IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE BINOD KUMAR DWIVEDI

CRIMINAL APPEAL No. 382 of 2015

TIJUBAI @ OMVATI BAI AND OTHERS

Versus

THE STATE OF MADHYA PRADESH

……...

Appearance:

Shri Nilesh Dave, learned counsel for the appellant No.1.

Shri Avinash Kumar Khare, learned counsel for the appellant No.2.

Shri Kamal Kumar Tiwari, learned Government Advocate for the respondent/State.

……..

Reserved on : 29/08/2024

Pronounced on : 03/09/2024

J U D G M E N T

Per*: *Justice Binod Kumar Dwivedi

The present criminal appeal has been filed under Section 374 of the Code of Criminal Procedure, 1973 by the appellants against the judgment of conviction and sentence dated 09/03/2015 passed by the 1st Additional

Sessions Judge, Biaora, District Rajgarh in S.T. No.422/2013, whereby the appellants have been convicted and sentenced as under :-

Conviction		**Sentence**		
Section	**Act**	**Imprisonment**	**Fine if deposited details**	**Imprisonment in lieu of fine**
120(b)(1)	IPC	14 years R.I.	Rs.1,000/-	6 months R.I.
363	IPC	7 years R.I.	Rs.1,000/-	6 months R.I.
342	IPC	1 year R.I.	Rs.500/-	1 month R.I
366	IPC	10 years R.I.	Rs.1,000/-	6 months R.I.
506(II)	IPC	3 years R.I.	Rs.1,000/-	2 months R.I.
376(d)	IPC	L.I.	Rs.10,000/-	1 Year R.I.
376(2)(N) Appellant no.2	IPC	L.I.	Rs.10,000/-	1 Year R.I.
376(1) Appellant no.2	IPC	10 years R.I.	Rs.5,000/-	6 months R.I.

02. The prosecution story as having emerged during trial, briefly stated, is that victim (PW-4) lodged report at Police Station Suthaliya, district Rajgarh with regard to the fact that on 18.11.2013 at about 7:00 pm appellant - Tijubai came to her house and took the victim to her house where appellant - Mahesh was already present. As soon as she entered the house, Tijubai closed the door and put the latch and thereafter, appellant - Mahesh closed her mouth and committed rape on her and threatened her to kill if she disclosed the incident to anyone. The victim informed about the incident to her mother (PW-10). On

27/11/2013, the incident was report to the aforesaid police station where the offence was registered at Crime No.242/2013 under Sections 376, 342, 506/34 of IPC and Section 3/4 of the Protection of Children from Sexual Offences Act, 2012.

03. During investigation, victim was taken for medical examination to the hospital at Rajgarh where she was examined by Dr. Shambhavi Soni (PW-15). On medical examination, as per Ex.-P/7 she found that her hymen was torn. Vaginal Slide was prepared and handed over to the concerned Constable. The accused was examined by Dr.B.S.Shikariya (PW-3) and report (Ex.-P/4) was prepared. The sealed articles were sent for FSL examination *vide* Ex.-P/12 and FSL report (Ex.-P/1) was obtained. During investigation, the accused/appellants were arrested vide arrest memos (Ex.-P/4) and (Ex.-P/10). The sealed articles received from District Hospital, Rajgarh were seized *vide* seizure memos (Ex.-P/5 and P/6). Spot map was prepared vide (Ex.-P/9 and P/11). Statement of the prosecution witnesses were recorded under Section 161 of Cr.P.C. and on completion of investigation, charge sheet was filed before the Court of Magistrate of competent local jurisdiction who in turn committed the case to the Court of Sessions and the trial commenced. Charges as mentioned herein above were framed and read over to the appellants who abjured the guilt and claimed to be tried.

04. To prove the prosecution case, the prosecution examined as many as 16 witnesses and also marked documents (Ex.-P/1 to P/12). On examination under Section 313 of Cr.P.C., the appellants claimed ignorance with regard to most of the circumstances. They have also pleaded innocence and also examined four witnesses namely Jagdish S/o Shankarlal (DW-1), Arun Jat (DW-2), Sumitra Bai (DW-3) and Jagdish S/o Chhotelal (DW-4) in their defence. The appellants have also marked documents (Ex.-D/1 to D/13). They have specifically taken plea in their examination under Section 313 of Cr.P.C. that they have been falsely implicated in the matter due to previous enmity. The learned trial Court vide the impugned judgment convicted and sentenced the appellants as mentioned herein above which is assailed in the present appeal before this Court.

