THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 5th March, 2025

DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl.A. No.03 of 2024

Appellant : Bickey Pariyar alias Darjee

versus

Respondent : State of Sikkim

Application under Section 374(2) of the Code of Criminal Procedure, 1973

Appearance

Ms. Puja Lamichaney, Advocate for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. This Appeal calls into question the Judgment, dated 29-11-2023, in S.T. (POCSO) Case No.51 of 2021, of the Court of the Learned Special Judge (POCSO Act, 2012), Gangtok, Sikkim, vide which, the Appellant was convicted of the offence under Section 4(2) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act") and sentenced to undergo simple imprisonment for a term of twenty years under Section 4(2) of the POCSO Act and to pay a fine of ₹ 2,000/- (Rupees two thousand) only, with a default stipulation.

2. The facts pertaining to the instant case are that, PW-2, the victim's mother, had taken PW-1 the victim, aged about fifteen years, on 02-10-2021 to the hospital for medical examination on her sudden illness. On such examination, it was found that PW-1 was pregnant. She revealed to PW-2 that the Appellant was the father. PW-2 accordingly lodged Exbt. 3, the FIR on 04-10-2021

before the jurisdictional Police Station, informing that, the Appellant aged about twenty-three years had raped and impregnated her child, which she came to learn through the Doctor on 28-09-2021. That, her daughter told her that she had been taken by the Appellant twice on 07-09-2021 to his residence at around 2 p.m. and a week earlier to his friend's place. The FIR was registered against the Appellant on the same date, i.e., 04-10-2021, under Section 376 of the Indian Penal Code, 1860 (hereinafter, "IPC") read with Section 5(j)(ii)/6 of the POCSO Act and endorsed to PW-11, the Investigating Officer (I.O.) for investigation, on completion of which, he submitted Charge-Sheet against the Appellant, under the above mentioned sections of law. The Learned Trial Court, on taking cognizance of the offence, framed Charge against the Appellant on two counts under Section 4(2) of the POCSO Act, for committing the offence, once in his friend's room and then in his own room, for two counts under Section 376(3) of the IPC. Charge was also framed under Section 5(l), Section 5(j)(ii) of the POCSO Act and Section 376(2)(n) of the IPC. The Appellant pleaded "not guilty" to the charges and claimed trial. The Prosecution examined eleven witnesses in an effort to establish its case beyond reasonable doubt. On closure of Prosecution evidence, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.") to enable him to explain the incriminating circumstances in the evidence against him. He claimed to be innocent and unaware of the reasons for his arrest and that he was falsely implicated. Thereafter, the final arguments of the parties were heard.

Consideration of the entire evidence by the Learned Trial Court, culminated in the conviction and sentence as extracted *supra*.

3. Learned Counsel for the Appellant advanced the argument that the Prosecution attempted unsuccessfully to establish that the victim was a minor. The Prosecution relied on the following documents to prove her age, viz., Exbt P-2/PW-1 her Birth Certificate, Exbt P-10/PW-10 letter issued by the Principal of the victim's school, indicating her date of birth as 03-09-2006, Exbt P-11/PW-10 the School Admission Register and Exbt P-19/PW-11 the Seizure Memo for the Birth Certificate. The witnesses furnished for proof of these said documents were PWs 1, 2 and 10. Regardless of the above, the Prosecution failed to establish the place of issuance of the Birth Certificate, its seizure or its contents. That, the production of the Register Exbt P-11/PW-10 was of no assistance to the Prosecution case as it was not the Register pertaining to the first School attended by the victim, and thereby rendered futile for proof of date of birth. Seizure Memo Exbt P-19/PW-11, stood unproved as the alleged witnesses thereof were not furnished by the Prosecution before the Court, and their purported signatures on the documents were proved by the I.O., raising suspicions about the Prosecution case of seizure of the Birth Certificate. The age of the victim thus stood unproved in terms of the mandate of law. To fortify her arguments, reliance was placed on ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[1]; ***Lall Bahadur Kami*** vs. ***The State of Sikkim***[2] and ***Mangala Mishra @ Dawa Tamang @ Jack*** vs. ***State of Sikkim***[3]. It was next argued that even assuming that the victim was a minor, no sexual assault was

[1] (2010) 9 SCC 209
[2] SLR (2017) Sikkim 585 : 2017 SCC OnLine Sikk 173
[3] SLR (2018) Sikkim 1373 : 2018 SCC OnLine Sikk 215

perpetrated on her by the Appellant as the act was consensual, sans proof of duress or threat held out by the Appellant. That, the time lines mentioned by PW-2 in the FIR and in her deposition in Court cannot withstand legal scrutiny as they contradict each other. It was urged that the Trial Court was in error in considering Exbt P-5/PW-8 as proof of sexual assault in the absence of evidence of the examining Doctor. That, discrepancies arise in the victim's statement under Section 164 of the Cr.P.C. and her evidence before the Court, rendering her as an unreliable witness for which the Appellant deserves the benefit of doubt. Hence, the impugned Judgment and Order on Sentence be set aside.

4. Learned Additional Public Prosecutor for his part, refuting the arguments advanced (*supra*), contended that the date of birth of the victim has been duly proved by the witnesses, bolstered by the documents on record and the medical evidence is revelatory of the fact that the Appellant had impregnated the victim who was a minor. Assuming that the sexual act was consensual, this argument is to be disregarded by the Court as the consent of a minor is no consent. That, there is no ground to interfere in the impugned Judgment and Order on Sentence.

5. Considering the arguments advanced and having carefully analysed the evidence on record, including the documentary evidence, I am now to assess, whether the Learned Trial Court correctly examined the Prosecution evidence to reach the conclusion that the victim was a minor, which thereby led to the conviction of the Appellant for sexually assaulting her.

6. The Learned Trial Court discussed the evidence of PW-4 and PW-6, the victim's elder sister and brother-in-law respectively,

who had deposed that the victim had stayed in their house for 2-3 days some time in the month of August, 2021, during which period the Appellant also frequented visit their house and got acquainted with PW-1, which resulted in their friendship. The victim's friend, PW-5, deposed that the Appellant was the victim's boyfriend as told to her by the victim in September, 2021. That, one night the victim came to her house for a sleepover during which time she called up the Appellant and he took them both for a drive in a taxi. Later, PW-1 and the Appellant went to the house of either his friend or his brother. The victim returned and informed PW-5 that she had sex with the Appellant. Later, PW-1 was found to be pregnant and the pregnancy was terminated. The Trial Court also found that PW-1 mentioned with a fair amount of detail the locations where she had sexual intercourse with the Appellant on two occasions, corroborating the evidence of PW-3 and PW-5. The victim's mother took her to the hospital where the victim's Urine Pregnancy Test revealed her pregnancy. The Trial Court considered Exbt P-2/PW-1, the Birth Certificate of the victim, which was identified by PW-2 and did not find any reason to doubt its veracity as the School Admission record also indicated the same. Taking into consideration the evidence of PW-2 with regard to the victim's age and considering the evidence of the Prosecution witnesses and finding that there was no delay in lodging of the FIR, the Trial Court convicted and sentenced the Appellant.

