 days.

4. It is considered necessary to briefly advert to the facts of the case relevant for deciding the age of the prosecutrix on the date of the incident, which is the only question raised before us for a decision.

5. On 25.9.2014, on information received by the police that two boys had kidnapped a girl, DD No.4PP was recorded. On the same day, an FIR No.828/2014 (Ex.PX-1) was registered at PS Punjabi Bagh at 5.40 P.M. under Section 363 IPC, on the basis of the complaint of the brother of the prosecutrix (PW-4) to the effect that his sister, aged 15 years was missing from their tenanted premises at village Madipur, New Delhi since 12.45 A.M., on 25.9.2014. In the complaint, a finger of suspicion was raised against the respondent. On 26.9.2014/27.9.2014, PW-4 informed ASI Sardar Singh (PW-7) that he suspected that the respondent might have taken his sister to his native village at Patliputra, Patna, Bihar. On 27.9.2014, PW-7 accompanied by Constable Sanjay, the complainant and his paternal uncle left by train to Patna. On 28.9.2014, the police party reached PS Patliputra, Patna, Bihar, took the assistance of the local police and went to the house of the respondent where, the prosecutrix (PW-1) and the respondent's mother were present. The respondent was not found in the house. The prosecutrix was identified by her brother (PW-4) and brought to the local police station. After completion of formalities, all of them returned to Delhi on 30.9.2014.

6. The prosecutrix (PW-1) was taken to SGM Hospital with her paternal aunt for a medical examination. She was medically examined there vide MLC Ex.PW1/A. Thereafter, she was produced before the Child Welfare Committee and from there, sent to Nirmal Chhaya. On 07.10.2014, the prosecutrix was produced before the learned Metropolitan Magistrate for recording her statement under Section 164 Cr.P.C. (Ex.PW1/B). In the said statement, the prosecutrix declared her age as 14 years and stated that she had abandoned her studies after class IX. The investigation of the case was assigned to SI Kailash (PW-6), who was later on joined by ASI Sardar Singh (PW-7). On 17.12.2014, the respondent was arrested from his house at village Madipur vide arrest memo, Ex.PW2/A. Thereafter, his disclosure statement (Ex.PW6/B) was recorded and he was sent

for a medical examination to SGM Hospital vide MLC, Ex.PW6/G. The respondent produced a mobile phone, which he stated contained a video recording of his marriage with the prosecutrix, that was seized vide seizure memo, Ex.PW6/F. The respondent also produced some documents including a receipt issued by the temple situated at Karnal Ganj, Gai Ghaat, near Mahatma Gandhi Bridge, his own affidavit and that of the prosecutrix, marked as Ex.PW6/D, Ex.PW6/E and Ex.PW1/DA, respectively.

7. On 18.12.2014, the respondent was produced in Court and sent to judicial custody. On 27.3.2015, charges for the offence under Sections 363 and 366 IPC and under Section 4 of the POCSO Act and in the alternate, under Section 376 IPC were framed against the respondent to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined 7 witnesses.

8. As the focus of the present appeal is on establishing the age of the prosecutrix on the date the alleged offence was committed, the relevant evidence on this aspect is extracted from the impugned judgment as below:-

"23. The crux of the entire case law is that the matriculation certificate, then school record of the first attended school, then the birth certificate issued by the corporation or municipal authority or panchayat and then the ossification test are to be considered, in the event of the earlier not being available. It is also clear that the correctness of a certificate issued by school/MCD is not to be doubted unless found to be false or forged.

24. It is important to discuss and analyse the evidence led on the point whether or not the prosecutrix was a minor on the date of the alleged offence.

25. Ms. X, the prosecutrix (PW1) has deposed that "I was aged about 14 years at that time....." In her cross examination, she has deposed that "Although I have studied up till 9th class but I do not know Hindi language completely and I know the language used in my native village... I have signed and put my thumb impressions on this Shapatpatra. Shapatpatra is now Exhibited as EX PW1/DA and it bears my signatures at point A and my thumb impression at point B.

