

Latest HLJ 2025 (HP)(1) 235 In the High Court of Himachal Pradesh, Shimla.

Cr. Appeal No.193 of 2022

(A) Indian Penal Code, 1860 Section 376–The Protection of Children from Sexual Offences (POCSO) Act 2012–Section 4–Rape against a minor– Penetrative sexual assault–Delay in FIR–Non-matching of DNA profiling–The appellant was convicted by the Trial Court under Section 376 of the IPC and Section 4 of the POCSO Act for sexually assaulting a minor–The victim reported that the appellant, a local religious figure, committed the assault after sending her brother away–DNA profiling is not matching to the victim or the accused– Appeal against conviction–Held–As per Rule 12(3)(a)(ii) of Juvenile Justice, Rule 2007 and Section 94 of the Juvenile Justice Act, 2015, the certificate from the school which was first attended by the victim has to be preferred to the birth certificate which falls within Rule 12 (iii)(a) of the Juvenile Justice Rule, 2007 or Section 94 (ii) of the JJ Act–In the absence of any evidence that a certificate from the school is not available, the reliance could not be placed upon the birth certificate issued by the Municipal Council–Further held–There was no corroboration to the testimony of the victim by the scientific evidence and the incident as narrated does not appear to be probable–The delay in sexual offences is usually not material; however, keeping in view of the circumstances of this case, the delay assumes significance–Trial Court has committed an error–Impugned order of conviction is set aside–Appeal allowed. (Paras 22, 23, 30 & 32)

(B) Indian Penal Code, 1860 Section 376–The Protection of Children from Sexual Offences (POCSO) Act 2012 Section–4–Rape against a minor– Identity of the victim-discrepancy with respect to the name of the victim–The victim had filed an application (Ext.PW-1/A)-before the police in which she mentioned herself as 'A'-The birth certificate collected by the prosecution (Ext.PW8/B) is in the name of 'R'–The application (Ext.PW8/A) for collecting the victim's birth certificate also mentions her name as 'A'–The victim had nowhere stated in her statement recorded on oath that she was also known as 'R'–Her mother (PW-2) stated that victim 'A' is her daughter–She nowhere mentioned that the victim was also known as 'R'–In the absence of any ante litem motam record of the fact that victim 'A' also known as 'R', post litem motam declaration made by her that she is also known as 'R' is not sufficient to connect her with the birth certificate placed on record. (Paras 14 and 15)

Cases referred:

(1) Kaptan Singh and Others vs. State of M.P. and Another (1997) 6 SCC 185.

(2) Rajesh Yadav vs. State of U.P., (2022) 12 SCC 200: 2022 Cr.L.J. 2986.

(3) Jarnail Singh vs. State of Haryana (2013) 7 SCC 263.

(4) Sanjeev Kumar Gupta vs. State of U.P.& Ors (2019) 12 SCC 370.

(5) Vinod Katara vs. State of U.P., 2022 SCC OnLine SC 1204.

(6) P. Yuvaprakash vs. State, 2023 SCC OnLine SC 846.

Parties represented by:

For the Appellant: Ms. Sunita Sharma, Senior Advocate with Ms. Sugandh Verma, Advocate.

For the Respondent: Mr. I.N. Mehta, Senior Additional Advocate General with Ms. Sharmila Patial, Additional Advocate General. Rakesh Kainthla, Judge:- The present appeal is directed against the judgment dated 09.02.2022 and order dated 23.02.2022 passed by learned Additional District & Sessions Judge, Fast Track, Special Court (POCSO), Solan, District Solan, H.P. (learned Trial Court) vide which the appellant (accused before the learned Trial Court) was convicted of the commission of offences punishable under Section 376 of the Indian Penal Code (for short 'IPC') and Section 4 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and sentenced as under:-

Sl.No. offence for which convicted

Substantive sentence imposed

Fine imposed In default of payment of fine, simple imprisonment imposed

3. Section 4 of the POCSO Act read with Section 376 of IPC

Rigorous imprisonment for fifteen (15) years

₹20,000/- Six months

2. It was ordered that the victim would be paid 50% compensation out of the fine amount if realised. (The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