05. Learned counsel for the appellant - Mahesh has vehemently assailed the impugned judgment on the following main grounds:- (i) the age of the victim (PW-4) has not been ascertained having regard to the oral and documentary evidence available on record. In support of his contention he has invited attention of this Court towards the statements of Pratap Singh Mandloi (PW-1), victim (PW-4), mother of the victim (PW-10) and Lekhraj (PW-16), brother of the victim and the Scholar Register (Ex.-P/2) in this regard. Assailing the finding with regard to the ascertainment of age and holding the

victim as child, he has placed reliance on the judgment dated 23/06/2021 of the co-ordinate Bench of this Court in Cr.A.No.1313/2017 wherein it has been held as under:-

> "12. Regarding the admissibility of the documents proved in support of the age of the prosecutix and their probative value, the Supreme Court in the case of ***Satpal Singh v. State of Haryana, (2010) 8 SCC 714*** has held as under**:-**
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> 19. So far as the issue as to whether the prosecutrix was a major or minor, it has also been elaborately considered by the courts below. In fact, the School Register has been produced and proved by the Head Master, Mohinder Singh (PW 3). According to him, Rajinder Kaur (PW 15), the prosecutrix, was admitted in Government School, Sharifgarh, Dist. Kurukshetra on 2.05.1990 on the basis of School Leaving Certificate issued by Government Primary School, Dhantori. In the School Register, her date of birth has been recorded as 13.02.1975. The question does arise as to whether the date of birth recorded in the School Register is admissible in evidence and can be relied upon without any corroboration. This question becomes relevant for the reason that in cross- examination, Sh. Mohinder Singh, Head Master (PW 3), has stated that the date of birth is registered in the school register as per the information furnished by the person/guardian accompanying the students, who comes to the school for admission and the school authorities do not verify the date of birth by any other means.
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> 20. 20. A document is admissible under Section 35 of the Indian Evidence Act, 1872 (hereinafter called as `Evidence Act') being a public document if prepared by a government official in the exercise of his official duty. However, the question does arise as what is the authenticity of the said entry for the reason that admissibility of a document is one thing and probity of it is different.
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> 21. In **State of Bihar & Ors. Vs. Radha Krishna Singh & Ors. AIR 1983 SC 684**, this Court dealt with a similar contention and held as under:-
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> "40. ….....Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be

combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil.....(SCC p.138, para 40)

53.....Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight. (SCC p.143, para 53)

145. (4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.(SCC p.171, para 145)"

22. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in ***Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029;*** Dayaram & Ors. Vs. Dawalatshah & Anr. ***AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681***. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases. Such entries may be in any public document, i.e. school register, voter list or family register prepared under the Rules and Regulations etc. in force, and may be admissible under Section 35 of the Evidence Act as held in ***Mohd. Ikram Hussain Vs. The State of U.P. & Ors. AIR 1964 SC 1625; and Santenu Mitra Vs. State of West Bengal AIR 1999 SC 1587.***

23. There may be conflicting entries in the official document and in such a situation, the entry made at a later stage has to be

accepted and relied upon. ***(Vide Shri Raja Durga Singh of Solon Vs. Tholu & Ors. AIR 1963 SC 361)***.

24. While dealing with a similar issue in ***Birad Mal Singhvi Vs. Anand Purohit AIR 1988 SC 1796,*** this Court held as under:- (SCC p.619, para 15)

"15.....To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. ***An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.***"

25. A Constitution Bench of this Court, while dealing with a similar issue in ***Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors. AIR 1965 SC 282,*** observed as under:- AIR p.286, para 18)

"18.....The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. We have therefore come to the conclusion that the High Court is right in holding that the entry made in an official record maintained by the illiterate Chowkidar, by somebody else at his request does not come within Section 35 of the Evidence Act."

26. In ***Vishnu Vs. State of Maharashtra (2006) 1 SCC 283***, while dealing with a similar issue, this Court observed that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. For determining the age of the child, the best evidence is of his/her parents, if it is supported by un-impeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the un-impeccable evidence of reliable persons and contemporaneous documents

> like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded.
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> 27. Thus, the entry in respect of age of the child seeking admission, made in the school register by semi-literate chowkidar at the instance of a person who came along with the child having no personal knowledge of the correct date of birth, cannot be relied upon.
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> 28. **Thus, the law on the issue can be summerised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the Court/Authority to examine its probative value. The authenticity of the entry would depend as on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case.**
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> 29. In case, the issue is examined in the light of the aforesaid settled legal proposition, there is nothing on record to corroborate the date of birth of the prosecutrix recorded in the School Register. It is not possible to ascertain as to who was the person who had given her date of birth as 13.02.1975 at the time of initial admission in the primary school. More so, it cannot be ascertained as who was the person who had recorded her date of birth in the Primary School Register. More so, the entry in respect of the date of birth of the prosecutrix in the Primary School Register has not been produced and proved before the Trial Court. Thus, in view of the above, it cannot be held with certainty that the prosecutrix was a major. Be that as it may, the issue of majority becomes irrelevant if the prosecution successfully establishes that it was not a consent case."

