

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE ROHIT ARYA

&

HON'BLE SHRI JUSTICE SATYENDRA KUMAR SINGH

ON THE 13th OF JANUARY, 2023

CRIMINAL APPEAL NO.11320 OF 2022

BETWEEN:-

**JITENDRA JATAV S/O RAMPRAKASH JATAV,
AGE-25, R/O - VILLAGE BARSANGPUR, POLICE
STATION THARET, DISTRICT - DATIA (MADHYA
PRADESH)**

.....APPELLANT

(BY SHRI SOHIT MISHRA – ADVOCATE)

AND

**STATE OF MADHYA PRADESH THROUGH
POLICE STATION PANDOKHAR, DISTRICT
DATIA (MADHYA PRADESH)**

.....RESPONDENT

(BY DR. SMT. ANJALI GYANANI – PUBLIC PROSECUTOR)

Reserved on : 10th of January, 2023
Pronounced on : 13th of January, 2023

This Criminal Appeal having been heard and reserved for judgment, coming on for pronouncement this day, Hon'ble Shri Justice Satyendra Kumar Singh pronounced the following:

JUDGMENT

The appellant has preferred this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (2 of 1974) (for brevity “Cr.P.C.”) being aggrieved by the judgment dated 07/11/2022 passed by the Court of Special Judge (POCSO Act), Datia in Special Case No.10/2020, whereby the appellant has been convicted for the offences punishable under Sections 363, 366, 376(1) of Indian Penal Code (for brevity “IPC”) and under Sections 3/4 and 5(j)(ii)/6 of Protection of Children from Sexual Offences Act, 2012 (for brevity “POCSO Act”) and in view of the provisions of Section 42 of POCSO Act, 2012, sentenced him as under:-

Conviction		Sentence		
Section	Act	Imprisonment	Fine	Imprisonment in lieu of fine
363	IPC	RI for 3 years.	3,000/-	RI for 1 year.
366	IPC	RI for 7 years.	5,000/-	RI for 2 years.
3 r/w 4	POCSO Act	RI for 10 years.	10,000/-	RI for 3 years.
5(j)(II) r/w 6	POCSO Act	RI for 20 years.	20,000/-	RI for 3 years.

2. The prosecution case in brief is as follows:-

(i) On 04/12/2019 at about 19.00 hours, complainant made an oral complaint to the police to the effect that in the intervening night of 2-3/12/2019, when he had gone to his agricultural field, situated at village Bhedpura, for watering the crops, his minor daughter prosecutrix aged about 17 years and 6 months had gone somewhere without informing him or his family members. On 03/12/2019 at about 4:00 hours, on being informed by his wife, he made search of her to nearby places and thereafter, reported to the police. On the basis of oral complaint made by

the complainant, an FIR, Ex.P/7 and missing person's report, Ex.P/6, were lodged at Police Station Pandokhar, District Datia.

(ii) On the next day, i.e. 05/12/2019, S.I., Darshan Shukla went to the place of occurrence, prepared the spot map and recorded the statement of the complainant and his wife. Thereafter, on 28/01/2020, prosecutrix was recovered from the possession of the appellant, as per Dastyavi Panchnama, Ex.P/1. S.I., Priyanka Singh recorded her statement and vide letter Ex.P/20, sent her to District Hospital, Datia for medical examination, where Dr. Jayanti Barethiya medically examined the prosecutrix as per MLC report Ex.P/2 and referred her for Sonography. Dr. Ravindra Baskel (PW-14) conducted the Sonography of the prosecutrix and found her pregnant as per report Ex.P/21. I/O S.I. Darshan Shukla obtained the copy of admission register entry, Ex.P/4, of Shashkiya Madhyamik Vidyalaya, Bhedpura, Bhandar, District Datia alongwith certificate Ex.P/5 about the age of the prosecutrix. Arrested the appellant and after completion of investigation, filed the charge-sheet before the Court of Special Judge (POCSO Act), Datia.

3. Learned Trial Court considering the material *prima facie* available on record framed charges under Sections 363, 366, 376(2)(n) of IPC and Sections 5(L)/6, 5(j)(ii)/6 of POCSO Act against the appellant, who abjured guilt and prayed for trial.

4. Learned Trial Court after appreciating the oral as well as documentary evidence available on record, convicted the appellant for the offences punishable under Sections 363, 366, 376(2)(n) of IPC and Sections 5(l)/6 & 5(j)(ii)/6 of POCSO Act, 2012 and in view of the provisions of Section 42 of POCSO Act, sentenced him as stated in para 1 of this judgment.

5. Being aggrieved by the said judgment of conviction and order of sentence, the appellant has preferred this appeal for setting aside the impugned judgment and discharging him from the aforesaid charges framed against him.

