**HIGH COURT OF MADHYA PRADESH : JABALPUR**

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**Division Bench :** **Hon'ble Shri Justice Sujoy Paul &**
**Hon'ble Smt. Justice Anjuli Palo**

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**M.Cr.C. No. 51854/2019**

State of Madhya Pradesh
Vs.
Praveen Vashishth

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Shri Ajay Mishra, Government Advocate for the State.

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**O R D ER**

**(21.1.2020)**

1) This petition seeking leave to appeal has been filed by the State under Section 378(1)/378(3) of the Cr.P.C. against the judgment of acquittal dated 16.9.2019 passed by Special Judge, Protection of Children From Sexual Offences Act, 2012, Ashta, District Sehore in Special S.T. No. 117/2017 whereby the respondent has been acquitted from the charges under Sections 5(f) and 5(i) of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act) read with Sections 376 (f), 376 (n) and 506 – II of the Indian Penal Code (for short IPC).

2) The prosecution case, in short, is that on 24.9.2017, the prosecutrix (PW-2) gave an application at P.S. Javar to the effect that she used to go to the accused for coaching of classes 10$^{th}$, 11$^{th}$ and 12$^{th}$ from the year 2015 to 2017. During the year 2016-17, the accused drugged

her and sexually exploited her several times and also emotionally blackmailed her. He also threatened her not to disclose to anyone at home about this, otherwise he would kill any of his family members.

3) On the complaint made by the prosecutrix, an FIR was registered against the respondent for the offences under Sections 376(2)(f)(m), 342 and 506 of the IPC and Section 5(f)(L)/6 of the POCSO Act at Crime No. 274/2017.

4) After investigation, charge sheet was filed before the competent Court. Learned trial Court framed the charges under Sections 5(f) and 5(i) of the POCSO Act read with Sections 376 (f), 376 (n) and 506 – II of the IPC.

5) The respondent abjured the guilt and pleaded false implication.

6) Learned trial Court while passing the impugned judgment of acquittal of the respondent, thoroughly discussed the evidence available on record and arrived at the conclusion that the prosecution has failed to establish that at the time of incident the prosecutrix was minor or below the age of 18 years. The prosecutrix was found to be major at the time of incident. It has been observed that the prosecutrix and the respondent were well known to each other and from the evidence available on record, it is apparent that she was a consenting party. In the medical report, the Doctor found that there was no mark of resistance on the body of the prosecutrix to prove that the respondent

has forcefully committed sexual intercourse with her. No external or internal injuries were found on the person of the prosecutrix. The trial Court further found that the FIR was lodged belatedly after about six months from the incident.

7) Being aggrieved by the aforesaid judgment of acquittal, the State has preferred this petition seeking leave to appeal on the ground that findings recorded by the trial Court to acquit the respondent, are illegal, arbitrary and contrary to law, as the material evidence adduced by the prosecution has not been properly appreciated. It is further submitted that at the time of incident, the prosecutrix was minor. There is no contradiction or omission in her statement as also in the testimony of other witnesses. The trial Court has wrongly acquitted the respondent, therefore, this petition may be allowed and leave to appeal may be granted.

8) We have heard learned Government Advocate at length and perused the record along with the impugned judgment. The first question for consideration is whether at the time of commission of offence, the prosecutrix was major? The Apex Court in the case of **Jarnail Singh vs. State of Haryana – (2013) 7 SCC 263** has discussed the provision of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 ("Rules of 2007" in brief). Rule 12 (3) gives list of documents and provides that the age of the child can be

ascertained by adopting first available basis out of number of options postulated therein. The Apex Court in Para 22 has observed as under:-

> **22.** On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "the 2007 Rules"). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:-
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> "**12. Procedure to be followed in determination of age.-** (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
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> (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.
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> (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a)(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 panchyat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order

> stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.
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> (5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.
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> (6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispension of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

9) A bare reading of Rule 12 of Rules of 2007 makes it clear that while determining the age, first preference should be given to matriculation or equivalent certificates and thereafter, order of preference would be; the date of birth certificate from the school (other than a play school) first attended; birth certificate given by a corporation or a municipal authority or a panchyat and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

10) In the present case, in regard to date of birth, two school certificates of the prosecutrix are available on record; first is Ex. P-9, which is a High School Certificate of the prosecutrix, in which the date of birth of the prosecutrix is mentioned as 6.3.1999. It is apparent from the said document that it was issued on behalf of the Principal of the School but his signatures are not there on the certificate, therefore, it cannot be relied upon. The learned trial Court has rightly held that the said document cannot be considered as an evidence to prove that the date of birth of the prosecutrix is 6.3.1999. Even scholar register of the school has not been produced by the prosecution in this regard. Except the aforesaid document, no other document is available on record to prove the date of birth of the prosecutrix. In the medical examination report (Ex. P-1), the age of the prosecutrix has been mentioned about 18½ years. Dr. Madhavi Rai (PW-1), who conducted the medical examination has opined that no exact opinion about commission of rape can be given. The trial Court has relied on a progress card of the prosecutrix (Ex.D-1), which has been produced by the respondent in his defence, in which the date of birth of the prosecutrix has been mentioned as 6.3.1998.

