(2024) 12 SHI CK 0015

High Court Of Himachal Pradesh

Case No: Criminal Appeal No. 246 Of 2021

ï¿½Vï¿½	APPELLANT
Vs	
State Of H.P.	RESPONDENT

Date of Decision: Dec. 6, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 161(3), 164, 313, 437A
- Indian Penal Code, 1860 - Section 201, 376, 506
- Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 94, 94(2), 94(2)(i), 94(2)(iii)
- Protection of Children from Sexual Offences Act, 2012 - Section 6, 34
- Evidence Act, 1872 - Section 145, 157

Hon'ble Judges: Vivek Singh Thakur, J; Rakesh Kainthla, J

Bench: Division Bench

Advocate: Rakesh Chaudhary, Mamta Bhatwan, Pawan Kumar Nadda

Final Decision: Disposed Of

Judgement

Under Section 376 IPC,"To suffer rigorous imprisonment for 7 years, pay fine of â,¹ 5000/- and in default

of payment of fine to undergo further simple imprisonment for six months

Under Section 6 POCSO,"To suffer rigorous imprisonment for 10 years, pay a fine of â,¹ 5000/- and in

default of payment of fine to undergo further simple imprisonment for six

months

Additional Advocate General for the respondent/State.,

9. Mr. Rakesh Chaudhary, learned counsel for the appellant, submitted that the learned Trial Court erred in convicting and sentencing the accused.",

The victim was not proved to be a minor, and the relationship between the victim and the accused was consensual. She did not support the prosecution",

case and learned Trial Court erred in relying upon the report of SFSL to convict and sentence the accused. Therefore, he prayed that the present",

appeal be allowed and the judgment and order passed by the learned Trial Court be set aside. He relied upon the judgments of Jarnail Singh versus,

the State of Haryana (2013) 7 SCC 263, Rishipal Singh Solanki versus State of U.P and others (2022) 8 SCC 602, Vishwanath Ahirwar",

versus State of U.P. Cr. Appeal No. 323 of 2021 decided on 27.04.2023 (Allahabad), State versus Basir Ahmad (2023) DHC 6846 DB and",

P. Yuvaprakash versus State of Rep. By Inspector of Police (2023) INSC 676 in support of his submission.,

10. Mr Pawan Kumar Nadda, learned Additional Advocate General for the respondent/State, submitted that the prosecution has relied upon the birth",

certificate of the victim to prove that she was a minor. A minor is incapable of giving consent; therefore, the consent of the victim was immaterial.",

The report of the SFSL clearly proved that the accused is the biological father and the victim is the biological mother of the baby girl. Thus, the",

prosecutionÃ¢â‚¬â„¢s version that the accused had a sexual relationship with the victim and the victim gave birth to a girl was duly proved. Therefore, he",

prayed that the appeal be dismissed.,

11. We have given considerable thought to the submissions made at the bar and have gone through the records carefully.,

12. The victim stated that the accused used to visit her house, and they developed physical relations with each other. The accused had not committed",

rape upon her. She was permitted to be cross-examined and admitted in her cross-examination by learned P.P. that she delivered a female child on,

31.10.2015 when she was alone. She admitted that she informed the accused (V) about this fact, and he took away the newborn child. She admitted",

that she had reported the matter to the police. She stated in her cross-examination by learned counsel for the defence that she and the accused had a,

friendship with each other. The accused had not threatened her or her sister.,

13. Thus, the victim had categorically stated that she had physical relations with the accused and denied that accused had raped her.",

14. The victimÃ¢â‚¬â„¢s mother stated that the accused developed physical relations with the victim and she gave birth to a female child. The victim was,

major at the time of the incident. She stated in her cross-examination that the victim had completed 18 years of age in February 2015.,

15. Thus, it is apparent that the victim and her mother have not supported the prosecution case regarding the commission of rape. The victim",

categorically stated that she had physical relations with the accused. She also denied that she was raped by the accused.,

16. The learned Trial Court held that the victim was minor on the date of the commission of crime and her consent was immaterial. The learned Trial,

Court relied upon the birth certificate issued by Desh Raj (PW3) to conclude the minority of the victim.,

17. It was laid down by the HonÃ¢â‚¬â„¢ble Supreme Court in Jarnail Singh versus State of Haryana (2013) 7 SCC 263 that the provisions of the,