7. Dealing now first with the question of the age of the victim, a Division Bench of this Court (Meenakshi Madan Rai, J. and Bhaskar Raj Pradhan, J.) in ***Mangala Mishra*** (*supra*), considered *inter alia* whether the Prosecution was able to establish that the

victim was a child, as defined under Section 2(d) of the POCSO Act. For this purpose, Section 35 of the Indian Evidence Act, 1872 (hereinafter, "Evidence Act") as also Section 74 thereof were considered and discussed at length by the Court. Reference was made to ***State of Bihar*** vs. ***Radha Krishna Singh and Others***[4] wherein the requirements of Section 35 of the Evidence Act was elucidated before a document can be held to be admissible under this Section, viz.; (i) the document must be in the nature of an entry in any public or other official book, register or record; (ii) it must state a fact in issue or a relevant fact; and (iii) the entry must be made by a public servant in the discharge of his official duties, or in performance of his duties. While considering Section 74 of the Evidence Act, this Court referred to the ratio of ***Madan Mohan Singh*** (*supra*), wherein it was held that 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. 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 authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. That, the standard of proof required is the same as in other civil and criminal cases. That, for determining the age of a person the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the

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[4] (1983) 3 SCC 118

school register/certificate stands belied by the unimpeachable 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.

(i) This Court in ***Mangala Mishra*** (*supra*), on the anvil of such pronouncements and discussions on legal aspects, concluded that there was no proof of seizure of the Birth Certificate from PW-2, the victim's mother therein and her evidence too was silent on the aspect of the victim's age. That, Exhibit 7 the victim's Birth Certificate, recorded the date of Birth of the victim as 14-09-2001, but the origin of the said document had remained an enigma as the Register of the Chief Registrar of Births and Deaths was not furnished to substantiate the entries made in Exhibit 7. No witness was forthcoming as the person who made the entries in any Register or on Exhibit 7 and the anomalies in Exhibit 6, the Property Seizure Memo, with regard to the time of the Seizure Memo was found unbelievable. In view of the said circumstance, the entries in Exhibit 7 was disbelieved by this Court. Relevantly, reference was also made to Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, which provides *inter alia* that for age determination the following evidence may be furnished;

> "**94. Presumption and determination of age.**—
> (1) ....
> (2) ....
> (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.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.**"**

(ii) In ***Lall Bahadur Kami*** (*supra*) this Court was considering whether the Prosecution was successful in establishing that the age of the victim was 17 years 8 months at the time of the incident, i.e., on 05-02-2016. Placing reliance on the decisions of ***Birad Mal Singhvi*** v. ***Anand Purohit***[5] and ***CIDCO*** vs. ***Vasudha Gorakhnath Mandevlekar***[6], it was observed that Exhibit 4, the Birth Certificate was seized in isolation as neither the School Admission Register nor the Register of Births and Deaths or the Class-X Marks Statement of the victim was seized by the I.O. The Court therefore mulled over whether reliance can be placed on Exhibit 4 solely, merely because it bears an official stamp and seal of the Registrar of Births and Deaths. The Court opined that the answer would be in the negative as none of the Prosecution witnesses have been able to vouchsafe for the truth of the contents thereof.

(iii) The same Division Bench of this Court (*supra*) in a Judgment (authored by Pradhan, J.) in ***State of Sikkim*** vs. ***Girjaman Rai @ Kami and Others***[7] had held as extracted hereinbelow;

> **"27.** Mere production of a birth certificate without even authenticating the same by proving it through its maker is however, not enough to prove the age of the victim. The age of the victim must be proved by leading clinching evidence. The cogency of the

[5] AIR 1988 SC 1796
[6] (2009) 7 SCC 283
[7] SLR (2019) Sikkim 266 : 2019 SCC OnLine Sikk 50

evidence led would ultimately help the Court in determining the age of the victim.**"**

8. In ***Birad Mal Singhvi*** (*supra*), the Supreme Court held as extracted hereinbelow;

> **"15.** The High Court held that in view of the entries contained in the Exs. 8, 9, 10, 11 and 12 proved by Anantram Sharma PW 3 and Kailash Chandra Taparia PW 5, the date of birth of Hukmichand and Suraj Prakash Joshi was proved and on the assumption it held that the two candidates had attained more than 25 years of age on the date of their nomination. In our opinion the High Court committed serious error. 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 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 material on which the age was recorded.** In Raja Janaki Nath Roy v. Jyotish Chandra Acharya Chowdhury, AIR 1941 Cal 41 a Division Bench of the Calcutta High Court discarded the entry in school register about the age of a party to the suit on the ground that there was no evidence to show on what material the entry in the register about the age of the plaintiff was made. The principle so laid down has been accepted by almost all the High Courts in the country see Jagan Nath v. Moti Ram, AIR 1951 Punjab 377, Sakhi Ram v. Presiding Officer, Labour Court, North Bihar, Muzzafarpur, AIR 1966 Patna 459, Ghanchi Vora Samsuddin Isabhai v. State of Gujarat, AIR 1970 Guj 178 and Radha Kishan Tickoo v. Bhushan Lal Tickoo, AIR 1971 J & K 62. In addition to these decisions the High Courts of Allahabad, Bombay, Madras have considered the question of probative value of an entry regarding the date of birth made in the scholar's register on in (sic) school certificate in election cases. **The Courts have consistently held that the date of birth mentioned in the scholar's register of secondary school certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined,** ……………." **[emphasis supplied]**

(i) In ***CIDCO*** (*supra*) it was observed by the Supreme Court as follows;

> "**18.** The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent. ………..**"**

9. On the touchstone of the decisions rendered in ***Lall Bahadur Kami*** (*supra*), ***Mangala Mishra*** (*supra*), ***Girjaman Rai*** (*supra*) and the observation of the Supreme Court in ***Birad Mal Singhvi*** (*supra*) and ***Madan Mohan Singh*** (*supra*), while examining the evidence on record and considering whether Exbt P-2/PW-1 can be taken as proof of the age of the victim's birth, I would have to answer in the negative for the following reasons;

(i) As already noticed in the decision of ***Madan Mohan Singh*** (*supra*), **for determining the age of a person, the best evidence is the evidence of the child's parents, with the caveat that it is to be supported by unimpeachable documents**. This caveat appears to have been inserted by the Court, by way of abundant caution, as the Courts are to be alive and sensitive to the fact that parents of a victim child, being interested witnesses and aggrieved by the acts of sexual assault perpetrated by an accused on their child would depose in support of the Prosecution case and testify that the victim was a minor. The production of unimpeachable documents in such a circumstance would be a firewall to an erroneous conviction thereby preventing travesty of justice. On the bedrock of the views expressed hereinabove and the observation of the Supreme Court on the parameters required for establishing age of a minor in a litany of decisions as already discussed, I now embark on examining the evidence so furnished by the Prosecution.

