

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE
HON'BLE JUSTICE SHRI ANAND PATHAK &
HON'BLE JUSTICE SHRI HIRDESH**

ON THE 19TH OF JUNE, 2025

CRIMINAL APPEAL 2988 OF 2025

Deepak Kushwah

Vs.

The State of Madhya Pradesh

Appearance:

Shri O. P. Mathur- learned Counsel for appellant.

Shri Vijay Sundaram- learned Public Prosecutor for respondent/ State.

JUDGMENT

Per Hirdesh, J:

Today, this case is listed for hearing on **IA No.6368 of 2025**, first application u/S 389 (1) of CrPC filed on behalf of appellant- Deepak Kushwah for suspension of jail sentence and grant of bail.

(2) On being asked, learned Counsel for appellant agreed to argue the matter finally. Accordingly, IA No.6368 of 2025 stands **closed**. With the consent of learned Counsel for parties, matter is heard finally.

(3) Being dissatisfied with the judgment of conviction and order of sentence dated 28th of February, 2025 passed by Special Judge (POCSO Act, 2012), Shivpuri in Special Case No.SC/06/2024, convicting the appellant under Section 5L/6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter it would be referred to as " the POCSO Act") and sentencing him to undergo 20 years' Rigorous Imprisonment with

fine of Rs.2,000/- with default stipulation, the instant criminal appeal under Section 374(2) of CrPC has been filed.

(4) Prosecution case, in short, is that informant (father of the victim), lodged a report at Police Station Kolaras, District Shivpuri to the effect that on Wednesday i.e. 29-11-2023 at about 09:00 in the morning, he had gone to his shop and his daughter (victim) was at home. Around 12:00 noon, he received a call from home that his daughter aged around 17 years 06 months was not at home. He came out of his shop and searched victim in the neighbourhood and among relatives, but his daughter could not be found. He expressed suspicion against accused Deepak Kushwah (appellant) and lodged a missing person's report of alluring and kidnapping his daughter. On the basis of such allegations, an FIR was lodged *vide* Crime No.428 of 2023 (Ex.P.3) under Section 363 of IPC against suspected accused Deepak Kushwah.

(5) Matter was investigated. Appellant was arrested on 01-12-2023. Victim was recovered on 8th December, 2023. Statements of the victim as well as of other witnesses were recorded. Relevant seizures were made. Thereafter, offence under Sections 363, 366, 376(2)(n) of IPC and Section 3/4 of the POCSO Act was enhanced. After completion of investigation, charge sheet was filed before the competent Court of criminal jurisdiction.

(6) Charges were framed. Appellant denied committing the alleged crime and sought trial. In the trial, accused in his statement recorded under Section 313 of CrPC pleaded that he is innocent and has falsely been implicated. Prosecution, in order to prove its case, examined as many as 10 witnesses whereas, appellant did not examine and produce any witness in order to lead evidence in his defence.

(7) The Trial Court, after evaluating documentary as well as oral evidence and medical evidence, convicted and sentenced appellant, as aforesaid.

(8) It is advanced on behalf of appellant that there are contradictions and discrepancies in the statements of prosecution witnesses. The age of victim has been stated to be 17 years 06 months on the basis of mark-sheet whereas prosecution could not produce any proof regarding her age nor has the ossification test of victim been conducted. Victim in Paras 7 and 8 of her Court statement deposed that she wanted to marry appellant and that is why she went voluntarily with him of her own free will and when appellant used to go to work, he did not lock the door of house. She had sexual intercourse with him consensually, therefore, it is a matter of consensual relationship between two young persons. From Paras 4 and 5 of statement of father of victim (PW-2), it is clear that the victim was above 18 years of age at the time of incident. The statement given by victim also shows that she was a consenting party and both victim and appellant got married of their own free will and lived in Indore as husband and wife. Although the trial Court after going through the evidence of prosecutrix has rightly acquitted appellant of charges of allurement and kidnapping as well as commission of rape without consent, but has committed an error in convicting and sentencing present appellant for alleged offence under Section 5L/6 of the POCSO Act. Hence, it is prayed that appellant deserves acquittal and the impugned judgment of conviction and order of sentence deserves to be set aside.

(9) On the other hand, learned counsel for State submitted that there is no merit at all in any of contentions of appellant. The material on record including medical evidence corroborating statement of victim for determination of guilt of appellant of alleged offence. Regarding both a child in conflict with law and a child who is victim of crime, as per scheme contemplated under Section 12 of Juvenile Justice (Care and Protection of Children) Rules, it is not permissible to determine the age in any other manner where school admission register/certificate given by school

authority as well as the High School certificate are very much available and clearly establish that victim was minor on the date of incident. Therefore, the judgment of conviction and order of sentence passed by Trial Court deserves confirmation and no interference is warranted. Hence, prayed for dismissal of appeal.