(ii) He has assailed the impugned judgment stating that it is a case of false implication on the ground of previous enmity. To buttress his point, he has invited attention of this Court towards the statement of victim (PW-4), Lakhan (PW-6), mother of the victim (PW-10) and brother of the victim

Lekhraj (PW-16). He has also emphatically pointed out that no acceptable explanation has been given for lodging FIR by delay of 9 days. In this context he has relied on the judgment of the Apex Court in the case of **Satpal Singh Vs. State of Haryana reported in AIR 2010 (SCW) 4951** wherein it has been held has under:-

> **"**13. In a rape case the prosecutrix remains worried about her future. She remains in traumatic state of mind. The family of the victim generally shows reluctance to go to the police station because of society's attitude towards such a woman. It casts doubts and shame upon her rather than comfort and sympathise with her. Family remains concern about its honour and reputation of the prosecutrix. After only having a cool thought it is possible for the family to lodge a complaint in sexual offences. **(Vide Karnel Singh Vs. State of M.P. AIR 1995 SC 2472; and State of Punjab Vs. Gurmeet Singh & Ors. AIR 1996 SC 1393).**
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> 14. This Court has consistently highlighted the reasons, objects and means of prompt lodging of FIR. Delay in lodging FIR more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Thus, FIR is to be filed more promptly and if there is any delay, the prosecution must furnish a satisfactory explanation for the same for the reason that in case the substratum of the evidence given by the complainant/informant is found to be unreliable, the prosecution case has to be rejected in its entirety. **[vide State of Andhra Pradesh Vs. M. Madhusudhan Rao (2008) 15 SCC 582].**

> 15. However, no straight jacket formula can be laid down in this regard. In case of sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to take the matter to the court or not. In such a fact-situation, near relations of the prosecutrix may take time as to what course of action should be adopted. Thus, delay is bound to occur. This Court has always taken judicial notice of the fact that "ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon" **[vide Satyapal Vs. State of Haryana AIR 2009 SC 2190].”**

(iii) He has further submitted that as per the victim, her clothes got torn during the incident, but the same has not been seized. In support of his contention he has also invited attention of this Court to the medical examination report (Ex.-P/7) and the FSL report (Ex.-P/1) obtained by the prosecution. Learned counsel has relied on the judgment of Apex Court in the case of **Alamelu and another Vs. State Represented by Inspector of Police** reported in **(2011) 2 SCC 385** wherein it has been held as under :-

> **“**40. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was

> recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.
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> 44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.
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> 45. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date."

06. Learned counsel for the appellant - Tijubai has also taken the same line of arguments as defence on behalf of the appellant - Mahesh and vehemently argued that this is a case, glaring example of false implication on the ground of previous enmity.

07. Sounding contra note, learned counsel for the respondent/State supporting the impugned judgment submits that it has been passed on due appreciation of evidence available on record. No substantial infirmity could be pointed out by the appellant which warrant interference in the findings recorded by the trial Court. He has repelled the contentions raised on behalf of the appellants about the findings of the trial Court with regard to victim being minor on the date of incident. Contentions as to previous enmity and lodging

of false report as counter blast after undue delay has also been opposed. In this regard, he submits that victim could muster courage to narrate the incident to her mother only after appellant - Mahesh fled away from the village. On these contentions, he prays for dismissal of the appeal as having no substance by affirming the findings of conviction and sentence by the learned trial Court.

08. We have heard the rival contentions of the learned counsel for the parties and have perused the record.

09. Before adverting to the merits of the case, proposition of law as expounded by Hon'ble the Supreme Court of India and High Court of Madhya Pradesh are to be taken note of. The Apex Court in the case of **Sidheswar Ganguly Vs. State of Web Bengal** reported in **AIR 1958 SC 143 : 1957 SCC Online SC 84**, in para 10 has held as under:

> **"**10. ……The learned Judge pointed out the several items of evidence which had been adduced by the prosecution bearing on the question of the girl's age. The only conclusive piece of evidence may be the birth certificate, but, unfortunately, in this country such a document is not ordinarily available. **The Court or the jury has to base its conclusion upon all the facts and circumstances disclosed on examining all the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available.** ……."

