HC-KAR

NC: 2025:KHC-K:4913-DB
CRL.A No. 200079 of 2016

IN THE HIGH COURT OF KARNATAKA,

KALABURAGI BENCH

DATED THIS THE 23RD DAY OF AUGUST, 2025

PRESENT

THE HON'BLE MR. JUSTICE H.P.SANDESH

AND

THE HON'BLE MR. JUSTICE T.M.NADAF

CRIMINAL APPEAL NO.200079 OF 2016

(374(Cr.PC)/415(BNSS)

BETWEEN

BHEEMARAYA @ BHEEMAREDDY @ REDDY
S/O MAREPPA DODMANI,
AGE: 21 YEARS, OCC: COOLIE WORK,
R/O: TIPPANATAGI, TQ: SHAHAPUR,
DIST: YADGIRI.

...APPELLANT

(BY SRI AVINASH A. UPLOANKAR, ADVOCATE)

AND

THE STATE THROUGH,
SHAHAPUR POLICE STATION,
DIST: YADGIRI.

...RESPONDENT

(BY SRI SIDDALING P. PATIL, ADDL. SPP FOR RESPONDENT)

THIS CRL.A. IS FILED U/S.374(2) OF CR.P.C PRAYING TO CALL FOR RECORDS AND EXAMINE THE RECORDS IN SESSIONS CASE NO.85/2012 AND SET ASIDE THE JUDGMENT PASSED BY THE LEARNED SESSION JUDGE, YADGIRI FOR CONVICTING THE APPELLANT BY ITS JUDGMENT DATED 17.06.2016, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 20.08.2025 AND COMING ON FOR 'PRONOUNCEMENT OF JUDGMENT', THIS DAY, THE COURT DELIVERED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE H.P.SANDESH
AND
HON'BLE MR. JUSTICE T.M.NADAF

CAV JUDGMENT

(PER: HON'BLE MR. JUSTICE H.P.SANDESH)

This appeal is filed by appellant/accused No.1 (hereinafter referred to as 'accused' for brevity) challenging the judgment of conviction and order of sentence dated 17.06.2016 passed in Sessions Case No.85/2012 by the Court of the District and Sessions Judge, Yadgiri (hereinafter referred to as 'Trial Court') wherein the Trial Court convicted the accused for the offences punishable under Section 366A and 376 of Indian Penal Code (IPC) and sentenced him to undergo simple imprisonment for seven years and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for six months for the offence punishable under Section

366A of IPC and further to undergo simple imprisonment for life and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for six months for the offence punishable under Section 376 of IPC.

2. The factual matrix of case of prosecution before the Trial Court is that on 11.11.2010 at 4:40 p.m. when the victim girl was in Balaji Book Depot, Shahapur along with her inmates, accused had induced her to go to any place knowingly well that she is less than 18 years for having sex. On 15.11.2010 at about 9:00 p.m. in Bolewad Gravel (Kankar) Machine Shed, accused subjected her to sexual act and committed rape on her, who is a minor girl against her will and consent.

3. It is also the case of the prosecution that accused No.2 aided to accused No.1 in committing such offences. So also accused Nos.3 and 4 have also committed an offence punishable under Section 109 read with Section 34 of IPC.

4. The prosecution mainly based on the complaints-Exs.P.3 and P5 registered the case, investigated the matter, collected the material against all the accused by recording the statement of witnesses and also obtaining the medical report of victim girl and documentary evidence of age proof and also conducted panchnama, spot panchnama, filed the charge-sheet. The accused persons were secured before the Trial Court. Accused No.2 passed away during the course of trial and hence offence against him is abated vide order dated 23.03.2015. On considering both oral and documentary evidence, the trial Court acquitted accused No.3 and 4, convicted accused No.1 i.e., appellant herein. Hence, the present appeal is filed.

5. The prosecution mainly relies upon the evidence of PWs.1 to 18 i.e., oral and documentary evidence as Exs.P.1 to P14 and MOs.1 to 3. The accused did not choose to lead any defence evidence, but got marked documents as Exs.D1 to D1(b).

6. The main contention of the counsel appearing for the accused in his argument that the Trial Court committed an error in passing the judgment of conviction and the reasons assigned is erroneous. As such, Trial Court slipped into an error and the appreciation of evidence is failure on the part of the trial Judge, which has resulted in substantial miscarriage of justice. The counsel would vehemently contend that Trial Court has convicted the accused only on the basis of the age, more particularly on the extract issued by PW.1 without looking into the other aspects. The counsel also vehemently contend that in absence of any material for believing the date of birth mentioned in the extract and without examining the validity of the document, trial Court committed an error and appreciation of the material before the Court for accepting date of birth certificate is against the dictum of the Hon'ble Supreme Court.

7. The counsel also vehemently contend that the evidence of the PW.2, who is the brother of the victim.

During his cross-examination, he categorically admitted with regard to the difference of age between him and the victim. It is very clear that he was aged more than 20 years. It is contended that teachers who have recorded the date of birth, the same is not supported by any other documents, either the revenue records or the hospital records. Trial Court erroneously accepted the age of the victim without any corroboration.