26. Mr. Ashok Kumar Chaudhary (PW3), who is a teacher in the school where the prosecutrix has studied, has deposed that "As per school record the prosecutrix was admitted in our school in class I on 12.08.2005. An entry at serial no.2373 in the admission register was made at the time of admission in school. As per school record the date of birth of the prosecutrix is 10.01.2000. No other record of the admission of the prosecutrix is now available in the school. So I cannot say as to what document was submitted for the date of birth of the prosecutrix by her parents/guardian at the time of her admission in the school. The copy of the relevant entry made at serial no.2373 is now exhibited as Ex.PW3/A which bears my signatures at points A, B and C. (original seen and returned). In the month of December 2014, the police officials came to the abovesaid school and asked me to produce the admission record of the prosecutrix. I had handed over the copy of admission record of the prosecutrix to the IO which was seized by the police

vide seizure memo Ex.PW3/B which bears my signatures at point A. I had also given in writing to the police the date of birth of any child is not got registered in the government record in the village so the date of birth of the child cannot be issued. My such handwritten note is now exhibited as Ex.PW3/C which bears my signatures at point A."

He has been cross examined on behalf of accused and deposed that "I was not the Principal of the abovesaid school during the year 2014. At that time, there was no Principal in the school. I was the officiating Principal/Incharge. I was issued an authorization by the Government for being Officiating Principal/Incharge but I have not brought the same to the Court today. I had taken the charge in the year 2014 but I do not remember the exact date and month. I had told the police officials that I was the Officiating Principal/Incharge but I had not given a copy government issued authorization in my favour. I had personally not made the entries regarding the admission of the prosecutrix in the school."

27. Mr.Z, brother of the prosecutrix (PW4) has deposed that "The prosecutrix is my younger sister. The date of birth (sic) the prosecutrix 10.01.2000." In his cross examination, he has deposed that "I do not have any proof regarding the date of birth of the prosecutrix. The same may be available with my parents."

28. Mr. Y, father of the prosecutrix (PW5) has deposed that

"The prosecutrix is my third child. I do not know the date of birth of the prosecutrix as I am illiterate. I do not know the present age of the prosecutrix. I got the prosecutrix admitted in school in class V in the village. At that time, the prosecutrix was aged about 3-4 years. She was admitted in class I and not in class V." In his cross examination, he has deposed that "I do not have any proof regarding the date of birth of the prosecutrix."

9. Thus, it emerges from the trial court record that the age of the prosecutrix was recorded as 14 years in the MLC (Ex.PW1/A). In her statement recorded under Section 164 Cr.P.C. (Ex.PW1/B) also, the victim mentioned her age as 14 years. Her stand remained the same during her deposition before the Court. However, in Ex.PW1/DA, a notarized affidavit dated 27.9.2014, duly signed by the victim and bearing her thumb impression, she had mentioned her age as 19½ years and declared that she is a major. In the rukka (PW4/A), PW-4, brother of the victim mentioned the age of his sister as 15 years. The FIR registered on the brother's complaint also mentions her age as 14 years. In his testimony, PW-4 stated that the date of birth of his sister is 10.1.2000. In his cross-examination, he admitted that he did not have any proof regarding his sister's date of birth and stated that it may be available with his parents. PW-5, the father of the victim deposed that she was his third child; that he did not know her date of birth as he was illiterate; nor did he know her present age. He stated that he had got his daughter admitted in a school in the village in class-I and at that time, she was 3-4 years old. In his cross-examination, he admitted that he did not have any proof regarding the date of birth of the victim.

10. PW-3, working as a teacher in MC Primary School, village Vikas Block Sirsia, District Saraswati, U.P. in the year 2014-15, produced the school records to prove the date of admission of the prosecutrix in class-I on 12.1.2005 and deposed that as per the said record, her date of birth is 10.1.2000. A copy of the relevant entry made at serial number 2373 in the School Admission Register is marked as Ex.PW3/A. In his cross-examination, PW-3 had clarified that he was only officiating as a Principal/Incharge in the year 2014 and had not personally made the entries.