Juvenile Justice Act (JJ Act) applied to determine the age of the child in conflict with the law. However, the same procedure should be followed to",

determine the age of the victim under the POCSO Act. It was observed:,

Ã¢â‚¬Å“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) postulate reliance on a birth certificate issued by a corporation or 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.Ã¢â‚¬â€¹ (Emphasis supplied)",

18. Thus, the provisions of Rule 12 have to be applied to determine the age of the victim.",

19. It was held in Sanjeev Kumar Gupta versus State of U.P.& Ors (2019) 12 SCC 370 that Rule 12 (3)(a) provides that a matriculation,

certificate, if available, in its absence date of Birth certificate from the school first attended and in their absence the birth certificate given by the",

Corporation Municipal Authority or Panchayat would be considered. These are in hierarchal order. Thus, where a matriculation certificate is available,",

the birth certificate from the school and the birth certificate given by the Corporation cannot be relied upon. It was observed:,

Ã¢â‚¬Å“12. Clause (a) of Rule 12(3) provides that for the purpose of seeking evidence in the enquiry, the following documents would have to be obtained:",

(i) matriculation or equivalent certificate if available;,

(ii) in the absence of (i) the date of birth certificate from the school first attended; and,

(iii) in the absence of (i) and (ii) the birth certificate given by a corporation, municipal authority or panchayat.",

Clause (a) of Rule 12(3) contains a hierarchical ordering, evident from the use of the language Ã¢â‚¬Å“in the absence whereofÃ¢â‚¬. 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. This facet of Rule 12(3) was noticed in the two-judge Bench decision of this Court in Ashwani Kumar Saxena [Ashwani Kumar Saxena v. State of M.P.,",

(2012) 9 SCC 750: (2013) 1 SCC (Cri) 594].,

13. K.S.P. Radhakrishnan, J. while holding that the procedures laid down in CrPC cannot be imported while making an enquiry in regard to a claim of juvenility under",

the 2007 Rules observed: (Ashwani Kumar Saxena case [Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750 : (2013) 1 SCC (Cri) 594], SCC pp. 763-64,",

para 32),

Ã¢â‚¬Å“32. Ã¢â‚¬Å“Age determination inquiryÃ¢â‚¬, contemplated under Section 7-A of the Act, read with Rule 12 of the 2007 Rules, enables the court to seek evidence, and in",

that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates the court",

needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the,

date of birth certificate from the school first attended the court need to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not,

an affidavit but certificates or documents). The question of obtaining a medical opinion from a duly constituted Medical Board arises only if the abovementioned,

documents are unavailable. In case an exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the",

benefit to the child or juvenile by considering his or her age on the lower side within the margin of one year.Ã¢â‚¬â€‹,

The Court took notice of the fact that there could be situations in which the date of birth recorded in the matriculation certificate, or for that matter in the other",

certificates referred to in Rule 12(3)(a), may not be correct. The Court held that where it was only when those documents are found to be fabricated or manipulated,",

could the date of birth as reflected be discarded. The Court held : (Ashwani Kumar Saxena case [Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750 :",

(2013) 1 SCC (Cri) 594], SCC p. 764, para 34)",

Ã¢â‚¬Å“34. Ã¢â‚¬Â¦ 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 the 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,

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.Ã¢â‚¬â€‹,

In the view of the Court, it was only if the above conditions were fulfilled that a medical report could be called.",

14. The decision in Ashwani Kumar Saxena [Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750: (2013) 1 SCC (Cri) 594] was rendered on 13-9-2012.",

Soon thereafter, a three-judge Bench of this Court considered the provisions of Section 7-A and Rule 12 in Abuzar Hossain [Abuzar Hossain v. State of W.B., (2012)",

10 SCC 489: (2013) 1 SCC (Cri) 83]. R.M. Lodha, J. (as the learned Chief Justice then was), speaking for himself and Anil R. Dave, J. observed: (Abuzar Hossain",

case [Abuzar Hossain v. State of W.B., (2012) 10 SCC 489: (2013) 1 SCC (Cri) 83], SCC pp. 509-10, para 39)",