(ii) PW-2 identified Exbt P-2/PW-1 as the Birth Certificate of the victim and her date of birth as 03-09-2006. PW-2 did not state that the Police seized Exbt P-2/PW-1 from her possession. While PW-11 the I.O. stated that Exbt P-2/PW-1 was seized from the victim's mother PW-2, under Seizure Memo Exbt P-19/PW-11 and identified Exbt P-19(b) and Exbt P-19(c) as the signatures of the witnesses to such seizure. The I.O. failed to state the names of the witnesses to the Seizure Memo, however a perusal of Exbt P-19/PW-11 would indicate the names of the witnesses at Sl. No.6(i) and 6(ii). As the said seizure witnesses were not furnished by the Prosecution to establish seizure of the Birth Certificate from PW-2, this fact, considered in tandem with the failure of PW-2 to mention such seizure from her possession, raises suspicions about the authenticity of the seizure and thereby the document Exbt P-2/PW-1. In the absence of the seizure witnesses with no reasons furnished by the I.O. for their absence, an adverse inference as provided under Section 114 *Illustrations* (g) of the Evidence Act can be drawn against the Prosecution. There is therefore no proof of seizure of Exhibit Exbt P-2/PW-1 which appears to be a document furnished in isolation.

(iii) Indeed, I am aware that the Supreme Court has time and again reiterated that conviction based solely on the testimony of a police officer cannot be questioned and their evidence cannot always be treated with suspicion. I am also aware that the legal provision in the Cr.P.C. does not envisage the presence of witnesses when the I.O. makes seizures, however the conditions prescribed therein must be fulfilled, which do not appear to be so in the instant matter. The I.O., after making independent persons stand

as witnesses to the alleged seizure by way of abundant precaution, despite their non-requirement as per Section 102 of the Cr.P.C., must furnish them as witnesses in the Court to prevent the Court from drawing an adverse inference on their non-production.

(iv) The Supreme Court in ***Takhaji Hiraji*** vs. ***Thakore Kubersing Chamansing and Others***[8] while discussing non-examination of a Prosecution witness observed as follows;

> **"19.** .... **It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case.** On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. ....**"**
>
> **[emphasis supplied]**

This observation was reiterated by the Supreme Court in ***Harvinder Singh alias Bachhu*** vs. ***State of Himachal Pradesh***[9].

(v) Exbt P-11/PW-10 is an extract of the School Admission Register where the victim's date of birth is recorded as 03-09-2006. Admittedly, this is not the first school attended by the victim. The Exhibit makes no mention of the person or document

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[8] (2001) 6 SCC 145

[9] 2023 SCC OnLine SC 1347

on the basis of which the victim's date of birth was entered. PW-10 the School Principal has admitted as much, besides elucidating in her evidence under cross-examination that, she could not say what documents were submitted in school when the victim was admitted or the document on the basis of which the birth details of the victim were entered in the Register Exbt P-11/PW-10. Deducing from the handwriting on the above Exhibit, the entries therein appear to be made by a single person, who unfortunately was not named or furnished as a Prosecution witness. The entries in the Birth Certificate Exbt P-2/PW-1 remained unverified as the concerned Register of Births and Deaths was not even furnished from the concerned Hospital/Public Health Centre and no reason has been given by PW-11 the I.O. as to why such an important document, being an official document, was not furnished to bolster and establish the Prosecution case. As seen from the decisions of the Supreme Court referred to above, an entry in the Register of Births and Deaths could have authenticated the date of birth of the victim. At this juncture, relevant reference is made to the pronouncement of a Division Bench of this Court in ***Sancha Hang Limboo*** vs. ***State of Sikkim***[10], where the question arose as to whether the authenticity of the contents of Exhibit 2 (the victim's Birth Certificate) could be raised in appeal, no question having been raised earlier before the Learned Trial Court. This Court after examining the entire evidence on record concluded that no question whatsoever about the age or authenticating of the date of birth of the victim was raised during trial and relying on ***Sham Lal alias Kuldip*** vs. ***Sanjeev Kumar and Others***[11] it was concluded that if a

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[10] SLR (2018) Sikkim 1 : 2018 SCC OnLine Sikk 10
[11] (2009) 12 SCC 454

public document was admitted without formal proof it cannot be questioned in appeal. The facts of the instant case are to be distinguished from ***Sancha Hang Limboo*** (*supra*) as the Birth Certificate herein was indeed questioned in the evidence of PW-2 and PW-10 during their cross-examination. It is apparent that the age of the victim was questioned even during the trial.

10. In view of the above obtaining facts and circumstances and the consequent discussions, I am of the considered view that it cannot be said that the age of the victim has been proved beyond reasonable doubt and on this aspect I am constrained to differ with the findings of the Learned Trial Court, which, while relying on the Birth Certificate solely and the evidence of PW-2, unsupported by unimpeachable evidence, concluded that she was a minor.

11. In a case like the present one, it is absolutely imperative that the Prosecution should prove the age of the victim beyond reasonable doubt. Any grey areas or lacuna in such proof have to be viewed by the Courts with the seriousness and gravity it deserves. The Court has to be alive to the fact that an erroneous consideration of date of birth of the alleged victim, sans adequate proof, would render a person suspected of having committed the offence, to long years of incarceration and most of his productive life being laid to waste in front of his eyes.

12. In light of the fact that the victim's age has not been proved, it is essential to examine the evidence of the victim with regard to the sexual acts being consensual or otherwise. PW-1 stated that;

> "……………………..…………………………..
>
> I had seen the accused for the first time in August 2021 in Rxx Gxxx where I had gone to vist my eldest sister. The accused was living in a room next

> to my sister's house. We did not speak to each other but he started to follow me through *facebook*. **Thereafter, we became friends and started chatting in social media and finally met on 22.08.2021 in Pxxx Hxxxx and we went for a drive together till Chorten Gumpa.**
>
> **The next day we met again in a room of one of Bickey's friend below Axxxx Gym. That was when we first had our physical relation.**
>
> **Q. Can you tell the Court exactly what you mean by the term 'physical'?**
>
> **Ans: We had sex.**
>
> **Thereafter, we met again on 07.09.2021 in his house where we once again had sex. Later, when my family found about my relationship with Bickey my family members lodged a complaint against him.** I was then sent to live with my Chama(Aunt). Later, as I began started stomach pain I was taken to Mxxxxxx hospital where on medically examined I was found to be pregnant. Thereafter, my family reported the matter to the Sadar police station(*PS*). I thereafter underwent an abortion. Thereafter, the police came to the hospital and took down my statement. I was also taken for counselling.
>
> ……………………………………………." **[emphasis supplied]**

Her cross-examination does not decimate the fact that the physical relations were consensual, she was in a romantic relationship with the Appellant and she, of her own accord, went with the Appellant. This is fortified by the evidence of PW-5 according to whom PW-1 had voluntarily told her that she had sexual relations with the Appellant in September, 2021 and again had another such encounter. That, PW-1 had lied to her parents of having gone out to town with PW-5, when in fact, she was with the Appellant, thereby proving that all acts of the victim with the Appellant were voluntary and consensual. The victim is not the Complainant, it is not the Prosecution case that she was forced into the act.