3. Briefly stated, the facts giving rise to the present appeal are that the police filed a charge sheet before the learned Trial Court against the accused for the commission of offences punishable under Section 376 of IPC and Section 4 of the POCSO Act. It was asserted that the victim 'A' (name being withheld to protect her identity) made a complaint (Ext.PW-1/A) before the Women Police Station, asserting that she and her mother were working in a Company. The accused is a Pandit. She returned to her home on 13.07.2019. Her mother sent her and her brother to the house of the accused, with the direction to bring holy rice treated with mantra. When they reached the house of the accused, the accused sent the victim's brother to bring cardamom. He called the victim to his room and bolted the room from inside. He drew the curtain and raped her. The victim tried to shout, but

the accused gagged her mouth. The victim's brother returned after some time, and they went to their home where the victim narrated the incident to her mother. The matter was reported to the police and F.I.R. (Ext.PW-10/A was registered at the Police Station.

4. Inspector Desh Raj (PW-14) investigated the case. He filed an application (Ext.PW-4/A) for conducting the medical examination of the victim. Dr Poonam Sharma (PW-4) conducted the medical examination of the victim and found that she had suffered an abrasion on the vaginal

opening, which could have been caused within 72 hours of the examination. She preserved the sample and blood of the victim on the FTA card for DNA profiling. She filled the identification form (Ext.PW-4/B). She issued an MLC (Ext.PW-4/D) stating that there was nothing to suggest that sexual intercourse had not taken place; however, the exact duration of the incident could not be narrated. She handed over the MLC and the

samples to the police official accompanying the victim. An application (Ext.PW- 11/A) was also filed for recording the statement of the victim under Section 164 of

Cr.P.C. Rahul (PW11) learned Judicial Magistrate, First Class, Court No.1, Solan recorded the statement of the victim (Ext.PW-11/B). Inspector Desh Raj (PW-14) arrested the accused on 19.07.2019. He filed an application (Ext.PW-5/A) for conducting the medical examination of the accused. Dr Gurmail Singh (PW-5) conducted the medical examination of the accused and found that he had not sustained any injuries. He preserved the samples, underwear (Ex.P-4), undervest ((Ext.P-5), and pubic hair. He obtained a blood sample of the accused on the FTA card for DNA profiling. In his opinion, there was nothing to show that the accused was incapable of performing sexual intercourse. He issued MLC (Ext.PW-5/C). The case property was deposited with Vishal Singh (PW-10), who deposited it in Malkhana. The victim showed the place of the incident. An identification memo (Ext.PW1/B) was prepared. She identified a Thermocol sheet (Ext. P-2), upon which she was raped. Thermocol sheet (Ext. P-2) was put into a cloth parcel and the parcel was sealed with nine (9) seal impressions of seal 'M'. Specimen of a seal impression (Ext.PW-14/A) was taken on a separate piece of cloth and the seal was handed over to Laxmi Singh (PW-3) after the use. Inspector Des Raj (PW-14) prepared the spot map (Ext.PW14/B) and took photographs (Ext.PW-7/A-1 to Ext.PW-7/A-3). LC Geetanjali (PW-7) video-recorded the proceedings and transferred them to the CD (Ext.PW-7/B). She issued a certificate (Ext.PW-7/C). The parcel was deposited with MHC-HC Vishal Singh (PW-10). Inspector Desh Raj (PW-14) took the accused to the spot. Victim showed the place where the incident had taken place. A memo of identification (Ext.PW3/A) was prepared. Photographs (Ext.PW-6/A 1 to Ext. PW-6/A-2) were taken and a certificate Ext.PW6/B was issued. Inspector Naveen Jhalta (PW-12) conducted further investigation. He filed

an application (Ext.PW8/A) and obtained the birth certificate of the victim (Ext.PW- 8/B). The samples were sent to SFSL, Junga. The result of analysis (Ext.PW-13/A

and Ext.PW13/B) was issued, in which it was shown that semen was detected on the underwear (Ext.P-4) of the accused and thermocol-sheet (Ext.P-2). Blood was also detected on it in traces, which was insufficient for serological examination. A DNA profile was obtained from the thermocol sheet, which was different from the DNA profile obtained from the blood of the victim and the accused. Statements of remaining witnesses were recorded as per their version and after completion of the investigation, the challan was prepared and presented before the learned Trial Court.