(10) Heard learned Counsel for the parties. Perused the record as well as impugned judgment.

(11) In the present case, the moot question is whether the victim was below 18 years of age at the time of incident or not ?

(12) Learned Counsel for the the appellant submits that age of victim is not correctly mentioned in the School Register (Admission Register). The victim as well as her father is unable to prove the age of victim below 18 years. Further, Rajeev Chauhan (PW-3), in his cross-examination admitted that at the time of admission of victim in school, he was not posted and he does not know who had come to get the victim admitted in the school. There was no document regarding date of birth of victim attached with application form with School/Admission Register.

(13) On the other hand, learned Counsel for the State submits that the Trial Court has rightly held the age of victim as 17 years 6 months and High School Mark-sheet was produced by the prosecution to prove the factum of date of birth of victim wherein it was clearly mentioned that the date of birth of victim is 01-06-2006.

(14) According to the legal principle well-established by the Hon'ble Apex Court, the age of the victim is to be determined under the provisions which are attracted for determining the age of a child in the Juvenile Justice Act. In the case of ***Rishipal Vs. State 2021, SCC Online SC 1079***, the principles were enunciated that when the question of age arises before the Court, the Court will determine the age by obtaining evidence under Section 9 and Section 94 of the Juvenile Justice (Care and Protection of Children) Act,

2015 after due consideration.

(15) Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, deals with the presumption and determination of age of a child brought before a Child Welfare Committee (CWC) or Juvenile Justice Board (JJB). If there is reasonable doubt regarding the person's age, the CWC or JJB is mandated to determine the age of child based on evidence. The following processes are required to be undertaken for presumption and determination of age:-

- "94.(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
 (ii) the birth certificate given by a Corporation or a Municipal Authority or a Panchayat;
 (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board."

(16) In the present case, prosecution had produced School/Admission Register (Ex.P.4C) in which, the date of birth of victim has been mentioned as 01-06-2006 and had also produced Matriculation Mark-sheet (Ex.P17-C) in which, the date of birth of victim has been mentioned as 01-06-2006. The moot question arises is whether the date of birth of victim mentioned in the School/Admission Register (Ex.P.4C) is authentic or has it been incorrectly mentioned.

(17) Rajeev Chauhan (PW-3) in Para 1 of his examination-in-chief deposed that on the basis of Admission Register, he had given date of birth certificate of the victim (Ex.P5), but in cross-examination in Para 02 of his cross-examination, he deposed that he was posted in the Primary School in the year 2014. When the victim was admitted, he was not posted in the school. He does not know who came to get the victim admitted in school. He does not have the victim's admission form or any document related to

date of birth. He cannot tell whether any such document is available.

(18) PW-2, father of victim in his examination-in-chief deposed that the victim is currently over 18 years old. He had admitted the victim to Class-I in the Government Girls' School in the Village and at that time, the victim was about 3 years old. In Para 7 of cross-examination, he deposed that he did not tell the date of birth of victim while enrolling her in school. He voluntarily stated that his father (grand-father of victim) had gone to get the victim admitted in school. He had not given any document/paper regarding the victim's birth to his father at that time. The date of birth of victim was written through his father (grand-father of victim) in the school and the same date of birth has been following till date. He does not know that the date of birth of his daughter-victim was wrongly written in the school or not. In Para 5 of his cross-examination, admitted that that he does not know the date of birth of his daughter-victim as well as the date of birth of both sons. It has been almost 30 years since his marriage. The first son was born after about 3-4 years of his marriage, after which, the second son was born two years later. After two-three years, victim girl was born.

(19) In the case of *Vishnu alias Undrya vs. State of Maharashtra (2006) 1 SCC 283*, the Hon'ble Apex Court has held that normally, the age recorded in the school certificate is considered to be the correct determination of age, provided the parents furnish correct age of the ward at the time of admission and it is authenticated, but in the present case, Rajeev Chauhan (PW-3) in his cross-examination stated that he does not have the victim's admission form or any document related to date of birth and father of victim (PW-2) in his cross-examination stated that he did not give any document regarding date of birth of his daughter-victim to his father (grand-father of victim) at the time of admission in school. Therefore, entry of date of birth of victim in School/Admission Register appears to be not authentic.