13. PW-2 deposed in Court that on 02-10-2021 her daughter suddenly fell ill and on her medical examination she came to learn that the child was pregnant. She lodged the FIR Exbt P-2/PW-1 on 04-10-2021. However, in the FIR she claims to have learnt through the Doctor on 28-09-2021 that PW-1 was pregnant.

These anomalies in the dates have gone unexplained by the Prosecution which is indeed indicative of slipshod and callous investigation.

14. The evidence of PW-8 is touched upon briefly as the crux of the Prosecution case pivots around the alleged pregnancy of the victim, to examine whether there was proof of pregnancy as alleged and as a tangential consideration whether the Prosecution case is thereby worthy of reliance. PW-8 stated that pregnancy was confirmed by a serum beta HCG test, but admitted that urine test for pregnancy is not 100% correct. Besides, it is noticed that the blood test report, medical report, or the ultra sound report after the ultra sound of the victim was conducted by the concerned doctor for the alleged pregnancy were not filed before the Court and PW-8 and the I.O. PW-11 admitted as much. It is also worth noticing that PW-8 claims that ultrasound on the victim was conducted on 30-09-2021 and the last medical test done on 05-10-2021 but the "case summary" Exbt P-5/PW-8 is dated 29-11-2021, with no explanation whatsoever for the delay in its preparation which exceeded a month. PW-8 admitted that the victim was examined by one Dr. Annet Thatal but neither the medical examination report nor the examining Doctor were furnished by the Prosecution to establish the allegation of pregnancy. It thus emanates that in the absence of the aforementioned documents, the Prosecution case lacks proof of the very crux of its case, i.e., the victim's pregnancy due to sexual assault. The Trial Court considered Exbt P-5/PW-8 the Case Summary as proof of the pregnancy and thereby sexual assault, notwithstanding the fact that it was only a summary of what had transpired in the hospital

and not of the alleged pregnancy. This document cannot fill the lacuna in the Prosecution case created by the non-production of the actual documents as proof of the medical tests of the victim.

15. In view of the above facts and circumstances and having appreciated holistically the entire evidence on record, it concludes that the Prosecution has failed to establish that the victim was a minor and that the Appellant had forcefully sexually assaulted her or forced her into a sexual relationship.

16. Consequently, the Appeal is allowed.

17. The conviction and sentence imposed on the Appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

18. The Appellant is acquitted of the offence under Section 4(2) of the POCSO Act.

19. He be set at liberty forthwith, if not required to be detained in any other case.

20. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

21. No order as to costs.

22. Copy of this Judgment be forwarded to the Learned Trial Court for information and compliance along with its records.

23. A copy of this Judgment be made over to the Appellant/Convict through the Jail Superintendent, Central Prison, Rongyek and to the Jail Authority for information and necessary steps.

(Meenakshi Madan Rai)
Judge
05-03-2025

Approved for reporting : **Yes**

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THE HIGH COURT OF SIKKIM: GANGTOK
(Criminal Appellate Jurisdiction)

CRL. A. No. 03 of 2024

Bickey Pariyar *alias* Darjee,
Son of Robin Pariyar,
Resident of Mickkhola,
Namchi,
District: Namchi, Sikkim.
Presently: Rongyek Jail .... Appellant

versus

State of Sikkim .... Respondent

J U D G M E N T

Bhaskar Raj Pradhan, J.

I have had the privilege of carefully reading the judgment prepared by my esteemed colleague, Justice Meenakshi Madan Rai. It has been held that the prosecution has failed to establish that the victim was a minor and the appellant had sexually assaulted her or forced her into sexual relation. However, I am unable to agree with the findings therein. I, therefore, respectfully record my reservation and dissent as noted hereinafter.

2. On examination of the evidence led by the prosecution and the cross-examination of the prosecution witnesses by the defence, I am of the view that:-

(i) the evidence of the victim, the victim's mother (PW-2) and Dr. Anup Pradhan (PW-8) corroborated by the case summary (exhibit P-5) of the hospital where the victim was

admitted and the medical certificate (exhibit P-6) issued by Dr. Anup Pradhan (PW-8) establishes without doubt that the appellant had sexual intercourse with the victim which made her pregnant and later was aborted.

(ii) the evidence of the victim's mother (PW-2) and the victim corroborated by the victim's original birth certificate (exhibit P-2), the certificate (exhibit P-10) issued by the Principal (PW-10) of the Government Girls' Senior Secondary School where the victim was studying, the attested copy of the school admission register (exhibit P-11) produced and exhibited by the Principal (PW-10) clearly establishes that the victim was born on 03.09.2006 and therefore, she was a child as defined in section 2(d) of *The Protection of Children from Sexual Offences Act, 2012* (the POCSO Act, 2012) at the time of the offence.

(iii) the birth certificate (exhibit P-2) proved by the victim's mother (PW-2) to whom it was issued and by the victim for whose benefit it was issued is a "public document" admissible without the evidence of the maker thereof. Similarly, the school admission register is also a "public document" maintained in the ordinary course of its business of the Government Girls' Senior Secondary School. The attested copy of the school admission register (exhibit P-11) has been proved by the Principal (PW-10) who was its custodian and the contents verified by the learned Special

Judge on comparison with the original school admission register produced for its inspection. The certificate (exhibit P-10) issued by the Principal (PW-10) and proved during trial is a certificate certifying the entries kept by the Government Girls' Senior Secondary School in the school admission register regarding the victim's date of birth and therefore, also admissible in evidence.

The Conviction

3. The appellant was convicted and sentenced with simple imprisonment for a term of twenty years and fine of rupees two thousand for the offence under section 4(2) of the POCSO Act, 2012. In default of payment of fine, the appellant was to undergo additional term of two months simple imprisonment. Period of imprisonment already undergone by the appellant during investigation and trial was to be set off against the sentence.