Ã¢â‚¬Å“39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued, nor can it be laid down",

as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules,

12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The,

statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The,

credibility and/or acceptability of the documents, like the school-leaving certificate or the voters' list, etc., obtained after conviction would depend on the facts and",

circumstances of each case, and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh [Akbar Sheikh v. State",

of W.B., (2009) 7 SCC 415 : (2009) 3 SCC (Cri) 431] and Pawan [Pawan v. State of Uttaranchal, (2009) 15 SCC 259 : (2010) 2 SCC (Cri) 522] these documents",

were not found prima facie credible while in Jitendra Singh [Jitendra Singh v. State of U.P., (2010) 13 SCC 523 : (2011) 1 SCC (Cri) 857] the documents viz. school-",

leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima",

facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the",

delinquent.Ã¢â‚¬â€‹,

15. The above decision in Abuzar Hossain [Abuzar Hossain v. State of W.B., (2012) 10 SCC 489 : (2013) 1 SCC (Cri) 83] was rendered on 10-10-2012. Though the",

earlier decision in Ashwani Kumar Saxena [Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750 : (2013) 1 SCC (Cri) 594] was not cited before the Court, it",

appears from the above extract that the three-Judge Bench observed that the credibility and acceptability of the documents, including the school leaving certificate,",

would depend on the facts and circumstances of each case, and no hard-and-fast rule as such could be laid down. Concurring with the judgment of R.M. Lodha, J.,",

T.S. Thakur, J. (as the learned Chief Justice then was) observed that directing an inquiry is not the same thing as declaring the accused to be a juvenile. In the former,",

the court simply records a prima facie conclusion, while in the latter, a declaration is made on the basis of evidence. Hence, the approach at the stage of directing the",

inquiry has to be more liberal (Abuzar Hossain case [Abuzar Hossain v. State of W.B., (2012) 10 SCC 489: (2013) 1 SCC (Cri) 83], SCC pp. 513-14, para 48)",

Ã¢â‚¬Å“48. If one were to adopt a wooden approach, one could say nothing short of a certificate, whether from the school or a municipal authority, which would satisfy",

the court's conscience before directing an enquiry. But, then directing an enquiry is not the same thing as declaring the accused to be a juvenile. The standard of",

proof required is different for both. In the former, the court simply records a prima facie conclusion. In the latter, the court makes a declaration on evidence that it",

scrutinises and accepts only if it is worthy of such acceptance. The approach at the stage of directing the enquiry has of necessity to be more liberal, lest there is an",

avoidable miscarriage of justice. Suffice it to say that while affidavits may not be generally accepted as a good enough basis for directing an enquiry, that they are",

not so accepted is not a rule of law but a rule of prudence. The Court would, therefore, in each case weigh the relevant factors, insist upon filing better affidavits if the",

need so arises, and even direct any additional information considered relevant, including the information regarding the age of the parents, the age of siblings and the",

like, to be furnished before it decides on a case-to-case basis whether or not an enquiry under Section 7-A ought to be conducted. It will eventually depend on how",

the court evaluates such material for a prima facie conclusion that the court may or may not direct an enquiry.Ã¢â‚¬â€‹,

16. Both these judgments have since been considered by a two-judge Bench of this Court in Parag Bhati [Parag Bhati v. State of U.P., (2016) 12 SCC 744 : (2017)",

3 SCC (Cri) 819], where it was observed : (SCC p. 758, para 36)",

Ã¢â‚¬Å“36. It is a settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness of the date,

of birth, the date of birth mentioned in the matriculation certificate has to be treated as conclusive proof of the date of birth of the accused. However, if there is any",

doubt or a contradictory stand being taken by the accused which raises doubt on the correctness of the date of birth then as laid down by this Court in Abuzar,

Hossain [Abuzar Hossain v. State of W.B., (2012) 10 SCC 489 : (2013) 1 SCC (Cri) 83], an enquiry for determination of the age of the accused is permissible which",

has been done in the present case.Ã¢â‚¬â€‹,

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:",

Ã¢â‚¬Å“94. Presumption and determination of age.Ã¢â‚¬"(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 obtainingÃ¢â‚¬"",

(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.Ã¢â‚¬â€‹,

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.",

Ã,,

20. It was held in Rishipal Singh Solanki v. State of U.P., (2022) 8 SCC 602t hat Section 94 of the Juvenile Justice Act, 2015, incorporated the",

provision of Rule 12 of Juvenile Justice Rules, 2007. The documents mentioned in Rule 12, (3)(a) i, ii, iii, of Juvenile Justice Rules, 2007 or Section",

94(2) of Juvenile Justice Act will be prima facie sufficient to prove the age. 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 hierarchal 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 Ã¢â‚¬Å“in the absence whereofÃ¢â‚¬. 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 that:",