11. Upon examining the evidence brought on record, the trial court rejected the stand of the prosecution that the prosecutrix was below 18 years of age at the time of the offence for the following reasons:-

"29. It is clear from the evidence of PWs 1, 3, 4 and 5 that there is no birth certificate of the prosecutrix available with the prosecution which could have been obtained from the corporation or the municipal authority or panchayat but the record of her first attended school is available.

30. The father of the prosecutrix (PW5) was not even aware of her date of birth and did not have any proof of the same. He has not even deposed that on what basis her date of birth was furnished to her school and what documents were submitted and who had actually got her admitted in school. He has also deposed that she was 3-4 years old at the time of admission but as per the school record, she was about 5 years old. This contradiction is too major to be ignored and no explanation for the same has been furnished by the prosecution. The brother of the prosecutrix (PW4) has although given her alleged date of birth but has deposed that he does not have any proof regarding the date of birth of the prosecutrix. The same may be available with her parents. The prosecutrix herself (PW1) has not deposed her date of birth but she has admitted signing the "Shapathpatra" (Ex.PW1/DA) dated 27.09.2014 wherein it is stated that she is aged 19 ½ years.

31. More importantly, the school record (Ex.PW3/A to Ex.PW3/C) only finds mention that the date of birth of the prosecutrix is 10.01.2000 but there are no supporting documents filed by her parents in the school including the application form, affidavits of the parents, any record of the Village Panchayat or Municipal authorities or even the hospital or nursing home where she may have been born. When the father of the prosecutrix (PW5) was not even aware about her date of birth and at what age she was admitted in school, then the authenticity of the date of birth mentioned in the school record is shattered. No document like adhar card or ration card of the prosecutrix has been produced by the prosecution. The prosecutrix has admitted the "shapathpatra" (Ex.PW1/DA) wherein her age is mentioned as 19 ½ years thereby indicating that she was a major and above 18 years of age at the time of the alleged incident.

32. Therefore, it is clear that it cannot be held that the prosecutrix was below 18 years of age at the time of the alleged offence. The evidence of the prosecution

indicates that she was above 18 years of age at the time of commission of the alleged offences."

12. The impugned judgment goes on to hold that the prosecution has miserably failed to prove that the respondent had kidnapped the prosecutrix, raped her and committed penetrative sexual assault on her. As a result, the respondent was acquitted.

13. Ms. Tiwari, learned APP argued that the trial court has failed to appreciate the provisions of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short, "JJ Rules"), which prescribe the procedure required to be followed in determination of the age of a child or a juvenile in conflict with law; that the trial court erred in appreciating the testimony of PW-3, who had produced sufficient documents to prove the age of the prosecutrix; that the prosecutrix had supported the case set up by the prosecution and was consistent in her testimony and once it was established that on the date of the incident, she was a minor, her consent becomes immaterial. In support of her submission, learned APP relied on Parag Bhati Vs. State of Uttar Pradesh & Another reported as (2016) 12 SCC 744 and State (GNCT of Delhi) Vs. Hargovind reported as 2018 SCC OnLine Del 9607.

14. Per contra, Mr. Sumit Gaba, learned counsel for the respondent cited Jaipal Singh Vs. State of Haryana reported as 2003 (2) RCR (Cri.) 310 (DB) and State (GNCT of Delhi) Vs. Mohd. Irfan reported as (2017) 242 DLT 237 to canvass that the school records pertaining to the age of the prosecutrix were rightly disbelieved by the trial court as the entry was not premised on any birth certificate and there was no other material to back the date of birth of the victim registered by the school as 10.1.2000.

15. We have carefully perused the trial court record, examined the impugned judgment and heard the arguments advanced by learned counsel for the parties.