11) The trial Court relying on the judgments of Apex Court in **Viradmal Singhvi vs. Anand Purohit AIR 1988 SC 1796** and **Amlendra Vs. State AIR 2011 SC 715** observed that it is a public document and it has been prepared by a public servant while discharging his official duties, therefore, it is admissible as per Section 35 of the Indian Evidence Act. The prosecutrix herself admitted the progress card (Ex.D-1) in her statement. She has also admitted the

progress card (Ex. D-2) of the year 2004-05, in which her date of birth is mentioned as 6.3.1998. The mother of the prosecutrix (PW-3) in her cross-examination admitted that the prosecutrix was firstly admitted in Saraswati Gyan Deep Madhyamik Vidyalaya, Mehatwada in Kinder Garten and the date of birth mentioned in the School is correct. If we go through all the aforesaid documents, which are admissible in evidence, the age of the prosecutrix appears to be above 18 years of age, therefore, in our considered opinion, the trial Court has rightly held that the prosecution has failed to establish that the age of the prosecutrix is below 18 years.

12) Now coming to the question, 'whether the prosecutrix was the consenting party.

13) The prosecutrix in her Court statement deposed that she used to go to the respondent for coaching in the year 2016-17. The respondent had exploited her physically and committed rape upon her several times by giving drugs to her from the year 2016 to 2017. The respondent had shown her obscene videos and compelled her to make her obscene videos. He also threatened her not to disclose anyone at home, otherwise he would kill any of his family members. The written complaint, on the basis of which the FIR was registered, was given by the prosecutrix on 24.9.2017.

14) The prosecutrix in her statement has neither stated that the respondent committed rape upon her forcibly without her consent nor under the false pretext that he would solemnize marriage with her. She has also not stated that the respondent had used any weapon to commit rape upon her. The FIR was not lodged with promptitude. If the prosecutrix was subjected to rape several times under the influence of drugs from the year 2016 by the respondent, she could have given the written complaint immediately after the rape was committed first time upon her, but she gave the written complaint in September, 2017 after about six months. As per medical evidence, there was no mark of resistance on her body. No external or internal injuries were found on the person of the prosecutrix. Dr. Madhvi Rai (PW-1) has also opined that no definite opinion can be given about commission of rape upon the prosecutrix. Apart from that, the respondent has adduced several letters (Ex. D-3 to D-18) written by the prosecutrix to him in his defence. As per the contents of those love letters, it appears that the prosecutrix as well as the respondent fell in love with each other, which further establishe the fact that the prosecutrix was in love with the respondent. The prosecutrix has admitted in her cross examination that the letters (Ex. D-3 to D-18) were written in her own handwriting. From the bare reading of aforesaid letters, it is apparent that the prosecutrix was in deep love with the respondent, but her family members particularly uncle, were annoyed with this relationship. In one of the letters, it is written that she told to her family members that it is her fault but she was compelled to lodge the FIR therefore, the prosecutrix lodged the FIR under pressure of her family members.

15) The Apex Court in the case of **Deepak Gulatee vs. State of Haryana – 2013 (7) SCC 675** has held that there is a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. It was stated by the Court that there may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do then such cases must be treated differently.

16) In the present case also, in view of the aforesaid discussion, it is apparent that the prosecutrix was in love affair with the respondent. She has nowhere stated that the respondent has committed sexual intercourse forcibly by using any weapon or without her consent or under the false pretext of marriage, which shows that she was a consenting party to have sexual intercourse with the respondent, therefore, such an act of the respondent cannot be termed as rape. As discussed in preceding paragraphs, the prosecution has failed to establish that the prosecutrix was below the age of 18 years at the time of incident.

17) In view of the aforesaid discussion, in our considered opinion, the trial Court has rightly recorded the findings to acquit the respondent from the charges under Sections 5(f) and 5(i) of the POCSO Act read with Sections 376 (f), 376 (n) and 506 – II of the IPC. We do not find any perversity or illegality in the findings recorded by the Court below. Accordingly, the prayer seeking leave to appeal is hereby rejected.

**(Sujoy Paul)**
**Judge**

**(Smt. Anjuli Palo)**
**Judge**

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