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:",

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹,

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:",

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹,

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:,

Ã¢â‚¬Å“(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;,

Ã, (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 BoardÃ¢â‚¬â€‹.,

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 Ã¢â‚¬Å“an ossification testÃ¢â‚¬ or Ã¢â‚¬Å“any other latest medical age determination,

testÃ¢â‚¬ 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 been 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 C-1 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 pari materia) with Section 94 of the JJ Act and held as,

follows:,

Ã, Ã¢â‚¬Å“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.Ã¢â‚¬â€‹,

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:,

Ã¢â‚¬Å“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. The victim admitted in her cross-examination that she was admitted to the school and had studied till the 9th class. Her mother also stated in her,

cross-examination that the victim was sent to the school when she was more than 7 years of age. She cleared the middle examination and failed in the,

9th Class. Thus, the victim had attended the school, and the date of birth certificate from the school that she first attended was available in the present",

case. Such a certificate falls within Rule 12 (3)(a) (ii) of the Juvenile Justice Rules, 2007 and has to be preferred to a birth certificate which falls",

within Rule 12 (3)(a) (iii) of the Juvenile Justice Rules, 2007.",

23. Thus, in the present case, the prosecution could not have relied upon the birth certificate when the certificate from the school attended by the",

victim was available and could have been procured from the school. The learned Trial Court failed to consider this aspect and erred in relying upon the,

birth certificate to conclude that the victim was a minor.,

24. The victimÃ¢â‚¬â„¢s mother and the victim stated that the victim was aged more than 18 years on the date of the incident. In the absence of the,

certificate from the school which the victim first attended, the best documentary evidence of the age of the victim is not available, and it cannot be",

held that the victim was a minor on the date of the incident. Since she had consented to the relationship; therefore, no case for the commission of an",

offence punishable under Section 376 of IPC and Section 6 of the POCSO Act are made out against the accused.,

25. The learned Trial Court also relied upon the statement of the victim recorded under Section 164 of Cr.P.C. The statement recorded under Section,

164 of Cr.P.C. is not a substantive piece of evidence and it can only be used to corroborate or contradict the witness in the Court. The learned Trial,

Court erred in considering the statement of the victim under Section 164 of Cr.P.C. as a substantive piece of evidence and relying upon the same. It,

was laid down by HonÃ¢â‚¬â„¢ble Madras High Court in R Palanisamy versus State 2013 LawSuit(Mad) 534t hat the statement recorded under,

Section 164 of Cr.P.C. cannot be regarded as a substantive piece of evidence when the maker turns hostile during the trial. It was observed: -,

Ã¢â‚¬Å“[46] In Ram Lakhan Sheo Charan And Others Vs. State Of U.P., 1991 CrLJ 2790, when the witness, whose statement has been recorded by the learned",

Magistrate under Section 164 Cr.P.C., during the Sessions' trial, turned hostile, did not support his statement to the Magistrate, a Division Bench of the Allahabad",

High Court observed as under:,

12. The trial was held when the new Code of Criminal Procedure had come into force. The wording of Section 164 in the new and old Code of Criminal Procedure with",

little changes are the same. As early as in Manik Gazi v. Emperor, 1942 AIR(Cal) 36, a Division Bench of the Calcutta High Court had held that the statements Under",

Section 164 of the Code can be used only to corroborate or contradict the statements made Under Sections 145 and 157 of the Indian Evidence Act, in Brij Bhushan",

Singh Vs. Emperor, 1946 AIR(PC) 38 and in Mamand v. Emperor, 1946 AIR(PC) 45, the Privy Council had observed that the statement Under Section 164 of the",

Code cannot be used as substantive evidence and it can only be used to contradict and corroborate the statement of a witness given in the Court. Similar,

observations, as made in the two cases below, were made by the Privy Council in Bhuboni Sahu v. King, 1949 AIR(PC) 257 and Bhagi v. Crown, 1950 CrLJ 1004. It was",

also held by a single Bench of the Himachal Pradesh Judicial Commissioner's court that a statement Under Section 164 of the Code cannot be used as a substantive,

piece of evidence. In State v. Hotey Khan, 1960 CrLJ 1167. A division Bench of this Court had also observed that statements Under Section 164 of the Code cannot",

be used as substantive evidence.,

13. The above catena of cases goes to show that where the witnesses do not support the prosecution story in the Court, then their statements Under Section 164 of",

the Code cannot be used as a substantive piece of evidence. In this case, the learned Judge had erred in using Exts. Ka-15 and Ka-16 as a substantive piece of",

evidence.""",

[47] Again, in Phool Chand Vs. State of U.P., 2004 CrLJ 1904, when a similar situation as in Ram Lakhan Sheo Charan arose, a Division Bench of the Allahabad High",