8. The counsel also vehemently contend that the evidence of PW.7 - victim girl is totally misconceived by the Trial Court in appreciating as she was with the appellant for more than two months and even in her statement made before learned Magistrate under Section 164 of Cr.P.C., categorically stated that accused never raped her and same is rejected on flimsy grounds unknown to law.

9. The counsel also brought to notice of this Court the evidence of PW.13-Doctor who categorically deposed that victim is at the age of 17 to 18 years and there are no

marks of recent sexual intercourse and this factum is also overlooked by the Trial Court.

10. The counsel also vehemently contends that ingredients of Section 366A of IPC are totally misunderstood by the Trial Court and the same is with regard to procuring a minor girl with an intention to subject her for sexual intercourse with another person against her will. The Trial Court wrongly convicted the accused invoking Section 366A of IPC.

11. The counsel also during his argument vehemently contends that the trial Court mainly relies upon the evidence of PW.1 who had produced the school certificate as per Ex.P1 and also Ex.P.2 the extract. The counsel also vehemently contend that when the Doctor evidence is very clear that she is aged about 17 to 18 years and when the victim accompanied the accused from Gulbarga to Pune and stayed for about two months with him, the Trial Judge ought to have appreciated the very conduct of the victim. The counsel would vehemently

contend that Ex.P.1 is not admissible and only secondary evidence has been relied upon and original material with regard to her age is concerned, nothing is collected and none of the witnesses spoken anything about the same with regard to the original records. The Trial Court relies upon only the secondary evidence and when the documents Exs.P.1 and P.2 are not admissible, the same ought not to have relied upon.

12. The counsel in support his argument also vehemently contend that the trial Court fails to take note of the proviso to Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules 2007. The proviso is very clear that authority shall determine the age of a juvenile or child or juvenile in conflict with law within a period of 30 days from the date of making of application for the purpose. He would also vehemently contend that Rule 12(3)(b) that only in absence of alternative methods prescribed under Rule 12(3)(a), medical opinion can be

sought and the certificate issued by the school in determining the age of prosecutrix cannot be relied upon.

13. The counsel in support of his argument relied upon the decision of the Hon'ble Apex Court in the case of ***Rajak Mohammad vs. The State of Himachal Pradesh***[1] and brought to notice of this Court that with regard to the focal point for decision would be the age of the prosecutrix in order to determine as to whether she was a major so as to give her consent and held that nothing hinges on the document exhibited by the prosecution, as that is the consequential certificate issued on the basis of the entries in exhibit PW.5/A, who is the mother of the prosecutrix who had allegedly signed exhibit PW.5 has not been examined by the prosecution. The Doctor who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

14. The counsel also relied upon the decision of the Hon'ble Supreme Court in the case of ***P.Yuvaprakash vs.***

[1] (2018) 9 SCC 248

State represented by Inspector of Police[2] wherein also discussion was made with regard to Protection of Children from Sexual Offences Act 2012 (POCSO Act) and so also Section 94 Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) and also brought to notice of this Court the discussion made in paragraph No.8 that, in the first instance, the school leaving certificate, or the matriculation certificate had to be seen; if that were not available, the birth certificate or records to that effect issued by the local or municipal authority are to be considered, and if neither of the first two classes of documents are available, then, age determination depends on the ossification test. Also a discussion was made in paragraph No.9 that what she stated in her statement under Section 164 of Cr.P.C., the accused could not have been convicted for the offences that he was charged with.

15. The counsel referring this judgment also would contend that in 164 statement, PW.7-victim categorically

[2] 2023 LiveLaw (SC) 538

stated that she was not subjected to any sexual act. The counsel also brought to notice of this Court the discussion made in paragraph No.18 that when the transfer certificate is produced that she has studied in the school and that the date of birth was based on the record sheet given by the school where she studied in the 7th standard. She admitted that though the date of birth was based on the birth certificate, it would normally be recorded on the basis of horoscope.

16. The counsel also brought to notice of this Court the discussion made in paragraph No.21 regarding the deposition of the Doctor wherein he has stated that victim had a ruptured hymen; there was no external injury at her private parts and that according to her "48 hours before medical examination there was no evidence to show that she had sexual assault is the opinion given by the Doctor". Under the circumstances a discussion was made that there was no penetrative sexual assault on her and hence, provisions of POCSO Act will not be applicable in the case.

17. The counsel also relied upon the decision of the learned Single Judge of this Court in Criminal Appeal No.577/2013 and brought to notice of this Court at paragraph Nos.8, 21 and 27 wherein a discussion was made regarding age of victim. Wherein relying upon the decision of the Hon'ble Apex Court in the case of ***Sunil vs. State of Haryana***[3] wherein an observation is made with regard to non-proving of school leaving certificate.

18. The counsel also brought to notice of this Court the discussion made in paragraph No.21 wherein taken a note of the evidence of the Doctor and also para 27 referring the decision in the case of ***Jogi Dan and others vs. State of Rajasthan***[4]***,*** wherein it is held that, in case of rape, in the absence of injuries either on the accused or on the prosecutrix shows that proxecturx did not resist but absence of injuries is not by itself sufficient to hold that a prosecutrix was a consenting party. Non production of witnesses gathered after hearing cries of prosecutrix,

[3] (2010) 1 SCC 742
[4] 2004 Crl.L.J 1726

conviction cannot be based on unreliable solitary statement of prosecutrix.