4. The learned Special Judge has concluded that the victim's mother (PW-2) has identified the victim's birth certificate (exhibit P-2) and has confirmed that her date of birth was 03.09.2006. The learned Special Judge has taken note of the fact that the victim also stated that her birth date was 03.09.2006. The learned Special Judge did not find any reason to doubt the veracity of the birth certificate (exhibit P-2) since the victim's date of birth in her school admission record is also the same. According to the learned Special

Judge, the Principal (PW-10) has corroborated that in the school records the victim's date of birth has been registered as 03.09.2006. Taking into consideration the evidence of the victim's mother (PW-2) supported by the victim's birth certificate (exhibit P-2) and the school records, the learned Special Judge concluded that the victim's date of birth was indeed 03.09.2006 and about 15 years old during the relevant time. The learned Special Judge concluded that the sexual intercourse between the appellant and the victim was consensual but as the victim was found to be a minor, the appellant was convicted for the offence under section 4(2) of the POCSO Act, 2012. However, the learned Special Judge opined that the appellant may not be punished for the same offence under sections 5(l) and 5(j)(ii) of the POCSO Act, 2012 and under sections 376(2)(n) and 376(3) of the Indian Penal Code, 1860.

Submissions

5. Ms Puja Lamichaney, learned counsel for the appellant, submits that the conclusion arrived at by the learned Special Judge that the victim was a minor is flawed as prosecution had failed to prove the victim's birth certificate (exhibit P-2), certificate (exhibit P-10) issued by the Principal and attested copy of the school admission register (exhibit P-11) in the manner required by law. She relied upon ***Madan Mohan Singh and others vs. Rajni Kant and***

another[1], ***Lall Bahadur Kami vs. The State of Sikkim***[2], ***Mangala Mishra @ Dawa Tamang @ Jack vs. State of Sikkim***[3]. It was submitted that production of the certificates is not enough and the prosecution ought to produce the officers who made the relevant entries in the registers and the evidence produced before them which satisfied them to make the entries. She further submitted that the seizure memo (exhibit P-19) by which the birth certificate (exhibit P-2) was seized, was not proved by the two witnesses named therein as both of them were not produced during trial. The learned counsel submits that as the minority of the victim has not been proved, the act being consensual the appellant is liable to be acquitted of all charges.

6. Alternatively, the learned counsel relied upon the order of the Supreme Court in ***K. Dhandapani vs. The State by the Inspector of Police***[4]. The appellant therein was the maternal uncle of the prosecutrix. He was convicted after trial for committing of offence of rape under sections 5(j)(ii) read with section 6, 5(l) read with section 6 and 5(n) read with section 6 of the POCSO Act, 2012. The High Court upheld the conviction and sentence. The appellant therein preferred Special Leave Petition before the Supreme Court. During the hearing, it was argued by the learned counsel for

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[1] (2010) 9 SCC 209
[2] SLR (2017) Sikkim 585
[3] SLR (2018) Sikkim 1373
[4] 2022 SCC Online SC 1056

the appellant that in fact he had married the prosecutrix and they had two children. It was submitted that the Supreme Court should exercise its power under Article 142 of the Constitution to do complete justice and it would not be in the interest of justice to disturb the family life of the appellant and the prosecutrix. Thereafter, the statement of the prosecutrix was recorded by the District Judge on the direction of the Supreme Court in which she stated that she has two children who were being taken care of by the appellant and she was leading a happy married life. In the peculiar facts and circumstances of the case, the Supreme Court held that the conviction and sentence of the appellant, who is the maternal uncle of the prosecutrix, deserve to be set aside in view of the subsequent events which had been brought to the notice of the Court. It was held that the Supreme Court cannot shut its eyes to the ground reality and disturb the happy family life of the appellant and the prosecutrix. It was also noted that the Supreme Court was informed about the custom in Tamil Nadu of the marriage of a girl with the maternal uncle. The appeal was therefore allowed and the conviction and sentence set aside.

7. The learned counsel for the appellant in the present case submitted that the factual situation was similar to that of ***K. Dhandapani*** (supra) as the victim desired to marry the appellant and was living with his mother.

8. The learned Additional Public Prosecutor submitted that the prosecution has been able to prove the case against the appellant beyond a reasonable doubt. The deposition of the victim clearly establishes the offence alleged. The victim's deposition is corroborated by the depositions of her mother (PW-2) – the first informant, and other prosecution witnesses.

The facts

9. The facts narrated in paragraph 2 of the judgment of Justice Meenakshi Madan Rai do not require reiteration. However, what transpired during the trial is relevant and these relevant facts are highlighted below.

10. The victim in her deposition stated that she was 16 years old and studying in Class-VIII as on 1st July, 2022. She also deposed that her date of birth was 03.09.2006 and exhibited her birth certificate (exhibit P-2) without any objection from the defence. The victim stated that she had seen the appellant for the first time in August 2021 who was living in a room next to her sister's house. They started following each other on *facebook*, became friends and started chatting on social media. They finally met on 22.08.2021 and on the next day they had sex in the appellant's friend's room. They again met in the appellant's house on 07.09.2021 and once again had sex. When her family found out about the relationship, complaint was filed. She also

stated that she was therefore medically examined and found to be pregnant. Thereafter, the matter was reported to the police station and then she had an abortion. The above facts have not been demolished during cross-examination.

11. What the victim stated in her deposition is corroborated by the deposition of the victim's mother (PW-2) who proved the FIR (exhibit-3) lodged by her. The FIR (exhibit-3) also corroborates the victim's deposition. The victim's mother (PW-2) identified the victim's birth certificate (exhibit P-2) without any objection from the defence. During cross-examination, the defence simply suggested that it was not a fact that the victim's date of birth was not 03.01.2006 and the birth certificate (exhibit P-2) was not of the victim. The victim denied the suggestions.

12. The victim deposed that she had sexual intercourse with the appellant on 23.08.2021 and 07.09.2021 in fair detail as to time and place. The case summary (exhibit P-5) of the hospital proved by Dr. Anup Pradhan (PW-8) records that the victim was admitted to the hospital on 28.09.2021, examined on 30.09.2021, after which on 01.10.2021 on confirmation of pregnancy, suction evacuation was performed on her. The victim was discharged on 05.10.2021. The FIR (exhibit 3) proved by the victim's mother (PW-2) was lodged by her on 4.10.2021 after the victim's pregnancy was confirmed. These facts are recorded

in the certificate issued by the hospital on 29.11.2021 (exhibit P-6) as well. Both these documents have been proved by Dr. Anup Pradhan (PW-8) who was the signatory thereto. The failure to examine the other signatory, i.e., Dr. Annet Thatal, would have no consequence as such.

13. The appellant's friend (PW-3) corroborated the deposition of the victim about going to the appellant's friend's house on 23.08.2021, when he deposed that during August-September, 2021, the appellant had taken his room keys and returned it after some hours. The fact that the victim had gone out with the appellant during September 2021 is corroborated by the victim's friend (PW-5) as well. The victim's sister (PW-4) confirmed that, in fact, the victim was having side pains towards the end of September 2021 and the victim's mother (PW-2) had taken her to the hospital where she was admitted for two days to undergo a test where she was found to be pregnant.