5. The learned Trial Court charged the accused with the commission of offences punishable under Section 376 of IPC, and Section 4 of the POCSO Act, to which the accused pleaded not guilty and claimed to be tried.

6. The prosecution examined fifteen (15) witnesses to prove its case. The victim (PW-1),

narrated the incident. Her mother (PW-2) had sent the victim and her son to bring the holy rice from the house of the accused. Laxmi Singh (PW-3) is the witness to the identification of the place of the incident and recovery of the Thermocol sheet (P-2). Dr Poonam Sharma (PW-4) conducted the medical examination of the victim. Dr. Gurmail Singh (PW-5) conducted the medical examination of the accused. Constable Sher Singh (PW-6) accompanied the accused. LC Geetanjali (PW-7) took the photographs and video-recorded the proceedings of identification of the place by the victim. Karam Chand (PW-8) proved the birth certificate of the victim. LC Poonam (PW-9) accompanied the victim and brought the samples from the hospital. She also carried the case property to SFSL, Junga. HC Vishal Singh (PW-10) was posted as MHC with whom the case properties were deposited. Rahul (PW-11) was posted as a Judicial Magistrate First Class, Court No.1, Solan, H.P., who recorded the

statement of the victim under Section 164 of Cr.P.C. Inspector Naveen Jhalta (PW- 12) conducted partial investigation of the case and prepared the challan.SI Sunita

Verma (PW-13) prepared the supplementary challan after receipt of the report of analysis. Inspector Desh Raj (PW-14) investigated the case. Constable Dharmender (PW-15) accompanied the accused to the hospital.

7. The accused, in his statement recorded under Section 313 of Cr.P.C., admitted that the victim and her mother were working in a private Pharmaceutical Company. He admitted that he was capable of performing the sexual intercourse. He denied the rest of the prosecution case. He stated that the victim and her mother deposed against him falsely in connivance with Rohit. He stated that he wanted to lead evidence in his defence, but subsequently, no defence evidence was led.

8. The learned Trial Court held that the victim was proved to be minor as per the birth certificate brought on record. There was a discrepancy in the birth certificate because the name of the victim was mentioned as 'R' and not 'A', but the Investigating Officer stated that the certificate belonged to the victim, as the name of the parents and address mentioned on the certificate were similar to the one mentioned by the child victim on the complaint (Ext.PW-1/A). There was no evidence that the victim had a sister named 'R' and the discrepancy in the name would not help the accused. The statement of the victim was corroborated by the report of medical examination and the previous statement recorded by the learned Magistrate. The victim's version was also corroborated by her mother. The delay in reporting the matter to the police was not fatal to the case of the prosecution; therefore, the accused was convicted and sentenced as aforesaid.

9. Feeling aggrieved and dissatisfied with the judgment and order passed by the learned Trial Court, the accused filed the present appeal, asserting that the learned Trial Court erred in convicting and sentencing the accused. There was a delay in reporting the matter to the police. The incident occurred on 13.07.2019, whereas the matter was reported to the police on 18.07.2019. The wife and

children of the accused were also present in his home and it is highly unlikely that the accused would have raped the victim in their presence. There was a discrepancy in the birth certificate, which was ignored by the learned Trial Court. The prosecution witnesses had materially

improved upon their version and contradicted each other. Therefore, it was prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside.