19. The counsel referring this decision would vehemently contend that this decision also helps the accused. The counsel also in support of his argument relied upon the decision in ***Sunil***'s case supra, wherein a discussion was made referring the judgment of the Hon'ble Apex Court in the case of ***Birad Mal Singhvi vs. Anand Purohit***[5] with an observation that the date of birth mentioned in the school register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. Also brought to notice of this Court the discussion made in paragraph Nos.27 and 32 about the alleged school leaving certificate on the basis of which the age was entered in the school was not produced.

20. *Per contra*, the counsel appearing for the respondent/State i.e., Additional State Public Prosecutor in

[5] AIR 1988 SC 1796

his argument would vehemently contend that the document which is produced before the trial Court through PW.1 is not disputed and there is no cross-examination to that effect denying the document of Exs.P.1 and P.2. In absence of any dispute to the same, now the accused cannot be permitted to question the same.

21. The counsel also would vehemently contend that the defence counsel mainly relied upon the evidence of PW.2 and his evidence cannot be relied upon with regard to the age of the victim, though PW.2 said the age between him and the victim, when the documentary evidence is placed before the Court and proved the same by examining the witness PW.1. Also in the cross-examination of PW.7 - victim regarding her age is concerned nothing is elicited and when the father was examined as PW.11 before the trial Court, no cross-examination was made regarding the age gap between his son and daughter. Hence, the very contention that evidence of PW.2 has to be relied upon cannot be

accepted. PW.11-father of victim has to speak about the age of victim, no cross-examination was made and when the document Ex.P.1 is placed before the Court, same is not a fatal and in absence of disputing the documents of Exs.P.1 and P.2, the same cannot be questioned before the Appellate Court. The counsel also vehemently contend that the Trial Court while accepting the document of Exs.P.1 and P.2 made specific observation that those two documents are not denied and now cannot contend that those documents are secondary evidence and not primary evidence.

22. The counsel also vehemently contend that when PW.13 - Doctor was examined before the Court he has stated that hymen would be torn due to cycling. But when PW.13 categorically deposes before the Court that she was subjected to sexual act though there was no recent sign of sexual act, subjecting her for sexual act is not disputed. It is also contended that throughout in the cross examination of victim and other witnesses suggestions are made that it

was a consensual sex, but question of consensual sex does not arise when the child is below the age of 16 years.

23. The counsel also vehemently contend that when the counsel for the accused relies upon document Ex.D-1 – the statement of victim girl under Section 164 of Cr.P.C and same is confronted and marked, wherein she categorically deposed that she was not subjected to sexual act. But in the cross-examination she has given an explanation that there was a threat by accused and hence, she has made the statement before the learned Magistrate, in such a manner. The counsel also vehemently contended that though Section 366A of IPC is invoked by prosecution and very definition of Section 361 attracts inducing and kidnapping a girl below the age of 18 years and also a penal proviso is made with the ingredients of Section 361 attracts the punishment provision i.e., Section 363 of IPC.

24. The counsel also vehemently contend that when the prosecution relies upon both oral and documentary

evidence regarding the age proof is concerned, there is no denial of certificate and evidence of PW-1 is very clear that documents are secured on the original Court regarding her age is concerned same are placed before the Court. The accused also did not dispute the fact that the victim had pursued her education in Kasturba School and evidence of PW.1 is also very clear that date of birth was recorded based on the school records, which were received from Kasturba school. The counsel also would contend that for invoking of Section 376 of IPC sexual act committed against the victim not stated in 164 statement is not fatal. The counsel also brought to notice of this Court that no cross-examination was made with regard to victim was not subjected to sexual act.

25. In reply to this argument, the counsel appearing for the appellant would vehemently contend that in order to prove the age of the victim girl not placed any primary evidence before the Court. Hence, the very conviction is not based on corroborative piece of evidence

against accused, accused is entitled for acquittal on the ground of benefit of doubt.

26. Having heard the counsel for the accused as well as the counsel appearing for the respondent/State and also considering the material available on record and the principles laid down in the aforesaid decisions, the points that would arises for consideration of this Court are:

i) Whether the Trial Court committed an error in convicting and sentencing the accused for the offences punishable under Sections 366A and 376 of IPC and whether it requires interference of this Court?

ii) What order?

27. Having considered the material on record, it is the specific case of the prosecution that victim girl was pursuing her education in high school and also she was staying in the hostel. She was taken by accused Nos.1 and 2 and accused Nos.3 and 4 facilitated accused No.1 to commit the offence. Now for re-appreciation of material is

concerned, accused Nos.3 and 4 are acquitted and no need to discuss the same, as there is no any counter appeal by State. It is also to be noted that accused No.2 passed away and case is abetted against him and only reconsideration is against accused No.1, who had been convicted for the above offences and sentenced.