(20) The Coordinate Bench of this Court at Jabablpur in recent judgment of ***Ram Prasad Ahirwar and Another vs. State of MP and Others, (2025) 1 MPLJ (Cri.) 5521*** has held as under:-

"45. When all these aspects are cumulatively taken into consideration and in view of judgment of the Apex Court in Birad Mal Singhvi versus Anand Purohit (supra) wherein the ratio of law is that to make compliance of Section 35 of the Indian Evidence Act, 1872, the entries regarding date of birth contained in the Scholar's Register and the Secondary School Examination have no probative value, if no persons on whose information, the date of birth of the candidate was mentioned in the School Record, is examined. The entry contained in Admission Form or in the Scholar's Register must be shown to be made on the basis of information given by the parents or a person having knowledge about the date of birth of the person concerned.

46. When ratio of law laid down by the Apex Court in Birad Mal Singhvi versus Anand Purohit (supra) is culled out then it is evident that the Complainant/PW.1 (father of victim/deceased) admits that when he had gone to admit the victim/deceased to the School, he had no idea about her date of birth. He admits that he does not know the date of birth of the victim/deceased. He admits that the victim/deceased was younger to Murat and he had given the age of Murat to be 13 years and then deposes that the victim/deceased was 2 years younger to Murat whereas PW.2 (mother of victim/deceased) admits that the age of Murat was 15 years and then says that the victim/deceased was 4 years younger to him.

47. When all these aspects are taken into consideration then the Complainant/PW.1 (father of victim/deceased), who had admittedly assisted the victim/deceased in taking admission in School, is admitting that he does not know the age of the victim/deceased as mentioned above and as is evident from Paragraph No.9 of the testimony of the Complainant/PW.1 (father of victim/deceased) then the victim/deceased cannot be considered to be below the age of 12 years as has been considered by learned Trial Court and, therefore, we are persuaded to accept the first proposition put forth by learned Senior Counsel for the appellants that the age of the victim/deceased could not be proved beyond reasonable doubt to hold that she was less than 12 years of age."

(21) When all the aspects are taken into consideration, it is evident that the father of victim (PW-2) in Para 5 of his cross-examination admitted that

he had no idea of date of birth of victim and admitted that his marriage was performed thirty years ago and the first son was born after about 3-4 years of marriage after which, the second son was born two years later and after two-three years, the victim was born. Therefore, she appears to be major at the time of incident.

(22) It is settled principle of law that undisputedly, the school authority is ignorant of date of birth of a student/ward, who is brought for admission to school. There are two sources of information relating to date of birth of ward entered in the school register. First source of information is the birth certificate of child issued by Municipality, Corporation, or Panchayat or any such other local authority/body, which itself is based upon the certificate given by hospital, where child was born. The second source of information is the date of birth of child as given by parent/guardian. Where source of information relating to date of birth of child is the statement of parent/guardian, the Court must satisfy itself that such parent/guardian has affirmatively stated to in his/her testimony. Where parent/guardian of victim/prosecutrix states in his/their testimony that they do not know the date of birth of victim/prosecutrix or that, they have given it to the school authorities as an estimation without being sure, then the Court must look for alternate proof relating to date of birth of victim/prosecutrix as the source of information on the basis of which, the date of birth of victim/prosecutrix was entered in the school register itself was doubtful, and the same does not become reliable only because it has been entered in the School Register.

(23) Father of victim (PW-2), who in his cross-examination emphatically admitted that he did not tell date of birth of his daughter while enrolling her in the school and his father (grand-father of victim) had gone to get his daughter-victim admitted in the school. He did not give any document regarding date of birth of his daughter to his father (grand-father of victim) while enrolling her in the school. Father of victim further in Para 5 of his

cross-examination admitted that his marriage was performed near about 30 years back which appears that his marriage was performed in near about year 1993-94 and his girl-victim was born in near about year 2002-04. Alleged date of incident was happened on 29-11-2023. It appears that age of victim was around 19-20 years of age at the time of alleged incident. Under such circumstances, the date of birth of victim entered in the school register on the basis of information given by parent of victim is unreliable and does not inspire confidence of Court.

(24) In cases under the POCSO Act, the age of victim is a fact in issue that prosecution must prove beyond reasonable doubt to secure the conviction of accused. The source of information on the basis of which, the date of birth of victim was entered in the school register is the information given by parent of victim, who is unaware of date of birth of prosecutrix. Rule 12(3) (a)(ii) of Juvenile Justice (Care and Protection of Children) Rules, 2007 enjoins Court to accept date of birth certificate from the school first attended (other than a play school). In the present case, copy of School/Admission Register (Ex.P04C) on the basis of which, Rajeev Chauhan (PW-3), the then School Authority, who had produced the date of birth certificate of victim girl *vide* Ex.P5 appears to be unreliable because of the fact that evidence of father of victim (PW-2) as well as School Authority Rajeev Chauhan (PW-3) could not narrate about the date of birth of victim with necessary clarity. Similarly, on the basis of School/Admission register, the date of birth of victim was mentioned in Mark-Sheet (Ex.P17-C) of victim. When victim's date of birth has been mentioned as 01-06-2006 in School/ Admission Register (Ex.P4-C) appears to be doubtful and unreliable, then the date of birth of victim mentioned in her Mark- Sheet (Ex.P17-C) is also doubtful and unreliable.