16. The sole question for a decision in this case hinges on determining the age of a victim of crime. In Jarnail Singh Vs. State of Haryana reported as (2013) 7 SCC 263, the Supreme Court has held that Rule 12 of the JJ Rules though strictly applicable to a child in conflict with law, would also extend in cases where the Court is required to determine the age of a child, who is a victim of a crime. Rule 12(3) lays down the procedure to be followed in determination of age and reads as follows:-

"12. Procedure to be followed in determination of Age.-...

(1) x x x x x

(2) x x x x x

(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."

17. In the instant case, the matriculation or equivalent certificate of the victim is not available as she deposed that she gave up studies after 9th class. Rule 12(3) (a) contemplates that in the absence of the matriculation or equivalent certificate, the date of birth certificate from the school first attended can be used as evidence to determine the age of a child. Mr.Ashok Kumar Chaudhary (PW-3), a teacher in the school where the victim has studied, had produced the school records, which showed that the victim was admitted in MC Primary School, Vikas Block Sirsia, District Sarawasti, UP in class-I on 12.08.2005. The school record notes her date of birth as 10.01.2000. However, PW-3 went on to state that there is no other record of admission of the victim available in the school and nor could he state as to what was the nature of the document submitted by the victim's parents at the time of her admission, for recording her date of birth in the school register.

18. It is well settled that an entry of the date of birth made in the school admission register would have evidentiary value only if there is material available based on which the age was so recorded. In the case of Brij Mohan Singh vs. Priya Brat Narain Sinha and Ors. reported as AIR 1965 SC 282, the Supreme Court held that an entry of birth recorded in the school register maintained by an illiterate Chowkidar, was not admissible and had no probative value within the meaning of Section 35 of the Indian Evidence Act. For ready reference, Section 35 of the Indian Evidence Act is reproduced below:-

"35. Relevancy of entry in public [record or an electronic record] made in performance of duty.-An entry in any public or other official book, register or [record or an electronic record], stating a fact in issue or relevant fact, and made

by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact."

19. In *Birad Mal Singhvi vs. Anand Purohit* reported as 1988 Supp. SCC 604, where a question arose with regard to eligibility of a candidate participating in an election to the State Legislative Assembly, in the context of attaining the age of 25 years as stipulated, the Supreme Court held as below:-

15.....Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. ..." (emphasis added)

20. The probative value of the entry regarding the date of birth made in a school register has come up for consideration by the Supreme Court and the High Courts in several other cases and the common view expressed is that no probative value can be attached to such a record unless and until the parents are examined or the person on whose information the entry may have been made, is examined.

21. In *Sushil Kumar vs. Rakesh Kumar* reported as AIR 2004 SC 230, the Supreme Court held thus:-

"34. In the aforementioned backdrop the evidences brought on record are required to be considered. The Admission Register or a Transfer Certificate issued by a Primary School do not satisfy the requirements of Section 35 of the Indian Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any reasonable person."

22. In *Satpal Singh vs. State of Haryana* reported as (2010) 8 SCC 714, the Supreme Court held that a document may be admissible under Section 35 of the Indian Evidence Act being a public document if prepared by a government official in exercise of his official duty but whether the entry contained therein has any probative value would still require to be examined in the facts and circumstances of a particular case. Citing several earlier decisions, the Supreme Court held that even if the entry was made in an official record by the official concerned in discharge of his official duty, it may have weight, but would still require



corroboration by the person on whose information the entry has been made and whether the entry so made has been exhibited and proved. The Supreme Court summarized the law in the following words:-

"28. Thus, the law on the issue can be summarised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the court/authority to examine its probative value. The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case." (emphasis added)

23. In the present case, the father of the victim, PW-5 deposed that he did not know the date of birth of his daughter as he was illiterate, nor was he in a position to state her current age. He stated that he got the victim admitted in the school in class-I in the village and at that time, she was about 3-4 years old. In his cross-examination, PW-5 admitted that he did not have any proof regarding his daughter's date of birth. It is therefore clear that the father of the victim had not submitted any document to the school at the time of getting his daughter admitted in class-I, on 12.08.2005, to establish her date of birth as 10.01.2000, as recorded by the school. He was candid enough to state that being illiterate, he did not know the date of birth of the victim and that she was between 3-4 years old when she was admitted in class-I.