10. Further, the Apex Court in para 21 and 22 of **Vishnu Vs. State of Maharashtra** reported in **AIR 2006 SC 508** has held as under:

"22. In the case of determination of the date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother, PW 1 and PW 13 categorically stated that PW 4 the prosecutrix was born on 29-11-1964, which is supported by unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW 1 and PW 13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age, provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. In the present case, as already noted, the parents had admitted to have given an incorrect date of birth of their daughter, presumably with a view to make up the age to secure admission in the school. Apart from this, as noticed earlier, the school certificate collected by PW 15 SI Bagal was not an authenticated document. Nobody was produced to prove the date of birth recorded in the school certificate. The date of birth recorded in the school certificate as 29-6-1963 is, therefore, belied by the unimpeachable evidence of PWs 1 and 13 and contemporaneous documents like date of birth register of the Greater Bombay Municipal Corporation and the register of the Nursing Home where the prosecutrix was born and proved by Dr. Shashikant Awasare, as noted above."

11. The Apex Court in the case of **Madan Mohan Singh and Others Vs. Rajni Kant and Another** reported in **(2010) 9 SCC 209** has further reiterated the considerations to be kept in view while determining the age of a person. Relevant para 19 to 22 are extracted herein below:

> **"19.** Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* v. *State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra* v. *State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587]
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> **20.** So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.
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> **21.** For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded. (Vide *Brij Mohan Singh* v. *Priya Brat*

> *Narain Sinha* [AIR 1965 SC 282] , *Birad Mal Singhvi* v. *Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796] , *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] and *Satpal Singh* v. *State of Haryana* [(2010) 8 SCC 714 : JT (2010) 7 SC 500] .)
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> **22.** If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh Kumar* v. *Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868] .)**"**

12. The Hon'ble Apex Court in the case of **Jarnail Singh Vs. State of Haryana** reported in **(2013) 7 SCC 263** in which it is mandated that the age of victim is approximately 16 years which is less than 18 years. Parties were at loggerheads on the aspect of determination of age, it is contended before this Court that the prosecution has not properly proved the age of victim. Nevertheless, the mark-sheet of High School Certificate (Ex.-P/8) has been filed in this respect. Hon'ble the Apex Court in the case of **Jarnail Singh (supra)** basing the rules of the **Juvenile Justice (Care and Protection of Children) Act, 2015**, ordained that the age of prosecutrix should be determined on the following grounds:-

> **"**(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 panchayat;
> (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."

13. On this point, the Division Bench of this Court in the case of **Ramswaroop Vs. State of Madhya Pradesh 2023 Lawsuit (MP) 435** has recently, after considering the catena of cases, viewed as under :-

> **"**34. This is trite that a document becomes admissible under Section 35 of Indian Evidence Act, if three conditions are fulfilled. We have examined the Admission Register and date of birth Register alongwith the statement of Headmaster (PW-9) who produced them before the Court below. We are satisfied that (i) entry relating to date of birth was made in the Register in discharge of public duty (ii) the entry states a relevant fact and (iii) the entry was made by a public servant in discharge of his official duty. Thus, School Register is a relevant and admissible document as per Section 35 of the Act. The School Register was held to be admissible for the purpose of determination of age in the later judgments of Supreme Court in Shah Nawaz, Ashwani Kumar Saxena, Mahadeo and Ram Suresh Singh (supra).
> 35. Pertinently, in Ashwani Kumar Saxena (supra), the Apex Court made it crystal clear that Admission Register of the school in which a candidate first attended, is a relevant piece of evidence for determining the date of

birth. It was poignantly held that the argument that parents could have entered a wrong date of birth in the Admission Register is erroneous because parents could not have anticipated at the time of entry of date of birth that their child would commit a crime or subject to a crime in future.**"**

14. In the case of **Desh Raj Vs. Bodh Raj** reported in **AIR 2008 SC 632** in para 25 and 26 has held as under:

> **"25.** Section 35 of the Evidence Act provides that an entry in any public or other official book or register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specifically enjoined by law of the country in which such book or register is kept, is itself a relevant fact. Having regard to the provisions of Section 35, entries in school admission registers in regard to age, caste, etc. have always been considered as relevant and admissible. (See *Umesh Chandra* v. *State of Rajasthan* [(1982) 2 SCC 202 : 1982 SCC (L&S) 200 : 1982 SCC (Cri) 396] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702] .) In *Madhuri Patil* v. *Addl. Commr. Tribal Development* [(1994) 6 SCC 241 : 1994 SCC (L&S) 1349 : (1994) 28 ATC 259] this Court observed that caste is reflected in relevant entries in the public records or school or college admission register at the relevant time and certificates are issued on its basis. In *Birad Mal Singhvi* [1988 Supp SCC 604 : AIR 1988 SC 1796] this Court after referring to the ingredients of Section 35 held thus: (SCC pp. 619-21, paras 15 & 17)
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> > "*15*. … An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on

> which the age was recorded. …
> ***
> *17*. … The entries regarding dates of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates was mentioned in the school record was examined. In the absence of the connecting evidence the documents produced by the respondent, to prove the age of the aforesaid two candidates have no evidentiary value."