28. In order to substantiate the case, victim was taken to Shahapur bus stand and then to Gulbarga and Puna. The prosecution mainly relies upon the evidence of PWs-5, 6, 8 and 9 and so also the evidence of PW-7. Before appreciating the evidence of PW-7, this Court has look into the evidence of PWs-5 and 6, who are the batch mates, who are pursuing their education along with the victim in the hostel. The hostel was at a distance of one kilometer from the school where they were pursuing their education. Both of them deposed that victim was also pursuing her education along with them. Both PWs-5 and 6 said that accused Nos.1 and 2 were came near the school and met PW-1, but PW-1 did not allow them to take

her, when both of them visited to school. PW-1 only told them not to come to school and loiter before the school. But the very evidence of PWs-5 and 6 is very clear that when both of them went near the book stall, accused Nos.1 and 2 came and PW-7 also informed them that they are their villagers and PW-5 said that accused No. 1 and 2 took her by holding her hand and she did not turn-up and the same was informed to the hostel warden and accused himself called the warden and informed that he was the brother of the victim.

29. In the cross-examination of PW-5, except eliciting that they didn't question when they held her hand and took PW-7 and did not inform the same to teacher or to the staff. Except this, nothing is elicited from the mouth of PW-5 and so also in the cross-examination of PW-6 only suggestions are made that accused No.1 and 2 did not take victim forcibly. It is also important to note that PW-7 victim also reiterates the same when she was along with PWs-5 and 6, accused No.1 and 2 came and took her.

30. PW-8 is the teacher categorically deposes before the Court that PWs-5 and 6 came and told that two boys came and took her, but they waited and they did not bring her back. Shahana Begum-warden also received the phone call and accused himself told her that he only took her. In the cross-examination, question was put to her that she didn't give any complaint, but witness explains that when the accused called and told that he only took her claiming that he is the brother, she did not give any complaint. PW-9 also in her evidence categorically said that the accused called and told that he is her brother and took her.

31. Having considered the evidence of these witnesses, it is very much clear that accused only came and took the victim girl and evidence of PW-5 and 6 is very clear that the accused only came and took her. The evidence of PWs-8 and 9 is also very clear that PWs-5 and 6 informed about the same and also accused only called PW-9 and informed about the same that he only took her

and their evidence is consistent and nothing is elicited. Having taken note of these evidences, it is very clear that appellant/accused No.1 is only took her. That apart, evidence of PW-7 is also very clear that accused had taken her to Gulbarga and Puna.

32. It is also important to note that PW-10 categorically deposes before the Court that accused No.1 only brought the victim and he was having acquaintance with accused No.1 and he only brought the victim to the place where he was working and both of them requested to work there and owner also agreed for the same and started to stay in the shed. He also categorically deposed that after one and half month, the police came and took both the accused and the victim. This evidence was not disputed or cross-examined by the defence.

33. It is also important to note that PW-17 is also another witness, who speaks about accused No.1 only brought the victim girl to the factory and deposes that both of them were staying in the same shed and except

the suggestion made to this witness that he is falsely deposing before the Court, nothing is elicited. Hence, the evidence of PWs-10 and 17 is very clear that accused took the victim girl to Puna and stayed along with the victim and these two witnesses evidence also collaborates with the evidence of the victim PW-7 that the accused only took the victim girl to Puna and staying in a shed along with victim. During the course of argument also the counsel for the accused not disputes seriously about these facts. He would vehemently contend that when the victim herself stayed along with accused for a period of two months, it is very clear that no question of invoking the offence under Section 366A so also Section 376 of IPC. These are all the materials taken note of by the Trial Court with regard to accused taking the victim and stayed along with the victim. It is also not in dispute that police only went and brought both accused and victim.

34. Now coming to the aspect of the issue whether she was subjected to sexual act or not. The Court has to

take note of the evidences of PW-7 – victim girl and PW.13-Doctor. PW-7 in her evidence reiterated the case of prosecution that accused No.1 took her from Gulbarga to Puna and to Puna Bolewada area and kept her in the shed. Her evidence is very clear that on 15.11.2020 at 9:00 p.m., accused subjected her to sexual act against her will by removing her cloth. When she refused, accused threatened that he is going to take her life and committed sexual act two–three times and everyday subjected her to sexual act as against her will. She also says that police came and took both of them from the said shed to Shahapura and she gave the statement and also she was taken to the Government Hospital, wherein she was subjected to medical examination. In the cross-examination, she admits that when accused Nos.1 and 2 came, at that time, PW-5 and 6 also were along with her. She admits that place is a public place, but she says that due to threat by accused, she did not scream and also she

did not resist till taking her to Puna, since there was a threat and she was afraid of the accused.

35. No doubt, in the cross-examination of PW-7, document was confronted as Ex.D-1 that she gave the statement before the learned Magistrate under Section 164 of Cr.P.C. She categorically admits that she made a statement that the accused did not subject her to sexual act for a period of two months. But, to the next question, she has given an explanation that accused threatened her and hence, she gave the statement in terms of Ex.D1(b). This Court also considered the evidence of PW-13 coupled with evidence of PW-7. PW-13 in his evidence categorically deposed that the victim might have been aged about 17 to 18 years and hymen was not intact. He has collected the smear and sent the same for FSL. He gave the report in terms of Ex.P-8. It is the evidence of PW.13 that there was no sign of any recent sexual act, but his categorical deposition before the Court is that victim was subjected to sexual act and there was a sign to that

effect. The only cross-examination made to this witness is that there may be possibility of hymen rupture due to cycling and as per direction of police, he had issued Exs.P-7 and P-8. To the suggestion that the victim was not subjected to sexual act, PW.13 categorically deposed before the Court that she was subjected to sexual act and there are signs of subjecting her for sexual act.