24. In the absence of any primary material based on which the age of the victim was recorded in the school register, it is not possible to accept her date of birth as 10.01.2000. Moreover, even the teacher from the school in question, who had appeared as PW-3, had stated that he had given a handwritten document to the police on 17.12.2014 (Ex.PW3/C), wherein he had recorded that when a child attains the age of 5+ years, the parents approach the school for their admission. If one goes by the said statement, then the testimony of the victim's father to the effect that he had got her admitted in class-I when she was about 3-4 years, cannot be accepted, as it is premised on mere guess work.

25. In Brij Mohan Singh (supra), the Supreme Court observed that in actual life, it frequently happens that persons give false age of a child at the time of admission in the school so that later in life, he would have an advantage when seeking public service for which the minimum age for eligibility is often prescribed. In Vishu vs. State of Maharashtra reported as (2006) 1 SCC 283, while dealing with a similar issue, the Supreme Court had yet again observed that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. For determining the age of the child, the best evidence is of his/her parents, if it is supported by unimpeachable documents.

26. We have noted earlier hereto that in the MLC and the statement of the victim

recorded under Section 164 Cr.PC, her age has been mentioned as 14 years. However, in the affidavit executed by her on 27.09.2014, she has mentioned her age as 19½ years. As against the above, the brother of the victim (PW-4) had mentioned his sister's age as 15 years in his complaint. In his cross-examination, he admitted that he did not have any proof regarding his sister's date of birth. It is evident that the victim's brother did not have any document or even a clear idea of her exact age and was speaking only on the basis of estimation. The father of the victim (PW-5) too deposed that he did not possess any document to establish the date of birth of his daughter. In a judgment of the Punjab and Haryana High Court entitled *Jaipal Singh vs. State of Haryana* reported as (2003) 2 RCR (Cri) 310 (DB), the Court elected not to accept the school certificate of the prosecutrix stating her age to be 15 years, which was found to be in conflict with the age mentioned in the FIR, MLC and the statement of the prosecutrix herself as also her father, for the reason that entry in the school record was not based on the birth certificate, but on the basis of the statement made by her father. Similarly, in the case of *State (GNCT of Delhi) vs. Mohd. Irfan* reported as 2017 (Suppl.) CrI.CC 355 (Delhi) (DB), where the school records of the prosecutrix mentioned her date of birth as 15.03.2003 and it turned out that the said entry was based on a subsequently dated affidavit given by her mother, the Court did not rely on the entries made in the school records.

27. We are of the opinion that in the absence of any material document based on which the entry of the date of birth of the victim has been made in the school register, mere production of the school register that records inter alia her date of birth as 10.01.2000, would not suffice. The victim was admitted in the school by her father, an illiterate person, who himself admits that he did not have any proof regarding the date of birth of his daughter. The facts mentioned above show that the prosecution has not been able to discharge the burden cast on it to prove that the age of the victim was below 18 years at the time of the alleged commission of offence and that being the only ground taken in this appeal to assail the impugned judgment, we do not find any reason to interfere in the subsequent findings returned by the trial court rejecting the prosecution version that on 25.09.2014, the respondent had kidnapped the victim with the intention to compel her to marry him against her will and he had committed penetrative sexual assault upon her and raped her. Once it is held that the girl was over 18 years of age and competent to give her consent, the question of the respondent raping her does not arise. It is apparent that the girl had eloped with the respondent on her own and was a consenting party to the sexual intercourse. In our view, the decisions cited by the learned APP will not be of any assistance in the peculiar facts and circumstances of the present case.

28. As a result, the impugned judgment is upheld. The State's appeal fails and is dismissed with no orders as to costs.