26. This Court further held that unless the parents, or persons conversant with their date of birth were examined, the entry in the school register by itself will not have much evidentiary value. In this case, we are concerned with the "caste" and not the date of birth. The residents of a village have more familiarity with the "caste" of a co-villager than the date of birth of the co-villager. Several villagers who knew the respondent and their father, including a cousin of the respondent has been examined and they have stated the caste of the respondent. The appellant has also produced other documentary evidence which clinch the issue, namely, the application made by the respondent's father for admission of the respondent to school, birth register extract and Village Pariwar Register extracts to establish the caste of the respondent. Further the said entries in the school register were made nearly forty years prior to the election petition. When read with other oral and documentary evidence, it cannot be said that Ext. PW 2-A has no evidentiary value even by applying the strict standards mentioned in *Birad Mal Singhvi* [1988 Supp SCC 604 : AIR 1988 SC 1796]."

15. The Apex Court in the case of **Jyoti Prakash Rai Vs. State of Bihar** reported in **AIR 2008 SC 1696** in para 21 has held as under:

> **"21.** In *Ravinder Singh Gorkhi* v. *State of U.P.* [(2006) 5

SCC 584 : (2006) 2 SCC (Cri) 632] it was held : (SCC p. 591, para 21)

> "*21*. Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case."

It was furthermore held : (*Ravinder Singh Gorkhi case* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632] , pp. 595-96, paras 38-40)

> "*38*. The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be

deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.

39. We are, therefore, of the opinion that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted. It is no doubt true that the court must strike a balance. In case of a dispute, the court may appreciate the evidence having regard to the facts and circumstances of the case. It would be a duty of the court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim. In this case, the appellant had never been serious in projecting his plea that he on the date of commission of the offence was a minor. He made such statement for the first time while he was examined under Section 313 of the Code of Criminal Procedure.

40. The family background of the appellant is also a relevant fact. His father was a 'Pradhan' of the village. He was found to be in possession of an unlicensed firearm. He was all along represented by a lawyer. The court estimated his age to be 18 years. He was tried jointly with the other accused. He had been treated alike with the other accused. On merit of the matter also the appellant stands on the same footing as the other accused. The prosecution has proved its case. In fact no such plea could be raised as the special leave petition of the persons similarly situated was dismissed when the Court issued notice having regard to the contention raised by him for the first time that he was a minor on the date of occurrence."

16. In the case of **Satpal Singh Vs. Stae of Haryana** reported in **(2010) 8 SCC 714** also it has been held that the entry made in official record by the official or person authorized in performance of his official duty is admissible under Section 35 of the Evidence Act but the party may still ask the Court/authority to examine its probative value. The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information.

17. The Division Bench of our own High Court in the case of **Shudha Vs. Charan Singh and Another** reported in **2007(II) MPWN 118** has held that where in school record no basis of mention of date of birth disclosed, cannot be relied upon. Relevant para 7 is extracted herein below:

> **"**The prosecution has heavily relied on the entry in school register about age of the prosecutrix i.e., 1.6.1989, but prosecution has failed to lead any evidence as to who, and on what basis, this date of birth disclosed before the school authority. The father of the prosecutrix Kanhyala (PW 4) has admitted that he did not get 'Janpatri' of the prosecutrix prepared and also not having in writing the date of birth of the prosecutrix. He also admitted that at the time of birth of the prosecutrix, the intimation was not given to village Kotwar, Sarpanch, or village chowkidar. He has stated that prosecutrix was taken to school for admission by his brother Radheshyam (PW 6), but as discussed herein above, PW6 Radheshyam's statement is completely silent on this issue. Kanhyalal (PW 4) is not able to give his own date of birth and date of birth of other children. In the light of these factual situations, prosecution has failed to establish the basis for date of

> birth of the prosecutrix in the school register and in our considered view, the learned trial Court, after detailed evaluation of evidence has given correct finding about age of the prosecutrix and prosecution has failed to discharge this burden by adducing cogent and reliable evidence."

18. From perusal of the aforesaid proposition of law as laid down by our own High Court as by the Apex Court, it is apparent that the evidence of parents with regard to the age of child, if supported by relevant document like birth certificate issued by Municipal Corporation, is the best evidence. In absence of the above, other relevant factors including oral evidence is to be considered.