10. We have heard Ms Sunita Sharma, learned Senior Counsel assisted by Ms Sugandh Verma, learned counsel for the appellant and Mr I.N. Mehta, learned Senior Additional Advocate General assisted by Ms Sharmila Patial, learned Additional Advocate General for the respondent/State.

11. Ms. Sunita Sharma, learned Senior Counsel submitted that the learned Trial Court erred in convicting and sentencing the accused. The prosecution relied upon the birth certificate of the victim with the name of 'R' whereas her name was mentioned as 'A' in the complaint. There was no evidence that the victim was also known by the name of 'R'. The victim stated in her statement that she had attended the school and the record of the school first attended by the victim was not brought on record. Hence, there was unsatisfactory evidence of the victim's age. As per the prosecution case, the victim was raped on the Thermocol sheet, which was sent to SFSL Junga, however, the DNA profile did not match with the accused or the victim. No fresh injury was noticed on the person of the victim. All these circumstances falsify the prosecution case regarding the rape. Therefore, she prayed that the judgment and order passed by the learned Trial Court be set aside.

12. Mr. I.N. Metha, learned Senior Additional Advocate General submitted that the victim described herself as 'R' and 'A' before the learned Judicial Magistrate and 'A' and 'R' before the Medical Officer. This was sufficient to show that victim 'A' was also known as 'R'. Her statement inspired confidence and the learned Trial Court had rightly relied upon the same. Therefore, he prayed that the present appeal be dismissed.

13. We have considered the submissions made at the bar and have gone through the records carefully.

14. The victim had filed an application (Ext.PW-1/A) before the police in which she mentioned herself as 'A'. The birth certificate collected by the prosecution (Ext.PW8/B) is in the name of 'R'. The application (Ext.PW8/A) for collecting the victim's birth certificate also mentions her name as 'A'. The victim mentioned her name 'A' alias R' before the Medical Officer and 'R' alias 'A' before the learned Judicial Magistrate, First Class, Court No.1, Solan; however, the description given by the victim is not sufficient because this was given after the registration of the F.I.R. and not before the dispute regarding her age had arisen. 15. The victim had nowhere stated in her statement recorded on oath that she was also known as 'R'. Her mother (PW-2) stated that victim 'A' is her daughter. She nowhere mentioned that the victim was also known as 'R'. She was the best person to depose about the other name of the victim, but she had not said so. Similarly, Laxmi Singh (PW-3) stated that victim 'A' identified the place of the

incident. The brother of the victim was not examined and there is nothing on record to show that the victim is also known as 'R'. In the absence of any ante litem motam record of the fact that victim 'A' also known as 'R', post litem motam declaration made by her that she is also known as 'R' is not sufficient to connect her with the birth certificate placed on record.

16. The learned Trial Court relied upon the statement of the Investigation Officer to hold that victim 'A' was also known as 'R'. Learned Trial Court erred in doing so. In *Kaptan Singh and Others Versus State of M.P. and Another* (1997) 6 SCC 185, the trial Court had based its judgment on the result of an investigation conducted by an Inspector of CID. It was held to be improper and it was held that the court cannot base its judgment on the result of the investigation. It was observed:-

"5....From the judgment of the trial Court, we find that one of the grounds that largely weighed with it for acquitting the appellants was that an Inspector of CID who had taken up the investigation of the case and was examined by the defence (D.W. 3) testified that during his investigation he found that the story as made out by the prosecution was not true and on the contrary, the plea of the accused (appellants) that in the night of the incident, a dacoity with murder took place in the house of Baijnath by unknown criminals and the appellants were implicated falsely was true. It is trite that the result of investigation can never be legal evidence; and this Court in *Vijender v. State of Delhi*, (1997) 3 JT (SC) 131, made the following comments while dealing with this issue :

"The reliance of the trial Judge on the result of the investigation to base his findings is again patently wrong. If the observation of the trial Judge in this regard is taken to its logical conclusion it would mean that a finding of guilt can be recorded against an accused without a trial, relying solely upon the police report submitted under Section 173, Cr.P.C., which is the outcome of an investigation. The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an Investigating Officer draws on the basis of materials collected during the investigation and such conclusion can only form the basis of a competent Court to take cognizance thereupon under Section 190(1)(b), Cr.P.C. and to proceed with the case for trial, where the materials collected during the investigation are to be translated into legal evidence. The trial Court is then required to base its conclusion solely on the evidence adduced during the trial, and it cannot rely on the investigation or the result thereof. Since this is an elementary principle of criminal law, we need not dilate on this point any further."