(25) So, in the considered opinion of this Court, the date of birth of the victim could not be found proved beyond reasonable doubt to hold that she

was 17 years 06 months of age at the time of alleged incident.

(26) So, in view of above discussions, prosecution has failed to prove the age of victim is less than 18 years.

(27) Now, the next question arises whether it is a case of free will and consent or not ?

(28) Victim (PW-1), in her examination-in-chief deposed that on the date of incident i.e. 29-11-2023, around 12:00 noon, her parents had gone to market and her brother had gone to work. Accused Deepak came to her house and asked him to come with him and told her that he would marry her. Then, she and accused Deepak went to Guna by bus from where, they went to Indore by train. Both of them were living in a rented premises. They got married on the next day in Temple by exchange of garlands. After marriage, they started living for about eight days as husband and wife. Accused had physical relations with her several times. In Para 6 of her cross-examination, she admitted that on the date of incident, when accused Deepak came to her house, her uncle-in-law (*Tau*), sister-in-law (*Bhavi*) and brother were in the house and accused met us and went back. In Para 7 of her cross-examination, she admitted that there were talks at her home about her marriage with accused and she wanted to marry him. Further in Para 8, she admitted that she went with the accused of her own and whenever accused used to go for work, he would not lock the door of the house from outside. Victim stated in para Nos. 7 and 8 as below :-

“07. यह सही है कि मेरी और आरोपी दीपक के रिश्ते की बात घर में चल रही थी। यह सही है कि मैं आरोपी दीपक से शादी करना चाहती थी।

08. यह सही है कि मैं अपनी इच्छा से आरोपी के साथ गई थी। यह सही है कि मेरे अनुसार जब भी आरोपी मजदूरी करने जाता था तो घर का दरवाजा बाहर से बंद करके नहीं आता था।”

This witness in her statement before the police deposed that on 08-12-2023, accused left for labour work in the morning and in the afternoon, she was standing outside the rented house, police with her father came there

and took her to Kolaras Police Station.

(29) Father of victim (PW-2), in Para 02 of his examination-in-chief deposed that accused Deepak is the brother-in-law of his nephew, who used to visit his house. He was at his shop and around 12:00 noon, his sister-in-law (*Bhavi*) called him and told him that his daughter was not at home and her whereabouts was unknown. He searched victim for two days, but when she was not found, he filed a report on the third day against accused Deepak Kushwah at Kolaras Police Station on the basis of suspicion.

(30) Looking to entire facts and circumstances of the case, so also from the evidence of victim (PW-1), nothing is illustrated to show that accused had taken away or enticed her to flee with him. She had left her house on her own and accompanied accused for Indore where she got married and stayed for about eight days. During this time, neither the victim had made any attempt to flee away nor give any information/complaint to police or anybody about the incident. This a peculiar case where evidence on record clearly makes out a case of consensual sex, allegation of forcibly sexual assault or intercourse without consent of victim is not found proved. On the basis of admissions made by victim, it was found proved that the allegation relating to her kidnapping/abduction from her lawful guardianship by enticing or taking away by appellant and commission of rape with her is doubtful, so that trial Court has rightly acquitted appellant of such charges levelled against him. In the wake of clear case of consensual sex, emerging from the prosecution case, between two i.e. victim and accused, specially inferred from the conduct of the victim that the victim was capable of understanding the consequences of her act.

(31) In view of foregoing discussions, the impugned judgment of conviction and order of sentence dated 28th of February, 2025 passed by Special Judge (POCSO Act, 2012), Shivpuri in Special Case No. SC/06/2024, convicting appellant under Section 5L/6 of POCSO Act and

sentencing him to undergo 20 years' rigorous imprisonment with fine of Rs.2,000/- with default stipulation deserves to be and is hereby **set aside**. Appellant is entitled to his liberty, on being acquitted of charges levelled against him. He shall be released forthwith, unless his custody is required in some other case.

(32) Let a copy of this judgment along with record be sent to the Trial Court and a copy of this judgment be sent to the concerned jail authority for information and compliance.

(ANAND PATHAK)
JUDGE

(HIRDESH)
JUDGE