19. In the instant case, it is undisputed that no documentary evidence except Scholar Register (Ex.-P/2) has been placed on record for ascertaining the age of the victim (PW-4). To prove Scholar Register (Ex.-P/2), Pratap Singh Mandloi (PW-1), on 02/12/2013 who was posted as Head Master at Government Primary School, Haasrod where the victim was admitted for schooling, has been examined by the prosecution. He has stated that on 08/07/2008 the victim was admitted in School by his mother (PW-10). In this Scholar Register her date of birth has been mentioned as 05/06/2001. This document has been verified by him on 02/12/2013 bearing his signatures between letters 'A' to 'A'. In para 3 to 5 of his cross-examination he has admitted that on the date of admission of the victim no

document with regard to proof of her age was submitted. Age mentioned in Scholar Register (Ex.-P/2) might be wrong. In para 5 of cross-examination, this witness has admitted that mother of the victim (PW-10) was not in a position to give information about date of birth of the victim, therefore, he on his own estimation has mentioned date of birth of victim in Ex.-P/2. Thus, it is apparent that the date of birth of the victim in Scholar Register is purely based on guess work of Pratap Singh Mandloi (PW-1).

20. The mother of the victim (PW-10) in para 14 of cross-examination has also admitted that she did not got recorded date of birth of the her daughter / victim, in the school. Teacher might have recorded her date of birth. This admission of mother of the victim also corroborates testimony of Pratap Singh Mandloi (PW-1). No basis of mentioning of date of birth is disclosed in Scholar Register (Ex.-P/2). In light of the judgments in the case of **Shudha (Supra)**, **Sidheswar Ganguly (Supra)**, **Vishnu (Supra)**, **Madan Mohan Singh (Supra)**, **Jarnail Singh (Supra)**, **Ramswaroop (Supra)**, **Desh Raj (Supra)**, **Jyoti Prakash Rai (Supra)** and **Satpal Singh (Supra)** no probative value can be attached to this document.

21. As far as oral evidence is concerned, the mother of the victim (PW-10) in para 4 of her cross-examination has admitted that she could not remember the date of birth of the victim. She has further stated that she was

married 30-35 years ago (date of recording of statement of this witness is 25/09/2014). She has also admitted that after three years of marriage, her son Lekhraj (PW-16) was born. She has also admitted that after two years of of birth of Lekhraj (PW-16) victim was born. On the basis of statement of this witness (PW-10) it appears that victim was born near about 25 years before the date of statement i.e. 25/09/2014 of PW-1. On the basis of this statement, by no stretch of imagination, the victim can be held below 18 years on the date of incident i.e. on 18/11/2013.

22. Victim (PW-4) though in answer to second question before the first paragraph during examination before the Court has mentioned her date of birth 05/06/2001 but in para 5 of cross-examination she has admitted that her parents are illiterate and no mark sheet or birth certificate is available with regard to her date of birth. In para 17 of cross-examination she has also admitted that her father committed suicide near about 25 years back. Further she has stated that on the date of death of her father she was in lap and has not started even to walk. Death of father of the victim occurred 25 years back (date of recording of statement of this witness is 08/05/2024) finds corroboration from para 15 of the statement of Lekhraj (PW-16), brother of the victim. Thus, it is manifest that she was born before the date of death of her father.

23. The brother of victim Lekhraj (PW-16) in para 1 of his examination-in-chief has stated that the victim is his younger sister of about 10-12 years of age. He has also admitted that his sister Mausam Bai just younger to him is 17 years of age. On first page of statement of this witness before the Court, in witness details his age is mentioned as 13 years. In para 5 of his cross-examination, he has admitted that his age is 18 years. The above material contradictions with regard to age of this witness falsify his statement with regard to his age and the age of victim, his younger sister. Therefore, statement of this witness with regard to the age of victim is not reliable as it does not found support from the statements of any other witnesses or from any documents. Trial Court has also committed grave error in placing reliance on entry in Scholar Register (Ex.-P/2), which is otherwise not reliable as mentioned herein above.

24. In view of the aforesaid discussion, finding of the trial Court in para 27 of the impugned judgment that on the date of incident 18/11/2023 victim was below 16 years of age is erroneous in teeth of the evidence available on record and cannot be upheld. Thus, we are of the opinion that prosecution utterly failed to prove that victim was a child below the age of 18 years on the date of incident.

25. In view of the above finding of this Court with regard to the age of victim on the date of incident, the conviction of appellants for the offence under Section 363 of IPC and Section 6 of POCSO Act fails as victim has not been found to be age of below 18 years. The above offences are attracted only when the victim is minor.