Court held as under:,

18. Learned Additional Public Prosecutor Sri Amarjeet Singh has tried to emphasise that Karan (P. W. 1) and his wife, Smt. Makkhan (P.W.2) were produced before",

the Magistrate for recording their statements under Section 164 Cr.P.C., in which they fully supported the facts/circumstances leading to the commission of multiple",

murders in this case. The learned counsel has contended that these statements should be given due weight and should be considered for proving the offences with,

which the appellants were charged. On thoughtful consideration of this legal aspect of the matter, we find that the aforesaid submission has no substance in it. The",

statement of a witness under Section 164 Cr. P. C. is one where the accused have hardly any occasion to cross-examine him, and if it is to be treated as a substantive",

piece of evidence, it should be duly tendered before the trial Court, and then a witness should be produced by the prosecution for his cross-examination. In this",

context, the learned Senior Advocate appearing for the appellants has cited the case law of Brij Bhushan Singh v. Emperor, 1946 AIR(PC) 38 and Ram Kishan",

Singh v. Harmit Kaur, 1972 CrLJ 267.",

In these cases, the Privy Council and the Hon'ble Supreme Court have categorically held that the statements recorded under Section 164 Cr. P. C. are not substantive",

evidence. It can be used only to corroborate the statements of the witness or to contradict them. In the present case, when the witnesses (P.W.1 and P.W.2) have",

themselves did not support their version, their statements earlier recorded under Section 164 Cr.P.C. could not be available to the prosecution for their corroboration.",

It could, to the maximum, be used by the prosecution for their contradiction, but that, too, has not been done in the present case. It is obvious that it would be a",

fallacy of a legal approach to have reliance upon the statement of a witness recorded under Section 164 Cr.P.C. and thereby to record conviction of the accused,

persons on that basis.""",

[48] In T.Diwakara Vs. State of Karnataka, 2006 CrLJ 4813, during the investigation, P.W.10 gave a statement before a Magistrate under Section 164 Cr.P.C., but,",

later, during the Sessions trial, he turned hostile. In such circumstances, the Karnataka High Court held as under :",

1....The statement of PW10 was recorded before the Magistrate. After the lodging of the complaint, PW10 has turned hostile. But, the trial court convicted the",

accused on the strength of the statement of PW10 recorded under Section 164 of the Criminal Procedure Code. The trial court grossly erred in placing reliance on the,

statement recorded under Section 164 of the Criminal Procedure Code as substantive evidence. While convicting the accused, the statement recorded under Section",

164 of the Criminal Procedure Code does not have any better legal status than the one recorded under Section 161(3) of the Criminal Procedure Code. At the most, if",

the deponent whose statement is recorded under Section 164 of the Criminal Procedure Code turns hostile, he/she could be prosecuted for perjury, but on the",

strength of such a statement, no conviction can be placed. """,

[49] When a witness gave a statement to the Magistrate under Section 164 Cr.P.C., later during the trial before the learned Sessions Judge disowned it, gave a",

different version, either the statement given by him before the learned Magistrate may be true or his deposition before the learned Sessions Judge may be true, but",

both may not be true.,

[50] In this connection, long ago, in In Re Madiga Narasigadu, 1949 AIR(Mad) 502, this Court observed as under:",

2. It is no doubt true that either the statement made before the Taluk Magistrate under Section 164, Criminal P.C. or the evidence given in P.R.C. No. 1 of 1946 on the",

file of the Stationary Sub-Magistrate, Dharmavaram, is false and false to the knowledge of the petitioners. If, according to the case of the respondent, the statements",

made under Section 164, Criminal P.C., were true, the evidence given before the Sub-Magistrate in P.R.C. No.1 of 1946 was false. But the petitioners say that they were",

forced to make false statements under Section 164, Criminal P.C.., and that later on, they spoke the truth before the Magistrate. In similar circumstances, the",

observations made by Beaumont, CJ., in Emperor v. Ningappa Ramappa, 1942 ILR(Bom) 26: are very instructive and may be cited in extenso. The learned Judge says:",