36. A conjoint reading of the evidence of PW.13 and PW.7 it is very clear that the victim was subjected to sexual act and the fact that hymen was not intact is not in dispute. PW.7 categorically deposed before the Court that she was subjected to sexual act by the accused forcibly and repeatedly everyday and the same corroborated with the evidence of PW.13-Doctor that she was subjected to sexual act and there were sighs that victim was subjected to sexual act, same is not disputed in the cross-examination of PW.13. Hence, it is clear that there is evidence before the Court that she was subjected to sexual act.

37. Now coming to the main focus on the contention of the leaned counsel for the accused that the prosecution failed to prove the age of the victim. Now this Court has to consider the evidence of PW.1 who is the Vice Principal of the school wherein the victim was pursuing the education at the time of the incident. The evidence of the Doctor is very clear that Investigating Officer requested PW.1 to provide the school certificate with regard to her age is concerned. She has verified the school records and the victim was admitted to their school for 9th standard, but she has not completed her studies of 9th standard. Having perused the school records register, she was born on 20.05.1996 and issued the certificate in terms of Ex.P1 and it contains her signature and also brought the original before the Court and the same is marked as Ex.P2 and the entry is marked as Ex.P.2(a) and Ex.P.2(b) is the Xerox. Her evidence is very clear that on the date of the incident i.e., 11.11.2010, the victim had attended the school and categorically deposed that at around 12 O'clock, the

accused came to the school and she scolded him. She came to know that in the evening the accused came and took the victim. In the cross-examination PW.1 categorically deposes before the Court that Kasturba School provided date of birth to their school and denied all suggestions with regard to accused No.1 did not come and enquired about the victim.

38. In the cross-examination, nothing is suggested with regard to the document of Exs.P-1 and P-2 and even not disputed the same except suggesting that Ex.P-1 she only created. To the very genuineness of the document is concerned, nothing is put to witness - PW-1 in the cross examination. The prosecution mainly relies upon the documents at Exs.P-1 and P-2 which clearly discloses the date of birth of victim as 20.05.1996 and the incident was taken place on 15.11.2010, which indicates that victim was subjected to sexual act within the age group of 16 years i.e., 14½ years. There is no denial of date of birth in the cross-examination of PW-1. Even it is suggested to

PW-1 that the Kasturba School have provided the date of birth, which means where the victim girl studied at the first instance. Now the counsel cannot question that primary document is not placed before the Court and only secondary evidence is placed before the Court and the same is elicited from the mouth of PW-1. It is very clear that original document which was placed at the first instance while pursuing the education is produced before the Court. The fact that date of birth is not denied by the accused during the course of examination, except suggesting that she has completed the age of 18, nothing is found. The very contention of the counsel appearing for the accused that the evidence of PW-2 is very clear with regard to the age gap between himself and his sister clearly discloses that victim was aged about 20 years cannot be accepted. This Court has to take note of documentary evidence available on record that too which came into existence prior to the incident i.e., at the time admission. The very contention of counsel that the

evidence of PW-2 has to be relied upon cannot be accepted, when there is no denial regarding the date of birth provided by Kasturba School.

39. It is also important to note that it is rightly pointed out by the Additional State Public Prosecutor that during the course of cross-examination of PW-11/father, nothing is suggested to extract the answer regarding date of birth of the victim and he is the right person to speak about the age and not PW-2 and he has categorically stated that victim was 14 years and denied the suggestion that victim was not aged 14 years.

40. It is also important to note that the counsel appearing for the accused relied upon several decisions with regard to the proof of age is concerned. He also brought to notice of this Court Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules 2007 is applicable in determining the age of the victim in the absence of any documentary proof, even medical opinion also could be considered. Having considered the proviso to

Rule 12 (3) is also no doubt, the documentary proof of birth certificate or other documentary evidence could be relied upon to determine the age of the victim girl. In the case on hand, there is no birth certificate, but the fact is that victim was admitted to school and while admitting given the date of birth and same was also entered in the school records and as pointed out by PW-1 that she has received the certificate from the concerned school in which she was admitted to school. Hence, the same cannot be secondary evidence as contended by the counsel by relying upon the decisions.

41. It is also important to note that in the case on hand, there is no denial of document Exs.P-1 and P2 that no such document was received from the Kasturba School and also no document was placed before the school authority to enter the date of birth. When such being the case, the Trial Court also taken a note of Section 35 of Evidence Act.

42. It is also important to note that when there is no denial of documents at Exs.P-1 and P2, in the cross examination, very contention that said document is not admissible cannot be accepted. It is also important to note that during the course of cross-examination also no such suggestions were made that it is a secondary evidence and the same is not admissible.