The High Court was, therefore, fully justified in commenting upon the trial Court's impermissible and undue reliance on the evidence of DW 3 and, for that matter, the result of his investigation. Incidentally, it may be mentioned that ignoring the report of investigation submitted by the

Inspector the Magistrate took cognizance of the offences alleged against the appellants and committed the case to the Court of Session.."

17. Similar is the judgment of the Hon'ble Supreme Court in *Rajesh Yadav v. State of U.P.*, (2022) 12 SCC 200: 2022 Cr.L.J. 2986, wherein it was held:-

"27. Section 173(2) of the CrPC calls upon the investigating officer to file his final report before the court. It being a report is nothing but a piece of evidence. It forms a mere opinion of the investigating officer on the materials collected by him. He takes note of the offence and thereafter, conducts an investigation to identify the offender, the truth of which can only be decided by the court."

18. Even otherwise, the victim (PW-1) stated in her crossexamination that she studied upto the

9thclass. It was laid down by the Hon'ble Supreme Court in Jarnail Singh versus State of Haryana (2013) 7 SCC 263 that the provisions of the Juvenile Justice Act (JJ Act) should be followed to determine the age of the victim under the POCSO Act. It was observed:

"23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with the law, we are of the view that the aforesaid statutory provision should be the basis for determining the age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of the minority is concerned between a child in conflict with law and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has an overriding effect over an option expressed in a subsequent clause. The highest-rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), the matriculation (or equivalent) certificate of the child concerned is the highest-rated option. In case the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation, a municipal authority, or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid that Rule 12(3) postulates the determination of the age of the child concerned on the basis of medical opinion.

24. Following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix VW, PW 6, could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied up to Class 3 only, and thereafter, had left her school and had started to do household work. The prosecution, in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW, PW 6, on the next available basis in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW 4) to prove the age of the prosecutrix VW, PW 6. Satpal (PW 4) was the Head Master of Government High School, Jathlana, where the prosecutrix VW, PW 6, had studied up to Class 3. Satpal (PW 4) had proved the certificate Ext. PG, as having been made on the basis of the school records indicating that the prosecutrix VW, PW 6 was born on 15-5-1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are, therefore, of the view that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix VW, PW 6. It would also be relevant to mention that under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material, including the ossification test, for determining the age of the prosecutrix VW, PW 6. The deposition of Satpal, PW 4, has not been contested. Therefore, the date of birth of the prosecutrix VW, PW 6 (indicated in Ext. PG as 15-7-1977) assumes finality. Accordingly, it is clear that the prosecutrix

VW, PW 6, was less than 15 years old on the date of occurrence, i.e. on 25-3-1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW, PW 6, was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court that even if the prosecutrix VW, PW 6, had accompanied the appellant accused Jarnail Singh of her own free will and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor.” (Emphasis supplied)

19. It was held in *Sanjeev Kumar Gupta versus State of U.P. & Ors* (2019) 12 SCC 370 that the Juvenile Justice Act 2015 came into force w.e.f. 15.01.2016. As per the Act, the matriculation certificate or the certificate from the school first attended by the victim was put at par. It was observed:

“17. The 2015 Act came into force on 15-1-2016. Section 111 repeals the earlier 2000 Act but stipulates that despite the repeal, anything done or any action taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of the new legislation. Section 94 contains provisions in regard to the determination of age, is in the following terms:

“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 Examination Board concerned, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation, 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.”

Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the Examination Board concerned in the same

category [namely (i) above]. In the absence thereof, category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the 2007 Rules made under the 2000 Act. Under Rule 12(3)(a)(i), the matriculation or equivalent certificate was given precedence, and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended could be obtained. In Section 94(2)(i), both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

20. It was held in *Vinod Katara versus State of U.P.*, 2022 SCC OnLine SC 1204, that clause (a) of Rule 12(3) of 2007 Rules contains a hierarchical order. It was observed:

48. Clause (a) of Rule 12(3) of the 2007 Rules contains a hierarchical ordering, evident from the use of the language “in the absence whereof”. This indicates that where a matriculation or equivalent certificate is available, the documents adverted to in (ii) and (iii) cannot be relied upon. The matriculation certificate, in other words, is given precedence. It is in the absence of a matriculation certificate that the date of birth certificate of the school first attended can be relied upon. It is in the absence of both the matriculation and the birth certificates of the first school attended that a birth certificate issued by the corporation, municipal authority or panchayat could be obtained.

49. In *Shah Nawaz v. State of Uttar Pradesh* (2011) 13 SCC 751, this Court, while examining the scope of Rule 12 of the 2007 Rules, had reiterated that medical opinion from the Medical Board should be sought only when the matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended, or any birth certificate issued by a corporation or a municipal authority or a panchayat or municipality is not available. This Court had held that the entry related to the date of birth entered in the mark sheet is valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.

21. A similar view was taken in *P. Yuvaprakash v. State*, 2023 SCC OnLine SC 846, wherein it was observed:

11. Before discussing the merits of the contentions and evidence in this case, it is necessary to extract Section 34 of the POCSO Act, which reads as follows:

“34. Procedure in case of commission of offence by child and determination of age by Special Court. - (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person, and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any

subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”

12. In view of Section 34(1) of the POCSO Act, Section 94 of the JJ Act 2015 becomes relevant and applicable. That provision is extracted below:

“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, 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.”

13. It is evident from conjoint reading of the above provisions that wherever the 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. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

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

(ii) the birth certificate given by a corporation, 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”.

14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate, matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate, showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court-summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar), had stated on oath that the records for the year 1997 with respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C1 could not have been relied upon to hold that M was below 18 years at the time of the commission of the offence.

15. In a recent decision, in *Rishipal Singh Solanki v. State of Uttar Pradesh* (2021) 12 SCR 502, this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in parimateria) with Section 94 of the JJ Act and held as follows: “20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in the determination of age. The juvenility of a person in conflict with the law had to be decided prima facie on the basis of physical appearance or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, the benefit could be given to the child or juvenile by considering the age on the lower side within the margin of one year.”

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this court held in *Sanjeev Kumar Gupta v. The State of Uttar Pradesh* (2019) 9 SCR 735 that: “Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof, category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i), the matriculation or equivalent certificate was given precedence, and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended could

be obtained. In Section 94(2)(i), both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In *Abuzar Hossain @ Gulam Hossain v. State of West Bengal* (2012) 9 SCR 224, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference. 22. Therefore, as per Rule 12(3)(a)(ii) of Juvenile Justice, Rule 2007 and Section 94 of the Juvenile Justice Act, 2015, the certificate from the school which was first attended by the victim has to be preferred to the birth certificate which falls within Rule 12 (iii)(a) of the Juvenile Justice Rule, 2007 or Section 94 (ii) of the JJ Act.

23. In the present case, the prosecution has relied upon the birth certificate which is next in hierarchy to the certificate from the school first attended by the victim. In the absence of any evidence that a certificate from the school is not available, the reliance could not be placed upon the birth certificate issued by the Municipal Council. Hence, there is unsatisfactory evidence regarding the age of the victim and the learned Trial Court erred in holding that the victim was proved to be minor on the date of the incident.