14. On an overall assessment of the facts proved by the prosecution through its various witnesses, there is nothing on record to suspect that what the victim deposed with certainty about her relationship, the two incidents with details as to time and place were untrue. The victim's deposition is of sterling quality and therefore, reliable.

The victim was a minor

15. The victim has categorically deposed that she was sixteen years old and studying in Class-VIII at the time of deposition, i.e., 1st July, 2022, which makes her fifteen years old when she had sexual intercourse with the appellant. The victim exhibited her birth certificate (exhibit P-2) and proved it without an objection from the defence. She categorically stated that her date of birth was 03.09.2006. There is no denial in the cross-examination by the defence as to her date of birth. The victim's birth certificate (exhibit P-2) has been proved by the victim's mother (PW-2) as well and she identified the same in Court without any objection from the defence. The victim's mother also reiterated that the victim's date of birth was 03.09.2006 and her evidence withstood the cross-examination by the defence.

16. The Principal (PW-10) of the Government Girls' Senior Secondary School produced the original school admission register maintained by the school and proved the attested copy of the school admission register (exhibit P-11) in which the details of the victim had been recorded. It records her date of birth as 03.09.2006 and also the birth certificate number and date. The original school admission register was compared with the attested copy of the school admission register (exhibit P-11) by the learned Special Judge and found to be true. Besides the school admission

register, the Principal (PW-10) also proved a letter written by her in response to a notice under section 91 of the Cr.P.C. in which the victim's date of birth, i.e., 03.09.2006, is also mentioned. The Principal (PW-10) also proved that along with the certificate (exhibit P-10), an attested copy of the school admission register (exhibit P-11) had also been enclosed. The school admission register contains sufficient details about the victim to safely infer that the entries were based on correct information provided.

The Birth Certificate & the School Admission Register are Public Documents

17. The birth certificate (exhibit P-2) and the school admission register maintained by the Government Girls' Senior Secondary School are public documents and therefore admissible in evidence without examining its authors. The birth certificate (exhibit P-2) providing details of the date of birth of the victim registered by the Registrar given to the informant have been proved by the victim and her mother (PW-2).

18. The birth certificate (exhibit P-2) issued by the Chief Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim, is a certificate issued under section 12/17 of the Registration of Births and Deaths Act, 1969. It bears the signature of the Issuing Authority, i.e., the Registrar of Births and Deaths. Section

12 mandates that the Registrar shall, as soon as the registration of a birth or death has been completed give, free of charge to the person who gives information under section 8 or section 9 an extract of the prescribed particulars under his hand from the register relating to such birth or death. Section 17 provides that any person could cause a search to be made by the Registrar for any entry in a register of births and deaths and obtain an extract from such register relating to any birth or death. Sub-section 2 of section 17 provides that all extracts given under the section shall be certified by the Registrar or any other officer authorised by the State Government to give such extracts as provided in section 76 of the Indian Evidence Act, 1872, and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates. Chapter II of the Registration of Births and Death Act, 1969 relates to appointments of various Registrars. It is seen that the Chief Registrar, the District Registrar and the Registrars are all appointed by the State Government. As such, they are all public servants. Section 77 of the Indian Evidence Act, 1872 provides that certified copies of public documents may be produced in proof of the content of the public documents or parts of the public documents of which they purport to be copies. Section 79 mandates that the Court "shall presume" to be genuine every document purporting to be a certificate,

certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the State Government. Section 79 also provides that the Court "shall" also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character he claims in such paper.

19. Both the public documents were exhibited by the prosecution without a protest from the defence.

Section 79 of the Indian Evidence Act, 1872 mandates the Court to presume that public documents are genuine.

20. The Supreme Court in ***Neeraj Dutta vs. State (NCT of Delhi)***[5], opined*:*

> ***"Presumptions***
>
> **64.** Courts are authorised to draw a particular inference from a particular fact, unless and until the truth of such inference is disproved by other facts. The court can, under Section 4 of the Evidence Act, raise a presumption for purposes of proof of a fact. It is well settled that a presumption is not in itself evidence but only makes a *prima facie* case for a party for whose benefit it exists. As per English law, there are three categories of presumptions, namely, (*i*) presumptions of fact or natural presumption; (*ii*) presumption of law (rebuttable and irrebuttable); and (*iii*) mixed presumptions i.e. "presumptions of mixed law and fact" or "presumptions of fact recognised by law". The expressions "may presume" and "shall presume" in Section 4 of the Evidence Act are also categories of presumptions. Factual presumptions or discretionary presumptions come under the division of "may presume" while legal presumptions or compulsory presumptions come under the division of "shall presume". "May presume" leaves it to the discretion of the court to make the presumption according to the circumstances of the case but "shall presume" leaves no

[5] (2023) 4 SCC 731

> option with the court, and it is bound to presume the fact as proved until evidence is given to disprove it, for instance, the genuineness of a document purporting to be the Gazette of India. The expression "shall presume" is found in Sections 79, 80, 81, 83, 85, 89 and 105 of the Evidence Act.
>
> [emphasis supplied]

Section 35 of the Indian Evidence Act, 1872

21. Section 35 of the Indian Evidence Act, 1872 provides that 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 electronic record is kept, is itself a relevant fact. Thus, the birth certificate (exhibit P-2) issued by the Registrar of Births and Deaths under the Registration of Births and Death Act, 1969 and the certified copy of the school admission register (exhibit P-11) maintained in the ordinary course of their business by the Government Girls' Senior Secondary School which recorded the date of birth of the victim as 03.09.2006 would be relevant facts.

Documents made ante litem motam can be relied upon safely when such documents are admissible under section 35 of the Indian Evidence Act, 1872

22. The birth certificate (exhibit P-2) dated 01.11.2006 and the school admission register were issued and recorded prior to the crime which was in the year 2021. It is settled law that documents made *ante litem motam* can

be relied upon safely when such documents are admissible under section 35 of the Indian Evidence Act, 1872. It has been held so by the Supreme Court in ***Murugan vs State of Tamil Nadu***[6].

23. In ***Harpal Singh and Another vs. State of Himachal Pradesh***[7], the Supreme Court held:

> "**3.** In the instant case the prosecution has proved the age of the girl by overwhelming evidence. To begin with, there is the evidence of Dr Jagdish Rai (PW 14) who is a radiologist and who, after X-ray examination of the girl found that she was about 15 years of age. This is corroborated by Ext. PF, which is an entry in the admission register maintained at the Government Girls' High School, Samnoli (wherein the girl was a student) and which is proved by the Headmaster. That entry states the date of birth of the girl as October 13, 1957. <u>There is yet another document viz. Ext. PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh during her childhood, was born to Lajwanti, wife of Daulat Ram on November 11, 1957. Mr Hardy submitted that in the absence of the examination of the officer/Chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties, that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author.</u> From whatever angle we view the evidence, the conclusion is inescapable that Saroj Kumari was below 16 years of age at the time of the occurrence. Accordingly we agree with judgments of the courts below and see no merit in this appeal which is dismissed."
>
> [emphasis supplied]

24. The Supreme Court in ***Sham Lal vs. Sanjeev Kumar***[8], held:

> "***Question 3***
>
> **21.** One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is

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[6] (2011) 6 SCC 111
[7] (1981) 1 SCC 560
[8] (2009) 12 SCC 454

the son of the deceased Balak Ram is Ext. P-2, the school leaving certificate. The learned District Judge, while dealing with this document has observed:

"On the other hand, there is a public document in the shape of school leaving certificate, Ext. P-2 issued by Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded as son of Shri Balak Ram."