6. Learned counsel for the appellant submits that the prosecutrix in her statement recorded during investigation under Section 164 of Cr.P.C., Ex.P/3, as well as statement recorded during trial specifically deposed that she went with appellant on her own will and thereafter solemnized marriage with him. Prosecution has failed to prove this fact beyond reasonable doubt that the prosecutrix was minor at the time of incident, as nothing has been produced on record except the school admission register entry, Ex.P/4 in this regard. Incharge Principal, Shashkiya Madhyamik Vidyalaya, Bhedpura, District Datia, Komal Singh Baghel (PW-2) admitted that he was not aware of the fact that on what basis the prosecutrix's date of birth was written therein as 05/06/2002. Prosecutrix herself admitted that she was about 19 ½ years old at the time of incident and was major at that time. Her father (PW-3), in para 8 of his cross-examination denied to have admitted the prosecutrix in Shaskiya Madhyamik Vidyalaya, Bhedpura, District Datia. He specifically deposed that the prosecutrix was born in the year 1998 and was major at the time of the incident. The prosecutrix's mother (PW-4) also made similar statement. Therefore, no offence is made out against the appellant, even then he has been convicted for the offences punishable under Sections 363, 366, 376(2)(n) of IPC and Sections 5(1)/6 & 5(j)(ii)/6 of POCSO Act. The impugned judgment is not sustainable, hence, the same may be set aside and appellant may be acquitted from the charges framed against him.

7. *Per contra*, learned counsel for the respondent/State while supporting the impugned judgment of conviction and order of sentence submits that judgment so passed by the Trial Court is based on proper appreciation of evidence available on record. Therefore, confirming the judgment of conviction and order of sentence, the appeal filed by the appellant deserves to be dismissed.

8. Heard learned counsel for both the parties and perused the record.

9. From the statement of the prosecutrix (PW-1), her father (PW-3) and her mother (PW-4), this fact is established that prosecutrix and appellant were known to each other for last about four years as appellant is the brother-in-law of the sister of the prosecutrix. The prosecutrix (PW-1) specifically deposed that about 4 years back, she met with the appellant in the marriage of her cousin and since then she and appellant started liking each other. She deposed that as her parents were not ready to solemnize her marriage with the appellant, therefore, on the date of incident she herself left her parental house and went with the appellant to Jamnagar, Gujarat, where they solemnized their marriage. She further deposed that thereafter, she alongwith the appellant went to appellant's house at Birsingpur and resided there as appellant's wife, from where police recovered her.

10. Admittedly, prosecutrix was recovered from the possession of the appellant as per Dastyavi Panchnama, Ex.P/1 and thereafter, her medical examination as well as ultrasonography was conducted, wherein, as per MLC report, Ex.P-2, and Ultrasound report, Ex.P-21, she was found pregnant. She in her statement recorded during trial, specifically deposed that she was residing with the appellant as his wife and is blessed with two sons, therefore, this fact is established that on

the date of incident she herself left her parental house, whereafter, appellant after solemnizing marriage, made physical relations with her repeatedly.

11. In view of the aforesaid, the only question falls for consideration of this Court is that “whether the prosecutrix was below 18 years of age and was minor at the time of incident ?” In this regard, prosecution has produced the school admission register entry Ex.P/4 of Shaskiya Madhyamik Vidyalaya, Bhedpura, District Datia and age certificate, Ex.P-5, issued by the Incharge Principal of the aforesaid school. Prosecution has examined Incharge Principal, Komal Singh Baghel (PW-2), who although on the basis of above school admission register entry, Ex.P/4, stated prosecutrix's date of birth as 5/6/2002, but he admitted in his cross-examination that he is not aware about the fact that on what basis prosecutrix's date of birth was written in the school admission register as he was not posted in the said school at the time of admission of the prosecutrix. He admitted that the date of birth of the students are generally written on the basis of information given by their parents.

12. In the instant case, prosecutrix's father complainant (PW-3) although, in his FIR, Ex.P-7, has stated the age of the prosecutrix as 17 years and 6 months, but he in his statements recorded during trial deposed that his daughter prosecutrix was born in the year 1998, and was major at the time of incident. He denied to have admitted the prosecutrix in Shaskiya Madhyamik Vidyalaya, Bhedpura, District Datia and turned hostile. His wife, i.e. mother of the prosecutrix (PW-4) also made similar statements. It has not been brought on record as to on what basis the date of birth of the prosecutrix, in her school admission

register entry, Ex.P-4, was written as 5/6/2002, therefore, although the above school admission register entry, Ex.P-4, of Shaskiya Madhyamik Vidyalaya, Bhedpura, District Datia, is admissible in evidence, but its probative value appears very low.

13. Hence, only on the basis of aforesaid school admission register entry, Ex.P-4, it cannot be said that the prosecutrix was below 18 years of age and was minor at the time of incident. In this regard, the observations made by Hon'ble Supreme Court in the case of *Satpal Singh Vs. State of Haryana, (2010) 8 SCC 714* can be relied upon.

Relevant paragraphs thereof are as under:-

19. So far as the issue as to whether the prosecutrix was a major or minor, it has also been elaborately considered by the courts below. In fact, the school register has been produced and proved by the Headmaster, Mohinder Singh (PW 3). According to him, Rajinder Kaur (PW 15), the prosecutrix, was admitted in Government School, Sharifgarh, District Kurukshetra on 2-5-1990 on the basis of school leaving certificate issued by Government Primary School, Dhantori. In the school register, her date of birth has been recorded as 13-2-1975. The question does arise as to whether the date of birth recorded in the school register is admissible in evidence and can be relied upon without any corroboration. This question becomes relevant for the reason that in cross-examination, Shri Mohinder Singh, Headmaster (PW 3), has stated that the date of birth is registered in the school register as per the information furnished by the person/guardian accompanying the students, who comes to the school for admission and the school authorities do not verify the date of birth by any other means.