No doubt, a man making a statement on oath before a Magistrate under Section 164, Criminal P.C., should speak the truth, but if he does not, the least he can do is to",

tell the truth when subsequently he goes in the witness box. To prosecute a man who has resiled from a false statement made under Section 164 is to encourage him,

in the belief that it pays to tell a lie and stick to it. It is far better that a man should escape punishment for having made a false statement under Section 164 than that,

he should be induced to believe that it is in his interest. However false the statement may have been, he adhered to it and thereby saved himself from prosecution.",

The danger of such a course leading to the conviction of an innocent person is too great to be risked.""",

With great respect, I agree with his observations. Applying those observations, I must say that the prosecution of the petitioners would not be in the interests of",

justice. Further, these petitioners are illiterate Madigas, and it is impossible to rule out the possibility that they were forced to make the statements which they did",

under Section 164, Criminal P.C., and later on, they spoke the truth before the Court.""",

[51] Thus, from the survey of the decisions relating to Section 164 Cr.P.C., as to its nature, scope, evidentiary value, consequences of the author of the statement",

resiling from his such statement before the learned Sessions Judge, his statement under Section 164 Cr.P.C., which is not a substantive piece of evidence loses its",

value. It cannot be used to record a finding of guilty. When the position of law is such that, in the case before us, in spite of the fact that the prosecutrix (P.W.1) has",

turned hostile and disowned her statement, the learned Additional Sessions Judge relied on it since it was recorded by a Judicial Officer. The trial court has",

completely gone wrong.Ã¢â‚¬â€‹,

26. This judgment was followed by this Court in Pankaj Vs State of H.P., Criminal Appeal No. 251 of 2018, decided on 12.07.2019.",

27. Thus, the learned Trial Court erred in relying upon the victimÃ¢â‚¬â„¢s statement recorded under Section 164 of CrPC as substantive evidence.",

28. Therefore, the judgment passed by the learned Trial Court is not sustainable. Hence, the present appeal is allowed, and judgment and order passed",

by the learned Trial Court are ordered to be set aside.,

29. The fine amount, if deposited, be refunded after the expiry of the period of limitation for filing the appeal in case no appeal is preferred, and in case",

of appeal, the same be dealt with as per the orders of the HonÃ¢â‚¬â„¢ble Supreme Court.",

30. Before parting, it is necessary to observe that the present case failed due to the failure of the Investigating Officer to collect the relevant evidence",

as per the judgment of the HonÃ¢â‚¬â„¢ble Supreme Court. Therefore, we deem it appropriate to direct the Director General of Police to issue necessary",

directions to the Investigating Officer to collect the evidence regarding the age of the victim as per Section 94 of the Juvenile Justice Act, 2015. The",

Investigating Officer shall collect the matriculation certificate or the date of birth certificate from the school. In case either of them is not available, the",

birth certificate from the Gram Panchayat/Municipal Corporation/municipal authority and, if all of them are not available, the medical evidence",

regarding the age. If the matriculation certificate, the birth certificate from the school of the victim or the birth certificate from the gram panchayat or",

the municipal council/corporation/authority is not available, the Investigating Officer shall specifically assert this fact in the charge sheet submitted by",

him to the Court. We also direct the Director of the Prosecution to issue instructions to the PPs to ensure that the provisions of section 94 of the JJ,

Act are complied with before the commencement of the trial.,

31. In view of the provisions of Section 437-A of the Code of Criminal Procedure [Section 481 of Bharatiya Nagarik Suraksha Sanhita, 2023",

(BNSS)], the appellant/accused is directed to furnish her personal bond in the sum of â‚¹25,000/- with one surety in the like amount to the satisfaction of",

the learned Registrar (Judicial) of this Court/learned Trial Court, within four weeks, which shall be effective for six months with stipulation that in the",

event of Special Leave Petition being filed against this judgment, or on grant of the leave, the appellant/accused, on receipt of notice(s) thereof, shall",

appear before the HonÃ¢â‚¬â„¢ble Supreme Court.,

32. A copy of this judgment, along with the records of the learned Trial Court, be sent back forthwith. Pending miscellaneous application(s), if any,",

also stand(s) disposed of.,

33. A copy of this order be sent to the Director General of Police and Director of Prosecution for necessary compliance who shall send the copies of,

the instructions issued by them to this Court through Registrar General on or before 31.12.2024.,