The findings of the learned District Judge holding Ext. P-2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence.

22. It has been held in *Dasondha Singh* v. *Zalam Singh* [(1997) 1 PLR 735 (P&H)] that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit. Even otherwise such a document falls within the ambit of Section 74, Evidence Act, and is admissible per se without formal proof.

[emphasis supplied]

25. In the light of the clear exposition of the Supreme Court as above, the mere denial by the defence in the cross-examination of the victim and her mother (PW-2) that 03.09.2006 was not the date of birth of the victim and that the birth certificate was not of the victim would not disprove the "legal presumption" or the "compulsory presumption" under section 79 of the Indian Evidence Act, 1872 as no evidence to disprove it was presented by the defence. Both the victim and her mother (PW-2) had denied the suggestion.

The judgments cited by the learned counsel for the appellant

26. In ***Madan Mohan Singh*** (supra), the facts were different than the present case. In that case, as noted by the Supreme Court the documents placed on record were school

leaving certificate, school registers, voters lists, and other documents prepared by authorised persons in exercise of their official duty. The Supreme Court noted the entries made in the electoral rolls for the legislative assembly for three consecutive elections which recorded different particulars of the same lady. The Supreme Court found that as per the first document the lady should have been born in 1941 as she was 34 years of age in 1975; as per the second list she should have been born in 1943 as she was 36 years of age in 1979. The Supreme Court also noted that immediately after one year in 1980 she became 41 years of age and according to this document she should have been born in 1939. It was held by the Supreme Court that there is so much inconsistencies that these documents cannot be read together for the reason that in 1979 if the lady was 36 years of age, in 1980 she has been shown 41 years of age. So, after expiry of one year her age has gone up by five years. Similar inconsistencies were recorded with regard to other document as well. The Supreme Court held that the aforesaid document placed on record by the appellants and so heavily relied upon by them if taken into consideration, they would simply lead to not only improbabilities and impossibilities but absurdities also. It is in this context that the Supreme Court held that 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.

27. I am afraid that in the present case, the exhibited public documents which establishes the proof of age of the victim has no such improbabilities, impossibilities or absurdities for this Court to venture to examine its probative value.

28. In ***Lall Bahadur Kami*** (supra), we had noted the conflicting evidence given by the prosecution witnesses of the birth certificate and the fact that none of the prosecution witnesses have been able to vouch safe for the truth of the contents thereof. We had also noted that neither the school admission register nor the register of births and deaths or the Class X mark sheet were seized by the investigating officer. It is in that fact situation that we sought to examine the probative value of the birth certificate which was seized in isolation.

29. In the present case, as held earlier, the victim's mother who would be the most natural person to give evidence about the birth of the victim, has categorically stated that the victim was born on 03.09.2006 and identified the birth certificate (exhibit P-2) as the birth certificate of the victim. The victim herself stated that she was born on 03.09.2006, identified her birth certificate (exhibit P-2),

deposed that she was 16 at the time of her deposition, i.e., 01.07.2022 and that she was studying in Class VIII then.

30. In ***Mangala Mishra*** (supra), we noted the exposition of law by the Supreme Court in ***Madan Mohan Singh*** (supra) distinguishing between the admissibility of a document and its probative value while noting the conflicting evidence led by the prosecution regarding seizure of the birth certificate of the victim. We also noted that the victim's mother who was examined as a prosecution witness neither made any claim that the birth certificate was seized by her nor did she mention about the victim's age. We noted that there was conflicting evidence as to from whom the birth certificate of the victim was seized from. After examining section 94 of the JJ Act of 2015, we held that in the first instance the date of birth from the school or matriculation of the child is unavailable then resort can be taken to a birth certificate given by a corporation or a municipal authority. We held that the provisions of section 94 of the JJ Act of 2015 have not been complied with and hence the prosecution had failed to establish the first requirement of the case under POCSO Act, viz., to establish that the victim was below the age of 18 years as is the requisite provided under section 2(d) of the POCSO Act.

31. The learned counsel for the appellant also emphasised on a suggestion by the defence during the cross-

examination of the Principal (PW-10). It was suggested that the school of which she was the principal and in which the school admission register was maintained was not the first school attended by the victim. This suggestion as is clear is as per the requirement of Rule 12(3)(a)(ii) of *the Juvenile Justice (Care and Protection of Children) Rules, 2007 (the 2007 Rules)*. However, this is not the requirement of section 94 of JJ Act of 2015. JJ Act of 2015 has replaced Rule 12 of the 2007 Rules. As such, the suggestion of the defence has no consequence whatsoever in the facts of the present case as the FIR (exhibit P-3) was lodged on 04.10.2021 when the JJ Act of 2015 had already been enforced. There is no suggestion by the defence that the entry made in the school admission register was untrue. As noted above, the attested copy of the school admission register (exhibit P-11) contains the details of the victim's birth certificate.

The Seizure Memo

32. The learned counsel for the appellant submitted that the seizure memo (exhibit P-19) was not proved by the two witnesses who were named in it. Thus, even the seizure of the birth certificate (exhibit P-2) is suspect.

33. The Investigating Officer deposed that the birth certificate of the victim was seized from her mother vide seizure memo (exhibit P-19) wherein exhibit P-19(a) is the signature of the victim's mother. He also identified the

signatures of the witnesses in the seizure memo and the birth certificate (exhibit P-2) seized through the seizure memo.

34. Nothing substantial was brought out during the cross-examination of the Investigating Officer (PW-11) to demolish the facts stated by him in his examination-in-chief regarding the investigation and the seizure of the birth certificate (exhibit P-2).