20. A document is admissible under Section 35 of the Evidence Act, 1872 (hereinafter called as "the Evidence Act") being a public document if

prepared by a government official in the exercise of his official duty. However, the question does arise as to what is the authenticity of the said entry for the reason that admissibility of a document is one thing and probity of it is different.

21. In *State of Bihar v. Radha Krishna Singh* [(1983) 3 SCC 118 : AIR 1983 SC 684] this Court dealt with a similar contention and held as under:

“40. ... Admissibility of a document is one thing and its probative value quite another—these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil. ... (SCC p. 138, para 40)

53. ... where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight. (SCC p. 143, para 53)

145. (4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little. (SCC p. 171, para 145)”

22. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma v. State of Bihar* [(1969) 2 SCC 359] ; *Ram Murti v. State of Haryana* [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029]; *Dayaram v. Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681] ; *Harpal Singh v. State of H.P.* [(1981) 1 SCC 560

: 1981 SCC (Cri) 208 : AIR 1981 SC 361] ; *Ravinder Singh Gorkhi v. State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632] ; *Babloo Pasi v. State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266] ; *Desh Raj v. Bodh Raj* [(2008) 2 SCC 186] and *Ram Suresh Singh v. Prabhat Singh* [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194] . In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases. Such entries may be in any public document i.e. school register, voters list or family register prepared under the rules and regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain v. State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra v. State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587]

23. There may be conflicting entries in the official document and in such a situation, the entry made at a later stage has to be accepted and relied upon. (Vide *Durga Singh v. Tholu* [AIR 1963 SC 361] .)

24. While dealing with a similar issue in *Birad Mal Singhvi v. Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796] , this Court held as under : (SCC p. 619, para 15)

“15. ... 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 entry regarding to 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.”

25. A Constitution Bench of this Court, while dealing with a similar issue in *Brij Mohan Singh v. Priya Brat Narain Sinha* [AIR 1965 SC 282] , observed as under : (AIR p. 286, para 18)

“18. ... The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. We have therefore come to the conclusion that the High Court is right in holding that the entry made in an official record maintained by the illiterate chowkidar, by somebody else at his request does not come within Section 35 of the Evidence Act.”

26. In *Vishnu v. State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] while dealing with a similar issue, this Court 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 unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the municipal corporation, government hospital/nursing home, etc., the entry in

the school register is to be discarded.

27. Thus, the entry in respect of age of the child seeking admission, made in the school register by semi-literate chowkidar at the instance of a person who came along with the child having no personal knowledge of the correct date of birth, cannot be relied upon.

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.

29. In case, the issue is examined in the light of the aforesaid settled legal proposition, there is nothing on record to corroborate the date of birth of the prosecutrix recorded in the school register. It is not possible to ascertain as to who was the person who had given her date of birth as 13-2-1975 at the time of initial admission in the primary school. More so, it cannot be ascertained as who was the person who had recorded her date of birth in the primary school register. More so, the entry in respect of the date of birth of the prosecutrix in the primary school register has not been produced and proved before the trial court. Thus, in view of the above, it cannot be held with certainty that the prosecutrix was a major. Be that as it may, the issue of majority becomes irrelevant if the prosecution successfully establishes that it was not a consent case.

14. In view of the aforesaid discussion, and also in the light of the law laid down by Hon'ble the Apex Court in the above case, in the

considered opinion of this Court, prosecution has not been able to prove this fact beyond reasonable doubt that the age of the prosecutrix was below 18 years at the time of the incident. Since this fact has already been found established that the prosecutrix herself went with the appellant on her own will and she was living with the appellant as his wife and has been blessed with two sons also, therefore, learned Trial Court has committed error in holding the appellant guilty for the offences punishable under Sections 363, 366, 376(2)(n) of IPC and Sections 5(l)/6 & 5(j)(ii)/6 of POCSO Act. The prosecution has failed to prove its case beyond reasonable doubt. Hence, conviction of the appellant cannot be upheld and the appeal filed by the appellant deserves to be allowed.

15. *Ex-consequenti*, the judgment and sentence dated 07/11/2022 passed by the Court of Special Judge (POCSO Act), Datia in Special Case No.10/2020 is hereby **set aside**. The appellant is acquitted of the charges framed against him.

16. The Appellant is in jail. He be set at liberty, if not required in any other case.

17. Fine amount (if any) deposited by the appellant be refunded to him.

18. The Registry is directed to immediately supply a copy of this judgment to the Appellant, free of cost.

19. Let the record of the Trial Court be sent back immediately, along with copy of this judgment, for necessary information and compliance.

20. The Appeal succeeds and is hereby **Allowed**.

(ROHIT ARYA)
JUDGE

(SATYENDRA KUMAR SINGH)
JUDGE