43. No doubt, the counsel appearing for the accused brought to notice of this Court the decision in ***P.Yuvaprakash***'s case supra and in that case, discussion was made with regard to invoking of POCSO Act, as well as Juvenile Justice Act 2015 and so also Section 94 of the J.J.Act, wherever the dispute with respect to the age of a person arises in the context of her or him being a victim, the courts have to take recourse to the steps indicated in **Section 94** of the JJ Act. Section 94(2)(i) mandates date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination and Board has to be firstly preferred in the absence of which,

the birth certificate issued by the Corporation or Municipal authority.

44. In the case on hand, no doubt, no such birth certificate is issued by the Corporation and there is no matriculation certificate as the victim has not got the matriculation examination. The only document available is the entry made in the school at the time of admission and we have already pointed out that the very document when the same was marked before the Trial Court as Exs.P-1 and P2, they were not disputed and even it is elicited from the mouth of PW-1 that the said document was received from the original school where she has studied. In the case on hand also no doubt there is no ossification test, but the Doctor who has been examined as PW-13 categorically deposed before the Court that victim is at the age of 17 to 18. Nothing is elicited from the mouth of PW-13 also disputing her age during the course of cross-examination regarding the age spoken by PW-13 and only suggestion was made with regard to the tear of hymen

and even the age deposed by PW-13 is also not disputed. This clearly shows that victim was a minor as on the date of incident. Even in the cross-examination of PW-1 and also PW-13, the age is not disputed, so also even in the cross-examination of PW-11-father. In absence of any dispute, the very contention raised by the accused in the Appellate Court that same is not admissible cannot be accepted. Hence the decision in ***P.Yuvaprakash***'s case relied upon by the counsel for the accused cannot come to the aid of accused.

45. The counsel also mainly relied upon the decision in ***Razak Mohamed***'s case supra and brought to notice of this Court, the discussion was made in paragraph No.5 that nothing hinges on the document exhibited by the prosecution as Ex.P-5 as that is the consequential certificate issued on the basis of the entries and mother of the prosecutrix who had allegedly signed Ex.P.5 has not been examined by the prosecution. No such circumstances also comes to the aid of accused in the case of hand and

also the document of age proof came from original school from where the victim had studied and the same is emerged during the course of evidence of PW.1. Hence, this decision also will not come to the aid of accused.

46. The counsel also relied upon the decision of the learned Single Judge in Crl.A.No.577/2013 and brought to notice of this Court at paragraph No.8 wherein learned Single Judge relied upon the decision in ***Sunil***'s case supra regarding age of victim is concerned. Wherein a discussion was made with regard to the case when the father of the prosecutrix was not able to give correct date of birth of the prosecutrix. But in the case on hand, date of birth document is placed before the Court in terms of Exs.P.1 and Ex.P.2 and same is not disputed. Hence, the said decision also will not come to the aid of accused. No doubt, the counsel also brought to notice of this Court the discussion made in paragraph No.21 of the judgment, wherein learned Single Judge while discussing the same has taken note of the fact that there being no injuries in

the private part of girl, but in the case of hand there were no signs of recent sexual act. But, the evidence of PW.13 – Doctor is very clear that she was subjected to sexual act and the evidence of the victim – PW-7 is also very clear that she was subjected to continuous sexual act and during course of cross-examination of PW.13 - Doctor even no suggestion was made to him that she was not subjected to any sexual act. The judgment which relied upon by the counsel i.e., Crl.A.No.577/2013 - Mansoor @ Ismail's case wherein while acquitting the accused, learned Single Judge made an observation that there were no injuries in private part as well as no evidence of the victim that she was subjected to sexual act. Hence, the sad decision will also not come to the aid of accused.

47. The other contention of the counsel appearing for accused that in 164 statement victim has not stated anything about that she was subjected to sexual act. It is unfortunate that when the defence counsel got confronted the document as exhibit to that effect as Ex.D1, but victim

has given an explanation that due to threat caused to her by accused, she had made such a statement. It is also important to note that 164 statement is not a substantive piece of evidence, but in her evidence before the Court the victim categorically deposed the manner in which she was subjected to sexual act. When such being the case, the very contention of the accused counsel that there is no cogent evidence before the Court that she was not subjected to sexual act and the very attempt made by the counsel during the course of cross-examination as to consensual sexual act is very clear that the victim was subjected to sexual act. The fact that victim is a minor, the question of consent doesn't arise. In terms of document Exs.P.1 and P.2, victim is aged about only 14½ years. Though counsel appearing for accused would contend that when PW.13- Doctor deposes before the Court that victim is aged about 17 and 18 years but documentary evidence is very clear that she was 14½ years. It is also the contention that there is difference of

age of two years as stated by PW.2 would come to the aid of accused also cannot be accepted, when documentary evidence is clear that victim was 14½ years. Mere absence of ossification test and the evidence of the Doctor assessing the age as approximate having considered the growth of the victim, is not fatal to the prosecution case when the age is proved by documentary evidence.

48. The trial Court, while considering the material on record regarding the age of the victim girl is concerned, has in detail considered the evidence and observed in paragraph No.13 that the accused has denied the fact that the victim girl was a minor at the time of the incident. The trial Court has also taken note of the argument canvassed before the trial Court that the victim girl had voluntarily accompanied accused No.1 and stayed with him for a period of two months. It was contended that the accused had sexual intercourse with the victim with her consent, however, in his statement recorded under Section 313 of Cr.P.C., the accused did not state anything about the

same. It is also observed in paragraph No.13 that if the sexual intercourse was consensual, the burden lies on the accused to prove that the victim was a major at the time of incident. No material has been placed on record to prove that she was a major.