26. The appellants have also been convicted under Section 366 of IPC, which is extracted herein below:

> **"366. Kidnapping, abducting or inducing woman to compel her marriage, etc.-** Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.]"

27. No evidence is available on record to the effect that victim was kidnapped or abducted by the appellant Tijubai with an intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or

seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, but no evidence in this regard is available in the instant case.

28. Victim (PW-4) herself stated that on the date of alleged incident she was at her home when appellant Tijubai @ Omvati Bai came and took her to her house where the alleged incident of rape happened. Even an iota of evidence is not available on record that victim was seduced and taken away by the appellant Tijubai. Similarly except bald singular statement of the victim, no evidence is available to attract the offence of intimidation as enshrined under Section 506-II of IPC. Hence, in absence of any evidence conviction under Section 366 and 506-II of IPC can also not found stamp of approval of this Court.

29. The contentions of learned counsel for the appellant assailing the finding of conviction and sentence in the impugned judgment with regard to the offence under Section 342 and 376(d) of IPC are that this case is glaring example of false implication on the ground of previous enmity. No incident of rape as alleged has taken place. To buttress his point, learned counsel has invited attention of this Court towards belated FIR (Ex.-P/3). Date of alleged incident in the instant case is 18/11/2013 and date of lodging of FIR is 27/11/2013. Learned counsel submitted that FIR is lodged after a delay of

about nine days and no satisfactory explanation has been offered by the prosecution with regard to the delay in lodging the FIR.

30. In this regard learned counsel has drawn attention of this Court towards another FIR (Ex.-D/12) registered at Crime No.245/2013 at Police Station Suthaliya against Lakhan (PW-6), Lekhraj (PW-16) and other five. It has been submitted that when this FIR (Ex.-D/12) was registered against the complainant side i.e. Lokesh (PW-6) and brother of the victim Lekhraj (PW-16) for incident which took place at about 07:00 pm on 18/11/2013. He submits that as a counter blast FIR (Ex.-P/3) in the present case has been lodged. It has also been submitted that brother of victim Radheshyam was prosecuted for offence of arson and was convicted for that. Due to this previous enmities, instant case has been lodged against the appellants on false grounds to settle the score against the appellants.

31. It is no longer *res integra* that delay in lodging of FIR if not properly explained dents prosecution case. It is true that in cases of rape family takes some time before lodging FIR as prestige of family and victim as well is on stake, but the explanation given must be reliable specially in cases where previous enmity exists between the parties. In the Instant case as per FIR Ex.P-3, incident allegedly took place on 18/11/2013 at about 7:00 pm and

FIR was lodged on 27/11/2013. The reason for delay in lodging FIR has been assigned as threat of life from the appellant – Mahesh to the victim.

32. The mother of the victim (PW-10) and brother of victim (PW-16) have stated in their statements before the Court that after the incident, the victim narrated the incident to them only after appellant - Mahesh has fled away from the village, but no reliable evidence has been brought on record in this regard as to when appellant - Mahesh left the village. Mother of the victim (PW-10) in her examination-in-chief in para 2 has stated that victim was left after 1½ hours of the incident and when she returned back to home, she was not taking food and used to cry and when she was enquired about the reason of unusual behaviour, she stated that appellant - Mahesh has committed rape on her. In para 10 of cross examination mother of the prosecutrix (PW-10) has stated that on the date of incident when she and her son (PW-16) returned from the field between 12:00 pm to 01:00 am in the night, the victim was sleeping. On the next day after taking food she left for school and returned from there at about 04:00 pm and after that she was performing the household chores. This continued for 8-10 days. She usually went to school and participated in the household chores. This statement belies her statement given in para 2 where this witness has stated that after the incident victim was not taking food properly and behaved abnormally.

33. Looking to para 10 of the statement of mother of the prosecutrix (PW-10), statement of her son (PW-16) also comes under suspicion and does not inspire confidence with regard to unusual conduct of the victim after the incident. Therefore, we are not inclined to accept the explanation that after the incident due to shock and trauma, the victim was behaving abnormally and therefore, she did not narrate the incident to these witnesses caused delay in lodging of FIR.

34. FIR Ex.-D/12 lodged at the instance of Sumitrabai against Lakhan (PW-6) and Lekhraj (PW-16) along with 5 other persons has been placed on record to show that complaint party had attacked and vandalized the house of the complainant. FIR (Ex.-D/12) was lodged on 27/11/2013 for the incident which took place at 7:30 am and same day after this FIR, as a counter blast, FIR (Ex.P/3) of rape on victim has been lodged against the appellants on the same date i.e. 27/11/2013 at 11:10 am.