24. The victim stated that the police recovered a black Thermocol-sheet at her instance, which was sealed in a parcel. LC Geetanjali (PW-7) stated that the victim identified the sheet over which the offence was committed. The thermocol sheet was taken into possession. Laxmi Singh (PW-3) stated that the victim identified the room where she was raped and a Thermocol sheet over which the offence was committed was seized. The sheet was sent to SFSL Junga and

human semen was detected on it. The DNA profile obtained from the thermocol- sheet was different from the DNA profile obtained from the blood of the victim or

the accused. This shows that the human semen detected on the sheet did not

match the accused and it had also no traces of the DNA of the victim. This scientific evidence falsifies the victim's version that she was raped on the thermocol sheet.

25. Dr. Poonam Sharma (PW-4), medically examined the victim. She noticed an abrasion on the vaginal opening. She stated in her cross-examination that abrasion marks can be caused by any reason. She did not notice any other injury. She could not say anything about the exact duration of the incident. Hence, the medical evidence also does not provide any corroboration to the victim's testimony.

26. The victim admitted in her cross-examination that the accused is married and has two children. His family stays with him. The victim's mother also admitted in her cross-examination that the accused was married and had four children. She admitted that the accused resided with his family. She stated that the family of the accused was at home but in another room. This admission shows that the incident is highly improbable. The family members were present in the home and it is difficult to believe that the accused would have bolted the doors, drawn the curtains and raped the victim in his house when his family members were at home.

27. The victim stated in her examination-in-chief that the accused shut the doors and windows and asked her to remove her Salwar. The accused performed a sexual act forcibly. She tried to raise alarm but the accused gagged her mouth. She admitted that several houses are located near the house of the accused. There is a liquor vend and 'Ahata' near the house of the accused. She admitted that several persons were present at the liquor vend and 'Ahata'. There is nothing on record to show that the victim had raised any alarm when the door was locked, the curtains were drawn and she was asked to open her Salwar.

28. The victim told to her mother that the accused had made a statement indicating that if she desired to marry Rohit, she would be required to engage in sexual acts with him seven times. She admitted in her cross-examination that she wanted to marry Rohit and had an altercation with her mother over this fact. All these circumstances show that the victim has not disclosed the complete truth before the Court and is withholding some vital information from the Court.

29. The victim's brother was not examined to corroborate her version that the accused had sent him with ₹20/- to bring cardamom. Keeping in view the fact that there was no corroboration to the testimony of the victim by the scientific evidence and the incident as narrated does not appear to be probable, his examination was necessary.

30. The victim stated that she disclosed the incident to her mother on the same day at 7:00 p.m. Her mother stated that she did not report the matter on the same day and reported the matter to the police on 18.07.2019 after mustering courage. The victim stated that she filed an application before the Women's Police Station on 18.07.2019. Since the application was made by the victim, there was no question of the victim's mother mustering courage. The victim has not given any reason for the delay in reporting the matter. The delay in sexual offences is usually

not material; however, keeping in view of the circumstances of this case, the delay assumes significance.

31. Thus, the evidence led by the prosecution was not sufficient to prove its case beyond reasonable doubt and the learned Trial Court erred in convicting and sentencing the accused. The accused is entitled to the benefit of doubt, which is extended to him.

32. In view of the above, the appeal is allowed, and the judgment of conviction and sentence of the appellant/accused are set aside. The appellant is acquitted of the charges framed against him. The appellant, who is in jail, is directed to be released forthwith, if not required in any other case. The fine amount, if deposited by the appellant, be refunded to him after the expiry of the limitation if no appeal is preferred.

33. The Registry is directed to prepare release warrants for the appellant. 34. In view of the provisions of Section 437-A of the Code of Criminal Procedure (Section 481 of Bhartiya Nagarik Suraksha Sanhita, 2023) the appellant is directed to furnish a personal bond in the sum of ₹50,000/- with one surety of the like amount to the satisfaction of the learned Trial Court which shall be effective for six months with a stipulation that in an event of a Special Leave Petition being filed against this judgment or on grant of the leave, the appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

35. A copy of this judgment along with the record of the learned Trial Court be sent back forthwith. Pending application(s), if any, also stand disposed of.