49. The trial Court also in detail discussed in paragraph No.14 by considering the evidence of PW.1 who had produced the documents at Exs.P1 and P2 and taken note of the cross-examination of PW.1 regarding the legality and validity of Exs.P1 and P2. The same was not denied or disputed by the accused during the course of cross-examination of PW.1. This Court taken note of the said fact while discussing the matter. The trial Court also took note of the fact that the register maintained in the School is admissible under Section 35 of the Evidence Act, holding that in the absence of denial of the same by the accused during the course of cross-examination of PWs.1 and 7, the entries made in Ex.P1 has evidentiary value to prove the age of the person. The trial Court discussed this

aspect considering the judgment of the Hon'ble Apex Court in the case of *Birad Mal Singhvi vs. Anand Purohit* reported in *AIR 1988 SC 796* relied upon by the learned counsel for the accused. It is also important to note that while invoking the principles laid down in the judgment, there must be a denial of documents at Exs.P1 and P2 and no suggestion was made to PW.1 to that effect. The documentary evidence makes it clear that the victim was minor that too she was aged about 14½ years at the time of the incident. The trial Court observed that the entry made in Ex.P2-school admission record along with the evidence of PW.1 is admissible under Section 35 of the Indian Evidence Act as it is an official act done during the course of discharging of duties while admitting the victim to the school.

50. The trial Court dealt with the matter in detail particularly, in paragraph No.17 of the impugned judgment wherein it observed that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules

2007 is applicable for determining the age of the victim of rape. When the trial Court applied its mind and consciously taken note of the same, this Court, instead of repeating the same, would like to extract paragraph No.17 of the judgment of the trial Court, which reads as follows:

> *"17) It is significant to note that rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 is applicable in determining the age of the victim of rape in view of the law laid down by the Hon'ble Supreme Court of India reported in Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr. (2013) 14 SCC 637 and it is clearly observed under rule 12(3)(b) that only in the absence of alternative methods described under rule 12(3)(a), medical opinion can be sought for and the certificate issued by the school in determining the age of the prosecutix is relied upon by the Hon'ble Supreme Court of India. This apart, the Hon'ble Supreme Court of India has also completely relied upon the date of entry mentioned in the school register while determining the age of the victim as it is an authenticated evidence though it is not available in birth certificate and in absence of school certificate and birth certificate then only the Court has to go to the medical opinion in view of the law laid down by the Hon'ble Supreme Court of India reported in A.I.R. 2004 SC 4404 (State of Himachal Pradesh Vs. Shree Kant Shekarl) and (2013) 14 SCC 637 stated above. Therefore here in this case, there is a school record which shows the entry with regard to the date of birth of victim girl and there is no denial of the date of birth during the course of the cross-examination of PWs.1 and 7 who have categorically stated the same and authenticity of Ex.P.1 and Ex.P.2 did not denied. Hence the Court has to determine the age of the*

victim girl only on the basis of Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, wherein it is stated that it has to be taken in to consideration through birth certificate or school certificate first and in the absence of the same it can make use of medical opinion evidence which has also been approved by the Hon'ble Supreme Court of India in the decisions stated above. Therefore it can safely conclude that the date of birth of the victim girl is 20-5-1996 on the date of the incident and thereby the victim girl is less than 16 years at the time of incident which has been established by the prosecution beyond all reasonable doubt"

51. Having reassessed the material available on record and having perused the reasoning of the trial Court, we do not find any error committed by the trial Court in accepting the case of the prosecution that the victim girl was a minor. Though a feeble attempt is made by the learned counsel appearing for the accused before this Court with regard to the evidence of PWs.1, 2, 7 and 11, we do not find any force in the contention that the victim was a major. Even the evidence of the doctor who has been examined as PW.13 before the trial Court will not come to the aid of the accused.

52. Now coming to the aspect of invoking Section 366A of IPC which states that whoever, induces a minor girl under the age of 18 years to go from any place or to do any act by any means of whatsoever, shall be punishable with imprisonment which may extend to 10 years and shall also be liable to fine. The trial Court failed to take note of the ingredients of Section 366A of IPC, which reads as follows.

> *"**[366A. Procuration of minor girl** –Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine**]**"*

53. The above provision deals with procuration of minor girl to do an act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person. But, here, it is not the case of procuring of a minor girl for subjecting her to sexual intercourse with another person. The trial Court

has lost sight of Section 366A of IPC while invoking the same.

54. Having perused the material on record and the case of the prosecution that the accused took the minor girl, and though she accompanied the accused, it has emerged during the course of evidence that she did not resist the same, but for the threat caused by the accused. Considering this, the Court has to examine the provisions of Section 359 of IPC which deals with kidnapping. However, having considered the material on record, this Court deems it appropriate to extract Section 361 of IPC which reads as follows:

> *"**361. Kidnapping from lawful guardianship**- Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*
>
> *Explanation- The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.*

Exception- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

55. Having read this penal provision, it is clear that whoever takes or entice any minor girl under the age of 16 years of age if a male and 18 years of age if a female is said to kidnap from lawful guardianship. In the case on hand, having taken note of date of birth of the victim, she was below the age of 16 years and she was taken out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap of such minor.