35. The birth certificate (exhibit P-2) was seized by the Investigating Officer (PW-11) from the victim's mother (PW-2) through seizure memo (exhibit P-19) which was exhibited by him as its maker - a police officer who is authorised to conduct the search. It is noticed that the seizure memo is under section 102 Cr.P.C. The said provision does not mandate the requirement of any witnesses for the procedure. There is no such inflexible proposition of law that there ought to be independent witnesses associated with the seizure. Section 102 Cr.P.C does not require it. The police officer in the course of investigation can seize any property if such property is necessary to link with the commission of offence. However, the seizure memo (exhibit P-19) records that the seizure was effected in the presence of the two witnesses. The two witnesses however were not cited as witnesses in the final report. They were, therefore, not examined. The Investigating Officer (PW-11) was examined

and he proved the seizure memo (exhibit P-19). No suggestion was given by the defence to the Investigating Officer (PW-11) that the two witnesses named in the seizure memo were withheld for any purpose. The seizure memo (exhibit P-19) records the seizure of only the birth certificate (exhibit P-2) of the victim from her mother (PW-2). The birth certificate (exhibit P-2) had been produced in the original and exhibited by the victim without any objection from the defence. The victim's mother (PW-2) was also examined. She did not depose that the birth certificate (exhibit P-2) was seized from her although she identified the birth certificate (exhibit P-2). The defence did not suggest that the birth certificate of the victim (exhibit P-2) was not seized from her. The identification of the signature [exhibit P-19(a)] of the victim's mother in the seizure memo (exhibit P-19) by the Investigating Officer (PW-11) was not objected to by the defence. The seizure memo (exhibit P-19) shows the seizure of the birth certificate (exhibit P-2) and nothing else. In the circumstances, it would be extremely difficult for the Court to disbelieve the Investigating Officer (PW-11) when he deposed about the seizure of the birth certificate (exhibit P-2) and in those circumstances, question the veracity of the birth certificate (exhibit P-2) itself. Even if the prosecution failed to produce the witnesses to the seizure, the birth certificate (exhibit P-2) which has been proved by both the

victim and her mother (PW-2) in whose custody it ought to have been, cannot be wished away. As such, the presumption under section 114(g) of the Indian Evidence Act, 1872 would be of no benefit to the appellant merely because the two seizure witnesses were not produced. As held above, there was not a suggestion from the defence that the birth certificate (exhibit P-2) was a false certificate.

36. The records of the learned Special Court reveal that the prosecution had placed the original birth certificate of the victim (exhibit P-2), the certificate (exhibit P-10) of the Principal (PW-10) certifying the date of birth as recorded in the school admission register and the attested copy of the school admission register (exhibit P-11) which was compared with the original school admission register produced and examined by the learned Special Court and found to be true. There is no suggestion from the defence that what is recorded therein is not the truth. The date of birth recorded in all the three documents is 03.09.2006. These documents corroborate what both the victim as well as her mother (PW-2) deposed before the Court. Additionally, the victim while deposing on 1st July, 2022, also stated that she was 16 years and studying in Class VIII. The victim exhibited her birth certificate (exhibit P-2) and her mother (PW-2) identified it before the Court. The only suggestion given by the defence to the victim regarding the birth certificate (exhibit P-2) was

that it was not hers. The victim emphatically denied the suggestion. During the cross-examination of the victim's mother (PW-2), a suggestion was made that the date of birth of the victim was not 03.01.2006 and that exhibit P-2 was not her birth certificate. The victim's mother also emphatically denied the suggestions.

37. Thus, the seizure of the birth certificate (exhibit P-2) of the victim cannot be doubted. Merely because the two witnesses to the seizure memo (exhibit P-19) were not examined, the birth certificate cannot be thrown out without consideration.

38. In ***Lakhi Ram Tambi***[9], we have held that the birth certificate is a public document admissible in evidence and as no objection was raised when it was admitted in evidence nor any issue raised on its probative value it cannot be questioned by the defence at the stage of appeal. I am not inclined to accept a contrary view to that of the Division Bench of this Court.

Determination of the age of the victim following the procedure under section 94 of the JJ Act of 2015

39. It is now well settled that the determination of the age of the victim under the POCSO Act can be carried out through an enquiry as contemplated under section 94 of the

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[9] SLR 2019 Sikkim 45

JJ Act of 2015. Section 94 of the JJ Act of 2015 reads as under:

> "**94. Presumption and determination of age**.(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the 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.
>
> (3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

40. It is noticed that section 94(2) of the JJ Act of 2015, mandates that the committee or the board shall undertake the process of age determination "by seeking evidence by obtaining" the certificates mentioned in sub-section 2(i) and sub-section 2(ii) without any further requirement.

41. The Supreme Court in ***P. Yuvaprakash vs. State Rep. By Inspector of Police***[10], held that from a conjoint reading of Section 34 of the POCSO Act and Section 94 of the JJ Act of 2015, it is evident that wherever a dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act the courts have to take recourse to the steps indicated in Section 94 of the JJ Act and the three documents in order of which the JJ Act requires consideration.

42. In ***Ashwani Kumar Saxena vs. State of Madhya Pradesh***[11], the Supreme Court while examining the provisions of the *Juvenile Justice (Care and Protection of Children) Act, 2000*, held that age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with the enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But Court, Juvenile Justice Board or a Committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents

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[10] 2023 SCC Online SC 846
[11] (2012) 9 SCC 750

kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the Juvenile Justice Board or the Committee need to go for medical report for age determination.

43. It is, therefore, clear that the mandate of section 94 of the JJ Act of 2015 has been fulfilled by the prosecution by producing the date of birth certificate from the school (exhibit P-10), the attested copy of the school admission register (exhibit P-11) as well as the birth certificate (exhibit P-2) issued by the Registrar of Births and Death, Health & Family Welfare Department, Government of Sikkim (exhibit P-2). Sub-section 3 of section 94 provides that the age recorded by the committee or the board to be the age of the person so brought before it shall, for the purpose of this Act, be deemed to be true age of that person. If the Special Court conducting the trial of the POCSO case is required to follow the JJ Act of 2015 as per the dicta of the Supreme Court [see ***P. Yuvaprakash*** (supra)] then the age recorded by the Special Court must be deemed to be the true age of the victim unless it is shown by cogent evidence that it is untrue. The learned Special Court has categorically held that the prosecution has been able to prove that the victim was born on 03.09.2006.

44. In the facts and circumstances of the present case and the analysis of the evidence produced by the prosecution and cross-examination of the prosecution witnesses by the defence, I am of the view that the prosecution has been able to establish beyond reasonable doubt that the victim was in fact a minor at the time of the offence. Therefore, although the proved sexual acts between the victim and the appellant were consensual, the POCSO Act of 2012 does not permit any concession. Consent of a minor is no consent at all. Resultantly, the impugned judgment passed by the learned Special Judge is upheld and the appeal dismissed.

45. In ***K. Dhandapani*** (supra), the Supreme Court in the peculiar facts of the case exercised the power it had under Article 142 of the Constitution of India which power we do not possess. In the circumstances, the appellant and the victim may approach the Supreme Court, if so advised.

(Bhaskar Raj Pradhan)
Judge
5th March, 2025

Approved for reporting: *Yes/~~No~~*
Internet : *Yes/~~No~~*
bp