35. Harishankar Bhargav (PW-2) Sub Inspector, who has proved the FIR (Ex.-P/3) of the instant case has also admitted in cross examination para 3 that at the instance of Jagdish S/o Shankarlal Mehar r/o Haasrod FIR (Ex.D/6) under Section 436/34 of IPC and Section 3(2) 3 of SC/ST Act was registered against brother of the victim (PW-16). Mother of the victim (PW-10) in cross examination in para 7 has admitted that she knows Lakhan

(PW-6) Sarjansingh, Udaysingh, Mangu, Lakhan S/o Kaluji and Radheshyam. She has further stated that Radheshyam is brother and others are her *jeth* and *dewar*. She has also admitted that at the instance of mother of appellant – Mahesh, a report (Ex.-D/12) was lodged at police station Suthaliya against her *dewar* and *jeth,* son and brother. Sub Inspector Harishankar Bhargav (PW-2), who has proved the FIR (Ex.-P/3) against the appellants has also admitted in para 3 of cross-examination that an FIR at the instance of Jagdish S/o Shankarlal (DW-1) resident of Haasrod under Section 436/34 of IPC and Section 3 (2) 3 of SC/ST Act was registered against the Radheshyam (brother of PW-10, mother of the victim) and brother of the victim (PW-16). It is also admitted that Radheshyam has been convicted in this case on arson. The defence witness Jagdish has also proved that there was previous enmity between the appellants and the complaint on the aforesaid grounds.

36. In view of the above evidence, arguments advanced on behalf of the appellants that they have been falsely implicated in this case to settle the score has substance. It can also be noted that as per the victim when she entered in the house of Tijubai, who locked the door with latch and appellant - Mahesh who was already present there had taken to her to the first floor of the house where he committed rape upon her. She has stated in

para 12 that her clothes got torn in the incident but the clothes have not been produced before the Investigating Officer for seizure which was substantial piece of evidence. In para 11 the victim has further admitted that when appellant - Mahesh was taking her to the upper floor, her mouth and hands were open, but no signs of scuffle have been found on the person of the victim during the medical examination or on the person of the appellant - Mahesh. Even though the victim has stated that when she was taken to the upper floor by appellant - Mahesh, she loudly raised hue and cry, but this statement is also not found reliable, as the place of incident i.e. the house of the appellant Tijubai and Mahesh is in the vicinity of the house of the victim from where if loud alarm is raised, will be heard in the house of the victim, as has been admitted by mother of the victim (PW-10) in para 9 of the cross examination. Therefore, it is not reliable that the victim raised alarm at the time of incident and despite that none appeared to save her.

37. Dr. Shambhavi Soni (PW-15) who had medically examined the victim has stated that she did not notice any mark of injury on the person of the victim. Hymen was old torn. Vagina was permitting 2 fingers. There were no injuries on the internal part. In such circumstances, she opined that no definite opinion can be given about the sexual intercourse with the appellant. In medical examination, no recent sexual activity has been

noticed. In FSL examination, presence of sperm have not been found in vaginal slide Article A and underwear, salwar and Kurta Article C1, C2, C3 of the victim. When this medical examination report (Ex.P/7) and FSL report Ex.P-1 is read conjointly with the evidence available on record with regard to the lodging of FIR by explaining undue delay and previous enmity of high degree between the family of the victim and the appellants, it makes amply clear that prosecution utterly failed to prove that the incident of commission of rape took place as alleged in the FIR (Ex.-P/3).

38. In view of the aforesaid, we are of the opinion that the prosecution utterly failed to prove the charges of offence as levelled against the appellants. The learned trial Court did not take cognizance of the aforesaid infirmities in the prosecution case as surfaced in the evidence adduced, therefore, the finding of conviction of the appellants with regard to the offfence under Sections 120(b)(1), 363,342,366,506(II), 376(d),376(2)(N), 376(1) of IPC is highly vulnerable and cannot be sustained.

39. Resultantly, the appeal succeeds and is hereby allowed by setting aside the judgment of conviction and sentence for offence under Sections 120(b)(1), 363, 342, 366, 506(II), 376(d), 376(2)(N), 376(1) of IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 and the appellants are acquitted of the charges. Fine amount, if any, deposited by

the appellants be refunded to them. The appellant No.2 is in jail. He be released forthwith, if not required in any other case. The bail bond of appellant No.1 is discharged.

40. A copy of judgment along with record be sent back to the concerned Court for compliance. A copy of the judgment be also sent through fastest mode to the concerned jail for necessary action and compliance.

41. Interlocutory application, if any, stands closed.

Certified copy as per rules.

(VIVEK RUSIA)
JUDGE

(BINOD KUMAR DWIVEDI)
JUDGE

RJ