56. From reading of the above provision, it is clear that inducement must be taken note and taking the minor girl below the age of 18 years from lawful guardianship. It is clear that the accused had induced minor girl to leave her lawful guardianship, not only taken the girl who is

below the age of 16 years but also gave a shelter to her in an unknown place and subjected her for sexual act. On plain reading of this provision, the consent of a minor who is taken or enticed is immaterial; it is only the guardian's consent which takes the case out of purview. Then the question of kidnapping does not arise. It is clear that taking the victim or enticing the victim must be shown to have been by means of force or fraud. Hence, it is relevant to refer to the provisions of Section 363 of IPC, when the ingredients of Section 361 of IPC are complete. This Court would like to rely upon Section 363 of IPC which reads as follows:

> *"**363. Punishment for kidnapping**- Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

57. Having perused the above provision and conjoint reading of Section 361 of IPC and Section 359 of IPC, it is very clear that whoever kidnaps any person from

the lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to 7 years and shall also be liable to fine. Hence, the trial Court misread Section 366A of IPC and convicted the accused for the offence punishable under Section 366A of IPC instead of Section 363 of IPC. Now, this Court has to modify the impugned judgment of conviction and order of sentence in respect of an offence under Section 366A of IPC and has to convict the accused for the offence punishable under Section 363 of IPC instead of Section 366A of IPC.

58. Now the question that arises before this Court is as to whether the accused could be convicted and sentenced invoking Section 363 of IPC. The same is permissible if the penal provision invoked is higher than the modified provision. The offence under Section 366A of IPC is punishable with imprisonment which may extend to 10 years and shall also be liable to fine, whereas, the offence under Section 363 of IPC is punishable upto 7

years and the same is lesser than the punishment prescribed in Section 366A of IPC. Therefore, this Court can modify the impugned judgment of conviction and order of sentence in terms of Section 216 of Cr.P.C., as the same is not involving in any miscarriage of justice to the accused.

59. Now coming to the aspect of offence under Section 376 of IPC. The trial Court taken note of the provision of Section 376 of IPC in paragraph No.19 and also taken note of the evidence available on record. Having re-assessed both oral and documentary evidence available on record particularly, we have taken note of the evidence of the victim girl who has deposed the manner in which she was subjected to sexual act and taken note of the evidence of PW.13-doctor who categorically deposed that though there are no signs of recent sexual act, but victim was subjected to sexual act. During the course of cross-examination of the doctor, it is not suggested to PW.13 that the victim was not subjected to sexual act

except making suggestion that there may be possibility of hymen rupture due to cycling. The doctor says that there is chance of hymen not being in intact. PW.7 victim girl categorically deposed that she was subjected to sexual act and nothing is elicited during the course of cross-examination to disbelieve her evidence and as we have already pointed out, in the cross-examination of PW.13 also, the accused not disputed the evidence of the doctor that the victim was subjected to sexual act. The learned counsel for the accused also not disputed the fact that the victim was taken to a particular place at Puna, stayed in the said place and both of them were captured by the police at the very same place and brought her back and subjected the victim to medical examination. The medical examination report indicates that the victim was subjected to sexual act. It is not the case of only the hymen tear but, it is a clear case of subjecting the victim for sexual act. As we have already pointed out, as per medical evidence as well as the consistent evidence of PWs.7 and

13, it is a clear case of subjecting the victim for sexual act and also material which we have analyzed before the Court is clear that she was 14½ years old and below the age of 16 years. Hence, the very contention of the learned counsel appearing for the accused that the Court can take note of two years on either side to give the benefit in favour of the accused does not arise.

60. In the case on hand, when the documentary evidence is very clear that the victim is below the age of 16 years, the question of considering the contention of the learned counsel for the accused that this Court can extend the benefit of doubt considering the evidence of the doctor-PW.13 that the victim is aged about 17 or 18 years, does not arise. Hence, we do not find any force in the arguments of the learned counsel appearing for the accused. We also do not find any error committed by the trial Court in invoking Section 376 of IPC. Therefore, we answer the point for consideration partly in affirmative.

61. In view of the discussions made above, we pass the following:

ORDER

i. The appeal is allowed in part.

ii. The impugned judgment of conviction and order of sentence dated 17.06.2016 passed in Sessions Case No.85/2012 by the Court of the District and Sessions Judge, Yadgiri convicting the accused for the offence punishable under Section 366A of IPC is set aside. The accused is convicted for the offence punishable under Section 363 of IPC and sentenced to undergo simple imprisonment for a period of five years and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for a period of six months.

iii. The impugned judgment of conviction and order of sentence passed by the trial Court convicting the accused for the offence punishable under Section 376 of IPC is confirmed.

iv. Both sentences shall run concurrently.

v. The accused is on bail. Hence, the trial Court is directed to secure him within one week from the date of receipt of a copy of this judgment and subject him for sentence.

Sd/-
(H.P.SANDESH)
JUDGE

Sd/-
(T.M.NADAF)
JUDGE

NB
List No.: 1 Sl No.: 28
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